COMMENTARIES

ON THE

ROMAN-DUTCH LAW.

BY SIMON VAN LEEUWEN, LL.D.

TRANSLATED FROM THE DUTCH.

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PREFACE.

M. SIMON VAN LEEUWEN was one of the most eminent advocates in Holland during the latter part of the seventeenth century, who distinguished himself by the publication of several professional works, of which the *Censura Forensis* (in Latin) and the *Rooms Hollands-Regt* (in Dutch) are most known and most valued. The title at length of the last-mentioned work, which is translated, is as follows: "THE ROMAN-DUTCH LAW, in which the antient Roman Law is assimilated with the existing Laws of the Netherlands, in all cases that may or can be useful in common occurrences; both with regard to the established Mode of Proceedings at Law, which are stated with especial brevity, and also with respect to the manner of prosecuting Claims in Courts of Judicature; confirmed by various Ordinances, Proclamations, Statutes, and Charters, given in these and the adjoining Provinces."

As Van Leeuwen's Dutch-Roman Law is the book to which the Dutch Courts of Justice on Ceylon most generally referred, as containing the System of Law which they were bound to administer to the Inhabitants on that Island; and, as the Judges of the Supreme Court of Judicature, established by His Majesty on the Island of Ceylon, are directed, by His Majesty's Charter and Instructions, to administer to those Inhabitants the same System of Laws (subject to certain alterations) as was administered to them by the Dutch Courts at the time of the surrender of the Island to the British Arms; — Sir Alexander Johnston, while Chief Justice and First Member of His Majesty's

Council on Ceylon, caused the present Volume to be translated into English, for the use of the Court, by such translators as he *could procure* on the Island.

In consequence of this Work being the basis of the Civil and Criminal Law of all those Colonies, which belonged to the Republic of Holland, but which now form part of the British Empire, the following Translation has been printed by command of His Majesty's Secretary of State for the Department of War and of Colonies. In preparing it for press, the whole has been carefully collated with the best edition of the original Work printed at Amsterdam in 1744, and corrected; and many hundreds of valuable references to the Civil Law Writers have consequently been added. Where particular words or sentences were so obscure, that their meaning could with difficulty be ascertained, the original has been annexed, either in a parenthesis, or in a note at the foot of the page. No pains have been spared in order to render the Translation as accurate and perspicuous as possible: so that the Work may form an useful Manual to professional Gentlemen on Ceylon, the Cape of Good Hope, and the other Dutch Colonies now under the English Government, where the Dutch Laws are still in force. And as the plan of the Work in a considerable degree resembles that of Mr. Justice Blackstone's admired Commentaries on the Laws of England, it has been deemed proper to substitute that of "*Commentaries on the Roman-Dutch Law*," in lieu of the title occurring in the original Work.

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12. *Of the Canon or Ecclesiastical Law, and how far it is in use with us.*
13. *Of the Feudal Law; when and by whom introduced.*

§ 1. RIGHT is that moral quality, by which we justly obtain either the government of persons, or the possession of things, or by the force of which we may claim somewhat as due to us (1). The knowledge of this is called jurisprudence and the practice of justice. Right defined.

§ 2. Jurisprudence is that knowledge of things, human and divine, which teaches us what is just and what is unjust. (2) Jurisprudence defined.

(1) L. 1. in fin. pr. Ff. de just. et jure. L. 90. Ff. de Reg. jur. Grotius, de Jure Belli, lib. 1. c. 1. § 3, 4.

(2) § 1. Inst. l. 10. §. 2. Ff. de just. et jure.

Justice defined.

§ 3. Justice is the constant and perpetual desire of giving to every man his due, according to what is right. (1)

Of the Precepts of Law.

§ 4. The precepts of law are these:—to live honestly, to injure no one, and to give to every one that which is his due. (2)

Law is either public or private;

§ 5. Law is either *public* or *private:*—the *former* regards the general welfare of the state; the *latter*, or private law, (of which we now propose to treat) concerns the profit and benefit of every individual in particular, as it respects the intercourse between man and man (3). Private law, again, is either human or divine.

divine;

§ 6. *Divine Law* is the will of God, as revealed in the Holy Scriptures, of which it is not the province of a lawyer to treat, except so far as it relates to right or wrong.

or human.

Human Law is divided into the Law of Nature, the Law of Nations, and the Civil Law. (4)

Of the Law of Nature.

§ 7. The *Law of Nature* is that natural rational understanding, by which man approves or disapproves of things according to their nature, whether it be good or bad. Such are, the connexion of man and woman, the procreation of children, &c. (5)

Of the Law of Nations.

§ 8. The *Law of Nations* is that, which has been adopted by all nations from the beginning of time, for the continuance and sustenance of the human race; viz. To serve God, to obey parents and the government, and to do unto others what we wish they should do to ourselves, and the like. (6)

Of the Civil Law.

§ 9. *Civil Law* is that law, which a nation enacts for the government of itself. It comprizes all those institutions, which are made by any person who has authority over a community, and contains commands, prohibitions, toleration, or punishments. (7)

Its Origin.

§ 10. These institutions are either such as are introduced from foreign countries, or are enacted by the people themselves. (8)

Universal Prevalence of the Roman Law.

§ 11. Thus, the Roman Law is at present observed as the Common Law of Nations by almost all nations, and is adopted in all those cases, for which their own laws have made no

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(1) Pr. Instit. l. 10. in pr. Ff. de justit. et jure.
(2) § 3. Instit. l. 10. § 1. Ff. de justit. et jure.
(3) § 4. Instit. l. 1. § 2. Ff. de justit. et jure.
(4) L. 1. l. 2. l. 3. Ff. de just. et jure toto tit. Inst. de jure nat. gent. et civ.
(5) Pr. et § 1. Instit. de jure nat. gent. et civ. Grotius, de jure Belli, lib. 1. c. 1. § 10.
(6) L. 2, 3. et seq. Ff. de just. et jure. § 3. inst. eod.
(7) L. 1. l. 7. Ff. de legib. l. 5. cod. eod.
(8) L. d. l. 9. Ff. de just. et jure.

provision (1): so that all constitutions, ordinances, placards, statutes and customs, which do not openly militate against this law, are to be explained conformably to it. And even if any thing seem to be repugnant to it in doubtful cases, it ought to be so far restrained, that the Roman Law be injured as little as possible. The authority of this law, however, varies in different countries, it being held in the highest esteem in some, while in others it is comparatively but little regarded.

That it is thus used and observed in our Netherlands, is testified by Grotius, Merula, and other writers (2); where it obtains so far, that the judges or counsellors of both courts of Holland promise by a solemn oath, that they will observe and follow in their decisions the written laws, &c. (3). And the States often repeat these laws in their laws and ordinances; and refer to them as a general law; for instance, in the proclamation concerning the *succession ab intestato* of the year 1599, art. 14. and others.

Of the Canon or Ecclesiastical Law.

§ 12. Together with the Roman Law, the Canon or Ecclesiastical law has also been introduced by the popes, particularly with reference to ecclesiastical matters and persons; which law is still observed in France, Germany, and in the Netherlands, by the pope and those who are subject to his ecclesiastical jurisdiction. But, in Holland and other countries which shook off the papal yoke at the time of the reformation, it was entirely rejected: although in some few cases which were not known to the antient Romans, as in testamentary affairs, matrimonial matters, the administration of oaths, and the like, (which are regulated according to the customs of our country), the Ecclesiastical Law is used and adopted for the sake of propriety and of precedent. (4) Further, ecclesiastical persons have no peculiar authority among us, nor any exclusive jurisdiction; and in ecclesiastical matters they are bound to demean themselves according to the church ordinance, prescribed to them by Their High Mightinesses the States of Holland in the year 1591, and subsequently renewed in the year 1612, and at other times.

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(1) Arg. l. 32. de legib. et l. 32 § ult. Cod. de Appell.

(2) See Grotius, *Inleyd.* lib. 1. tit. 2. n. 26. Merula Prax. Civ. lib. 1. tit. 4. cap. 1. in fin. Christin. vol. 1. decis. 343. Godelin de Jure Noviss. lib. 1. cap. 13. Nicol. Borgund. ad Consuetud. Flandr. in proem. num. 5. Sande, lib. 2. tit. 2. defin. 2 & 7. in fin. et lib. 4. tit. 1. def. 1. in fin.

(3) See Merula Prax. Civ. lib. 4. tit. 6. cap. 2. num. 1.

(4) See Neostad. Cur. Holl. decis. 22. Andr. Gail. lib. 2. observ. 88. and Coorn. Consil. xi.

Of the Feudal Law.

§ 13. In like manner the feudal law was, in progress of time, introduced as a general law by the Emperors, Henry, Lothaire, Conrad, and Frederic Barbarossa (who ascended the imperial throne A. D. 1155), from the collection of the laws of the Lombards (1). These laws, some writers are of opinion, were borrowed by the Lombards from the Franks, among whom they were in force long before the christian æra. (2)

(1) See lib. 2. Feudor. tit. 11. 34. 57. lib. 5. tit. 2, 3, 4.

(2) Carol. Molinæus ad Consuetud. Paris. lib. 1. tit. 1. des fiefs, num. 12. Connan. lib. 2. Comment. cap. 9. To what extent it is observed in Holland, see Christin. vol. 6. decis. 1. Neostad. de feudi Holland. Success. cap. 3. num. 12. Gudelin. de feud. in prolegom. num. 5. Instructie van de Leen Kamer van Holland, (i. e. Instruction of the Loan Chamber of Holland), art. 1. verb. van regtswegen.

CHAP. II.

On the Introduction of the Roman Law into Holland, and on the Constitution and Government of the Country, its Judges and Tribunals.

§ 1. *Introduction of the Roman Law into Holland.*
2. *Of the Antient Government of the Country.*
3. *Origin of the Counts of Holland.*
4. *To what Laws they are subject.*
5. *When and by whom those Laws were transgressed.*
6. *The Pacification of Ghent.*
7. *The Union of Utrecht.*
8. *King Philip declared to have lost and forfeited his Country.*
9. *William Prince of Orange elected General of the Army.*
10. *The Council of the States General instituted.*
11. *The Council of the States.*
12. *The Council of Admiralty.*
13. *Chamber of Accounts of the States General.*
14. *The States of Holland.*
15. *The Commissioned Council of the States of Holland and West Friesland.*
16. *Chamber of Finance.*
17. *The Chamber of Accounts of the County.*
18. *Of the Stadholders of Holland, and their Power.*
§ 19. *Of the Governments of the Cities.—Civil Jurisdiction of Burgomasters and Aldermen.*
20. *Criminal Jurisdiction of Bailiffs, Burgomasters, and Aldermen.*
21. *Tribunals of Aldermen in the Cities.*
22. *Jurisdiction and Powers of Bailiffs, Lords of Manors. and sworn Persons in the Country*
23. *Of the Name and Office of Bailiff or Sheriff.*
24. *The Meeting of the Neighbourhood when altered into that of Aldermen.*
25. *Origin of the Bailiff's Tribunal of well-descended Men.*
26. *Inspectors of Rynland, by whom and when introduced.*
27. *Court of Foresters and Companions.*
28. *The Provincial Court at the Hague.*
29. *The High Court at Mechlin.*
30. *Origin of the Feudal Court.*
31. *Alterations in the Government made in the Years* 1650 *and* 1672.

§ 1. IT is by no means certain, at what time and by whom the Roman Law was introduced into these countries. Some writers are of opinion (for which there is some reason), that, on account of its peculiar gravity, it was occasionally proposed to the

Introduction of the Roman Law into Holland.

judges as a precedent, and in time had crept in, and at length was admitted as law (1). This notion agrees with the opinion of those, who think that the Roman law was introduced into these countries by King William the second of that name, and the eighteenth (or according to some the fourteenth) Count of Holland; who having been elected and confirmed King of the Romans, in the twentieth year of his age, by the princes of the empire, was desirous that the Dutch should make still further use of the Roman law: consequently it was introduced and adopted in Holland with greater honour than it had before received; and a palace was erected at the Hague, where a council was to be held concerning the important affairs of the country (2). Thus much is certain, that, instead of justice being administered (as it formerly was) sometimes at one place and sometimes at another, as at Dordrecht, Haarlem, Leyden, Gravesande, &c.; it was administered at one certain place after the time of King William, who was the first sovereign that assigned a fixed and certain place for that purpose, and who considered the Hague as the fittest place for the administration of justice; and accordingly since his time, whatever concerned the general administration of justice, was referred thither. Such is the opinion of Merula (3) which has been strenuously controverted by William van Goudhoven (4), who in opposition to the opinions of Adrian Junius and Louis Guiciardin, asserts that the general pleadings in Holland were first established at the Hague by Philip Duke of Burgundy in the year 1428. But these two writers are to be distinctly understood as speaking of another institution, as well as of a description of judges, and a method of proceeding at law, differing from that which has been observed since the institution established by that duke.

Of the antient Government of the Country.

§ 2. With regard to the general affairs of the country, it is certain that the Netherlands have from the most antient times even to the present period, been considered and acknowledged to be perfectly free countries. So that, in the beginning, the government of the country was vested in certain principal persons who were most distinguished for their wisdom and opulence; to whom a general was sometimes added, to oppose the common enemy. As, however, in process of time, his command became

(1) See Grotius, Inleyd. lib. 1. tit. 2. and Merula, Prax. Civ. lib. 1. tit. 4. c. 1.

(2) Joan Beca: in Otthon. III. Episcop. 36. and Hadrian. Barland. de Principib. Holland. cap. 18.

(3) Lib. 4. tit. 1. c. 2.

(4) In his Memorandum on the Chronicle of Holland, (*Chronijk van Holland*,) p. 99.

temporary and not permanent, and was deemed insufficient, it was judged expedient (with a reservation of liberty) to place a Prince over the whole body of the state, under the denomination of Count; who was to be the principal among the nobility, and those having authority among the lords.

Origin of the Counts of Holland.

§ 3. Accordingly one was elected, in whose stead the Dutch have always chosen the nearest of his descendants, not indeed with the design of making the dignity hereditary, but with the consent of the people, that is to say, of the States; who acknowledged no one for their prince until he had placed himself under obligation to the States, to observe the laws and customs of the country, upon the performance of which, fidelity and obedience were again promised to him in every thing which he should command, according to the laws (1): and the command of the princes in these countries, as well with respect to the laws as the resolutions of the States, was always so narrowly moderated and limited, that they never enjoyed the supreme power themselves.

To what laws they are subject.

§ 4. The laws to which the Count of Holland was required particularly to submit himself were the following: First, that no countess should take a husband, except according to the pleasure of the States; secondly, that the offices of counsellors, administrators of money, bailiffs and others, should be given exclusively to natives; thirdly, that the States should be at liberty to alter the Political Government, when and as often as they should please, without requiring the consent of the Count for that purpose; fourthly, that no new taxes or impositions should be established, nor any one be freed from the old ones, but with the consent of the States; fifthly, that no declaration of war should be received by the Prince, either for asserting or obtaining indemnification for losses sustained, but with the consent of the States; sixthly, that the Princes should always use the Dutch language in their writings; seventhly, that the coins established by the Prince should be altered by the States accordingly as they should think proper; eighthly, that the Count should not be at liberty to alienate any part of his county; ninthly, that the States should not be summoned by any writ to hold a session or public assembly out of the province; tenthly, if the Prince should have application to make, or should require any contributions, he would make it himself, and not

(1) On this subject see the oath of king Philip, the last count of Holland, taken on behalf of the Netherlands in the year 1555, inserted in the 5th Journal of Mr. Jan van Dam, secretary to the court of Holland, p. 45.

through his stadholder or deputy; eleventhly, that he should cause justice to be administered by public judges; lastly, that the antient laws and privileges should be inviolable; and, if the Prince should issue any ordinance contrary to them, that no person should be obliged to obey such ordinance.

The preceding regulations are conformable to the old handwritings still in existence, as well of the Lady Maria of Burgundy as others. These laws and rights were kept inviolate for a long period; and all persons who opposed them were restrained and punished by the States of Holland and the neighbouring allies; and the natural liberties of the countries were always protected and maintained.

When and by whom those laws were transgressed.

§ 5. The counts of the house of Burgundy being descended from a royal family, were the first who attempted to make an advance towards monarchy; liberty, however, continued to subsist, not only in external appearance, but also in a considerable degree in its full strength and lustre. The Emperor Charles V. being Emperor and King of other countries, could not bear to be considered here as only a Prince; but his son Philip, who aspired to entire and absolute power everywhere, cherished such a degree of hatred against all people who prescribed any law to their Princes, that with an authority entirely strange and contrary to natural liberty, he endeavoured to introduce a completely despotic power into these countries. He commenced these measures secretly during the life of his father, the Emperor Charles V., and made some progress in them; and under the management of that great tyrant the Duke of Alva, seemed to threaten and predict the fall and entire destruction of our Netherlands. In consequence of his tyrannical conduct, the states of Holland, whose province it was to protect not only the laws, but also the rights of the public, as well as their own rights, were obliged to take arms in defence of their liberties, after the example of the Romans, who had recourse to arms whenever their chief officers aspired to sovereign power. Accordingly, on the 19th of July in the year 1572, the states of Holland declared war against the Duke of Alva; and shortly after they were joined by the states of the neighbouring provinces of the Netherlands, for the protection of public liberty.

The Pacification of Ghent.

§ 6. In the year 1576 the treaty and pacification of Ghent were concluded; in which it was resolved first of all, that this country should get rid of the Spaniards and other foreigners.

The Union of Utrecht.

§ 7. Subsequently, in the year 1579, the union and final treaty was made at Utrecht; in which the said confederates,

namely, Gelderland, Holland, Zealand, Utrecht, Friesland, Over-Yssel, Groeningen, and the adjacent countries, joined together, and engaged never to separate from each other, but to assist each other, as if they were one body.

King Philip declared to have forfeited his County.

§ 8. By a public declaration on the 26th July 1581, they renounced the name of Count, and announced that King Philip, in consequence of his having violated the laws of the country, had, conformably to the laws, truly forfeited his principality; and

William Prince of Orange elected General of the Army.

§ 9. That they thereby chose William Prince of Orange to be the first and principal protector of the liberty of the Netherlands. These occurrences made no little alteration in the government and state of these countries.

The Council of the States General instituted.

§ 10. As the confederated states had resolved to maintain a community of war, of peace, of foreign alliance, and of many other matters; so they sometimes held meetings for the purpose of making resolutions for the public welfare. To these meetings each state sent its respective commissioner or deputy; and the council thus convened, was denominated *the Council of the States General.*

The Council of the States.

§ 11. As, however, that council was not able to accomplish every thing, by reason of the multiplicity of business that came before it, a permanent or standing council was afterwards added to it, denominated the *Council of the States.* To its care, (but subordinate to the Council of the States General, and subject to their pleasure) among other things, were entrusted the affairs of the union, and the management and maintenance of the military forces, the execution of the ordinances and commands of the States General and confederacy; and all matters which were of too great importance for them to take cognizance of, were to be laid before the States General, to whom the Council of the States were to make a full statement of them.

The Council of Admiralty.

§ 12. Besides the two preceding councils, the provinces or states of Holland, Zealand, and Friesland, formed a *Council of Admiralty;* which took cognizance of all maritime affairs whatsoever, and was composed of commissioners or deputies from the States General and also from every *confederated* province. These commissioners are changed by turns.

Chamber of Accounts.

§ 13. The accounts of the general government are examined by certain persons appointed for that purpose; and the place where they hold their meetings is denominated the *Chamber of Accounts of the States General.* All matters concerning the general defence were transferred by the union, or by special delegation, to the

States General; and all other matters were left to be managed by the States of the confederated provinces, each in its respective province. In Holland, the same regulation and system of government are used and maintained.

The States of Holland.

§ 14. The highest power is vested in the States of Holland; who meet as often as business requires, and are composed of the knights, nobility, and commissioners, who are termed *deputies*. The order of knighthood and nobility is preserved by twelve persons, who are most eminent for the nobility of their descent as well as for their landed property. The cities, which send commissioners or deputies, are Dordrecht, Haarlem, Delft, Leyden, Amsterdam, Gouda, Rotterdam, Gorrichem, Schiedam, Schoonhoven, Briel, Alkmaer, Hoorn, Enkhuyhen, Edam, Monnikendam, Medenblek, and Purmerent. If any dispute arise respecting contributions and taxes, for the purpose of declaring war or making peace, the deputies who are summoned to settle it, are those of Woerden, Geertruydenberg, Naarden, Muyden, Oudewater, Heusden, Wesop, and Workom; but these had for many years no place in the council; and were at first excused on account of their inability, and at present because it is out of use.

Commissioned Council of the States of Holland and West Friesland.

§ 15. Business having become greatly increased, as we have already remarked, another council was established, whose province it was to have the superintendence of the public means and other affairs of the country in the absence of the States of Holland, and to settle all differences arising therefrom. This is denominated the *Commissioned Council of the States of Holland and West Friesland.* This council also summons the States when necessary; and executes their resolutions; and amongst these, some are authorized to examine the accounts of the receivers of the public revenue.

Chamber of Finance.

§ 16. They have likewise their chambers of accounts (or of finance), the functions of which are executed by their commissioners and inferiors.

Chamber of Accounts of the County.

§ 17. With regard to the revenue of the county, viz. the property, privileges, and other income which formerly belonged to the Counts of Holland to a great extent, there is a special chamber and seat, denominated the *Chamber of Accounts of the County.* Formerly it consisted of five, but at present it is composed of six persons, who are appointed by the States of Holland. The first four of these are denominated *counsellors* and *account-masters*; and the two others, *auditors*, who are occupied in auditing and examining the accounts.

§ 18. As the Counts were not always present, some being abroad, and others absent on expeditions, they had their deputies, as chiefs and directors of the affairs of the country, who, since the renunciation of allegiance to King Philip, went over to William Prince of Orange, to whom, on account of his peculiar good services and the confidence reposed in him, the power of the Counts of Holland was almost fully ceded in the year 1581. The powers thus offered to him, that prince accepted and executed, under the denomination of Governor and Captain General of the United Netherlands, for the conducting of military affairs in general, and also as Stadholder of Holland, Zealand, and West Friesland, for the management of the civil affairs of the Country and the administration of justice. After his death this office devolved on his descendants by succession, viz. first on Maurice to whom it was given after the death of his father William, in the year 1585; and after his decease on his brother Frederick Henry, in the year 1625; who, after a war of eighty years with the King of Spain, retrieved our affairs; and who, after many conquests, in the year 1647 concluded an inviolable peace. After the decease of Maurice, the same dignity was conferred upon his son, William II., in the beginning of the year 1648: but on account of his untimely death (which happened at the latter end of the year 1650), the said power and high dignity having become vacant, affairs were so much neglected in the course of twenty years, that they were plunged from the highest degree of good order, to which under Providence they had attained, under the management of the House of Orange, into the lowest condition, and seemed destined to be entirely reduced; but that calamity was prevented by the re-establishment of the antient office of Stadholder, to which the present William the Third was appointed. Accordingly, on the 3d July 1672, the title of Governor and Captain General of the United Netherlands, and the Stadholdership of Holland, Zealand and Friesland, was conferred upon him, together with all such dignities as had formerly been enjoyed by the Princes his ancestors, of very laudable memory.

Of the Stadholders of Holland and their power.

The Stadholder of Holland was always the first, the most worthy, and most esteemed person next to the Prince of the country; in whose name and in whose stead he officiated as Stadholder, upon all emergencies and difficulties, in order to issue the requisite commands, as well concerning the affairs o the country as the administration of justice; upon him, on the renunciation of the government of the Counts of Holland, the

same dignity, as chief of the whole country, was conferred. His commission and power consist not only in preserving, and in causing to be preserved, the countries, cities, ditches, frontiers, and places situate within the country, and in performing every thing having any relation to the preservation and protection of the said countries, cities, ditches, and places, but also in protecting, promoting, and preserving the government, administration of justice, privileges and welfare of the country, its members, cities, and inhabitants; in causing the exercise of the reformed religion to be maintained and protected from all molestation, discord, detriment and loss; and further, in causing justice to be administered in the said countries, and its provisions of justice to be properly granted and executed. He is likewise to perform every thing relating to the affairs of the country and to war, according to the pleasure of the States, or upon the good advice of their commissioned councils, and all matters relating to justice and the maintaining of public law matters, upon the advice and approbation of the president and counsellors of Holland, Zealand, and West Friesland. He is also to appoint and nominate the magistrates; namely, burgomasters, aldermen, and counsellors in the cities, each of them according to the tenor of their charters and antient privileges; some upon previous recommendation, and some upon an unlimited election. (1)

Of the Governments of the Cities.—Civil Jurisdiction of Bailiffs, Burgomasters, and Aldermen.

§ 19. The government and care of the cities in particular is vested in the council and court of every city, whereof the counsellors are permanent, and those of the court are chosen annually. Under the court, the burgomasters are to protect the rights of the public and the welfare of the city; and the aldermen are placed to administer justice. They also take cognizance of all cases that are subject to corporal punishment; wherein the bailiff, as chief officer, officiates, either as prosecutor or accuser. In some cities, however, where difficult cases arise concerning the government of the city, the bailiff, burgomasters, and aldermen are consulted, and denominated the *College of Justice*, who, if required, are summoned by the burgomasters.

Criminal Jurisdiction of Bailiffs, Burgomasters, and Aldermen.

§ 20. These magistrates officiate likewise as judges in cases relating to the common peace of the inhabitants, namely, against seditious, refractory, and rebellious citizens, who rise up against their governments and commands: and also in cases of

(1) See the articles and instructions given to Mathias van Oostenryk, as governor of the Netherlands, and prince William as stadholder, dated 8th December 1577, by Peter Bor. book 12. p. 7. Eman van Meteren, book 7.; to prince Maurice of the last of November 1585, by the said Peter Bor. book 20. p. 85; and to Frederick Hendrick, on the 24th May 1625, by L. Aitzema, vol. 1. book 5. p. 994. See also the instruction of the court of Holland, art. 1, 2, 3, *et seq.*

great disputes, calumny, and animosity against each other, (from which greater mischief is always apprehended); and inflict punishment by way of fatherly chastisement, which we usually denominate *matters of correction*. In these cases, upon the complaint of the bailiff, without any previous law proceedings being had, justice is done in a summary way; and the refractory person is fined on behalf of the city or the poor, according to the exigency of the case, or is turned out of the city as an incorrigible person. According to Grotius (1), no appeal is granted against these decisions. But in what manner the same is to be limited against the mal-practices of some, see the remonstrance of the high court concerning justice and the government of Holland, made to the States of Holland on the 22d March 1617, and also the resolution of the States of Holland, of the 24th June 1598, against all malevolent and suspicious persons. By the latter, the officers and burgomasters of the cities of Holland and West Friesland are authorized and empowered to banish from or cause to be conveyed out of such cities, (whenever the service of the countries shall require it), all persons who by words or deeds shall say, do, or undertake any thing that may tend to the prejudice of the public welfare of the country or the cities in particular, and further to banish, in like manner, such persons as in their conscience, by a majority of votes, they shall suspect, without any formal suit or other proceedings, before sun-rise or sooner; and such their sentence shall take effect, notwithstanding any contradiction, opposition, or appeal.

Tribunals of Aldermen in the Cities.

§ 21. In other common cases, justice is administered as well in the cities as in villages, for which purpose sometimes seven and sometimes eight persons are summoned; but with this difference, that in cities the aldermen, without distinction, try all cases, whether civil, common, or criminal, whereof the sheriff is head or chief officer; who is no judge, but causes the commands of the judges to be carried into execution, assembles the meeting, collects the votes, and maintains the laws of the country in common and in criminal cases, as prosecutor and investigator.

Jurisdiction and Powers of Bailiffs, Lords of Manors, and sworn Persons in the Country.

§ 22. In the country, the *lords of manors* and certain *sworn persons* have the management of village and country cases, the latter are assessors of village taxes, and especially of the capitation tax, which each person pays according to his ability and situation in life, first with *stippen* (2), whole and half *sgreven* (2), as far as *oorden* (2), and half and whole *stivers* (2);

(1) See his *Consultatien van de Hollandsche Regtsgel*, (Consultations of Dutch Jurisprudence), vol. iii. cons. 326. n. 65.

(2) These are the names of certain Dutch coins.

amounting to a trifling sum upon each family, which being computed together, is doubled according to the share of each, until it amounts to the sum required on account of village contributions, which by some writers are called *bede*, by others *de steek*, and again by others *schildtual*. The lords of manors have the direction of all cases concerning manors; namely, public roads, waters, sluices, bridges, &c. The jurisdiction is divided into two special courts; one consisting of the sheriff and aldermen in common cases, and the other of the bailiff and men in offences and criminal cases, whence the difference of the words *schout* and *baljuw*: the former (*schout*) proceeds from *sgult*, by the Germans written *sgoltes*, because he is like a demander of common debts, according to Grotius (1); who notes down the original word, and in old writings finds *sgout* and *sgoudig* for *sguld* and *sguldig*.

Of the Name and Office of Bailiff.

§ 23. The word *bailiff* (*baljuw*), is derived from the French, and signifies a chief ruler or superior. By the old Frieslanders he was called *Aesge* or *Aetga*; and was a chief, who, being called, together with the common neighbours of the suitors, decided in common cases. And *sgelte* was with them the person who, in the name of the King or of the Count, collected the fines, and decided superior, that is, criminal cases, wherein the old Friesland law *Aesgadoem* signifies a *decision of the aesge*, in common cases, and *sgelte* a *criminal decision*; which was formerly in use, and indeed until lately, in the administration of justice among neighbours in the country of Holland; as appears in the customs of Rynland. (2)

The Meeting of the Neighbourhood, when altered into that of Aldermen.

§ 24. Thence proceeded the law denominated *aasdom's right*, until, by the charter of Count Floris, granted in the year 1291 to the people of Kenemerland, the neighbours meeting was altered into that of sheriff and aldermen, in the following words: "What the neighbours decide in Kenmerland, the aldermen shall decide in all such cases as are determined by the neighbours." These words were repeated in the charter of Duke William Van Beyeren, in the year 1415. An alteration, similar to that made in the law of Kenmerland, was made in Rynland by the States of Holland, on the 9th of October 1577; until which time justice was administered by the neighbours. (3)

Origin of the Bailiffs' Tribunal of well-descended men.

§ 25. Besides the aldermen in the country, there is another tribunal, denominated the *tribunal of well-descended men* (that is, of the nobility), the judges of which are *well-descended men* (or

(1) Inleyd. lib. ii. c. 28.
(2) Art. 15.
(3) Grotius, Inleyd. lib. 2. c. 28.

noblemen;) by some writers this tribunal is called *men* or *men's men*, because the nobility ought to consist of free and independent persons, who are to pronounce sentence upon a free man, as we read in many old charters. Of this tribunal, which takes cognizance of all criminal and other cases that are liable to corporal punishment, the bailiff is the chief, as already mentioned; and upon whose complaint justice is done, from the highest, that is, in the name of the supreme government (1); before whom the decisions of the aldermen in civil and common cases are to be brought in appeal or revision, to see whether they were decided properly or not. But it is uncertain by whom and when each of them was instituted. In Rynland the common opinion is, that the first institution of well born men took place in the year 1295 by Count Floris, the fifth of that name, whose tribunal was antiently divided of old into criminal and civil cases, under separate jurisdictions; and that the offices were executed by different persons; viz. in criminal cases by thirteen, and in civil cases by seven men, until upon their statement and complaint some time made to the commission of finance, then held at Brussels, some time before the rebellion, the bailiff was allowed to administer justice with thirteen elected good men, both in criminal as well as in civil cases. This union was subsequently followed by other peculiar lords of manors and bailiffs: and those of Nootwyker-hout, who in like manner formerly composed a divided tribunal, were by the States of Holland, on the 15th March 1614, altered into *nine-well born men*, upon the application of Andries Van Thienen, the then bailiff, and they were allowed to administer justice together.

In Kennemerland, all vassals antiently had the privilege of administering justice in conjunction with the bailiff, and also of pronouncing decisions, as appears from the following passage from the charter of the said Count Floris, of the year 1291: "*Further every man may decide for us and our bailiff, who is our good man over a penitent convict*" (2); appeal antiently lay from the decision of the aldermen to bailiff and men, as appears from the following words in the said charter: "*If any one contradicts the aldermen, the bailiff and men shall decide the question.*" It was likewise usual antiently, in the southern part of Holland, that the bailiffs should hold a court of justice with *men's men*; namely, vassals who held lands in fee under another vassal,

(1) Goenw. ad. L. 3. C. de Defens. Civit. book iii. c. 9. § 14.

(2) The words of the original charter are *over eene bene-schuldigen* (*dasis boet schuldigen*) *man.*

and who took the oath of vassals. This court was composed of at least from seven to fifteen persons; as appears at large from the charters of the southern part of Holland. (1)

Inspectors of Rynland, by whom and when introduced.

§ 26. This was the first tribunal in Holland and West Friesland, in which all cases whatever were decided, until the establishment of the college of Dyke-reeve and Inspectors of Rynland, by William King of the Romans, as Count of Holland, in the year 1255, which tribunal was to take cognizance of, and to decide upon, matters relating to dykes and waters.

Court of Foresters and Companions.

§ 27. In the year 1376, a special court of foresters and companions was established, who decided cases concerning hunting and forests.

Provincial Court at the Hague.

§ 28. Afterwards a provincial court was instituted at the Hague by Philip Duke of Burgundy, in the year 1428.

High Court at Mechlin.

§ 29. And in 1474, the high court at Mechlin was established by Duke Charles the Bold; which was also taken to the Hague in the year 1582, on account of the differences in the Provinces of the Netherlands. By this removal, besides cases of appeals, the decision of many other cases was taken away from the inferior judges, as appears from the instruction, by which the same was established, and afterwards increased; both which courts we think ought to be joined together, and to form but one tribunal, with a double number of counsellors, in order to diminish the time and expences incurred by suitors.

Origin of the Feudal Court.

§ 30. In like manner, the said Duke Charles, in the year 1469, established a feudal court, consisting of a stadholder and vassals, which was to decide on all feudal cases, and which was renewed by the Emperor Charles V. by a special instruction in the year 1519. The jurisdiction of this court was afterwards, in time of war, given to the provincial court; but on the 7th of April 1661, it was again renewed and made to consist of a stadholder, of the vassals, and the president and court of Holland in the provincial court, who for that purpose ought all to be vassals.

The preceding sketch will convey a summary idea of the state and government of our country, as they stood both before and after the war; a declaration of which was issued by the States of Holland for the preservation of the liberty, justice, privileges, and laudable customs of the said country, on the 16th October 1587 (2). After the treaty of peace between Philip IV. King of Spain, and the States General of the United Nether-

(1) Pp. 512. 470.

(1) See Grotius, vol. iii. of the Cons. & Adv. of the Dutch Jurisprudence, (*Cons. en Advys. van de Hollandse Regtsgel*), vol. iii. Cons. 326. and in his Apologia, c. x.

lands, made on the 30th January 1648, and the death of the two invincible chiefs, Frederic and William, Princes of Orange, some alterations were made in the constitution; by which the several powers of the government were freely re-established and enlarged (1). Further, by several resolutions passed in the provincial council in the years 1650 and 1651, in the great hall of the Hague, many dignities, offices, and additions were made to the States General, especially in cases relative to religion, the union, and troops, in granting patents and changing garrisons (2). About the same time, and also afterwards, the States assumed the power of conferring those offices and privileges which had formerly, from time to time, been recommended and left to the governors and stadholders of the same provinces. On the death of William II., which took place at the latter end of the year 1650, the said States General granted a charter to the cities, authorizing them to nominate and elect their own government, in conformity with the regulations contained in the said charter. These regulations differ a little in some cities, but in others they agree. Formerly, a double number was recommended by them, and one half of them was chosen by the stadholder: but on the re-establishment of the stadholdership in the person of the present Prince, William III., on the 3d July 1672, with the same dignities which his ancestors the Princes of Orange had enjoyed, all the grants aforesaid were repealed and became obsolete: so that the election of burgomasters and aldermen in the cities again devolved upon the stadholder, pursuant to their antient charters.

Alterations in the Government made in the years 1650 and 1672.

(1) See the Herstelde Leeuw (Re-established Lion) of L. Aitzema.

(2) See the aforesaid L. Aitzema, and the history of the years 1651 and 1652.

CHAP. III.

Of Laws.

[Grot. 1. 2.]

§ 1. *Law defined; and wherein it consists;*
2. *In commanding;*
3. *In permitting;*
4. *In prohibiting;*
5. *In punishing.*
6. *Whether and how far the Judge is bound to adhere to the punishing Law.*
7. *Laws made by us are either written or unwritten, general or special.*
8. *General Laws by whom to be made.*
9. *Special Laws by whom to be made.*
10. *Customs general or peculiar.*
11. *How they are to be proved.*
12. *The Decision of a Superior Judge is not reckoned as a Law.*
13. *By whom and when Laws given are to be observed.*

IN order to make every one lead an honest life, agreeably to the strict rules of justice and equity, and give to each his due without injury to any one, the all-wise God gave the human race, and amongst the same appointed those in authority to be as a rule and plummet of what is right or wrong, the resolution of the law or justice.

Law defined; and wherein it consists:

§ 1. Law is the general will of the supreme government, guided by the strictest principles of justice and equity, and instituted for the public good (1); the real strength of which consists in *commanding*, *permitting* what is good, in *prohibiting* and *punishing* what is bad (2). New laws are not to be extended to cases and transactions that occurred prior to the publication of them, unless such laws contain some explanation of earlier laws. (3)

In commanding.

§ 2. In *commanding:* it is not possible that something which is to serve as a guidance and plummet of justice, can be otherwise exercised but by a mutual obligation of the supreme power and also of the subjects, in imposing the observation of whatever in its own nature is good. In consequence of this command and the obligation arising therefrom, every thing is rendered inviolable; and an impression is made on the subject, that he is

(1) L. 1. l. 2. Ff. de Legib.
(2) L. 7. Ff. eod.
(3) Sanden. Dec. lib. 2. ch. 5, 6.

to follow and observe every thing according to this fundamental rule, viz. that where a thing is commanded, the contrary thereof is prohibited.

§ 3. In *permitting:* there are many points which by law are neither commanded nor prohibited, and yet, as a consequence and similarity, by permission and custom they are taken for good (1); and in order that it may appear on the contrary that whatever is not expressly commanded or tacitly permitted, is even so far unpermitted as if it was expressly prohibited, a *permissive law* also commands or obliges. In permitting.

§ 4. In *prohibiting:* in order that right and equalized equality may obtain a more extensive and undiminished result in knowledge, and just distinction of good and bad, it is likewise laid down as a fundamental rule, that whatever is not prohibited by the laws as bad, or from its own nature does not belong thereto, is permitted and good; for every one is allowed to do, not whatever the laws permit, but whatever the laws do not prohibit (2). There are, however, several exceptions to this general system (3). In prohibiting.

§ 5. In *punishing*, for not doing whatever has been commanded, and avoiding whatever the law prohibits, either because it annuls entirely whatever was done against the law, or is really considered as ineffectual; as in the case of a marriage, wherein every thing, required by the law for the existence thereof as necessary, has not been observed and performed (4). So, in the case of a last will, wherein every thing is not observed which the law requires for its existence, &c.: or more so, to compel those, who have transgressed the commanding laws, and made themselves guilty, to observe those very laws by means of punishment inflicted as an example to others. For which purpose the judges are placed, each in his respective jurisdiction; who, as the living voice of the law, maintains the same in a perpetual existence, and must cause it to be maintained with such discretion as the circumstances of men, cases, times, and occurrences, do severally require; inclining not only to whatever has often happened, but also to whatever has constantly occurred and has been observed. In punishing.

§ 6. In the discharge of this office the Judge is bound especially to follow the law, as the person to whom the judgment thereof does not belong, and to behave himself therein as the Whether, and how far, the Judge is bound to adhere to the punishing Law.

(1) L. 12, 13. l. 32. Ff. de legib.
(2) L. 28. § 2. Ff. ex quib. causis Maj. L. 43. Ff. de Procur. L. 1. § 1. Ff. de Testam.
(3) See Coorn. Cons. 6. n. 10.
(4) See the 3d act of the Political Ordinance of the year 1580.

executor and servant thereof. In causes, wherein the law requires a public punishment, he is obliged in conscience immediately to execute the law; but not (as some are of opinion) on account of the common saying of the Roman lawyers, that it is better to let a guilty person escape with impunity than to condemn one that is innocent; of which Cicero (1) gives several examples. Therefore, the mitigation and aggravation of the punishment rest within the good conscience and discretion of the judge, which rule agrees with the doubtfulness of the crime, namely, whether, or when any person has committed any crime, it is punishable or not by the law; or whether it deserves a small or heavy punishment; but upon whatever delinquent a public punishment has been pronounced, the judge is strictly obliged to observe the law (2). As crimes will prevail more if the wickedness of mankind be not checked by severe punishment, it is likewise to be considered in a more strict sense; because it is impossible that the laws, wishing to preserve the constant welfare of good people, can attain their aim without it, which requires also that no legal punishment, how hard soever it may seem, should be executed through favour or malice; but that every thing should be decided according to justice. To which we may add, that the heaviest operations of the law, consisting of punishment, forfeitures, penalties, fines, confiscation of privileges and property, do concern only the future (3), and serve as a public warning to every one, to guard him from disgrace and loss: and therefore no one can complain against the law, but is more bound to yield obedience to it, and the punishing law (as on account of the wickedness of mankind, evil cannot be otherwise prevented), may be very hard and severe. Unless, as some who are versed in Scriptures mean, a punishment equal to the evil should be deemed sufficient, so far as it relates to injury done to another. But as the effect of such light punishment of crimes (which in the beginning appeared sufficient) with respect to persons who dare transgress more and more even against what has been expressly prohibited, will be to render them more ready to undertake things for which they fear no severe punishment; hence it is an undoubted conclusion, that the severer the punishment is, and the more strictly the same be observed, the more salutary it is; for the removal of the confidence of escaping

(1) Orat. pro Roscio Amerino.

(2) Arg. l. 1. § 4. ad Senat. Turpillian. See also articles 13 & 59 of King Philip's edict and ordinance relative to criminal justice, issued in the year 1570, and my observations thereon.

(3) L. 7. Cod. de Legib. l. 65. Cod. de Decurionib.

with impunity, destroys also the root of evil; besides, it rests with government, who have it in their power (although one does not proceed to it so easily, especially in cases subject to punishment) to mitigate with compassion the severity of the law, if there be any, according to the circumstances of the case, and also to make it cease entirely, and place it out of prosecution at law (1): because, through ignorance, the Judges both in the cities and in the country try to decide every thing according to their imagined proportion in equity, (without regarding the laws, as if they were hard,) and out of it a better proportion in equity was to be found, and misuse the same too much, and observe it too little, especially in punishing crimes; wherein, from a foolish mercy, they proceed too much beyond the necessity of the punishing law, and, according to the inclination which induces them, mitigate the same too much. Hence many crimes are not punished as they ought to be, and some remain entirely with impunity; and in their judgments and decisions the judges make use of expressions publicly, and as if they were at liberty to alter and mitigate laws, they insert this clause, namely, *preferring grace to the rigour of justice.* In consequence of which conduct, the States of Holland made clear provisions, on the 27th September 1668; and directed that in future no judges in Holland and West Friesland should presume to insert the said clause in their sentences.

Laws are, written or unwritten;

§ 7. The laws, therefore, as already stated (2), are either introduced from abroad or made by ourselves. And these are either *written* or *unwritten.* (3)

general or special;

The written laws again are, either *general*, extending their power or obligation to all the inhabitants of our country, or *special*, that is, peculiar to some place or to some people, such as statutes, proclamations, privileges, &c. (4)

General Laws by whom to be made.

§ 8. General laws are only made and issued by the states of the country, or by other governments to whom the legislative power is given; such as the president and counsellors of Holland, who have the power of making laws relative to certain matters, viz. the style of the tribunal, law proceedings, the punishment of faults and crimes which may be committed by secretaries, proctors, advocates and their clerks, and others. (5)

(1) L. 11. Ff. l. ult. § fin. cod. de Legib.
(2) See chap. 1. p. 2. § 10.
(3) Inst. l. 1. tit. 2. § 3. l. 32. Ff. de legib.
(4) Instit. l. 1. tit. 2. § 6. de Constit. Princip.
(5) See Merula, lib. 1. tit. 4. c. 4. Christin, vol. 2. dec. 51. n. 8. and dec. 65. n. 3, 4.

Special laws by whom to be made.

§ 9. *Special* laws are not only made and issued by the states or governments of the countries, but even by the principal cities, villages, and divisions of the country, which have obtained full power to issue proclamations and ordinances, each within its own jurisdiction, for the use and benefit of their city or country; provided they call in and take for that purpose the sheriff or bailiff, in the name of the supreme governments, and obtain the approbation of the Prince of the country (1).

The dykereeves of Rynland and Delftland, have also the power of issuing proclamations in cases under their inspection, and in whatever belongs thereto; as appears from the introduction to the proclamations of Rynland of the 2d December 1609, and of Delftland of the 4th June 1598. But whether the bailiff and the sworn well-born men of Rynland have power to make proclamations, is doubted by many, and not without reason, so long as nothing more is ascertained concerning the same: for they ascribe it to themselves in the introduction to their proclamations of the last of June 1620, not fully, but only mention that they have it in their possession. All these proclamations made by virtue of such privileges, have the force of laws, unless they contain any thing relative to matters of which their privilege does not speak, and which are not within their jurisdiction, or which will be to the prejudice of the public, or contrary to the written laws admitted by us, or against the common local laws, or in prejudice of a third person (2). Such proclamations I have often seen pass by the court without any notice whatsoever being taken of them, though they have afterwards been strictly sought for, and disputed whenever any the least difficulty was to be expected therefrom. It is therefore more certain to have such proclamations confirmed by the States. The power of some cities to make proclamations is much limited, namely, on condition that they should have the confirmation of the government in Holland, as is the privilege

(1) See Merula, lib. 1. tit. 4. c. 6. Grotius, Inleyd. lib. 1. tit. 2. The charters of the undermentioned princes, viz. of count Floris to the inhabitants of Leyden, granted on the Sunday after the feast of St. Luke, in the year 1266; of count William to the inhabitants of Amsterdam in 1342; of duke Jan van Beyeren, confirmed on the 18th January 1420; and of the said Count William, given to the inhabitants of Haarlem on St. Clement's day in 1245, and to the city of Delft in 1246; of Philip duke of Burgundy to those of Naarden on the 2d June 1459; of the emperor Charles V. to those of Wiesop on the 2d Sept. 1552. See also the Charters and Customs of the Southern Part of Holland, pag. mihi 53. art. 37, 38. Merula, Prax. Civil. lib. 1. tit. 4. c. 6. Rinking de Rigimans Seculari, lib. 2. class 1. c. 10. n. 3.

(2) See Grotius, Inleyd. lib. 1. c. 2. vers. Over de Kragt.

of those of Werop, granted under the following proviso, viz. that the privileges with which any particular person is favoured, are to be granted, so far as they have power to make laws; so that an inferior judge, notwithstanding he himself is amenable to a superior power and government, can grant a special privilege to any person; provided, however, he does not prejudice or violate the laws enacted by the supreme government. These, again, are either *general* or *special*; that is, concerning and appertaining to certain countries, cities, villages, meetings, corporations, and also relating to certain persons, as widows, orphans, &c. or to peculiar persons. (1)

Customs are either general or special.

§ 10. The *unwritten* laws or customs are likewise either *general*, that is, used by the whole country; for example, the community of property between husband and wife in Holland; or they are *special*, which are in force only in particular places, such as the right of appropriation in Rynland, Delftland, Kenemerland, and Voorne, &c. (2)

How they are to be proved.

§ 11. In order to defend and prove a custom, which does not fully militate against the laws, it is not exactly necessary that the same should be confirmed by a decision, in *contradictorio judicio*, as it were; as was understood by the court of Utrecht and by the high court of Mechlin, according to Radeland (3) and Christin (4); who extend that opinion so far, that it would not even be required in customs and usages which are fully contrary to the written laws.

The decision of a superior judge not reckoned as law.

§ 12. By some jurists the decision of the judge is also reckoned among the written laws; but since even the high court in Holland has not full power to make laws, it consequently follows, that neither the decision of the said court, nor of any other, has the force of law, or is fully binding upon others (5). Although otherwise, a case often so decided is of considerable force in similar cases; so it is said to have been judged in the high courts of Holland (6) and Mechlin. (7)

If, however, any difficulty arise concerning the meaning or explanation of any laws or proclamations, it is usual to follow the decision made in some similar case. So likewise it is not reckoned as a consequential custom, when a thing has constantly been done in one particular way, which one could or

(1) See Merula Prax. Civ. lib. 1. tit. 4. c. 3.
(2) See Zurk, Cod. Bat. voce Costume.
(3) Trajectens. Decis. 13. n. 4.
(4) Decis. vol. 4. Decis. 187. n. 9.
(5) L. 13. Cod. de sentent. & interloc.
(6) Coren, observ. 30. n. 2, 3, 4.
(7) Christin, vol. i. decis. 1. and vol. ii. decis. 51. n. 5. et seq. and decis. 65. Zypæ Not. Jur. Belg. tit. de Legibus, vers. igitur.

might have done otherwise; and no right is lost by not doing it, or by doing it in a different manner. (1)

By whom and when laws given are to be observed.

§ 13. With regard to the persons by whom, and the time when the laws given are to be observed as laws, and are binding upon any one, it is a fixed rule with us, (as it formerly was with the States and even the Counts of Holland, who were obliged to swear, that they would observe the laws and charters of the country,) that such laws and charters are to be observed without distinction by every one, both in high as well as in low conditions, without distinction (2); namely, as soon as the publication thereof has been made at the accustomed place, which is often in one place earlier than at others. So that a general publication by the States, or by the court of Holland at the Hague, is not sufficient to be considered as binding upon the inhabitants of other cities and places, where publications are usually made; as was understood with regard to the city of Briel and the countries of Voorn, on the 23d of June 1621; and for the city of Wandrigen and the villages appertaining thereto in the year 1618; namely, that no general country ordinances or placards are binding upon the inhabitants of particular cities, before they are published at the place where publication is usually made in such cities. (3)

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(1) See this subject more fully discussed, infra, book ii. chap. 10.

(2) See Grotius de Jure Belli, lib. 1. chap. 4. n. 8. et de Antiq. Reip. Batav. c. 5. Merula, Prax. Civil. lib. 1. tit. 4. c. 5. n. 22. Christin, vol. 1. dec. 9.

(3) See Coren, observ. 1. Groenew. ad Grot. i. 2. 2. Merula, 4, 5. 1.

CHAP. IV.

Of the Power of Governments in giving Laws, granting Letters of Grace or Favour of Redress.

§ 1. *How many Sorts of Laws there are with us.*
2. *Wherein the Power and Authority of Government particularly consist.*
3. *Privileges, &c. granted to particular Persons, how to be understood, and when they have not their full Progress.*
4. *Whether and how far Confirmation thereof by the daily Judge may be refused or allowed.*

How many sorts of Law there are with us.

§ 1. THE mere will and pleasure of government is a law to the subjects (1); who are to remember that the prince, that is, the government of the country, being of divine institution, has grounded his will upon important causes, and his pleasure upon equity and propriety; and who arranges every thing to the honor of God and prosperity of his subjects; whether it be recommended with the words of edicts, ordinances, or placards, or by way of resolutions, rescripts or otherwise: such as approbations, confirmations, revocations, alterations, instructions, moderations, ampliations, interpretations, consents, authorizations, and the like. All which are constantly observed as laws, and reckoned amongst the same according to Merula (1); if it be but certain and beyond doubt that it is the meaning of government, that their will and pleasure should be observed as a law; so that no judgement should be pronounced according to precedents or mere decisions, but according to the laws: for which purpose the following conclusion is often added, among us, for the confirmation of ordinances and placards, viz. "*Whereas it has pleased us so, and we deem it expedient for the service of the country.*" The force and effect of this conclusion, and by whom the same was antiently to be used, is treated of distinctly by Dirk Graswinkel, doctor of law, in the sixth chapter of his Meditation and ingenious observations on Placards upon the point of Usufruct.

Wherein the power and authority of Government particularly consist.

§ 2. The power of government, in granting grace, is mostly acknowleged, when to any one, out of the written laws, something is granted or remitted from a peculiar favour; such as pardons, remissions, abolitions, letters of legitimation, respite, or attermination, sureté des corps, benefit of inventory, *venia ætatis*, and the like, the nature of which will be treated in their

(1) Leg. 1. Cod. de Legib.

(2) Pras. Civil. lib. 1. tit. 4. chap. 2. n. 14.

proper place. And so may otherwise all occurrences be represented to them as petitions; and thereupon a favor may be prayed for and granted; unless the petition tends to the prejudice of a third person, or of the community (1), or notoriously militate against the law, or is not beneficial to the petitioner. I say, *all occurrences without distinction*; even if they be of a litigious nature, against which redress may always be obtained by petition (*vulgo request civil*), from the supreme government (in whose place the high court officiates in those matters), wherever the circumstances of the case require it, even against decisions of the high court, by way of revision or on account of other important causes, according to the instructions of the high court.

Privileges, &c. granted to particular persons how to be understood.

§ 3. But privileges or other provisions, granted to any one by the supreme government, have not always their full effect for the purpose for which they were obtained. For, in the first place, rescripts, which have been granted against the law, or to the prejudice of the community, may and ought to be annulled and refused by the judges, and even by all those to whom not only the knowledge but even the confirmation and approbation thereof are recommended: on the other hand, whenever any thing is made known to the supreme government, which deviates from and is against the truth, it makes the petitioner unworthy of having the fruit and enjoyment of his prayer granted to him, which is also taken cognizance of in the confirmation; both which exceptions are also understood to agree with the tacit meaning of the supreme government, who, one trusts, wish and desire nothing that militates against the law or is prejudicial to the interests of the community, and therefore grants them, under this proviso, namely, that the information given is the truth. (2)

Whether and how far confirmation thereof by the daily Judge may be refused or allowed.

§ 4. With respect to preceding grants, and the confirmation of letters of remission, redress, or favour which have been granted, such as pardons, remissions, abolitions, and the like; the judge, to whom the confirmation was referred, has nothing else to do, but directly to examine whether the information given be true, and whether nothing was concealed therein that related to the matter, nor any thing alleged contrary to truth, which would make the petitioner unworthy of the favour obtained. In which case he may reject the said favour; but if he finds it to be true and unblameable, he may not reject or delay the favour granted; and between mere redress, arising from matters

(1) Vide Mæstert de Justit. Rom. Leg. lib. 1. dub. 20. & seq.

(2) L. 7. Cod. de divers. rescript. capt. exparte. Gail. lib. 1. observ. and DD. Comm. ad tit. Cod. Si contra jus vel utilit. public. Grotius, Inleyd. book i. c. 2. §. Over. de Kragt.

grounded upon deceptions, fraud, or neglect, the judge is not only recommended to controul the confirmation, and to investigate whether the information be true, but also, whether the circumstance of the matter is such that the petitioner may be redressed according to law. (1)

CHAP. V.

Of the different kinds of Rights, and their Operation; and of the Condition and different kinds of Persons.

§ 1. *Different kinds of Rights.*
2. *Wherein Right consists.*
3. *The working of Justice through mere Equality or Proportion, how to be understood.*
4. *Every one is free from his Birth amongst us, and Slavery is with us unknown.*
5. *Different kinds of Persons.*

Different Kinds of Right.

§ 1. THE laws which are thus in force among us, have relation to the rights of persons, things, or actions (2): for, according to the doctrine of the wise Epictetus, there is nothing so good which has being but men, and whatever is out of human being is a matter or judicial means for the proportioned equality in the condition and use thereof.

Wherein Right consists.

§ 2. This division is taken and arranged from and according to the condition of whatever is right, in every point, and consists in causing every one to have his own right, as we may denominate it; not that it is in every point, every where, and always equal; as for example, that twice two makes four, and twice four eight; but so that the said right in the prosperity of the community consists often in inequality, with regard to which one and three and four, as well as five and three, make eight, as well as twice two makes four, and twice four eight, including in the same the two operations of righteousness which are proposed in l. 1. § 1. de justit. et jure, whereof the one looks upon the appurtenance in rewarding through mere equality, whereby two things are compared together with each other in proportion; so that the one does not differ a hair's breadth from the other, such as two matters, both weighing one pound, are both equal: and the other looks upon the worth in granting through a proportion, whereby two things are said to be even and equal

(1) L. 3. Ff. de integr. rest. (2) Inst. lib. 1. tit. 2. § ult.

with regard to something else, although in themselves they are unequal; so that, in number, one makes as much as three, and in two equal shares with regard to the worth, four, and three and five eight; and in weights and measures, the inferior with the superior quantity produce an equal weight and measure. In order to comprehend this the more clearly, the example of Cyrus king of Persia is sufficient; who was instructed by his preceptor Xenophon, (in order to give to every one his due) not to divide among his warriors the cloth which they had plundered, in equal proportions, but that he should give to each of them according to his size, and in proportion to his real deserts.

The working of Justice through mere Equality or Proportion, how to be understood.

§ 3. This is distinguished by the philosophers into an equality, according to an arithmetical or geometrical proportion, which seems to be followed by the lawyers also.

This is denominated by Grotius (1), a conferring and indemnifying justice; whereof the *indemnifying* is the simple proportion, and the *conferring* or the comparative proportion is mostly used. These are words which, without clear explanation, are very obscure: and of which he speaks more clearly, and illustrates them with several observations, in his inestimable book De Jure Belli ac Pacis. (2)

In order that every person may obtain his due, we must in the first place consider, in what the right of each person consists, and what is due to every one; the knowledge of this, with regard to persons, consists in the right that appertains to them, with respect to the situation in life or in the right which every one has in matters without regard to his person; and next to that, in the judicial means to obtain the same from those who are unwilling to give it and who refuse it.

Every one is free among us, and Slavery is unknown.

§ 4. With respect to persons, every one is free among us by their birth; and slavery is unknown among us and not in use: so that in order to protect natural liberty, slaves who are brought here from other countries are declared to be free as soon as they reach the limits of our countries, notwithstanding their masters. (3)

Different kinds of persons.

§ 5. Free persons are divided, in law, into men and women, relations by blood or strangers, persons born legitimately or illegitimately, and noble or ignoble persons, natives or strangers, clergy or laity, learned or unlearned, persons who are of age, and minors.

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(1) Inleyd. b. i. c. 1.
(2) Lib. i. c. 1. § 8.
(3) See Christin, vol. 4. decis. 80. n. 2. & seqq. Gudel. de Jure Noviss. lib. i. c. 4. Grotius, Inleyd. l. i. c. 4. § 2. Zyp. Not. Jur. Belg. lib. 6. The charter given by count Floris to the people of Monnikkendam in the year 1288.

CHAP. VI.

Of Men and Women, and their several Rights.

§ 1. *Distinction between Men and Women, according to their Nature.*
2. *When they may enter into Matrimony, with or without the Consent of Parents.*
3. *Women are excluded from all Offices and Dignities.*
4. *What Power is given to them over their Persons and Property by the Roman Law.*
5. *Of their Condition in Germany, and in Over-yssel and Gelderland.*
6. *And also in Holland.*
7. *How far married Women are under the Guardianship of their Husbands.*
8. *Whether and how far a married Woman can bind both herself and her Husband.*

§ 1. THE law recognizes but little distinction between men and women, when married; that distinction consists in little else besides the innate sensation which in a man differs from a woman; and, also in that a woman, according to her nature, is sooner fit for procreation than a man although the age of puberty commences earlier with the one than with the other. And therefore, among the old lawyers, some are of opinion that one should judge by their external appearance; others again hold, that it should be confined to a certain number of years, which would be applicable, if not to all, at least to the greatest part of them, according to which rule the law does not allow a man to marry sooner than at the end of his fourteenth year, which is allowed to a woman at her twelfth year and is observed by almost all nations. (1)

Distinction between Men and Women according to their Nature.

§ 2. And so among us the marriage of a daughter, who is twenty years of age, cannot be impeded by the parents without preceding legal reasons, which in a young man does not take place until after his twenty-fifth year. (2)

When they may enter into Matrimony, with or without the consent of their Parents.

§ 3. And it proceeds also from nature, that the female sex is usually excluded from all offices and dignities, belonging to the government of a people and from public affairs, on account of their natural weakness, in consequence of their being less fitted for matters requiring understanding and judgment than the male sex: whereas they are found in many points incapable of manag-

Women are excluded from all Offices and Dignities.

(1) L. 24. Cod. de Nupt. l. 10. Ff. de Concrit. et Demonstrat. pr. Instit. lib. i. tit. 10. de Nupt. tit. 13. de Tutelis.

(2) See the Political Ordinance, art. 3. & seq.

ing themselves or their affairs with full wisdom, and in most cases they act against their own interest; and antiently were entirely under the power and guardianship of men, to whom it belongs, as being the wisest, to command the inferior sex. This, however, mostly consists in a voluntary obedience and mutual duty: and nature, in that point, is not so weak in many as we are apt to suppose. And in many women the understanding is greater, and in many men again it is found inferior; and many women even surpass men in understanding and in the management of affairs. (1)

What Power is given to them, over their Persons and Property by the Roman Law.

§ 4. And therefore, according to the Roman law, women who have attained their majority are allowed, without prohibition, to manage themselves and their property, and to dispose thereof as they think proper. (2)

Of their Condition in Germany and in Overyssel and Gelderland;

§ 5. But, among the Germans, the first and original institution is still strictly followed; according to which, in order that the command of all men over all women should not create confusion, the unmarried are under the constant guardianship and power of lawful or chosen guardians; and the married women are entirely under the guardianship and power of their husbands (3). The same usage, as far as respects unmarried women, is still observed in Gelderland, Overyssel, and the adjacent places, the inhabitants of which adhere to the Old Saxon law. (4)

and also in Holland.

§ 6. In Holland, it seems to have been the antient custom, that aged and orphan spinsters, or widows, could not appear in judgment, nor alienate any property, except through their chosen guardians. But as this custom in some measure militates against the natural liberty of our nation, it became obsolete in progress of time; and one part only of this custom still continued in force, viz. that a woman, for her security in the management of her affairs, chuses a bystander to be her guardian, who is denominated a *street guardian,* but without being obliged so to do (5). Some remains of this usage, according to William de Groot (6), are still to be found in North Holland.

How far married women are under the guardianship of their husbands.

§ 7. But with respect to married women, it is almost the universal usage, that they are entirely under the guardianship

(1) As appears in H. C. Agrippa de Nobilitate et præcellentia sexus, and J. Beverwyk, in his Treatise on the Excellence of Women, (*Uytementheit der Vrouwen*).

(2) L. 8. Cod. de Pact. Conv.

(3) Constit. Elect. Saxon, part ii. constr. 15. Reinhard de Differ. Jur. Saxon, lib. ii. pars 4. diss. 14.

(4) Sande, lib. 2. tit. 4. defin. 3.

(5) Grotius, Inleyd. b. 1. c. 4.

(6) Inleyding tot de Hollandse Practyck, (Introduction to Dutch Practice), lib. 1. c. 2.

and protection of their husbands (1); so that every thing, on their behalf, ought to be, and may be, done by their husbands; who appear in judgement for their wives, and encumber and alienate their property, even that which they have kept out of the community, without requiring their consent thereto, as was understood by the courts of Holland (2), of Utrecht (3), and of Friesland (4); unless such power were specially taken from him by ante-nuptial contract (5); or unless, in consequence of his bad management and squandering, a division of property had been obtained by the wife, and the administration of his wife's property had been publicly prohibited to him as a spendthrift. Moreover, women may not appear in judgment without their husbands, and decrees pronounced against them are null and void, according to Imbert and others (6). In like manner, whatever transaction and agreement had been entered into by a wife without her husband becomes actually void. (7)

Whether and how far a married woman can bind both herself and her husband.

§ 8. If a woman carries on a public trade, she is understood, in whatever relates to her trade, to bind herself and her husband; and may alienate and encumber the goods of the trade (8). In like manner, if a woman credits something which served for the benefit of the common household, she is understood thereby to bind both herself and her husband; and the local laws of Over-yssel expressly introduce it (9); and it was understood by the court of Holland, on the 6th November 1603, in the case of Cornelis, Jacobs, and Company, cloth merchants, against Mrs. Maria Diert; and on the 26th March 1607, in the case of the Countess of Salem, against several creditors; and so by the charter of Count William, granted to the city of Delft in 1247; and by Philip Duke of Burgundy, before Easter mass of the year 1448, subsequently confirmed by the said Count William to

(1) Grotius, book i. c. 4. & 11. Sande, lib. 2. tit. 4. defin. 1. Zyp. Not. Jur. Belg. de tutel. in fine.

(2) Nieustad, Tract. de Pact. antenuptial. observ. 10.

(3) Radeland, Cur. Traject. decis. 21.

(4) Sande, lib. 1. tit. 2. def. 3.

(5) Nieustad de Pact. antenuptial. obs. 21. & 91. in notis. Costuymen van Antwerp (Customs of Antwerp), tit. 41. art. 15. Costuymen van Zuid-Holland (Customs of the southern parts of Holland in the year 1571, delivered to the Court of Holland), art. 6.

(6) Imbert. Enchirid. Jur. Gall. verbo Auctorité de curateur. Joan. Papon. lib. 7. tit. 1. Arrest. 10, 11, et seq. Christin. vol. 2. decis. 153. n. 4.

(7) See Argentr. ad Consuetud. Britann. art. 424. Gloss. 1. Gomez. ad. l. tauri. 154. et seq. Christin. ad Leg. Mechlin. tit. 9. art. 4. n. 38. et seq. Stokm. decis. 52.

(8) See the Customs of the Southern Parts of Holland, transmitted to the Court of Holland in 1571, art. 35. Customs of Utrecht, rubr. 22. art. 4. Customs of Antwerp, chap. 41. art. 13. 34. 40. and according to the Statutes of Leyden, art. 142. Country Laws of Over-Yssel, vol. 2. tit. 2. art. 5. Customs of the City of Deventer, vol. 3. tit. 2. art. 9. The Privileges of the City of Zutphen, tit. 26. art. 7. and Sande, lib. 2. tit. 4. defin. 4.

(9) Tit. 2. art. 5.

the people of Harlem on St. Clement's day in the year 1245; and by Count Floris V. to those of Monikendam, granted in the year 1288 (which Grotius (1) relates as common law) "*That a man having a wife who bakes and brews, may forfeit an oven full of bread, or a whole brewing of beer, against which her husband can do nothing. And in like manner, if a man's wife is in the habit of selling or purchasing wool, thread, or linen, she may forfeit the measure which is denominated a stone; and so a man's wife who does not carry on public trade, may prejudice her husband to the value of four-pence.*" In Friesland no community of property is introduced by custom in marriages, unless an express stipulation be made to that effect: in that province, therefore, it is the custom that the husband can neither alienate nor encumber his wife's property. (2)

CHAP. VII.

Of Relationship or Consanguinity, and of legitimate and illegitimate Birth.

[Grot. I. 12.]

§ 1. *Consanguinity defined.—Its different Sorts.*
2. *Of legitimate Birth.*
3. *Of illegitimate Birth. — Its different Sorts or Degrees.*
4. *What Difference there is between them in Law.*
5. *Natural Children, whether, and how to be legitimated.*
6. *Of the Effect of legitimating natural Children.*
7. *Bastards, procreated in Adultery, cannot be legitimated.*

BY generation and descent all men are either related or strangers to each other. (3)

Consanguinity defined.

§ 1. Relations are those who are allied, under one generation, by birth or marriage; of these, some are relations by blood, and others are denominated relations by affinity. (4)

Strangers are those who are not related to each other, either by birth or marriage. (5)

(1) Inleyd, b. 1. c. 5.
(2) Sande, lib. 2. tit. 4. def. 2.
(3) L. 1. in fin. Ff. quod protutore. L. 3. § 11. Ff. de reb. ecr. of Vremld. l. 19. Cod. de jure de lib.
(4) L. ult. Ff. de justit. et jure.
(5) D. l. 19. Cod. de jure de lib. l. 6. Ff. de ventre inspiciendo.

Relationship proceeds from mere birth and procreation by one and the same woman (1), and also from the lawful marriage of man and wife (2); whence it follows that some are *legitimate*, and others *illegitimate*, by birth. (3)

Of legitimate Birth.

§ 2. Those persons are deemed to be of *legitimate* birth who are descended from married parents, and consequently from a lawful marriage (4); which is taken in a very broad sense; so that it is sufficient if the father and mother of the children were married at any time during pregnancy, whether at the beginning or at the end (5). For, according to law, the husband is considered as the father of the child brought forth by his wife (6), unless his impotency or constant absence be manifest, or he is willing to declare upon oath that he never had connection with his wife previous to the marriage (7); of which matter we shall treat more at large in its proper place. And both Gail (8) and Sande (9) concur in saying, that those persons are to be considered as legitimate who are born in the seventh month, or likewise in the hundred and eighty-second day after the consummation of the marriage and lying with the woman (10). And again, if a woman, who leads a virtuous life and is free from blame, bring forth a child within the eleventh month after her husband's death, such child is considered as legitimate. (11)

Of illegitimate Birth, and its different Sorts or Degrees.

§ 3. *Illegitimate* are those persons who are born out of lawful wedlock: of this description are, 1. Such as are born of unmarried persons; 2. Such as are born of married persons in adultery; or 3. Such as are born of unmarried persons, on account of whose too near relationship they are procreated in incest (12); some of whom are denominated *natural children* or *bastards*, and others *bastards procreated in adultery*.

What Difference there is between them in Law.

§ 4. The distinction between these sorts of illegitimate children in law, consists chiefly in taking bequests and inheritance. With regard to natural children, or mere bastards, they are reckoned as if they had no father; they can neither bear his name, nor inherit property from him or from his relations, unless it be

(1) L. 4. § 2. Ff. de Gradib.
(2) L. 23. Ff. de Statu Hom.
(3) L. 1. Cod. de nat. lib.
(4) L. 6. Ff. de his qui sui vel alien. jur. L. 11. § 9. Ff. ad leg. Jul. de adulter. Gail. lib. 2. obs. 27.
(5) Pr. Inst. de Ingen. l. 2. Ff. de Statu Homin.
(6) D. l. 6. Ff. de his qui sui, 19. Ff. de Statu Hom.
(7) D. l. 6. Ff. de his qui sui vel alien.
(8) Lib. 4. obs. 97. n. 12
(9) Lib. 1. tit. 10. def. 2.
(10) L. 12. Ff. de Statu Hom. l. 3. § 12. Ff. de suis et legitim.
(11) Novell. 39. c. 2. See on this subject, Sande, lib. 4. tit. 8. def. 10. and J. Beverwyk's Treasure of Health, (*Schat der gesondheid*) vol. 2. c. 4.
(12) § 12, 13. Instit. de Nupt

bequeathed by last will and testament (1). In some places this is even limited to a certain portion, as will be shewn in the sequel under the title of inheritance. But from their mother and her relations they take inheritance, like other children, according to the proverb, "*the mother makes no bastards.*" (2)

Bastards born in adultery, and such as are procreated in incest, can take nothing by way of inheritance, either from their father or mother, or from her relations, not even by last will; unless any thing be bequeathed for their necessary maintenance. (3)

Further, so great was the distinction, in antient times, between legitimate and illegitimate children, that such children as were illegitimate were considered as dishonest; and therefore were excluded from all honourable offices and situations in the state, and they were inadmissible as witness against persons of legitimate birth, as may be seen in the charter of Count Floris (commonly called the Corpulent), granted to the people of Monnikkendam on Lady day in the year 1288; (which among other things contains the following clause, viz. "That Popish children, or any persons who did not issue from lawful bed, should not give evidence in the rights of good people;") and by the charter of the same Count Floris, given to the people of Kennemerland at Albert's Mountain on Friday after half fast-time (4) in the year 1291, and afterwards renewed by Duke William on the 3d of April, containing the following clause, viz. "That he would appoint a bailiff among them, who may be placed with honor, and who was not a bastard," that is, as it was subsequently explained by Duke William, a person born in lawful wedlock. This regulation is still observed in Germany with respect to offices and dignities, according to the Saxon local laws, which (though in other respects many of them are adopted by us) enact, that no persons of illegitimate birth shall officiate in any judicial office, although legitimated afterwards by subsequent marriage, or by favor of the government of the country (5). In consequence of this law, strict inquiry is usually made in the academies and schools of Germany, with respect to the legitimate birth of a person, before he is admitted to the doctorate or any other high dignity; which circumstance of legitimacy they are

(1) L. 23. Ff. de Statu Hom. l. 15. Ff. de in jus vocando, l. 2. 4. 8. Ff. Unde Cognati.

(2) L. 29. § 1. Ff. de in offic. testam. § 3. Instit. de Senatus Consult. Orphiciano, l. 2. 4. Ff. Unde Cognati.

(3) Auth. ex Complexu Cod. de Incest. Nupt. cap. 5. in fin. extr. De eo qui duxit in matrim. quam polluit adult. See also Cost. Antwerp, tit. 45. art. 7, 8.

(4) Most probably the Friday after Midlent Sunday. *Editor.*

(5) See Minsinger, centur. 4. obs. 31.

in the habit of inserting even in testimonial letters, namely, that such has appeared to them. But amongst us such distinction is not now looked upon so narrowly; so that natural children, when honest of themselves, and leading an unblamable life, may easily wash off the stain of their birth; and on account of their personal virtues are placed among others, in honour and dignity. And in this respect we follow the written laws, which do not attribute the crime of parents to their children, nor withhold from them any dignity or honour. (1)

Natural Children, whether and how to be legitimated.

§ 5. Natural children, procreated out of wedlock, are legitimated, and obtain in every respect the same right with legitimate children; provided their parents enter into lawful marriage with each other, even although, after the birth, either of them was married to another, (2) without its being necessary thereto. So some are of opinion, that children, procreated *before* wedlock should themselves be present at the confirmation of the marriage, as if they are declared legitimate by the clergyman themselves; whence the proverb, "*marry with the child under the cloak*," seems to have proceeded.

If the mother die, or any other impediment occur, so that the father cannot enter into lawful marriage with her, and yet he is desirous that the child or children procreated by her out of marriage should be considered and reputed as legitimate, he may obtain it as a favour from the government of the country, which grants such favour easily, especially if he have no other children, or if they also consent thereto. (3).

Which favour makes the natural children obtain the same right, in every point, with those who are legitimate, so far as concerns the father himself; but it does not concern the other relations of the father, except such as have expressly consented thereto; neither does it extend to feudal property, unless it is especially expressed. (4)

Bastards procreated in adultery cannot be legitimated by a subsequent marriage; because, according to the spiritual laws, it cannot exist with those with whom a person has lived before

(1) L. 26. Ff. de pœnis, l. 6. Ff. de decurionib.

(2) § ult. Instit. de Nupt. § 2. Instit. de hæredit. quæ ab intestat. Novell, 74. c. 2. in fin. *Vide* Zyp. Not. Jur. Belg. tit. de nat. lib. pag. (mihi) 177. Cavall. Spel. Asr. quæst. 606.

(3) Novell. 74. Nov. 89. c. 10. l. 24. Ff. de Naturalib. rest. Gail. lib. 2. obs. 42.

(4) Cap. naturales, si de feudo defuncti contentio. See Grotius, Iuleyd. b. 1. c. 12. Neostad. de feudi Holland. success. c. 5. in fin. And. Gail. lib. 2. obs. 140. n. 8. Gudelin de Jure novissimo, lib. 3. c. 15. Zyp. Notit. Jur. belg. de naturalib, lib. — Christin. vol. 1. decis. 199. n. 18, and vol. 3. decis. 145. n. 20. et seq.

in adultery; and no favour is granted by the government to legitimate those who were born with such ignominy, according to the edict of the emperor Charles V. of the 20th October 1541, art. 31.; and ordinance respecting remission of the punishment of murder, letters of legitimation, &c. of the 19th May, art. 28. which command that no letters of legitimation should be granted to bastards procreated by persons at the time of their marriage. (1)

CHAP. VIII.

Of Consanguinity or Relationship.

[Grot. II. 27.]

§ 1. *Relationship of the Father's or Mother's Side how to be distinguished.*
2. *Differences in the genealogies of Jesus Christ, recorded by Matthew and Luke, explained.*
3. *Relationship is distinguished into Lines and Degrees, or Members.*
4. *Of the right and collateral Lines of Relationship.*
5. *The right Line between Parents and Children how to be reckoned in its Members.*
6. *The Collateral Line how to be reckoned in its Members.*
7. *Degrees of Relationship, how to be reckoned according to the written Laws.*
8. *Wherein they differ from the Enumeration of Relationship according to the Canon Law.*
9. *Affinity, how to be reckoned in enumerating Degrees of Relationship.*

AMONG those who are related to each other by birth, a distinction is to be made, whether they are related to each other by descent from one and the same stock; namely, whether they are descended from one man or from one woman.

Relationship by the Father's or Mother's Side how to be distinguished.

§ 1. Those who are related to each other by one stock of descent through one man, are denominated from the *side of the sword*, and through one woman *from the side of the spindle*.

(1) See Zurk. *Cod. Bat.* op. Legitimatie, (in Legitimacy).

Relations from the side of the sword retain the same name and coat of arms of the family; as in the children of two brothers, and in ulterior descendants from the malestock. (1)

Relations *from the side of the spindle* are two sisters' children and their descendants. (2)

Differences in the Genealogies of Christ recorded by Matthew and Luke, explained.

§ 2. The difference between these two kinds of relationship is shewn in the genealogies of Jesus Christ, which are variously related by the Evangelists Matthew and Luke. Matthew, according to the Hebrew manner, has enumerated the genealogy of Christ on the side of the sword, from Joseph upon Jacob the father of Joseph, and mother's brother and uncle of Mary, who in failure of other male heirs must retain the name of the family of Mary; for, among the Jews, no woman could make out the number or name. Whereas Luke has given the same genealogy without regarding the Hebrew custom, according to the true descent, likewise through the intervening women.

Relationship is distinguished into Lines and Degrees, or Members.

§ 3. Relationship, whether from the side of the sword or spindle, is distinguished into lines and degrees, or members (3).

A *line* is a connected series of several persons descended from one common stock, and who are, as it were, linked together.

This is further distinguished into the *right* line and the *collateral* line. (4)

Of the right and collateral Lines of Relationship.

§ 4. The *right line* is that between parents and children, *ascending* to the father, mother, grandfather, grandmother, great grandfather, and great grandmother, and so forth; and *descending* to children, grandchildren, great grandchildren, and so forth. (5)

The *collateral line* is that, which runs sideways through two or more brothers or sisters and their descendants. (6)

The *lines* are again distinguished into degrees or members, by which the one is linked to the other, and through which we reckon from the one to the other, from and to those from whom they were all descended (7); of whom the nearer or farther enumeration of relationship produces the difference in law, which consists especially in obtaining inheritances and the undertaking of guardianship, which appertains to the nearest of the family; and likewise in marriage, which is prohibited within certain degrees of relationship (8) (as will be treated of in a subsequent part of this work); and as this entirely depends upon the proper

(1) § 1. Instit. de Legitim. Agnat. Success. l. 7. Ff. de legitim. tutor.
(2) L. 196. Ff. de Verb. Signif. l. 10. § 2. Ff. de Gradib. d. § 1. Instit. de legitim. Agnator Success.
(3) L. 9. Ff. de Gradib.
(4) L. 1. Ff. de Gradib.
(5) Ibid.
(6) Ibid.
(7) Ibid.
(8) § 1. et seq. Inst. de Nupt.

enumeration of the degrees or members of nearer or more remote relationship, it is necessary to treat of them in particular.

The right Line between Parents and Children, how to be reckoned in its Members.

§ 5. Between parents and children we reckon straight upwards or straight downwards, through the rule, *so many descents, so many members:* for example, in the *ascending* line, the father is the first; the grandfather, the second; the great grandfather, the third; the great grandfather's father, the fourth; the great grandfather's grandfather, the fifth; and the great grandfather's great grandfather, the sixth member is enumerated from myself; and likewise through mother, grandmother, great grandmother, &c. And also, in the *descending line*, my child is the first; the grandchild, the second; the great grandchild, the third; the great grandchild's child, the fourth; the great grandchild's grand child, the fifth; and the great grandchild's great grandchild, the sixth member, and so forth.

The collateral Line, how to be be reckoned in its Members.

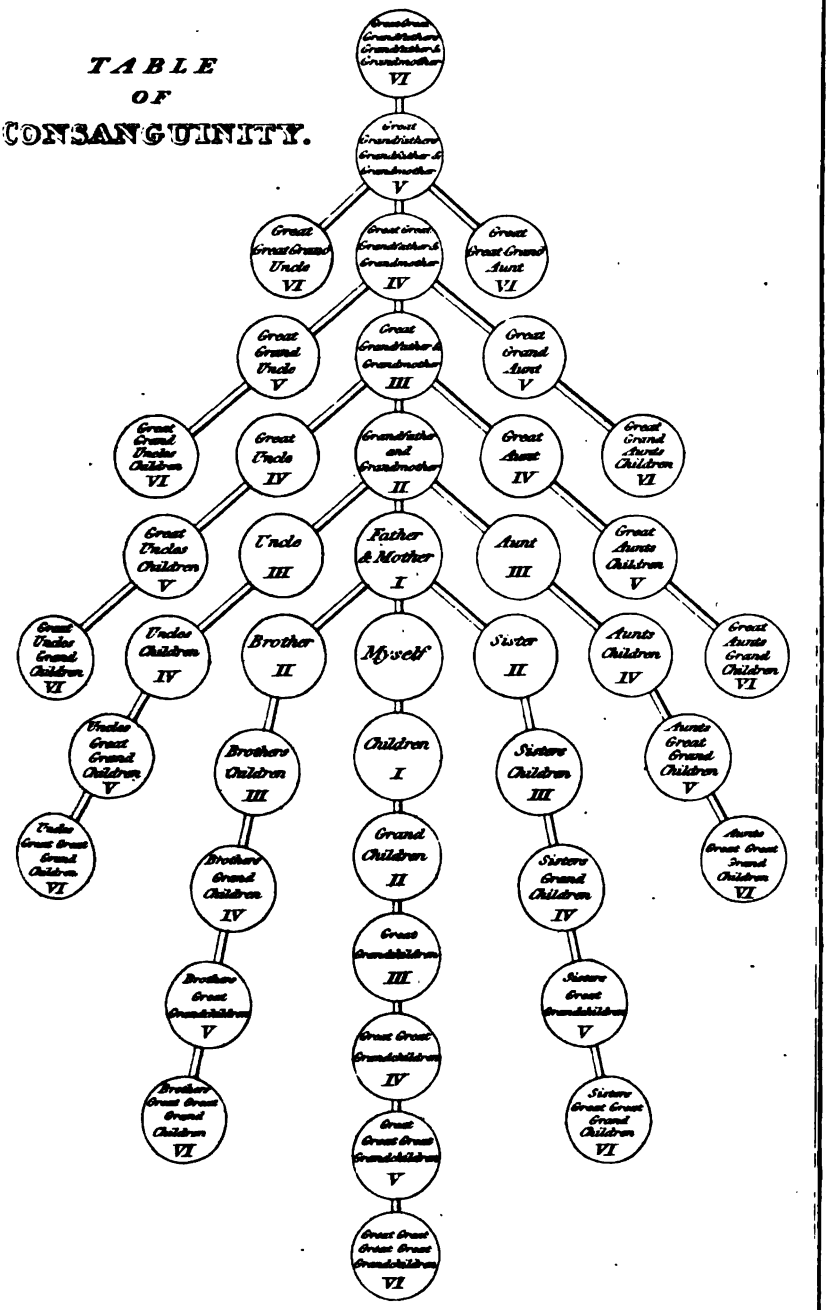
§ 6. But in the *collateral line*, because it springs up and spreads itself in several branches, all of which proceed from one stock, so we ought, as it were, to climb up first sideways to the common stock that produced them all, and thence to descend again sideways to the person concerning whose relationship enquiry is made, counting likewise according to the same rule; namely, so many descents between me and him of whose relationship enquiry is made, so many members; or otherwise so many persons, so many members, excepting one, whether we deduct previously the common stock, which of itself makes out no member or descent, or whether we deduct for it the first person from whom we begin to reckon, who likewise from himself makes out no member or descent; so that the second person is always the first member. (1)

Degrees of Relationship, how to be reckoned according to the written Laws.

§ 7. With regard to the exact enumeration of degrees of relationship, according to the written laws, (which we follow in the enumeration of members of relationship) we have inserted an illustration of them, in the annexed engraving, reckoning from the middle point, which we have taken to be the person putting the query; and from him we have reckoned right upwards or downwards, and in the crooked or side line, obliquely or sideways, going upwards and downwards through the common stock to the person concerning whose relationship enquiry is made, as far as the sixth degree, according to the rule, *so many persons, so many members, with the exception of one:* for instance, to know how near brothers' and sisters' children are related to each other,

(1) d. l. 10. § 9. Pf. de Gradib.

TABLE OF CONSANGUINITY.



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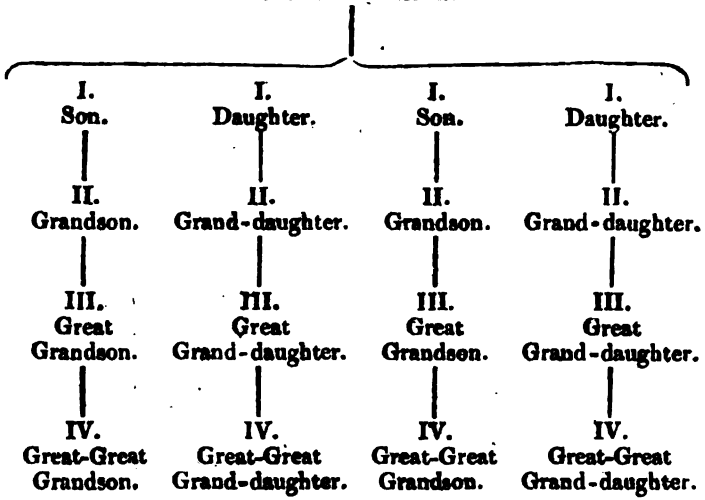
we ought to reckon in this way, viz.—myself—my father—my grandfather—(from whom we all proceeded) my uncle, and my uncle's child, are five persons; one being deducted, who is not reckoned, there remain four persons; so we are related to each other in the fourth degree. Or otherwise, according to the rule, *so many descents, so many members*, in which case, we should reckon, viz.— my grandfather (from whom we all proceeded) begat my father and my uncle, who again begat myself and my cousin, which are two descents, consequently likewise two members; each descent being reckoned one member, unless it be reckoned double and on both sides, which consequently would also make out four descents, and of course four members; and according to this example, the result will be the same. But as the other mode of reckoning is more certain, and has been followed by us in every point, we consider it to be more easily understood and to be followed in every case as is sufficiently pointed out through all the members in the accompanying engraving, both in the ascending as well as in the descending and collateral lines, as far as the sixth member; whence it may easily be extended to any additional number of members.

Wherein they differ, according to the Canon Law.

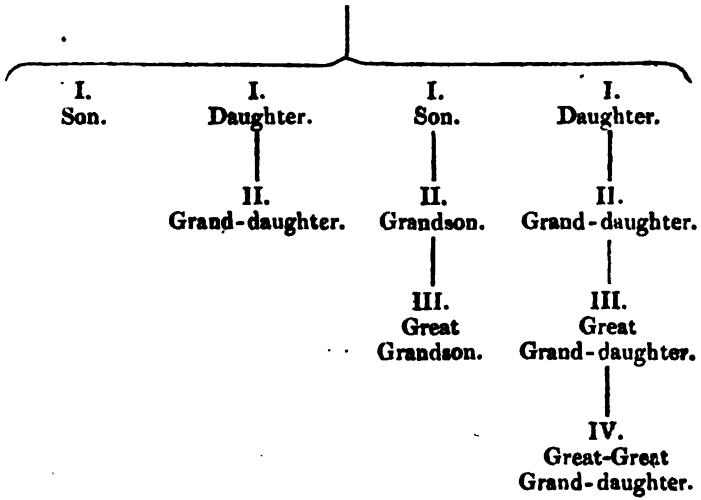
§ 8. The preceding enumeration of relationship differs from that followed by the canon law, which likewise in the collateral line reckons only from the common stock downwards, the first descendants thereof being reckoned in one row for the first member; the second for the second member; the third for the third member, according to the following:—*In proportion to the distance from the common stock of two persons, where they are equal, or of the lowest, where they are unequal, so far are they likewise from each other.* Agreeably to this rule, in equal degree, two brothers' children, and, in unequal degree, an uncle and his brother's child, are related both in the second degree, with distinction of equal or unequal degrees (1); which, according to the written laws and preceding example, make each other related in the fourth and third degree; and thus confusion is often created in the enumeration of the degrees of consanguinity by persons who cannot well distinguish them. On this account, as this mode of reckoning degrees of consanguinity has not been admitted by us, we have inserted the following tables, in order to point it out and elucidate it.

(1) Vide cap. ad eadem, 102. et cap. primo gradu 106. caus. 35. quæst. 5.

EQUAL LINE.



UNEQUAL LINE.



From the preceding tables it appears, that this mode of reckoning degrees of consanguinity with that of the Romans, agrees in the right line in the ascending and descending line, but in the collateral line it differs; which according to the canon law consists in two different or divided lines, from the stock descending in equal or unequal degrees, and likewise only from above, from the one descent counting to the other descending line, whereas the other ascends from him who puts the question to the common stock, and thence descends to the person concerning whose relationship enquiry is made, according to the example already adduced and explained.

Affinity, how to be reckoned in enumerating Degrees of Relationship.

§ 9. The same enumeration of relationship, which exists in relationship by blood, exists likewise in affinity; whereby two different degrees of relationship by marriage are connected with each other, but existing between the husband and between his wife's relations, and again between the wife and her husband's relations, unless the relationship proceeds farther between the husband's relations and wife's relations, or unless we can truly say, that affinity exists between husband and wife themselves, although the same in every point has its origin in each of them; to which good attention is to be paid, in order to discover therein the error of the common people; who think that two men married to two sisters, and two women married to two brothers, are related to each other in affinity, and that the wife of the one and the husband of the other bear affinity to the other man and the other wife, but not the two husbands of the two sisters, or the two wives of the two brothers; who, they think, are and remain strangers to each other, and that they are not connected by blood mutually through marriage, which really makes out affinity, although they otherwise, on account of the honesty of their wives and husbands, call each other brothers-in-law. But this topic will be extensively discussed more at large in a subsequent page, where we treat of persons who, on account of relationship by blood or affinity, cannot marry with each other.

So, the wife's relations and relations by blood are the husband's relations in affinity; and again, the husband's relations and relations by blood are the wife's relations in affinity, in one and the same degree of enumeration of relationship; namely, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, and so forth. (1)

(1) L. 4. § 5, et seq. Ff. de gradib. et affinib.

CHAP. IX.

Of Nobility and well-born Persons.

[Grot. I. 14.]

§ 1. *Of the right Distinction of Persons. — Nobility and Nobles, what and who they are.*
2. *Nobility, how to be proved.*
3. *Natural Children of Counts and Barons are also considered as Noble.*
4. *Origin of the Nobility of Holland.*
5. *Of Dukes.*
6. *Of Counts, and their various Appellations.*
7. *When these Dignities were made hereditary.*
8. *Of Knights.*
9. *Of Barons.*
10. *Of Esquires.*
11. *Of the Privileges attached to a Barony.*
12. *Of a Burgraveship.*
13. *Of a Military Barony (Baanrodschap).*
14. *Of the Distinction between high, middle, and low Jurisdiction, and its Incidents.*
15. *Further Distinction between Noble and Ignoble Persons.*
16. *Of well-born Men.*
17. *Of the antient Condition of servile People among us.*

Of the right Distinction of Persons.

§ 1. AT the end of the fifth Chapter it was stated (1), that all persons of this country were free from the cruel slavery which prevailed among the Romans, and which still exists in the unchristian world; the masters of which have the right to dispose of the life and death of the slaves. But common servitude existed in these regions, to a certain extent, though with a reservation of natural liberty: for in these countries the people were antiently divided into nobles, well-born persons, and servants. The same condition of persons existed among the Franks and Saxons, from whom we derive our origin, and by whom they were denominated *Edlingi*, *Frilingi*, and *Lassi*, that is *noble*, *free*, or *well-born*, and abandoned or serving people (2). In the case of the well-born men of Maasland, impetrators, and the treasurers of the northern part of Holland, and some husbandmen of the same manor, it was expressly acknowledged. (3)

Nobility and Nobles, what and who they were.

(1) See p. 29. vide supra.
(2) Joann. Pontan. Origin. Francicar. lib. 6. c. 15. P. M. Wechner, Pract. Obs. de verbor. Signif. in verb Lassi. Sentence of the Court of Holland of March 4, 1532.
(3) Math. vander Heuve, Handvest-Chronyk, book 8. c. 18.

Nobility is an advantageous superiority and dignity above others, either by descent, or derived from the illustrious deeds of the person who bears it; and those are deemed noble who possess such dignities above persons who are ignoble, whether by birth or in consequence of their own demerits.

Noble by birth are those who are lawfully descended from a father who inherited such excellency and dignity from his ancestors; whether he can prove that he was descended from an emperor, king, prince, count, baron, knight, or lord; or whether his family had, from very antient times, been acknowledged to be noble. Of this description there are many, and most of those among us who are not able to trace the first stock and origin of their nobility from the one to the other, yet have been acknowledged to be noble from very antient times; and this reputation is considered to be sufficient proof of nobility: Such are those who were antiently summoned by writ, to appear in such a dignity in the council of the states of the country.

Nobility, how to be proved.

§ 2. To prove, that a person is of noble descent, it is sufficient that he be descended from a noble man, by lawful wedlock, although the wife was not noble, as she is ennobled by her husband (1); but an ignoble person, although born of a noble woman, cannot be considered as a noble man (2); for a woman does not confer nobility or derive it from her children, who are to follow the condition, dignity, and situation in life of her husband. (3)

Natural Children of Counts and Barons are considered as Noble.

§ 3. The children of counts and barons, although born out of marriage or of concubines, are also reckoned among nobles, but with this difference, viz. that they may not bear the coat of arms, except with a stripe drawn from the left hand obliquely upwards to the right hand (4); whence the old proverb seems to have arisen, "*A stripe runs across it.*" By which we understand, that it is something which is not thoroughly clear.

Origin of the Nobility of Holland.

§ 4. The nobility of Holland does not derive its origin so much from the natural privileges of birth as from gifts or remunerations for great and valiant deeds; whereas in very antient times no kings or counts had any hereditary possession of preceding rights, either in Holland or among the Germans, from whom the Dutch counts were chiefly descended. For, previous to the year 900, there were not so many degrees of nobility: the only

(1) L. 13. Cod. de dignit.
(2) L. 19. Ff. de Statu. homin.
(3) L. 10. in fin. Ff. de Senatoribus junct. d. l. 19. Ff. de Statu hom. See also Tiraquell de Nobilitate, c. 18. n. 13. 20, et seq.
(4) See Chassan. ad consuet. Burgund. rubric. 8. § 3. n. 18. et seq. Tiraquell de Nobilitate, c. 15. n. 5. Zypæ Notit. Jur. Belg. de dignitate, vera, Ut Spurio.

degrees then existing, were emperors, kings, and princes; dukes, counts, margraves, and palsgraves. Knights and barons were names of officers, but with no hereditary manors attached to them.

Of Dukes.

§ 5. A duke was the chief or first commander over troops, who was chosen by the prince, and placed in certain provinces. So it appears in a certain letter concerning the institution of a convent at Lucerne in Switzerland, dated in the year 840, commencing thus: "*I, Wighard, and my brother Rupert, Dukes of the military troops of Swabia under king Louis,*" *&c.* and in Latin, a Duke is denominated *Dux*, i. e. a leader, guide, or lord of the expedition.

Of Counts, and their various Appellations.

§ 6. A count was a judge or chief, placed by the emperor or the king, and possessing a certain peculiar jurisdiction. Of this description are the counts by us called *Dyk Graven* who are chiefs or dyke judges; and the counts called *Pluym Graven*, who have the superintendance over swan-quills and the fishery of Vroon *(Vroon-visseryen)*.

The Counts called *Landgraves*, (*Landgraven*) were judges of certain provinces.

The Counts called *Margraves* (*Markgraven*) were judges over certain marches or limits of countries.

The Counts called *Palsgraves* (*Palsgraven*) were judges, or lieutenants of the king in a conquered city or country.

Counts called *Burgraves* (*Burg-graven*) were judges over certain villages or manors, or keepers of certain ditches or castles.

All these services or offices were usually given to persons of noble birth, and especially to those who were the most able among the barons.

When these Dignities were made hereditary.

§ 7. But since the time of the emperor Otho, (who ascended the imperial throne in 936) the dignities of dukes and counts have become hereditary; and these nobles have been placed above barons: to them have been given the hereditary direction and possession of whole provinces. These titles, but especially those of barons and knights, were conferred upon the Dutch, also on account of their courageous deeds, by the counts, who gradually intruded themselves, and with their favoured subjects made themselves both great and powerful: and together with these titles the Dutch were favoured with the hereditary possession of baronies, counties, manors, castles, or other good income; but with direction that they should be at the service of the public, and the counts upon the confines of the territories.

§ 8. Knights were those who obtained the highest honour and dignity in a certain order, by their glorious achievements in arms, as a token of courage and their own deeds; and under certain great circumstances they were incorporated, and gifted with the possession of lordly property as already stated. Of Knights.

§ 9. Barons were free Lords, who exercised the highest jurisdiction; whose baronies were free and independent of counts, as appears in the decisions of Philip duke of Burgundy, of the 11th June 1452. Of Barons.

Chiefs of troops were also denominated *Barons*, (*Bander* or *Baander heeren*) because they conducted the same and were lords of banners or ensigns which they established (1).

These were very numerous; for we read that when count William the third was installed at Harlem in the year one thousand three hundred and five, there was present on that occasion the number of one thousand Dutch knights, and one hundred barons. (2)

§ 10. Those, who were possessed of nobility alone, and who had the possession of such property from their family, were denominated *Esquires*. These also formed a particular order, until, by their achievements, they attained the degree of knighthood, and are now indiscriminately termed *Gentlemen*. Among the privileges which they possessed, the principal were baronies and lordships (on which account they are denominated barons and lords), under which is comprized all other inferior hereditary income, such as tenths, quit rents, rents, tributes, and the like. Of Esquires.

§ 11. To a barony belongs the privilege of exercising the highest jurisdiction, as well in civil as in criminal cases. For this purpose a baron is authorized to keep a gallows of four posts (which we call *having the gallows and engine*); and further, to brand, hang, draw, behead, cut off ears, banish, confiscate, and declare forfeited; to establish public markets; to draw or enjoy the fifth penny of all fines (whereby a person may engage oneself by writing or letters); to succeed to the inheritances of bastards, which inheritances used formerly to devolve on the counts, but in almost all the cities were remitted by charters, &c. Privileges attached to a Barony.

§ 12. The burgrave, antiently, had a middle kind of jurisdiction; he could take cognizance of fines to the amount of fifty shillings; he could cause thieves to be hung to a gallows of Of a Burgraveship.

(1) See Beschrejving van Zuid Holland (*Description of the Southern Part of Holland,*) p. 101.

(2) See the Chronyk van Holland (*Chronicles of Holland*) under the said Count William, the XXIId Count.

posts, but he could neither have nor keep a gallows unless it was required; further, he was to take cognizance of thefts committed within his lordship: and the gallows was to be placed without posts and sides; and if it happened to fall down by any accident, he could not cause it to be raised again, unless he was under the necessity of hanging another thief; he could make statutes with respect to the harvest, and the using of no instruments of war; and he might once a year make enquiry with respect to the same.

Of a Military Barony (*Baanrodschap*).

§ 13. To a military barony *(Baanrodschap)* appertained the following privileges, viz. None of such a baron's subjects might bake bread, except in an oven of the lord to whom the lordship belonged. No one might cause his corn to be ground but in the mill of the said lord, upon forfeiture of the bread and flour; and no other oven or mill could be erected. Of this custom, some vestiges still appear to remain in certain villages, the inhabitants of which may be compelled to use certain mills, in which mills all the inhabitants are obliged to cause their corn to be ground, as well as the benefit of the wind: it being a privilege that no mills can be erected without the consent of the lord, who stipulates for a yearly acknowledgment for such liberty.

Of the Distinction between high, middle, and low Jurisdiction;

§ 14. In these various territories or lordships there existed, antiently, a distinction of *high*, *middle*, and *low* jurisdiction, according to Jan Botengier (1); which at present is distinguished into *high*, i. e. *criminal*, and into *low*, i.e. *civil* jurisdiction; whereof the villages having such jurisdiction are denominated *free*, or *manors with jurisdiction over life*, and the others are simply denominated *manors*.

and its Incidents.

Under this jurisdiction there is a civil, otherwise *middle* or inferior jurisdiction, which is exercised by the bailiff, in the name of the lord of the manor. The order and management of the daily police, and also the administration of country justice; the infliction of punishment by fines and forfeitures, and distinction of crimes and great offences, (in the punishment whereof, government and the public are much interested) are respectively exercised by the bailiff alone: and therefore it is denominated *high jurisdiction*. To it belongs also the keeping in repair and good order of the dikes, banks, roads, streets; and also the curatorship of orphans and of the property of churches. Further, the bailiff has the superintendance of church-mass, fairs, shrove-tide, pedlars, gamblers, &c. To this jurisdiction likewise belongs the

(1) Somme Rurual, c. 272. 274, et seq.

enjoyment of the third part of all fines condemned by the bailiff under the same jurisdiction, which he is to receive and to render an account thereof, pursuant to the great privilege of the Lady Margaret given in the year 1346, whereby the lords of the manors were allowed the third penny of all forfeitures within their manors or concerning the same, in the jurisdiction whereof the bailiff acts; although through the ignorance of some peasant bailiffs this seems to have fallen into disuse, yet it does not prevent others from exercising and introducing such right, because the neglect of another can neither hinder me nor deprive me of my right(1), as was understood in several similar cases, as appears more extensively in my memorandum upon the customs of Rynland, art. 10.

§ 15. A further distinction between noble and ignoble persons is to be found in the following particulars; if a person wound or murder a noble, the offender is punished with greater severity, than if he had committed the same offence against an ignoble person; as appears by the charter of Jan van Henegouwen, granted to the people of Kennerland in the year 1303. An ignoble person cannot pronounce judgment against a nobleman; and in many cases he cannot bear witness: moreover nobles are free from the contributions which were antiently paid for keeping in repair gardens, fishponds, bridges, and roads, which are still paid by the inhabitants of villages, each according to his portion, under the denomination of *Herbet beede*, *Röttingen*, and *Riemtalen*, the latter whereof is still only in use. Further Distinction between noble and ignoble Persons.

Further, noblemen have the free hunting of hares, rabbits, and all other wild and superior animals and birds, as is treated of at large by P. Merula (2).

Ignoble persons are again distinguished into *well-born* and *common* people. Of well-born Men.

§ 16. *Well-born* men were, of old, such as were born of free and respectable parents and ancestors.

Free are those who have lived upon their own income and never exercised any servile handicraft or trade. Many of this description antiently went and resided in the country; and many were elected judges of the highest, that is, of the criminal tribunals, and many charters direct that none but such free people may be elected thereto, as appears in the charter of Count Floris, given on Friday after half fast-time (3) in the year 1281, to

(1) L. 27. § 4. Ff. de pact. l. 3. Ff. de transact. l. 1. et tot. tit. Cod. Res. inter alias acta.

(2) Van de Wildernissen, b. 2. tit. 2. c. 1.

(3) The Friday after Midlent Sunday. *Edit.*

the people of Kennemerland; namely, "*That no bailiff, nor lords of manors, nor sheriffs, should try free men, except by chosen free men; that the sheriff shall be free and well-born, who shall administer justice to a free man; and further, whoever pronounces judgment upon a free man before a sheriff, he must be likewise a free and well-born man;*" and by a charter of the Empress Margaret, given to the people of the northern part of Holland before Whitsuntide in the year 1346, to the following purport; "*We and our descendants will take no one for our sworn counsellors, unless they be well-born men.*" And on that account the judges who sit with the bailiff to administer high justice, are still usually denominated well-born men; in consequence whereof one writer says, that the well-born men of Rynland had, antiently, the privilege of carrying their arms publicly and of riding with spurs; and others have added thereto, that Count Floris had made those of his time noblemen and knights (1). But the authenticity of these statements I do not undertake to certify; on which account some of them would maintain that the well-born men, as well as noblemen, were free from paying contributions. With us, however as far as respects justice, they are in every point equal with the common people, and have no privilege except that while they are in office, they are free from being elected as aldermen, as we pointed out before more at large. (2)

Of the antient Condition of servile People.

§ 17. *Servile people* were such, as were subject to servitude under the lord; which seems to have had its origin when these countries were waste and abandoned, either from the inhabitants who remained from the *Cimbri*, who in these countries had possessions, or, as some are of opinion, from the *Hessi*, or *Catti*, who are denominated Nether Saxons, which people were ruled and taken possession of by the noblemen of the said place; who were followed by their servile men and women to whom they gave the full right of property in grounds, and divided lands, under certain servile obligations and contributions and other obligations. But this bore no similarity to the severity of Roman and Heathen slavery, which was never known among us. This subjection and obligation consisted in the following particulars; viz. Servile people could not marry without the

(1) See Math. Vander Hoeven's Handvest-Chronyk. b. 2. c. 2. p. 89. Oude Hollandse Chronyk. div. 19. c. 21. W. van Goudhoven in de Beschryving van Graaf Floris, p. 329. Handvesten van Zuyd-Holland, pag. (mihi) 579.

(2) See my *Redening van het Regt en oorsprong der Edelen en Welgeboren in Holland*, (i. e. Treatise on the Right and Origin of Noblemen and well-born Men in Holland.)

consent of their lord, and provided they gave a certain dowry; they could do nothing else except attend to husbandry. They were obliged, at their death, to leave the best pledge to the lord, which was denominated the death-pledge (*dodenpand*). They were obliged to assist the lord against his foreign enemies and the like: but all these obligations have now become obsolete.

CHAP. X.

Of natives and foreigners: Of citizens and freemen, and the distinctions between them.

§ 1. *Of Natives.*
2. *Of Foreigners, and how their Rights are to be distinguished.*
3. *Of Burghers.*
4. *Of Freemen, whether and how they are to be distinguished from Burghers.*
5. *Who, and what Cities, are free from Tolls.*
6. *Of Letters of Naturalization.*

BETWEEN natives and foreigners, burghers and freemen, the difference used to be very great with respect to their rights.

§ 1. *Natives* are those, who are born in the country (1). Of Natives,

§ 2. *Foreigners* are those who were born in another country. Of Foreigners,

Antiently, foreigners in this country could not dispose of their property by last will, but their estate devolved entirely to the counts. Neither could they give evidence, nor bear witness, as appears by the charter granted by count Floris to the people of Monnikkendam and Waterland, in the year 1288. In case of any wrong or injury done to foreigners, the punishment and indemnification were less than those, where natives were the plaintiffs; and they were excluded from all offices of dignity, as appears by the charter of John Duke of Brabant, given to the city of Delft at the end of February 1424, and of the Lady Maria, 14th March 1476, granted generally to the people of Holland, Zealand, and Friesland (2). Of these charters, the former has become entirely, and the latter partially, obsolete; and since the edict of the Em- and how their Rights are to be distinguished.

(1) L. 1. § 1. Pf. ad Municipal.
(2) Art. 4. See also Merula, Prax. Civil. l. 4. tit. 9. c. 1. Christin. vol. 5. dec. 35. n. 13.

peror Charles V. of the 17th May 1555, it has not been in force, except against those foreigners who are in the habit of putting it in practice against the natives of this country (1).

Again, natives are either *burghers* born in a city, or *freemen*, that is, persons born out of a city who have acquired the privileges of citizenship (2).

Of Burghers.

§ 3. Those are not only considered as burghers by birth, who, as well as their ancestors, were born in the city, but also those who reside in the suburbs, and within the jurisdiction thereof: such as bleachers, millers, and others, who are in the service of the burghers of the city, and are in every point subject to the jurisdiction of the city; because a law or custom of a city is also in force in the suburbs; and the inhabitants of the suburbs likewise enjoy the privileges of the city in common with the burghers (3). For which purpose, by a charter of John Duke of Brabant, dated at the end of February 1420, it was granted to the city of Delft, that all those, who either then did or should thereafter reside southward of the city of Delft as far as the Meuse, within fourteen rods on both sides of the channel, should have and enjoy all such liberties, rights, and privileges, as are enjoyed by inhabitants being freemen; every lord of the manor reserving his right. And by a charter of Joan Count of Holland, dated on St. Valentine's Day in 1290, to the people of Haarlem, it is granted, that the common people residing without the city in the Rysevoort, separated by a bridge on the north towards Schooten and on the other side towards the south, and those who reside outside the forest under the city, should have and retain the right of the citizenship of that city, and be reckoned among the number of burghers.

Those are also considered as native citizens, who by accident were born out of the fixed residence of their parents; as when any person is by accident out of the city, or in the service or embassy of the public in another city, and his wife happens to be confined there, the child would according to the right of citizenship, not be reckoned as born at the place of his birth, but the place where the parents had their fixed and real residence; which by accident or embassy on behalf of the public, they are not understood to have abandoned, as is treated of in a subse-

(1) See Merula, Prax. Civ. l. 4. tit. 9. c. 1. n. 7. and Historie van P. Borre, b. 21. p. 68.

(2) L. 1. in pr. & § 2. Ff. ad municip. Cod. de incolis, l. 228, 229. § 2. Ff. de Verb. Signif.

(3) L. 2. l. 87. Ff. de verb. Signif. l. 99. § 1. Ff. eod. l. 1. § apud Labeonem. Ff. de Aq. Pluv. See also Faber ad Cod. lib. 6. tit. 19. def. 17. n. 3. Van den Sande, l. 2. tit. 5. def. 5.

quent part of this work (1). Moreover, by virtue of several statutes and custom rights, it is observed that any man, who marries the daughter of a citizen by birth, becomes thereby also a citizen of that place; and their children, although they are afterwards born out of the city, are considered as citizens, by birth, of the city where the mother was born (2); according to Gomez Leonius (3), this custom is observed in Sicily for several reasons.

Of Freemen; whether and how they are to be distinguished from Burghers.

§ 4. Freemen are such as are born out of the city, and have purchased the right of citizenship, and of carrying on the trade of burghers, which is granted to any one upon application, for a trifling sum, provided he takes the oath of allegiance. Such persons, after they have been free men for some years, obtain likewise the full right of citizenship; and are eligible to all the offices and dignities attached to the city, together with other burghers. So it was granted by the charter granted by the Lady Jacoba to the people of Delft on the 20th December 1417, viz. "That no one may be burgomaster or alderman there, unless he has been a free man for the space of four years or longer." A similar charter was granted to the people of Leyden, and confirmed by Count William on the eve of St. Clement, A.D. 1351, viz. "That no one should there hold the office of bailiff, alderman, counsellor, churchmaster, churchwarden, or master of a hospital, &c. unless he had been a freeman for some years previously." Which charter was subsequently renewed by Duke Albert on the 15th June 1386. A similar charter was granted to the people of Amsterdam by Duke Albert of Beyaren on the 25th January 1394, viz. "That no one should be bailiff, alderman, or counsellor, unless he had been freeman within the said city, and had constantly resided there for the space of seven years successively;" which was likewise granted by a charter of Count Floris to the people of Gouda on Thursday after the Feast of St. Peter and Paul; and by a charter of Duke William van Beyeren granted to the people of Naarden on the 20th May 1355.

Who, and what Cities, are free from Tolls.

§ 5. Further, freemen have, in every respect, the same right with citizens; and to several was granted by charter the freedom from all tolls upon their importing and exporting merchandize, according to the charter granted by Count Floris to the people of Haarlem on Sunday se'nnight after Easter in 1266; by the

(1) Vide infra, book iii. c. xii. § 10. See Arg. l. pen. Ff. de Senator. Cons. & Advys. tom. i. cons. 152.

(2) Arg. l. 196. Ff. de Reg. Jur.

(3) Decis. 89.

same Count Floris to those of Delft on St. Pontianus's Day in 1266; and renewed by Count William afterwards in 1311 and 1315; by the same Count Floris to the people of Leyden on Sunday after St. Luke in 1266, and by the same Count to those of Amsterdam on Sunday before the Feast of St. Simon and Jude in 1291; afterwards renewed by Count William on Monday after St. Nicholas in 1342; by Duke William II. on May evening in 1409; and by Duke Jan van Beyeren on the 18th January 1420; and by the said Count Floris to the people of Monnikkendam on Lady Day in 1288, renewed by Count William on Tuesday before Easter in 1340, and by Duke Albert on the eve of St. Lambert in 1400, and by the same Duke to those of Weesop in the year 1401.

Freemen are obliged to observe the privileges, and to assist in taking upon them all the incumbrances and services of the city, and to reside therein, on penalty (if they go out of the city to avoid it) of paying for the right which is called *issue* on behalf of the city, that is, the tenth penny upon their moveable property, concerning which there are in several cities peculiar charters and statutes. (1)

Letters of Naturalisation.

§ 6. Besides the privileges above stated, there is in fact but little difference between foreigners, burghers, and freemen; the real difference consisting chiefly in this, viz. that foreigners are not promoted to high offices and dignities, and to the management of the affairs of the country, so much as the natives; wherefore letters of naturalization are sometimes granted to foreigners by favour of the states of the country, on account of their merits; by which they are declared to be admissible to all offices and dignities of this state equally with the natives.

(1) See the Statutes of the City of Leyden, art. 83. and Chart. granted to it on the 13th July 1493; of the 3d November 1525; and of the 14th November 1542. Charters of Amsterdam of the year 1613, page 36. Grants of Emperor Charles to those of Delft on the 27th March 1545, which is treated of more extensively in b. 3. c. 11. n. 13. See also Christin. v. 5. vers. 31. Gail, lib. 2. obs. 35. n. 9. &c. obs. 36. n. 10.

CHAP. XI.

Of spiritual and secular persons, of learned and unlearned persons, and their Privileges in law.

§ 1. *Distinction in law between Spiritual and Secular Persons.*
2. *Of the Privilege of Sanctuary to Offenders; and whether it extended to Churchyards and other sacred Places.*
3. *Whether, and how far Spiritual Persons are exempted from Expeditions and Guards, and likewise from Excise and Imposts.*
§ 4. *How far the Property of Spiritual Persons may devolve, by inheritance, upon the Clergy.*
5. *Whether, and how far, the Spiritual Law and Tribunals obtain amongst us.*
6. *Of learned and unlearned Persons, and their Privileges.*

Distinction in Law between secular and spiritual Persons.

§ 1. BETWEEN spiritual and secular persons, a very great difference subsisted with respect to jurisdiction and the course of law. No person could have cognizance of a spiritual person, but the spiritual judge; on which account the high tribunal at Utrecht was instituted, and was under the direction of the bishop. In like manner, every offender, for what offences soever he was liable to prosecution, had free access to churches, convents, churchyards, and other grounds belonging to the clergy, as well as to places dedicated to God; whence he could not be taken, nor could his person be molested in any way whatsoever.

Of the Privilege of Sanctuary to Offenders; and whether it extended to Churchyards and other sacred Places.

§ 2. This privilege of sanctuary having been grossly abused, and many enormous offences passing unpunished, in consequence of many places being reputed to be sanctuaries which had no pretensions to that privilege, an agreement was entered into towards the end of February 1434, between Roeloff van Diephout, bishop of Utrecht, and Philip Duke of Burgundy, Count of Holland, (which agreement was afterwards renewed by and on behalf of the said Duke, and was published on the 26th September 1464), by which it was settled, that "no person should enjoy the privilege of a clerk or clergyman who had not the tonsure, and who did not wear a proper clerical dress, or who did not live as a clerk is obliged to do: and if any parson or clerk shall commit any excess within the counties of Holland, Zealand, and Friesland, whether by breaking the peace, fighting, drunkenness, or any other misconduct unbecoming a rational

clerk, the Duke of Burgundy may cause him to be apprehended by his bailiff or justices, and may deliver him into the hands of the bishop, or his dean or deputy (1), of the place where the case occurred; and those whom they know to be clerks they may not release until they have made amends to the Count whom they shall have offended, according to their offences. And further, if any one, on account of any offence committed by him, proceeds to the church or churchyards, who may not protect the liberty of the church fully, according to the written laws, the Count of Holland may cause such offender to be apprehended in the churchyard or in the church, without violating such church or churchyards; and the liberty of the church shall not avail those who with premeditated design murder any one, when fully convicted; nor those who have been banished by the Count, or who, by the justice of the country, have been banished offences, and high treason or similar crimes; and the Count may cause such persons to be apprehended in any churches or churchyards, without violating the privilege of such church or churchyard." And likewise, subsequently, by certain articles and memoirs for the officers of His Imperial Majesty, several agreements between the Emperor Charles V. and the Bishop and the cathedral church of Utrecht were confirmed on the 1st February 1528, and 28th August 1529, containing all the above points, together with the following additional clause, viz. "That the officers of His Imperial Majesty, saving the right of the Emperor, may, against all secular persons in the first instance, take cognizance of all offences committed by secular persons within their jurisdiction, as well as of all cases which may be denominated *mixti fori*, that is, which belong both to secular and to spiritual tribunals." There was likewise a similar *free place* (or sanctuary) within the city of Leyden, upon the Fish Bridge, under the protection of a certain chapel situated in the corner of the said bridge by the water-side, and extending to the High Street, which the burgomaster Orlers called *De Witte Capelle*, or the Fish Chapel. And in order to designate this free place, a large white stone was placed conspicuously upon a corner of the same bridge, to distinguish it from the blue stone in the Bread Street, where the deprivation of the rights of citizenship for debts was effected; of which mention is also made by the burgomaster Orlers (2): and from the red stone at the

(1) *Provisoir*, in the original.

(2) In his description of the city of Leyden, p. 33.

Marendorp, where formerly justice was administered, and punishments were inflicted for crimes that incurred corporal punishment.

Whether and how far spiritual Persons are exempted from Expeditions and Guards, and from Excise and Imposts.

§ 3. Among the other immunities enjoyed by the clergy, the principal were, exemption from military expeditions and mounting guard, and also from all excise and imposts (1). The former of these exemptions is still in force with respect to spiritual persons in particular, and the latter with respect to poor hospitals in general.

How far the Property of spiritual Persons may devolve, by inheritance, upon the Clergy.

§ 4. The clergy likewise introduced a custom (2), that all the property of persons going into any convents or spiritual congregations belonging to certain orders, should be entirely for the benefit of such convents or congregations: in consequence of this usage, the clergy engrossed such treasures as would, in all probability, have rendered them masters of almost all the lands, rents, and premises of the country. In order to provide against this mischief, Philip Duke of Burgundy, by the advice of the knights and citizens of Holland, Zealand, and Friesland, about the year 1440, appointed certain commissioners to examine the state of the spiritual order, and afterwards to fix the number and extent of houses and congregations, to make regulations concerning their property and rents, and attach to them property sufficient to maintain them honestly and reasonably; and to make good ordinances and agreements with them relative to their future inheritances and disbursements: accordingly, these commissioners summoned the heads of such convents and ecclesiastical congregations before them, and communicated to them the ordinance just cited; but as they would not disclose either the state of their convents nor the amount of property possessed by them, of which they were desirous to continue in possession, the said Duke Philip, upon the advice aforesaid, ordained, by a proclamation of the 28th October 1446,—"that, in future, no ecclesiastical persons actually ordained, of what order soever they may be, should take, in Holland, Zealand, or Friesland, any inheritance from their parents, relations, or friends, in any manner whatsoever, nor purchase any more lands or premises, nor obtain the same by last will or otherwise, until such persons so ordained should have sent to the said commissioners, in order to make some agreement or order concerning the said property." It was likewise further ordained by the Emperor Charles V.

(1) Auth. l. 5. *et seq.* Cod. de Sacrosanct. Eccles. Auth. Item nulla. Cod. de Episcop. & Cleric.

(2) Arg. l. 2. Cod. de Episcop. & Cleric. contra Auth. licentiam, & *seq.*

on the 6th July 1515, (which ordinance was subsequently renewed on the 20th March 1524), "that no convents or hospitals may retain for themselves any fee, premises, houses, hereditary rents, or any other moveable property, which may devolve upon any one of their domestics by the death of their relations; but, after their decease, the persons to whom such property devolved, should be obliged to deliver up and allow the same to pass to the next secular heir who ought to succeed to such property."

This ordinance is still in force among us: so that, in hospitals for the maintenance of poor and necessitous persons, if they obtain any thing by inheritance or otherwise from their family, they cannot enjoy it, except a reasonable compensation be made for whatever has been expended for them. To this effect, statutes have been expressly made in some cities (1), with the exception, however, of such hospitals as had such privilege particularly granted to them by charter. This privilege was granted to the hospital of St. Catherine at Leyden by Duke Albert Van Beyeren, on the 14th August 1401, viz. that "whosoever shall be admitted into that hospital, is admitted with all his property, and with whatever he may succeed to; which shall remain for the said hospital, unless he be so rich as to keep property out upon conditions, when such person, whether husband or wife, may dispose of the same by will."

Whether and how far the Spiritual Law and Tribunals obtain among us.

§ 5. With regard to the jurisdiction and tribunal of the clergy, since the reformation of religion and the revolution in the Netherlands, all popish convents and monastic orders have been extirpated in Holland, and their property has been confiscated to the public, for the maintenance of churches, hospitals, and schools, and other general purposes; and all ecclesiastical laws, jurisdictions, and tribunals have entirely ceased; and, among us, the ministers of the church have no peculiar privileges above secular persons, neither have they retained any peculiar tribunal or jurisdiction, except in matters pertaining to ecclesiastical discipline among their church-members, whom, for public wickedness and scandalous lives, they may compel to submit to the discipline of the church, pursuant to the 34th and following article of the church ordinance prescribed to them by the States of Holland in May 1591. Independently of which, in Friesland, according to the testimony of John Van den Sande (2), the church ministers have the privilege of appearing in judgement in the first instance before the High Court.

(1) See the *Keuren van Leyden* (Statutes of Leyden), art. 98.

(2) Lib. 1. tit. 1. defin. 1.

Of learned and unlearned Persons, and their Privileges.

§ 6. Between the learned and unlearned there is this difference, that among the learned (who have already attained the highest degree of knowledge), those also are reputed who are zealously and diligently exerting themselves to attain that degree in the schools and academies; these enjoy certain privileges, which were conferred on them by Emperor Frederic Barbarossa, in the year 1158 (2), and likewise by the written laws; viz.

1. That they may return and go with their property, free from all tolls, and without any molestation whatever.

2. That both their persons and property shall be exempted from letters of reprisals, arrest, or detention, for the public service.

3. That they shall be free from the lodging of soldiers, and from all expeditions and guards, and other services and burdens to which citizens are liable.

4. That they shall have and reserve their peculiar tribunal before their instructors, school-council, and other similar privileges.

To the same effect are the 38th and 39th articles of the laws and statutes of the university of the city of Leyden; the 38th article of which is of the following tenor, viz.

" The rector, professors, and officers of the university, and the doctors and magistrates who have obtained their title in the said university, and all students who still study there continually with diligence, and who do not carry on any trade, or exercise any handicraft, or earn their subsistence like freemen, shall (themselves as well as their families), be free from lodging any soldiers or courtiers at their houses, and shall further be free from all day and night guards, and likewise from all contributions to the works or fortifications of the city; unless it be otherwise understood, for some urgent necessity and important causes, upon the advice and with the approbation of the rector and senate of the university."

This exception did not take effect during the emergency that occurred in the years 1672 and 1673, when the French extended their conquests to the very gate of the city of Leyden, into which they were expected to make their entrance. On this urgent occasion the students themselves were obliged to take up arms, and they continued to mount guard day and night, for a whole year, and were occupied much more than the citizens in the extraordinary military exercises which were then necessary,

(1) Auth. habita. Cod. ne filius pro patre.

under the able direction of their preceptor and professor Christianus Meller, as their captain and commander. To the preceding statement we may add that the States of Holland declared the members of the said university to be free from paying excise and impost upon such quantity of wine and beer as every man could use with propriety; which quantity was limited for those under twenty and up to the age of forty; and all above forty were allowed, in like manner, eighty measures or one hundred and sixty bottles in a year, to be fetched four times a year; and further, the single men were allowed half a barrel of beer, and the householders twenty half barrels in a year.

The 39th article, which treats on their trial before the tribunal, is of the following tenor; viz. "that all students and all persons belonging to the university, both in civil and in criminal causes, whether they be plaintiffs or defendants, shall not appear in judgement but before the rector and two assistants, with burgomasters and two aldermen of the city of Leyden, whether they have any difference with students or with burghers." But on this subject we shall treat more particularly in a subsequent part of this work. (1)

CHAP. XII.

Of Persons who are of full age, and of Minors.

[Grot. 1. 7.]

§ 1. *Of Persons of full Age, and Minors.*
2. *Of aged Persons, and from what Burthens and Services they are excused.*
§ 3. *Of Minors, and how they are to be considered such.*

THE difference between persons who are of full age and minors is very great.

Of Persons of full age, and Minors.

§ 1. Persons of full age are those who, having attained the age of perfect understanding and wisdom, are capable of managing both themselves and their property (1). Among the persons who are of full age, some are aged and others are not aged.

(1) Vide *infra*, Book V. ch. vi. § 3. (2) L. 1. in fin. Ff. de minorib.

Of aged Persons, and from what burthens and services they are excused.

§ 2. The precise commencement of old age is not certain, and is left to the discretion of the judge to determine, except in such cases and under such circumstances as are expressed by the law; viz. in cases of guardianship, and in troublesome public services, as expeditions, mounting guard during the night, and the like; from which a man of seventy is excused upon his application according to law, as he also may be excused from all civil and personal offices (1). So long, however, as notorious incapacity does not interfere, aged persons are commonly preferred to their juniors in the management of public affairs, because their counsels are considered wise; and therefore, in most cities, the supreme council for conducting public affairs is composed of a certain number of persons who have during their lifetime been continually employed in public business.

Of Minors, and how they are to be considered such.

§ 3. Minors are all unmarried young persons under twenty-five years of age, whether male or female, and until they attain that age, they are neither masters of themselves, nor can they take the management of their own property (2); but, according to the statutes of the orphan-halls of almost all the cities in Holland, the period of minority was formerly limited to fifteen years, and subsequently to eighteen years, at which time our ancestors considered young persons to be capable of earning their own subsistence, and at the same time allowed them to take the management of themselves and of their own property, according to Grotius (3), and various antient writings that are still extant; whence it appears to be the present practice in the country, that bonds for payment of the inheritances of children, under the charge of the surviving father or mother, are not made out exactly payable at their twenty-fifth, but at the eighteenth and twentieth years of their age; the children continuing to remain under the management of their guardians until their twenty-fifth year of age. To the same effect are the statutes of Rotterdam of the year 1598, (art. 37.) relative to pupils, viz. That "whoever promises to maintain children until they are twenty-five years of age, shall send off the males at the eighteenth year of their age, and the females at their sixteenth year." And, according to the customs of the city and country of Heusden, art. 58. it is an old right, "that minors, having attained the eighteenth year of age, become their own masters."

(1) § 3. Instit. de excusat. tutor. junct. l. 2. ff. de Vacat. muner. l. 3. ff. de Jure immunit. l. 3. § 6 & 10. ff. de Muneris.

(2) L. 1. ff. de Minorib. pr. Instit. de curator.

(3) Grotius, Inleyd. book i. c. 7. at the beginning.

Under minors are also comprehended all deaf, dumb, mad, silly, and frantic persons, or those who, in consequence of some other defect, are incapable of managing themselves and their property (1), and likewise all spendthrifts or prodigals to whom the management of their property has been publicly prohibited. (2)

Minors are further distinguished into marriageable and unmarriageable, viz. boys under fourteen, and girls under twelve years of age, and they are under the power either of their parents or of their guardians, of which we shall treat separately in the following chapters.

CHAP. XIII.

Of the Power of Parents over their Children.

§ 1. *Of the Power of the Father, and wherein it consists at present.*
2. *How far Parents may enjoy the Usufruct of their Children's Property.*
3. *Of the Adoption and Education of Children among us.*
4. *The Father's Power ceases, and Children become their own Masters, by Marriage;*
5. *Also by allowing them to live away from them, and earn their own Support.*
§ 6. *When they become of Age.*
7. *The Education of Children, how and by whom to be effected.*
8. *How and by whom Foundlings are to be maintained.*
9. *Agreements and Statements concerning Children's Property, relative to their Education, &c. how to be carried into execution, and how far to be understood.*

Of the Power of the Father, and wherein it consists at present.

§ 1. THE great and peculiar power, which the Romans had over their children, does not agree with the manners of our country (3); so that, at present, it consists in nothing else but that reverence which children, on behalf of God, owe to their parents; and on the other side, in that succour and assistance which is due from parents in managing and executing their children's affairs. Further, children are still prohibited from

(1) § 3. 4. Instit de Curator. l. 1. Ff. de Curator furios.

(2) §. 3. Instit de Curator. l. 6. Ff. de Verb. oblig. § 2. in fine. Instit. quib. non est permiss. fac. testam. See also Grotius, Inleyd. book i. chap. 7 & 11. and the customs of Antwerp, c. 43. art. 66 & 90.

(3) See Grotius, Inleyd. lib. 1. c. 6. n. 5. Gudelin de Jure Noviss. lib. 1. c. 13. vers. *quia moribus*, Cons. & Adv. tom. 1. cons. 44.

contracting matrimony without their parents full consent; viz. sons under twenty-five years of age, and daughters under twenty (1); and a father is allowed moderately to punish his child, if he see cause for chastisement (2). And, where children inherit property in their own right, the management and guardianship of such property belong to the father, unless the person bequeathing the same appoint guardians; of whose powers and functions we shall treat at large in a subsequent chapter.

How far Parents may enjoy the Usufruct of their Children's Property.

§ 2. No parents, however, can enjoy the usufruct of their children's property, which they obtain from others, (as was allowed by the written laws), but they ought to cause the same to increase for the children, but with this single exception, that it may be appropriated to defray the expense of their education; for which purpose the same may be disbursed. For no father is obliged to maintain his child when the latter is himself possessed of the means of support (3). Antiently, this practice so far obtained in Holland, that a widow, who had young children, usually continued in the possession of the estate, maintaining them from its produce, until the eldest son became of age. But this practice is no longer in force, unless by last will or agreement (4), and provided the children have their free and unincumbered legitimate portion; the fruits or produce of which, although so bequeathed by last will, may however not be enjoyed, but the said legitimate portion ought always to devolve upon the children free and unincumbered (5). On this point a decision was given by the Court of Holland, and confirmed by the High Court on the 17th September 1613, between Lady Elizabeth van Arkel, Lady of Waardenburg, and Thomas van Thienes, Lord of Heukelom and Castren, impetrators in a case of appeal, and Adrian de Noyelles knight, Lord of Marles, &c. defendant.

Of the Adoption and Education of Children among us.

§ 3. The adoption of children, which obtained among the antients, does not exist and is unknown among us; and children who among us are brought home and educated, may like other persons, be constituted our heirs, but without our being under the necessity so to do. But neither as children, nor as relations by blood, can they inherit *ab intestato* (6).

(1) See Politic. Ordonn. art. 3.
(2) L. 3. Cod. de Patr. Potest.
(3) Contra. l. 1. et tot. tit. Cod. de bonis maternis, & tit. De bonis quæ liberis. Costuym van Antwerp (Customs of Antwerp), tit. 36. art. 5. Cons. & Adv. vol. i. cons. 146. and vol. ii. cons. 129. Grotius, Inleyd. lib. 1. c. 9. n. 9, 10. Neerl. Adv. 1. c. 35.
(4) Grotius, Inleyd. lib. 2. tit. 13. n. 2.
(5) See Sande, lib. 4. tit. 7. def. 1. Gail. lib. 2. obs. 144. n. 1.
(6) Vinn. ad pr. Inst. de Adopt. Grotius, Inleyd. lib. 1. c. 6. in princip. Gudelin de Jure Noviss. lib. 1. c. 13. in fin. Christin. vol iv. Decis. 185. n. 4, 5. Imbert, Enchirid. in verb. filii adoptio. Fons, Practiq. des Cours, ad tit. instil. de adopt Stokmans, dec. 69. *adoptionem adhuc practicabilem censet.*

The power of parents over their children is not perpetual, but ceases and terminates on certain occurrences; but, nevertheless, children remain obliged to shew their parents obedience and reverence according to the laws of nature and of God, which are recorded in the twentieth chapter of the book of Exodus.

The power of parents over their children terminates,

The Father's Power ceases, and Children become their own Masters, by Marriage.

§ 4. *First*, by marriage, by which children not only cease to be under the power of their parents, but even minors so far become of age and their own masters (1), that a widow, notwithstanding she is under the age of twenty-five, is among us considered to be of age, and does not again fall under the power of her parents. (2) This is likewise clearly expressed in the statutes and orders relative to matrimonial affairs within Amsterdam, (art. 13.) with which the customs and statutes of almost all the cities in Holland agree, as will be hereafter shewn. In consequence of these regulations, with respect to the guardianship of his highness William the third Prince of Orange, it was adjudged by the court of Holland on the 30th May 1651, (whose decision was confirmed by the High Court on the 29th July following), that her royal highness his mother, being a widow, and having obtained the right of majority, (notwithstanding she was still a minor), retained that right, and on that account was entitled to have the guardianship of her son then being a minor, as appears more at large in the work of L. Van Aitzema, intitled *De Herstelde Leeuw* (3), and in the observations of Mr. Jacob Van Heems Keik, intitled the *Arcadia of Holland*. (4)

By allowing them to live away from them and earn their own support.

§ 5. *Secondly*, Children whose parents are not dead, cease to be under their power through a release or removal (5), and that not only a clear and express release, but also through a tacit toleration; for instance, when children separate themselves from their parents with respect to their habitation and livelihood, and maintain themselves, by which means children obtain the management of their own property, and may appear in judgement for themselves. (6)

(1) See Grotius, Inleyd. lib. 1. c. 6. n. 9. & c. 10. n. 3. Sand. lib. 2. tit. 7. Defin. 5. Gudelin, de Jur. Noviss. lib. 1. c. 13. circa. fin. Christin. vol. iv. decis. 185. n. 7. et ad Leg. Mech. tit. 9. art. 14. n. 7. Zypæ Notit. Jur. Belg. tit. ad Macedon. Argentr. ad Consuet. Britann. art. 499. Gomes. ad l. 47. Taurinum.

(2) L. 18. Cod. de Nupt. Tiraquel. in legib. connub. glos. 3. n. 1 & 2. Boër. ad Consuetud. Bituric. tit. 1. § 2. & decis. 197. n. 3.

(3) pp. 348. 362.

(4) Hollandse Arcadia, p. 140. edit. of 1662.

(5) § Instit. quib. mod. jus patr. potest. solvi.

(6) Novell. Leon. 25. in fin. Gothofred, ad l. 3. Cod. de Emancip. Grotius, Inleyd. lib. 1. c. 6. n. 10, 11. Christin. vol. iv. decis. 186. n. 11, Cust. of Antwerp, tit. 43. art. 73.

When they become of age.

§ 6. *Thirdly,* Children whose parents are not deceased, become their own masters as soon as they are above the age of twenty-five (1), as will be hereafter shewn. The power and guardianship of fathers over their children sometimes also ceases, without the children becoming their own master; as,

1. When the father himself is placed under guardianship. (2)

2. The paternal power is not regarded in the management of property, which children obtain from others by inheritance or bequest, &c. of which property the care and management are left to parents, but with regard to which they are considered in no other light than as guardians. (3)

With respect to the further dignity, employment, or offices of children, by which the paternal power is much contracted, there is but little doubt among us, whether the power of parents over their children ceases or not, where such dignity or office consists either in an office of state, (such as burgomaster, aldermen, or counsellor of a city or corporation of citizens, or similar higher offices in the management of the country), to which only persons who are above their majority are admissible; but if the office or dignity be an inferior one, it cannot dissolve the special power of parents over their children. (4)

The Education of Children, how and by whom to be effected.

§ 7. To the obedience and reverence which children owe their parents, correspond the education and maintenance which parents owe to their children, according to their situation in life, and their circumstances, and which may legally be demanded from them (5); unless the children can maintain themselves by means of any art or handicraft, or unless they have succeeded to or obtained any property from others, the fruits or produce of which may be laid out for their maintenance (6), but not otherwise. Whereas, among us, the father has no right of usufruct over the property of the children, as he formerly had; but he ought to be responsible for it in the same manner as the guardians of minors are, as already stated (7). The education and maintenance of children is a common charge, and is to be born both by the mother as well as by the father (8), although such children

(1) Christin. vol. iv. decis. 186. n. 9. Boër. ad Consuetud. Biturig. tit. 1: § 2. Godefin. de Jure Novis. lib. 1. c. 13.

(2) Grotius, Inleyd. lib. 1. c. 6. in fin.

(3) Vinn. ad § ult. Instit. quib. mod. pat. potest. solvatur.

(4) Vide Arnisæum de Repub. lib. 1. c. 4. § 7.

(5) Tot. tit. Ff. et Cod. de agnoscend. & alend. lib. vel parentib.

(6) L. 5. § 7. Ff. 7. de agnoscend. lib. Customs of Antwerp, tit. 36. art. 5. Cons. & Advys. part 1. cons. 146. & part 2. cons. 129. Grotius, Inleyd. lib. 2. part 9. n. 9.

(7) See p. 61. § 2.

(8) L. 5. § 1. Ff. de agnoscend. et alend. lib.

are born out of wedlock (1). But if one of them has no means or capacity, the other will be obliged, under such circumstances, solely to maintain the child; so that natural children, whose father is known, ought likewise to be maintained by him (2): however, in doubtful cases, the father must be proved; and as this is sometimes difficult to prove, and on the side of the father cannot be fully proved, he therefore is considered as such, who being stated to be the father, dares not deny upon oath that he never carnally knew the child's mother, provided the woman swears that he is the father of the child; but if he can declare upon oath that he never carnally knew such woman, her oath will not be credited, although she should make it whilst in labour. (3)

If there be no father and mother, or if they be unable to maintain their children, the grandfather and grandmother, on either side, are obliged to support them (4), in which case a grandfather will likewise be obliged to educate and maintain the child which his son has begotten on any one out of lawful marriage. (5)

As children have a claim to be maintained by their parents, so they are bound to maintain the latter when reduced to poverty. (6)

Further, a brother is obliged to maintain and educate his brother, sister, or brother-in-law, either of the whole or of the half blood, if they be reduced to poverty (7); and likewise his natural brother (8); but the maintenance of further relations or friends is not obligatory, so that an uncle is not bound to maintain his nephew (9). Those who cannot maintain themselves, and who have no relations who are obliged or willing to maintain them, are to be maintained from the poor's funds of the city or place where they reside, unless they be small and young orphans; for which purpose there are in many places peculiar hospitals established, under the denomination of *Poor Orphan Houses.*

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(1) Cap. 5. in fin. x. de eo qui duxit in Matrim. quam poll. Adulter. Christin. ad Leg. Mechlin. tit. 18. art. 6. n. 1. Surd. de Aliment. tit. 1. quæst. 14. n. 4. Grotius, Inleyd. lib. 3. vol. 35. n. 20.

(2) L. 5. § 1. Ff. de agnoscend. et alend. lib.

(3) See Grotius, Inleyd. book iii. c. 35. at the end. Sande, lib. 1. tit. 10. def. 2. Christin. ad leg. Mechlin. tit. 18. art. 5. Customs of Antwerp, tit. 45. art. 9. Gail. lib. 2. obs. 97. Cons. & Adv. of Dutch lawyers, (*Cons. en Advysen van de Hollandse Regtsgeleerden*) vol. i. cons. 301. and vol. iii. cons. 156. Mascard. de probat, vol. ii. conclus. 786, *et seq.*

(4) L. 5. Ff. de agnosc. lib.

(5) See Faber, ad Cod. tit. Ne filius pro patre, def. 3. Surd de Aliment. tit. 4. quæst. 12.

(6) L. 5. § item rescript. Ff. de lib. Agnosc. *Parentibus*, says Cicero (Orat. de Respons. Haruspic.) nos primum natura conciliat quos non alere nefarium est.

(7) Sande, lib. 2. tit. 8. def. 2. Cons. & Adv. vol. iv. cons. 70. n. 5.

(8) Novell. 89. et Auth. licet. Cod. de naturalib. lib.

(9) Sande Dict. def. 2. Cons. vol. ii. cons. 278 & 279.

§ 8. In like manner, poor exposed foundlings are usually maintained, among us, out of the poor's fund of the place where they are found (1). In the Roman Catholic countries, as France, Italy, Brabant, and elsewhere, special houses have been instituted for foundlings: and, in order to prevent further mischief and danger to young and recently born children, who are often abandoned and killed, all children who are brought there secretly, and laid down at a certain place made for that purpose outside, *clam testibus*, are accepted and further maintained; but recourse is not always had to these establishments in consequence of poverty (which seems to have been the original design of their institution), but they are frequently and chiefly resorted to, even by persons of property, in order to palliate and conceal their lewd conduct; and in the clothes in which such children are found wrapped up, their names are marked and hung to their necks, and likewise a penny from which a piece is cut off, with similar other tokens by which such children may be known when they grow up, and to perceive the silent opinion of the managers of such houses relative to the same: but, since the reformation of religion among us, these establishments for foundlings have been considered both impolitic and immoral, as being a public inducement to lewdness, and therefore have been abolished and condemned.

How and by whom Foundlings are to be maintained.

Under the terms 'education' and 'maintenance' are not only intended meat and drink, but likewise clothes, lodging, accommodation, correction, instruction, and learning, both in the fear of God and also in other arts and trades, according to every person's situation in life and circumstances. (2)

§ 9. Promises of education are likewise often made by the survivor of two married persons to orphans, on a division of the estate by appraisement, proof, or agreement, and the survivor is even often directed by last will and testament to undertake their education. On a division of the estate by valuation and agreement, an express appraisement and proof are required according to the orphan statutes of Rhynland, (art. 32.); but by the orphan statutes of Leyden, (art. 25), and of Oudewater, (art. 176.) the officers for registering and taking care of orphans' estates may, upon good faith in the survivor, make the agreement without an inventory being produced.

Agreements and statements concerning Children's Property, relative to their Education, &c. how to be carried into execution, and how far to be understood.

The survivor, whether father or mother, making a statement of the property of their children to such officer by way of agreement

(1) See Christin. ad Leg. Mechlin. tit. 1. art. 51. Sande, lib. 2. tit. 8. def. 4.

(2) D. l. 5. non tantum. Ff. de Agnosc. lib. l. ult. Ff. de Aliment. legat. & l. 1. Cod. de Alend. lib. l. 4. Ubi pupil educari.

or otherwise in case of a separation, or by last will, &c. and taking the charge upon themselves, are obliged to maintain such children for the interest of the property proved, how trifling soever it may be; and to preserve such property until they come of age, enter into matrimony or any other state to be approved of, which, in making the agreement, is taken into consideration (1), otherwise the interest or produce of such property as the children may afterwards obtain from others, by last will or otherwise, will be applicable to their maintenance and education, unless it was allowed in the bequest, or otherwise contracted, when the division, agreement, or valuation took place (2), either because something more is allowed to the parents when the separation or agreement takes place, or that the amount of the interest was much greater than is required for the maintenance of the children.

If children be not properly maintained by the parents or others, they are to be placed somewhere else upon advice of the orphan-registers (*Weesmasters*), at the expense of those who took the burden of the maintenance upon them, or were obliged thereto, and who, on that account, will be compelled by *parate execution.* (3)

But where the longest liver, whether father or mother, departs this life encumbered with the maintenance of the children before their education has been completed, it is by no means clear what line of conduct is to be followed under such circumstance; on this subject, indeed, there are in some cities special statutes. Thus, at Leyden, if agreement and proof be made, with direction to educate the children, and the survivor afterwards marry again and depart this life, the widow or widower of such survivor shall be obliged, during the continuance of such education, previously to return out of the common estate as much as the orphan-registers (*Weesmasters*), according to their discretion, shall deem expedient, for the purpose of contributing towards their maintenance. (4)

At Delft, such education ceases at the death of the survivor, unless it was otherwise expressed by the agreement. (5)

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(1) See the Orphan-Statutes (*Keuren van de Wees-Kamer*) of Edam, Monikkendam, and Purmerent, tit. 4. art. 2; of Briel, tit. 4. art. 59.; and of Alkmaar, tit. 4. art. 2 & 3.

(2) See the Orphan-Statutes of Amsterdam, art. 31.; of Alkmaar, tit. 4. art. 4.; of Monikkendam, tit. 4. art. 4.; and of Briel, art. 61.

(3) See the Orphan-Statutes (*Keuren van de Weeskamer*) of Leyden, art. 54.; of Alkmar, tit. 4. art. 13.; and of Amsterdam, art. 33.

(4) See the Orphan-Statutes of Leyden, art. 28.

(5) See the Orphan-Statutes of that place, art. 12.

At Rotterdam, it is required to be specially expressed in the acts and promises concerning the agreement, whether the maintenance shall cease or not at the death of the person who makes such promise. (1)

But the orphan-statutes of Middleburgh require that orphans, provided they enjoy their promised or proved inheritance, shall have no further claim upon the estate of the deceased, who had prmised to maintain them until such time as they come of age, but that the estate shall be released from further maintenance, unless the guardians or orphan-registers (*Weesmasters*) deem it advisable to make a different agreement. (2)

At Alkmaar, the estate of the survivor remains encumbered with the maintenance of the children, unless it be otherwise agreed, or unless the heirs of the deceased or the holder of the estate be willing to allow the orphans such property, as they might have acquired independent of the property proved, or at least to increase the statement or proof accordingly, as the Weesmasters or registers of Orphans' Estates, direct. (3)

At Antwerp, it is sufficient if such widower or widow satisfy the agreement so far as it goes, and continue to educate the children for the interest of the property proved, and if they take care of the principal, or give the pupils the property which they might have acquired independently of such agreement. (4)

But where there are no special statutes, the general and more estimable opinion of the doctors ought to be followed, who say that such obligation ceases entirely and becomes void of itself on the death of the survivor; whereas, by the death of the survivor all the property of the whole estate devolves upon the children, and as the minor child in such case enjoys also his share, and is in possession of all the property out of which that child was maintained by the survivor, so far as concerns the property detained, any further promise is entirely personal, and involves no other or further obligation; as however the power of discharging such obligation exists, (as it often happens that the surviving father or mother, without any or very little detained property, take upon them the education of the children), it is understood that, when the property does not extend so far, they do not bind themselves further than they are otherwise obliged, which obligation of course ceases with death, and does not go

(1) See the Orphan-Statutes of that place, art. 37.
(2) See the Orphan-Statutes of that place, art. 30.
(3) See the Orphan-Statutes of Alkmar, tit. 4. art. 2 & 3.
(4) See the Customs of Antwerp, tit. 43. art. 32.

over to the heirs or other children; but if the longest liver afterwards enter into a second marriage without any ante-nuptial contract, and consequently in community of property, in which case the detained property (from which the child was to be maintained) may happen to be alienated and diminished; or if the longest liver become notoriously insolvent, whereby the said foundation ceases, and as the children cannot obtain the property which they otherwise would have acquired independent of the property proved;—in these cases, they retain their right of education, and must be indemnified for it; such at least is the view which I have taken of this subject, with others; and therefore it is adjudged, that a widow or widower of such survivor (who has promised to the children of the former marriage, when the property was proved or by agreement beyond a certain amount), is bound in law to educate such child or children until he or they come of age, and to give him or them their respective portion when they come of age, after the death of the surviving father or mother: but children, who are of age, are not bound, after the death of father or mother, to take upon them the burden of the education of their minor brothers and sisters, nor can the minors with regard thereto enjoy any indemnification; but on the partition of the property, such child or children ought to be satisfied each with his lawful portion without any distinction. (1)

(1) See the Cons. & Advys. vol. i. cons. 46 & 172.

CHAP. XIV.

Of Marriage.

[Grot. I. 5.]

§ 1. *Nature and Origin of Marriage.*
2. *One Wife only allowed to a Man, and why.*
3. *What is necessary for the Consummation of a Marriage.*
4. *Whether the Publication of Banns may be shortened, and whether the Marriage of a sick Person can be celebrated before the Bed.*
5. *Whether and how a Person residing abroad can be married by Proxy.*
6. *The Marriage of Minors illegal, without the Consent of Parents, or the Survivor of them.*
7. *Legal Causes of Refusal of Marriage.*
8. *No Appeal against the Decisions of them.*
9. *The Consent of Guardians not necessary.*
10. *Legal Impediments to Marriage.*
11. *Previous Promises.*
12. *Consanguinity.*
13. *Affinity.*
14. *Second and further Marriages; within what Time and under what Restrictions allowed.*

THE power of parents over their children consists chiefly in refusing or allowing them to marry. In discussing this subject, we propose to treat of the nature of marriage, of the parties who may enter into this contract, and in what manner marriages may take place according to the laws of this country.

Nature and Origin of Marriage.

§ 1. Marriage or matrimony, by the Germans called *Ehe*, from which our word *Egt* is derived, is a social contract between man and woman, obliging them to an inseparable cohabitation during life (1). From this contract marriage has its origin, because the education of children could not be properly attended to if each person did not separately know his own, which could not take place if a woman cohabited promiscuously with different men. Again, the stronger affection a man has for the education of his children, the less it is divided; therefore reason, and the more comfortable existence of human being, rendered matrimony necessary, by which a wife should inseparably be bound to her husband, and a husband to his wife. This union is undoubtedly observed after the example of Adam and Eve, and seems to be

(1) Pr. Inst. de Patr. Potest. l. 1. Ff. de Ritu Nupt.

inculcated in the soul of men as a command, so that every one knows his own wife, and keeps himself to her alone; therefore Jesus Christ reproved the Pharisees and Scribes, as related by Matthew (xix. 3—6.) "Have you not read that he, which made them at the beginning, made them male and female: and said, they twain shall be one flesh;" explaining the same with this emphasis—"What therefore God hath joined together, let not man put asunder;" whence follows the inseparableness of matrimony. So the said command is noted down by Moses, (Gen. ii. 24.); and has been transmitted through Noah, Japhet, Gomar, and others, to the present European people, by whom it is still observed.

One Wife only allowed to a Man, and why.

§ 2. Therefore it is a constant law among Christians, that a man may have but one wife, and a wife but one husband in marriage at one time; those who do otherwise are punished as adulterers (1). Although, in the mean time, both before and after the age of Moses, a man was permitted to have more than one wife, and God had pointed out by the example of Adam and Eve what was good and best, it does not thence follow that it was always and uniformly good, or that it was unlawful to do otherwise. So Sarai endeavoured to make up for her barrenness by giving her handmaid Hagar to Isaac, and it was good in the eyes of God (2). It also appears from many examples in the Old Testament, that polygamy was not always observed after the time of Moses, nor was it judged bad in itself, but was considered as an indifferent thing, and in antient times was so understood by many people. Thus Josephus says (3), that it was an antient practice among the Jews, to have many wives at the same time. Among the Athenians, we learn from the example of Socrates and others, that more than one wife was allowed at one time; and the same practice still obtains among the Persians, Turks, and other oriental nations, who permit a man to marry as many wives as he can maintain; and, with them, the greatness of a man's power and state is represented by the multitude of wives. With regard to the Germans, Tacitus testifies (4), that of all the foreign nations with whom the Romans had any intercourse, they only kept themselves contented each with one wife; the same practice obtained

(1) L. 30. § ult. Ff. ad l. Jul. de Adult. Novell. 134. c. 10. See Sande, lib. 5. tit. 9. defin. 16. Menoch. de Arbitrar. Judic. casu 420. no. 1, 2, et seq. Bell. Jurid. p. 607.

(2) Gen. xvi. 1—3.
(3) Ant. Jud. book xvii. c. 1. § 2.
(4) De Morib. Germ.

among the Romans, and therefore it is praised by them in the Germans. (1)

The persons who may enter into matrimony ought to be young men above fourteen years of age, and young women above twelve years of age (2); but no mad, foolish, or senseless persons (i. e. idiots) (3), may marry. According to the old German laws and customs, it was reckoned shameful for a girl to enter into matrimony before she had completed the twentieth year of her age (4). Whence it seems to have proceeded, that a daughter, being reckoned marriageable at her twentieth year, the parents could not impede her without lawful reasons, which they, before her twentieth year, may do without assigning any reasons, as will be shewn more at large in § 6. p. 73, 74. infra. (5)

What is necessary for the Consummation of a Marriage.

§ 3. Antiently, in these countries, the requisites to the consummation of a marriage were very few, and of little importance, consisting almost solely in cohabiting together, with the knowledge of the nearest relations on both sides. On many occasions this usage was very dangerous; for it sometimes happened, that persons entered into matrimony contrary to their previous promises, or with their near relations by blood or in affinity, and also without the previous consent of those who ought to have been apprised of such marriage. To prevent such abuses, it was subsequently introduced, that no marriage should be considered as consummated, until after three legal publications of the banns either in the churches, or before the court of justice, (pursuant to the rule and order enacted thereupon by the political ordinance), such marriage has been duly confirmed; which agrees likewise with the divine laws (6). And so rigorous is our law on this subject, that if the least thing be wanting thereto, the transaction itself amounts to no marriage (7). And again, a marriage so consummated ought to have its full force, although no actual cohabitation had followed thereupon; as it was determined in the case of the new-married couple who were both drowned in their return home. (8)

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(1) See Grotius, de Jure belli, lib. 2. c. 5. n. 9.
(2) § 1. Inst. de Nupt.
(3) Quorum nullum animi est judicium, l. 5. Ff. de R. Jur.
(4) Cæsar. lib. vi. de Mor. Germ. Tacitus, ut supra.
(5) See Polit. Ordin. art. 3. See also the statutes of Zealand of the year 1496, c. 2. art. 25.
(6) Cap. 4. Extr. de clandestin. sponsal. cap. cum in tua. 27. Extr. eod. cap. aliter, 3. quæst. 5. Constantin. Harmenopulus, lib. 4. Epitom. tit. 4.
(7) See Political Ordinance, art. 3. Arg. § ult. Instit. de nupt. junct. l. non dubium, c. 5. Cod. de legib. et l. relegatorum, 7. § 4. Ff. de interdict. et relegat. Sande, lib. 2. tit. 1. def. 1.
(8) See Neostad. de pact. ante nupt. obs. 15, 16, 17. Coren, Cons. 26. n. 64. Groenw. ad l. 8. C. de Incestu.

The following particulars are requisite to constitute a legal marriage among us; viz. All persons desirous of marrying are obliged to appear before the court of justice, or the ministers of the church of their place of abode, where they have had their fixed domicile for the last year and day; and to apply there for three Sundays or market-days, when publications of the banns are to be made in the church, or the court-house, or other places where the court of justice is held; and every one who may have any impediment to propose, may and ought to do it in the mean time, on pain of being otherwise deprived of that right. The legal impediments to marriage are, previous promises or too near relationship, which will be treated at length in §§ 10—13, pp. 78—81. infra.

Whether the Publication of Banns may be shortened; and whether the Marriage of a sick Person can be celebrated before the Bed.

§ 4. It is, however, questionable whether any person can in anywise be excused from these necessary observances in a case of *necessity* which admits of no delay; for instance, whether any person who is dangerously ill, or one who is obliged suddenly to go abroad, should make application that the three proclamations of banns may be made on one day and at one time by three successive performances, or that any person lying sick in bed may be married before his bed by a clergyman? It is understood that the three proclamations of the marriage banns were only to preserve the right of a third person, and that the marrying in church is but an external ceremony of a public confirmation, introduced likewise for better security, and that we can and may deviate therefrom, for *legal reasons*; provided that a third person preserves his right so far as concerns the three proclamations of banns, if any person has any right; and therefore it takes place by consent of government, upon previous cognizance of the case (1); but the greatest difficulty is, in case the necessity should be so urgent that there is not sufficient time to apply to government, and obtain leave. In similar cases, some are of opinion that it may be granted by the daily judge; because all the necessity of observing the law is excused, especially if it so happens that life, honour, or dignity depends thereon, as is maintained, in conformity with the general opinion of the Doctors, by Jerome Cævallus (2); and it agrees also with the institution of the Council of Trent (3), in these words; previously to the consummation of the marriage three proclamations ought to be made in church, in order that, if there be

(1) D.D. ad l. 31. Ff. de legib. Gail, lib. 1. obs. 14. n. 6.

(2) Hieronymi Cævall. Specul. Commun. opin. quæst. 906. n. 53, 54.

(3) Sess. 24. c. 1.

any impediment, it may the more easily be seen; unless the ordinary judge deems it proper to remit the said banns, which therefore is recommended to his good precaution: and it is not certain whether it can likewise be made applicable at present to the Protestants; because the said remission and excuse of the law through the punishment against transgressors thereof, (contained in the 3d art. of the political ordinance), are attached to the highest power, and are made a case wherein the daily judge cannot act.

Whether and how a Person residing abroad may be married by Proxy.

§ 5. Further, the doctors assert, that any person being abroad may be married, by virtue of letters and power of attorney, without his being present himself (1); which opinion also agrees with the ecclesiastical laws (2); and Groenewegen (3) testifies that it is observed with us also; and in my time a person who was in India, was thus married by another in the church here with a certain daughter, by virtue of a power of attorney empowering him to marry and receive her in the name of the constituent.

The Marriage of Minors illegal without the Consent of Parents, or of the Survivor of them.

§ 6. Again, no banns are allowed to minors, young men under twenty-five, and daughters under twenty years of age, before the free consent of the parents, or the survivor of either of them, has clearly appeared, (see the political ordinance art. 3.); which consent, according to the written laws, is the substance of the marriage; so that marriages entered into without consent of parents are of themselves of no effect. (4)

Reason, indeed, also teaches that parents who have thus far brought up their children, may merely have the honour of consenting to the marriage of such children from whom they expect their heirs (5); especially in the case of minors, whose judgement is too weak, and subject to many snares and seductions (6). This is especially necessary with respect to girls, who, on account of their fickle weakness, cannot be allowed to deprive themselves of the wise advice of their parents (7), as they are mostly found to be acting against their own interest (8); so that with the Romans it was the duty of the father to marry his daughter, and to look out a fit consort for her.

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(1) Ex. l. 5, 6. L. 34. de Ritu Nupt. Duaren. de Nupt. c. 2.

(2) L. final. de procurat. in 6 Gloss. in cap. cum societas, 27, quæst. 2.

(3) Tract. de legib. abrogat. add. l. 5. de Ritu nupt.

(4) See the Political Ordinance, art. 13. l. 34. Ff. de Ritu Nupt. l. Paulus. 11. de statu hominum. l. 7. l. 12. Cod. de Nupt. l. unica. § 1. versic. Oportet. Cod. de Raptu. Virg. Schneidewin ad tit. de Nupt. part 2. requis. 4. Tholosen. Syntag. Jur. lib. 9. c. 3. n. 9, 10. 20. Sande, lib. 2. tit. 1. defin. 4.

(5) L. 12. § 3. Ff. de capt. & postlim. rev.

(6) Theophil. ad pr. Inst. de Nupt. l. 1. Ff. de Minorib.

(7) L. 1. l. 2. Ff. ad Senat. Vellejan.

(8) L. 4. Cod. de Sponsalib.

(9) L. 19. Ff. de Ritu. Nupt. l. fin. Cod. de dot. Promission.

And therefore a distinction is made by some doctors between the father and mother, as if the consent of the mother was merely required for the sake of chastity (1); but this is contradicted by others, who, where there is no father, deem the consent of the mother so necessary, that, in case it is wanting, a marriage would be declared unlawful (2). And so it is likewise understood with us, in conformity to the words of the political ordinance, (art. 3.) "*The consent of the parents, or the survivor of them;*" but this consent of parents is also understood to take place tacitly, and *per ratihabitionem*, if parents wilfully and knowingly have suffered the banns of the children to be published, and allowed the marriage to be consummated, without saying any thing against it or impeding it (3); and so it was likewise understood in Friesland, according to Sande (4); so that a marriage, consummated secretly without the knowledge of the parents, cannot exist, and may by them be annulled, and be declared to amount to no marriage, as it was frequently adjudged in my time. (5)

But if the persons were of age, namely, the young men twenty-five, and the women twenty (who antiently were judged to be marriageable at twenty (6), in such case, likewise, the consent of parents, or of the survivor of them, is required; but the parents are then compelled either to consent to the application, or to allege good and lawful reasons for their refusal; for this purpose, in such a case, they are summoned to appear before the consistory or the government, in order to allege their reasons; and if they do not appear there, their silence is considered as a consent; or if their reasons be not found good and lawful, no regard is taken thereof, and the publication of banns is granted notwithstanding; and if no objection be made thereto by any person within the said time, or if those who oppose be wanting in their right, the petitioners may be married lawfully and publicly in the church or before the court of justice. (7)

Legal Causes of the Refusal of Marriage.

§ 7. The causes for which parents may impede the progress of the marriage of children who are of age, are left to the dis-

(1) Masuer. de Nupt. p. 331. Menoch. l. 2. Presumpt. 4. Covarruvius de Matrimonio, Pars 2. § 8.

(2) Per. l. 18. & l. 20. Cod. de Nupt. Cujac. 3. Observ. c. 5. Donell. lib. 3. Comment. c. 20.

(3) Per. l. 5. Cod. de Nupt. Pecc. de Testam. Conjug. lib. 1. c. 5. Cujac. lib. 16. Observ. cap. ult.

(4) Lib. 2. tit. 1. defin. 2.

(5) See Sande, lib. 2. tit. 1. defin. 4.

(6) According to the statutes of the country of Zealand, of the year 1496, chap. 2. art. 25.

(7) See Polit. Ord. art. 3. and Grotius, Inleyd. lib. 1. c. 5. vers. Namentlyk dat.

cretion of the judge; and, in these cases, the following circumstances are especially regarded; viz.

1. Too great disparity of rank, parentage, and fortune; by which the family of the person marrying would be disgraced or degraded, and the young man be unable to bear the charges of the marriage. Disparity of fortune is not otherwise so much regarded, because every one is at liberty to endeavour to derive benefit by a good marriage; and property, in a strict sense, does not amount to the substance of a marriage, but is only accidental and contingent. (1)

2. If the future consort be accused of any crime, or leads a dishonest life. (2)

3. Difference of religion; as, between members of the Reformed religion and the adherents of the Pope; yet some are of opinion, that since we neither persecute the latter, nor suffer them to persecute others, this is a question that needs not be so narrowly investigated. (3)

4. That the daughter has been misled and deceived, against the exhortation of the parents.

5. That an implacable enmity exists between the parents, and that further evil may be expected, &c.

In which cases the judge ought chiefly to regard the just complaints of the parents, and so much is confided to him, that by resolution of the States of Holland it was understood, "that in matrimonial matters, wherein the declaration of the magistrate agrees with the declaration of the parents, or the survivor of them, no reformation, appeal, provocation, or any provisions shall be granted against the same." Conformable to this resolution was the decision in the case of Miss Agatha Welhouk against Geraldo Welhouk, her father, residing at Delft. In this case, the plaintiff had been prevailed upon and misled by the minister Arnoldus Bornius, of Delft, to give him her affections, under pretence of instructing her in the catechism and exercises of the church, while she was yet a minor, and in which affections she refractorily persisted, notwithstanding her parents efforts to the contrary, and the repugnancy manifested by them. The magistrates of the city of Delft, therefore, dismissed her demand to marry the said Arnold Bornius against her said father's consent, by decree of the 16th December 1661; against

(1) L. 12. § 1. Ff. de Sponsalib. l. 12. l. 18. Cod. de Nuptiis & Covarruv. de Matrim. pars 2. c. 3. § 7. n. 3.

(2) L. 20. Cod. de Adult. l. 41. l. 43. in pr. & § seq. Ff. de Ritu Nupt. l. 3. Ff. Si quis a par. manumiss.

(3) Utr. Cons. 2 D. c. 133. See also Henr. Brouwer. de Jure Connubior. lib. 2. c. 24. n. 17.

this decree she appealed to the court of Holland; and the case, having been carried in the high court, the following edict followed thereupon of the States of Holland, of the 27th September 1663; viz.

No Appeal against the Decisions of them.

§ 8. "By renovation and ampliation of the preceding resolution, it was found good, ordained, and enacted by form of an eternal edict; that in future, if any dispute arise between a child or children on the one side, and the parents, or the survivor of them, on the other side, in matrimonial matters, such differences and matters should be decided, with regard to the nobility and the officers of the court, by the said court itself; and with regard to all others who are under the jurisdiction of the court, in the closed or walled cities of the country, including the Hague, by the law-college or the court of such cities, the full and complete number (as far as is possible), and not less than two third parts of the meeting, being present; with the exception of the city of Delft, where it shall take place before aldermen; provided also, that, as far as is possible, the full and complete number, and not less than two third parts of the aldermen, be present; and that those of our courts, laws, and justices, as well as the aforesaid aldermen, shall, on hearing the parties, and upon proper cognizance of the case, decide in a summary way and *de plano*, as they shall deem it expedient; and whenever their disposition or declaration agrees with the approbations and assertions of the parents, or the survivor of them, then the said disposition and declaration made by the said court, by the law-college, or aldermen, shall fully take effect, unless an appeal, reformation and provocation, revision, or other provisions of justice be granted against the same. Provided, however, that the above shall not extend to any other than the aforesaid places, magistrates, or judges in the aforesaid country." (1)

The Consent of Guardians not necessary.

§ 9. According to Grotius (2), the consent of guardians is not necessary for the consummation of marriage of their wards; provided it be not of the management of guardians or relations whether the daughter marries or not (3). The same great writer says, among other points, that such statutes as prohibit a daugh-

(1) The above subjects are treated with more prolixity by Basil. Moner. de matrimonio, c. 2. n. 10. Menoch. Consil. 69. Covarruv. pars 2. de Matrimonio, c. 3. § 7. Cypræ. de Sponsalib. c. 13. 35. Alber. Gentil. de Nupt. lib. 3. c. 4. Henric. Brouwer. tract. de Jure Connubior. lib. 2. c. 24. n. 11. & seq.

(2) Arg. l. 8. Cod. de Nupt: Grotius, Inleyd. lib. 1. c. 8. verse 't Huwelyk (Marriage).

(3) L. 20. de Ritu Nupt. d. l. 8. Cod. de Nupt. Quod latius tractat Georgius Tholosan. Syntagm. Jur. Civil. lib. 9 c. 3. n. 13. & Schneidewin ad tit. Inst. de Nuptiis, pars 2. requisitio 4. n. 40. et ad tit. de Actionibus, § omnium. n. 49, 50.

ter or young man from marrying without the consent of their guardians or other relations, cannot exist, because they would militate against the freedom of marriage (1); but that such consent is only required for the sake of chastity. And it is to be observed, that although a marriage may take place among us, at present, without the consent of guardians, yet those who enter into matrimony with minors against the will of their guardians, cannot enjoy of their property by contracts, last wills, or otherwise. (2)

But some are of opinion that as the proclamation of the Emperor Charles V. became entirely obsolete in other respects on account of its severity, therefore it ought not to take effect in this respect also, so far as relates to the penalty: and it is understood that consent has been tacitly given if the banns were published in the church without any impediment; because at the time of the proclamation of the Emperor Charles V. those orders were already given, and children could then marry without the knowledge of their nearest relations or guardians. But such provisions having been made, such marriage, by the Political Ordinance, cannot take place without their knowledge; and if they mean to offer any reasons, they can impede it; so it follows thence, that the penalty ceases therewith of itself. (3)

Therefore the law of the country, by which a community of property is introduced, so far as it may be prejudicial to minors, has likewise no place with regard to such persons (4); but it is to be taken in a very narrow sense, that if the guardians, before the third publication of the banns, have not alleged good and lawful reasons for their refusal, it is to be considered as a tacit consent (5); besides, in Zealand, and in some cities of Holland (where certain peculiar orders have been made with regard to matrimonial affairs), minors are not only obliged to exhibit the consent of their parents, or the survivor of them, but also, if they have no parents, from their guardians or nearest relations. (6)

The preceding statements concerning the consent of parents to the marriage of their children, do not apply to a second

(1) Per DD. in l. Titia. 132. Ff. de Verb. Obligat.

(2) See the Proclamation of the Emperor Charles V. of the 4th Oct. 1540, art. 17. Political Ordinance, art. 13. in fin. See Sande, lib. 4. tit. 4. def. 5. Christin. ad leg. Mechlin. tit. 16. art. 1. n. 9. Customs of Antwerp, tit. 43. n. 93.

(3) See Peccius de testam. conjug. lib. 1. c. 5. Sande, lib. 2. tit. 1. defin. 2.

(4) Grotius, Inleyd. lib. 1. c. 8. n. 2. & seq.

(5) Sande, lib. 2. tit. 1. defin. 2. in verbis succedit. Peccius de testam. conjug. lib. 1. c. 5.

(6) See the Political Ordinance of Zealand, art. 8.; and the Provisional Orders made relative to matrimonial matters within Leyden, art. 3.

marriage; although the marriage of widows, being minors (who are deprived of assistance and left to themselves), without consent of the father, seems not to be permitted by the written laws (1); so it was adjudged in Friesland, according to Sande (2); which, pursuant to the conclusion of the ecclesiastical law, is understood to take place for the sake of modesty only, without necessity (3); which agrees likewise with the words of the Political Ordinance (art. 3.), where it is only spoken of young men and young daughters, which words cannot be otherwise interpreted and made applicable but to the first marriage; and so it was expressly explained in the statutes of Amsterdam (4); to which we may add, that with us the marriage always makes a person his own guardian and master, without subjecting widows and widowers (being minors) again to the power of their parents, as we have shewn in the preceding and following chapters; in which the power of parents over their children, and of guardians over their wards, are treated at considerable length.

Legal Impediments to Marriage.

§ 10. Among the legal causes which can impede the consummation of a marriage, these are the principal; namely, previous promises, or too near relationship.

Previous Promises.

§ 11. If any person have bound himself to more than one person by marriage promises, the first must take effect and the others be considered void (5); for a man may have but one wife, and a wife but one husband, at one and the same time (6); the second, however, preserves his or her right to indemnification to such an amount as he might have been prejudiced by such marriage, because the promises so previously made could not be fulfilled.

Consanguinity.

§ 12. With regard to consanguinity or relationship, blind nature and instinct teach us that the nearer the relationship the greater the affection is; and, therefore, from the beginning it was not deemed either wrong or not to be permitted, but necessary, that brothers and sisters should be united in marriage, wherein the children of Adam have undoubtedly continued to live from the beginning, as well as the descendants of Noah after the flood.

After the confusion of tongues at Babel this practice was carried among all nations, by whom it was observed for a long

(1) L. 18. Cod. de Nupt.
(2) Lib. 2. tit. 1. def. 3.
(3) Secundum Gloss. Bartol. & Salicet. add. l. 18. Covarr. de Sponsal. pars 2. c. 3. § 8. n. 4. & Gloss. in cap. sufficiat. 2. caus. 27. quæst. 2. c. ult. et ibi. Gloss. caus. 32. quæst. 2.
(4) See the Instruction of Matrimonial Matters of that place (*Instructie vande Huwelyxe-saken aldaar*), art. 13.
(5) Arg. l. 29. Ff. de Reg. Jur.
(6) L. 18. Cod. ad leg. Jul. de Adult. l. 2. Cod. de incest. Nupt. Polit. Ordin. art. 14, 15, & seq.

time, and it still obtains among some barbarians. Among the Athenians, Æmilius Probus (1) has related, that Cimon married Elpinezen, his full sister, not so much from the ardour of his affection for her, but because it was the custom of the country. Historians have also recorded the same usage of the antient Egyptians and Persians, who not only intermarried with brothers and sisters, but also with parents and children (2); and Julius Cæsar (3), speaking of the Britons, who were of the German origin and confederacy, says, "they had among them ten or twelve wives in common, and even more, brothers with sisters, and parents with children;" and therefore the reasons assigned by those who are skilled in the scriptures, (viz. that the prohibition of marriage between too near relations ought to consist in an innate aversion and too narrow obligation and shame between the one and the other, which would be diminished and removed by marriage; for a man would not be able to shew so much respect to his mother as he owes her, if he had her for his wife; and that it is also improper and would be contrary to nature, that brothers and sisters should discover their shame to each other), together with other far-fetched reasons, which are discussed at length by Grotius (4), are rather insufficientas they only have a peculiar emphasis upon the ascending and descending line; and with respect to further relations, one would be able easily to refute them, if political and secular wise reasons were not added thereto; viz. that in proportion as population increased, it was discovered that in consequence of such unions, some generations became too powerful and began to exalt themselves above others who were not so strong, and to rule over them. Hence originated wars; and in many, who could not bear each other amongst them on account of the greatness of their generation, it burst out so violently, that the destruction of the human race was apprehended. In consequence thereof, and for the better existence of the same, the civil law enacted, that the more divisions of generations there were, the closer and more certain the communion would be among them; and therefore, in conformity with the law of Moses (5), it is established among almost every people, as a general law of nations, that marriages within certain degrees of relationship are bad and injurious.

(1) In Cimone.
(2) Vide Cyrill. contra Jul. imp. lib. 6. Lucian. dialog. de Sacrificiis Strab. lib. 10. de Cretensib. Theodoret. orat. 9. de legibus, Diog. Laërt. in Procem.
(3) De Bell. Gall. lib. 5.
(4) De Jure Belli et Pacis, lib. 2. c. 5. n. 12, 13.
(5) Lev. xviii. 7. Numb. xxxvi. 11.

Pursuant to this law, all ascending and descending relations *ad infinitum*, are considered as being too near to allow any of them to intermarry (1); but in collateral relations, the exception extends only to the fourth degree; so that the marriage between a sister's and brother's children, (who are related to each other in the fourth degree), is not prohibited, either by the divine or by any secular laws; although, according to the canon law (which are observed by the adherents of the Pope in this country), no marriage may take place among them.

Affinity. § 13. This prohibition, likewise, extends to relations by affinity, that is, between those who are related to each other in the ascending and descending line *ad infinitum*, or in the collateral line by affinity related in the third degree. (2) Thus it prohibits a marriage between me and my wife's relations, and between my wife and my relations mutually, but not between my relations and my wife's relations, or my wife's relations and my relations, who are related to each other neither by blood nor affinity; so that the wife and husband are the beginning and ground of affinity, as we have already shewn. (3)

Grotius (4) has carefully enumerated who those persons really are between whom no marriage can take place, either on account of relationship or of affinity, for the purpose of affording information to those who cannot well reckon the degrees, whereof we shall mention a few of the most doubtful cases.

The question having occurred, whether any person may be allowed to marry his previously deceased wife's sister's daughter, or her previously deceased husband's brother's son, it was understood on the 27th April 1580, by the states of Holland, upon the petition of Dirk Janz Stierman, that he may marry his wife's sister's daughter; but upon second consideration, that the same obligation exists between such persons as between parents and children, it was judged, that such marriage was contrary to the political ordinance, to the divine laws, and also to common chastity; and therefore it was refused on the 7th April 1584 to Gerbrand Borrez, residing at Veerburg, and on the 26th February 1609 to Gillis Van Flory, procurator general, upon advice of the high court; and, subsequently, it was con-

(1) See Political Ordinance, art. 5. Polit. Ordin. of Zealand, art. 13. § 1. & 2. Instit. de Nupt.

(2) § 6. Instit. de Nupt. Politic. Ordinance, art. 8.; of Zealand, art. 16.

(3) See chap. viii. § 8. p. 39—41. supra.

(4) Inleyd. lib. 1. c. 5. vers. Onder Bloed-ver wanten.

stantly refused, particularly to Claas Cornelisz Niéuwland, burgomaster at the Hague, notwithstanding the banns had been twice published in the year 1626 between him and his deceased wife's sister's daughter, with the consent of the Prince of Orange. The third publication of the banns, however, was prevented, and he was prohibited from marrying her, although he had no children by his wife; and thereupon it was resolved by the States General that similar marriages should not be allowed in future; and so it was subsequently refused to Nicholas Ley, residing at Amsterdam, in the year 1627; and in the year 1638, to Willem Engelsz Visser, residing at Bergen op Zoom (1). Finally, in order to remove all further doubts on this subject, it was declared by the States of Holland on the 24th May 1664, that marriages with a person's deceased wife's brother's or sister's daughter (notwithstanding they are not particularly forbidden in the 18th and following article of the Political Ordinance) are to be considered as unpermitted and void. Whence it follows, that all other degrees of affinity, not expressed in the Political Ordinance, and which are not prohibited by any other explanations, are to be considered as permitted. Upon similar grounds I have lately decided that the marriage with a deceased wife's aunt must be considered as permitted.

In the Political Ordinance mention is made only of the first sort of affinity (that is, those who are related in the ascending and descending lines); but no notice is taken of the second kind of affinity, as it is denominated by some, by which any one, although in the same degree of affinity, is however not so nearly related to me; as my step-father's and step-son's widows are in the ascending and descending lines, and as my wife's brother's widow; and in the collateral line, my wife's uncle's or brother's widow respectively, are in the collateral line. The question, therefore, is, whether marriages, in the second sort of affinity, are prohibited among us? Although by the canon laws (2) all such marriages seem to be free, however as it is said in the civil law (3), that no one may marry his step-son's widow, so it is understood that in the ascending and descending line of affinity such marriages are prohibited; but not when the affinity comes from the collateral line. So that it is understood that I may marry with my wife's brother's widow, and likewise her

(1) Concerning this case, see an opinion of the Professors of Theology in the University of Leyden, of the 23d Sept. 1638, in Cons. & Advysen, vol. iii. cons. 323.

(2) Per tit. in Decret. Gregor. de consang. et affinit.

(3) L. 15. Ff. de Ritu Nupt.

uncle's widow; although, in point of chastity, it appears somewhat contradictory, especially if there be children on both sides.(1)

Among the further prohibited degrees which do not much militate against chastity, as often occurs among those related by affinity, dispensation is sometimes granted. (2)

How and in what manner the degrees in the relationship ought to be reckoned, and what serves to render them lighter, we have already pointed out in the eighth chapter.

Antiently no marriage could take place between guardians and orphans, governors and subjects; but since, in the consummation of marriage such necessary observances have been introduced, that all deception is thereby understood to be excluded; so no prohibition lies against the marriage of guardians with their wards, or of governors with their subjects. (3)

Second and further Marriages, within what Time and under what Restrictions allowed.

§ 14. According to our laws a man may have only one wife and a woman only one husband, at one and the same time, as already stated. But second and following marriages, subsequently contracted, are neither prohibited by laws nor in daily practice (4); except that a widow, in order to avoid confusion of blood, ought to wait six months after the death of her first husband, unless she be delivered of the child of which she might be pregnant (5); so that a woman is allowed to marry within one year after the death of her husband, against the written laws, without subjecting herself to infamy or disgrace, as was understood by the Court of Holland, in the case of Mrs. Anna van Charu, plaintiff in reconvention against Mr. Otto van Arkkel, in the year 1586; and it agrees with the ecclesiastical laws (6); as was determined by Antonius Faber (7). But the penalties in the written laws against a widow, introduced for the benefit of children of the former marriage, are still in full use (8): And according to the authorities cited below (8),

(1) See Cons. & Adv. vol. ii. cons. 156. and vol. iii. cons. 107. et seq.

(2) See Grotius, Inleyd. l. 1. c. 5. n. 17. Coren, cons. 21. n. 27, 28. in notis.

(3) Zypæ, Not. Jur. Belg. tit. de Sponsal. in pr. Gudel. de Jur. Noviss. lib. 1. cap. 9. in fine. Montan de Tutelis. c. 31. Argent. ad Consuetud. Britann. art. 35. not. 1. n. 4.

(4) Tot. tit. Cod. de Secund. Nuptiis.

(5) See Instruction of Matrimonial Matters (*Instructie van Huwelyxe-saken*) of Leyden, art. 14.; of Delft, art. 9.; of Amsterdam, art. 14.

(6) Cap. penult. & ante-penult. Extr. de Secund. Nupt. Covarruv. de Sponsalib. pars 2. c. 3. § 9. n. 7. Zanch. de Matrim. lib. 7. disput. 87. n. 23. et seq. Pecc. de Testam. Conjug. lib. 1. c. 12. vers. Utrum.

(7) Ad Cod. lib. 5. tit. 5. def. 1. and Coren, cons. 11.

(8) See the Resolution of the Court of Holland, upon the revisal of the suit of the said Mrs. Anna van Charu against Mr. Otto van Arkkel, taken on the 24th Feb. 1586. See also l. 3. l. 6. Cod. de Secund. Nupt. Sande, lib. 2. tit. 3. def. 1. & seq. Christin. vol. i. decis. 223. 271. n. 21, 22. 336. vol. iii. decis. 131. n. 9. Gudelin, de Jur. Noviss. lib. 1. c. 12. fine. Zypæ. Notit. Jur. Belg. de Secund. Nupt. Coren. cons. 11. n. 11. Cons. & Advys. vol. i. cons. 47. vers. ten laatsten.

because the husbands or wives (to please their second husbands or wives) are often urged on and do not hesitate to prejudice the children of the first marriage, and often prejudice them in their rights, it was introduced into these countries also, for the benefit of children, that any person marrying with a widow or widower, having children of the former marriage, may not enjoy more by last will, contracts, donations *mortis causâ*, or otherwise, in the second marriage, than the smallest portion of a child (1); provided however that the community of property introduced by the common law of the country be not thereby hindered, as will be shewn at length in the subsequent part of this work.

CHAP. XV.

Of Divorce.

§ 1. *Divorce, when granted; and of what Effect it is.*
2. *The giving of a Bill of Divorce, whether and by whom customary, and for what Causes.*
3. *Never admitted as a Practice among us, except in case of Separation from Bed and Board.*
4. *The Case of the Lady Jacoba.*
5. *Divorce on account of Impotency.*
6. *Of the Education of Children in case of Separation.*

§ 1. MARRIAGE is to last during the lifetime of the parties; and no divorce is allowed, but by the death of one of the parties, or on account of preceding adultery (2), if prayed for by the party injured; in which case, likewise, the injured party may marry another during the lifetime of the adulterous person (3); this is often inserted in the verdict. So it was decided by the court of Holland in a suit between Guilliam de Gordyn, plaintiff, against Anne Van Hohenlo, defendant; by which the husband was allowed to marry another; and in the case of Janneken Lexyes, impetrator in a case of divorce against

Divorce, when granted, and of what Effect it is.

(1) L. 6. Cod. de secund. Nupt.
(2) § 1. Inst. de patr. potest. l. 1. Ff. de Ritu Nupt. Matth. xix. 9. l. 8. cum Auth. seq. Cod. de Repud.
(3) See Politic. Ordinance, art. 18. of Zealand, art. 33. Ritterhus. de Differ. Jur. Civ. & Canon. lib. 2. c. 8, 9. Beza de divort. Church Ordinance of Geneva, art. 145, 146.

Nicolas Egger, defendant, whereby the wife was allowed to marry another; decided on the 3d July 1617. But the adulterous person may not marry again with another, according to the canon laws (1); but amongst us such persons are also allowed to marry again, if the injured party marry another, and on that account all hopes of reconciliation are removed. (2)

We say, *upon the prayer of the party injured*, because the divorce is not actually grounded upon the adultery, and is not as it were a penalty; but because it can only be effected at the request of the party injured, but not without the will of the said party; from which right, after he becomes entitled thereto, he may deviate, and forgive the adulterer his crime; and it is likewise tacitly understood to take place, if a husband had carnal knowledge of his wife subsequently to his becoming privy to her adultery, which, in such case, is considered as a tacit forgiveness; so that, if he afterwards prays on that account for divorce, his prayer will not be heard. (3)

The giving of a Bill of Divorce, whether and by whom customary, and for what Causes.

§ 2. According to the civil law of Moses (4), a man who married a woman in whom he found no pleasure, because he discovered something dishonest in her, could before ten witnesses give her a bill of divorce, and therewith cause her to depart from his house; which bill was not allowed to women. (5) This practice, among the Romans, was judged unlawful at the beginning, according to the institution of Romulus, without any adultery, and continued to be observed until it was also understood to be applicable to incapacity to propagate (6). Of such divorces Spurius Corbulus, otherwise called Servilius Corbilius Ruga, set the first example, according to Valerius Maximus (7) and Aulus Gellius (8); until at length bills of divorce and separations were allowed by the emperor Domitian, on account of disagreements, which were subsequently extended to many other cases (9), the abuse of which amongst the Romans (who likewise allowed them to women) became so great, that women began to use them as a privilege for their inconstancy. Alluding to this

(1) Cap. literis. 12. extr. De præsumpt. et Canon. quædam cum fratre, 32 quæst. 7. Can. Siquis viduam. Can. qui dormierit. Can. concubuisti caus. & quæst. ead.

(2) See Beza, tract. de divort. per adult. Rittershus. de differ. Jur. Civil. & Canonici, lib. 2. c. 9. in fin. Cons. & Adv. vol. i. cons. 307. vol. iii. cons. 72. Groenew. ad l. 8. de repudiis.

(3) L. 13. § 10. l. 40. Ff. l. 2. Cod. ad leg. Jul. de Adulter. Groenew. ad l. 2. C. ad leg. Jul. de Adult. Sande, lib. 2. tit. 6. def. 1.

(4) Deut. xxiv.

(5) See Grotius, annotat. ad Deuter. xxiv.

(6) L. 10. Junct. auth. seq. Cod. de repud. l. 39. § 1. Ff. de Jure dot.

(7) Lib. 2. ch. 1.

(8) Lib. 4. ch. 3. & lib. 17. c. ult.

(9) Tot. tit. Ff. et Cod de Divort. & Repud.

circumstance, the poet Juvenal thus disdainfully expresses himself;

> Sic crescit numerus; sic fiunt octo mariti
> Quinque per autumnos. (1)

And likewise Seneca (2) complains of the corruption of morals, namely, that some women began to compute the years, not according to the number of consuls, but according to the number of their divorced husbands, which number was limited by the emperors Diocletian and Maximian (3), but was subsequently extended much farther by the emperor Justinian. (4)

Never admitted as a Practice among us, except in case of Separation from Bed and Board.

§ 3. All the causes for which divorce was allowed by the written laws (besides death and adultery), were antiently unknown among us (5); and they are still unknown, except only when ill treatment on the part of the husband or wife, renders cohabitation insupportable, so that ill consequences are to be apprehended therefrom. In this case, separation from bed and board and cohabitation is allowed, though the matrimonial contract remains inviolate, and under constant hopes of reconciliation, according to the institution of the canon laws, which in this instance are in force among us. (6)

The Case of the Lady Jacoba.

§ 4. Conformably to this rule was the determination and decree of the court of Rome, in the year 1426, in the case of Duke John, Duke of Brabant, and the Lady Jacoba, the only daughter of Duke William Van Beyrens, the twenty-fifth Countess of Holland, namely, that she was wrongly and unlawfully divorced from the said Duke John, her husband, (on dissolution of marriage with whom, she had in the mean time married Humphrey Duke of Gloucester, brother of Henry V. King of England); and that she was to return to her uncle Amadeus Duke of Savoy, who was to have the custody of her until she should be again reconciled to her said divorced husband. (7)

But if either of the consorts wilfully abandons the other for a long time, without any cause, and without any intention of

(1) Sat. 6. v. 228.
" Thus grows the number: she eight husbands takes,
In autumns five."
(2) De benefic. lib. 3. c. 16.
(3) L. 8. Cod. de Repud.
(4) Novell. 140. Dion. Cassius, Hist. Rom. c. 54. Brisson, ad leg. Jul. de Adult. Tract. singul. verb. Divortia Septem.
(5) See Grotius, Inleyd. book 1. c. 5. verse Volgens Christus vermaning (*according to the exhortation of Christ*). Neostad. de pact. antenupt. obs. 7, 8.
(6) Cap. litteras in fin. extr. de restitut. Spoliator. & Cap. ex transmissa. eod. cap. 1. Ut lite non contestata. See also Grotius, d. loco. Neostad. d. obs. 8. in not. Sande, lib. 2. tit. def. 1.
(7) See a more copious account of this case, by Petrus Scriverius, under the said lady Jacoba, page (mihi) 392. J. van Heemskerks, Bat. Arcad. p. 367. & seq.

returning, a divorce is likewise allowed on that account (1); and so it has been decided by the court of Amsterdam, where such occurrences easily take place; and, most recently, on the 29th June 1650, in the case of Mathys Van Gerven and Arnolda Van Eyk, in which, for a similar cause, a divorce was not only granted, but the party abandoned was even allowed to marry with another (2). And at Leyden, in the year 1644, in a case of divorce between Maria Dammen, plaintiff, and Freuri Beuricant, defendant, who ran away from a convent, and pretending to be of the Reformed Religion, married her, and during the marriage returned to the convent; which marriage was dissolved, according to the advice of several professors of theology at Leyden, and she was allowed to marry another; and so lately, on the 2d October 1662, by a decree of the aldermen of Leyden in a suit between Jan Kneliszoon Van Oudshoorn, plaintiff, and Katherine Schaak, who went away from him; in which marriage, after the third and fourth legal description and summons had been issued, without receiving any answer or vindication, a malicious desertion was declared to have taken place; and he was released from the matrimonial tie, and was allowed to marry with another. This decree, on account of the manner of proceedings held therein, is worthy of being carefully inspected. And in a similar case, sentence was likewise pronounced by the court of Holland, on the 26th February 1658, between Andries Doys and Catherine Del Beek. (3)

If a person depart from the country without any intelligence being received of him for some years, it is the opinion of some jurists, that his wife may petition to marry another (4), and that such petition may be granted; but this is to be understood only in case of malicious desertion; for, if any war intervene, or any voyage be commenced, how many years soever may elapse without the wife having any intelligence of her husband, she must remain satisfied until she obtains certain intelligence; but this rule is not very narrowly observed (5): and if *many* years elapse without any intelligence, the husband is considered as dead, or a malicious deserter; and so it was understood by the

(1) See Beza de divort. per desert. Ames. de casib. conscientiæ, lib. 5. c. 38. n. 6, 7. Zanches. de operib. Dei, lib. 4. c. 1. thes. 5.

(2) See Pecc. de testam. conjug. c. 4. Beza de divort. per desert.

(3) See Henric. Brouwer. de Jure Connubior. lib. 2. c. 18. n. 12. the local law of Overyssel, part 2. tit. 1. art. 18. which likewise appears in the Church ordinance of Geneva, which is continually observed in France.

(4) Arg. l. 6. l. 7. Cod. de repud. junct. Novell. 22. c. 14.

(5) L. pen. Ff. de Sponsalib. aut. hodiè. Cod. de repud.

court of Holland in the year 1645; the decision and proceedings thereof are inserted in the *Papegay*. (1)

Divorce on account of Impotency.

§ 5. Further, if a marriage was *accidentally* contracted with a person, who either naturally, or in consequence of an incurable defect, is found incapable of procreation, such marriage, on the petition of the injured party, would be declared to be of no force, and even to be lawfully dissolved, and the injured party would be allowed to enter into a lawful marriage with another (2), as was understood by the court of Holland, by its sentence of the 24th April 1592, in a suit between Mrs. Maria Van Bekesteyn and Dirk Van Hove (3); and a similar decree was given in a suit between Adriaantje Adriaans, plaintiff, and Jacob Harmensz, defendant, on the 17th March 1617.

Of the Education of Children in case of Separation.

§ 6. The matrimonial tie being dissolved during the lifetime of the parties, the children must be brought up and educated by both parties equally, according to their ability and the extent of the estate, without distinction; and so it was understood by the court of Holland, December 13th, 1664, in contradictorio judicio. (4)

But in whose house, and under whose care the children are in such case to remain, is a questionable point, which is trusted to the discretion of the judge; who, according to circumstances, allows the boys either to remain with their father, and the girls with their mother, or otherwise; that is to say, all of them, without distinction, either with the father or with the mother (5); but the mother, *cæteris paribus*, and if there be no reason to the contrary, would be the nearest, if she wishes it; and so it is understood, even in other cases, as in the education and maintenance of natural or illegitimate children, as was understood in France (6), in Brabant, and other adjacent places (7), and likewise in Friezland. (8)

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(1) Page 57.

(2) Arg. l. 10. cum auth. seq. Cod. de repud. l. 39. § 1. Pf. de Jure Dot. Christin. vol. i. decis. 338. & vol. v. decis. 192.

(3) This sentence is given, Peter Bor's *Nederlandse Historie*, (History of the Netherlands) book 29. tom. 4. p. 15. and the proceedings thereof are inserted, under unknown names, in the *Papegay*, p. 57. et seq.

(4) Cap. quum haberet. 5. extr. de eo qui duxit in matrim. quam poll. adult. Grotius, Inleyd. lib. 3. part 35. n. 20. Christin. ad Leg. Mechlin, tit. 18. art. 6. Swed. de Aliment. tit. 1. quæst. 14. n. 4.

(5) Per Gloss. in L. Unic. Cod. de divortio facto. Menoch. de Arbitr. judic. cas. 168.

(6) A. Robertus, lib. 1. rer. Judicatar. c. 9.

(7) Christin. ad Leg. Mechl. tit. 18. art. 8.

(8) According to Joan. van den Sande, lib. 2. tit. 8. def. 1. See A. Peres. ad tit. Cod. ubi pupill. educari. deb. in fin. Maynard, lib. 6. dec. 50. Anton Faber ad Cod. eod. tit. Ordonantie van de Weeskamer, tot. Alkmar en Edam (Ordinance of the Orphan's Register of Alkmar and Edam) tit. 4. art. 5. 7. Coren. Consil. 5 & 17.

CHAP. XVI.

Of Guardianship and Guardians.

[Grot. I. 7. *et seq.*]

§ 1. *Guardianship defined.*
2. *Different kinds of Guardianship.*
3. *Of Guardians by Will.*
4. *Legal Guardians, how and by whom appointed.*
5. *In what Cases Guardians may give up their Office.*
6. *Of the Powers and Duties of Guardians.*
7. *Penalty on Guardians concealing Property.*
8. *How far the Proceedings of Guardians shall enure to the Benefit or Prejudice of their Wards.—In what Cases moveable Property may be sold by them.*
9. *In what Cases immoveable Property may or may not be sold.*
10, 11. *Of the Termination of Guardianship, by Wards coming of Age, or otherwise.*
12. *On the Termination of his Guardianship, in what Cases the Guardian is bound to make good all Losses.*
13. *Of the giving up of the Property by Guardians, on Minors coming of Age.*

Guardianship defined.

§ 1. GUARDIANSHIP is the legal management over any one's person, who, on account of minority or incapacity, is unable to protect himself (1). Guardians, tutors, or providers, are the managers and inspectors of orphans; that is, of all parentless, fatherless, or motherless children, who are under twenty-five years of age, whether males or females (2).

Different Kinds of Guardians.

§ 2. Guardians are appointed to superintend minors, either by last will, or by the lawful government (3). Guardianship, therefore, is divided into *testamentary*, that is, such as is constituted by last will, and *legal*.

Guardians born or *guardians by blood*, who formerly had the power of guardianship of themselves, are not at present admitted, unless they are empowered by government upon information taken and previous enquiry made (4); except only in the

(1) Inst. lib. 1. tit. 13. de Tutel. § 1.
(2) Cost. Antwerp. c. 43. art. 66. Christin. vol. iii. decis. 148. n. 14. et ad Leg. Mechl. tit. 19. art. 27. Montan. de Tutel. c. 37. n. 86. Andr. Gail. lib. 2. obs. 96. n. 1. Grotius, Inleyd. lib. 1. part 7. n. 1. Vinn. ad pr. inst. quib. mod. tutel. finitur. Et ad pr. Inst. de curator.

(3) Zypæ Not. Jur. Belg. de tutorib. in verbis tutela.
(4) Neostadt. supr. cur. decis. 59. circa fin. Christin. ad Leg. Mechl. tit. 19. art. 3. n. 10. et vol. iii. decis. 147. n. 4, 5. Rebuff. ad constit. reg. de sentent. provis. art. 3. Gloss. 2. n. 3.

territory of Voornland, where the surviving father or mother continues to be guardian in preference to others, and if there be neither father nor mother, the eldest and nearest male relation by the father's side, and so from the eldest to the nearest (the nearest by the father's side being always preferred to any by the mother's side), provided security be given. And in case of incapacity or inability in giving security, and securing the orphan, the nearest following after him is constituted guardian; and so on, until a fit person be found, according to the 74th article of the proclamation confirmed by the emperor Charles V. in the year 1519.

This mode of choosing guardians is also chiefly observed with us, but only upon information taken, and enquiry and election made, the power and choice remaining always with the magistrates, who, without any regard to the nearest by blood, are to choose for guardians such persons as they may think most proper for the benefit and advantage of the *pupils* or wards.

Of Guardians by Will.

§ 3. By last will, guardians are constituted over the persons of minors, as well by the mother as by the father (1); and although such guardians were appointed by the party first deceasing, the survivor may afterwards also appoint guardians with the same right (2); and, indeed, every one without distinction may, among us, appoint such persons as he shall think proper to superintend and take the management of his goods (3); the same practice also obtains in France, according to Argentre. (4)

But, at Alkmaar, testamentary guardians ought also to be previously *confirmed*, that is, approved of by the *Weesmasters* or Orphans' Registers (5); who, if there be sufficient reasons, may pass by or overlook such guardian, or nominate another person to act as joint guardian with them. (6)

If the testamentary guardians, or any of them, in case of death or otherwise, be wanting, others ought immediately to be placed in their room, by those who were empowered thereto by the same will, or otherwise by government (7); but this is to be understood without any further interference of the Weesmasters or Orphans' Registers in the government and administration of

(1) Contra. l. 1. Ff. de testam. tutel. l. 40. Ff. de administrat. tutor. l. 1. Cod. quando mulier.

(2) Contra. l. 27. Ff. de Testament. tutel. et tot. tit. Cod in quib. caus. tutor. vel curat. habent.

(3) Contra. § 3. Instit. de tutel. & § 4. Inst. quibus. testam. tutor. dar. pos. Grotius, Inleyd. book c. 7. et seq.

(4) Ad consuetud. Britann. art. 474. Gloss. 2. & art. 475. Gloss. 5. n. 4.

(5) Ordonantie van de Weeskamer Aldaar. tit. 7. art. 2.

(6) Ibid. art. 12.

(7) L. 11. Ff. de testam. tutel.

the orphan's person or property, as it militates against the ground and propriety of testamentary guardianship (1), in which the legal guardianship never takes place, except for want of testamentary guardians; and when testamentary guardians are once appointed, the legal guardians can in no case be substituted for them. But although a legal guardianship be renewed by the law, a testamentary guardianship continues; so that the *Weeskamer* or Orphan's Register, being once excluded by the right of father or mother, and without any distinction, it remains always excluded (2). This, however, is not so strictly observed (though contrary to law) by some *Weeskamers* or Orphans' Registers; who, upon the least deviation or neglect, maintain that the guardianship devolves upon them. I have seen instances of this kind, in which the Weeskamer excluded unlimitedly and perfectly. But if no election of guardians be made, or if the Weeskamer be excluded by two married people in a mutual will, the survivor being placed as guardian, with power to choose another guardian with him, or (in case of death) instead of him; and if the survivor depart this life without having provided a guardian by will, it has been understood by the Weeskamer in similar cases, contrary to the opinion of the lawyers, that the guardianship, and consequently the estate, had devolved upon him. (3)

Legal Guardians, how and by whom appointed.

§ 4. Antiently, where no provision had been made by the last will of parents, or of either of them, respecting the guardianship of their minor children, the guardianship over orphans usually appertained to the Counts; until it was granted by the Empress Margaret to the people of the southern part of Holland by a charter of the 10th May 1346, "that, in future, no guardianship should devolve by death upon the Counts, but that the orphans should have for their guardians one of the eldest persons who was most nearly related to them by the side by which they became orphans." In like manner, it was allowed by the same Empress Margaret, on the Friday after Ascension-day, to the people of Kenmerland, in the same year, that one of the relations of the four sides, viz. the nearest by the side of the father's father, by the side of father's mother, by the side of mother's father, and by the side of mother's mother,—"being a male, shall be placed as guardian over the children, who shall render

(1) Arg. l. 9. § 1. Ff. de Tutel. & rationib. distrah. & d. l. 11. Ff. de Testam. tut.

(2) See Consult. & Advys. Amstel. vol. iii. cons. 65. Rotterd. vol. iii. cons. 77.

(3) See the Cons. & Advys. vol. iv. cons. 167.

an account to them annually" (1); but in the southern part of Holland, those who officiated as guardians were obliged to do every thing in the presence and with the approbation of the justice or magistrate, and to render an account to him every year (2); and if there were no guardians by blood, or if they did not accept the guardianship within one month, the lord of the manor or the sheriff was to be guardian of the orphans (3); and as the nearest relations were not always the fittest or most capable persons, it was afterwards resolved that the government, i. e. the court of Holland (4), or the justice or weeskamer (in cities and in the country under their jurisdiction) of the place where the death occurred, should appoint guardians and superintendents, or others reserving the superintendence; for which purpose the surviving parent (whether father or mother), and some of the nearest relations of the deceased, or (if there be no father or mother) two of the nearest relations alone of each side, are obliged to appear within a certain time before the justice or weeskamer where the death occurred, and desire that guardians may be placed over the surviving orphans; and such justice or weeskamer, after information taken, is in the practice and under the obligation of appointing two guardians, who are the eldest and nearest of kin by the side of the deceased, if they be fit and proper persons; but if they be not duly qualified, the two eldest and nearest following after them are to be appointed, and so forth; and on failure of relations, two other capable men, either quite strangers to the deceased, or related by the side of the survivor, are to be appointed, upon previous information relative to the matter, and investigation had concerning their ability and fidelity; provided that the father or mother, grandfather or grandmother, being capable and willing, should be chosen in preference to others, with the addition of another guardian or guardians, the highest superintendence consequently remaining always with the court of justice or weeskamer (5); and this, although they were deprived of the inheritance of their children

(1) See the Customs of the southern part of Holland (*Costuymen van Zuid Holland*) p. 584. and the Charters of Kenmerland (*Handvesten van Kenmerland*), p. 14.

(2) See this stated at large in the Cost. van Zuid Holland, p. 501.

(3) Ibid. p. 502.

(4) Cur. Holland. decis. ult.

(5) Tit. Instit. de legitim. parent. tutela authent. Matri & Aviæ. Cod. quando mulier tut. off. Cost. Antwerp. tit. 43. art. 1. Grotius, Inleyd. lib. 1. c. 7. Arg. l. 1. Ff. de Jurisdict. Cost. Antwerp. tit. 43. art. 1. Vinn. Instit. de legitim. agnator. tutel. in fin. See also Keuren van Zeland, anno 1496, c. 2. art. 7. Van den Lande van Voorn, anno 1598, art. 74. Keuren van de Wees-kamer van Leyden, art. 13.; van Rotterdam, art. 8.

by ante-nuptial contract or otherwise (1); without such appointment women cannot be guardians over minors. (2)

But, at Amsterdam, a father, if he had been excluded from the inheritance of his child by any bequest or conditions, can neither be guardian, nor can any woman accept any guardianship there, although a mother or grandmother, not even when they may be heirs of their children; in which case, if they be capable thereof, they may have the administration of the property of their children or grand-children, upon giving security. (3)

But where fathers or mothers are constituted guardians, in case of separation or of difference with their children, their guardianship ought to cease, and another person ought for that time to be placed in their stead. So also, in case of a suit being commenced between a guardian and his ward, in as much as the guardian cannot exercise his authority, as such, against himself, another guardian is appointed, by whose intervention the suit is carried on; and when it is determined, his guardianship ceases. (4)

This guardianship the father and grandfather retain continually until its termination, without distinction, in the same manner as other guardians, but the mother and grandmother hold it only until they marry again, and mostly, under a renunciation of the benefit of the *Senatus consulti Vellejani*, and good security (5); but according to some, this practice is now no longer in use, except in those places where it is expressly stipulated by statutes, as often is the case. (6)

In the appointments of guardians, governments and magistrates ought particularly to ascertain whether the guardians be substantial men; and for that purpose, if there be any doubt, to take good security. (7)

Whoever is debtor or creditor of an orphan, may not be his guardian, and may be rejected on that account (8), unless he had been so constituted by last will, upon the previous know-

(1) See Ordon. van de Wees-kamer, Alkmaar, Monikendam, Edam, & Purmerend, tit. 7. art. 9. Briel, tit. 7. art. 7.

(2) L. 16. l. ult. Ff. de Tutel.

(3) See the Ordinance of the Wees-kamer there, art. 35, 36.

(4) Inst. lib. 1. tit. 21. De Auct. tutor. § ult.

(5) Auth. Sacramen. Cod. quando mulier tutel. offic. & Anton. Fab. ad Cod. tit. eodem. Sande, lib. 2. tit. 9. def. 3.

(6) See particularly the Statutes (*Keuren*) of Leyden, art. 13.; of Amsterdam, art. 36.; of Rynland, art. 17. et seq. Groenewegen, de legib. abrog. ad auth. matri. Cod. quando mulier tut. off.

(7) Inst. lib. 1. tit. 24. De Satisdat. tutor. Grotius, Inleyd. book 1. c. 9. Sande, lib. 2. tit. 9. defin. 9.

(8) Novell. 74.

ledge of the debt, according to the opinion of some writers (1). This circumstance he is obliged to make known before he accepts the guardianship; otherwise he loses his debt, if he be a creditor (2); and so it was decided against a guardian (who had been appointed upon a previous knowledge of the debt), by the court of Holland on the 17th February 1615, in the case of Jan Peter Maartensz, appellant, against Jan Peter Bolles, defendant; which case contains various other important points, and is therefore worthy of being examined.

If guardians or their heirs be found to have no sufficient means to answer for the execution of their guardianship, the governments who appointed them were accustomed to be responsible for it (3); which agrees with the tenor of a certain charter, granted to the people of South Holland by Count Jan Van Henegouwen on Sunday after St. Boniface's day, 1303, and containing the following among other points;—"and if it so happen, that the guardian alienates the property of the pupil (or ward), when he becomes of age, the lord of the manor is to pay for the same, in the manor where the succession occurred, and that lord of the manor shall have his remedy against the guardian, if he can." (4) But as the appointment of guardians takes place, among us, upon a perfect knowledge of all the circumstances, and upon good faith, although the pupils or wards may meet with some difficulties therein, in the judgement of many, such difficulties are not chargeable against the magistrates, unless there had been any unfaithfulness or fraud. (5)

But since orphans are nowhere expressly deprived of that right, nor by any general custom contrary thereto, except only that it might seldom or never have occurred; it certainly appears to be an equitable opinion, that the magistrate or government is bound for the deficiency, if it can be proved to them that they either took no security, or took insufficient security, at the time of the appointing such guardians. And so it was determined (6), on the 23d May 1646, by the court of Holland, in the case of Kasper Bussche, plaintiff, against Arnold Altera, defendant, and confirmed by the high court on the 30th May 1653.

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(1) See Sande, lib. 2. tit. 9. def. 1.
(2) Novell. 74. c. 4.
(3) Inst. lib. 1. tit. 24. de Satisdat. Curator. et tot. tit. de Magist. conv. § 2.
(4) Cost. Zuid-Holland, p. 466.
(5) Gothof. & Autumn. ad tit. Cod. de Magist. conven. Perez. eod in fine. Christin. vol. iii. decis. 181. n. 4. Zypæ, Notit. Jur. Belg. de tutoribus, in verb. Magistrat. Vinn. ad § ult. de Satisdat. tutor. n. 2. Grotius, Inleyd. book 1. c. 9.
(6) L. 1. Si præses, & seq. Ff. de Magistrat. conv.

In what Cases Guardians may give up their Office.

§ 5. If the guardian, whether appointed by last will or by the government, be unable, or otherwise be under great inconvenience, they may inform the court of their dislike and reasons, who, according to its discretion, will take cognizance, and provide as they think it expedient for the benefit of the orphans (1). But if guardians cannot absolve themselves by lawful and sufficient reasons, at the discretion of the court, they may (when unwilling to accept of the guardianship) be compelled thereto by imprisonment. (2)

Of the Powers and Duties of Guardians.

§ 6. Concerning the power and duty of guardians in executing their office, the following things are particularly to be remarked; on entering upon their guardianship, they ought to make a proper statement and description or *inventory* (3) of all the property belonging to the pupil or ward, to his or her nearest relations by the side of the deceased, likewise to the weeskamer or orphans' register, where it is not excluded; and annually, or once in every two years, to render a proper account of their administration, and to lay out the surplus according to their advice (4). This was at first enacted by the emperor Charles V. in the year 1548, at Augsburg, and is now always observed (5); notwithstanding they were excused from producing such inventory and account by the last will; whereof notice is taken by the weeskamer or the officers of the court of justice, at their discretion, to the most advantage, without being required to consider themselves entirely bound thereto by the said last will. (6)

Penalty on Guardians concealing Property.

§ 7. Whosoever conceals any property unfaithfully when the inventory is made, forfeits his share in the same, if he have any right thereto (7): so it was also determined by the court of Holland, where a widower, or a person remaining in the possession of the estate, unfaithfully concealed property, by making and delivering in a false statement and inventory, as occurred in

(1) See the *Keuren van de Weeskamer* (or Statutes of the Orphans Register) of Alkmar & Edam. tit. 7. art. 17.; Briel, art. 115.; Amsterdam, art. 38.; Rotterdam, art. 11.; Leyden, art. 16, 17. Cost. Antwerp. tit. 43. art. 26.

(2) Arg. § 3. Instit. de Satisdat. Tutor.

(3) L. 7. Ff. l. 24. Cod. de administrat. tutor. l. ult. § 1. Cod. arbiter.

(4) Zypæ, Notit. Jur. Belg. tit. de Tutor. in verb. Tutor. Contr. l. 1. § fin. l. 4. § 1. l. 2. l. 9. § 4. l. 10. Ff. de Tutel. & rat. distrah. Quibus demum, finitâ tutelâ, rationes redduntur.

(5) See the Keuren van de Weeskamer (or Statutes of the Orphans' Register) of Leyden, art. 53.; of Rynland, art. 44.; of Oudewater of the year 1609, art. 196.; of Alkmaar, tit. 8. art. 5.; of Monikkendam and the Briel, tit. 9. art. 1.

(6) Arg. l. 2. § 44. Ff. ad Senatus cons. Tetull. junct. l. 10. Ff. de confirm. tutor. l. 5. § 7. Ff. de administr. tutor. & l. 7. Ff. de ann. legat. Covarruv. var. resol. lib. 2. c. 14. n. 4. DD. ad d. l. 5. § 7. de Administrat. tutor. Montan. de tutelis. c. 32. reg. 5. Neostad. Decis. cur Holland. 20. Ordon. van de Weeskamer, tot. Rotterdam, art. 16. Alkmaar. tit. 9. art. 2. Cons. & Advys. vol. i. cons. 30.

(7) L. 59. Ff. ad Leg. Falcid. l. 48. Ff. ad Senat. Trebell. l. 5. Cod. de legat.

the case of Henrik and Mayken Geurs, as heirs Elsjen Claas Van Swieten, against Marytje Bodein, widow of Gerrit Pietersz Knuysting, on the 10th November 1662 (1). If such concealment takes place on the part of other guardians, they are punishable on that account, and are bound to make good the loss (2). At Leyden they forfeit the just value of the property out of their own effects, for the benefit of the orphan, besides being subject to arbitrary correction (3). If any property be concealed without their knowledge, or be afterwards discovered, the guardians are obliged to add the same to the inventory. (4)

How far the Proceedings of Guardians shall enure to the Benefit or Prejudice of their Wards.

§ 8. The administering guardians ought also to lend out and employ the money for the benefit and good security of the wards or pupils, directly, upon good mortgage or good security; or otherwise, in some places after two, and in others after three months negligence, they may be obliged themselves to pay the proper interest thereupon. (5)

The power of guardians over their pupils or wards is so complete, that all transactions whatsoever relating to them ought to be made by their guardians, and in their name (6); and all transactions and engagements made by the pupils without their guardians will be considered as not subject to be enforced by law, and of no effect so far as they might have been deceived or prejudiced by such transaction; but if they be enriched, it shall remain effectual; so that pupils or wards may make a contract for their own benefit, and bind another thereby, and likewise be held responsible *pro tanto*; but they may not bind themselves to their prejudice. (7) This mostly takes place in mutual transactions, such as purchase, hire, or the like.

In what Cases moveable Property may be sold by them.

The *moveable* property of pupils may be sold by them for their use with the knowledge of the weeskamer or register of orphans' effects, where the latter is not excluded. (8)

(1) See the Wees-keuren (*Orphan-Statutes*) of Amsterdam, art. 5.; of Leyden, art. 29.; Oudewater, art. 177.; Wesop, art. 16.; Alkmaar, art. 8.

(2) L. ult. § 1. Cod. arbitr. tut.

(3) Wees-Keuren, Leyden, art. 29.

(4) The Wees-kamer, Amsterdam, art. 5.; Briel, art. 29.; Alkmar & Edam, tit. 2. art. 8.; Leyden, art. 30. Cost. Antwerp, tit. 43. art. 34.

(5) L. 7. § 11. Ff. de administrat. tutor. See also Neostad. Suprem. Cur. dec. 51. Sande, lib. 2. tit. 9. def. 13. & lib. 3. tit. 14. def. 6. Grotius, Inleyd. book 1. c. 9. vers. de Penningen. Cons. & Advys. part 1. cons. 117. part 2. cons. 146. *infra*, book 4. ch. 7. § 6. Neerl. Adv. 1. c. 61. Ordon. van de Weeskamer, Leyden, art. 39.; Alkmaar & Edam, tit. 8. art. 9. 11.; Rotterdam, art. 26.; Middelburg, art. 37.; Briel, art. 124. 126.; Monikkendam, tit. 8. art. 9. Cost. Antwerp, tit. 43. art. 41.

(6) Tot. tit. Inst. Dig. & Cod. de authoritate tutorum.

(7) § 2. Inst. quib. alienare licet. et Vinnius ad idem. l. 47. Ff. de Solut.

(8) L. 5. § 9. Ff. de reb. eorum qui sub tutela.

In what Cases immoveable Property may or may not be sold.

§ 9. But *immoveable* property may not be sold without the knowledge of the court, or the judge of the place (1); but such sale is only permitted when it is necessary to satisfy a debt, to maintain the pupils, or otherwise for their public benefit. (2)

In both cases the property is to be sold publicly, and to the highest bidder (3); and, so far as relates to *moveable* property, should any loss be incurred, it will be chargeable to the guardians. They will likewise be chargeable with the amount of the loss, so far as relates to the immoveable property; besides which, the sale would be of no effect; viz. if the pupils should suffer loss in consequence of the property not having been sold publicly, but not otherwise, as was judged by the high court in the case of Meester Gysbert Van Netse, as guardian of his deceased son, against Joost Henrixsz and Gerrit Van Bracum. (4)

Of the Termination of Guardianship by Wards coming of Age or otherwise.

§ 10. Further, by the death of the pupils or guardians, and by their becoming incapable or unable, or by any such cause, the guardianship terminates (5); as it antiently used to do with some at their eighteenth, and with some at their twentieth year; as may be seen in several old charters, until at length the written laws were followed in this respect. Accordingly, the guardianship, both of young men as well as of young women *(confusa curationis et tutelæ distinctione)* ceases on their attaining their twenty-fifth year, or on the marriage of the pupils (6); unless for great reasons (at least with regard to *immoveable* property) such guardianship be extended beyond the twenty-fifth year, or after the solemnization of matrimony. Such an extended guardianship is, in many places, left with the guardians appointed, at the discretion of the judge or of the weeskamer (or orphans register) (7); and in such places the minors or married persons do not even become their own guardians until, after examination of the weeskamer, they are legally released, and permitted to be their own guardians.

(1) See the Ordon. van de Weeskamer, Leyden, art. 34.; Briel, art. 103.; Alkmaar & Edam, tit. 8. art. 15, 16.; Rotterdam, art. 25.

(2) L. 5. § 9. & § 15. de reb. eor. qui sub tutela. l. 5. Cod. de præd. minor. Arg. l. 8. § 17. Ff. de transact.

(3) Arg. l. 1. Cod. de fid. & jur. hast. fisc. Rebuff. ad Constitut. Reg. tom. 2. de restit. artic. 2. Gloss. 7. n. 8.

(4) L. 11. § 2. l. 27. Ff. de Minorib. Montan. de tutel. c. 33. n. 450.

(5) § 3. Instit. quib. mod. tutel. finitur. tot. tit. Ff. & Cod. de suspect. tutor.

(6) Pr. Inst. de Curator. Gudelin. de Jur. Noviss. l. 1. c. ult. in fine. Christin. vol. iii. decis. 148. n. 14. 16. & vol. vi. decis. 82. n. 9. Zypæ, Notit. Jur. Belg. tit. de Tutoribus, vers. Matrimonio. Quod in Germania receptum esse, testatur. Gail, lib. 2. obs. 96. Et in Gallia, Baro. ad pr. inst. quib. mod. tutel. fin.

(7) See Keuren van de Weeskamer (Statutes of the Orphans' Register) of Leyden, art. 59, 60; of Rotterdam, art. 38, 39.; Keuren van den lande Zeland (Statutes of the country of Zealand), ch. 2. art. 31.

§ 11. I have said the *twenty-fifth year*, or *state of matrimony*; because with us the matrimonial state usually constitutes a person his own master, as appears in the statutes of the weeskamer, or orphans' register of Dordrecht, and other places. (1) Thus, by a charter of Duke Albert, it was granted to the people of Delft on St. Nicholas's day, in the year 1389, "That the counsellors, who are to be guardians of orphans, should be until their twentieth year, unless they marry upon hearing common friends." And this agrees with the custom of Guelderland, and other provinces (2), which also is observed throughout France, according to Montanus. (3)

Sometimes, however, minors are permitted by licence from government, for some reasons, to have the free and complete management of their property, and to be their own masters and guardians, even before they come of age. This is usually granted to young men, who conduct themselves well, at their twentieth, and to daughters at their eighteenth year; in order that they may, from that period, have the entire management and direction of themselves, their property and affairs, without the interference of guardians (4). But with us it is even granted by the States of Holland (who have complete authority, and to whom application is to be made for such purpose) to persons under eighteen years of age; viz. upon application to the States of Holland by petition, which petition is referred to the government under which the petitioner resides, for its advice thereupon, after information taken of the matters, the life and conduct of the petitioner; which being done, such licence is granted or refused, as circumstances require. But persons who are thus made of age, cannot alienate their immoveable property, except with the knowledge of the judge, unless it was expressly granted by the letters of the court. (5)

On the Termination of his Guardianship, in what Cases the Guardian is liable to make good all Losses.

§ 12. On the termination of the guardianship, the guardian may be summoned to make good all losses and inconveniences which were occasioned by their public omission or negligence in the affairs of the pupils. (6)

(1) Keuren van de Weeskamer, Dordrecht, art. 59.; Haarlem, art. 6.; Amsterdam, art. 24.; Briel, tit. 10. art. 154.; Alkmaar, Edam, Monnikendam, Purmerend, tit. 10. art. 5.

(2) Landregt van de Velew, c. 26. art. 1. Brabant; Cost. Antwerp. tit. 43. art. 48.; Mechlin, tit. 19. art. 27.; Hartogenbos, c. 23. art. 22.; Friesland, cost. Friesl. art. 9.; Zealand, Ordonnantie van de Wees-kamer der Stad Middelburg, art. 52.; Flanders, Costuymen Ghent, rubric. 22. art. 10.; Bruges, tit. 18. art. 2.; Sluys, rubric. 18. art. 15. n. 18.

(3) Montanus, de tutel. c. 15. n. 18.

(4) L. 1, 2. Cod. de his qui ven. ætat.

(5) Grotius, Inleyd. lib. i. c. 10. vers. Ten derden. Zypæ Not. Jur. Belg. tit. de integr. restit. & tit. de tutorib. vers. Matrimonio.

(6) L. 7. Cod. Arbitr. tutel.

For, further, guardians are not liable to make good misfortunes or losses which have occurred accidentally, without their fault or omission; but such losses ought to come in prejudice of the pupils themselves (1): for instance, if a guardian had laid out the money of his pupils to the best advantage, with persons who, at the time of its being so laid out, were judged good by every one, and had full credit; or if he had left the money upon bond in the hands of the same persons with whom the father or mother of the children had placed the same, because he knew not of their insufficiency; if such persons afterwards happen to decay, or become bankrupt, he will not be obliged to make good the loss which may thus be sustained by the pupils (2). And so it was judged by the court of Holland, in the case of Claas Lottens Gaal plaintiff, against Hendrik Bakker defendant, on the 18th December 1613.

In like manner an *inspecting guardian* (3) is not obliged to make good any loss incurred in the property of pupils, so long as the *administering guardian* can pay; because the administering guardian ought to be careful in all his transactions. So also, guardians who had not the administration, have the benefit of excussion (4); by virtue of which the person who had the actual administration of the property of the ward, was liable to be first sued: and it is only in case of his being found insolvent that the inspecting guardians (who had no such administration) are liable for the deficiency. (5) And, agreeable to this rule, was the decision of the court of Holland, in the case of Jannetjen Aerts appellant, against Gilles Gerards, on the 25th March 1615. (6)

Of the giving up of the Property by Guardians, on Minors coming of age.

§ 13. For the benefit of the pupils or wards it is to be remarked, that all acts passed before the *weesmasters*, or registers of orphans' estates, with respect to those whose property remains in the *weeskamer*, or orphans' hall, are considered, and are of the same force as judicial bonds. (7)

By the various statutes referred to below (7) it is enacted,

(1) Arg. l. 23. Ff. de Reg. Jur.

(2) L. 37. § 1. Ff. de Negot. gestis. d. l. 7. Cod. Arbitr. tutel. junct. l. 3. Ff. de cond. & demonstrat. & ibi Castrens. Cyn. et Alberic. ad Auth. novissimo Cod. de administrat. tutor. quos sequitur Hartman Pistor. lib. 1. quæst. 40. n. 29. See Sande, lib. 2. tit. 9. def. 13.

(3) A guardian who has no actual management of the money.

(4) In the original, *beneficie van excussie*, answering to the *beneficium excussionis* of the civil law, which was a seizure and detention of goods, until full payment was made.—Editor.

(5) L. 3. § 2. Ff. de administr. tutor. l. ult. Cod. de divid. tut. l. 2. vers. cum alter. Ff. Si tut. vel curat. non gess.

(6) See Carpsov, Defin. For. pars 2. const. 11. def. 36. Nich. Everh. consil. 91. n. 2. & consil. 191. n. 7, 8, 9. Montan. in tract. de tutel. c. 39. n. 149. 155. 160. 178. et seq. Christin. ad Leg. Mechl. tit. 19. art. 23. n. 3. & vol. 1. decis. 180.

(7) See the Ordinance of the Weeskamer, Leyden, art. 42.; Amsterdam, art. 29.; Charters of Wesop, p. 30.; Resolution of the States of Holland of the 2d September 1592.

among other points, that the principal of orphan rents may be desired to be paid off, and must be redeemed when the children come of age; and also, that if the principal be at any time requested to be paid off, on six months previous notice, it must be paid; and that those who are desirous of redeeming must give three months previous notice thereof: so that if the children, on coming of age, wish that the said rents should be redeemed, the notice for such redemption ought to be made within six months after the children have come of age; otherwise the rents ought to be further continued until it shall be convenient to the debtor to redeem the same: it is also provided, that the payment of the rents ought to be made precisely on the day the same becomes due; namely, without deducting any known or unknown incumbrances; and that when the redemption takes place, the parties levying the rents have the option of taking them either according to the currency at the time of the redemption, or the rate of the three previous months, or of the subsequent currency; lastly, it is provided, that the securities are bound as debtors, each for the whole; and that the wives are also bound, although they had not renounced the benefit of the senatus consulti velleiani, ordinis, divisionis et excussionis; all which is included in the term of *weeskamers regt*, or the right of the orphan-hall, without any further or other expressions being necessary. (1)

By the ordinance of the weeskamer of Haarlem (art. 29.) it was also enacted, that the money of orphans lent out by weesmasters, or registers of orphans' property, should be preferred to all other debts, unless they are older letters; and that the orphan book should be of the same force as judicial sealed letters, and have the same power upon the property entered on the orphan book, so long as it is not discharged and redeemed. The same right was conceded to the people of Wormer and Gisp, by a grant of the States of Holland of the 10th May 1617.

Guardians are also appointed over those who have no power over themselves on account of incapacity, or want of understanding and senses; such are mad and frantick people, who stand in need of some superintendant: and those persons also, who through their loose, inconsiderate, voluptuous, and profligate life, squander their property, are, upon information of the

(1) See the Weeskamer or Orphan Statutes of Leyden, art. 42, 43, 44, et seq.; of Delft, art. 26 & 27; and of Alkmaar, art. 6.

matters, placed under guardianship, and proper care is to be taken of their property, like that of minors; and every one is prohibited by advertisement from having any transactions with them. (1)

(1) § 3. Instit. de Curat. et tit. de curat. furios. Grotius, Inleyd. book 1. c. 11.

COMMENTARIES

ON THE

DUTCH-ROMAN LAW.

BOOK II.

CHAP. I.

Of the Nature of Things, and the real Distinctions thereof.

[Grot. 2. 1.]

§ 1. *Things defined.*
2. *Things are either simple,*
3. *or Compound;*
4. *Corporeal;*
5. *Incorporeal;*
6. *Moveable or immoveable.*
7. *How Actions, Credits, Rents, &c. are to be considered.*
8. *Of the different Manners in which Things are treated of.*
9. *Of Things belonging to nobody.*
10. *Of the different Kinds of Things belonging to anybody.*
11. *Of Things belonging to every one,*
12. *Of the Nature and different Kinds of Things which are in common among Mankind in general.*
13. *Of the Right of Fishing and Fisheries.*
14. *Of Things common to the Public.*
15. *Of Things belonging to particular Persons.*

§ 1. HAVING already treated of persons in the foregoing book, let us now proceed to enquire concerning things; by which we are to understand whatever may be opposed to persons, and of which it cannot be said that they are persons. Things defined.

Things are to be considered either according to their own nature, or according to their uses.

Things considered according to their own nature, are distinguished into simple or compound.

Things are, either simple,

§ 2. A *simple* thing is one that has no concern with any thing else, but is a mere demonstration of a proposition, as for example, that man, that land, that money.

or compound;

§ 3. *Compound* things are those in which are included things of various kinds, demonstrating what has been proposed, and consisting of a whole, which comprehends many parts; as, an inheritance or a generation, to which belong many of the same kind: for example, under the term *animal* are included *man* and *beast;* under the word *beast* are comprized a *horse*, an *ox*, and an *ass;* and to the word *man* belongs John, Peter, Paul; and to an *inheritance* belong all the goods of the deceased, viz. *house*, *garden*, *chattels*, &c. (1)

Things are further distinguished into corporeal and incorporeal.

Corporeal,

§ 4. *Corporeal* things are those which may be touched and seen; as, for example, houses, lands, cloth, &c. (2)

or Incorporeal.

§ 5. *Incorporeal* things are those which are not subject to the touch or sight, but consist in rights and privileges; as a right of inheritance, a right to go over land, and the like. (3)

Moveable, or immoveable.

§ 6. *Corporeal* things again are either *moveable* or *immoveable*.

Moveable things are those which move by themselves, as beasts, horses, cows, &c. (4); or must be moved by others, as a stone or a sword.

Immoveable things are houses, grounds, &c. under which is also included whatever is immoveable by nature, or is fastened with nails. (5)

How Actions, Rents, Credits, &c. are to be considered.

§ 7. But in order to judge whether debts, actions, and credits are considered as immoveable, the following distinction ought to be observed; viz. the actions, and the right that one has upon or to immoveable property, are considered as immoveable goods, and all others are as moveable (6); whence it arises, that some persons, without distinction, consider annual rents also as immoveable goods, if the same are established and secured upon immoveable things (7). Nevertheless it is to be understood,

(1) L. 1. § 7. Ff. ad l. falcidia.

(2) § 1. Instit. de reb. corp. & incorporalibus.

(3) § 2. Instit. de reb. corp. l. 208. Ff. de verb. signif.

(4) L. 39. Ff. de verb. Signific. & l. 3. § 13. Ff. de acq. vel amittenda possess.

(5) L. 17. in pr. cum. §§ seq. Ff. de act. empt. quod eleganter, tractat Mantica de tacitis & ambiguis convent. lib. 4. tit. 15 & 16.

(6) Bartol. in l. si sic 75. §. fin. Ff. de legat. 1 & in l. moventium 93. Ff. de verbor. signif. and cons. 50. Chassen ad Cons. Burg. rubr. 4. § 3. vers. omnium mobilium, num. 9. Christin. ad Leg. Mechlin. tit. 9. art. 8. num. 16. & tit. 16. art. 2. n. 14. Gail, lib. 2. observ. 11. num. 9. Tiraquell. de retract. municip. § 1. Gloss. 7. num. 1. Zypæ. Notit. Jur. Belg. de hæred. vel act. vend.

(7) See Christin. ad Leg. Mechlin. tit. 11. artic. 25. num. 8, 9. and vol. decis. 212. num. & decis. 213. num. 7. l. 14. Cod. de secund. Nupt. Fab. ad Cod. lib. 6. tit. 19. defin. 11.

that such actions may be reckoned as immoveable property, provided they really consist in enjoyment and possession; as quit-rents, tributes, power of redemption, or the like: but other common, secured, or mortgaged rents, which are redeemable, consisting of a sum of money, as a capital sum, and of annual rent, are to be considered as nothing else but immoveable property, because the creditor never becomes the owner of the mortgaged property; for it may only be sold according to the judgement and decree of the judge, for the purpose of realizing the capital sum and the interest which has accrued thereon, so that it always is and remains an action of money(1); and it was accordingly understood so by the Supreme Council, in March 1661, in the case of William Lauwer versus the heirs of Niclaas Lauwer, and lastly on the 24th June 1664, in the case of Maria Van Santen, widow of Doctor Johan Van Blenkvliet, versus Adriana Van Gufdorp, widow of Dominicus Van Blenkvliet; and on December 23, 1674, the court of Holland decreed, in the case of Abraham Van Bassen against N. N., that bonds for securing the payment of rent should be considered as moveable goods. (2)

Of the different Manners in which Things are treated of.

§ 8. With regard to the use of things, there are two points to be observed, they are, 1. either, things belonging to anybody, or, 2. things belonging to nobody.

Things belonging to nobody are those, which neither belong to the property of any person, nor are possessed by any one; such as newly-discovered islands, shells cast up by the sea, wild animals never caught, or property thrown away or abandoned.

Of Things belonging to nobody.

§ 9. Further, things belonging to nobody, being generally divided, may be brought into the possession or property of some person, such as things that never had any owner, or things abandoned by their proprietors, as fishes, birds, and wild animals, which have never before been possessed by anybody (3), goods which abandoned by their original owner, as the finding of sea, and hidden treasures, which belong to the first occupant and finder of them (4); of which we shall hereafter treat more particularly.

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(1) See Argentr. ad cons. Brit. art. 61. Glos. 1. n. 5. art. 219. Gloss. 6. per tit.

(2) Vide Neost. de Pact. antenupt. obs. 2. n. 13. & in notis. Vide Wesel ad Nov. Ukr. art. 12. quæ novella quosdam redditus annuos pro immobilibus habet. Et circa alia hujus materiæ Wesel cum Rodenburgo, ibidem allegato, non ejusdem cum van Leeuwen opinionis est.

(3) § 6, 7. 12. Inst. de rer. divis.

(4) d. § 12. juncr. § 46. Instit. de rer. divis. l. 1, 2. Ff. pro derelict.

Among the things which can be no man's property are things sacred, religious, and holy, and places dedicated to God; such are churches, chapels, graves, and the dikes of towns, and the like (1); but, since the reformation, we pay no such veneration to sacred places (2); and persons have a complete right and property in the graves which are in churches, and they may be sold and alienated by the true proprietors as their own property. (3)

Of the different kinds of Things belonging to anybody.

§ 10. Things belonging to anybody may be said to belong, either to all men, or to any community of men, or to particular persons. (4)

Of Things belonging to any one.

§ 11. Things belonging to all mankind are the sea and the air, as also the sand and the shore of the sea (5); which, according to the law of nations, every one is at liberty to navigate, fish in, and to make use thereof as he may think proper, but without injuring any body (6); and how far this liberty extends among us may be seen in the writings of Grotius, Selden, and others. (7)

The air may be used by every one without restraint, for building right above his ground, in length and breadth proportioned to his ground. (8)

Of the Nature and different Kinds of Things which are common among Mankind in in general.

§ 12. Things belonging to any community are either *common to the land*, or *common to the people*.

Common to the land are those things which belong to the whole civil society; viz. waters, streams, rivers, highways, fords, navigation from each province, as also the ground and banks of those waters, forasmuch as they are covered for the most part of the time (9). For example, the communication of Holland and West-Vriesland comes to the Rhine, the Waal, the Maas, the Yssel, the Leck, the lakes and navigable waters, together with the ground and shore appertaining thereto; and forasmuch as they run within the limits of Holland, the government has the power and right to lay upon them taxes, gabels, and other impositions, payable by the strangers who eventually may make use of such streams and waters. (10)

(1) § 7. junct. § 12. instit. eod. Novell. 76. cap. 1. & vers. 131. cap. 7. & tot. tit. 1. & in 6. de Eccles. conseq.

(2) Calvin. Instit. lib. 3. cap. 20. n. 30. Ames. Anti-Bellarmin, tom. 2. lib. 6. cap. 7. quæst. 3. 5. 8. seq. Rivet, Controv. tract. 2. quæst. 41.

(3) Grot. Inleyd. lib. 2. part 1. n. 24.

(4) Pr. instit. de rer. decis.

(5) § 1 & 3. Instit. de rer. divis.

(6) L. 4. Ff. de rer. divis. § 5. instit. eod.

(7) See Grotius de Jure Belli, lib. 2. c. 3. n. 9. ejusd. Mare Liberum, c. 5. Selden, Mare Claus. & Pontan. versus Selden; I van Heemskirk, in his Batavise Arcadia, page 462, and the continuation thereof, printed in the year 1663, page 298. 300, et seq.

(8) L. 8. Cod. de Servit.

(9) § 2. Instit. de rer. divis. & cap. unic. quæ sunt Regalia feud.

(10) See Grotius, Inleyd. lib. 2. c. 1. n. 15, 16. 26. & de Jure Belli, lib. 2. c. 3. n. 14.

§ 13. But as the same were antiently granted to the Earls of Holland for their support, so the principal use and right thereof have belonged ever since to the dignity of the Earls; in which is also included fishing in the same waters, which every one at present may not pursue (1) unless it be granted, farmed, or otherwise duly allowed to them (2); but fishing with an angling rod at all places is allowed to every one without injuring another. See Placaat, April 13, 1558, by the States of Holland, June 3, 1609, junct., the Placaat of the Court of Holland, Aug. 3, 1613, and May 18, 1643. By which corporal punishment is denounced against those, who, under pretext of angling, trespass on the lands in Rhineland and its dependencies, and cause any damage to any person's hay, turf, reed, small and thick-set alder trees, or other plantations. Of the Right of Fishing and Fisheries.

§ 14. Things *common to the public* are those which in a smaller degree also belong to civil society; such are the goods of cities, villages, manors, the precincts or liberties of a town or village, guildhalls, or those belonging to handicraft societies, families, assemblies, and other communities; as senate houses, houses appropriated to particular districts, villages, and manors, markets, churches, guildhalls of fraternities, artillery yards, playhouses, burying places, courts of justice, tribunals, and the like (3). Which things may serve for many purposes, but each of them must be made use of separately, agreeably to the regulations concerning them, unless it happens otherwise with common consent. Of Things common to the Public.

§ 15. The things *belonging* to *particular* persons, are many and various, and they are distinguished into moveable and immoveable. Of Things belonging to private Persons.

Moveable things are those, which from their own nature may belong to one as well as to another, and may be acquired from every person with the consent of the proprietor, and may be disposed of.

Immoveable things are such as belong to particular persons, and can by no means be acquired (4). They are either entirely subject to disposal or not, as the air or the sea, or are only partially disposable, the alienation and disposal of them being prohibited by right and laws (of which we have treated in § 8.) or by the will of the former proprietor, as fiduciary and mortgaged goods, as also all spiritual chattels and incomes, of which we shall treat in the ensuing part of this work.

(1) Secundum § 2. Instit. de rer. divis.
(2) Placaat, April 10, 1550; Sept. 8, 1552; April 13, 1558; May 14, 1586.
(3) Arg. § 6. de rer. divis.
(4) L. 34. § 5. Ff. de Contr. Empt.

CHAP. II.

Of Property, and how it may be acquired.

[Grot. 2, 3.]

§ 1. *Property defined.* | § 2. *How acquired.*

Property defined.

§ 1. ALL right to any goods consists either in property, or in right of possession.

Property is that right which appertains to every thing (1), whether it be in possession or not; because it may consist of property without possession, or of possession without property (2); in consequence of which, property is distinguished into *full* and *defective* property.

Full property is that which any person has, besides the right of property, and also the complete use thereof.

Defective property is, when a thing belongs to one person, the benefit of which is enjoyed by another (3); or in which there is some defect, so that the proprietor cannot fully dispose of it agreeably to his desire. (4)

Full property, again, consists of one or of many things, or of corporeal and incorporeal things, agreeably to the distinction above stated.

How acquired.

§ 2. The property of a single thing, whether it be possessed by any one, or have already appertained to another, is acquired in various ways and means; some persons have enumerated eleven ways; others, nine; and others, again, seven, five, and less; but it would be more proper and convenient to divide them into three classes, under the general appellation of *acquisition*, viz. first, by occupancy, or entering into and taking possession of a thing that is hitherto unowned; secondly, *by obtaining it afterwards by increase*; and, thirdly, by a *donation made by the owner*. Of these three modes, the two first relate to the acquisition of things which have no owner; and the last to the acquisition of things which belong to another person.

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(1) L. 17. Ff. ad L. Aquil. l. 16. § 1. Ff. de Usu et habitat.
(2) L. 12. Ff. de acq. vel amitt. possess.
(3) § ult. Inst. de usufructu.
(4) L. 15. § 1. Ff. de Servitut. l. 5. § 9. Ff. de Oper. Nov. nunciat.

CHAP. III.

Of Occupancy, or the Acquisition of Property having no Owner, by entering upon it, and taking possession thereof.

§ 1. *Of the acquisition of living Things, having no owner.*
2. *Of the hunting of wild Animals;*
3. *To whom permitted.*
4. *Of Fowling.*
5. *Penalties on taking Swans.*
6. *Who may have Decoys, and in what Manner, and of their Privileges.*
7. *Of the Right of Fishing.*
8. *Of the Acquisition of inanimate Things, having no Owner.*
9. *Things found in the Sea, or stranded, or lost, by whom to be appropriated.*
10. *Of the Booty and Plunder of Enemies.*
11. *Of barren and abandoned Lands.*
12. *The Nature of Boeseurregt.*
13. *Of Treasure-trove.*

§ 1. TWO kinds of things are comprised in the taking possession of any thing that has no owner, viz. animated creatures, as wild and uncaught animals, or of inanimate things, which include every other kind of things. Of the Acquisition of living Things, having no Owner.

I say *wild* animals; because animals are either tame by nature, or made tame by custom, or entirely wild by nature. Of these, such as are wild can become the property of any one only by possession and occupancy (1); for animals which usually go from and return again to the house, as bees, pigeons, ducks, swans, and the like, though they are wild by nature, and though they go to a great distance, are nevertheless considered as being our property; and they may not be possessed by any other person, unless they have been out beyond their time, given up, and abandoned by us, without a hope of their returning back. (2)

All other wild animals, viz. birds, fishes, and other beasts living in the sea or in any other waters, in the air, or upon the earth, according to the first institution of laws, may be caught, and possession may be taken of them (3): such was from the beginning the general right; and it was pursued by every one, whether rich or poor; till such time that the hunting and flight of the wild animals became peculiar and hereditary to the princes and gentlemen, and to other supreme magistrates, and limited

(1) § 12. Inst. de rer. divis.
(2) § 15. Instit. de rer. divis. l. 4. l. 5. Ff. de acq. rer. domin.
(3) § 13. Instit. de rer. divis. l. 3. Ff. de acq. rer. domin. See Gen. i. 9. Cicero de Offic. lib. 1.

under certain orders (1); in consequence of which some of them keep their game in their inclosed parks and fisheries: hence it is to be understood that those persons who keep their game in their own inclosed parks, are the owners thereof, and they may not be caught by any other person whosoever (2). Fishing in the confluence of waters, fish-ponds, &c. belonging to the vassals of his imperial majesty, or to other subjects, has several times been prohibited under a severe penalty; nor may any person kill their swans, geese, and pigeons, or any other birds, or shoot them with guns, bows, or catch them with nets, cords, falls, or with any other instruments; or steal the eggs of those birds; or interrupt them in any way whatsoever. (3)

Of the hunting of wild Animals;

§ 2. I shall now proceed to shew particularly, how far the hunting of wild animals extends among us, and to whom it is allowed, and to whom not. It is to be observed,-that the hunting and appropriating of wild animals may be done in three different ways; viz. on the earth, in the air, and in the water; and they are generally distinguished by the terms of hunting, fowling, and fishing. (4)

to whom permitted.

§ 3. The hunting of the wild animals, viz. deer, does, roes, hogs, &c. may not be pursued by every one indiscriminately, but only by those permitted by the earls or counts; and barons are allowed to hunt only one deer annually. (5)

Small wild animals, such as hares and rabbits, may be hunted by all nobles and principal officers of the country (except in certain places which were antiently appropriated to the Counts), who are specified by Merula (6); who has discussed at length both the mode of granting permission for hunting, as well as the manner in which the chase was to be pursued. With the exception of these persons, no one is allowed to catch either hares or rabbits (7), even in his own land. (8)

Of Fowling.

§ 4. With respect to the flight and catching of birds, it is not so positively fixed; but the common people are only forbidden to catch the following, by means of birds of prey, viz. partridges,

(1) See Merula, van de Wildernessen, lib. 2. tit. 2. cap. 1. Grotius, Inleyd. book 2. part 4. See also Christin. vol. v. decis. 84. Gudelin. de Jur. Noviss. lib. 2. cap. 2. Andr. Gail, lib. 2. observ. 68.

(2) Arg. § 12. Instit. de rer. divis. vers. quicquid autem. junct. l. 3. § 14. Ff. de acq. vel amit. poss. Zyp. Not. Jur. Belg. tit. de jure fisci. vers. feræ.

(3) Placaat, April 10, 1550; Sept. 8. 1552; May 14, 1568; Feb. 27, 1602; and Jan. 11, 1642.

(4) § 12. Instit. de rer. divis. & l. 2. § 1. Ff. de acquir. rer. domin. See Merula, van de Wildernessen, lib. 2. tit. 2.

(5) Zypæ, Not. Jur. Belg. tit. de venat. ferar. Merula, van de Wildernessen, lib. 1. tit. 2. c. 1. in pr. Placaat, Dec. 26, 1517; art. 19. May 19, 1544; and Feb. 12. 1561. art. 7.

(6) Wetten, der Wildernessen, lib. 2. tit. 2 & 3.

(7) Grotius, Inleyd. lib. 1. c. 14.

(8) Ibid. lib. 2. c. 4. n. 26.

pheasants, bitterns, herons, quails, cranes, wild swans, bustards, guillemots, divers, and grebes, boat-bills, &c. the pursuing of which belongs exclusively to the Counts only, and to such nobles as are favoured therewith by the Counts, with the knowledge of the foresters and esquires. (1)

Penalties on taking Swans.

§ 5. By a placaat of the 13th April 1559, all persons are prohibited from shooting either old or young swans, or catching them with nets, or with any other instruments, or from hunting them with dogs, so as to make these bite: and further, no person may steal either the eggs of swans, or their young, on pain of being fined for the first offence twenty-five gilders, and thirty for the second, besides arbitrary and exemplary correction. Moreover, no person may carry any wild or tame swans, either marked or unmarked, without heads or feet, for sale, or sell the same, either on market days, or make a present of them to any person without declaring the person from whom they obtained them, and to whom they did belong, and also by whose order they did so, on the penalties above specified. By a decree of the Court of Holland, dated Dec. 22, 1555, it was declared, in the suit between Mr. Philip van Ligne, Lord of Wasnaar, plaintiff, and Jan Vorn van Wyngaarden defendant, that in Holland there is an old custom, that those who fetch a swan, or take it away from any person, are to be punished by the *pluymgraaf*, or overseer of the poultry, in the following manner; viz. that officer hangs the same swan or swans on a piece of timber fixed in a large parlour, one foot above the level of the floor, and pours over the swan a quantity of good red wheat, until the bird is completely covered with it, which wheat is declared to be forfeited to the parties whose right of fowling was violated, besides such pecuniary penalty as may be awarded. (2)

If any person unintentionally take any noble birds, he will be declared not guilty of such taking, provided he carry the bird to the hawk-house (*valk-huys*) at the Hague, but will receive for it a reasonable reward. (3)

All other wild birds may be caught by any person without distinction; and as soon as they are taken, they instantly become the property of the captor. (4)

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(1) In the original *Meester-Knapen.*—See Grotius, Inleyd. lib. 3. tit. 4. vers. Den Moet. Placaat, Sept. 25, 1549; and Nov. 18, 1555.

(2) Vide Sententie Boek, n. 42.

(3) Placaat, September 22, 1549; and November 18, 1555.

(4) § 12. Inst. de rer. divis.

Who may have Decoys, and in what manner, and of their Privileges.

§ 6. The regulation concerning the taking of wild ducks was renewed by two placaats of the 20th Dec. 1550, and the 30th Jan. 1604, for the purpose of preventing the damage sustained thereby in the tithes, grass and corn lands; and it was ordered, that no person may henceforth make any new decoys within the dikes, on pain of forty gilders, and that the same should be broken down, unless such person has so much land on which he can make a decoy without any injury to his neighbours; and for the making of such decoy he may obtain leave on application to the chief magistrate: it was further ordered, that those who shall within ten years thereafter fix a decoy; and if it does not contain eight morgen (or sixteen acres) of land, it shall be broken down, excepting those of lords of manors, who are entitled to keep the fowls tied on lines (it is to be understood, that this is a right belonging to the dignity of Count); and that those who keep decoys, either within or without the dikes, shall be obliged to shut up their birds during the seasons of sowing and reaping; that is to say, from the middle of March to the 1st of May, and from the middle of July to the 1st of September, on pain of forfeiting six pounds, besides the uninclosed birds.

In like manner it is ordered by a placaat of Jan. 28, 1591, in the country of the Rhine, and of May 13, 1610, and May 10, 1611, at Delft, that no person who is not possessed of landed property to the amount of twelve morgen (or twenty-four acres) either freehold or leasehold; of which land, in the territory belonging to Delft, six morgen (or twelve acres) must annually be cultivated; he may neither rear any pigeons nor construct pigeon-houses, on pain of forfeiting six gilders for the first offence, twelve for the second, and for the third offence he shall be subject to arbitrary correction, and such pigeon-house shall be demolished.

The privilege of fowling, however, is so far granted by a placaat of Jan. 8, 1585, that no person may attempt, either by day or night, to approach the decoys, creeks, canals, rivers, or any other waters, to or within the distance of five hundred roods, or run towards them, or towards any wharf situated near them, and shoot with any long or short fire-arms, or knock at their fences, toss their sails, or throw them over, and make any noise whatever, either by calling or screeching in or about the before-mentioned creeks, canals, rivers, or any other waters, by which the fowls may be chased away or disturbed from their cages, on pain of forfeiting such fire-arms, and of being fined ten gilders for the

first offence, and for the second such offender shall be subject to arbitrary correction.

Moreover, by the placaats of May 2, 1605, Sept. 10, 1608, and Oct. 27, 1610, the shooting of any pigeons or tame ducks in the country is prohibited, on pain of forfeiting twelve gilders for the first offence, and afterwards twenty-four gilders, besides the forfeiture of the fire-arms and arbitrary correction.

If any persons chase and shoot a wild bird, and if it does not fall immediately, it afterwards may be caught or taken up by any other person. (1)

Of the Right of Fishing.

§ 7. The right of fishing in the North and South Seas belongs to all the fishermen of the adjacent countries. (2)

But fishing may be practised with an angling rod in rivers, and in other waters (which, as we have already stated, are among royalties (3);) provided that no person, under pretext of such angling, injure the freeholders in Rhineland in their hay, reed, turf, alder trees, or any other plantations. (4)

Those only who are possessed of the right of sovereignty may fish with fishing apparatus in the rivers and navigable waters. (5)

The placaats of the 8th February 1521, and the 26th April 1578, the 9th March 1580, the 10th April 1582, the 3d June 1609, 5th March 1610, 20th of May 1624, and 18th of March 1648, prescribe the manner of fishing, and also the kinds of apparatus which must be made use of, as well in the North Sea as upon the herring fishery and great fishery; and likewise direct the manner of fishing, and the fishing apparatus which is to be employed in the rivers, lakes, and channels, both within and without the dikes.

Of the Acquisition of inanimate Things, having no Owner.

§ 8. All inanimate things which have no owner, belong to the person who first finds or takes them up, without distinction. (6)

Of this description are unknown islands discovered in the sea (7); as also goods abandoned by their proprietors (8); money thrown away to make people scramble for it (9); and likewise the productions of the sea itself, and whatever may be cast on shore. (10)

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(1) § 13. Instit. de rer. divis. l. 5. § 1. Ff. de acq. rer. domin.

(2) L. 1. Ff. de acquir. rer. dom. Vide etiam Batavise Arcad. p. 300.

(3) Placaat, April 13, 1558; and of the States of Holland, June 3, 1609, artic. 21.

(4) Arg. § 12. Instit. de rer. divis. vers. Plane. Placaat of the Court of Holland, Aug. 3, 1613; and May 18, 1643.

(5) Placaat, April 10, 1550; Sept. 8, 1552; April 13, 1558; and May 14, 1568.

(6) L. 3. Ff. de acquir. vel amittend. possess.

(7) § 22. Instit. de rer. divis.

(8) § 45, 46. Inst. de rer. divis. l. 2. Ff. de his quæ pro derelict. et Groeneweg. ad § 47.

(9) § 45. Instit. de rer. divis.

(10) § 18. Instit. de rer. divis.

Stranded goods which are lost by high floods or shipwrecks, being taken up from the sea, and found on the shore, remain under the property of their former master and proprietor, and cannot become the property of any other person (1). These regulations were at first neglected by us, but afterwards it was understood, that all shipwrecked things found in sea, and all stranded goods should devolve among us to the Counts; but in process of time the equity of the Roman laws for the most part relaxed these regulations.

Things found in the Sea, or stranded or lost, by whom to be appropriated.

§ 9. First of all, in consequence of the stranding of a ship of Hamburg near Schevening, in the year 1442, it was ordered for the future, that every person who should lose his property by shipwreck, may again appropriate it to himself wherever he may find it, except the inhabitants of such countries where a different practice obtains against the inhabitants of Holland, concerning which subject several decrees have been issued. Such goods were taken care of faithfully and carefully by the *treasurer general of Espergne* (2), and publicly sold for the advantage of those who may thereafter be found entitled thereto, and the proceeds thereof were to be given to the owner of the goods, after deducting a reasonable sum for salvage; all persons seizing such property without giving information thereof either to the treasurer or his overseers, and receiving salvage for the same, will be punished as thieves, as well as those who receive and detain such goods. (3)

A similar practice obtains in the case of all other goods, if not intentionally abandoned, strayed, lost, or mislaid by the proper owner; the right to which goods is not forfeited by the proper proprietor thereof (4); but the finder of such goods must take them to the public keeper (5). If such goods be not claimed by the right owner, they will devolve, in the last place, to the Count. (6)

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(1) § 47. Instit. de rer. divis. l. 1. Cod. Naufrag. l. ult. Ff. de incend. ruin. et naufrag.

(2) The original term is *Rent-Meester Generaal van Espergne*. We have no correspondent English Officer.—Editor.

(3) See the Placaats, March 10, 1529; Sept. 13, 1549; renewed July 27, 1556; July 8, 1559; July 12, 1563; March 9, 1567; July 5, 1559; May 17, 1574; and Feb. 29, 1579; also the Placaats of Nov. 4, 1606; May 24, 1613; April 20, 1620; Oct. 31, 1626; Feb. 4, 1648; May 17, 1651; and Dec. 2, 1663. See further, Grotius, Inleyd. lib. 2. tit. 4. in fin. vers. Wat belangt. De Jure Belli, lib. 2. c. 7. n. 1. Andr. Gail, lib. 1. observ. 18. Zyp. Not. Jur. Belg. tit. de Jure fisci, in verb. Bona Naufraga. Christin. vol. 5. decis. 94. Batav. Arcad. p. (mihi) 447, and p. 288. et seq. edit. 1663.

(4) L. 67. Ff. de rei vind.

(5) Burgund. ad consuetud. Fland. Tract. 12. num. 2, 3, 4.

(6) Tot. tit. Cod. de bon. vacant. Cost. Antwerp. titul. 58. art. 3. Goris Adversar. Miscell. Tract. 3. c. 12. n. 1. et seq. Cassan ad Consuetud. Burg. rub. 1. § 2.

§ 10. Among things that have no owner are also to be reckoned the booty and prey taken from our enemies in war; of which the immoveable goods devolve to the commonwealth, but the chattels and moveable things devolve to the right owner (1). The same may be said of such goods as may have been taken and obtained in certain particular cases, or to booty acquired on highways; but things obtained by soldiers when on public service during war, and conquered, are to go to the treasury of the state, with the exception of a small dividend amongst them as a gratuity. (2)

Of the Booty and Plunder of Enemies.

§ 11. According to the Roman laws, under this description are comprehended barren and abandoned lands, which may be appropriated by every one after the expiration of two years (3), but this practice does not obtain among us; but the same may not be owned by others, and such lands must remain under the property of the former owner, even though the same should have been abandoned in consequence of war, or influx of water, or any other occurrence and inability; for Philip II., in the year 1587, by letters patent offered certain lands, which had been abandoned by the inhabitants, in consequence of the surprise of war and famine, to be possessed and cultivated according to their desire; and added to this clause, that the expences incurred in improving such lands must be defrayed by the former owners. (4)

Of barren and abandoned Lands.

§ 12. The taxes laid upon the dikes in South Holland and Gelderland, are an old right. No person may abandon his lands in consequence of the taxes introduced for the purpose of keeping the dikes in repair, without abandoning all his other lands, houses, rents, and other goods situated within the circumference of the dikes, from which the taxes may be realized or levied; and if they prove inadequate, a claim may be made upon such other lands, and the whole *bosom* (*boesem*) proceeding from the same lands subjects the owner to the duty for keeping dikes in repair, which is called the *boesem regt*, or bosom-right (5). Further, no person may, in the countries mentioned below (5), abandon his lands on account of the expences of the *ze-weer* or *sea weather*; otherwise the sheriff, who has laid out his money, if the land is not good, may seek his remedy against his other goods. (6)

The Nature of *Boesem-Regt*.

(1) § 17. Instit. de rer. divis. Grotius, Inleyd. lib. 2. part 4. num. 31.
(2) Grot. de Jure Bell. lib. 3. c. 6. Vinn. ad § 17. inst. de rer. divis.
(3) L. 8. de omni agro deserto.
(4) See Zyp. Notit. Jur. Belg. de Jure Emphyth. in fin.
(5) See Beschryving van Zuid-Holland, p. 578. Gereformeerde Dyk-regten van 't ryk Nymegen, over-en-neder Betuwe, Sampt Maas en Waal. c. 11. art. 3, 4.
(6) See Keuren van de Landen Voorn. art. 69 & seq.

Of Treasure-trove.

§ 13. Any concealed treasures, which a person may find upon or in his own ground, belong to himself in propriety; but if any such treasure be found in the land of another person, one half thereof belongs to the owner of the soil, and the other half to the finder. (1)

In many countries, where treasure is found, it is seized and appropriated by the government of such countries; and this usage, according to Christin (2), has obtained in almost every place: but Grotius says that this is uncertain among us (3); and the right of the Count to such treasure was objected to on good grounds. Where, however, there is no sufficient proof thereof, other writers are of opinion, upon good grounds, that in such case we ought to follow the written laws. *Propterea quod, nempe, quicquam de eo cautum reperiatur legibus propriis, neque Romani juris vigor dissuetudine usuve contrario hac in parte enervatus sit* (4); of which there is a good example in the case of Klein Pietersz of Langweld, who, in digging a sewer at Sgravenhage, found a small pot containing some gold coins, to which the chamber of accounts could not prove themselves to be entitled; but as he could not afford to go to law with that chamber, (having previously agreed with the owner of the ground), he petitioned the chamber, that all the right which any Count might have to such money might be entirely transferred to him; and, after a previous advice of the treasurer of the perquisite-money of the country, denominated *Espergne* (5), and of the advocate-fiscal, his application was granted in consequence of his poverty, by certain letters written on that subject, and bearing date June 30th, 1636, but with a condition that he should pay sixteen of such coins to the dignity of Count. (6)

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(1) § 39. Inst. de rer. divis. & l. unic. Cod. de Thesaur.

(2) Ad Consuetud. Mechlin. tit. 1. art. 51. and Grotius de Jure Belli, lib. 2. c. 8. n. 7.

(3) Inleyd. lib. 2. in fine.

(4) See Groeneweg de legib. abrogat. ad § 39. Inst. de rer. div. and Batav. Arcad. p. (mihi) 441, or p. 282 et seq. of the edition of the year 1663.

(5) In the original, *Rent-meester van Espergne*; this officer seems to have answered to our receivers-general of counties.—Editor.

(6) Vide Register B. A. fol. 136.

CHAP. IV.

Of the Acquisition of Property by Accession and Increment.

§ 1. *Accession defined.*
2. *Increment, how and by whom to be appropriated.*
3. *How far Lords of Manors are entitled to the Right of Increment.*
4. *In what Cases the Right of Property in Land is lost by Inundations, &c.*

§ 1. ACCESSION is a mode of acquiring property, in which any corporeal thing receives an increase, either by natural or by artificial means. Accession defined.

§ 2. With respect to such increase, it has been maintained in behalf of the Counts in Holland and West-Friesland, that that the same belongs to them (1); but this has been denied by others, because the variety of customs, and the decrees passed in consequence of their being considered as right, would render such claim very uncertain (2). It is probable, that islands and increments formed in rivers and in the common waters of the country, and which are separated from the other land, may appertain to the dignity of Count, while the flowing rivers till this present time belong to the Count, and are consequently reckoned among the revenues of the country, whence it follows that all increment in the same belongs to him also (3). But it cannot be applied to whatever the sea and the rivers imperceptibly cast upon any person's land, whereon it begins to take root; and as we have no rule on this subject, it must therefore be understood, according to the Roman laws, that such *alluvion* or imperceptible increase belongs to the owner of the land where the increase had taken place (4). But it is otherwise in respect to lands which are overflowed only: for an inundation does not alter the face and nature of the earth; and therefore, when the waters have receded, it is apparent, that the property will be found still to remain in him in whom it was vested before the inundation. (5) Increment, how and by whom to be appropriated.

(1) Plac. May 22, 1559.
(2) Grot. Inleyd. lib. 2. c. 9. vers. In Holland.
(3) On this subject, see Plac. May 22, 1559. Grot. Inleyd. lib. 2. tit. 9. vers. Dat sodanig, & de Jure Belli, lib. 2. cap. 8. num. 10. Christin. vol. iv. decis. 86. num. 7. Goris de differ. Jur. § 23. Zypæ, Notit. Jur. Belg. tit. de Jure fisci vers. Res communes Perz, ad Cod. de Alluv. num. 8. Consult. & Advys. tom. 2. cons. 26.
(4) § 20, 21. Instit. de rer. acquis.
(5) § 24. Instit. de rer. acquis. l. 7. § 6. l. 30. § 3. de acquir. rer. domin.

Antiently, it was customary that increments in rivers belonged so far to the adjacent lands as a person could ride on both sides with a dung cart, or, according to the old customs of the country, wells may be dug; of which increments, before the justice of Maas-sluice in the year 1568, a dam was made by some old people, which extended so far in the river, that a person going from his land could reach to the opposite side with his sword. (1)

How far Lords of Manors are entitled to Increment.

§ 3. In Holland and Zeland the lords of the manors pretend, that by virtue of their manors they have a right to increment, though no mention is made thereof in their letters of investiture; unless such right was expressly excluded from the letters of investiture; and accordingly it was so understood by the court of accompts of the sovereignty, in the years 1557 and 1560.

The treasurer of Beooster Scheldt (East Scheldt) was ordered to make a collection of the duty imposed upon the furzes and increase, and as the lords of manors who possess the same in the district under his receipt had refused to pay it, and in consequence of this refusal he was unable to make the intended collection, he informed the chamber thereof, by which he was ordered to submit the case to the consideration of the full college of the court of Holland, where it was understood that the lords of manors were entitled to such furzes, thickets, and increase, provided they raise their manors, and pay the duty imposed thereupon.

But in the countries where the Counts had granted the land under certain *regulations* (2), the right of increment belongs to the Count (3). If the land be drained up to the river, or have accumulated in such a manner that its just extent cannot be ascertained, the right of increment belongs to the owner. (4)

In what Cases the Right of Property in Land is lost by Inundation, &c.

§ 4. Where lands have been inundated by the waters of the country, and have remained in conjunction with them for the space of ten years, and grow up again with mud, and become solid land, they are considered by us as abandoned, and devolved to the Count (5). To the lords of certain downs or wildernesses belongs also that part which was covered or filled up with sand

(1) See Grotius, Inleyd. l. 1. cap. 7. num. 13. 17. & de Jure Belli, lib. 2. c. 8. num. 14.

(2) *Roetalen*, in the original, for which no corresponding English word is to be found in the dictionaries.

(3) L. 16. Ff. de acquir. rer. domin. l. 1. § 6. Ff. de fluminib.

(4) Grot. de Jure Belli, lib. 2. cap. 9. num. 12.

(5) Arg. § 21. in verb. longiore tempore instit. de rer. divis. & pr. instit. de usucap. Grot. de Jure Belli, lib. 2. cap. 8. num. 10. contra § 23. instit. de rer. divis.

for the space of ten years, and has the semblance of a wilderness, and which has remained uninclosed. (1)

Several decrees, corresponding with the above regulation, were given in the year 1525, by the court of Holland, because their ancestors, before the great inundation of the year 1421, had landed property there; but if there have not been from time to time some mark of possession, and repairs, as by fishing or otherwise, they are considered as not being able to retain the possession thereof(2): so it was understood by the court of Holland, in the case of the procurator general, who summoned all the freeholders of the lake of South Holland; saying, that in consequence of the inundation of the year 1421, he was entitled to all the lands and fisheries which they possessed therein; upon which the burgomasters of Dordrecht defended the rights of their fellow citizens, the freeholders of the same lake, that the procurator general was not entitled to such a general demand, but that he should be obliged to institute his action concerning it, and that he should consider it as being the privilege of the dignity of Count; upon which a decree was passed in 1502, against the procurator general. It was also decreed on the last day of January 1588, by the supreme court, in behalf of the heirs of Gerrit van Roon against the procurator general and dikegrave and the high inspectors of the banks of Bonaventura, which decree was afterwards confirmed on a revision.

They who have a right to the increment, may make dams, inclosures, or other works, provided they do not injure the interests of a third person, or the common navigation (3). For the prevention of damages or obstructions to the fisheries or neighbouring grounds belonging to any person by means of such dams or fences, certain places have particular statutes and local laws. (4)

(1) Grotius, Inleyd. book 2. c. 9. vers. *Door overloop*.

(2) Contra l. 23. quib. mod. usufruct. amitt. Grotius, Inleyd. lib. 2. c. 9. vers. Hoewel. & De Jure Belli, lib. 2. c. 8. n. 10. Cons. & Advys. tom. 2. cons. 26. num. 2. Beschryving van Zuid Holland, (Description of South Holland) page 578.

(3) Arg. tot. tit. Ff. de flumin. Ne quid in flum. publ. Perez ad tit. Cod. de Alluvionib. § 1.

(4) On this subject the reformed Dyke-laws of Nymeguen, the Upper and Lower Betuwe, Saint Maas & Wall, by the States of the principality of Gelder and the county of Zutphen, agreed upon at the convention of Arnheim on the 25th Aug. 1640. cap. 16 & 17.

CHAP. V.

Of artificial Accession.

[Grot. 2. 8. 9.]

§ 1. *Artificial accession defined.*
2. *What has been sown or cultivated upon any person's ground, belongs to the proprietor of the ground.*
3. *Where Two Substances are mixed together, to whom the Compound belongs.*
4. *To whom a Picture or Writing upon another Person's Pannel or Paper belongs.*
5. *Of Property by Confusion.*
6. *In what cases Compensation ought to take place.*

Artificial Accession defined.

§ 1. ARTIFICIAL accession is, when two things being joined together, that which is of the greatest value attracts to itself that which is of less value, in consequence of the shape derived from the commixtion.

What has been sown or cultivated upon any Person's Ground, belongs to the Proprietor of the Ground.

§ 2. Whatever is inseparably cultivated or sown upon the ground of another person belongs to the owner of such ground (1); whether any person had sown the seed of another person upon his own ground, or his own seed upon another person's ground. (2)

Where Two Substances are mixed together, to whom the Compound belongs.

§ 3. If from another person's marble a statue be produced, or from another person's malt beer be made, or from a person's materials wine and honey, mead and the like, be made; or if they be made partly from another's materials, and partly from the maker's own materials: in these cases the matters which are joined together cannot be separated from each other, and as the form or shape contributes more to the essence of the thing than the matter, the possession thereof is consequently adjudged to the person who imparted the shape, provided the latter pays for whatever he has brought upon another's ground (3). Very frequently it happens that a thing which is added to another substance, is of greater value and more costly than the substance to which it is added; it must, however, follow the substance to which it is put, just as one person's gold that is woven into the cloth of another, belongs to the cloth. (4)

To whom a Picture or Writing upon

§ 4. I said *in consequence of a shape derived from commixtion*, that is, if the two substances united together can be conveniently

(1) L. 2. Ff. de superfic. & l. 50. Ff. de acquir. rer. domin. § 21. Inst. de rer. divis.

(2) § 29, 30. Instit. de rer. divis.

(3) § 25. Inst. de rer. divis. l. 13. § 1. Ff. de verb. Signif. l. 6. § 1. Ff. de Auro & Arg. leg. l. 9. § 3. Ff. ad Exhibend.

(4) § 26. Inst. de rer. divis.

separated from each other, and be brought each to its former quality, just as a thing that is made of silver or gold can easily be converted into rough gold or silver, by which the thing is not lost, but on the contrary each person retains his own property. (1)

another Person's Pannel belongs.

An exception, however, is made in favour of the art of painting; for, if any one paint any thing upon cloth or board belonging to another person, such painting belongs to the former (2); the same maxim is also in force among us in regard to writings executed on paper belonging to another person (3); for a person may write any thing of as much value as the paper may be worth, just as a painter may paint upon a pannel or piece of cloth: for example, a person may write down his accounts, or his thoughts, or any thing else which he does not wish to communicate to any other person, upon a piece of paper belonging to another person. (4)

Of Property by Confusion.

§ 5. If the materials of two persons be incorporated together, without any new form or shape being communicated to them, then the whole mass or composition is common to both proprietors. (5)

In what cases Compensation ought to take place.

§ 6. In conclusion, it must be well observed, that in mixing together the goods of one with the goods of another, or the materials of one with those of another, if such commixtion have taken place in good faith, in this case the person to whom the possession is allotted, is obliged to make a reasonable compensation to him who must give up his property (6); otherwise, if the commixtion had unfaithfully taken place, in which event the owner of the materials must retain his right, and the person mixing them forfeits his labour, together with the materials themselves. (7)

(1) § 25. Instit. de rer. divis. l. 38. § 4. Ff. de leg. 3.

(2) § 34. Instit. de rer. divis.

(3) Contra. § 33. Inst. de rer. divis.

(4) See Grotius, Inleyd. l. 2. cap. 8. ven. Dog hier, towards the end. Mynsinger. Vinn. and Fons. practiq. de Cours. ad d. § 33. Instit. de rer. divis.

(5) § 27. Instit. de rer. divis.

(6) § 26. Instit. de rer. divis. & ibi Vinn. num. 4. Jure enim naturæ æquum est neminem cum alterius jactura fieri locupletiorem. l. 14. Ff. de condict. indeb. l. 206. Ff. d. R. Jur. lib. 2. feudor. tit. 28.

(7) § 30. Instit. de rer. divis.

CHAP. VI.

Of the gathering of Fruits.

[Grot. 2. 6.]

§ 1. *Of the gathering of Fruits from the Property of another bonâ fide possessed as a Person's own.*
2. *Fruits defined.*
3. *When and how the Perception of Fruits ceases, and Restitution is to be made to the lawful Owner.*
4. *Where a Person possesses a Thing unfairly, he is obliged to make Restitution.*

Of the gathering of Fruits from the Property of another, bona fide possessed as a Person's own.

§ 1. BY the possession of an estate which a person bona fide believes to be his own, he acquires in consequence the possession of the fruits of such estate. (1)

Fruits defined.

§ 2. Under the term *fruits* is comprized whatever the property so possessed could annually produce; viz. all fruits of trees, fruits of the earth, as also whatever is produced from the cattle; viz. calves, foals, lambs, bees, chickens, young pigeons, geese, milk, cheese, butter, and the like. (2)

When and how the Perception of Fruits ceases, and Restitution is to be made to the lawful Owner.

§ 3. This possession and perception of fruits ceases as soon as the property is claimed by the proper owner; and after a full pleading at law had thereon, all the subsequent fruits and profits must be restored to him (3), as well as the expences and improvements made to the said property; but should such expences and improvements exceed the benefits which the possessor had enjoyed, he may claim again the whole of such expences or improvements, provided the value of the profits actually enjoyed be deducted and discounted. (4)

Where a Person possesses a Thing unfairly,

§ 4. No person may in an unfair manner, and knowing that he possesses a thing belonging to another person, enjoy the

(1) § 35. Instit. de rer. divis. l. 48. Ff. de acquir. rer. domin.

(2) § 19. & § 39. Instit. de rer. divis. junct. l. 7. § 12, 13. Ff. Soluto matrimon. l. 19. l. 28. l. 36. Ff. de usur. l. 62. de rei vind. l. 3, 4. Ff. de usufr. car. rer. quæ usu consum. l. 121. Ff. de verb. Signific. & ibi Gœddæus. Vinnius, ad § 5. Instit. de rer. divis. et Stockmans, decis. 127.

(3) L. 22. Cod. de rei vindicat. l. 2. de fruct. et lit. expens. § 2. Instit. de offic. Jud. Idque nulla amplius distinction. factor fructuum naturalium aut industrialium et rejecta Stricti Juris, et bon. fid. item realium aut personalium actionum distinctione. Mornac & Autumn. ad d. l. 22. Cod. de rei vind. & Confer. du Droict in l. 45. Ff. de usur. Rebuff. ad Constit. reg. de fruct. art. 1. in pr. Sande, l. 5. tit. 15. defin. 1.

(4) L. 31. Ff. de petit. heredit. l. 48. Ff. de rei vindicat. l. 11. de Noxal. action. See this subject treated at length by Sande, l. 3. tit. 15. defin. 2, 3, 4. & DD. ibi allegat.

benefit arising therefrom; nemo enim ex suo scelere compendium habere debet; but such person shall be obliged to restore, not only the goods and the fruits enjoyed by him, but also whatever the owner might have acquired otherwise, after previously deducting the expences. (1) he is obliged to make Restitution.

CHAP. VII.

Of the Acquisition of Property by Tradition or Transfer.

[Grot. 2. 5.]

§ 1. *Possession, how acquired.*
2. *Of moveable Property.*
3. *Within what Time Goods sold for ready Money, but not paid for, are to be claimed back.*
4. *Of immoveable Property.*
5. *By whom Transfer may be made.*
6. *The Property and Possession of Goods, by whom to be acquired.*
7. *Whether and how far Parents are entitled to whatever Children may acquire while boarding with them..*
§ 8. *Who may not deliver up or transfer their own Property.*
9. *How private and fraudulent Transfers are to be annulled.*
10. *Whether a debtor may, to the Prejudice of his Creditors, renounce and abdicate his Right of Inheritance.*
11. *Whether a Person may pay a Creditor, to the Prejudice of his other Creditors, a Sum of Money before the Day on which it is actually due.*

§ 1. IN order to acquire goods belonging to another person, a transfer is necessary, for a mere promise and agreement cannot make any other person owner thereof. (2) Possession, how acquired.

§ 2. With respect to moveable property, it is sufficient that it be delivered by private contract; as also when any body sells or makes me a present of any part of his goods which I had in my keeping, or the fruits enjoyed by me as a tenant; which things per fictionem brevis manus, are considered as delivered (3); so, Of moveable Property.

(1) §. 35. Instit. de rer. divis. l. 22. Cod. de rei vindicat. l. 3. Cod. de cond. ex lege junct. § 2. Instit. de offic. Jud. l. 62. § 1. Ff. de rei vind. l. 5. Cod. eod. l. 12. Ff. quod met. caus. l. 7. pr. Ff. solut. matrim. l. 36. § ult. Ff. de petit. l. 51. in pr. Ff. famil. erciscund.

(2) L. 20. Cod. de pact. l. 15. Cod. de rei vind. arg. l. 3. Ff. de oblig. & act. § 40. Instit. de rer. divis.

(3) § 44. Instit. de rer. divis.

in the case of merchandize deposited in a warehouse, if the key of such warehouse be delivered to the buyer, the merchandise is considered as also delivered (1); but delivery arising from a sale does not follow the possession, unless the purchase money be paid, or the purchaser give security for it, or the purchase money be tendered to the vendor. (2)

Within what Time Goods sold for ready Money, but not paid for, may be claimed back.

§ 8. In like manner a merchant may sue for goods sold, and claim them back as his own property (which he sold for ready money, on condition to deliver or make them over) in case the purchaser fails to pay the purchase money; and wherever or in whose custody soever such goods may be, they will be considered as the vendor's own property, till the sum agreed upon is paid (3), unless such goods were in the meantime sold in the public market, where it is understood that goods are under no claim, because at a public market one cannot properly inquire in what manner the vendor has got the goods thus sold; neither can the purchaser see the vendor's person and good faith, it it being almost unknown to the others; and without an assurance of the possession of the goods purchased, the access to the market will decline, in which case the purchaser who bought the goods in good faith at the public market, cannot restore them to any one who may claim the same, either under that or any other pretext whatsoever, provided the claimant pays the purchase money. (4)

If goods be sold for ready money, but not paid for, and on their being resold if a third person purchase them *bona fide*, and pays for them accordingly, if such goods be demanded back, it would be very hard upon him who purchased them from the last proprietor, and who did not know but that they were his own free goods, to be compelled to deliver them up; concerning this point it has been settled in some places that the right of demanding goods sold for ready money, and remaining unpaid for, shall continue only for a certain short period of time, within which it must be prosecuted. At Amsterdam this period is limited to six weeks by the statute of that place of the 31st January 1658, and at Leyden to fourteen days by the statute of that place, dated the 24th Sept. 1659.

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(1) § 45. Inst. eod.

(2) § 41. Instit. de rer. divis. & ibi. DD. l. 5. § pen. Ff. de trib. act. Customs of Antwerp, cap. 58. art. 7.

(3) § 41. Instit. de rer. divis. l. 23. Ff. de rei vindicat. & l. 16. Cod. de Evict.

(4) See Grotius, Inleyd. book 2. c. 3. vers. Uytgenemen. Costal. ad l. 36. Ff. de condict. indebiti, and the DD. cited in my Censura Forensis, lib. 2. cap. 11. n. 3.

In Rynland it is customary in the country to agree that ships, boats, horses, or cows should remain mortgaged for the amount of the purchase money until it is paid; and though such goods fall into the hands of a third person, the right of demanding the goods so sold is there still in force. (1)

And it is a general custom, that in the bill or bond the ship be in such a manner mortgaged for the amount of the purchase money, that, to what port soever she may navigate or sail, and in whose possession soever she may be, she may be seized and carried to law, as long as the amount for which she has been purchased remains unpaid. (2) The same custom exists with regard to transferred and resigned moveable property, of which a person has continued in the temporary possession at the will of the owner, and to which a third person would not be entitled, although there should be a positive or tacit agreement between the possessor of such property and such third person; provided the agreed right of detaining such property should fully appear in the transfer of such allowed possession, agreeably to an order made at Amsterdam, May 31, 1631. (3)

§ 4. In order to prevent the commission of frauds upon immoveable property, the law does not allow every sort of livery or transfer; in consequence of which a certain regulation was gradually adopted in regard to transferring immoveable property. Land, houses, out-houses, &c. therefore are not held by us as transferred, unless the transfers thereof are previously passed and executed before the magistrates and the justices of the place where the property is situated. The transfer of *allodial lands* ought to be passed and executed before the lord of the manor and his vassals; see the placaat, May 9, 1529 (4), to which the States afterwards added, in the year 1591, that where transfers are made of goods by virtue of sale or exchange, the fortieth penny should be paid for the same, on pain of all transfers otherwise made being annulled and declared void. (5)

Of immoveable Property.

The immediate design (*causa impulsiva*) of the said placaats was, not only to prevent persons from being deceived in the buying, selling, and mortgaging of immoveable property, (which is very seldom possessed with such full, free or right property, as it would otherwise have been); but also to ascertain the wealth,

(1) See the Custom of Rhynland, art. 48.

(2) Arg. l. 2. Ff de leg. Commissoria, & l. 12. § 2, 3. Ff. de pignorat act.

(3) See it in Cons. & Advys. Rotterd. part 3. cons. 174.

(4) Grotius, Inleyd. lib. 2. cap. 5. vers. Maar ontilbaar. Christin. vol. i. decis. 24.

(5) See Placaat, Vander 40 penning, (Placart of the 40th penny), art. 11.

situation, and circumstance of the property possessed of by the inhabitants, as well as of each place; it was therefore several times decreed by the supreme court that the clause mentioned in the said placarts, viz. that "the sale, alienation, and changes otherwise effected, should be declared null and void," has relation to a third person, but not to the dealers themselves (1). From the operation of these regulations are excluded all alienations acquired *titulo universali*, by inheritance, marriage, donation, bequest by last will, community of property in consequence of marriage, separation of estate, or the like. (2)

By the statutes of Leyden the two following cases are excluded, viz. whenever the purchaser is immediately put into possession of the goods sold, or the sale has taken place after the affixion of cards (*Billetjen*). (3)

Goods stolen from a person, or unfairly alienated, may be recovered by an immediate seizure and demand from the person who may be in the possession thereof, though he had purchased them *bona fide*, without paying the cost of the same (4); but as every one may not justify himself (5), the seizure must take place with the knowledge and assistance of the sheriff. (6)

In several countries, however, the preceding regulation is not observed; thus, in the case of goods purchased at fairs or public markets, the purchaser is not obliged to return them again without being paid the price for which the goods were purchased (7). The same kind of right is possessed by pawnbrokers, venders of old clothes, gold and silversmiths, after they had previously exposed to public view, at their door, during the period of eight days, the goods purchased by them. (8)

By whom Transfers may be made.

§ 5. Transfers may be made by the owner himself, or by his proxy (9), provided the power of attorney for transferring moveable property be passed before the sheriffs; yea, such property passes, according to law, upon the death of the owner by

(1) See Neostad. Suprem. Cur. decis. 70. in fin. Cur. Holl. dec. 32. in fin.

(2) See Neost. Suprem. Holland. decis. 8. Christin. vol. 1. decis. 362. Zypæ, Not. Jur. Belg. tit. de rei vindicat.

(3) Art. 112.

(4) Recueil van Rosenb. c. 46. n. 28. et seq. Utr. cons. 2. D. cons. 44. Wissenbag, ad l. 2. C. de furtis. l. 3. l. 23. Cod. de rei vind. l. 16. Cod. de evict. l. 2. Cod. de furt. Handvest (*Charter*) of the Lady Maria, A.D. 1476.

(5) Unic. Cod. ne quis in sua caus. jud.

(6) See the Statutes (*Keuren*) of the city of Leyden, artic. 127. By-law of the city of Amsterdam, statute book A. fol. 23. In the printed charters of the year 1613, page 107. Charter of South Holland, page 114. Statutes of the country abovementioned, art. 105 & 106. Statutes of Zealand, cap. 3. art. 23.

(7) Zyp. Not. Jur. Belg. tit. de rei vind. vers. Jure.

(8) Placart of the States of Holland, March 17, 1663. See also Grotius, Inleyd. book 2. c. 3. vers. uitgenomen. A. Matthei Paremiæ. 7. n. 17. et de Auctionib. c. 11. n. 70.

(9) § 42. Instit. de rer. divis.

transfer, (even against the will of the proprietor), just as the justice delivers over to the creditor the power which he had in his keeping, or the power over all the debtor's other goods, or the proceeds thereof realized by execution. (1)

The Property and Possession of Goods by whom to be acquired.

§ 6. The property and possession of things may be acquired, not only by and through ourselves, but also by and through those who are under our power and command (2); and likewise through those whom we commission to act for us, and to execute our business to our advantage. (3)

Whether and how far Parents are entitled to whatever Children may acquire while boarding with them.

§ 7. Further, among us, parents acquire a full property in whatever their children may obtain, whether by acquisition or labour, while boarding with them (4); and they reserve nothing whatever therefrom for themselves, excepting only, if a son, through his labour or science, have considerably increased his father's estate, it is not without reason considered but just by many, that in the division of the said estate it should be taken into consideration, and that he should therefore previously enjoy something more than other children, viz. so much as may be deemed proper by arbitrators in equity. (5)

Who may not deliver up or transfer their Property.

§ 8. Again, there are certain persons who have no authority to alienate their property themselves; such are all minors, whose property is to be delivered by the guardians and those who are placed over them (6); and likewise all silly, furious, and mad persons (7); and also prodigals, or those who are proclaimed unfit to be credited, and from whom the management of their property has been taken away by public proclamation. (8)

Among these classes of persons are reckoned all married women, who are under the power of their husbands; for it is not without reason that those to whom they have trusted their bodies, should also be allowed so far to have the management of their property (9), that a wife may not alienate or encumber her own property without her husband's consent; and, without him, she is not bound by her transaction, except only as far as concerns house-keeping; and women carrying on public trade,

(1) Tot. tit. Cod. Si. in caus. Jud. pig. cap. l. 15. § 3. Ff. de re Jud. l. 5. Cod. de Jure, dominii impetrand.

(2) Tot. tit. Instit. & Cod. per quas person.

(3) L. 8. Cod. de acq. poss. vide Jacob Coren, obs. 25.

(4) § 1. Instit. per quas person. arg. l. 5. § 7. Ff. de lib. agnoscend. Gudelin. de Jure Novis. lib. 1. ch. 13. in fin. Customs of Antwerp, ch. 36. art. 7. Sande, lib. 2. tit. 7. def. 3.

(5) Vide Tholosan. Syntagm. Jur. lib. 11. c. 8. n. 21. Sande, dict. loco. Grotius, Inleyd. lib. 1. ch. 6. n. 3. Cust. of Antwerp, d. loco.

(6) § 2. Instit. quib. alien. lic.

(7) § fin. Inst. eod.

(8) L. 1. Cod. de Curat. furios.

(9) L. 8. Cod. de pact. conv. vide Neostad. de pact. antenupt. obs. 10. Grotius, Inleyd. lib. 1. c. 6. n. 33. Sande, de prohibit. rer. alienat. Herbai, lib. sing. c. 13. § 5, 6.

so far as concerns her trade (1); of which we have already treated more fully in the former part of this work (2): and the securities given for such obligation are also not bound, because the debtor herself, namely the wife, is not responsible, as was determined by the court of Holland, on the 30th December 1613, between Thomas Jansz, sail-maker, against Cornelis Adriaansz and company, defendants.

Lastly, defaulters (3) and bankrupts may not alienate their property to the prejudice of their creditors (4); but in such case a curator is appointed, and authorized to convert their goods into money in a proper way for the benefit of the creditors who have the best title thereto (5), to which office any of the creditors is deemed admissible (6); as was often understood by the court of Holland, notwithstanding it may even be in disuse in some cities.

Provided, however, that any one, who is indebted more than his property is worth, may, previous to his bankruptcy, and while he has still credit, make payment to those who demand the same (7); and he may transfer to them his immoveable property, either in payment or for their security; provided every thing be transacted sincerely and lawfully; as was understood by the court of Holland in the case of Peter Van Ravenstein and company, first impetrators of a penal mandate, and subsequently plaintiffs against Wouter Alewyn and company, on the 3d January 1631. The same practice also usually obtains at Amsterdam, on account of trade. (8)

How private and fraudulent Transfers are to be annulled.

§ 9. All alienations, transfers, or cessions, to the prejudice of other creditors, made for a trifling value by any person who is indebted more than he is able to pay, may be annulled within a year by the said creditors (9); and, with us, in such a case the article must be returned with the fruits, reserving the indemnification and restitution of whatever might have been paid thereupon (10); but in the country of Voorn, any person who has been in the peaceable possession of the goods for a year and day, if execution be subsequently levied against them, is not bound to

(1) Vide Joan à Sande, lib. 2. tit. 4. def. 4. Grotius, lib. 1. ch. 5. n. 37. Customs of Antwerp, ch. 41. art. 13. 34. 40. 42, 43. Christin. ad leg. Mechlin, tit. 9. art. 10. Gudelin de Jure novissimo, lib. 1. ch. 7.

(2) See book I. ch vi. § 8. pp. 31, 32. supra.

(3) In the original, Achter-uit-vaarders; literally, those who go backwards.

(4) Vide Plac. Oct. 4, 1540. Customs of Antwerp, ch. 65. art. 4, 5.

(5) L. 1. § 1. l. 2. in pr. & l. fin. Ff. de Curator. bon. dand.

(6) Secundum, l. 2. § 4. Ff. eod.

(7) L. 6. § 6. l. 10. § 16. l. 24. Ff. de his quæ in fraud. creditor.

(8) Vide Bell. jurid. page 619.

(9) L. 1. l. 6. § 8. & § 11. Ff. de his quæ in fraud. creditor.

(10) Contra. l. 7. & l. 8. Ff. eod. Grotius, Inleyd. lib. 2. c. 5. n. 10.

make restitution of rent, nor indemnification for fruits received before the trial of the cause, unless the said possession was maintained unlawfully and fraudulently. (1)

It is moreover the practice throughout Holland, where any person is indebted more than he can pay, to transfer and cede his moveable goods to one or other of his creditors, provided that he should remain in possession thereof during their pleasure and through toleration, which sort of transfer and cession continues in force for as far as it is lawful (2); but it is in most cases abused, and made fraudulently, to the prejudice of other creditors: for the prevention of this deceitful and prejudicial contrivance, by which the trade, livelihood, and prosperity of honest people are considerably impaired and prejudiced, there are various good provisions and orders made in the mercantile cities by special statutes and ordinances; and amongst others at Amsterdam, December 3d, 1644; at Leyden, March 21st, 1650; at Delft, May 16th, 1652; and at Gouda, December 8th, 1659; all with approbation and aggregation of the states of Holland against fraudulent transfers and other deceitful acts committed by bankrupts to secure their creditors shortly before they become bankrupt. As these statutes are too prolix to be inserted in this work, we may briefly remark that they chiefly consist in the following particulars:—No transfers or cessions of moveable goods, in satisfaction or for securing former debts or incumbrances, shall be valid, unless an entry be made thereof within a certain short time after their execution, in a public register to be kept for that purpose in the secretary's office, at least four weeks (3), and at some places six weeks, before such deliverer, mortgagor, or the person executing the same, becomes fugitive, or otherwise be found unable to pay his debts, although such goods were actually delivered into the hands of the creditor and replaced.

Whether a Debtor may, to the Prejudice of his Creditors, renounce his Right of Inheritance.

§ 10. It may, however, be asked, whether, independent of such clandestine transfers and alienation, the omission and negligence of the debtor, when he neglects his right to the prejudice of his creditors, is careless, or remits or cedes the same, can tend to the prejudice of his creditors? and whether no indemnification ought to be made to him for it? With regard to such prejudice, as it consists in *fact*, it cannot be well proved. On

(1) See the Statutes of that place, art. 55.
(2) On this custom, see Cons. & Advys. vol. iii. cons. 174. n. 1, 2. where it is fully treated.
(3) Vide Recueil de Rosenboom, page 311.

such occasions, indeed, it is not so much taken into consideration, as one does not understand that the creditors are prejudiced if the debtor neglect to obtain any thing, but only then when some part of his already acquired property is diminished (1); so that a son may, to the prejudice of his creditors, cede and remit his father's inheritance, and even his legitimate portion (2); and so it was understood by the court of Holland, on the 29th June 1663, in the case of Jaquelina Spiljeurs and Peter Coenen, impetrators for relief, in appeal against Frans van Cingelshouk, curator of the renounced estate and effects of Johannes Spiljeurs defendant; namely, that the said Johannes Spiljeurs may renounce and cede, to the prejudice of his creditors, the inheritance of his idiot sister (who had a short time before been placed under curators, and had died intestate), and also of whatever devolved on him from his grandfather's estate *ab intestato, ex clausula fidei commissi;* but appeal was lodged in the said cause to the high court, on account of fraud in the pretended deceitful renunciation, and for other reasons, the result of which is expected daily.

Whether a Person may pay a Creditor, to the Prejudice of his other Creditors, a Sum of Money before the Day on which it is actually due.

§ 11. It is likewise doubted, whether a person may make payment to one creditor in prejudice of the others, before the time, of a sum due on a certain day, (Arg. l. 10. § 12. & l. 14. Ff. quæ in fraud. credit.) But as this text speaks only of transactions which have occurred *after* the debtor has been declared insolvent, or after the management of his effects has been given to any one; and as a person may otherwise pay a debt due on a certain day, in spite of his creditors, before such day of payment arrives; so there is no doubt but it may take place, especially among us, with whom, it is a common usage in trade to receive debts payable on a certain day in cash, after deducting the usual interest according to the course of time.

(1) L. 6. Ff. de his quæ in fraud. cred. l. 134. Ff. de reg. Jur. Annæ Robbert. rer. jud. lib. 3. ch. 12.

(2) Vide Fachin. lib. 13. c. 46. Sande, lib. 3. tit. 13. def. ult. Groeneweg. de leg. abrogat. ad l. 6. Ff. quæ in fraud. cred. & l. 14. Ff. de suis & legitim.

CHAP. VIII.

(a) *Of the Right of Possession, and Prescription.* (b)

[(a) Grotius, 2. 2. (b) Grotius, 2. 7. & 3. 46.]

§ 1. *Right of Possession defined.*
2. *By whom, and how to be proved.*
3. *When it is acquired.*
4. *Of Prescription, as it antiently stood.*
5. *Of Prescription, as it now is, both in Civil and in Criminal Cases.*
6. *Exceptions to Prescription in certain Cases.*
7. *How far Prescription takes Effect in the Case of a Bond, upon which no Demand has been made for Ten or Twenty Years;*
8. *Also in the Cases of a Quit-rent or an unredeemable Rent;*
9. *And in the Case of a common hypothecated Rent.*
10. *In case of the Division of an Estate, in which a Charge is left upon another, whether the hypothecated Property can thereby in Process of Time be redeemed.*
11. *Fees of Advocates and Proctors, &c. how far affected by Prescription.*
12. *Against what Sort of Actions and Duties Prescription never lies.*

FULL property is not only obtained by a direct delivery, of which we have already treated, but also by a long and *bonâ fide* possession of another person's property.

§ 1. Right of possession consists only in a naked and mere detention and holding of an article, to use the same as one's own property (1). It consists in the following particulars; viz. when any one is in such possession of any property or right a year and upwards, he has a right to hold it in his possession until any one else, who opposes him therein, has legally taken over the property in question (2), without making any distinction whether that possession was *bona fide* or fraudulently commenced, because the mere possession is sufficient, and excuses any one from further proving why and how he has such right thereto (3); so that, when any one claims a thing as his right, it is always to be adjudged to the possessor so long as the claimant does not clearly prove his right, although the possessor on his part makes

Right of Possession defined.

§ 2. By whom and how to be proved.

(1) L. 3. §. Ff. de acq. vel amit. possess.
(2) Vide Grot. Inleyd. book 2. ch. 2. vers. Het regt hier uit. & ch. 7. vers. Wan. in de Handvesten, Keuren der Stad Leyden, (*Statutes of the City of Leyden*) art. 203. l. Cod. unde vi. l. 7. § 3. Ff. quod vi aut clam. l. 3. Ff. de just. & jure.
(3) L. final. Cod. de rei vindic. § 4. Instit. de interdict. l. 11. Ff. de petit hæred.

no proof (1). This usage prevails both in incorporeal and in corporeal things, to which a person has a right, and is justified in doing any thing, or in allowing it to be done. (2)

When it is acquired.

§ 3. When such possession is *bona fide* and unmolested, and is attended with prescription, it passes over into full property; and the property so lawfully acquired, may be detained by every person whomsoever with a good conscience. (3)

A person lawfully in possession may protect and maintain both himself and the property of which he is possessed against those who wish to molest him in his right of possession, even to the loss of the adverse party (4), and may continue in such possession of which he was deprived, or in which he was molested, if it only occurs whilst the fact is fresh, and without any delay. This rule is still understood to have been observed, although two or three or more days intervene whilst the injured party endeavours and makes ready, and collects his friends or weapons, or otherwise exerts his zeal to assist in protecting his possession. (5)

Of Prescription, as it anciently stood.

§ 4. This prescription was various according to the Roman lawyers; some requiring three years possession, by which all moveable property is obtained (6), while others require four years, within which the property of unoccupied goods, or of things purchased from the treasury, is acquired (7). Others again require ten years for acquiring property of all immoveable goods of those who are present (i. e. those who are in the same country), and twenty years in the case of persons being abroad (8); others require thirty years possession, by which all things without any title or good faith are obtained against those who are present, and forty years against those who are abroad (9). Others require forty years possession of effects that have belonged to churches, hospitals, and cities (10); lastly, others require many years possession, the commencement of which is out of memory

(1) § 4. Instit de interdict. l. 2. Cod. de probat. l. 4. Cod. de edendo. l. 14. Ff. de probat. Menoch. lib. 6. præsumpt. 69. n. 5. Peec. Tract. van besetten en hand opleggen (Treatise on arrest and apprehension) ch. 16. n. 6.

(2) Vide Schneidüin ad § 2. Instit. de action. n. 54. Cæpol. de Servit. ch. 20.

(3) Couvarr. in cap. possessor. de Reg. Jur. in 6. part. 3. § 2. Leasius de Justit. & Jure, lib. 2. chap. 6. dubit. 17.

(4) L. 6. § 1. Ff. de acquirend. possess.

(5) Arg. l. 3. § 7. & seq. Ff. eod.

(6) Pr. Inst. de usucap. l. unic. Cod. de usucap. transform. Groetaw. ad § fin. de usucap. is of opinion that it still prevails amongst us.

(7) L. 1. § 2. Ff. de Jure fisci. § ult. Instit. de Usucap. tot. tit. Cod. de quadrienn. præscript.

(8) Pr. & § 1. Instit. de Usucap. d. l. unic. Cod. de Usucap. transform. l. 9. l. penult. Cod. de præscript. long. temp.

(9) L. 3, 4. 7. Cod. de præscript. longiss. temp.

(10) Auth. quas actiones. Cod. de Sacrosanct. Eccles. Novell. 111. junct. Novell. 131. c. 6.

of man, and by which all prerogatives are obtained, that could not otherwise be acquired by mere possession; such as the privilege of coining, and other prerogatives of the state or sovereign, which are denominated "Regalia." (1)

Of Prescription as it now is, both in Civil and in Criminal Cases.

§ 5. But at present the prescription of the longest time only is universally admitted without distinction; but in this prescription the doctors are by no means agreed what time is requisite to obtain full property. Thus some are of opinion that thirty years are sufficient, and that in this respect we did not deviate from the written laws, with which agree the statutes of Zealand (ch. 2. art. 2.), by which it was expressly enacted, that the right to all immoveable property is prescribed against those who are present in twenty years, and against those who are abroad in thirty years. And the statutes of the country of Voorn (art. 56.) require a prescription of thirty years of immoveable goods, which number is sufficient. Other jurists, on the other hand, require a third part of one hundred years, or thirty-three years and four months (2): or otherwise a distinction is made between moveable and immoveable property; so that with respect to moveable thirty, and respecting immoveable a third part of one hundred years would be required (3). This last opinion we think is the most probable, and for the following reasons:

First, Because the charters of Lady Maria Duchess of Burgundy, and Countess of Holland, granted May 14th, 1476, and others (on which Grotius (4) wishes to fix his opinion) speak only of immoveable property; viz. feudal tenures and hereditary goods. (5)

Secondly, Because the decision of the vassals of the year 1530 (which is likewise mentioned by Grotius) cannot be extended to moveable goods.

Thirdly, Because whatever is not expressly contained in the said charters, and adopted by the general customs of Holland, must follow the result of the Roman laws, as we have elsewhere shown.

Exceptions to Prescription in certain Cases.

§ 16. An exception, however, is to be made with respect to all uncommon, shorter or longer prescriptions, which for special causes are separated from the common prescription, which one

(1) L. 3. § 4. & l. ult. Ff. de sp. quot. & rest.

(2) Vide Grotius, Inleyd. book 2. c. 7. in fin. Radelant, cur. traject. decis. 47. n. 6. Gois, advers. miscell. c. 9. n. 12.

(3) Vide Groenew. ad tit. C. de præscr. 30 vel 40 ann. Netherlands Adv. 1. c. 44.

(4) Inleyd. in loco.

(5) Vide Charters above noticed, art. 7.

cannot say to have been specially annulled, or become obsolete, as in the prescription of above a year in cases of inquiry and calumny (1); of two years in cases of craftiness and fraud (2); of four years in redresses (3); of defrauded legitimate portion, that is, lawful share of inheritance (4); of five years in the division of estates and in cases of adultery (5); and likewise, the lapse of twenty years, by which all criminal actions are annulled (6). Those which are not thereby understood to be annulled or affected, are to be found in Sande. (7)

To the preceding cases it is to be added, that in the year 1346, the Lady Maria granted, by a charter to the people of the northern part of Holland, that all crimes, with the exception of murder, arson attended with murder, and theft, by the lapse of above a year, that is, a year and six weeks, should be considered and left annulled, unless the bailiff had commenced his action within that time. (8)

Further, all pecuniary fines and civil amerciaments are no more prescribed against in five years, but become void within a year.(9)

As, however, among us, all bailiffs are strictly obliged, on pain of forfeiting their offices, to proceed against notorious offenders immediately, and against those who are concealed and fugitive, by citation and ringing the bells; and in case of default, contumacy, or otherwise, to proceed to punishment and executing the same for all offences; the court of Holland, after the lapse of more than one year, through the attorney general (*fiscal*) takes cognizance of all offences that are prescribed against, as well as such as remain unpunished (10); consequently, it can scarcely occur, that a crime which is known would, during the course of five or twenty years, more or less, remain unpunished; at least there are very few, if any, such examples amongst us.

How far Prescription takes Effect in the Case of a Bond,

7. From this general rule, according to the opinion of some, an exception is made in the case of personal running debts and bonds, which are excepted from the prescription of thirty, or a third

(1) L. 5. Cod. de injur.
(2) L. fin. Cod. de dolo malo.
(3) L. ult. Cod. de temp. in integr. restit.
(4) L. 8. § fin. Ff. de in offic. testam.
(5) L. 5. Cod. ad leg. Jul. de adulter.
(6) L. querela. 12. Cod. ad l. Com. de fals. cap. quum venerabilis extr. de except.
(7) Lib. 5. tit. 9. def. 2. See also Anton. Matth. de criminibus, lib. 48. tit. 20. c. 4. n. 14.
(8) Vide Hogerbeet's Van 'taanleggen der processen (*on the institution of suits*), near the beginning. Charters of Monikendam, page 2. Cons. & Adv. vol. iii. cons. 116, 117. Recueil of Rosenb. ch. 4. § 35. Charters of Amsterdam, page 7.
(9) L. 2. Cod. de vectigal. & commiss. Vide Placaat van de generale gemene middlen (*Proclamation of the general Commonwealth*) of the 4th Sept. 1603. Anton Matth. de Criminib. lib. 48. tit. 2. c. ult. n. 9 & ult.
(10) Instruct. van den Hove, art. 8.

part of a hundred years, whereof no payment is demanded within ten years among those who are present, and twenty years among those who are abroad (1): as it was understood by the court of Holland also, on the 1st of February 1612, in the case of Baartje Willems, impetrator against Abram Dirksz; namely, that a bond upon which no demand was made in twenty years, is prescribed against and annulled; but as it rests upon no other ground but that of the common prescription of ten or twenty years, introduced by the written laws in all common cases, which amongst us is prolonged to a prescription of thirty years, it is more probable that it will also not be prescribed against within thirty years.

upon which no Demand has been made for Ten or Twenty Years.

And it is also understood, that quit-rents and annual running rents become prescribed against in respect to the time that they become due, in thirty years: so that the same become prescribed against only after the thirtieth year; the other twenty-nine, together with the principal, remaining in full force, as was decided in the case of Adrian Molen-yser, impetrator of reformation, against Appolonia Oets, on the 10th May 1613.

§ 8. It is likewise understood of hereditary rents, perpetual irredeemable rents, and feudal tenures, which exist of themselves (unless indeed we consider them not as rent, but as principal itself), which ought to be paid every year, and as many principal sums as there are years elapsed (2); and therefore, the same do not become prescribed alike, but each year separately (3). And thus it was understood by the court of Holland on the 10th May 1612, in the case of Adrian Molenyser, impetrator of reformation, against Appolonia Gouser; namely, that a rent does not principally become prescribed against, so far as the rent is concerned, after the thirty years are expired, unless the said farm or rent had remained unpaid beyond remembrance, in which case the whole right is understood to be prescribed, as it was understood in France, according to Faber and other writers (4); and so it was understood by the court of Holland, on the 22d March 1641, in the case of Karel de Konink against Martinus Jacobsz. If a demand be duly made to the debtor, and he refuses payment, the prescription will commence from that time, according to Balbus. (5)

Also, in the cases of a Quit-rent, or an irredeemable Rent;

(1) DD. ad. l. 28. Cod. de pact. & l. 6. Ff. de Usur.

(2) L. 4. Ff. de ann. legat. Vide Stokman, decis. 80.

(3) L. 7. § ult. Cod. de præscript. 30 vel 40 annorum. See Meynard. Decis. Tholosan. lib. 6. decis. 34. in fin. Joan. à Sande, lib. 5. tit. 6. def. 1. Andr. Gail, lib. 2. obs. 73. n. 1.

(4) See Anton. Fab. ad Cod. lib. 7. tit. 13. def. 19. Guidon. Pap. decis. 46. n. 2.

(5) See Balbus de præscript. 4. part. 4. princip. quæst. 11. n. 3.

And in the case of a common hypothecated or mortgaged rent.

§ 9. Otherwise a common hypothecated or mortgaged debt and rent, the hypothecated property being with a second strange possessor, becomes prescribed and annulled, if thirty years elapse without any demand for payment having been made upon him on that account, and upon the first debtor himself, or his heirs, after the lapse of forty years. (1)

Agreeably to this principle, in the case of Elizabeth van Nieuwe against Gerrit Jansz van der Eyk and Jan Pietersz, (in which the mortgage (2) had been in a strange hand nearly forty years, without notice being given of the rent, because it was always well paid by the first debtor and his heirs), it was decreed by the court of Holland, that the possessors of the said mortgage became free by the prescription of forty years; nevertheless, as the forty years were not expired, that the impetrator could be relieved and redressed against such prescription; and therefore the civil petition was approved of, and she was redressed against the said prescription, and the defendants were condemned to pay the rents, and the mortgage was declared bound and executable for the same. This decision was made on the 5th June 1609. (3)

And in the case of Maarten van Naarden, who caused a purchased rent to be secured upon a morgen (or ten acres) of land, which was afterwards sold without being incumbered with the said rent, and was delivered upon a decree of the court that was prayed for, and subsequently sold to others, without the proprietors of the rent having made themselves known to the possessors of the said land in thirty-nine or forty years, who afterwards came in search of their mortgage, and demanded the rents; the court rejected their action.—See the case of Dorothea van Naarden, impetrator against Willem Dirxsz otherwise Willem Cornelisz, December 22, 1620.

In case of the Division of an Estate in which a Charge is left upon another, whether the hypothecated Property can thereby, in process of time, be redeemed.

§ 10. But in the case of a division of an estate, where an agreement was made between two joint debtors, that one of them should keep the mortgaged land, and that the other should take the rent with which it was incumbered to his charge, who having consequently paid the said rent for forty years, afterwards became unable, on which account the receiver of the rent called upon the other for payment of it, and endeavoured to pursue the mortgage: it was understood by the court of Hol-

(1) L. 1. § 1. Cod. de annali. excepc. vide Neostad. decis. 8. l. 3. 7. Cod. de præscript. 30 vel 40 annor.

(2) *Hypoteek*, in the original.

(3) See also Neostad. Cur. Holland. decis. 8.

land, on the 28th October 1608 (1), that the agreement made between such heirs and joint debtors may not prejudice the creditor, nor diminish his right, but that he retained his right to the mortgage, and that it was still bound for the same.

And therefore it was explained, by an ampliation of the 25th article of the orphan statutes of the city of Leyden, on the 24th September 1659, that whenever guardians of children, omitting to make a division of the estate or inheritance, enter into an agreement with the surviving father or mother, whereby the survivor engages and promises to pay all the debts with which the common estate is incumbered, and to release the children therefrom; and in case he pays over to them (by way of buying off) their inheritance; or if he promises to pay over certain goods, or a sum of money; in such a case the creditors of the said common estate would be obliged to demand the right which they have against the said common estate, and consequently against the said pupils, from the said survivor; or in case of departure or delay, to institute their claim against him within three years, to be computed from the time that the inheritance was entered upon or bought off, which not being done, in case of the longer delay of the recovery of the said debts they would be under obligation for, having followed the credit of the said survivor or possessor of the estate, and would have no action against the children, who will be freed from the said debts.

Fees of Advocates, Proctors, &c. how far affected by Prescription.

§ 11. It was enacted by the Emperor Charles V. as a general law of these Netherlands, by edict of the 4th October 1540, art. 10. and the interpretation followed thereupon, of the 14th February 1549, that all attendants of the court, advocates and proctors, labourers, servants, and merchants, should demand their fees and arrears within two years, unless there be a bond for the same, in which case a person will be obliged to sue the debtor within ten years, or his heirs within two years after receiving information of his death, or otherwise the same will be considered as paid: but this seems again to be annulled by custom; which, however, is still observed in Friezland, by virtue of a special local law (2); and also in France, according to Papon. (2)

Against what sort of Actions and Duties Prescription never lies.

§ 12. Besides the preceding, there are some actions and duties, against which no prescription ever runs, although they

(1) Arg. l. 25. Cod. de pact.
(1) Sande, lib. 5. tit. 6. def. 2.
(2) Vide Johan. Papon. lib. 6. tit. 12. art. 8. Coren, consil. 29. Wesel ad Const. Ultr. p. 287.

should not be practised from time out of memory; viz. duties that consist in a liberty of doing or leaving something, such as the right of appropriation, and the privilege of going upon a common road; the hereditary rent, of which we have spoken above, (§ 7. p. 133); feudal rights; the right of patronage; the rights of vicars, &c.; which are not lost, though not practised for many years by the persons entitled to them, because justa ignorantia, minority, absence, and the like, are the cause of negligence in the exercise of such right; and independently thereof, because, as is said, it consists in a liberty of doing or leaving; and on the other hand, the possessor who possesses the same without any good title, must be considered as possessing the same fraudulently; in which case the lapse of time cannot avail him, and he who neglected the same must always be excused. (1)

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(1) Facit textus in l. 2. Ff. de via public. junct. l. 10. Cod. de pignor. act. l. 12. Ff. quibus mod. pign. vel Hypothec. DD. ad d. l. 2. Ff. de via publica. Balb. de præscr. 4. Quint. part. princ. & post abbatem. Rochus de Curte, tract. de jure patronat. Rubrica de translatione jur. patron. verb. ipse vel is a quo. num. 81. Alexand. lib. 4. consil. 75. num. 35. vers. nec obstat. Andr. Gail, lib. 2. obs. 18. n. 4, 5.

CHAP. IX.

Of defective Property or Usufruct.

[Grot. 2. 33. Grot. 2. 38.]

§ 1. *Full Usufruct defined.*
2. *Nature of defective Usufruct, or a mere Use.*
3. *What is included in Usufruct.*
4. *Iron and other Mines.*
5. *Of the Usufruct of Turf and marshy Lands.*
6. *Goods for Consumption, how to be possessed for the Purpose of having the Use thereof.*
7. *Of the Usufruct of Furniture, Clothes, or Chattels.*
8. *Usufruct is distinguished into* Usufruct, *and into* having the Use and Profit *of an Estate for Life, without having the actual* Property *of such Estate.*
9. *Whether, and in what manner Usufruct may be transferred to another, or be incumbered.*
10. *How to be used.*
11. *What Kinds of Charges are to be borne by the Usufructuary.*
12. *Usufruct, how acquired.*
13. *How it devolves again on the Proprietor; and when it ceases, and to whom the outstanding Fruits belong.*
14. *Of the Termination of Usufruct by Cession to the Usufructuary;*
15. *How through Disuse.*

THUS far we have treated of the acquisition of property in general, and in what manner it occurs: we now proceed to shew the point in which it specially consists, as well with respect to corporeal as to incorporeal things, or mere matters containing many things. We shall therefore treat, first, of incorporeal things, as well in mere matter as in matters containing many things, in general; and afterwards, of matters comprehending many particular things, especially of inheritances and the possession of estates, and whatever appertains to them.

Property is either *full* or *defective*.

Defective property is that in which something is wanting to the proprietor, so as to render him unable to do with his property what is otherwise not prohibited by the laws, and what he would otherwise be at liberty to do; consisting in usufruct, or in an inferior title.

Usufruct is on the other hand either *full* or *defective*.

§ 1. *Full usufruct* is the right of drawing and enjoying all the fruits, profits, and income of another's property, without dimi- Usufruct defined.

nution of such property, and of disposing of the same according to one's pleasure. (1)

Nature of defective Usufruct, or a mere Use.

§ 2. *Defective usufruct* is, when the use of a thing is limited to certain modes; such as, having the *use*, that is, the right of drawing not *the whole*, but a certain profit from a thing, without being obliged to cede the same to any one else. Of the same nature also is the right to have the use of a house, to inhabit the same with one's family.

What is included in Usufruct.

§ 3. We said, '*without diminution of such property*;' because all benefits arising from the property itself, of what description soever they may be, are included therein; but not those which concern the *existence* of the matter or thing itself; such as, grass, corn, the multiplying of cattle, wool, milk, and so forth, rent of houses, cutting trees fit to be cut, (if leave be given for that purpose (2),) and likewise an annuity which becomes due annually, as was understood by sentence of the court of the 19th May 1595, in the case between Adrian Van Stokkum and Catherine Van Dorp, and also the division of the actions in the East and West India Company. (3)

Iron and other Mines.

§ 4. And likewise iron, copper, and other metals dug from the earth, are reckoned as usufruct, if they grow again annually (4); but if they do not grow again, the usufructuary may take the benefit of the money which they produce; but he ought, at the termination of the usufruct, to return the same to the proprietor. (5)

Of the Usufruct of Turf, and Marshy Lands.

§ 5. The same understanding takes place among us in the usufruct of turf and marshy lands, namely, that the mud may be well drawn up, and turf may be made; but that the money proceeding therefrom is not to be used by the usufructuary, but belongs to the proprietor of the soil; and therefore the use of the money may be enjoyed: but, at the termination of the usufruct, it ought to devolve upon the proprietor, for which the usufructuary is bound to give security. (6)

But, whether it would also be applicable to lands where

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(1) Pr. inst. de usufructu. & § 1. Instit. de usu et habitat. l. 7 & seq. Ff. de usufruct.

(2) L. 9. Ff. de usufruct. Ff. de usur. § 37. Instit. de rer. divis. l. 68. § 1. Ff. de usufruct. l. 7. § 1. Ff. de usufr. l. 62. Ff. de rei vindic. l. 9. § fin. Ff. de usufruct.

(3) Vide Joan. Castil. Soto Major de usufr. ch. 36. n. 29. & seq. Sarmient. Selectar. quæst. lib. 3. ch. 10. and Coren, obs. 7. Wesel ad Nov. Ultr. art. 10.

(4) L. 9. § 1. Ff. de usufruct. l. 7. item si vir. Ff. solut matrimon. vide Elbert. Leonin. tract. de usufruct. Cujac. lib. 15. obs. 21. Hottoman. lib. 1. animadvers. respons. ch. 13. Faber conjectur. lib. 1. ch. 8. Zas. lib. 2. Sing. intellect. ch. 4.

(5) DD. alleg. junct. Berlich. practic. quæst. part 3. conclus. 35. n. 21, 22, 23.

(6) L. 1. l. 9. Ff. usufr. quemad. cav. vide Sande, lib. 5. tit. 3. def. 2 & 3.

stones, pots, or pans are burned, or which contain any peculiar kind of earth, and whether the usufructuary may take out the earth of such land in the manner aforesaid, these are points that may be questioned for the same or similar reasons; but as the proper use of such lands does not consist therein, as is the case in iron or other mines, and as, among us, the rule with respect to the turf and marshy lands, which can produce little or no benefit, cannot be extended so far, and cannot take place without prejudice to the land itself, the usufructuary ought to make use of them with discretion. (1)

And so it was inserted in the statute of the country of Voorn (art. 70.), that, whenever land is dug out by any person, or by the ancestors of any person, the cession of such land will not be deemed sufficient.

All the preceding rules are to be understood of usufruct, of which the matter itself remains in existence undiminished, and which, at the termination of the usufruct, is delivered up in the same state, good or bad, in which it was before, and the use of which can be trusted to any one without security. (2)

Goods for Consumption, how to be possessed, for the Purpose of having the Use thereof.

§ 6. But in other cases, in which the use is productive of consumption, such as in coined money, clothes made, oil, wine, grain, and similar articles, they cannot come into usufruct, without security or appraisement, in which security is given that, at the termination of the usufruct, so much of a similar sort, or the value thereof, shall be returned, and the security is instead of the article itself. (3)

Of the Usufruct of Furniture, Clothes, or Chattels.

§ 7. But with respect to furniture, clothes, or chattels, as they may be *bona fide* worn out and returned, it will be sufficient for the usufructuary to give security that he will use the same properly; and that, on the termination of the usufruct, he will return them in the state in which the same shall be *then* found; as was understood by the court of Holland on the 14th May 1612.

Usufruct is distinguished into *Usufruct*, and into *having the Use and Profit* of an Estate for Life, without having the actual *Property* of such Estate.

§ 8. Usufruct, in general, is again distinguished into *usufruct*, and into *having the use and profit of an estate for life*, without being actually possessed of the *property*. When the usufruct of all the goods is bequeathed to any person, the question is, whether the time of the execution of the will, or of the testator's death, ought to be observed; and on this point, Van Zutphen says, there is a great difference of opinion among the lawyers. (4)

(1) Arg. l. 9 & l. 65. Ff. de usufructu. l. 1. Ff. de usufructu quemadmod. cav.

(2) L. 1. Ff. de usufruct.

(3) L. 1. l. 2. l. 7. Ff. de usufr. earrer. quæ usu consumunt. § 2. Instit. de usufruct. See also Grotius, Inleyd. lib. 2. c. 39. at the end; and Andr. Gail, lib. 2. obs. 46. n. 2.

(4) See his Practic., under the word *Lyfrenten*, sect. 41. p. 538.

Usufruct is limited to the *person*, and to the *life-time* of a person who is entitled to it.

Whether and in what manner Usufruct may be transferred to another, or be incumbered.

§ 9. So that the usufructuary cannot cede his usufruct to any other person, excepting only that he can allow the enjoyment of some of its fruits thereof to another, during the continuance of his usufruct (1); and therefore it is also understood, that the fruits belonging to an usufructuary may be arrested, and execution taken out upon his right of usufruct (2); but he may neither mortgage nor incumber the same. (3)

How to be used.

§ 10. An usufructuary may not use the property so that the same be impaired or diminished; and he ought to give security, that at the termination of the usufruct, the same shall be returned (4). Which security, and the taking of the necessary inventory for that purpose, may not be dispensed with, or prohibited from being demanded by a testator; and it may be freely demanded by the legatee, for the purpose of obtaining what has been bequeathed to him by his testator, if he finds it necessary, or if it be prohibited, as will hereafter be more fully proved. (5)

He ought also to make indemnification for fruit-bearing trees, and for other trees planted for decoration, wherever one is blown down or decays otherwise; and he may cut down none of them, excepting only for the necessary melioration of the farm. (6)

Houses and their roofs he ought to keep in good repair at his own expense; but new buildings, and other expenses which are seldom incurred, are to be defrayed by the proprietor. (7)

With respect to which, it was enacted at Gouda and Oudewater, "That to whomsoever a house shall be given, or by whomsoever a house shall be obtained by last will, to be used during his life-time, it ought to be kept in good repair by him, in whatever the house requires, or his heirs may be required to make good the loss, or he may be deprived of the use thereof during his life-time. Whenever the property requires any new repairs or foundations, he who claims the property shall procure the

(1) § 3. Instit. de usufructu. l. 66. Ff. de Jure dot. arg. l. 31. Ff. de pignor. lib. 2. feudor. tit. 8. in pr. vers. rei autem. l. 38. cum seq. Ff. de usufr. See also Garsia, de expens. ch. 10. n. 27. Cust. of Antwerp, tit. 48. n. 9.

(2) Vide Berlich, part 1. conclus. 80. n. 26. Math. Coler de process. execut. part. 2. ch. 3. n. 266 & 270.

(3) L. 15. § 7. Ff. de Usufr.

(4) L. 9. Ff. de usufr. quemadmod. cav. See Pecc. de Testam. Conjug. lib. 5. ch. 14. n. 4. Andr. Gail, lib. 2. obs. 47.

(5) Vide infra, book III. ch. 4. § 18. and ch. 8. § 18.

(6) L. 10, 11. Ff. eod. vide Christin. ad ll. Mechlin. tit. 15. art. 1, 2. Cust. of Antwerp. ch. 48. art. 3, 4.

(7) L. 7. § 2, 3. Ff. de Usufruct. See also Cust. of Antwerp, ch. 48. art. 3, 4.; of Mechlin, tit. 15. art. 1, 2. Consult. & Advys. vol. i. cons. 133. quæst. 3.

materials at the place where they are required; and he who uses the same shall pay the daily wages. If he who uses it make default, the proprietor may take the possession thereof, provided he pays the user; if aged above fifty years, the third part; and if under fifty years, half of the value of the hire or rent which such goods are annually worth. (1)

What Kinds of Charges are to be borne by the Usufructuary.

§ 11. The usufructuary is also obliged to pay all charges incurred upon the property; viz. duties, taxes, poundage, and similar contributions (2); unless the same concerns the property itself, which is to be advanced by the usufructuary, but ought to be returned at the end of the usufruct (3); as is also contained in the proclamation concerning the *forty* and *twenty* pence (art. 6.) "that whenever the *usufruct* of any immoveable property is bequeathed to any person, and such *property* is bequeathed to another related to the deceased in the collateral line, in such a case he shall be bound to pay the twentieth penny to the country, provided restitution be made thereof to his heir at the termination of the usufruct by the proprietor."

Usufruct, how acquired.

§ 12. Usufruct is acquired by agreement (4), or by last will, when the mere *property* is bequeathed to any one, and the *usufruct* to another (5), or by prescription of the third part of one hundred years (of which we have already treated); and likewise by adjudication of the judge in estates of co-heirs or division of lands, in which the usufruct is decreed to the one, and the property to the other. (6)

But in order that properties should not remain unbeneficial, the usufruct is but temporary, and in certain cases reverts again to the property. (7) For instance,

How it devolves again on the Proprietor; and when it ceases, and to whom the outstanding Fruits belong.

§ 13. First, the usufruct ceases with the death of the usufructuary (8), which is construed narrowly, so that the fruits standing on the field, which are not yet gathered, are understood not to belong to the heirs of the usufructuary, but to the proprietor (9), with the exception of rent, money, or hire of lands. If the usufructuary does not survive the day on which the payment falls due, the same is divided and split (10): and so it was also understood by the court of Holland, on the 27th February 1606, in the case of Sion Lus, impetrator of letters

(1) Vide Ordinance at Gouda, art. 210 & 211. Statutes of Oudewater, art. 152.
(2) L. 7. § 2. Ff. de usufruct. l. 28. de usu et usufruct. legat. B. van Zutphen, Pract. p. 528. and the authors there cited.
(3) d. l. 7. § 2. l. 27. § 3. l. 62. Ff. de usufruct.
(4) § 1. Instit. de Usufruct.
(5) Ibid. et l. 19. Ff. de Usufr. legat.
(6) l. 6. §. Ff. de usufruct.
(7) § 1. Instit. de usufruct.
(8) L. 3. § fin. Ff. quib. mod. usufr. amit.
(9) § 36. Instit. de rer. divis. l. 25. § 1. Ff. de usur.
(10) L. 26. l. 36. Ff. de usufruct.

decretal (1) against the burgomaster of Dordrecht; namely, that life-rents are to be paid until the day of death.

But where the usufruct is bequeathed to certain inseparable communities, such as churches, hospitals, societies, cities, and the like, it is understood to terminate after the expiration of one hundred years, which in an extensive degree is reckoned a man's life-time. (2)

Secondly, the usufruct ceases by the destruction of the thing upon which the usufruct or the use was placed. (3)

Of the Termination of the Usufruct, by Cession to the Usufructuary.

§ 14. Thirdly, it ceases by cession of the usufructuary, or by the united mixture of the property with the usufruct, as when the usufruct is due to the proprietor, or the property to the usufructuary. (4)

Which is likewise to be understood of the cession by usufructuaries on behalf of the proprietor; for the cession or transfer of one person's right to another does not annul or alter the usufruct, but it remains one and the same; so that by the transfer of the usufruct on behalf of another, the whole usufruct-right is not understood to go over, but only the enjoyment thereof (5), as is rightly asserted by Scipio Gentil and John Van den Sande (6), and is distinguished by Grotius (7), and by Christin (7); unless such termination of the usufruct be effected by deceitful transfer, and a discharge fraudulently made against the right, and with a view to defraud a third person, which then is so completely void, that the usufructuary thereby loses his whole right (9); and so it was understood by the high court in Holland, namely, that a father, being guardian of his children, had lost the usufruct, and in his lifetime it was joined to and mixed with the property; because he, on behalf of his creditors, had mortgaged the house, and had thereby caused the same to be sold by execution; and the purchaser was condemned to cede the house purchased on behalf of the children, and to return the fruits produced *a tempore litis motæ*, in the case of Timan Lukasz, as guardian of the children of Ysbrand Jacobsz Bok, impetrators

(1) Or of closed letters; the original is *Impetrant van beslote missive.*

(2) L. 56. de usufruct. l. 8. Ff. de usufruct. legat. l. 23. in pr. & § 1. Cod. de Sacrosanct. Eccles.

(3) § 3. Instit. de usufruct. l. 2. Ff. quib. mod. usufruct. amitt.

(4) § 3. Inst. de usufruct. l. 2. l. 5. in pr. Ff. Si usufruct. pet.

(5) Arg. l. 38. Ff. de usufruct.

(6) Tract. de action. cess. ch. 5. n. 35.

(7) Inleyding tot. de Hollandse Regtsgeleertheid, lib. 2. c. 39. vers. Tenderden.

(8) Christin. ad Leg. Mechlin. tit. 15. art. 6. n. 7. and art. 7. n. 3. and vol. 1. decis. 139.

(9) Arg. l. 1. Cod. de sepulchro violat. l. 18. Ff. ad leg. Jul. de adulter. l. 13. § 4. Ff. de his, qui infam. notant. Vide Pinell. in l. 1. Cod. de bon. matern. part. 3. n. 38. Covarruv. var. resolut. lib. 2. c. 8. n. 7. et DD. ad § 3. instit. de usufr. et l. 66. Ff. de jure dot.

of reformation against Wellim Dirkot and Hubert Appelman, defendants, decided on the 22d December 1605, and confirmed in revision on the 23d February 1608.

§ 15. Fourthly, the usufruct ceases through disuse during a third part of one hundred years. (1) How, through Disuse.

Through disuse; that is, by not using the thing in such a manner as he is entitled to, although he uses it otherwise (2); but if he *misuses* the same, or renders it worse, he would not therefore be deprived of his right. (3)

The usufruct, which is not confined to a person's life-time, but devolves by death from the one to the other, without distinction, unless it be confined to a certain generation, is a quit-rent right, or a feudal-right. (4)

CHAP. X.

Of Quit-rent Right.

[Grot. 2. 40. & 3. 18.]

§ 1. *Quit-rent Right, what, and how to be contracted for.*
2. *Whether and when it terminates.*
3. *May be sold by a Quit-renter, and be ceded to another.*
4. *Whether, in case of a Division of Quit-rent Ground, the Rent ought also to be divided, and what is customary in such Case.*
5. *Whether, in case of any Accident or Loss being sustained in the Rent, an Abatement is allowed.*
6. *How Quit-rent Right is acquired.*
7. *How it is terminated and lost.*

IN Holland there are several sorts of rents which are all denominated *quit-rents*, or belong to that kind of rents.

§ 1. There are quit-rent right (*emphyteusis*), tithe-right, tribute-right, and the like. Quit-rent right (*emphyteusis*) is an hereditary *immortal* right, by which the lord of the uncultivated land grants the perpetual and hereditary usufruct thereof, on condition of improving the land, provided he enjoys a good annual rent for the same. (5) Quit-rent Right, what, and how to be contracted for.

(1) L. 20. l. 25. quib. mod. usufruct. amitt.
(2) L. 1. Ff. quem admod. serv. amitt.
(3) L. 1. §§ 5, 6. quem admod. usufr. amitt.
(4) § 3. Instit. locat. l. fin. Cod. de jure emphyteutico, in verb. necessitatem.
(5) L. 1. Cod. de Jur. emphyt. l. 1. & § 2. Ff. Si ager. vectig.

I say, an *immortal right;* because it does not terminate with the death of the possessor (1), but is transmitted to the heir, reserving the right of making a new entry at every transmission, with a double rent for the benefit of the lord, as may be seen in a certain charter granted by Count Floris to the people of Monikendam on Lady-day in the year 1288, in the following words; "whether it be husband or wife who dies possessed of the farm, the nearest heir shall reserve that land with an hereditary rent, when he has paid to the right lord of the land double rent, and likewise from generation to generation, lasting for ever."

But there is another sort of quit-rent-right, although not customary amongst us, which is renewable from five years to five years, or from ten to ten years, or which after death of a person ought to be renewed by another, on pain of its termination otherwise. (2)

Whether and when it terminates.

§ 2. This rent comes instead of property, and is a real part of such agreement; in which, if it remains three years unpaid, the quit-renter is deprived of his right on behalf of the lord (3); yet in such a manner that it ought also to be judged by a final judgement of the judge. (4)

But the quit-rent is chiefly instituted in such manner, that if the annual rent be not paid exactly on the day it is due, the quit-renter loses his right; but on the other hand, although the quit-renter neglects to make an actual and undemanded offer, he is at present easily excused, by means of redress (5); and therefore, among us, the quit-renter may not only not be deprived of his right without a preceding judgment of the judge, on account of his default of payment, as was understood in the case (cited below) of Jan Knelisz, at Moordrecht, appellant, against Adrian Doentz; but even in contracts containing penalties, no judgment will be given so far; on which account it is mostly redressed by agreement, and likewise by decree, with one year's quit-rent, or by paying for a double neglect. (6)

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(1) § 3. Instit. de locat. conduct. l. 1. Ff. Si ager. vectigal. l. 3. Cod. de fundo patrimonial.

(2) Cap. 1. extr. de precar. On this subject see Grotius, Inleyd. lib. 2. ch. 40.

(3) L. 2. Cod. de Jure Emphyteutico.

(4) Grotius, Inleyd. lib. 2. ch. 40. n. 3. ch. 43. n. 5. Christin. vol. iii. decis. 120. n. 2. Sentence of the Court of Holland, between Jan Knelisz, at Moordragt, appellant, against Andrian Doens, on the 22d December 1615.

(5) Cap. ult. extra. de locat. Grotius, Inleyd. lib. 2. ch. 40. n. 28. Clarius, § emphyteut. quæst. 8. in fin. Sentence of the Court of Holland, between the heirs of Dirk van Leeuwen, doctor of law, impetrators in the first instance against the possessors of the lands situate in the Groep (*Furrow*) pronounced on the 2d November 1616, and confirmed by the High Court on the 22d of December 1623.

(6) Vide Coren, observ. 22. Sentence between Dirk van Leeuwen, doctor of law, and the possessors of the lands situate on the Groep (*Furrow*) above cited, vide Cons. & Adv. vol. ii. cons. 5.

Such is the practice generally observed among us; and it agrees with the mode observed in France, which we follow, where the same prevails also, saving any special contract made otherwise; and therefore, it is a common proverb there, that quit-rent goods become equal to a person's free property. (1)

§ 3. So that the quit-renter, independently of enjoying himself the usufruct of the land, may also transfer that right to another. But in case of a sale he ought (according to the Roman law) to give the preference to the lord, in order to reserve the same for himself for the same price if he desires it, within two months, or to receive one fiftieth part of the price agreed upon for renewing his quit-renter, as a token of property; but it may likewise be given as a donation, or be exchanged without the knowledge of the lord (2), provided, that for making an entry of it, and for renewing his quit-renter, one fiftieth part be likewise enjoyed by him upon the value of the property. (3)

May be sold by a Quit-renter, and be ceded to another.

But among us, the quit-renter may without distinction, sell and alienate his quit-rent land freely and unmolested, in what manner soever he wishes, without concerning himself therein with the lord (4), the latter reserving only his right to appropriate the same within one year after it comes to his knowledge (5); and if he does not use the right of appropriation, he enjoys for making entry thereof in the book, &c. for the first year, a double rent, besides the value of a can of wine for the receiver as his perquisite, which is generally understood to be included in the clause of quit-rent right, although it be not further expressed.

§ 4. Since then the pecuniary annual rent comes instead of the property, and is understood to be a real part of the quit-rent, it is questionable whether in case the quit-renter happens to sell part of the quit-rent ground, or to alienate the same otherwise, one part of the quit-rent ought to be split and divided in consequence thereof; but as the quit-rent and every part of it is indivisibly founded upon the whole ground granted, it consequently follows, that although the payment is split, the whole ground still remains bound for the least part thereof (6); and so

Whether, in case of a Division of Quit-rent Ground, the Rent ought also to be divided, and what is customary in such case.

(1) Vide Charond, lib. 11. respons. 20. and Chassan ad Consuetud. Burgund. tit. de fiefs. § en choses. Anton. Fab. ad Cod. lib. 4. tit. 42. def. 8.

(2) L. 3. Cod. de Jure emphyteut.

(3) Juxta, d. l. 3. in fin. & ibi. Sichard, n. 19.

(4) Vide Neostad. Cur. Holland. decis. 59, & Supr. Cur. decis. 39. in fin.

(5) Vide Customs of Rhynland, art. 40, Tiraquell de retract. lign. § 21. n. 3, 4. Christin. vol. decis. 122. Cap. ult. extr. de locat.

(6) Arg. l. 2. Cod. Si unus ex plurimis. See the Customs of Rhynland, art. 41.

it was understood by the court of Holland in the case of a mortgaged annual rent, which was split, that the whole ground, without the division being taken into consideration, remains bound to the receiver of the rent, and that he has his choice from what part to recover the same (1); and therefore, generally, in case of such division, this clause is added and contracted for; to wit, "*with hypothecation of the whole farm or rent;*" by virtue of which a person would be obliged to pay the rent, or an indemnification in lieu thereof, in case the receiver of the rent wishes to recover the whole rent from the divided spot, with the reservation of the right of indemnification. The same construction is also understood in the case of a succession of several joint heirs, each of whom is specially responsible for the whole quit-rent (2); although the quit-renter causes the quit-rent, on account of his perquisite right of transfer, to be transferred upon one of them all, at their option, from the one to the other, each reserving his right.

Whether, in case of any Accident or Loss being sustained in the Rent, an Abatement is allowed.

§ 5. It is also understood, that, in case of any accident, or loss being sustained in consequence of inundation, war, or other accident, to the ground whence the quit-rent issues, the quit-renter notwithstanding ought to pay his whole rent so long as enough remains in existence from which the annual rent can be raised; for, since he enjoys the benefit of all acquisition and improvement, so, in like manner, he ought to bear alone the loss which the same may suffer. (3)

How Quit-rent right is acquired.

§ 6. The quit-rent right is acquired and granted, like all immoveable things, by a lawful donation and transfer upon stamp and letters; so that, among us, it is unnecessary to consider further the doubt entertained concerning it by the doctors, viz. whether a writing is also required therein (4); and also by succession, as well by last will as *ab intestato*, that is, by inheritance without bequest, unless the same be bound by agreement to certain generation when granted (5); and likewise by prescription of a third part of one hundred years, if the property had

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(1) Vide Neostad. decis. 4. Radelant. decis. 85. n. 7. Christin. ad leg. Mechlin. tit. 13. art. 31.

(2) Arg. d. l. Cod. Si unus ex pluribus. Jul. Clarius, § emphyteusis. quæst. 14. in fin. Christin. vol. i. decis. 107. n. 10.

(3) Arg. l. 9. § 2 & 3. l. 13. § 5. Ff. de Usufruct. junct. l. 1. cod. de Jur. Emphyteut. et ibi Barthol. Salycet. Autum. confer du droict. Anton. Faber ad cod. lib. 4. tit. 43. def. 36. Alvar. Valas. tract. de Jure Emphyteut. quæst. 27. n. 4. in fin. Andr. Gail. lib. 2. obs. 23. n. 23.

(4) Vide Arnold Vinn. ad § instit. de locat. conduct. n. 8. Christin. vol. 3. decis. 119. n. 5.

(5) L. fin. Cod. de Jure Emphyteut. l. 114. § 15, 17. Ff. de leg. 1. l. 67. § 2 & 5. Ff. de leg. 2. Fusar. de Subst. quæst. 380. n. 8. & seq. et quæst. 111.

been used for quit-rent. And further, it is acquired in the same manner as all other goods.

§ 7. And it terminates likewise by the death of the generation to which the same was limited, with direction of renovation, unless a new grant be solicited in time by the nearest relations of the last possessor (1). Quit-rent right is also lost through prescription of a third part of one hundred years, from the time that the same had not been used by the quit-renter; but the quit-rent right is otherwise not so easily lost on the side of the receiver of the rent, unless the quit-renter had not only not paid the rent, but had also possessed the quit-rent so long, as his own free property. (2)

How it is terminated and lost.

§ 8. As we have already shown how far this kind of right terminates through default of payment and neglect of three years, whereby the right devolves on the proprietor, it only remains that we notice the last and principal means by which it is lost, viz. the termination of the cause itself, namely, if it entirely goes to nothing; but if part thereof only happens to perish, for example, if the house happens to be burnt down which was built upon the quit-rent ground, one would understand that the quit-rent ought notwithstanding to be paid for the remaining ground (3); unless the quit-rent issues only from the house or building (4); or unless it was stipulated when granted, that although the property granted happens to perish by accident or otherwise, yet the year's rent ought to be paid (5); which sort of conditions may also exist in law, and are made, among us, under the following clause, namely, "free of every thing, without any deduction whatsoever."

(1) Vide Christin. vol. 3. decis. 122. n. 8. Anton Gabriel. commun. conclus. lib. 3. de Jure Emphyteut. conclus. 1. Fachin. lib. 1. controv. c. 100.

(2) Vide Neostad Supr. Cur. decis. 39. and also what has already been said in ch. viii. § 8. supra p. 133.

(3) L. 1. Cod. de Jure Emphyt. Arg. l. 98. § 8. Ff. de solut. junct. See Anton. Faber, ad Cod. lib. 4. tit. 43. def. 36. Grot. Inleyd. lib. 2. c. 40. vers. Ten Sesten.

(4) Arg. l. 1. § 3. l. 10. Ff. quib. mod. Usufruct. vel usus amitt.

(5) Arg. l. 78. § 3. de contrah. empt. junct. l. 1. Cod. de Jure Emphyth. in verbis super omnibus.

CHAP. XI.

Of Tithes and Tithe-right.

[Grot. 2. 46.]

§ 1. *Tithe-right defined.*
2. *Its Origin, not from the spiritual Law, but from Secular Grants.*
3. *Different Kinds of Tithes.*
4. *Whether certain Tithes do exist.*
5. *Whether Hemp is subject to Tithe.*
6. *Tithes, how to be collected.*

Tithe-right defined.

§ 1. TITHE-RIGHT is a right to enjoy a certain part of fruits annually, whether it be one tenth, one eighth, one eleventh, one fifteenth, one sixteenth, one twentieth, one thirtieth, or one fortieth part; namely, of the principal kind which is mostly used. (1)

And so the tithe-right is understood, among us, to draw the eleventh part of certain fruits, as is declared by a certain charter of William Count of Hainault to the inhabitants of the country of Swyndregt in the southern part of Holland, given on Wednesday after St. Maarten's day in 1337, and containing these words; "the tithe we shall reserve; to wit, the eleventh part of unthreshed corn, and the eleventh lamb:" as was also understood in revision by the high court in Holland, in the case of Bernhard Van den Boonguard, Lord of Nienrode, against the burgomasters and rulers of Naarden, Huyssen, Blaricum, Larum, and Hilversum, on the 21st January 1628.

Its Origin, not from Spiritual Law, but from Secular Grants.

§ 2. This right, in our country, does not proceed from the spiritual law, according to the opinion of some writers, who think that it was introduced among christians in imitation of the ceremonial law (2); viz. that the tenth part of all fruits ought to be destined and paid to the support of the church, and whatever belongs thereto (3); but from secular grants. First, it was delivered to the supreme power as a token of subordination, which again in process of time conferred it upon the Count of Holland; as is unquestionably proved from the testimony of the abbot of Floricamp, and other antiquities collected by Grotius (4). By the Count, this right was further granted to others, as a consequence of lordly goods and particular income.

(1) Cap. in aliquibus. vers. illa. Ext. de decimis.

(2) See Levit. xxvii. 30. Numb. xviii. 21. Deut. xiv. 22, 28. and xxvi. 12.

(3) Tot. tit. extr. in 6. & Clementin. de decimis.

(4) Inleyd. lib. 2. c. 45.

These tithes are for the most part feudal property, and, together with the fee, ought to be granted and renewed; for it is understood, that no vassals, being entitled to high or low contributions by virtue of their manors, have any right to tithes unless it is expressly inferred from their grant. (1)

With respect to this right, an old custom is found in the statutes of the country of Zealand (2), that whosoever holds any tithe of the Count and departs this life, his legitimate son or sons shall be bound to pay to the Count, if Mambour's lands, *one livre black Tournois* (worth about twenty stivers in our country); and if the person deceased have no legitimate son or sons, then the deceased's legitimate daughter or daughters may have and keep every spot of ground for two livres Tournois; and if he have neither son nor daughter of legitimate birth, then his legitimate brother or brothers may redeem the same, every spot for three livres Tournois, which redemption they ought to effect within half a year after his death, on pain of forfeiting such tithe. And in case he have no sons, daughters, or brothers, it will devolve on the Count (if Mambour's lands) to make his profit thereby; and if any one give or sell any tithe to his sons, daughters or brothers, it must be redeemed for the same sums as it had devolved by the death of the deceased. But if any one sell his tithe to any other person, he shall give to the Count, if Mambour's lands, on account of such transfer and grant, *three livres black*, if he have either sons, daughters, or brothers in existence; and if he have neither sons, daughters, nor brothers in existence, then he may not sell his tithe, unless with the consent of the Count, or his stadholder or treasurer.

§ 3. Tithes are of three sorts; viz. upon *corn* or *small grain* and *crying tithe*. Different Kinds of Tithes.

Corn tithe is of rye, wheat, oats, barley, &c.

Small tithe is of herbs, timber, grass, hay, turnips, radishes, cabbages, onions, apples, pears, nuts, &c.

Crying tithes are upon foles, calves, lambs, young pigs, geese, bees, &c.

The crying tithes and inferior sort of small tithes are commonly collected in the following manner:

The crying tithes, of ten, one, and of five, a half, or the full value of both, at the option of the party entitled to the same;

(1) Vide Grotius, Inleyd. d. loco versè. 't is ook sulks; and proclamation of Emperor Charles V., dated October 1, 1520.

(2) A. D. 1496. ch. 2. art. 9.

under five, of every lamb, calf, or pig, a quarter stiver; of a fole, one stiver, and the like; all more or less according to the customs of the place to which the parties entitled belong. And it is understood, that whatsoever horses, pigs, sheep, and the like, were within the jurisdiction, tithe will be due every new year's day upon their increase, although they are alienated immediately afterwards, or carried away to other places; and also upon those animals which, having been in the manor, were, through connivance and agreement with others who pay tithe, driven to other places and fetched back immediately afterwards; and the same is collected every year in May, or sooner when alienation takes place, and later when the animals are multiplied.

Whether certain Tithes do exist.

§ 4. But with respect to small tithes, it is to be observed, that most of them were not established from antient times, but were extorted from time to time, by way of intrusion, by the nobles, from the good people, without any right, as appears from the proclamations of the emperor Charles V. of October 1st, 1520, and April 9th, 1529; by which it was ordered, that neither they nor any one else should exercise any tithe-right, excepting what they and their ancestors had been accustomed to take and use for the space of forty years, and previously; or in case they have other legal return thereof. In like manner, upon the remonstration of the burgomasters and rulers of the city of Leyden, concerning the market gardeners at that place, against the noblemen and other persons levying tithes in Rynland; the said proclamations were explained by a rescript of the Court of Holland of the 18th March 1603, addressed to the states of the same country; viz. that pot-herbs, and the fruits of trees, cabbages, carrots, onions, roots, beans, peas, turnips, or radish, salad, apples, pears, nuts, and all other the like fruits, upon what sort and parcel of land soever the same might have grown and have been produced, are *not fruits* subject to payment of tithes; and, therefore, that no person was allowed to demand, levy, or enjoy any tithe, earnest money, or other charges in lieu of tithe of the said fruits, unless it be by virtue of a special title; or unless, when the lands are granted, it be found that they are expressly entitled thereto, or unless by final sentence pronounced in the principal case (the said sentence having become absolute), such right was adjudged to them; or unless it appear clearly, that a similar right of tithe, previous to the date of the said proclamation of the year 1520, became legally prescribed by the time of forty years.

Whether Hemp is subject to Tithe.

§ 5. It was a question with many, whether hemp is also subject to tithe; but this point was explained by a proclamation of the

emperor Charles V., dated April 19, 1529, that tithes should also be paid of hemp, turnips, flax, or similar round or flat seed, as well as of wheat, barley, and oats, notwithstanding the same had not been sown for more than forty years; unless such lands were specially released therefrom, by privilege, by ordinance, or by sentence, which became absolute before the date of the said ordinance; and it was therefore distinctly understood by the Court of Holland at the end of July 1608, in the case of Lord Hendrik van Wyngaarden, that tithe of hemp ought to be paid before it is threshed, and that such tithe belongs to the person entitled to receive the same, whether the hemp bear seed or not, as well as the hemp seed; but at some places this right to tithe is bought off for a trifling sum payable upon every spot of ground that is sown with hemp.

In general, tithes are payable both upon feudal as well as upon other land; and it is obtained and lost like all other feodal and other ground.

Tithes, how to be collected.

§ 6. In order to prevent the lord who is entitled to tithe from being defrauded in his dues, the occupier of the land subject to them cannot carry away the fruits of the field, unless he gives due notice thereof to the lord of the tithe, and summons him to appear on a certain day to receive his tithe; but if he does not come on the appointed day, such occupier will be at liberty to cause his fruits to be carried home, leaving the eleventh bundle for the lord. (1)

Respecting right to tithes in Holland, and its origin and progress, Mr. Peter van der Schelling has lately written an extensive treatise, in which obscure circumstances concerning this right are treated with great clearness and precision.

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(1) Vide Grotius, Inleyd. lib. 2. ch. 45. in fin. Keuren van Lande Voorn, (statutes of the country of Voorn). art. 99; of Zealand, ch. 3. art. 36. Proclamation of the Emperor Charles V. July 7, 1554; and of King Philip, June 6, 1564.

CHAP. XII.

Of Tributes, Taxes, Farms having the Right of Preference and Appropriation, perpetual and irredeemable Rents.

[Grot. 2. 46. and of Rents, 3. 14. 29.]

§ 1. *Tribute or Tax-right defined.*
2. *Difference between it and the antient Quit-rent Right.*
3. *Of Abbot-right, or Death Pledge.*
4. *Of a Farm with the Preference of Appropriation.*
5. *Of Contribution-right.*
6. *Of the collecting of small Rents, &c.*
7. *Of the Redemption of such Rents.*

Tribute or Tax-right defined.

§ 1. TRIBUTE or tax-right is a duty whereby an annual rent (*instar antiquarum fundationum ad pias causas a fundatoribus bonis suis impositarum*), upon certain immoveable property sold, is imposed and established by the seller perpetually and hereditarily. By some these rents are perpetual and irredeemable; and by others they are such as have been transmitted from their ancestors, which in antient times used to be of such consequence that such lands were free of all other rents or charges; and with regard to the inheritance or disinheritance of the said lands, they were subject to no court of aldermen or usual tribunal, but justice was to be administered to them by other farm-holders of the same lord, whom he was at liberty to summon for that purpose, according to Bottelier (1), who says, "They owe no rents nor other charges, nor are they subject to the court of aldermen; but when the lord requires justice upon any farm or division, which the one claims from the other, he may summon his farm-holders, and may admonish them to do and to pronounce justice, and they are obliged to do according to the exhortation of their lord. And there is otherwise no court of aldermen, nor are more than four or five men holding farms required to appear; viz. the first persons whom the lord shall summon; and they take cognizance only of the inheritance or disinheritance of lands held in farm; and it ought neither to be done nor decided by others."

Difference between it and the antient Quit-rent right.

§ 2. This tax-right differs from the antient quit-rent right, in the following particulars; viz. that the said property is not forfeited by non-payment; but the said rent is irredeemable, unless it be otherwise provided for and stipulated by agree-

(1) Jan Bottelier, Somme Rural, ch. 201.

ment (1); and thus distinguished from other rents which are bought for money, and secured or established, and which may always be redeemed for the money paid; or if it be doubtful, with the sixteenth penny (2), of which we shall hereafter treat more fully.

§ 3. In Abswoude the abbots of Egmond had from antient times the right by us called *abbot-right* or *death-pledge*, which consisted in the following particulars; viz. on the death of every person they were entitled to receive the best pledge, or twenty-five pounds for the same. In process of time this was abolished, by introducing the payment of six hundred gilders principal, or the rent of seven gilders eighteen stivers and sixpence per annum; concerning which there are still some letters to be seen in the possession of the treasurer of the university of Leyden, (that university being endowed with some ecclesiastical income), the most recent of which letters bears date the end of February 1588, and 26th May 1595. In consequence thereof there is an old custom still observed at Delft, that the best dress of the deceased belongs to the church, or a commutation is made for it, by payment of a certain sum of money. Of the Abbot-right, or Death-pledge.

§ 4. A farm with the preference of appropriation differs very little, if at all, from the tribute-right, with which it agrees with the quit-rent right in this respect; viz. that he who levies the rent upon the sale or alienation of the property incumbered with such rent, has the right of preference and appropriation. This right is mentioned in the statutes of Leyden, of the year 1583, (art. 72.) and in the new statutes of the year 1658, (art. 120.) as follows; "Until the sale, at any time soever, of any houses or premises antiently incumbered with the right of preference to be appropriated, and until the conclusion of the bargain, according to the statutes, the seller or purchaser shall offer the person who holds the farm, or his attorney, the second purchase thereof, who is allowed twenty-four hours to make his election accordingly; and in the interval may appropriate the purchase to himself. (3) Of a Farm with the Preference of Appropriation.

§ 5. Contribution-right greatly resembles the antient quit-rent right, and is often a rent of only one doit, or a stiver per annum; and in like manner, if it be not paid exactly at the Of Contribution-right.

(1) Grotius, Inleyd. lib. 3. c. 14. n. 31. Zypæ Notit. Jur. Belg. de reditibus, vers. sub moderatione.

(2) Vide Grotium, Inleyd. lib. 3. ch. 14. n. 31, 32. and lib. 2. ch. 46. n. 3. Zypæ Notit. Jur. Belg. et supra, vers. et quoniam & vers. seq. Cust. of Antwerp, tit. 55. art. 9, 10, 15, 23. Christin. vol. 1. decis. 303. n. 33. et seq.

(3) See this right treated more at large in the first vol. of sentences and decisions of the court of Holland, decis. 18. p. 46.

time when it is due, the incumbrance laid thereupon ceases, and is declared forfeited. This right also takes its origin from the granting out of barren lands for improvement, upon that incumbrance; but as such neglect has never been confirmed by a decision *in judicio contradictorio*, it is also easily bought off for a trifling consideration, and is usually amended with a double contribution, as was understood by the court of Holland; on condition, that if any one happens to neglect it again, knowing or not knowing the fact, then in such case the said doit, by being redoubled, should be accumulated so long as and until the land should be entirely neglected and forfeited for the benefit of the person entitled to the contribution, at whose option it would afterwards be, to enter upon the land as his own free property, and to act therewith according to his pleasure; which contribution being neglected for about forty succeeding years, the time of the said neglect is completed and amended by paying at once double contribution for the first year, and every succeeding year single contribution, as appears in the often-cited case of Jan Cornelisz, sheriff of Moordregt, impetrator in relief of appeal against Adrian Jan Doensz, dated 22d December 1615.

There are two customs observed in Holland respecting the contribution-right, both of which are contradictory to law, and to reason.

In the first case, when any person departs this life, who is possessed of property incumbered with contributions, in such case each of his heirs is obliged to pay the whole contribution to the person entitled thereto, until such time as the estate is cleared; whereas otherwise it would have been sufficient for the deceased to pay only one contribution; consequently all the heirs together ought to be bound but for one contribution in right of the deceased, whose person they merely represent.

Secondly, if any person entitled to contribution dies before the estate is cleared, and the contribution is laid upon one man, the whole contribution must likewise be paid by each of his heirs.

Of the collecting, &c. of Small Rents, &c.

§ 6. With respect to the collecting of the small rents, hereditary rents, tributes, and contributions, a public sitting or assembly was antiently introduced into Holland, for the ease of the treasurer of the manorial income, at which the good country people were obliged to come and pay their small rents, hereditary rents, or tributes; and whosoever did not come on the appointed day of such sitting, was proceeded against by public distress, in general in the parish where the said sitting was held before; and a certain proper day was appointed for those who

were unwilling to pay, for the purpose of selling the farm, at the place where it ought to be, which was to be appointed and published in the parish, and which farming out was held by two vassals or aldermen, upon the pledge of twice the value in money, and thrice the value in distress; and whosoever happened to pay on the day that such distress was made, and prevented his loss, he was allowed to do it, provided he paid to the sworn messenger for his wages four pounds Flemish, and to the treasurer and his clerks two pounds Flemish; but whosoever did not appear at such time, and did not redeem his pledge within a year, or at least before the farming out again for the following year, of the future rents, tributes, and hereditary rents, then the treasurer or his clerk, for the rents of the two years past which then would be due, might freely appropriate the said pledges for the loss of the same for the benefit of the lord, on account of the failure of payment; so that the said treasurer was obliged, on the day of the publication for the sitting of the next year, to give a public information, generally, in the parish where it ought to be, of the right; whereupon their pledge was proceeded against, and notice was then given of the christian and other names of the defaulters to pay their said rent, hereditary rent, or tribute, in order that they might come and prevent their loss in time, and that no person might have reason to say that it was intended to force or surprise them. But as these solemnities and circumstances are now laid aside, such rents are at present collected by some lords and treasurers on the day of the sitting; and by a proclamation of the States of Holland, issued at the end of October 1620, relative to the exact payment of the Count's rent, hereditary rent, and poultry-money, land-tax, hereditary rents, and other small rents, it was ordained that the treasurer of the Count's income should be obliged to hold a sitting, every two, or at furthest every three years, once in every city or village where such small income issues; and should therefore, by affixing public advertisements on the churches and at the doors of court houses, cause every person to be summoned who is indebted to the Count in any tributes, contributions, hereditary rents, capon-money, ground hires, and other small rents; and whoever does not come to pay on the said day of sitting, may still do it within a year, at the office of the said treasurer, provided he pays double rent; and if any person does not come within the said year, the treasurers shall cause information to be given by public advertisement as aforesaid, to the possessors of houses, premises, lands, and rents, upon which

such farms or rents stand, that they still come within the following year and pay off the same, upon penalty (on the expiration of that time) of forfeiting, over and above the said double rents, for every stiver of the said rents, one gilder, besides the tributes and hereditary rents which are due according to the constitution of the letters of grant, and are to be paid precisely on a certain day on pain of forfeiture. But it was afterwards ordained by renovation of the same proclamation, on the 27th September 1658; "that instead thereof, each person who may be so indebted in any tributes, contributions, hereditary rents, or hires, should pay the same precisely within the month that they become due, on pain, in case of default, of forfeiting double the rent; and if they do not still make payment thereof within six months afterwards, that such defaulters should forfeit *a quadruplum*, or four times doubled rent; and if they do not come and pay the same within the same year, the treasurers and receivers shall give proper information and make publication, by affixing advertisements to the possessors of such houses, premises, lands, and farms, to come and pay the same within the following year, on pain, if the said time be also expired, of forfeiting, over and above the said quadruple rent, for every stiver of the said rent, one gilder: which will also be collected by the said treasurers and receivers; one half whereof, as aforesaid, will be detained for the informer. And, therefore, from the above will be excluded all sorts of tributes and hereditary rents, which a person owes according to the letters of constitution or grant, payable on a certain precise day, and upon forfeiture of such as will remain unpaid, upon all such rights and obligations as are in existence till now by virtue of the said letters." (1)

Of the Redemption of such Rents.

§ 7. "In order to exonerate the good inhabitants from the trouble and incumbrance to which the said small income, farms, rents, &c. subject them, in paying and making entries thereof in other books or otherwise; it was also consented and granted, that every person owing such said rents shall be at liberty to redeem the principal thereof at any time with the twenty-fifth penny; and further, the principal of the small hereditary rents amounting to and under one pound Flemish, may be redeemed with the fortieth penny; and if they are under or amount to

(1) The following is the Original of the above very obscure sentences, beginning with "And therefore," &c.—"Des sullen in al 't gunt voorst. is, uitgesondert en uytbehouden syn: alle manieren van Chynsen en Erf-pagten, die men schuldig is, volgend de Brieven van *Constitutie*, of uitgift, te betalen op sekre prefyzen dag, en op verbeurt, de welk sullen blyven staan, op al sulk regt, en verband, als deself vermogens de voorss. Brieven tot nog toe geddaan hebben."

twenty gilders, with the forty-eighth penny; and the tributes, contributions, &c. with the fiftieth penny. And whereas several cities, the university of Leyden, and the hospitals everywhere in the cities and in the country, claim several tributes, hereditary rents, contributions, &c. upon different mortgages; it was also granted that they should be all considered to be of one and the same nature, benefit, and obligation, as the goods above named."

CHAP. XIII.

Of redeemable Rents, and in what manner the Redemption of them is effected.

[Grot. 3. 14. 29.]

§ 1. *Nature of perpetual and irredeemable Rents.*
2. *The Redemption of Rents, how to be effected, if not regulated by contract.*
3. *How to be made when the Rent is fixed in a certain Specie and Value in Money.*
4. *How, when no certain Species is mentioned; or if a certain Species be mentioned, but not the Value.*
5. *How such Redemption was anciently effected, when Money was not current.*
6. *Value of a Rhenish Gilder.*
7. *Value of a Shield of Philip Duke of Burgundy, otherwise called a Klinkart.*
8. *A good St. Andrew's Gilder.*
9. *A Wilhelmus Shield.*
10. *A Wilhelmus Gilder of Dordrecht.*
11. *A Reinaldus or Arnoldus, and the Gilder of Beyer.*
12. *A Gold Shield of Burgundy.*
13. *A Gold Noble.*
14. *Carolus Guilder.*
15. *A Shield.*
16. *A Pound of Holland.*
17. *A Shilling of Holland.*
18. *A Pound good Money, or Komans Payment.*
19. *A large Komans Payment.*
20. *A Shilling good Money.*
21. *Certain Coin called the Old Bod Drager.*
22. *The Leu of Holland.*
23. *The Dordrecht Garden, and Flemish Plakke.*
24. *A Denier.*
25. *A large Tournois.*
26. *Rents otherwise irredeemable, how to be redeemed at the Desire of the Person who levies the Rent.*

§ 1. BESIDES the quit-rent right, tribute, contribution-right, and similar grants that may be made of the ground, an agreement may be made of annual rents, irredeemable on the part of the person owing rent; so that a person levying rent of

Nature of perpetual and irredeemable Rents.

a purchased rent, may not demand the principal; the debtor, nevertheless, always has an option of redeeming the same at any time after proper notice, notwithstanding it was agreed that such redemption ought to be effected within a certain time: but, as this sort of agreement is contrary to strict propriety, it cannot exist in law; because the person levying the rent sells his principal to the debtor of the rent for the annual rent, and what was once sold cannot be demanded back. This sort of contract is spoken of in some old bills of yearly rents as a *perpetual*, irredeemable rent, and hence ignorant persons understand that the same may never be redeemed by those who owe the rent; but it is understood to be perpetual and irredeemable only on the side of the person levying the rent, who may not demand back the principal so long as the rents are punctually paid to him (1). By the local law of Veluw and Veluwensoom (2), it is said, "that whosoever takes money upon rent, and gives security for the same, cannot be compelled to redeem it, although he had delivered it in writing, and sealed; for it is understood that no compulsion ought to take place therein." And it is also prohibited by the local laws of the country of Zutphen (3), and of Overyssel (4). In Holland there are also special statutes in several cities concerning the same, to wit, the new statutes at Leyden (5). And it was also prohibited at Amsterdam by statutes of the 10th March 1565, and enacted, that such rents may be redeemed at the highest rate with the eighteenth penny, (or $5\frac{5}{9}$ per cent). By the statutes of the city of Delft it was enacted, on the 21st November 1460, that a person may redeem there all rents issuing out of any houses or premises, at any time when the proprietor of the houses or premises shall please, with the best penny, at the rate of twenty-two, and not higher, ($4\frac{6}{11}$ per cent).

The Redemption of Rents how to be effected, if not regulated by Contract.

§ 2. It is a general custom, where the amount of the purchase-money of the rent is not ascertained, (for, antiently, it was not the practice to mention the amount in bills of yearly rents, nor in other purchase-deeds, which merely contained a clause acknowledging that the party was well satisfied and fully paid for the same), that such rent may likewise be redeemed at the rate of the 16th

(1) Vide Molin. de Usuris, n. 128, 351. Covarruv. Var. Resol. lib. 3. c. 8. n. 7. Papon. lib. 2. tit. 7. art. 1. Zyp. Notit. Jur. Belg. tit. de Reditib. vers. et quoniam. Anselm. Cod. Belgic. tit. van Renten. § 1, 3, 9. Grotius, Inleyd. lib. 3. c. 14. vers. Dese Handelinge. Cons. & Advys. vol. i. cons. 206. Cust. of Antwerp, c. 57. art. 56.; of Mechlin, tit. 12. art. 3.; of Utrecht, rubr. 26. art. 3.

(2) Ch. 25. art. 7.

(3) Tit. 20. art. 2.

(4) Vol. ii. tit. 11. art. 7, 12, 13.

(5) Art. 70, 118.

penny; that is, with sixteen times so much as one year's rent amounts to (1); but since the state has diminished the rents of principals running against the state to the 20th penny (which has subsequently been fixed at the 25th penny), that is, of every twenty or twenty-five guilders principal one of interest or rent, the court and high court have observed the same course in adjudging rents, where they were not agreed upon, but ought to be adjudged according to law, as will appear hereafter (2). It is, however, understood by some, that in such rents the redemption ought to be reckoned at a rate similar to that fixed by government, and that the preceding customs and ordinances were thereby annulled and altered.

How to be made when the Rent is fixed in a certain Specie and Value in Money.

§ 3. The same practice which obtained in the case of yearly rent, also prevailed in the redemption of rent; which, in most cases, was antiently stipulated to be for a certain amount of certain sort of money, which was to be paid and redeemed precisely in that very sort; for which purpose a specific weight and value were put upon the said sort of money: for instance, the rose-noble was, at the rate of thirty-two and a half market price, equal to nine Flemish shillings; the gold rider, at sixty-eight market price, was equal to four Flemish shillings; the golden leu, of fifty-eight market price, was equal to five Flemish shillings; the Carolus, at eighty-four market price, was equal to twenty stivers; a guilder of King Philip, of seventy-eight market price, was equal to twenty-five stivers; a krabbelaar, at four stivers; a vlies, at three stivers; the double stiver, at four Flemish groten; and so forth, in all other denominations of money, both gold and silver, as it was current about the year 1400 and afterwards; with which sort of money, or the expressed value thereof in other money, it was always sufficient to make payment, although the value of the money during the lapse of time was increased or diminished; because, at the institution, that exact value of that time was fixed according to the opinion of Molinæus and other authors (3); unless in the sort of money with which it was specially expressed that such redemption was to be effected, the clause of the value thereof be added. This is usually done, and is found in old title-deeds, for the purpose

(1) Vide Grotius, Inleyd. lib. 3. ch. 14. sect. Andersints. Cust. of Antwerp, tit. 57. art. 25 & 28.; of Mechlin, tit. 12. art. 3. Codex Belg. tit. Renten § 9. Cust. of Utrecht, rubric 26. art. 2. Local law of Veluw, tit. 25. art. 5, 6.; of Overyssel, art. 6. 12. Grant of King Philip I. to the people of the Hague, Sept. 11, 1500.

(2) Vide Book IV. ch. vii. § 3. infra.

(3) Molinæi Tract. de Usuris. quæst. 92. n. 623. Hotoman. Illustr. quæst. 15. Donell. ad l. 10. Ff. de reb. credit. n. 10, 11. Everard. consil. 99. n. 17. Cons. & Adv. of Rotterdam, part 3. cons. 333.

of expressing the meaning well, or the value of payment with which a person may yearly purchase the same; or when in the title-deed no certain sort and weight of money is mentioned; or when a certain sort and weight of money are mentioned, without adding thereto at what value the same may be paid and redeemed with other sort of money.

How, when no certain Species is mentioned; or, if certain Species be mentioned, but not the Value.

§ 4. In all these cases it is understood that the payment and redemption thereof run on in the same sort, and ought to be effected according to the value of the rent as it existed at the time when such payment and redeeming are effected, unless any loss or gain be actually sustained or obtained thereby; because in the agreement the exact value of the established rent alone is considered, without limiting it to a certain time (1); whereby, although the same sort and weight rise and diminish, the person who levies the rent does not enjoy more or less, because with such rise and fall the value of all other goods rises and falls also; so that at present one cannot buy for a rose noble (which is now worth ten or eleven guilders), more than could be purchased for the same rose noble when it was worth only nine shillings (2). Ignorant persons imagine, and rejoice, that their accumulated money is apparently risen to a greater value, without thinking that when they go to the market they will find all other commodities risen in price just as much as their money seems to have risen in value; and so, one hundred years ago, when money seemed less in value than it is at present, a person could purchase a pair of shoes for the value of one hundred eggs, which he still does, now that money has become much cheaper and seems to have risen higher in value. (3)

In the agreement, the exact weight of the sort of money is mentioned; because it frequently happens in the course of time, that the same sort of money rises and diminishes in weight, and on that account also can be reduced or increased to a lower or higher price; which change may not be considered in the redemption of rents, but the value thereof ought to remain the same. But the outward change may only be subject to consideration; viz. the increase or decrease of price of one and the same sort of money; for which purpose the weight is the exact assay. (4)

(1) L. 26. § 4. Ff. de Condict. indebiti. l. 24. Ff. depositi. l. 68. Ff. ad Senat. Trebell. l. 65. § 1. Ff. de Verb. Oblig.

(2) Arg. l. 2. Cod. de Vet. Numismat. Potest.

(3) Vide Neostad. Cur. Holland, decis. 47. Jacob. Coren. Supr. Cur. Holland, decis. 23. Gail. lib. 2. obs. 73.

(4) Vide Vinn. ad pr. Inst. quib. mod. re contrah. oblig. post. DD. supra allegat.

It is also to be remarked, that whatever is said of the increase and decrease of money, is to be understood of the exact currency of money publicly fixed by government, of which it cannot be said, that some sort of money happens sometimes to increase beyond the exact value, either through misuse, or from course of exchange, unless it be by a long and general custom. (1)

§ 5. Where the institution of the rent is of such antiquity, that the sort of money stipulated therein is no longer known or current (as often is the case), we usually fix upon the most recent value, and the last currency thereof. Hence it has happened, that several sorts of money having become unknown among us, the value thereof, as antiently fixed, remains in existence. I have noted several instances of this kind out of deeds and records, as appears among other documents in a certain receipt of Mr. Klaas de Vriese, counsellor and treasurer general of Holland, dated February 16, 1456. How such Redemption was effected when Money was not current.

§ 6. The Rhenish gilder is reckoned at three and four shillings; the vbel, which in other deeds is not reckoned higher than at fifteen stivers, but which was afterwards increased to twenty, is still reckoned indiscriminately at fifteen, or, if it be current, at twenty; and subsequently at eighteen, as is the practice in Holland and Friezland in the corn trade, in gold gilders at twenty-eight stivers each. Value of a Rhenish Gilder.

§ 7. In a certain bill of yearly rent granted on behalf of the city of Delft, by Maximilian and Maria, on the 19th March 1478, after Easter, amounting to six hundred schilden (or shields) of Phillip Duke of Burgundy, otherwise called *klinkaarts*, each is reckoned at fifteen white stivers, and by some at fourteen; which subsequently was increased to twenty-five and thirty. Value of a Shield of Philip Duke of Burgundy, otherwise called a *Klinkart*.

§ 8. And in a certain transfer of *May and Autumn Scot*, of Naaldwyk and Eyke duynen, granted by the Emperor Charles V. to Simon van der Does, on the 5th January 1536, the good St. Andrew's gilder is reckoned at twenty-nine stivers, which is commonly valued by others at twenty-eight stivers. A good St. Andrew's Gilder.

§ 9. A Wilhelmus shield is valued by some at twenty-five stivers, and by others at twenty-one, but by most at twenty stivers. A Wilhelmus Shield.

§ 10. And the Wilhelmus gilder of Dordrecht is valued at twenty-one Dutch shillings, and each of these at one blank or A Wilhelmus Gilder of Dordrecht.

(1) Vide Anton. Faber. ad Cod. lib. 8. tit. 29. def. 11. and Carpzov. Defin. Forens. part 2. constit. 28. defin. 1, 2.

twelve pence, that is, sixteen stivers and a half altogether. I mean, however, that a shilling of Holland ought to be reckoned for one stiver, and the Wilhelmus gilder at twenty-one stivers, because antiently it was not the practice to compute by pence, but by deniers, twelve of which make one stiver; and so at present, in the accounts of the state, twelve deniers are reckoned for one stiver, which in like manner are considered as so many pence by ignorant persons.

A Reinaldus or Arnoldus, and the Gilder of Beyer.

§ 11. The Reinaldus or Arnoldus gilder, and also the Beyer's gilder, is valued at fourteen stivers.

A Gold Shield of Burgundy.

§ 12. A gold shield of Burgundy is valued at fifteen stivers, and seems to be the same as the shield of Philip Duke of Burgundy.

A Gold Noble.

§ 13. In some deeds a gold noble was valued at forty and subsequently at fifty stivers; but I think it agrees with the English noble or angel, which is still current (1) and lately increased in price to seven gilders: unless it be intended to maintain, that by a Rose noble or Henricus noble, is to be understood what in some deeds is likewise valued at fifty stivers.

Carolus Gilder.

§ 14. A Carolus gilder is valued at twenty stivers, or forty Flemish groten, also antiently called *Koman's groten*; whether by this is to be understood the gold Carolus at forty-eight in the market, which at its first institution was not valued at more than twenty stivers, or was reckoned at the rate of the silver Carolus lately current at twenty stivers; which is most probable, as the golden Carolus is current at three gilders, and the silver at the rate of twenty, as has long since been known.

A Shield.

§ 15. A schild or shield is commonly fourteen stivers.

A Pound of Holland.

§ 16. A pound of Holland is valued at fifteen stivers.

A Shilling of Holland.

§ 17. A shilling of Holland is reckoned by some as much as a blank penny, at twelve pennies, by which is understood twelve deniers, which make one stiver; because antiently pecuniary reckonings were not made with pence, but with deniers instead of a stiver, as we have already stated.

A Pound, good Money, or *Koman's Payment*.

§ 18. A pound good money, or a pound *Koman's payment*, is one gilder, or twenty stivers.

A large Koman's Payment.

§ 19. A *large Koman's payment* is half a stiver.

A Shilling.

§ 20. A shilling good money is equal to one stiver.

Bod drager.

§ 21. An old *Bot* or *Bod drager* is paid with one stiver.

The Leu of Holland.

§ 22. A leu (or lion) of Holland was one penny, three of which were equivalent to two bod dragers.

(1) That is, in the early part of the 18th century.—EDITOR.

§ 23. A *Dordrecht garden* and Flemish *plakke*, is also reckoned at one stiver. The Dordrecht Garden and Flemish Plakke.

§ 24. A denier is one-twelfth part of a stiver; which according to the Tournois computation of money became current among other things now in use with us. A Denier.

§ 25. A *large Tournoys* was antiently current among us for the value of twelve deniers, or for one stiver, as I have found in several old accounts. A large Tournois.

§ 26. All these are to be understood of redeemable rents; because the hereditary rents, rents having the preference and appropriation-right, perpetual and irredeemable rents, tributes, and contributions, are not redeemable but with the consent of the person who levies the rent; in which we mostly follow the rule contained in the proclamation of the States of Holland of the end of October 1620, and now lately renewed, Sept. 27, 1658. (1) Rents otherwise irredeemable, how to be redeemed at the Desire of the Person who levies the Rent.

(1) See the proclamation itself in ch. xii. pp. 155—157. supra.

CHAP. XIV.

Of Feudal Tenure.

[Grot. 2. 41.]

§ 1. *The Origin of Feudal Tenures.*
2. *Nature of a Feudal Right, and what Property it conveys.*
3. *Appurtenances to Feudal Property.*
4. *Nature of bad and right Fiefs in Holland.*
5. *Nature of good Feudal Tenures in Holland, and how they devolve by Succession.*
6. *Feudal Tenures indivisible, excepting in Zealand.*
7. *How to be used.*
8. *Of the Resignation of Property to the Lord, and receiving it again from him upon Feudal Tenure.*
§ 9. *Original Distinction of good and bad Fiefs in Holland.*
10. *Why there are few or no Fiefs in Friezland.*
11. *What sort of Obligation exists between the Lord and his Vassals.*
12. *What sort of Services the Vassals are to perform to the Lord.*
13. *Whether and how far they are free from those Services.*
14. *The Vassals Oath of Fealty.*
15. *Of the Fiefs of the Lord and of the Nobility.*
16. *The County of Holland never occupied by any one upon Feudal Tenures.*
17. *Second Fief.*
18. *Common Fief.*

The Origin of Feudal Tenures.

§ 1. IT is uncertain by whom and whence the feudal law was introduced amongst us. The common opinion is, that it was first instituted by the Saxons and antient Germans in Italy, and especially in the dukedom of Milan, (which was the first country invaded by them, and where they reigned for a long time under the denomination of the *Longobardi* or *Lombards*, which last appellation is still in use), for the purpose of securing the submission of their subjects; and from the institution of the Emperors Henry, Lothaire, Conrad, and Frederic Barbarossa (made about the year 1100), it is said to have been introduced among us in the same manner as among other nations. Of this opinion is Grotius (1), who says, that the feudal law is natural to the Germans, and is found in no other countries but those in which they have antiently instituted and observed the same. But Molinæus, who wrote concerning the law of Paris,

(1) De Jure Belli, lib. 1. ch. 3.

respecting lands (Landregt) testifies (1), that he found it recorded in some antient writings and memorandums, that the Franks reigned in Saxony and Germany, that is, in the realm of Sweden, many years before the birth of Christ, and there instituted the feudal law; whence it was again introduced in France, and was adopted from the Franks by the Saxons, and the Longobardi or Lombards, and thence introduced in Italy. The feudal law is also ascribed by Conan (2) to the antient Franks, whose chieftains had their subordinate servants, whom they took with them to war; and whose state and circumstances, he says, were such, that they had all the necessaries of life in common with those under whom they belonged; and on the other hand, if any thing happened to them, or if any molestation were done to them, they were in the habit of bearing it together, or putting themselves to death. However this may be, it is well known that the feudal law was also antiently in use among us, as we have already stated (3); and it mostly has its origin from the act of the proprietors themselves, who being apprehensive of attacks and inconveniences from foreigners, resigned their own property to the Count, from whom they received it again from him upon feudal tenure, under promise of protection and defence.

Nature of a Feudal Right, and what Property it conveys.

§ 2. The feudal right is a gift of certain immoveable property, as an hereditary indivisible usufruct, under the reciprocal obligation of protection and homage between the lord and his vassal. (4)

I say *a gift*, because it ought to come from the mere benevolence of the lord, without his enjoying or receiving any thing for it. (5)

I call it *immoveable property*, because no feudal right can be conferred over moveable property, as this is not fixed or lasting.

Appurtenances to Feudal Property.

§ 3. Under *immoveable property*, are reckoned lands, houses, lakes, waters, rivers, forests, meadows, gardens, right of hunting, aviaries, fisheries, high, middle, and low jurisdictions, quit-rents, tithes, tributes, contributions, annual taxes, and all seignorial rents, viz. of poultry-money, capon-money, or similar duties; and in short, whatever else belongs in anywise to im-

(1) Lib. 1. tit. 7. des fiefs. n. 2.
(2) Francisci Conan, lib. 2. commentar. 9.
(3) See p. 4. supra.
(4) Cap. Unic. in fin. lib. 2. feud. c. 23. in quib. caus. feud. amitt.
(5) Ibid.

moveable property, and can be considered as such, or accrues therefrom. (1)

I say *hereditary*, because a fief being once granted, always devolves upon the vassal's descendants, and never reverts again to the lord, unless any fault or misdeed be committed on the part of the possessor. (2)

Nature of *bad* and *right* Fiefs in Holland.

§ 4. There were two sorts of fiefs antiently known among us, the oldest of which is what we call a *right fief*, or a *bad fief*; and the more recent, a *good fief*. The former, that is, a right or bad fief, devolves upon the oldest and nearest male issue among the lawful children of the last possessor, and their further descendants, men descended from men; or, in failure of males, it devolves again upon the lord. In this kind of fief, representation does not take place, of which we shall treat hereafter; so that an older son, descended from a younger son, ought to go before a younger son descended from an older son; and it does not devolve by succession upon any descendants or collateral relations, nor upon any daughters, unless it be clearly inserted in the grant; in which case, after the death of such daughters, it devolves by inheritance upon their sons, and other male descendants, in preference to women. (3)

Nature of good Feudal Tenures, and how they devolve in Succession.

§ 5. Afterwards, upon the supplication of the first grantee (4), the fiefs in Holland were made equal to the written laws; so that they do not easily devolve upon the lord, and therefore are denominated *good fiefs*. These are generally expressed by the name of an *immortal hereditary fief*; and they are not discontinued so long as any one can be found, from the side of the sword or the spindle (5); who by succession may be heir to the last possessor (6); and so it was understood by the sentence of the feudal court, Dec. 26th, 1540, on behalf of the young Lady Catherine van Wyngaarden against Hendrik Kreusing, Lord of Benthuysen: or otherwise with this clause, "*that it should not devolve by succession upon sister's grand-children;*" by which the succession to the fief is understood to be put on the same footing with the right of succession of property not subject to feudal tenure. Whereas, formerly, the right of succession of property not subject to feudal tenure,

(1) Gloss. & DD. ad d. cap. feud. cognit. Hanseton de Jur. feud. lib. 1. c. 4. Christin, vol. 6. decis. 6. n. 13. Everhard, Bronkhorst, Method. feud. ch. 4.

(2) § ult. in quib. caus. feud. amit. cap. 1. de natura feudi, and cap. 1. de feud. sine culpa non amittendi.

(3) Neostad. de feud. c. 3. Et Obs. rer. judic. 8 & 9. Grotius, Inleyd. lib. 2. c. 41. vers. Een erflyke.

(4) In the original it is, *door beding van de eerste uitgave.*

(5) That is, any relation of the father or mother's side.

(6) Vide Neostad. de feud. c. 4. n. 11.

through misuse, was confined within the fourth degree, and was subsequently extended according to the Roman laws. (1)

§ 6. I say *indivisible*; because, in Holland, feudal property is not divisible, and ought only to be inherited by and to remain in one person (2); unless it be allowed and permitted by grant and consent from the lord, upon the application of the vassal. But in Zealand, even the bad fiefs are divisible among all the sons and heirs, as well of the younger as of the elder brother (3). In that country also, the succession to the fiefs may also be bought off by the daughters, if there be no sons, or if there be no daughters, by other relations, for a trifling sum for every spot of ground extending to something more than an acre. (4)

Feudal Tenures indivisible, except in Zealand.

§ 7. I say *usufruct*; because the vassal enjoys all the interest and fruits of the feudal property, but only *the usufruct* thereof, the real property remaining in the lord of the fief: and therefore, as an usufructuary ought to draw the fruits without diminishing the property itself; so, in like manner, the vassal cannot, without consent of the lord of the fief, do any thing that would in anywise impair or diminish the feudal property; and so Lord Jan van Montfoort, who was possessed of the manor of Adelaartswoud (now called Hasarswoude) upon feudal tenure from the Count, having allowed several persons to dig up the marshy and fenny lands situate in the same manor, and to turn the ground, was declared, by a sentence of the court of Holland, to have granted a wrongful permission; and he was prohibited from allowing it any more, on pain of forfeiting one thousand golden leus. He was further condemned to declare upon oath, what and how much money he had enjoyed on that account, and for the same to purchase so many lands and premises as the said money would amount to, or to make good the value thereof to the Count out of his own lands, on pain of forfeiting four hundred golden leus, besides the value of all such sums as it could be proved that he had received, and of further forfeiting on *account of the messus* two hundred gold leus for the benefit of the Count. A similar sentence was pronounced on the same day against Arend van Swieten, concerning the manor of Soetermeer.

How to be used.

(1) Tit. feud. de nat. feud. success. Neostad. de feud. c. 4. n. 8. Grotius, Inleyd. lib. 2. c. 41. vers. Maar door, &c. in het midden.

(2) Vide Neostad. de feud. obs. 8 & 9; & de feud. Holland. Success. c. 5. Bort, Van de Lenen, c. 5. Fred. a Sande ad Consuetud. feud. Gelr. tract. prælim. c. 1. n. 34.

(3) Vide statutes of the country of Zealand (*Keuren van den Lande Zeeland*) ch. 2. art. 6. Bort, d. loco.

(4) Vide Statutes of Zealand, c. 2. art. 8.

Of the Resignation of Property to the Lord, and receiving it back again upon Feudal Tenure.

§ 8. The protection and defence which the lord afforded to his vassal, against any molestation by others, was antiently held in so much consideration among us, especially during the civil war of the Houxs and Kabeljawsen (as it is called), that many resigned their property to the Count and received it again from him upon feudal tenure, wholly with the view of obtaining his protection (1). This made the Counts formidable, as the power of the others became subordinate and submissive.

Hence it is evident, that most of the feudal property has its origin not from the Count, but from the cession of the people themselves; and it is also evident, that the Counts themselves never did much to or for those lands.

Original Distinction of good and bad Fiefs in Holland.

§ 9. It is probable that this circumstance gave birth to the distinction of *bad* or *good fiefs of Holland*, and *of good immortal hereditary fiefs*; whereas such cession, for the purpose of receiving the lands again upon feudal tenure, was a common agreement, that the said property should continue to be inherited and succeeded to in the same manner as the vassal's own property, subject to no feudal right.

Why there are few or no Fiefs in Friesland.

§ 10. But a different practice obtained in Friezland, where the people antiently relied more upon their own power, and took better care of the preservation of their great liberty; and where the cession above mentioned was never in use; and therefore very few, if any fiefs, are found there. The Emperor Charles V., indeed, endeavoured to introduce them in the following manner, but without success. He offered his protection to the Friezlanders upon that footing, saying, it was nothing else but putting their bonnets upon his head; which bonnets he, taking off again, with a perfect certainty that they will never fall off, will put upon their heads where they stood before. This proposal, however, they politely refused, with the following answer; viz. That they meant and trusted that the bonnets of the peasants stood as fast and as well upon their heads, as the Emperor ever could or would wish to place them.

What Sort of Obligation exists between the Lord and his Vassals.

§ 11. Thus there was a mutual obligation between the lord and his vassal, by which the lord took his vassal under protection; and the vassal bound himself again to be faithful to his lord, and to seek his profit; to give him good advice; to assist and stand by him; to defend whatever might be prejudicial to him; and to discover whatever might tend to his loss. (2)

(1) Vide Neostad. de feud. c. 1. n. 12. and Grotius, Inleyd. lib. 2. c. 41. vers. Maar door op 't eynde.

(1) Cap. Unic. de Nov. form. fidel.

What Sort of Services the Vassals are to perform to the Lord.

§ 12. This feudal obligation from the vassal to his lord, anciently, was carried to such a height, that the vassals themselves, or in case of their being under considerable impediment, other persons procured by them in their stead, were obliged to be at the service of their lords at their own expence, in cases of necessity, when the defence of their country required it, *within the limits;* but not without the limits, unless the war was commenced and undertaken with the knowledge and advice of knights, and the states of the country. This is denominated a *lordly expedition*, as appears from the following passages from a charter granted by the Empress Margaret to the people of Kenmerland, on Friday after Ascension-day, 1346: "Neither we, nor our descendants, will commence nor accept any war against the territories of other lords without our limits or countries of Holland, Zealand, and Friezland, except with the approbation of our knights, esquires, and our cities of Holland, wherein it will be their duty to serve us, and our people will always be ready to serve us therein; and when we require their service we will come within the jurisdiction of our bailiff of Kenmerland, and speak with our well-born men concerning the service which we shall require from them, as our ancestors before us did," &c.

Whether and how far they are free from those Services.

§ 13. But although this recourse and remedy may not now be necessary, or may have gradually become obsolete, yet the vassals are not released from performing the services which they owe to the lord, according to Grotius (1), though the contrary is asserted by Neostadius and others (2). These services, however, having now ceased, the fiefs among us are now become in every respect (as in France) the same as property that is not subject to feudal rights; saving only the court-rights and fees due to the lord at every succession or change of lord, as an acknowledgement of the right and one's own deed. (3)

The Vassals Oath of Fealty.

§ 14. The oath of allegiance to the lord, which was taken by his vassals or any one in their name, in the presence of some or at least of two other vassals of the lord (4), is at present taken in our country in the following manner; "I swear that I will be obedient and bear allegiance to their High Mightinesses the States, representing the county of Holland, Zealand, and West

(1) Inleyd. lib. 2. c. 41. vers. uit Kragte van desen.

(2) Vide Neostad. de feudi Holland. Succes. c. 1. n. 18. Matthys van der Houve, Handvest Chronyc, lib. 1. c. 10. p. 60.

(3) Zypæ Notit. Jur. Belg. tit. de feud. Bus. ad l. 1. Ff. Si ager vectigal. Argentr. ad Consuetud. Brit. ad rubric. tit. 16. n. 3, 4.

(4) Zypæ Notit. Jur. Belg. tit. de feudis. vers. juramenti. l. 2. feud. tit. 2. & 32. in fin. & tit. 58. § idcirco.

Friezland, and to their stadholder: and that I will never, by advice or deed, endeavour to do any thing which will cause any impediment or loss to the republic, or to its inhabitants; but if any such thing shall come to my knowledge, I will, according to the best of my abilities, defend, and give or cause information to be given to the said lords and to their stadholder: and I will protect the revenues and income of their Mightinesses, according to the best of my abilities; and further, I will be at the service of their High Mightinesses, and assist them with my advice and deeds, there and where it shall please them, and they may be required; nor will I divulge any thing to their prejudice which shall be trusted to me; and, moreover, I will do whatever a good and faithful vassal is obliged to do. So help me God Almighty," &c. This oath is followed by other feudal lords also.

The foregoing oath is to be renewed within one year and six weeks, as often as the fief devolves by succession, or the possessor is changed (1), paying every time the court-rights and lord's fees attached thereto, and which are mostly expressed in the grants; of which we shall treat in a subsequent page.

Fiefs are usually divided into *lordly*, *noble*, and *common* fiefs.

Of the Fiefs of the Lord and of the Nobility.

§ 15. Lordly or noble fiefs are those which are granted by a king or prince, and which, besides the possession of jurisdiction, have the titles of honour and dignities of kingdoms, dukedoms, counties, baronies, and the like. Of this description of fiefs are those which the Kings of Denmark, Poland, Bohemia, and almost all the princes in Germany possess from the empire (2); so Brabant and Guelderland are possessed as fiefs of the empire, as Flanders, Artois, and Hainault are antiently known to have been held as fiefs of the French crown.

The County of Holland never occupied by any one upon Feudal Tenures.

§ 16. Some writers have attempted to assert that the county of Holland was held upon feodal tenure from the Emperor, with this distinction, that it was a free feudal tenure excused from all services and incumbrances. But this assertion is supported by no evidence; for the inhabitants of Holland never were subordinate, but were always considered as free; for, according to Matthew Vossius (3), Charles the Simple, King of France, expresly ceded by a charter all right and pretension which he or his ancestors had thereto; and (4), after the empire came from the Franks into the possession of the Saxons, the Emperor

(1) Neostad. de feud. c. ult. n. 4.
(2) Gail, lib. 1. obs. 30.
(3) Hollandse Historie, pp. 3. 16.
(4) Ibid. p. 24.

Otho II. by a letter and seal relinquished all claims of feudal right over Holland. (1)

§ 17. From these lordly and noble fiefs proceeded other inferior fiefs, which were in like manner held upon feudal tenure by other vassals, otherwise denominated *men of men*, or more commonly *sub-feudal tenures*. (2) Second Fief.

§ 18. *Common feudal* tenures are such as are held without any lordly titles or nobility being attached to them. (3) Common Fief.

CHAP. XV.

In what Manner Feudal Tenure is acquired.

[Grotius 2. 42.]

§ 1. *How Feudal Tenure is acquired by Grant.*
2. *How by Succession.*
3. *Whether and how far Representation is allowed.*
4. *How by last Will, by Grant, and Permission.*
5. *By Transfer or Gift, Sale, Exchange, &c.*
6. *By Hypothecation or Incumbrance.*
7. *Restitution of Fiefs purchased, how and to whom to be made.*

FEUDAL tenure is acquired by grant, succession, last will, or arbitrary transfer.

§ 1. When a fief is acquired by grant, it is either from the grantor's own estate, or from the vassal's surrender of his own property into the hands of the lord, as stated in the preceding chapter. In this case the lord of the fee cedes to his vassal, on condition of protection and defence on the one side, and of servitude on the other, the full possession of certain property for himself and his heirs, provided that it shall not devolve by succession within certain degrees, under an acknowledgement of court-right and of the dues payable to the lord upon every change of owner. How Feudal Tenure is acquired by Grant.

As we have already treated sufficiently in the preceding chapter of the protection and defence to be given by the lord,

(1) See this subject further proved by Grotius in his treatise on antiquity of the Batavian Republic (*van de Oudheid der Batavsche Republyk*), and by John van Heemskerk in his Batavian Arcadia (*Batavise Arcadia*) p. 186. et seq. under the denomination *Sun-fiefs* (Sonne-Lenen).

(2) De his qui feud. dar. poss.

(3) Cap. 1. vers. Cæteri. Quis dicatur dun. c. 1. in princ. De his qui feud. dare poss.

of the servitude due from the vassal, and also of the devolution of good and bad fiefs by succession, it is only necessary now to remark that the said obligation is to be resumed and renewed by the successor, whenever the possession of such fief changes, which is to be delivered and effected by the lord in the presence of two other vassals under similar promises, paying every time, as an acknowledgement of the lord's property, the court-rights and other fees due to the lord, of which we shall speak in the following chapter.

How by Succession.

§ 2. The succession to feudal property is the same as in the case of other property which is not subject to the feudal law, excepting only for as far as was otherwise agreed by the grant, which is strictly to be observed, and subject also to the following exceptions (1);

1. The fee is not divisible, (unless by consent, as we have already shewn) (2), but devolves only upon one person, to the exclusion of all others. (3)

2. The fee remains always for the descendants of the first vassal, or for him who is related to the first possessor from that side (4); unless the successor to such fee again resigns it to the lord, and receives the same anew from him upon feudal tenure, on condition that it should devolve upon the person who will inherit his own property which is not subject to feudal tenure: in this case such heir excludes other descendants of the first follower to the fee, as was unanimously understood by the feudal court upon previous information taken thereupon. (5)

3. In a fee the collateral relations go before the ascendants. (6)

4. The nearest degree excludes the more remote degrees, and no representation is allowed; so that an older son, descended from a younger son, would supersede a younger son descended from an older son. (7)

Whether, and how far, Representation is allowed.

§ 3. The preceding regulations and exceptions are to be understood as applying to *right* or *bad* fiefs, which alone are treated of by Neostad (8), or to such concerning which it was so agreed by the grant; of which sort there are few, if any, among us. But with respect to good hereditary fiefs, which do not devolve by succession, I am of opinion with Neostad (9), that the written

(1) Gudelin de jure feudi, part 3. c. 5. n. 10. Baro de acq. benef. lib. 2. c. 16.
(2) See ch. xiv. pp. 166, 167, supra.
(3) Neostad. obs. feud. 8, 9.
(4) Vide Notable Poincten van Leenen, art. 21.
(5) Reg. D. ii. p. 186. vers.
(6) Vide Neostad. de feud. c. 5. n. 35. & 45.
(7) Vide Neostad. c. 3. n. 4. Notable Poincten van Leenen, art. 15.
(8) De feud. Holland. Succes. c. 3. n. 4.
(9) De feud. c. 6. n. 16.

feudal law ought to take effect; according to which, representation is allowed among brothers and sisters, and their children inheriting at the same time (1). Grotius, however, seems to have held a different opinion; for in one place (2), after brothers and sisters he allows their children to succeed; and in the same chapter, he expressly, and without distinction, says, that with respect to the succession of feudal property, the nearest excludes the more distant relation of the same branch; which opinion seems to have been carefully followed by our modern lawyers (3). But without a special law or further reasons, their authority cannot be indulged so far; but the written feudal law ought to be observed, as it always is in doubtful cases; with this distinction, however, that where the feudal property is divisible, more collateral relations inherit alike by representation; for example, a brother, together with the children of a brother who died before, and so forth. But where the feudal property is not divisible, and the eldest has the preference, as is often the case among us, a son descended from an older brother would by representation go in the room of his father before a younger brother, who is still in existence. (4)

5. In the same degree a man goes before a woman; and between two or more men, the eldest go before and between more women likewise; according to the old proverb,

"The eldest in the street.
The nearest in degree.
The men before the women always retain a fee in Holland."

6. Besides the first degree of descendants, a woman descended from a man takes in preference to a man descended from a woman, though they are both equally near in point of consanguinity, as is explained in the old laws of Kenmerland, under the title of *keeping feudal property*, viz. "That whenever a man has feudal property, the title of which contains that it should not devolve by succession within the first degree, the young man has the preference before an old woman, though they are both equally near. Should such young man and old woman die before the man who possessed the feudal property, and the young man leave behind a daughter, and the woman a son; then the young man's daughter shall have the feudal property in preference to such old woman's son, according to

(1) and (4) Cap. unic. de success. fratr. rel grad. succed. in feud.
(2) Inleyd. lib. 2. c. 41.
(3) See particularly Cons. & Advys. c. 4. cons. 154. et seq. and Mr. Peter Bort thereon; as also in his Tract. van het verst-erf der Hollandse Lenen (Treatise on the succession to fiefs in Holland), part 5. maxim 3.

feudal right, so far as they are both equally near to such feudal property."

Further, the general law of succession prevails according to the right denominated *Aasdom's right*, from the oldest to the nearest, not from the lord or grantor, but from the last possessor; because, as stated in the last chapter, feudal property mostly originated from the resignation made by the lineage of the possessor or his ancestors, and not from the lords of feudal property; which law of succession is enumerated from degree to degree by Grotius. (1)

How, by last Will, by Grant and Permission.

§ 4. By last will, upon a grant or permission of government, a vassal may bequeath the feudal property to whomsoever he pleases, without requiring the consent of the nearest lord or the nearest relations or feudal successors (2). Without such permission the bequest is by some authors considered so completely void and of no effect, that even the value of the bequest may not be demanded, which is followed in other countries (3); and Grotius also makes it applicable to our practice (4); but Groenewegen testified that it was understood by the court of Holland, that in the same manner as the value of property (not subject to the feudal law) bequeathed to any one, can be claimed, although the management of it is prohibited to the heirs (5), so it is likewise understood to be the case among us with respect to feudal property, which has become in every respect almost like to property not subject to feudal law.

By Transfer or Gift, Sale, Exchange, &c.

§ 5. Feudal property is acquired by a voluntary transfer effected by gift, sale, or exchange, or by a transfer in the presence of the lord and two vassals; by which the fee is first resigned to the lord, who then invests the new feudal successor. This investiture he cannot refuse; nor can it be prevented by the nearest feudal successors in perpetual hereditary fiefs; and which, by the vassal, may be alienated, incumbered, or disposed of, in the same manner as all other property, the lord reserving only his right of appropriation, if sold for money, and also his court-rights and seignorial dues; but the lord need not allow the alienation of good and bad fiefs (6), upon penalty of its being declared null and void, if the transfer be made otherwise; so that a fee, although

(1) Inleyd. lib. 2. c. 41. See also Neostad. de feud. Holland. success.

(2) Vide Grotius, Inleyd. book 2. c. 42. Neostad. obs. feud. 1. Bort. van 't verstoerf van de Lenen, c. 1. n. 18, 19, & 82.

(3) Vide Christin. vol. vi. decis. 84. n. 4.

(4) Inleyd. lib. 2. c. 42.

(5) § 4. Instit. de legat.

(6) Vide Grotius, Inleyd. lib. 2. c. 42. Frederic. a Sande ad consuetud. feud. Gelr. tract. 2. c. 1. n. 7, 8. 10. Christin. vol. i. decis. 185. n. 26. and decis. 268. n. 6. Consult. van Hollandse Regtgel, cons. 110. Coren, obs. 32. n. 21.

sold, but not delivered and transferred in that way, ought notwithstanding to descend to the legal successor to the fief, as was understood by the court of Holland, between Mr. Peter de Sancto and Adriana Willems, on the 11th June 1543; provided the purchaser retains his action against the heirs of the vendor, so far as he is interested in the non-execution of the transfer; in which action the successor to the fee is not responsible for more than his share. (1)

By Hypothecation or Incumbrance.

§ 6. And therefore no hypothecation (mortgage) or incumbrance of rents, &c. can be effected, but before vassals as aforesaid; and then such rent ought likewise to be received upon feudal tenure, and similar court-rights and seignorial dues are to be paid, in the same manner as upon the feudal property itself. (2)

Restitution of Fiefs purchased, how and to whom to be made.

§ 7. It ought however to be remarked, that if the fee be purchased for money, or resigned by any one out of his own property, and received again upon feudal tenure (as is often done in difficult times) according to Neostad (3); in that case the son or other descendants of the first vassal, make restitution and indemnification (as well for the benefit of the widow as of the other children) of whatever the estate has been diminished thereby through purchase or otherwise (4), as was understood by the court of Holland, on the 31st July 1611, in the case of Mrs. Maria Van Nierop, against Mr. Van Orsmaal; and also on the 13th Jan. 1547, between Philippus Godschalk and John Harp. In this last case, Godschalk having received some lands on his marriage with his wife, whose guardian had resigned the same to the county, and had received them again upon feudal tenure without her consent, was condemned, after her death, to cause half of the said lands to be devolved free upon her heirs. (5)

I say, *for the benefit of the widow or other heirs*; because the right of making restitution is not transmitted further; and on behalf of the collateral heirs or others, no indemnification need be made. (6)

I say, *by purchase or otherwise diminished*; because indemnification and restitution ought to be made, not only to the

(1) Vide Fachin. lib. 7. controv. c. 14. Neostad. de feud. observ. 5. & de feud. Holland. Success. c. 5. n. 60. Coren, obs. rer. judic. obs. 8.

(2) Vide Neostad. de feud. c. ult. n. 26. Missive, printed together with the Notable Poincten van Lenen. Grotius, Inleyd. lib. 2. c. 42. vers. Men mag ook.

(3) De feud. c. 1. n. 12.

(4) Grotius, Inleyd. lib. 2. c. 42. n. 19. & seq.

(5) Vide Register, D. 2. p. 169.

(6) Arg. l. 21. § 1. Cod. de testam. Grotius, Inleyd. lib. 1. c. 42. Neostad. c. 5. n. 18 & 49. Lambert Goris, Advers. Tract. 3.

amount of the purchase, but also to the amount of whatever was expended upon the feudal property for any real and necessary, or at least useful improvement, and by which the estate was diminished; so that the other children, instead thereof, ought to have so much money as they would have had, if the father of the said property had not been purchased or improved. (1)

The preceding doctrine is not supported by the twentieth article of the *Notable Poincten* (notable points,) which are used in the feudal courts of the county, &c. (though Mr. Peter Bort is of a contrary opinion (2)) and which contain these words; " *to make restitution of the money with which the said fief was bought, provided he receives his share therein,* and whatever the improvement, &c." Which improvement, although it be otherwise upon a mere writing without name, that can bind no one, cannot at all events be extended otherwise or further than to the improvement which arises from the situation and circumstance of the feudal property itself: for example, whether in consequence of the change of time the fief was purchased for much less than it is worth at the time the restitution is made; and also whether such improvement was made with some acquisition or other profitable means without the expence of the estate; but in no wise to any other charges and improvements, by which the estate of the deceased might have been diminished; because the expence incurred by the father, for the benefit of the one son alone, makes him a director of the son's affairs, and gives him a right to indemnification, unless it be proved that he had made a present thereof to his son; provided however those expences do not exceeed the necessity and utility of the matter itself; excepting only such expences as were incurred for the sake of ornament; which consequently render the feudal property so much more valuable to every one, or which the successor to such feudal property would likewise have made himself (3). With this agrees what Grotius says (4); viz. " To make indemnification to whatsoever amount the estate is diminished thereby, by making restitution of the right value thereof." (5) Hence it follows, that equality ought to prevail

(1) Vide Christin. vol. vi. decis. 43. n. 7. Fred. à Sande ad consuetud. feudal. Gelr. Tract. 2. tit. 2. n. 13. Lambert Goris, Adversar. Tract. 1. c. 3. n. 11.

(2) Tractaat, hoe dat de Hollandse Lenen by versterf erven? c. 9. sect. 4. n. 5. p. 184.

(3) Arg. l. 5. Cod. de rei vind. l. 39. § 1. Ff. de petit. hered. Arg. l. 47. § 1. Ff. de solut. l. 3. § 6. Ff. de in rem verso & simul.

(4) Inleyd. lib. 2. c. 41. vers. Wanneer het Leen.

(5) Vide Neostad. de Feud. c. 5. vers. Sin autem precii nomine.

in the inheritance of children as much as is possible (1); and, on the other hand, that if a father has laid out either the whole or a considerable part of his property upon the improvement of a fief, the other children would thereby be prejudiced in those rights which the natural and unalterable laws inviolably allowed them; which of course would militate against right, reason, and equity (2); as I was of opinion in the case of the children and heirs of the pensionary Counsellor Paau, knight, lord of Heemstede, &c. and the juridical faculty in the university of Leyden, concerning the purchased and improved manor of Heemstede near Harlem, on the 10th May 1653; and my opinion was adopted by them.

CHAP. XVI.

Of Court-rights, or Fees and Dues to the Feudal Lord.

§ 1. *Court-rights or Fees defined; what Amounts are to be taken from great, small, and middle Sort of Fiefs.*
2. *Lords' Fees what; and how they are to be purchased.*
3. *A Year's Rent fixed for the Lord's Due, whether and how to be reckoned upon Feudal Ground that is built upon.*
4. *How to be reckoned when there is no certain Lord's Due expressed.*
5. *Whether and when it is not necessary to pay Court-fees or Lords Dues at the Investiture of the Fief.*
6. *Confirmation what, and when sufficient.*

IN the preceding chapter it was stated that the investiture of the fiefs at every succession, or whenever the possessor is changed, ought to be renewed upon payment of the court-rights or fees, and the seignorial or lord's dues attached thereto; which investiture, if not applied for within a year and six weeks, would cause the fief to devolve upon the lord according to the feudal laws; but it is commonly excused among us upon payment of double fees, if it be not attended with public deceit or fraud, or if the vassal, being summoned for that purpose, had allowed himself to be bribed; in consequence of which, upon a judge-

(1) L. cum pater. l. 77. § dulcissimis. Ff. de leg. 2. l. 4. Cod. commun. d. vid. l. fin. Cod. commun. utriusque jud.

(2) L. maximum vitium. 4 Cod. de lib. præterit.

ment previously given, he would forfeit the whole feudal right for the benefit of the feudal lord. (1)

Court-rights or Fees defined.

§ 1. The court-rights or fees which the Count takes previously to the investiture and renewal of the fief, are the following:

What Amount is to be taken of a large Fief;

Of a *large fief*, that is, one which includes high or inferior rights, or otherwise has an income of thirty gilders per annum, the following fees are taken; viz.

	Gilders.	Stivers.
For a stamp	7	10
For the register-master	7	10
For the clerk	0	39
For the door-keeper	0	39
For the chamberlain	0	39
For the gate-keeper	0	24
Total	22	1

of a middle sort of Fief;

Of a middle sort of fief, the income of which is below thirty and above ten gilders, the following fees are taken:

	Gilders.	Stivers.
For a stamp	4	0
For the register-master	4	0
For the clerk	0	18
For the door-keeper	0	14
For the gate-keeper	0	8
Total	10	0

of an inferior Fief.

Of an inferior fief, the income of which is above ten gilders, the following fees are taken:

	Gilders.	Stivers.
For the stamp	2	0
For the register-master	2	0
For the clerk	0	9
For the door-keeper	0	7
For the gate-keeper	0	4
Total	5	0

The Lord's Fees what; and how they are to be purchased.

§ 2. The seigniorial or lord's fees, which are to be paid to the lord as an acknowledgement and token of respect at every investiture and renewal, and which are frequently specified in the grants, are numerous; viz. a falcon, sacre-hawk (2); sparrow-

(1) Vide Grotius, Inleyd. lib. 2. cc. 43 & 41. Neostad. de feud. Holland. Success. c. ult. n. 6, 7.

(2) The *Falco Sacer* of Linnæus.—EDITOR.

hawk, salmon, pike, greyhounds, spurs, gloves, and the like, all which are commuted for a certain sum of money, which was antiently fixed by the Count, and is still observed, and which is likewise followed in the feudal courts of vassals; viz.

	Gild.	Stiv.	Pence.
A good meal	5	0	6
A red sparrow-hawk	1	0	0
A greyhound with collar, each greyhound 3 pounds, and each collar 24 stivers	4	4	0
A *zeel winden* (1), each *wind*, 3 pounds	6	0	0
A bugle-horn, well mounted	1	10	0
A bugle, and a pair of new gloves	1	0	0
A pair of gauntlets (wapen-hand-schoenen)	1	4	0
A pair of gloves	0	4	0
A pair of white gloves	0	3	0
A pair of leather gloves	0	5	0
A maarwetse (1) pike	0	10	0
A taalwarder (1) pike	0	10	0
A good pike	1	0	0
A red sparrow-hawk	3	15	0
A good sparrow-hawk, a gold English noble, reckoned at	4	8	0
A fat peacock	1	0	0
A capon	0	7	0
A couple of fat capons	1	0	0
A couple of rabbits	0	5	0
A cask of wine	0	4	0
A cask of Rhenish wine	0	6	0
A pair of smaarlen (1)	0	5	0
A good salmon	3	0	0
A pair of spurs	0	10	0
A new sword	2	0	0
A pound of good money	1	0	0
A pound of Holland	0	15	0
A pound *swarts* (a certain coin), for which we receive	0	6	6
A pound *swarten*, 16 pennies for a halfpenny every pound	1	0	0
Ten shillings *swarten*	0	7	6
Five pound swarten for every *large Tournois*, at 16 pence, for which one receives	5	0	0
A loot (a certain weight), of pure silver	1	11	0

(1) No corresponding English term can be found for this obsolete word.

	Gild.	Stiv.	Pence.
An ounce of fine silver	1	8	0
An English noble	3	15	0
A half English noble	2	8	0
A Flemish noble	4	0	0
A noble of 48 halfpence	1	4	0
A shield (écu) of France	2	2	0
A crown of France	2	0	0
An old French shield (écu)	2	6	6
A gold shield	2	8	0
A gold Dutch shield (schild)	1	18	0
A gold Wilhelmus shield	1	12	0
A shield of Bourbon, for which we receive a gold gilder and a half, at	2	0	0
A gold gilder	1	10	0
A large gilder, for which we pay	1	8	0
A large gilder, for which we receive a gold gilder	1	10	0
A Rhenish gilder	1	8	0
A gold *hallink* (or Florence florin), for which one pays a Florence ducat	1	10	0
Five shillings good Tournois	0	12	6
Seventeen shillings	0	17	0
A gold penny, for which a person shall receive an old Dutch shield, and the same shield reckoned at one and a half gold gilders, at	2	2	0
A *postulaat's* gilder	2	0	0
Twenty Dutch pence	0	1	4
Five marks of silver, each mark reckoned at four pounds of Holland	15	0	0
Twenty *king's Tournois*, for which one receives for each four Flemish pounds	2	0	0
Ten pounds of *parasises*	5	0	0
A horse worth fifty gilders	10	0	0

I have also seen in old grants of certain manors, that the above dues were to be levied by a *man on horseback*; and in others, that they were to be levied by a *man in harness*. Having been questioned what was to be understood by these terms, I am of opinion, not that the man himself was to be in harness, but that he was to be furnished with whatever is required for a man on horseback, or for a man in harness, or the value thereof.

A Year's Rent fixed for the Lord's due, whether and how to be reckoned upon

§ 3. Otherwise the dearest lord's due is a year's hire or rent, which is also construed narrowly; and the fruits or the hire for the improvement and acquisition made and acquired from abroad, by and through the vassal, without the real assistance,

and on account of the fief itself, do not come into any consideration. For example; if upon any premises or ground subject to feudal rights, a house or other building be erected, it shall not be under obligation to contribute more for the lord's fee than a year's hire of the said premises or ground, without considering the house or other building standing thereon; for whatever is built upon feudal ground, without the assistance or means of the fief itself, cannot be considered as subject to feudal rights (1); of this fee however, an ill use is made by some; and a year's hire or rent is extorted from the good people, who allow themselves to be imposed upon by the literal consideration of the words themselves, both upon the improvements and acquisitions, and also upon the fief itself, a year's hire or fruits: such was the opinion of Mr. Jacob Maestertius, professor of laws at Leyden, and of myself, some years ago, on behalf of the possessors of certain divided premises, which were let on the south side of the church of Soeterwoude, (anciently called de Loet); which by a division allowed by the feudal lord long after the original grant, with reservation of his right, were covered with houses, and now form part of the after fiefs of the house of Rodenburg, which at present are possessed of by Nicolas Korsteman, Lord of Rodenburg. It is further to be specially observed, that the lord's due for a year's fruits is not charged upon large or middle sort of fiefs, but mostly upon the inferior fiefs, which can yield to the amount of ten gilders per annum, or less, in order that it may not exceed the amount required to purchase the dearest lord's due. (2)

Feudal Ground that is built upon.

§ 4. If no lord's due be mentioned in the grant, then for a large or middle sort of fief, ten gilders are reckoned; and for a small fief, a year's rent.

How to be reckoned, when there is no certain Lord's Due expressed.

These court fees and lord's dues ought to be paid not only in case of succession, but also at every alienation, change, or transfer; and also in case of any mortgage, as often as it occurs. (3)

§ 5. But in case of the lord's death, the oath of fealty is renewed upon the successor's application, without paying any court-fees and lord's dues (4): so, if any thing be resigned to the lord, to be received again from him upon feudal tenure, no seignorial dues are paid. (5)

Whether and when it is not necessary to pay Court-fees or Lords' Dues at the Investiture of the Fief.

(1) Vide Rosenthal de feudis, c. 10. conclus. 43. per tot. & c. 12. conclus. 15. n. 12.

(2) Vide Fred. à Sande ad constitut. feud. Gelriæ, tract. 2. tit. 1. c. 3. n. 17.

(3) Vide Soes. de feud. c. 13. n. 22. et seq. Haneton. de Jure feud. lib. 3. c. 5.

(4) Vide Christin. vol. 6. decis. 25. n. 10. & seq.

(5) Notable Poincten van de Leenhoven, art. 9.

Confirmation what, and when sufficient.

§ 6. And moreover, if a morning present, an usufruct surety (1), or the like, be established or secured upon feudal property, nothing but confirmation is necessary; in which case the chamberlain, door-keeper, gate-keeper, or other persons receive nothing. And likewise any one to whom the usufruct of a fief is made, requires only confirmation; but in such case the right successor to the fief ought to levy within the year, and to contribute for the lord's due, although he has no actual enjoyment of the fruits thereof during the life-time of the usufructuary. (2)

And when the usufruct is extended to one, two, or three fiefs, the income thereof is laid upon one, and then the right of confirmation is taken either of a middle, small, or large fief, according to its income; so that only one fee for confirmation is due, although one hundred fiefs be included therein: if, however, any one transfers his fief, and reserves his usufruct, in that case no confirmation fee is paid thereupon. (3)

CHAP. XVII.

How Feudal Property is lost.

[Grot. 2. 43.]

§ 1. *How Feudal Property is lost through Destruction;*
2. *Through Prescription;*
3. *By the Vassal's Resignation of it to the Lord;*
4. *Through Forfeiture by the Vassal or the Lord;*
5. *When the Investiture is neglected for the Space of One Year and Six Weeks;*
6. *Through want of a lawful Successor to the Feudal Property.*

How Feudal Property is lost through Destruction;

§ 1. A FIEF is lost,

I. *Through destruction*, such as by washing away, by the water's breaking in upon the land, and the like calamities. (4)

Through Prescription;

§ 2. II. *Through prescription*, by which the lord, after a possession of one hundred years, again appropriates entirely to himself the feudal property (5); or if a fief be possessed by a

(1) *Waarborg togt.*
(2) Notable Poinoten van de Lenen, art. 9
(3) Ibid. art. 7. 8. 13.
(4) Arg. l. 1. Cod. de Jure Emphyteut. c. 1. in fine. quib. mod. feud. amitt. junct. l. 2. Ff. de usufructu.
(5) Arg. c. 1. § Si quis. Si de feudo defuncti, et ibi DD.

stranger, who is not entitled thereto, during the third part of one hundred years, the right successor to the fief thereby loses his right, and the feudal lord is obliged to take the new possessor as the lawful successor (1). But the lord does not lose *his* right, although he does not use it during the third part of one hundred years, because it does not always occur, and cannot be constantly exercised and possessed, as is necessary in a prescription; and also, because it is a prerogative to do or leave a thing against which prescription never lies (2), as we have already shown, in ch. viii. § 12. p. 135, 136. *supra*.

§ 3. III. *Through resignation*; when the vassal delivers the feudal property again into the hand of his lord, or when he resigns and transfers his right on behalf of a distant successor (3), both which resignations may be effected without the consent of the lord (4). But a full resignation to the lord cannot be effected to the prejudice of the successor to the fief; so that it does not last longer than the life-time of him who resigns, after whose death the successor to the fief may resume the said fief, unless he himself had also given his consent to the resignation, or had confirmed it. (5)

By the Vassal's Resignation of it to the Lord;

And likewise through resignation of the lord to his vassal, when he allows him to possess the fief as his own free property, not subject to feudal rights (6). And so bad fiefs are also often made good, perpetual, and hereditary fiefs; and are likewise purchased as free property, not subject to feudal right, mostly for a third part of the true value. Of this we have a precedent in a certain grant by Reynout de Grebber van Persyn, executed on the 29th March 1620 (7); and so the manor of Soeterwoude, which is said to have been a bad fief, was converted into a good fief, as a sort of acknowledgement to the county, at the death of the Lord Mauring van der Aa, burgomaster of the city of Leyden, upon whom it was conferred on behalf of the said city of Leyden, as Lord of Soeterwoude, he having survived without children.

§ 4. IV. *Through forfeiture*, on account of the vassal's unfaithfulness or want of respect towards the lord (8), of which the

Through Forfeiture by the Vassal, or Lord;

(1) d. c. 1. Si quis. Christin. vol. i. decis. 294. Frederic a Sande consuetud. feud. Gelriæ tract. 1. tit. 1. c. 2. n. 1. Grotius, Inleyd. lib. 2. c. 43. v. Ten vierden.

(2) Arg. l. 2. Ff. de via publica, et ibi DD.

(3) Cap. 1. in fine pr. Qualiter olim feudum alienum pot.

(4) Cap. unic. de Vasall. qui contra constit. Reg. Lothar. cap. unic de Vasall. decrep. ætat.

(5) Cap. 1. de alienat. feud. patern. & ibi Gloss.

(6) Arg. tit. quis juris si post alienat. feudi Vasall. id. recuperaverit.

(7) See the *Placaat Boek* of Jan Jansz, p. 360.

(8) Cap. unic. in quib. caus. feud. amitt.

judge has a discretional power of judging; or when any thing is committed which renders him liable to forfeiture; so that the lord cannot seize the feudal property, unless judgment has actually been pronounced. (1)

I say, *forfeiture of the vassal to the lord*; because, ordinarily among us, other offences committed against another, but not against the lord, do not render the fief subject to forfeiture, even not when all the property is declared to be forfeited (2). Thus, the charter granted by the Empress Margaret, after Ascension Wednesday, in the year 1346 (3), to the people of the northern part of Holland, contains a clause, that "every one should possess his feudal property freely, although he should commit any offence; so long as he performs to the lord from whom he holds it, whatever services a vassal is bound to."

By the antient laws of Kenmerland a fief is forfeited on account of four causes; namely, when a vassal lies with his lord's wife; 2. If he unjustly carries arms against his feudal lord; 3. If he intends to betray or poison his feudal lord; or 4. If a vassal does not assist and relieve his lord according to the best of his power, as he is bound to do whenever he is unjustly besieged. (4)

When the Investiture is neglected for the space of One Year and Six Weeks;

§ 5. V. According to the written laws, the feudal right becomes also forfeited to the lord through neglecting to have the successor to the fief invested within the space of one year and six weeks after the vassal's death (5); but such negligence may be amended discretionally, often with double court fees and double dues to the lord. (6)

As the vassal incurs a forfeiture of the fief if he does not perform the services which he is bound to render to his lord, so in like manner it is forfeited by the feudal lord, and is considered free, in consequence of the lord's unfaithfulness (7), which if it be a second sort of fief is forfeited to the lord's sovereign, as is contained in the ancient laws of Kenmerland; namely, "In case the feudal lord does not do justice to the property which is

(1) Cap. 1. in pr. de feudo sine culpa non amitt. Neostad. de feud. Succes. c. fin. n. 8. Christin. vol. vi. decis. 77. Andr. Gail, lib. 2. Obs. 51.

(2) Cap. 1. & cap. fin. quæ fuit prima caus. benefic. amitt. Vide Christin. vol. i. decis. 300. Grotius, Inleyd. lib. 2. c. 43. vers. Ten tweden.

(3) Art. 14.

(4) Cap. 1. § 2. quæ fuit prima causa benefic. amitt. Cap. unic. de feud. sine culp. non amitt.

(5) Tit. quæ fuit prima causa benefic. amitt. in pr.

(6) Vide Placaat, Oct. 20, 1580; July 25, 1592; and Dec. 23, 1610. Neostad. de feud. Holland. Succes. c. fin. n. 6, 7. Grotius, Inleyd. lib. 2. c. 42. vers. Heergewaden.

(7) Cap. unic. Qualiter dom. propriet. privet.

held of him upon feudal tenure, or in case he will not invest him, he shall then take two men of the sovereign, and desire for that purpose a first, second, and a third meeting, bare-headed, ungirded, with application by turns, and then take the testimony of the said men."

Through Want of a lawful Successor to the Feudal Property.

§ 6. VI. And lastly, the feudal right is lost *through want* of a lawful successor to the feudal property; that is, at the death of any person without heirs who can or may be feudal successors (1); viz. in strict feudal property, on failure of male issue descended from the first vassal; and in perpetual hereditary fiefs, in failure (as some are of opinion) of the tenth degree (2); and whereas it seems to rest upon the foundation, that, in property not subject to feudal right, the property devolves upon the republic, if none of the relations of the deceased be found related to him within the tenth degree, (which by mistake in the interpretation of the Roman law (3), where the tenth degree is considered ad infinitum (4), is misinterpreted, as will be pointed out at its place), it follows thence, that the succession to the fief is unlimited, so long as there is any one who can in anywise prove his relationship to the last possessor.

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(1) Cap. 1. § Qui cleric. Si de feud. defunct. content. c. 1. in fine de alienat. feud.

(2) According to Neostad. de feud. Success. c. 5. n. 77. Grotius, Inleyd. lib. 2. c. 43.

(3) § 5. Instit. de Success. Cognator.

(4) Per l. 2. § 1. Ff. de suis & legitim.

CHAP. XVIII.

Of Spiritual Institutions and Prebends.

§ 1. *Whether and how far the Jus-patronatus appertains to Barons in placing or approving of Clergymen.*
2. *Nature and Origin of Vicarages or Prebends.*
3. *The Gift thereof, by and to whom to be made.*
4. *The Difference between Feudal Property and Prebends with respect to Succession.*
5. *Of the original Institution of Prebends; and in what Manner they antiently were, and now are, renewed.*
6. *What other Spiritual Goods devolve for the general Benefit.*
7. *Of the Canonical Order of Utrecht, the Abbies of Rynsberg, &c. and the Order of the Knights of St. John of Malta, why excluded from Devolution, and for what Purpose instituted.*

Whether and how far the Jus-Patronatus extends to Barons, in placing and appointing Clergymen.

§ 1. UNDER the usufruct of an estate for life, without the property, by way of feudal right, spiritual institutions are reckoned by many; of which some are destined and given entirely for the use of the diocese and church. This kind of property, since the introduction of the reformed religion, has been entirely seized for the general benefit, for the support of churches and their ministers; excepting that some barons of parishes or villages, in consideration of their ancestors having erected and endowed the churches there out of their own property, upon condition that they and their descendants should have and reserve always such right, have remained in possession of such right; by virtue of which, at every vacancy, or on the death of the preacher, they presented another in his stead in the said church, at least upon recommendation of the community, namely, to confirm and approve such recommendation, or to reject it. This right is usually called the jus patronatus, or right of patronage; and in many places it has continued so long, as to leave no memory thereof, excepting that they are in possession thereof.

Nature and Origin of Vicarages or Prebends.

§ 2. Other goods were only destined for certain divine services, to be performed by certain persons, either clerk or priest of their generation, for the blessed memory and merits and the souls of the dead. These endowments, which may be possessed and served by gift of the nearest and oldest of their generation, are denominated *vicarages* or *prebends*, and the goods are de-

nominated *prebendal goods.* The services for which they were given, chiefly consisted in the keeping of night-watches, and in celebrating masses for the dead, prayers, and similar superstitious observances; and in offering prayers for the repose of the souls of the founders, as well as of their ancestors, in one church or other, in honour of some reputed holy altar or other.

The Gift thereof, by and to whom to be made.

§ 3. The gift of the possession of the said prebends was usually left to any one of the founder's or institutor's descendants, being a priest or clerk, to devolve (as often as the same is subject to devolution) upon the eldest and nearest person lawfully descended from the founder, as a free hereditary fief. Young men are to have the right of presentation before the older women where they were equally near of kin, according to the tenor of the institution, which in such case is to be followed; but there is seldom much difference; or, otherwise, where there is no certain agreement, the right of common inheritance, ab intestato, is usually followed. (1)

The difference between Feudal Property and Prebends, with respect to Succession.

§ 4. There is, however, this difference between feudal property and prebends; viz. that the right of bequeathing the gift, as often as it devolves, does not devolve upon the nearest descendant of the last preceding possessor (as is the case with respect to feudal property, in which the fief always devolves upon the nearest of kin to the last possessor), but it ought always to devolve upon the nearest of kin to the first institutor; because the feudal lord alienates his feudal property out of his generation, and delivers it to another; and also, because the fief is sometimes first delivered to the lord out of the bosom of the feudal successors, and again received from him upon feudal tenure, on condition of succession amongst their descendants. Whereas, in prebends, the founder always bequeaths the gift out of his own property, and wishes to reserve it for and within his own generation, and which may not devolve upon any stranger, but ought to devolve always upon the nearest of blood (2). So that the clause, *of devolution as a perpetual hereditary fief,* so usually expressed in the deeds of foundation, is not to be understood further or otherwise, but with a reference to the blood, and the nearest to the first founder, and not to the last possessor.

Of the original Institution of Prebends, and

§ 5. This institution could not be effected without the knowledge and confirmation of the bishop (3); neither, on the death

(1) Arg. l. 8. & l. 3. Pf. de Jure Codicillor.

(2) Roch. de Curte, Tract. de Jure patron. Rubric. de translatione jur. patronat. n. 25.

(3) Arg. cap. nullis presbyter. & cap. placuit de consecrat. distinct. 1. c. 1. Junct. Novell. 67.

in what Manner they antiently were, and now are, renewed.

of the incumbent, could another be put in possession of it, unless the person upon whom the gift was conferred, was recommended to the bishop; and, after being confirmed by the same, was incorporated, and judged capable of performing the duties belonging thereto. Such person, if not a priest, ought at least to be a clerk (the crown of the head being previously shaven), and for that purpose be possessed of a diploma, or other higher dignities, and authorized and admitted to perform the duties of the church. For, although the gift was in the power of the founder's nearest descendant, the service could not be performed and executed without the solemnities of the church. (1)

But, since the reformed religion was introduced, all such church services (which militate against the grounds of the true doctrine of salvation, and of the christian institution) have entirely ceased with the presumptuous idolatry and other institutions of the pope; but with this exception, that the gift and the possession of such prebends, in consequence of their having been left by persons out of their own property, to and on behalf of their descendants, are allowed to be given by and to them agreeably to the intention of the founder; provided it be also effected upon a previous recommendation to the States of Holland, instead of the bishop, and their approbation follows thereupon; and provided also, that instead of the rejected and discontinued services on behalf of the maintenance of churches, of the ministers of the same, and of schools, a third part of the annual fruits and income be paid to the spiritual treasury. And sometimes a clause is added, that the person, to whom the gift is made, shall receive instruction at the schools; for although such services were rejected, it cannot be thence inferred, that the same devolves on the heirs, but ought to be applied to other similar uses and observations (2). See the ordinance of the States of Holland of the year 1578, and the renewal thereof of the 12th December 1658; where direction is given with that view, concerning the third part of the fruits; but it cannot as yet be put into full practice on account of the poverty of the persons to whom the same is given for their necessary maintenance.

What other Spiritual Goods devolve for the general Benefit.

§ 6. Other spiritual goods, which were antiently left and bequeathed to churches and hospitals, without any reservation of

(1) Cap. 1. 2. Extra. de jure patronatus, et ibi DD.

(2) Arg. l. 18. Ff. de usu & usufr. leg. junct. l. 21. & l. 26. de Sacrosanct. Eccles. c. 16. extr. de præbendis.

useful possession, were at the time of the Reformation wholly seized for the support of churches and the ministers thereof.

From these are also distinctly excluded such spiritual institutions as, although the descendants of the first founder did not retain possession of them, were however destined to another use, and not to that of the church.

§ 7. Of this description are the canonical order of Utrecht, which was specially instituted to keep the council of the States; the abbies of Rynsburg, Leeuwenhorst, and Ter Le, for the support of noblemen who became poor; the order of St. John of Jerusalem (now settled at Malta), which was instituted by knights and great princes, for the protection of the Christian faith against the violence of the Great Turk, and has been introduced into other countries, where the knights were endowed with numerous possessions, most of which have been seized in consequence of death, and the decay of the said order.

The Canonical Order of Utrecht, the Abbies of Rynsbeg, &c. and the Knights of St. John of Malta, why excluded from Devolution, and for what Purpose instituted.

CHAP. XIX.

Of Services in general.

[Grot. 2. 36.]

§ 1. *Service defined.*
2. *How to be obtained by Contract and Cession.*
3. *How, through Right of Possession and Prescription.*
4. *Of a Building concerning which no Complaint has been preferred for a Year and a Day, &c.*
5. *Whether, and when, Sufferance implies Right of Service.*
6. *If a Proprietor of Two separate Houses makes full Use of them, and afterwards sells them again separately, each House reserves its former Incumbrances and Benefits, without the Right of Service used between both, unless the same be mentioned at the Sale.*
7. *Difference between House and Rural Services.*

IT was formerly stated, that defective property consists in usufruct or inferior benefit.

§ 1. The benefit inferior to usufruct is service, that is, the right of prohibiting something beyond or without the common right, or of doing to or in another's house or upon another's ground something for his own benefit; for otherwise, according to common right, another is at liberty to do in or upon his own property whatever he pleases, without molestation by another:

Service defined.

services, therefore, are understood to be two-fold; *commanding* in what belongs to another, and *suffering* from another in so far as respects one's own property. (1)

How to be obtained by Contract or Cession.

§ 2. This right is obtained,

1. *Through contract and cession* (2); but a thing in which many are concerned cannot be incumbered with service without the consent of all the parties interested (3). Such cession is also applicable to immoveable property, and the same is bound by it according to law (4); with us, however, it cannot exist to the prejudice of a third person, but in the same way as immoveable goods themselves ought to be transferred, that is, before the court of justice of the place where the property is situated; so that other promises will only bind the promiser, and not the property itself or its creditors, and so it was understood by the court of Holland on the 8th February 1627, in the case of Jan Fransz Bak against Jan le Cocq.

How, through Right of Possession and Prescription.

§ 3. II. *Through right of possession and prescription of a third part of one hundred years* (5); of which we have already treated.

Of a Building, concerning which no Complaint has been preferred for a Year and a Day, &c.

§ 4. And therefore it is a special law, that a building which has stood for a year and day without being complained against, is sufficiently prescribed to detain it so, provided only a reasonable indemnification be made to the person who thereby suffered loss (6). At Amsterdam, when any person is found building upon another's ground or premises, he forfeits ten gilders, and the structure ought to be demolished. (7)

Whether, and when, Sufferance implies Right of Servitude.

§ 5. This right of possession is to be understood of something which is possessed neither by violence, nor secretly, without knowledge (8); nor at the request or upon a requested permission; for, if I, upon a preceding request, allow my neighbours to do any thing in or about my premises or land, which I otherwise was not obliged to allow, it is understood that it may always be again repealed and prohibited; and contains in itself this tacit agreement; namely, *until notice of injunction be given* (9). But the most certain rule in such case, is to

(1) L. 26. Ff. de servit urban. præd. l. 8. § 5. Ff. si servit. vind. l. 8. cod. de servit. l. 8. Ff. de servit. urban. præd.

(2) § ult. Instit. de servitut. l. 1. § ult. de servit. præd. rustic.

(3) L. 28. Ff. commun. divid. l. 2. Ff. de servit.

(4) L. ult. Cod. de reb. alien. non alienandis.

(5) L. 10. Ff. Si servit. vind. l. 2. Cod. de servit. l. ult. Cod. de præscript. long. temp. l. pen. § 1. in fin. Cod. de præscript. 30 vel 40 annor.

(6) Arg. l. 1. et tot. tit. Ff. uti possidet. Vide Christin. ad leg. Mechlin. tit. 14. art. 45. Statutes of the City of Leyden, art. 103.

(7) Vide Rec. van Rotenb. p. 234. § 6.

(8) L. 1. Cod. de servit. & aqua. l. 1. Cod. Uti possidetis.

(9) Arg. l. 25. Ff. de probat. l. 1. Ff. de precario.

make an express condition; for otherwise, if a thing be merely allowed upon a previous application, which cannot be taken away or redressed without loss or detriment to the thing itself, as well as to the injury of the person to whom such permission was given, it is understood that such sufferance implies a cession and service, to be so always reserved and tolerated; as, for instance, if I allow my neighbour to build upon my wall, or to lay a beam in my wall, on which his building may rest. (1)

§ 6. This service consists in a right either upon or over another person's property, and not in or upon one's own property (2), for no one can owe any thing to himself, or upon his own property; as often occurs when a person obtains a property of two separate houses, together with each other, from one of which some service is due on behalf of the other, and the said right of service happens to be merged and annulled in and towards each other (3). But if afterwards the said houses be again separately sold, without annulling the preceding services, each of these will again go over, and the same will be understood to be reserved: so, if the possessor in the mean-time have used some beneficial service of the one upon the other, they will again cease in case of being separately sold (4), notwithstanding the following clause had existed, viz. "*so as it stands built and made, to be used and inhabited;*" by which we understand that it contains no services in particular, unless they were specially mentioned, as was often understood (5), because such clause is merely a description of the length, breadth, depth, and further situation of the property sold; by which the vendor declares that he will exclude nothing from what was sold, which he would otherwise be obliged to do expressly, and further with such right as the same may have. But that he in no wise lies or promises any special right of service thereupon (6); so that if any thing be built thereon, which would give any service to one's neighbour, which he need not suffer, it ought to be removed; for if it would give a service on one side, it would again give a service on the other side, that the said building should never be made otherwise, or be raised higher than then

If a Proprietor of Two separate Houses makes full use of them, and afterwards sells them again separately, each House reserves its former Incumbrances and Benefits, without the Right of Service used between them both, unless the same be mentioned at the Sale.

(1) Arg. l. 4. Ff. locati. Bart. Caepoll. de Servit. urban. prædior. c. 79. n. 6, 7.
(2) L. 26. Ff. de Servit. urban. præd.
(3) L. 1. Ff. Quemadmod. servit. amitt. l. 10. Ff. commun. præd. l. 18. Ff. de Servit.
(4) Arg. l. 9. Ff. commun. præd. d. l. 18. Ff. de Servit. l. 2. § 19. Ff. de hered. vend. Grotius, Inleyd. lib. 2. c. 36. vers. So wanneer. Cost. Antwerp. c. 62. art. 4. Keuren van de erfscheydingen tot Rotterdam (Statutes concerning the division of premises at Rotterdam) art. 16.
(5) Arg. l. 16. § 3. Ff. de serv. urban. præd.
(6) Per. l. 10. Ff. commun. præd.

it was; which would entirely deviate from the meaning of the contract.

Difference between House and Rural Services.

§ 7. Services are usually divided into *house* services and *rural* services (1), which differ from each other in the following respects; viz. all *rural* services consist in doing or suffering, while *house* services consist not only in doing or suffering, but also in an obligation of not doing something upon one's own property, which otherwise is permitted to be done, such as not to build higher, not to surround or prevent the light, or to do similar acts. (2)

Moreover, rural services may from their own nature, be done by turns and at intervals, whereas house services are lasting and continual. (3)

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(1) L. 198. Ff. Verb. signif. l. 16. Cod. de Præd. & al. reb. minor. l. 2. Ff. de Servit. Rustic. Prædior.

(2) L. 15. § 1. Ff. de Servit. l. 6. § 2. Ff. Si servit. vind. l. 1. in fin. Ff. de Aq. pluv.

(3) L. 14. Ff. de Servit. l. 18. Ff. de Servit. urban. prædior.

CHAP. XX.

Of House Services.

[Grot. 2. 34.]

§ 1. *House Service defined.*
2. *The Service of supporting Burthens or Building.*
3. *In what Manner a Building may be erected upon or against a common Wall.*
4. *A Service attached to a Building is perpetual.*
5. *The joint Use of a Wall, how to be distinguished from one's own.*
6. *An Anchor or Beam being placed through, what it is, and what Right it has.*
7. *The Right of extending a Building to the Ground of another.*
8. *Drop-right defined; and whether and how a Building may be raised to prevent it.*
§ 9. *Of the Right of receiving the Drop.*
10. *Right of Watercourse.*
11. *Right of having a Gutter.*
12. *Of the Right of preventing a Building from being carried higher.*
13. *Of the Service of Light.*
14. *Of free Sight or Prospect.*
15. *Of the Right of having Windows.*
16. *Every one may make a standing Light in his own Wall.*
17. *Prohibition of Sight, what.*
18. *A Service subject to Prohibition cannot be obtained by Prescription through mere Possession.*

§ 1. HOUSE services are those which really concern the use and habitation of a house or inhabited premises. House Service defined.

These are such as consist in doing or suffering something, as in leaving off something on account of the neighbouring house, or in not being at liberty to do the same. (1)

Services of *doing* or *suffering* are the carrying of another person's burthen, or suffering an anchor or beam of another person's house, or allowing the water of another person's house to fall into one's own watercourse, or suffering in one's own watercourse that of another house; or allowing the water thereof to run out through one's own course, or the like. (2)

§ 2. The service of supporting a burthen is, when any one's wall or pillar must support the burthen or building of another; or when a person is at liberty to make his building upon or against another person's wall or pillar (3). For, according to The Service of supporting a Burthen or Building.

(1) § 2. Inst. de Actionib.
(2) § 1. Instit. de Servit. l. 2. Ff. de Servit. urban. prædior.
(3) L. 1. § fin. l. 33. Ff. de Servit. urban præd.

§ 3. In what Manner a Building may be erected upon or against a common Wall.

common right, no one may erect any building upon the wall of another, and not even upon a common partition wall, excepting upon the *half thereof*, provided such wall be so thick that one half of it can support a building (1); because in such a case the party is understood to build, not so much upon another's as upon his own ground (2). But if the wall be not so thick (as is often the case with us), that one half of it will support any building, such erection cannot be made upon a common wall without general consent, otherwise such building will also be liable to community to such extent (3). On this subject there are special statutes in several cities, as at Leyden, where any one may lay bricks or cause them to be wrought upon a common partition wall, without opposition from the party to whom it belongs in community; provided that the same may at any time be used by the other party, upon previously paying the half of the expences incurred for that purpose. (4).

A Service attached to a Building is perpetual.

§ 4. This service is perpetual, and cannot terminate; so that the person whose wall must bear the building of another, ought to keep the said wall in fit repair for that purpose, at his own expence (5). But the support of the building, while the wall is repairing, must be made and paid for by the proprietor of such building. (6)

The joint Use of a Wall, how to be distinguished.

§ 5. If a wall be raised upon *half ground*, that is, upon ground belonging to two several persons, it is understood to be common: so also is whatever is found between two adjacent properties, unless on one side or other the property thereof be specially proved, either by clear evidence or from probable circumstances (7); such as, when by a certain figure or mark on the one side or other, the full property can be proved; for example, the putting of a beam or anchor through the wall, from the one side, or the placing of a window in it (8), for no one may otherwise put an anchor through a common wall, nor make any windows, or other opening but, with the general consent,

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(1) L. 25. § 1. Ff. de Servit. urban. prad.

(2) L. 8. l. 9. Cod. de Servit.

(3) L. 8. l. 13. Ff. de Servit. urban. prad. l. 4. l. 32. Ff. pro Socio. Bart. Cæpol. de Servit. urban. prad. c. 40. n. 11, 29. Menoch. de Præsumpt. lib. 6. præsumpt. 73. n. 23 & seq.

(4) Vide Keuren de Stad Leyden (*Statutes of the City of Leyden*) art. 105.; with respect to Amsterdam, see the Recueil of Rosenboom, tit. Timmeren & Recuyen (of building and the regulation thereof.)

(5) L. 33. Ff. de Servit. urban. prad. l. 6. § 2. in fin. Ff. Si Serv. vindicet.

(6) L. 8. Ff. Si. Servic. vindic. Vide Bartol. Cæpoll. de Servit. urbanor. prædior. c. 37. n. 4 & 6.

(7) L. 19. Ff. communi dividendo. l. 83. Ff. pro socio; & l. 26. de Ff. Servitut. prad.

(8) Vide Menoch. de præsumpt. lib. 6. præsumpt. 73. n. 10. & seq. Cæpoll. de Servit. urban. prad. c. 40. n. 11. 13.

and upon the service agreed upon (1). But at Leyden, according to the statutes of that place (art. 106.) every one may place standing lights in common walls, admitting light from his neighbour's premises, as well upon the ground floor as in the up-stair rooms; provided such lights be placed seven feet and a half high from the ground, and six feet and a half high from the floor in up-stair rooms; viz. with iron bars fastened in the posts of the window, at least five inches from each other, without any one being at liberty to hinder or impede the said light, excepting by building properly; in which case such light ought to be removed, and the holes stopped up. And according to the 104th statute of the same city, every person may cause an anchor to be put through his neighbour's side wall, and build thereupon, provided the said anchor be properly covered, and the wall strengthened at least with half a stone; so that such a mark there should give no one any right of property, nor even of community, where it does not appear that it proceeded from any service permitted or agreed upon.

In like manner no baker's oven, nor gutters, nor any thing else, may be made in any common wall, by which such wall may in anywise be injured. (2)

The joint Use of a Wall, how to be distinguished from one's own.

§ 6. The service, which renders one person subject to another's putting an anchor or beam into his wall, is the right of having an anchor through another's wall, or placing a beam upon the building of another, which, otherwise, no one need allow (3); for no one is bound to suffer upon his ground any thing belonging to his neighbour that projects from the right line, or he may compel him to draw it in. (4)

He who has a right of placing a beam, is also understood to have the liberty of building upon such beam (5); and instead of old beams he may place new ones, but neither more in number nor in any other manner than those which were before there. (6)

But if any one have allowed his neighbour without contradiction to put a beam in his wall, he may for once keep there the beam so placed, without putting a new one in its stead. (7)

(1) L. 40. Ff. de Servit. urban. prædi. See also Christin. ad leg. Mechlin. tit. 14. art. 14. Cost. Antwerp, c. 62. art. 32.

(2) L. 13. l. 19. Ff. de Servit. urban. prædior. Vide Christin. ad leg. Mechlin. tit. 14. art. 14, 15. Cost. Antwerp, c. 62. art. 32. Cæpoll. de Servit. urban. prædior. c. 36. in fin.

(3) L. 20. et l. 27. Ff. de Servitut. urban. prædior.

(4) L. 25. Ff. eod.

(5) Cæpoll. de Servit. urban. præd. c. 37. n. 7. Cons. & Advys. vol. i. cons. 233.

(6) d. l. 20. §. 2. Ff. de Servit. urban. præd.

(7) l. 14. Ff. Si Servit. vind. Cæpoll. de Servit. urban. præd. c. 30. n. 5.

The Right of extending a Building to the Ground of another.

§ 7. A similar service is the right of projecting my building to or over another's ground. (1)

The right of catching the drop is two-fold; namely, that of causing the drop to fall, and that of receiving the drop.

Drop-right defined; and whether and how a Building may be raised, to prevent it.

§ 8. *Drop-right* is the right of making the rain-water of my roof fall upon another's ground (2), which otherwise no person need suffer, as every one is bound to carry away or conduct the water of his own house upon or through his house (3). Whoever is obliged to receive upon his ground the water of another, is bound to leave for that purpose a certain vacant place not built upon, of the breadth of about half a foot (4); but in some cities there are statutes which enact that every person, for his own convenience, and between houses and ground receiving water, may build and inclose it; provided he receives the said water with a leaden gutter under the roof, and by that means carries off the water, and likewise all open watercourses may commonly be led away under the earth. (5)

Of the Right of receiving the Drop.

§ 9. The *receiving of drops* is the right of catching the rain-water running from another's roof or premises, for one's own benefit; for, otherwise, the water falling upon my roof or premises belongs to me. (6)

Right of Watercourse.

§ 10. A right of watercourse is the right of making the water of one's house run over another's ground, who in that case is obliged to conduct the same further over his premises, or through a gutter; this is to be understood of clean water: for which purpose, the person who has such right is bound to put a grate over the hole of the place where the water is discharged, in order that the dirt may be stopped there, as is testified of a general custom by Christin. (7)

Of the Right of having a Gutter.

§ 11. The right of discharging dirty water through a gutter, through which all sorts of dirt of private and other places may be carried off, is a special right (8); and if this sort of gutter happens to be stopped, it ought to be opened and repaired by him who has the exclusive right thereto; but if it be for the common use of others also, it ought to be cleaned and repaired by him who evidently caused such obstruction, or otherwise at

(1) L. 242. § 1. Ff. de verb. signif.
(2) L. 2. Ff. de Servit. urban. prædior.
(3) L. ult. § pen. Ff. quos vi aut clam.
(4) L. 20. § ult. Ff. de Servit. urban. prædior. Christin. ad leg. Mech. tit. 14. art. 36. Cæpoll. de Servitut. urban. prædior. c. 41. n. 2.
(5) Vide the Statutes (*Keuren*) of Leyden, art. 104.
(6) d. l. 2 Ff de Servit. urban. prædior. l 6. Cod. de Servit. et aqua.
(7) Ad Leg. Mechlin. tit. 14. art. 24. and art. 49. Cost. Antwerp, tit. 62. art. 52.
(8) L. 7. Ff. de servitut.

the general expence of all those who discharge dirt through the same, unless it be otherwise agreed upon. (1)

A service, on account of which a person may not do whatever he pleases out of regard for another, consists of impediments of building higher, of free light, free prospect, right of opening windows, prohibition of sight, and the like.

The Right of preventing a Building from being carried higher.

§ 12. Impediment of building higher is that right, by which one neighbour may prohibit another from raising his building in height; as otherwise, according to common right, he would be at liberty to raise the same as high as he pleases, even to the hindrance of another. (2)

Of the Service of Light.

§ 13. Which, in some respect, agrees with the right of having a free light, and includes the service, that the light may not be impeded by any higher building, by virtue of which it ought to remain so far from such lights that the same cannot be shaded by any building or trees. (3)

Of free Sight or Prospect.

§ 14. But the right of having free sight extends still farther; for it not only includes the light of heaven above, but a free and unprevented prospect over the earth in a straight line, by virtue of which any one ought to leave the prospect the same as it was at the time of the institution of the said service. (4)

Of the Right of having Windows.

§ 15. *Window-right* is the right of having a window suspended, or going up, over another's premises; which also includes the right of free light, but which also no one need otherwise allow. (5)

Every one may make a standing Light in his own Wall.

§ 16. But no one can be prohibited from having standing lights in his own wall, through which he can see into the premises of another (6), excepting only that one may build and surround it; concerning which there are special statutes in some cities. (7)

Prohibition of Sight, what.

§ 17. To the preceding case there is an exception, when a person has a right to prohibit the sight; which is a service whereby any one is prohibited from seeing out of his premises over the premises of another. (8)

A Service, subject to Prohibition, cannot be

§ 18. With respect to which it is to be observed as a general rule, that such a service as would prohibit or hinder any thing

(1) L. 1. Ff. de cloac. l. 8. Cod. de Servit. l. 4. § ult. & seq. Ff. de dam. inf. Vide Christin. ad Leg. Mechl. tit. 14. art. 22, 23. Cost. Antwerp. tit. 62. art. 58, 59. Cæpoll. de Servit. urban. prædior. c. 62.

(2) § 1. Instit. de Servit. l. 1. Ff. de Servit. urban. l. 8, 9. Cod. de Servit.

(3) § 1. Inst. de Servit. l. 4. l. 15. de Servit. urban. præd. Cæpoll. de Servit. urban. præd. c. 35. c. 36. n. 2, 7.

(4) L. 15. et. seq. de Servit. urban. præd.

(5) Art. l. ult. § ult. Ff. de Servit. urban. præd.

(6) Arg. l. 8. Cod. de Servit. & aqua. Cæpoll. de Servit. urban. præd. c. 62. n. 1, 2.

(7) See the Statutes of the City of Leyden, art. 106.

(8) L. 8. Cod. de Servit. Cæpoll. de servitut. urbanor. præd. c. 62.

obtained by Prescription, through mere Possession.

to any person in or upon his premises, and which exists like a prohibition, cannot be acquired through mere sufferance, nor prescription of mere possession, if no public prohibition precedes it (1); and so it was understood by the high court of Holland, that prescription never runs against the right, that one's light should not be surrounded or prevented without preceding prohibition and further permission following thereupon. (2)

CHAP. XXI.

Of Rural Service.

[Grot. 2. 35.]

§ 1. *Nature and different Kinds of Rural Services.*
2. *Of a Foot-path.*
3. *Of a Riding-path.*
4. *Of a Driving-path.*
5. *Of a Road.*
6. *How to be used.*
7. *Highways and Waters, by whom to be used.*
8. *What ought to be the Course of a necessary Road.*
9. *Of Roads by Sufferance; and in what respects they are to be distinguished from Highways.*
10. *A Right of Egress and Regress to common Water may not be abandoned for a similar Right of Way out of the Highway, which would be nearer.*
11. *What Breadth ought to be left for a Path or Road.*
12. *Of the Right of Way when Land is divided.*
13. *Of a Passage for Water.*
14. *Of the Right of giving Water to one's Cattle over the Ground of another Person.*
15. *Of a Watercourse.*
16. *Of a Water-leading.*
17. *Of the Right to a Passage by Water.*
18. *How and by whom it is to be maintained.*
19. *Of Rural Service that is subject to Prohibition.*
20. *How far the planting of high Trees is prohibited.*
21. *No Fences to be made between Gardens higher than Six or Seven Feet.*
22. *No Filth to be discharged into running Water.*

Nature and different Kinds of rural Services.

§ 1. RURAL services are, properly speaking, whatever belongs to rural estates, and consist in doing something upon or over the ground of another, or in suffering it to be done, or in not doing it, in his own ground. (3)

(1) Per. Gloss. 2. DD. ad l. qui luminibus. 11. Ff. de Servitut. urban. prad. et l. 1. Cod. de Servit. & aq.

(2) Vide Neostad. Supr. Cur. decis. 98. Cæpoll. de Servit. urban prad. c. 20. n. 7. Cons. & Advys. vol. I. decis. 199. Grotius, Inleyd. lib. 2. c. 34.

(3) l. 1. Ff. de Servit rustic. prad.

The rights or services of rural estates are these; viz. a foot-path, a riding-path, a driving-path, a road, a passage for water, a passage by water, and the like. (1)

§ 2. A *foot-path* is the right of passing and repassing on foot over another man's land or ground. (2) Of a Foot-path.

§ 3. A *riding-path* is the right of riding on horseback, or in a coach with horses or other beasts, over another man's ground. (3) Of a Riding-path.

§ 4. A *driving-path* is the right of driving cattle over the ground of another, which is also used as a footpath and a riding-path. (4) Of a Driving-path.

§ 5. A *road* is the right of going over another man's ground to ride, hunt, or drive thereon; which is also used as a foot-path, as a riding-path, and as a road to drive upon. (5) Of a Road.

§ 6. All these services have this in common, that whosoever is entitled to make use of them, is bound to do it in a proper manner, and without the least injury to the ground subject thereto; so that, although the whole country and every smallest part thereof is liable to such services, and he who has such right would evidently be at liberty to use his right upon every part of the said land, yet, to prevent the proprietor of the land subject thereto from being constantly vexed, the service is usually used on the nearest low spot, and with the least prejudice to the one or other side of the land; and care is to be taken that cattle be tied by the neck, and led and driven on, without allowing them to graze on the land; and where any one has once taken his place, he cannot afterwards alter the same, (for that can only be done by him who is subject to the service), without inconvenience or hindrance of him to whom the service belongs (6). A similar enactment was also made by the people of Mechlin (7); and Christin (in his extensive explanation) testifies that it is every where in use. How to be used.

§ 7. All highways and waters may be used by all persons in general (8): for which purpose, on every spot of land, where there is no special road, there ought to be allowed from the one over the other, as far as the said highway, an overpath or road on the nearest and least prejudicial low spot, according to Highways and Waters, by whom to be used.

(1) Ibid. et pr. inst. de Servit. rusticas.
(2) Ibid.
(3) L. 8. Ff. de Servit. rust. præd.
(4) l. 1. Ff. de Servit. rust. præd.
(5) Ibid.
(6) Arg. l. 9. Ff. de Servit. rustic. præd. l. 13. § 1. l. 22. Ff. de Serv. rustic. præd. junct. l. 2. Ff. de relig. & sumpt. fun. Keuren Van Delfland, art. 213, 214. Bartol. Carpzll. de Servit. rust. præd. c. 2. n. 7.
(7) Vide Cost. Mechlin, tit. 14. art. 50.
(8) L. 2. Ff. de via et itin. public.

common guidance where the land is not uneven, which is denominated a *necessary road for persons to walk as well as for waggons to drive upon*, for the purpose of carrying home the fruits of the said land, or for driving beasts out and in. (1)

What ought to be the Course of a necessary Road.

§ 8. And the said outpath usually points to the road or water, to which the said land has been farmed out to make its pathwork (as with us the keeping in repair of the common roads comes to the charge of the nearest lands); but lands which do not lead either to roads or to waters, ought to have their out-path to the highways, sufferance roads, or common waters, also on the nearest and least prejudicial low spot. (2)

Whoever is bound to give such a necessary road to another person, is not prohibited from inclosing his land properly with ditches, hedges, or otherwise to inclose and to free the same from the common access, allowing only the necessary road when and so often as it is required. (3)

Of Roads by Sufferance; and in what respects they are to be distinguished from Highways.

§ 9. Sufferance or neighbouring roads are those, which are subject to some community, and are destined for the common use; which, because they remain without being inclosed, and in consequence thereof *suffer* the egress and ingress, are denominated sufferance roads. Whence the distinction seems to have arisen, that some lands make no pathworks to common roads, as for their special service the nearest sufferance roads were first made and destined; whence some, on account of their general use, were in the course of time taken by the manors to be kept in repair; and, therefore, to those and no other lands ought to be pointed out their right and proper outpath to the sufferance road, the outpath of other lands remaining upon and to those roads where they make their pathwork, as is above stated; although by the lapse of time their first commencement and institution may be lost, and their use become for the greatest part so common, that almost all roads are farmed out, and few if any lands are free from keeping the same in repair.

A Right of Egress and Regress to common Water may

§ 10. And it is also to be observed, that where any one can have his egress and ingress to a common water, or can have it nearer, so that he may with more conveniency proceed by

(1) L. 1. §. fin. Ff. de via publ. l. 23. § fin. Ff. de Servit. rustic. præd. l. 81. § 3. Ff. de legat. 1. Joan. Papon. lib. 1. arrest. 3. Costal. ad l. 10. Ff. de Servit. urban. præd. Cost. Antwerp, c. 62. art. 83. and of Mechlin, tit. 14. art. 51. Grotius, Inleyd. lib. 2. c. 35. vers. Een Nood-weg. Statutes of the Lords, the Superintendants of Rynland (Keuren van het Heimraatschap van Rynland) art. 145.; of Delfland, art. 212. & seq.; and of Schieland, art. 146.

(2) Vide the aforesaid Statutes of Rynland, art. 145.; of Delfland, art. 212.; and of Schieland, art. 146.

(3) Zypæ. Notit. Jur. Belg. tit. de viis publicis, in princ.

water, to his land, he ought to be satisfied, without being at liberty to desire a similar outpath to the highway by land. (1)

not be abandoned for a similar Right of Way out of the High-way, which would be nearer.

§ 11. The breadth of a road is in law limited; in a straight line, to eight, and at the turning, to sixteen feet (2). Of the other service no breadth is limited; if not mentioned in the agreement, it is left at discretion (3); and therefore, with us, a footpath is usually taken at the breadth of three or four feet; a road or driving road, at the breadth of eight; or, if the same be used by more persons, generally, for the purpose of allowing two coaches to pass by each other, at the breadth of fourteen feet; at least it is limited at twelve feet.

What Breadth ought to be left for a Path or Road.

§ 12. If a piece of land be divided into two or more parts, the hind part ought to have its outpath over the front piece, although no mention was made thereof; because the separation of the land can force no service upon the neighbours, unless it was so situated, that a person could go from the front piece by land, and out of the hind piece by water; in which case, the piece sold ought to be satisfied with an egress by water (4), according to what has already been stated; and so, if any one had sold the front piece, and kept the kind piece. (5)

Of the Right of Way when Land is divided.

In like manner, a piece of land, having a service of an outpath or out-way upon or over another piece of land, may be divided into so many parts as one wishes, and each spot obtains the same right to an outpath and way from the hind over the front spot, and so forth. (6)

§ 13. A water passage (*water gang*) is the right of fetching water over the ground of another, out of a common reservoir of water, or from the well of another person, which also includes a right of way (7). This may also be denominated a house-service, for wells are often in common use between several persons; and with us, on account of the injury that may be done to the premises of another, as well as the trouble of fetching water, they are mostly vaulted, and the water is drawn by every one through leaden pipes to his ground, and the wells standing between several premises are surrounded with planks; and to each

Of a Passage for Water.

(1) Vide Statutes of the Lords the Superintendants of Dikes of Rynland, ut supra, art. 145.; and of Schieland, art. 146.

(2) L. 8. Ff. de Servit. Rustic. præd.

(3) L. 13. §. 2. Ff. eod. l. 6. in fin. Ff. quemadmod. serv. amitt.

(4) Arg. l. 23. in fin. Ff. de servit. rustic. præd. junct. l. 66. Ff. de contr. empt.

(5) Arg. l. 23. in fin. Ff. de servit. rust. præd. junct. l. 12. Ff. commun. prædior.

(6) per. d. l. 23. § 3. Ff. eod. Vide Bartol. Cæpoll. de servit. rusticor. præd. c. 1. n. 12. & c. 3. n. 7.

(7) L. 1. § 1. Ff. de Servit. præd. rust. junct. l. 3. § 3. Ff. de Servit. præd. rust.

well is left a hole through which the water may be drawn, without any further or other access to the premises of each other.

Of the Right of giving Water to one's Cattle over the Ground of another Person.

§ 14. Next in order comes the right of giving water to one's cattle over the ground of another, or of leading them through the same for the purpose of watering them, which includes both a footway and a road or driving path. (1)

Of a Watercourse.

§ 15. The right to a watercourse is the right of discharging water beyond its own course, and of causing the same to run over the ground of another; for, according to the common right, every one may stop or return the outside water as he pleases. (2)

Of a Waterleading.

§ 16. The *leading of water* (water-leyding) is the right of leading or conducting the common water through the water of another person or through his own. (3)

Of the Right to a Passage by Water.

§ 17. A passage by water is the right of proceeding through the water of another, which is commonly taken at the breadth of twelve feet, and of such a depth, that a loaded Rhenish ship can float through; whereas, otherwise, common ditches need not be broader than seven feet, and of a reasonable depth, to prevent cattle from running into the lands of other persons (4). In Schieland, the breadth required is six feet. (5)

How and by whom it is to be maintained.

§ 18. If, in process of time, the passage by water becomes narrower or shallow, it is customary to have the same deepened at the general expence of those who are to pass through the same (6); and, on that account, those who owe the service of passage by water, ought to allow the mud dug on each side [to be thrown] upon the border of his land. (7)

Of Rural Service, that is subject to Prohibition.

§ 19. Rural service consisting of prohibition, whereby another is prohibited from doing something upon his land which he otherwise would be at liberty to do, is the planting his land with high trees, or allowing the same to grow higher than six or eight feet; for, according to common right, every one may plant his land with such high trees as he thinks proper (8), provided they do not hang over his neighbour's ground, who in such case may cut off the over-hanging boughs (9). The statutes of sepa-

§ 20. How far the planting of high Trees is to be prohibited.

(1) Ibid.

(2) L. 1. §. 11, 12. Ff. de aqua & aq. pluv. arc. See also Grotius, Inleyd. lib. 2. c. 35. vers. Waterloising.

(3) L. 1. l. 2. § 2. Ff. de Servit. Rustic.

(4) Vide Statutes of Rhinelsnd, art. 147; of Delfsnd, art. 63.

(5) See the Statutes of that place, art. 157.

(6) Arg. l. 1. Ff. de cloacis.

(7) Arg. l. 15. in fin. Ff. de Servit l. 1. § ult. Ff. de aqua & aquæ pluv. & l. 2. § 1. Ff. eod.

(8) Arg. l. 9. Ff. de Servit. urban. præd.

(9) Vide Cost. Antwerp, tit. 62. art. ult.; Mechlin, tit. 14. art. ult.

ration of premises of Rotterdam (Keuren van Erf-scheyding tot Rotterdam, art. 101); of Rhineland (1), and Delfland (2), direct, that trees should not be planted nearer than fifty rods from any wind-water mills; which distance in Schieland (3) is limited to one hundred rods. Further, no trees may be planted there to the south side of the dikes of clay-roads (Kley-wegen), and they ought to be lopped on the north side (4). In Delfland (5) also, no person may plant trees or young trees in the inside of watercourses where there is a towing-path for boats.

§ 21. There is likewise a common service among gardeners, by which they are prevented from separating the gardens with fences higher or lower than six or seven feet from the ground; not lower for the sake of liberty, and not higher on account of shade of the sun.

No Fences to be made between Gardens higher than Six or Seven Feet.

§ 22. And, moreover, no privies or gutters may be placed in or over running waters, by which any filth may be discharged in the same: neither may any one throw dead bodies or carrion into navigable or other common waters, or allow the same to remain there; but they ought to be buried. (6)

No Filth to be discharged into running Water.

CHAP. XXII.

In what Manner a Service is lost.

[Grot. 2. 37.]

§ 1. *How a Service is lost,*
I. *through Confusion.*
2. II. *Through Cession.*
3. III. *Through Sufferance to the contrary.*
§ 4. IV. *Through Disuse.*
5. V. *Through Cessation of the Institutor's Right.*
6. VI. *Through Destruction of the Cause.*

§ 1. AS a service is acquired through various means, so it is in like manner lost by various ways; viz.

How a Service is lost.

I. *Through confusion of the property,* and its devolving upon the person by whom the service is to be performed or suffered, or upon a person who cannot do with his property what he

I. Through Confusion.

(1) Keuren van het Heimraadschap van Rynland, art. 159.
(2) Keuren van Delfland, art. 206.
(3) Keuren van Schieland, 16a.
(4) Keuren van Rynland, art. 132, 133; van Delfland, art. 155.; van Schieland, art. 133.
(5) Keuren van Delfland, art. 218.
(6) Keuren van Rynland, art. 144, 156.; Delfland, art. 136.; Schieland, art. 155.

otherwise would be at liberty to do (1); for no one can be said to be subject to any service to himself, or to his own property, as we have already shown (2). If, however, any person become proprietor of two separate houses, one of which is subject to some service to the other, such service ceases as long as that person remains the proprietor thereof; but if such houses be afterwards again sold separately, each house again acquires its former service, whether advantageous or prejudicial (3), as we have more fully shown in a preceding part of this work (4).

II. Through Cession.

§ 2. II. A service is lost *through cession* and renunciation, by the person to whom it belongs. (5).

III. Through Sufferance to the contrary.

§ 3. III. Through sufferance of whatever militates against the service; as for instance, when any one tolerates his neighbour's building upon the ground over a path; or when he builds against the light or prospect which he was bound to leave him free and clear (6). For if any one be negligent in prohibiting the work which his neighbour is carrying on with his knowledge, where he can and may impede it, he is understood to tolerate it, and he can merely demand indemnification; and when the work is finished, he cannot cause it to be demolished. (7)

IV. Through Disuse.

§ 4. IV. Next in order follows disuse, through neglect of a third part of one hundred years (8), whether such service was not used at all, or whether the person entitled thereto had made use of a similar service instead thereof: as for instance, if I had taken my path, which I had over my neighbour's land, over the land of another in the vicinity (9). In what manner such prescription occurs, and how it is to be used, we have treated more fully in the preceding eighth chapter; with regard to which it is to be remarked, that it applies to such services as are in certain and constant use, but not to those which may be either used or not (10); according to the same exceptions as are stated in the preceding chapter, § 12.

V. Through Cessation of the Institutor's Right.

§ 5. V. A service is lost through *cessation of the right* of the person who had allowed such service, either upon or over some-

(1) L. 1. Ff. quemadmodum Servit. amitt.
(2) Per. l. 26. Ff. de Servit. urban. præd. & l. 10. Ff. Commun. præd.
(3) Per. l. 9. Ff. Commun. prædior. l. 18. Ff. de Servit. l. 2. § 19. Ff. de hæred. vend.
(4) See ch. xix. § 6. p. 191. supra.
(5) L. 6. Ff. de Servit. § 40. Instit. de rer. divis. l. 35. Ff. de reg. jur.
(6) L. 8. Ff. quemadmod. Servit. amitt.
(7) Arg. l. 28. Ff. Commun. divid. l. 13. Ff. de damno infect.
(8) L. 7. Cod. de Præscript. 30 annor. l. 13. l. 14. Cod. de Servit.
(9) L. 17. Ff. eod.
(10) Arg. l. 14. Ff. de Servit. l. 2. Ff. de via publica.

thing to which he had a right only during his life-time, or for a certain time, or upon certain condition (1); for no one can give another a greater right than he himself possesses. (2)

§ 6. VI. And lastly, a service is lost through destruction of the matter whence it arises (3), so that the whole matter goes to nothing, and cannot again be recovered: for example, if a house fall down, or be destroyed, which had a right to discharge its water upon my ground; and if at the same place a new house be erected, it is understood that such new-built house will have the same right of service, on account of the ground which remained there, and also belonged to the house, and which remained the same, although the house was altered (4); so if a piece of land over which I had a right of way, be overflowed with water, and again become dry, within a third part of one hundred years, or if a well, out of which I had the liberty of drawing water, become dry, and afterwards again produces water, I should reserve the same right, and make use of it again. (5)

VI. Through Destruction of the Cause.

(1) Arg. l. 31. Ff. de pignorib. junct. l. 11. § 1. Ff. quemadmod. Servit. amitt.
(2) L. 120. Ff. de reg. jur. junct. l. 105. Ff. de condit. & demonstrat.
(3) L. 14. § 1. Ff. quemadmod. serv. amitt. §. 3. Instit. de Servit.
(4) L. 20. § 2. Ff. de Servit. urban. præd.
(5) L. 14. Ff. quemadmod. serv. amitt. junct. l. 35. Ff. de Serv. rust. præd. l. 23. l. 24. Ff. quemadmod. usufr. amitt.

COMMENTARIES

ON THE

DUTCH-ROMAN LAW.

BOOK III.

CHAP. I.

Of the Right to an Estate, and of Inheritance.

[Grot. I. 14.]

1. *An Estate defined.*
2. *Of the Right to an Estate, and how it is acquired by Inheritance.*
3. *Whether and how far an Heir is obliged for and on behalf of the deceased.*
4. *An Inheritance, how acquired.*

§ 1. HAVING treated thus far of simple things, and the possession thereof, we now come to treat of compound things, or those including many; viz. of the right to an estate, and in what manner it is to be held. An Estate defined.

An estate includes whatsoever a deceased person leaves behind him, and died possessed of; namely, house, garden, chattels, debts, and actions. (1)

§ 2. A right to an estate is acquired through inheritance, which is the acquisition of another's estate (2), by which a person obtains not only the real possession of the property in existence, but likewise actions, that is, all right and claim which the deceased had upon and against another; and in which the heir binds himself to pay the debts of the deceased, and to satisfy all claims against him (3). From these obligations of the deceased, Of the Right to an Estate; and how it is acquired by Inheritance.

§ 3. Whether and how far an Heir

(1) L. 119. Ff. de verb. signif.
(2) L. 24. Ff. de verb. signif. l. 62. Ff. de reg. jur.
(3) L. 1. l. 3. Ff. de bonor. possess. l. 8. l. 37. Ff. de arg. hered. l. ult. Cod. de hered. act. §. 1. Instit. de perpet. & Temp. Act. l. unic. Cod. ut action. ab hæred. & contra hæred.

is obliged for and on Behalf of the Deceased.

to which the heir is liable, crimes only are excluded, on account of which the deceased was liable to corporal punisnment, which ceases with the death, and do not go over to the heir (1). For other offences, on account of which any fine is only levied, or indemnification for damages is made; the heir of the deceased is likewise liable, so far as goods will go or come into the hands of the heir (2). But with respect to the indemnification of damages sustained and occasioned, they are bound to make complete satisfaction. (3)

An Inheritance, how acquired.

§ 4. The manner in which an inheritance is acquired, is twofold; viz. by last will, or by the law of succession (4); of which inheritance by last will is first in order; because the law cannot appropriate to itself the division of any person's property, except where the deceased would not himself make a division of his estate. (5)

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(1) L. 1. in pr. & § 2. Ff. de privat. delict. 26. Ff. de pœnis.

(2) Arg. d. l. 1. in pr. & § 2 Ff. de privat. delict. l. 26. Ff. de pœnis. Et § 1. Instit. de perpet. & temp. act.

(3) See Groeneweg. de legib. abrogat. ad tit. Cod. Ex delict. defunct. in quantum heredes teneantur. Christin. vol. iii. decis. 122.

(4) § ult. Instit. per quas personas.

(5) L. 39. Ff. de acq. vel amitt. hered. l. 20. § 1. Ff. de pact. dotal. l. 21. Cod. Mandati: For an explanation of last wills, see Sande, lib. 4. tit. 5. dec. 8.

CHAP. II.

Of Last Wills, and how they exist.

[Grotius, 2. 17. Van Leuwen, Censura Forensis, 3. 2.]

§ 1. *A last Will defined.*
2. *Of the different Sorts of Last Wills and Testaments and Codicils; and in what respects they differ from each other; and of the Effect of the Codicilar Clause.*
3. *Wills are either nuncupative or written.*
4. *Whether and how far a last Will can be valid among us, without being reduced into Writing.*
5. *Nature of written or closed Wills.*
6. *Last Wills, whether nuncupative or written, how made and confirmed.*
7. *Before Notary and Witnesses when introduced.*
8. *A Will is invalidated by a Witness, who at the Time of its Execution was considered to be Fourteen Years of Age, being afterwards found to be under that Age.*
9. *A blind Person's Will, how to be made.*
10. *Whether the Witnesses to a Will ought to be apprized of its Contents.*
11. *Whether a Will, executed according to the Solemnity required in one Place, can take effect at another Place, where other or more Solemnities are required.*
12. *Of privileged Wills.*
13. *A Will of a Father amongst his Children.*
14. *Of the Will of a Military Person when on actual Service.*
15. *Of a Will made during the Plague, or for the benefit of the Poor.*
16. *When Wills begin to take effect.*
17. *Of the Effect of the Derogatory Clause.*
18. *Wills how to be altered and rendered void.*

A last Will defined.

§ 1. A LAST will is a declaration of what any one wishes to be done with his property after his death (1), and likewise of another's property if he consents thereto; and having given his consent for that purpose, cannot retract it. (2)

Of the different Sorts of last Wills and Testaments, and Codicils; and in what respects they differ from

§ 2. There are testaments and codicils, which bear so great a resemblance to each other, according to our customs, so far as relates to their external necessity, that they can scarcely be separated (3); with this exception however, that in codicils, no full

(1) L. 1. Ff. qui testam. fac. poss.
(2) Stockman, decis. 20.
(3) Concerning Codicils, see Grotius, Inleyd. lib. 2. c. 25. verse By Ons. Vinn. ad § ult. Inst. de Codicill. Coren. obs. 31. post num. 35. Major tamen.

each other; and of the Effect of the Codicilar Clause.

inheritance can be bequeathed; nor having been bequeathed, can the legatee be deprived of it (1); but a codicil can only serve for mere bequests and legacies (2); although, among us, the writings in which mere legacies are left without the right of inheritance, are likewise denominated last wills (3). So, that the chief use of codicils is this; viz. that in them, besides and together with a last will, something can be bespoken or altered independently of the will, or be disposed of in a manner different from that which had been enjoined in the said will, when it does not consist in full inheritance, or in deprivation of full inheritance; because two last wills cannot exist at one and the same time, but that which was last executed will annul the former, as will be shown in a following page; unless the same be supported by the codicilar clause customary amongst us, wherever no express alteration has been made by the latest will (4). In all last wills the codicilar clause is usually added; namely, that the paper writing executed may exist either as a last will and testament, or as a codicil, in such manner as it may best have effect; which clause is of such force, that if by virtue of the same will no one becomes or remains heir, or whether the nominated heir dies before the testator, or the inheritance for other reasons falls away, the inheritance bequeathed will devolve on that account upon the nearest relations entitled to that inheritance *ab intestato*, as if no inheritance whatever had been bequeathed; yet the legacies and mere bequests contained in the said will, and whatever has been desired therein, remain in full force, and by the heir *ab intestato* ought to be paid and satisfied, which otherwise would likewise fall away. (5)

Last Wills are either nuncupative or written.

§ 3. Last wills are either nuncupative or written. A nuncupative will is, when the testator declares his will by word of mouth. This kind of wills, which is most in use among us (6), is made in the following manner: the notary having received the will and intention out of the mouth of the testator, for the sake of memory, commits the same to writing, and reads it to the testator and witnesses; and afterwards enquires of the testa-

(1) § 2. Instit. de Codicill. l. 6. Cod. de jure Codicillor.

(2) Grotius ut supra.

(3) See Gudelin. de Jure Novis. lib. 2. c. 5. in pr. Christin. vol. i. decis. 247. n. 8. & decis. 307. n. 17. Vinn. in § ult. instit. de hered. instit. n. 1.

(4) § 2. Inst. in quib. mod. test. infirm. Arg. § 3. Instit. quib. mod. test. infirm.

(5) Per. l. 181. Ff. de reg. jur. l. 14. & l. 29. Cod. de fidei commis. Vide Guil. lib. 2. obs. 114. n. 1. Joan à Sande, lib. 4. tit. 4. def. 10. n. 4. Cons. van de Hollandse Regtsg. vol. i. cons. 36. & 121. Groenew. ad l. 9. Ff. de testam. tutel. Vinn. ad § 1. inst. de Codic. n. 1.

(6) Neostad. Cur. Holland. decis. 1. in fine.

tor, in the presence of the witnesses, whether he thoroughly comprehended the same, and whether it is his desire and last will. In confirmation of which, it is subscribed by the testator, the witnesses, and the notary; and an entry of it is made by the notary in his book, in order that he may give a copy of it when required.

Whether and how far a Last Will can be valid among us, without being reduced into Writing.

§ 4. But though a nuncupative will be made in this way for the greater security, it does not follow, that the writing and the subscribing of the testator and witnesses are an essential part of a will; for if it accidentally happen that the testator is prevented from observing all these formalities by the dangerous nature of his sickness, or is otherwise hindered through necessity from observing the same in every point, and merely verbally declares his will before notary and witnesses, it must be considered as a good and valid will. (1)

A husband and wife may both make their last wills in one and the same paper writing (2); these, however, are considered as two separate wills, which each of them may always alter separately (3), and without the knowledge of the other, as well as after the death of either of them (4); but with this exception only, that if they have benefitted each other reciprocally, and directed how the goods of their common estate shall go after the death of the longest liver, in such case the survivor, having enjoyed the benefit or wishing to enjoy it, may make no other last will or testamentary disposition of his or her share, unless he or she had previously rejected the benefit made, and had ceded the same, as is pointed out more extensively in § 8. (p. 223) of the following chapter.

Nature of written or *closed* Wills.

§ 5. *Written*, or *closed* wills, as they are also called, are made by the testator's committing his will to writing himself, who, after subscribing and closing it, delivers the same to the notary in the presence of two witnesses, declaring that whatever is contained therein is his full last will, which then is likewise superscribed by the notary; and, an act being passed thereof, the same is subscribed by the testator and witnesses. In this kind of wills, however, it is especially to be considered, that a

(1) Novell. Leon. 34. Coren. obs. 10. Böer ad Cons. Bitur. tit. 2. § 1. littera. F. Vigl. § fin. instit. de testam. ordinand. n. 3. Clar. § testam. quæstion 4. n. 1. Bartol. ad l. 2. in princ. Ff. quem.dmod. testam. aper. Cons. & Adv. tom. 2. cons. 12, 13, 14, 15, 16.

(2) Grotius, Inleyd. lib. 2. c. 17. vers. Tweluyden.

(3) Arg. 1. Ff. de heredib. instit. l. 20. Ff. de Vulg. & pupilli substit. et ibi DD.

(4) Pecc. de testam. conjug. lib. 1. c. 43. Everhard. consil. 79. Fab. Cod. lib. 6. tit. 5. def. 18. Gail. lib. 3. obs. 117. n. 1, 2.

closed will of two wedded persons, in which one benefits the other, ought to be written by a third person; because no one can write any last will in which he himself is benefitted (1); which, however, would not seem to affect a verbal will which is afterwards committed into writing. (2)

Last Wills, whether nuncupative or written, how made and confirmed.

§ 6. Among us, both written and nuncupative wills and codicils are made and confirmed in two ways, viz. either before a notary and two witnesses, or before a secretary and two judicial persons, that is to say, two aldermen of the place where it takes place. (3)

Before a Notary and Witness when introduced.

§ 7. This custom of making last wills before a notary and two witnesses, in these countries, is not above two hundred years old; for we find in the old statutes of Leyden, that about the year 1449, and afterwards, no bequests by last will could take effect unless they were sealed with the seals of two aldermen and the seal of the city; and likewise no last wills have been found before or about that time, except such as were executed before the aldermen of the same city; whence we conclude that the execution of last wills before a notary has been introduced in these countries only since the emperor Charles V. (by a proclamation of the 21st March 1524) fixed a certain number of notaries, who were to be nominated by the magistrates of every place, and recommended to the court of Holland to be examined as to their possessing the requisite capacities, besides whom no one was allowed to execute the said office; and this regulation is still constantly observed in Holland. The first nomination of notaries under it was made at Amsterdam in August 1565, where five persons were appointed, three of whom were secretaries in the said city. In the statute-books of Leyden of the year 1545, and previous thereto, no mention is made of notaries; but in the statutes of the year 1583, (art 15.) six notaries were appointed.

Further, at many places it was held that, according to the canon laws, any one may make his last will before the clergyman of the parish and two witnesses: hence it appears, that the number of seven or five witnesses, who were required by the Roman law for the purpose of executing last wills and testaments,

(1) Tot. Cod. de his qui sibi adscribunt in testamento.

(2) Mantic. de Conjectur. ultimar. volunt. lib. 1. tit. 6. n. 5. 7. Pecc. de testam. conjug. lib. 3. c. 10. Faber. Cod. lib. 9. tit. 14. def. 1. Sentence of the Court of Holland of the 23d Jan. 1648. It was understood by the Court of Holland that this kind of wills takes place indifferently among us, according to Groenweg. addict. tit. de his qui sibi adscrib. See also Cons. & Advys. vol. ii. cons. 147. Neerl. Adv. 1. c. 14. & seq.

(3) Vide Keuren van Leyden, art. 149.; Oudewater, art. 167.; Amsterdam, c. 44. art. 1, 2.

was reduced among us to two witnesses; but on mature consideration of the ground of the Roman laws, this is not the case; for the practice of making last wills and testaments before a notary and two witnesses agrees still with the Roman laws, by which the seven witnesses required according to the first institution was afterwards reduced to five, in the reign of emperor Leo. (1)

Wills executed before a notary and two witnesses are still considered to include and to be of equal validity with those executed before five witnesses; for, by the Roman law a notary alone had as much credit as three other witnesses (2), who, being added to the two witnesses, makes out the required number of five witnesses; and the same rule is understood as applying to a secretary and two judicial persons or aldermen.

The witnesses to last wills and testaments ought to be two men, persons of honour and good knowledge, above the age of fourteen years. (3)

A Will is invalidated by a Witness, who at the Time of its Execution was considered to be 14 Years of Age, being afterwards found to be under that Age.

§ 8. This rule with respect to age is so narrowly taken, that if a witness at the time of executing a last will be judged by every one to be fourteen years old, and if it be found afterwards that he had not attained the requisite age (how little soever the difference may be), it will render such will invalid, as I have often seen decided. The consideration, however, that on some occasions we ought to give way for the benefit of the public, and to render the will effectual, (which, if in anywise possible, ought to be done) (4), can make an incompetent deed of any person valid, who had pretended to be competent, and was considered so by every one (5); because the testimony of a person under fourteen years is from its own nature considered inconsistent on account of the weakness of his understanding and the imperfection of his judgment, which can by no means be supplied, especially as, among us, the number of witnesses to a will has been so reduced, that the defect cannot be filled up by the other joint witnesses, whereas no truth can exist or appear but from the mouth at least of two credible witnesses.

A blind Person's Will, how to be made.

§ 9. Anciently, blind persons, and others who could not write, required one witness more, who subscribed for them (6); but now, since a notary and two witnesses have full credit in whatever is done before them, it is not so necessary, as the want of the same

(1) See Novell. Leonis, 41.
(2) Novell. 73. § 1.
(3) § 6. Instit. de Testamentis, l. 80. § 1. & l. 26. Ff. qui testam. fac. poss. Wesel, ad Nov. Utr. art. 17.
(4) L. 1. Cod. de Sacrosanct. Eccles.
(5) § 7. Instit. de testam. ordin. l. 1. Cod. de testam. & l. Barbarius à hilippus, Ff. de offic. Prætor.
(6) L. 8. Cod. qui testam. fac. poss.

would not make the will invalid; although in the case of a person born blind, who cannot write, some jurists deem it not inexpedient that a third witness should be added to the two others, for the sake of better security, and also to avoid all danger. But this distinction is to be understood of the said law (1) only with respect to wills which were privately executed, merely before witnesses, according to the practice of that time, but cannot be made applicable to other wills executed publicly, and in contemplation of the law; whereas to such paper writings no suspicion of fraud or falsity can be attributed (2): and so it was understood by the high court of Holland, in the case of Knelis Goris, residing at the Kage, against the heirs of Marytge Willems, widow of Dignus Jansz, according to the opinion of Messieurs Petrus Cuneus, professor of the academy at Leyden, and Cornelis Rosch, doctor of law, advocate of the court of Holland, in the year 1639.

Whether the Witnesses to a Will ought to be apprized of its Contents.

§ 10. But it is questionable whether the witnesses ought likewise to have a thorough knowledge of the contents of the will, and to bear witness thereof. In the case of a *closed* will, it was antiently held to be unnecessary and contradictory, as it still is. But as nuncupative wills are likewise committed into writing among us, it ought to be sufficient even at present, that the witnesses should bear knowledge only thereof; that the last will having been read to the testator, he had declared that whatever was contained therein, was his desire and ultimate will. And it is not necessary, neither is it required, that the witnesses should thoroughly know the testator, unless the notary himself does not know him (3); in order thus to remove any deception or disguise: thus Julius Clarius (4) relates, that in his time, a certain woman concealed the recent death of her husband, and caused another person, whom she trusted, to lie in bed and personate him; and who, pretending to be the sick man, made a will in his name in her favour; and I understand likewise, that similar instances have occurred in this country (5). In Friesland the Roman laws and manners are so far observed, that seven witnesses are still required at the execution of a last will.

Whether a Will, executed according to the Solemnity required in

§ 11. Hence this question has arisen; viz. whether a will, made according to the practice required at the place where it is effected (as in Holland for instance), having been duly confirmed

(1) L. 8. Cod. qui testam. fac. poss.
(2) L. 10. Ff. de probat. & l. 31. Cod. de donat. l. 27. Cod. de testam.
(3) Plac. Oct. 3, 1549, art. 9. junct. l. 9. Cod. de testam.
(4) Lib. 3. Sentent. §. Testamenta. quæst. 59.
(5) Ranchin. var. lect. lib. 2. ch. 6. relates a similar case.

before a notary and two witnesses, ought likewise to take effect in other places, where other and more numerous solemnities are required to the execution of a will (as in Friesland the number of witnesses required is seven); and whether, if a man having made his last will, according to the custom of Holland, in one part of Holland, and who happens to die in Friesland afterwards, or to leave any property in the territory of Friesland, the said will so made would be held good in Friesland. And upon the general opinion of the doctors it was understood, that a will confirmed at a certain place, according to the solemnities required there, takes effect everywhere without distinction (1); because the solemnity required to the existence of any thing, belongs to the knowledge and jurisdiction of the government of that place where it ought to be observed (2). And if a person be obliged to follow the practice of different places, any person who lives now at this, and then at another place, would be obliged to make so many wills, or to observe different forms in one and the same will; and a will, which is but a *single* act, would be judged of according to different forms of law. (3)

one Place, can take Effect at another Place where oth r or more Solemnities are required.

§ 12. There are, however, certain wills, which, although the common and proper form is not observed in them, are nevertheless considered perfect, by virtue of a peculiar privilege.

Of privileged Wills.

§ 13. Of this description is the will of a father or mother, making a division of his or her property, amongst his or her children; who, although they make it verbally, in the presence of two witnesses, so that there may be any proof thereof, or by their own writing; and even although it should be written by another, yet if they had but signed the same, such testament would have full effect, so far as relates to the children (4); as it also would for the purpose of annulling a former will properly made (5). Such a will is understood to have effect likewise with respect to grand-children, and further descendants, according to Sande, and other writers (6), as it also has in the case of a blind person, according to Julius Clarus. (7)

Will of a Father among his Children.

(1) DD. in l. 1. Cod. de Samina Trinitate. Vide tamen. Neerl. Adv. 1. c. 46.

(2) Per. l. 6. Cod. de Evict. l. 3. in fin. Ff. de testib. l. 2. Cod. quemadmod. testam. aper. fac. l. 9. l. ult. Cod. de testam.

(3) On this subject, see Covarr. lib. 2. de Sponsalib. § 7. n. 8. Castal. ad d. l. 6. Ff. de Evict. Guidon Papa. decis. 22. Tessaur. 2. quæst. for. 8. Gail, lib. 2. obs. 123. Joan. à Sande, lib. 4. tit. 1. def. 14.

(4) Arg. l. 40. in verb. legitimis probationibus, Ff. de testam. militari. l. hac. consultissima 21. cum. auth. seq. Cod. de testam. Vide Gudelin. de Jure Novissimo, lib. 2. c. 5. vers Porro observandum.

(5) Vinn. ad § 7. Instit. quib. mod. testam. Infer. n. 5.

(6) Sande, lib. 4. tit. 1. def. 6. Julius Clarus, testamentum, quæst. 21. n. 1. Hartm. Pistor. lib. 2. quæst. 1. n. 26.

(7) Julius Clarus, d. § Testamentum, quæst. 17. n. 2. Sande, lib. 4. tit. 1. def. 8. Vasq. Illustr. controvers. 103. n. 11. Grass. § Testamentum. quæst. 32. in fin.

Of the Will of a military Person, when on actual Service.

§ 14. In like manner, military men, when on actual service in camp, are permitted to make their last wills, either by word of mouth or in writing, without observing the requisite formalities, provided there be sufficient legal evidence that they have so made their testaments. (1)

Of a Will made during the Plague, or for the Benefit of the Poor.

§ 15. It is at present by no means settled, whether wills made during the time of plague, or for the benefit of the poor, may be reckoned among such excepted last wills; so that it is not certain whether such wills may be attested by a woman, or any other unlawful person; and also, whether such will made verbally before two witnesses, would be valid without a notary. With respect to wills made during the prevalence of a plague, Julius Clarus and Gabriel (2), are of opinion, that the solemnities in making wills are so narrowly looked upon among us, that in such case they ought not to be omitted: and so it was likewise judged in France (3). Such wills likewise ought not to take place among us in cities and places where the great number of notaries and witnesses, even on such occasions, will leave no one unassisted. But according to Gail and others (4), it is more equitable in such cases still to follow therein the Roman laws; according to which the court of Holland has frequently decided that such wills are also reckoned among the excepted wills, and considered valid, although all the formalities required should not be complied with. With respect to wills for the benefit of the poor, it is uncertain whether they are admissible among the exceptions or not, as the formalities required are observed by some, and not by others. (5)

The Roman law, with respect to the wills of husbandmen, is not in force among us, because notaries or country practitioners (*land-schryvers*) are to be found in every village.

When Wills begin to take Effect.

§ 16. Wills, when made, do not take full effect until they are confirmed by the death of the testator; for the will of man is subject to change as long as he lives (6). So that the testator

(1) L. 40. et tot. tit. de testam. milit. Quod etiam num obtinere tradunt. Grotius, Inleyd. lib. 2. tit. 17. vers. Een Krygsman. n. 28 & seq. Vinn. ad § ult. Instit. de militari testam. Gail, lib. 2. obs. 118. n. 1. 6. Gudelin. de Jur. Noviss. l. 5. c. ult. vers. hæc ut. Perez. ad Cod. de testam. militari, in fin. Vigl. ad nibr. de testam. n. 11. Vinnius ad princ. Instit. de militari testamento, n. 1.

(2) Jul. Clar. § testam. quæst. 56. n. 3. in fin. and Gabriel, lib. 4. de testam. conclus. 8. n. 3.

(3) According to Ann. Robert. rer. judicat. lib. 2. c. 10.

(4) Gail, lib. 2. observ. 118. n. 18. Mynsenger, cent. 1. obs. 96. Cons. & Adv. part 1. cons. 77. & part 2. cons. 36 & 94.

(5) Vide Grotius, Inleyd. lib. 2. c. 17. in fin. Coren, observ. 31. Sande, lib. 4. tit. 1. def. 13 & 14. Christin. vol. 1. decis. 304. n. 12. cum seq. Radelant. decis. Cur. Traject. 125. n. 34 & seq.

(6) L. 4. Ff. de adimend. legat.

may always alter his will, although he had clearly expressed in the same, by a *derogatory clause*, that any will thereafter made by him will not be valid, except with special recantation and insertion of certain words.

§ 17. Yet with similar confirmation he is understood to wish that such bequests, as he may cause to be inserted in consequence of a loose imprudence or deception of others, should not be valid; but in no wise that he should be deprived of the power of making any other will in future, or of altering his will (1); if there be but certain proof that he wished to alter his preceding will freely and without compulsion from any one. Of the Effect of the *Derogatory Clause*.

Hence it follows, that the obligation of such clause is not necessary, nor does it come into consideration when the free and unconstrained will of the testator can appear (2), for otherwise the derogatory clause may easily be made use of by him, in whose behalf the first will was made, to secure himself against the testator's altering his will, and thus to oppose and reject a later and subsequent will, which, however, the testator can by no means be deprived of the power of making. (3)

But in order that there may be certain and indubitable evidence of the will having undergone alteration, it is not sufficient that the testator merely declare that he altera his will, or that he wishes to die intestate; but he ought to make the alteration by a second and subsequent will, either before the court of justice, or before a notary and witnesses, by a special act of revocation, of which there ought to be legal evidence (4); unless any one declare before the court of justice, that he does not wish that the will made by him should take effect, and persevere for ten subsequent years in that desire and will (5). Wills closed and written by the testator himself, are understood to have been revoked and annulled, if the testator have purposely cut it through, or thrown into the fire (6); so that even if the superscription of such a closed will be exhibited without the inclosed paper writing, one would believe that it was re-

(1) Arg. l. 22. Ff. de legat. 3. junct. l. 4. Ff. de adimend. legat. Grotius, Inleyd. lib. 1. c. 24. vers. Daar is nog. Vinn. ad § 2. Inst. quib. mod. test. inf. n. 7.

(2) See Jul. Clar. Sentent. lib. 3. § testamentum, quæst. 99. Pecc. de testam. conjug. l. 1. c. 10. n. 5, 6. Menoch. lib. 4. Præsump. 166. n. 13. Alexander. consil. 134. n. 2. vol. i. & lib. 4. cons. 7.

(3) L. 4. Ff. de adimend. legat. et lib. 2. Ff. de legat. 3.

(4) See Coren, cons. 10. n. 24. & seq. Julius Clar. § testamentum. quæst. 91, 92. Papon. lib. 20. tit. 1. Arrest. 3. Fachin. lib. 4. c. 8. Cod. Fabrian. lib. 6. tit. 5. def. 29. n. 1, 2. Mantic. de conject. ultim. volunt. lib. 2. tit. 15. n. 28. & seq. Neost. decis. 1. et de pact. antenupt. obs. 22. vers. Quod autem actores.

(5) L. 27. Cod. de testam.

(6) L. 1. & tot. tit. Ff. de his quæ in testam. de lant. l. 30. Cod. de testam. Grotius, Inleyd. lib. 2. c. 24. n. 14.

voked or annulled by the testator, although no preceding perfect will would be considered otherwise annulled or revoked, but by a subsequent and later one (1); but it has no effect in wills executed before a notary and witnesses, which cannot be otherwise revoked but by a second will, containing a clear revocation of the first (2). We said that the alteration or revocation of a will ought to be made either by a second last will, or before a court of justice, or before a notary and witnesses, or otherwise, in order that there may be lawful evidence of such alteration or revocation; for it is not absolutely requisite that a second will should be made, or that heirs should be again nominated, &c.; but it is sufficient that the revocation be as legal as the execution of the will itself was, so far as concerns the execution of it, and no more; in order that every deed may be annulled in the same way as it was executed (3). Hence it will be sufficient for the revocation of a will, if the testator declare publicly before a notary and witnesses, that he desires his property to be divided according to the law of succession (4); or that the same should go to those who by law are entitled to inherit his property (5); or if he only desire that his last will should not take effect, as it was understood by the court of Holland, on the 29th July 1644, between Wouter van Isendoorm plaintiff, and Michael Romeyn, defendant.

By the Roman law it was sufficient for the revocation of a will, if the testator had made and completed a later and subsequent perfect will, although it contained no general or special revocation of the preceding will (6). But now, since testaments and codicils are so blended together that the real difference of an inheritance and a bequest under them, is almost entirely removed (so that an inheritance and bequest, without distinction, may be left as well by the one as by the other), that will which is last made will be considered among us a codicil, as pointed out heretofore; unless and so far as a general or special revocation of the preceding testament had been inserted therein.

Wills how to be altered and made void.

§ 18. I say a *special revocation*, because a general revocation of all preceding testaments, codicils, &c. is not always sufficient;

(1) Per. l. 11. Ff. de injusto rupt. et l. 11. Ff. de bon. poss. secund. tab.

(2) Vide Neostad. cur. Holland. dec. 1. Cons. & Advys. Rotterd. vol. iii. consult. 156. Clar. § Testamentum quæst. 93. n. 1. Mantic. de Conjectur. ultim. volunt. lib. 12. tit. 1. n. 33. Fab. Cod. lib. 6. tit. 5. def. 30. But Vinnius (ad § 2 Inst. quib. mod. test. inf. n. 3.) is of a different opinion.

(3) L. 35. Ff. de reg. jur.

(4) L. 1. § 1. Ff. Si Tabul. testam. null. exstab.

(5) L. 21. § 3. Cod. de testam.

(6) § 2. Instit. quib. mod. testam. infirm.

and therefore the future derogatory clause (by which any one wills and desires that whatever disposition he may make after that time shall be of no value, and shall not exist but with the insertion of certain words), ought not to be otherwise revoked, but by a special and express revocation, though it be not with the insertion of certain words (1), which is not insisted upon if, independently thereof the free and unconstrained alteration of will can be made to appear. (2)

Further, by a general revocation inserted in testaments, the ante-nuptial contracts, or those entered into previous to marriage, cannot be understood to be revoked or released; for general institutions cannot, according to Neostadt (3), be extended beyond cases which are of a similar nature (4), excepting so far as the said will contains a new and express direction against the tenor of the ante-nuptial contract; because the unquestionable will of the testator is to be considered as a law. (5)

According to the written laws, a last will of a father, among his children, written and signed by himself, cannot be annulled to the prejudice of the said children, excepting by a special revocation of the same (6). But it has been decreed by the high court of Holland, that with respect to such wills, a general insertion of the revocation customary among notaries is sufficient; and that no special revocation is required, much less any insertion respecting the nature of the will. (7)

(1) L. 22. Ff. de leg. 4.
(2) See Julius Clarus, lib. 3. Sentent. § testamentum, quæst 99. Pecc. de testam. Conjug. d. lib. 1. c. 10. Johann. Durant de arte testandi, tit. 10. Cautela 1. Sande, lib. 3. tit. 1. def. 10. & DD. ibi allegat.
(3) De Pact. Antenupt. obs. 3.
(4) Barthol. in l. legatorum 33. § fin. & l. Titia. 34. § Lucius, Ff. de Legat. 2.
(5) L. in Conditionibus primum locum. 19. l. Publius. 36. Ff. de Condit. & demonstrat.
(6) See Cons. & Adv. vol. i. cons. 50.
(7) Vide Coren, Obs. Rer. Jud. 39.

CHAP. III.

By whom and to whom Inheritances may be left.

[Grotius, 2. 15, 16. Censura Forensis, 3. 3.]

§ 1. *How, and when, a Will, being valid of itself, the Tenor thereof becomes invalid.*
2. *Who are legally incapacitated from making a Will.*
3. *Persons deserting to the Enemy.*
4. *Whether Criminals condemned to death are incapacitated from making a Will.*
5. *Or Bastards.*
6. *Or Persons maintained in Hospitals.*
7. *Of what Property, and in whose behalf, a Person may not freely dispose by Will.*
8. *If a Husband and Wife bequeath Property to each other, upon Condition that the longest Liver shall take all the Property, such longest Liver, after enjoying the Benefit of the whole, cannot make a testamentary Disposition of his or her Share.*
9. *Who may not inherit by Will.*
10. *Bastards.*
11. *Natural Children.*
12. *Guardians, Curators, Administrators, and Sponsors, or Godfathers and Godmothers.*
13. *Convents, Ecclesiastical Bodies, and other prohibited Colleges.*
14. *No Adherents of the Pope, or popishly ordained Persons.*
15. *No Notaries, under Wills made in their Presence.*
16. *How far Minors, without the Consent of their Parents, Guardians, &c. may bequeath to each other by Will.*
17. *How far a Widow or Widower, having Children by a former Marriage, may bequeath Property to the Second Consort.*
18. *How far Husband and Wife may do so in Gelderland and in the Diocese of Utrecht.*
19. *How far at Delft.*
20. *No Adulterer or Adulteress can inherit from each other.*

How and when a Will, being valid of itself, the Tenor thereof becomes invalid.

§ 1. IT sometimes happens, that whilst a will remains in full force, the *tenor* of it becomes invalid either wholly or in part.

Whatever is directed by a will, made by a person who cannot legally make any will, becomes utterly invalid (1). Thus, in the diocese of Utrecht, a testamentary disposition made

(1) Tot. tit. Inst. quib. non est permis. fac. testam.

by persons who have not fully completed the age of eighteen and sixteen years, is absolutely void (1.)

Who are legally incapacitated from making a Will.

§ 2. The persons who are legally incapacitated from making a will, are the following; viz. all minors, that is, men under fourteen and women under twelve years of age (2); persons born dumb and deaf (3), madmen, lunatics, and ideots (4); and likewise all prodigals who are under an interdiction, and are prohibited from having the management of their own affairs (5). But if a madman make his testament during a lucid interval, such testament is good (6). And equity has likewise introduced amongst us this rule; viz. that whatever prodigals bona fide and in their senses, leave to their friends, descendants, the poor, or other persons, in which bequest no extravagance or squandering can be pointed out, ought to remain valid and take effect (7); as the Court of Holland has often decided, though such bequest will be more certain if the knowledge of the government or the confirmation of the guardians be obtained. (8)

Persons deserting to the Enemy.

§ 3. Among the persons who are legally incapacitated from making wills, are reckoned those who desert from us to the enemy, who lose their right of citizenship, and are considered as enemies (9); but persons who are taken prisoners by the enemy do not, among us, lose their right and liberty of making wills, because they do not themselves change their condition but remain the same (10). In like manner, those who are made prisoners by the Turks do not lose their right of making wills. (11)

Whether Criminals condemned to Death are incapacitated from making a Will;

§ 4. According to the Roman law, the wills of criminals condemned to death and punished, are invalid (12); but at present no such persons are prohibited from making wills, provided their property be not judicially declared to be forfeited (13).

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(1) Wesel, ad Nov. Ultr. art. 16.
(2) § 1. Inst. eod.
(3) L. 7. Ff. qui testam. fac. poss. § 3. Inst. quib. non est permiss. fac. test.
(4) § 1. Inst. eod.
(5) § 2. Inst. eod. 18. Ff. qui testam. fac. poss. Sande, lib. 3. tit. 1. def. 3.
(6) § 1. Inst. eod. l. 16. § 1. l. 17. Ff. qui testam. fac. poss.
(7) Novell. Leon. 39. Charond. Pandect. du droict. Franc. lib. 3. § 2. Sande, lib. 4. tit. 1.
(8) Cost. Antwerp. tit. 46. art. 8.
(9) L. 19. § 4. Ff. de captiv. & postlim. revers. Veruy, Ars. testandi, c. 4. Groeneweg ad § ult. Inst. quibus non est permiss. fac. testam. Sande, lib. 4. tit. 1. def. 2.
(10) Facit. arg. l. qui a latronibus, 13. Ff. qui testam. fac. poss. Vinn. & Fons ad § ult. Instit. quibus non est permiss. fac. testam. Zypæ. Notit. Jur. Belg. tit. de Testam. vers. generaliter.
(11) Vide Covarruv. in cap. peccatum, part 3. § 11. n. 6. Sande, lib. 4. tit. 1. def. 2.
(12) L. 8. § 1. et in fin. Ff. qui testam. fac. poss.
(13) Arg. l. 11. Ff. de testam milit. quod ita consuetudine observari tradunt, Clarus, § testamentum, quæst. 19. n. 1. et quæst. 21. n. 1. Vasq. controv. quæst. n. 4, 5. Comes ad l. tauri. 4 Gutier, lib. 2. practic. quæst. 38. Farinac Praxes criminal. quæst. 102. n. 131. 158.

Or Bastards;

§ 5. But whether persons of illegitimate birth are also prohibited from making a will, has been unjustly questioned among us, in opposition to the written laws. To remove all disputes, therefore, a bastard, who is desirous of making a valid will, must make application for that purpose to the States of Holland for permission (1); on the contrary, upon the question, whether bastards may dispose by will of their property, without having such permission or confirmation thereof, it was determined by the court of Holland in the affirmative; and in consequence of its decision thereof, the treasurer of the perquisite-treasure of the country denominated Espergne, was condemned to return certain property belonging to a bastard who had made a will, and which on that account had been seized by him, to the heirs nominated in the will, in the case of Lion van Boshuysen, the litigating impetrator against the attorney general defendant, on the 17th November 1543; and a similar decree was made by the said court in the cause between Jan Klaasz, priest, and others, executors of the will of Mr. Pieter Jacobz, priest, against Tielman van Dulcum, treasurer of the perquisites and attorney general, on the 5th August 1504. (2)

Or Persons maintained in Hospitals.

§ 6. Those, who are maintained at Amsterdam in hospitals, cannot dispose of their property by last will, but it devolves upon the hospital in which they were maintained; unless their children be appointed heirs in preference to such hospitals; namely, if they were not able to maintain their parents. (3)

Those, who have been brought up at Amsterdam, may have no other heirs but the orphan house, if they depart this life without children. (4)

These rights or other privileges are in almost all cities granted to the poor hospitals at their institution, and are still observed; and a similar privilege was granted by Albert Duke of Beyren, to the hospital of St. Catherine at Leyden, on the 18th March 1401; viz. That all persons who should be admitted therein, should be admitted with all the property possessed by them, and such as they may acquire in future, which ought to remain in the said hospital. And it was further granted by William Duke of Beyren, on the 3d November 1409, to the male and female

(1) Vide Papegay, page 645. & seq. Papon. lib. 21. tit. 3. art. 5, 6. Christin. vol. i. decis. 82. n. 4.

(2) See Cons. & Adv. vol. i. cons. 135. vers. soo veel. cons. 173. quæst. 2. Groenwege in Not. supra Grotium, lib. 2. c. 15. n. 6.

(3) See the Ordinance for old men and women at Amsterdam, art. 3. and likewise at Oudewater, art. 206.

(4) See the Ordinance of the Orphan House at Amsterdam of the 14th Feb. 1584.

hospital at Delft; that if any person in that city should go to the said hospital, they could not sell any rents, inheritances, and houses of which they might be possessed, but that they should enjoy and use all the fruits and benefits thereof during their lifetime, and after their death that the said property should devolve and be inherited in the following proportions; viz. two third parts by their lawful heirs, and the other third part should devolve upon the hospital in which they depart this life.

But it is to be considered, that this rule cannot be extended to those who receive alms, and reside at their own houses; so that at many places if such persons who, under the denomination of *house poor*, have had the benefit of any alms from them, leave any property behind, or acquire any property, it will suffice to re-repay, or to cause to be repaid, the amount of what they may have received for alms. (1)

Of what Property, and in whose Behalf, Persons may not freely dispose by Will.

§ 7. Testaments or last wills become void in part, when and so far as property is disposed of by the testator, of which he has not the free disposal; or, when any property is bequeathed to persons who cannot inherit by last will; or, when any thing is insisted upon which is impossible, or is desired, which militates against sound reason. (2)

The following are the different kinds of property of which a testator has not the free disposal; viz.

First, Property that is bound and entailed, of which we shall treat in a subsequent chapter.

Secondly, All feudal property, of which a person may not dispose by last will, without the permission of government; which is not only granted to be disposed of by way of inheritance, but likewise to be given by turns to one or more individuals. (3)

If a Husband and Wife bequeath Property to each other, upon Condition that the longest Liver shall take all the Property, such longest Liver, after enjoying the Bene

§ 8. Thirdly, when two married persons have reciprocally benefited each other, and thereby directed how the goods of the common estate should devolve after the death of the survivor of them, such survivor having enjoyed the benefit, cannot dispose of his or her share by last will (4); and so it was judged in the causes upon a will between Philip Duke of Arschot, and Mrs. Johanna van Halewyn his consort, by the high court of

(1) Vide Keuren van Leyden, (*the Statutes of Leyden*) art. 98.

(2) Hollandse, cons. vol. vi. p. 669.

(3) According to Grotius, lib. 2. c. 15. vers. Een Leenman, &c. 42. vers. Ten tweden.

(4) Vide Neerl. Adv. 1. c. 22. Pecc. de testam. conjug. lib. 1. c. 43. n. 14. Everhard. consil. 12. n 11. arg. l. sicut 8. § venditionis 11. Ff. quib. mod. pignus vel hypothec. solv. junct. l 5. Cod. de obligat. et actionib. Jason & alii DD. ad. l. si feudum 81. Ff. de leg. 1.

fit of the *Whole*, cannot make a testamentary Disposition of his or her *Share*.

Mechlin (1); and also by the court of Holland, on the 7th April 1645, in the case of Kors and Kornelis Korzoon van Oudewater, against the widow and children of Floriz Lambertz van Oudewater, respecting the will of Lambert Korszoon van Oudewater and Teuntyen Floris, wedded persons. (2)

Who may not inherit by Will.

§ 9. The following persons cannot inherit by last will; viz. those who desert to and remain with the enemy, and persons banished; and whatever is bequeathed to such persons is not only considered as not bequeathed and annulled (3), but it devolves upon the county (4). The same effect also takes place when any thing devolves upon such persons by the law of succession; on which account, Duke William, on the 13th March 1413, granted to N. N. that all the inheritance by succession of her brother, who was with the enemy, should devolve upon his mother (5); and Duke Albert, in the year 1394, granted to N. N. that her property, after her death, should devolve upon and be inherited by her sons, who were under banishment, in the same manner as if they were not banished persons (6). And so, an accomplice or accessary in the murder of any person, cannot inherit from him, either by last will and testament, or by the law of succession, any property whatsoever; but such property will devolve upon the county; because no one may enjoy any benefit in consequence of his own crime, or derive any benefit from an act which is punishable. (7)

Bastards.

§ 10. In like manner, bastards procreated in adultery cannot inherit or enjoy any property, either from their parents or ancestors (8), or by the law of succession, or by last will (9); but if it be enjoyed and allowed by the nearest relations, it will devolve upon the county, if it be not withdrawn from the said children within two months (10); excepting only whatever has been left for necessary maintenance (11). Still less can the

(1) As appears more at large in Johan Decker Dissert. Jur. lib. 1. c. 1. and in Christin. vol. vi. decis. 58. n. 6. Which authors state that the decisions of the high Court of Brabant were in several cases according to the opinions of Peoc. and Everhard.

(2) Vide Coren, obs. 11, 12. Grotius, Inleyd. lib. 2. c. 15. in fin. Cost. Antwerp, c. 41. art. 51.

(3) Secundum l. 3. Ff. de his quæ pro non script. hab.

(4) According to Christin, vol. iv. decis. 127. n. 1. & vol. . decis. 4. 13. cum seq. Zypæ Notit. Jur. Belg. de Jure fisci, in fin.

(5) Vide Register B. A. fol. 136.

(6) Register B. D. page 195.

(7) L. fin. Ff de bonis damnator. l 1. Cod. de his quib. ut indign. l. 10. § 1. Ff. de Solut. matrim. l. 134. § 1. D. de R. J. Keuren van Zeland, c. 2. art. 28.

(8) Gail. 2. obs. 115.

(9) Auth. ex complexu. Cod. de incest. nupt.

(10) L. 1. Cod. de natural. lib. Cons. & Adv. Rotterdam, tom. 3. cons. 91. n. 8.

(11) Cap. 5. in fin. x. de eo. qui duxit in matrim. quam. poll. adult. Neostad. suprem. Cur. decis. 2. Christin. vol. i. decis. 117. Customs of Antwerp, tit. 45. art. 7. 8. Gail. lib. 2. obs. 115.

parents inherit from each other, who polluted matrimony with such adultery. (1)

Natural Children.

§ 11. Other natural children may, like other strangers, inherit property from their parents by last will (2); which, in Friezland, if there are other legitimate children, cannot be extended further than to one twelfth part of the whole estate (3); and in several cities it is, in like manner, limited to a certain share, as at Leyden and Oudewater, where any person having legitimate children cannot leave a natural child more than one fourth part of a child's portion (4); which proportion, by a special privilege granted by Duke Albert to the people of Amsterdam in the year 1387, and to those of Leyden in the year 1389, was extended still further, viz. that if any property be left to bastards there, and they die there without lawful issue, such property should again devolve upon the persons from whom they were descended.

Guardians, Curators, Administrators, and Sponsors, or Godfathers and Godmothers.

§ 12. The guardians, curators, and administrators of minors and their wives or children, and also sponsors, that is, godfathers and godmothers, concubines, &c. cannot take from their pupils, godchildren, and minors, any immoveable property by last will, nor any thing by which their immoveable property will be encumbered (5). Grotius understands this only of *immoveable* property, to the exclusion of all moveable goods without distinction. But in law, for one and the same reason, it is understood to apply to moveable property of considerable value, which in similar cases is put upon the same level with immoveable property (6). To determine this point, therefore, with the greater certainty in the Netherlands, Philip, King of Spain, subsequently explained the eternal edict in the year 1611, by an ampliation (7); and it was so understood by a sentence of the court in the case of Mr. Van Noortwyk against Mr. Van ——— defendant, the defendant having been guardian of Cornelis Van Watervliet, and instituted his universal heir; and it was judged by the court that the immoveable goods of the said Watervliet, (he having died a minor), must devolve upon Mr.

(1) L. 6. Cod. de incest. nupt. l. 13. Ff. de his quæ ut indign.

(2) Groeneweg, ad l. 2. Cod. de natural. lib. a. 5.

(3) Sande, lib. 4. tit. 4. def. 3.

(4) See Statutes (*Keuren*) of Leyden, art. 190.; of Oudewater, art. 178.

(5) Plac. Oct. 4, 1540. Zypæ Notit. Jur. Belg. tit. de testam. in verb. ita hæc. Sande, lib. 2. tit. 9. def. 19, 20. Cost. Antwerp. tit. 46. art. 7. Rebuff. ad constit. reg. Tractat. de donat. & aliis dispoſit. tutor. contra. l. 5. Ff. de donat.

(6) Arg. l. 22. Cod. de administr. tutor. cap. tua extra. de his quæ fiunt a prælatis. Glosa. in cap. 1. verb. assistentes in fin. De Ceric. ægrot. in 6. Vide Cephal. cons. 593. n. 54. et seq.

(7) Vid. Wesel ad Const. Ultr. art. 15.

Van Noortwyk, who would have been heir ab intestato; and it was understood to belong amongst immoveable goods, actiones et jura: this sentence was likewise confirmed by the high court in the year 1675.

But it is not understood of those who, without a will, ought by law to inherit the property of such minor ab intestato, to whom any bequest of their pupils of immoveable property is not prohibited. (1)

Convents, Ecclesiastical Bodies, and other prohibited Colleges.

§ 13. By proclamation of the 20th March 1584, and 15th October 1591, no convents and prohibited ecclesiastical bodies may inherit any immoveable property by last will; which, for the reasons above cited, must likewise be extended to moveable property of considerable value (2); and the said prohibited bodies are entirely excluded from all inheritances by last wills (3). The prohibited bodies among us are, all communities, meetings, and sects that are not of the true Christian reformed religion, as publicly taught in the churches here; some of which are necessarily indulged on account of our intercourse with foreign people and nations, yet not so that such indulgence is to be construed into an approval of the same, or that they should make any acquisition which otherwise is not permitted, or is prohibited by the laws. (4)

No Adherents of the Pope, or popishly ordained Persons.

§ 14. To this head may be referred the proclamation of the States of Holland of the 4th May 1655; by which all persons are thenceforth strictly prohibited from bequeathing any property whatsoever by testaments, codicils, legacies, donations *mortis causâ*, and *inter vivos*, or by any other fraudulent and simulated transactions and contracts, to or on behalf of any pretended spiritual persons, priests, nuns, and nuns at liberty to break their vows, or other adherents of the Pope, and persons ordained; neither to any convents, nor to any other spiritual poor institution or hospitals; and that the said property should not be succeeded to, according to such dispositions of last wills, donations, or contracts, but that the said property should devolve upon those who, according to the customs and laws of the country, would be entitled thereto by the law of succession.

No Notaries, under Wills made in their Presence.

§ 15. Further, no notaries can take or enjoy any benefit under wills executed before them (5); neither can any other persons

(1) Vide Christin. vol. 4. dec. 4. n. 10. Cons. & Adv. vol. i. cons. 10 & 114. and Amsterdam vol. iii. cons. 147.

(2) Arg. l. 22. Cod. de administr. tutor.

(3) L. 8. Cod. de hered. instit. Vide Coren. obs. 9.

(4) Vide Groeneweg. ad tit. Cod. de hæretic. et Manich.

(5) L. divus. ff. ad l. Cornel. de falsis. Christin. vol. i. decis. 350.

who have inserted any thing for their own benefit in the last wills of others. (1)

§ 16. It was likewise directed by a proclamation of the 4th October 1540, that whoever promises to marry, or actually marries a young man under the age of twenty-five, or a girl under the age of twenty, without the consent of the father or mother, and the nearest relations, or the magistrates of the place, such betrothed or married persons cannot take any thing by last will; which proclamation was made at that time, when, with respect to marriages contracted without the consent of those who ought to have any controul therein, no full law was enacted; and when the dissolute permission of a girl to a young man, who agreed to marry before the priest (who alone took cognizance thereof, and certified that such persons had entered into matrimony before him), was carried to such a length, that frequently the parents, guardians, and other relations, could obtain no previous knowledge thereof. But since by the political ordinance in the year 1580, (art. 3.) such provision was made therein, that no one can enter into matrimony without the knowledge of his parents, guardians, or the magistrates, the preceding 11th art. of the proclamation of the 4th Oct. 1540, necessarily loses its force, though Grotius (2) has inconsiderately inserted it as if it could still take effect.

How far Minors, without the Consent of their Parents, Guardians, &c. may bequeath to each other by Will.

§ 17. A man or woman entering into a second marriage with any one having children by a former marriage, cannot take any benefit by last will, donation, or otherwise, exceeding the smallest portion of any of the children of the former marriage (3); and whatever has been given or bequeathed to him or her beyond that portion, comes only to the benefit of the children of the former marriage (4). Agreeably to this was the decision of the high court, on the 31st July 1620, in the case of Adriana de Ruysser, residing at Ter-Veer, impetrator in case of appeal against Jacob Pietersz, defendant, and on the 3d of June 1634, between Philippus de Bakkere, the litigating prisoner and plaintiff, against Anthonis Tisius, defendant (5). But on this subject we shall treat more fully in the following book, under the titles of partnership, community, and ante-nuptial contracts.

How far a Widow or Widower, having Children by a former Marriage, may bequeath Property to the Second Consort.

(1) Vide tit. C. de his qui sibi in testam. adscr. and Groeneweg. upon that title, and also Van den Berg, Advysb. vol. i. cons. 19. & seq.

(2) Inleyd. lib. 2. c. 11. vers. by huwelyk & c. 16. vers. maus die.

(3) L. hac Edictale, 6. Cod. de Secund. Nupt.

(4) Novell. 22. c. 27.

(5) See Cons. and Adv. vol. vi. part. 2, cons. 181.

How far Husband and Wife may do so in Gelderland, and in the Diocese of Utrecht.

§ 18. In Gelderland and the diocese of Utrecht, husband and wife may neither leave property reciprocally by last will, excepting only the usufruct (1); which is only to be understood of property situated there, according to the declaration of the States of Utrecht, on the 14th April 1659, (art. 1.) wherein it was explained, that the said statute is real, and only limited to property within their jurisdiction; and that the people of Utrecht were not prohibited from bequeathing to each other property to be found in Holland or elsewhere, without the diocese of Utrecht. (2)

How far at Delft.

§ 19. At Delft also a statute exists, that a wife may not by testamentary disposition make a bequest to her husband, excepting when it is done reciprocally; namely, provided that her husband bequeaths to her again as much as she has bequeathed to him (3). And so a similar practice obtained at Leyden, according to the old statutes of that city, previous to the year 1400, one of which enacted that no husband should benefit his wife, nor a wife her husband, nor their reciprocal heirs, when such benefit takes place on behalf of the one and not of the other. This statute, however, was altered and annulled on the 4th of March 1460.

No Adulterer or Adulteress can inherit from each other.

§ 20. If any one commits adultery, he loses thereby, on behalf of his consort, all such benefits as he otherwise would have been entitled to (4), as will be said hereafter in the fourth book, under the title of ante-nuptial contracts.

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(1) See Cost. Utrecht, rubr. 22. art. 7.
(2) Vide Wesel ad Nov. Ultr. art. 1. & seq.
(3) Vide Cons. & Advys. vol. i. cons. 136.
(4) See the Political Ordinance, art. 18. Junct. Novell. 117. c. 8. § 2. c. 9. § 4.

CHAP. IV.

Of the bequeathing of Inheritances in general, and whom a Person may or must institute as Heir.

[Grot. 2. 18.]

§ 1. *Bequeathing an Inheritance defined.*
2. *Who, and how many Persons may be instituted Heirs.*
3. *Division of an Inheritance, how to be understood.*
4. *Whether, and how far Property may be bequeathed partly by last Will, and partly left to be inherited pursuant to the Law of Succession.*
5. *What Persons a Testator ought necessarily to institute as Heir for a certain Portion.*
6. *What Right Children have where Parents have omitted to institute them Heirs, or have unjustly disinherited them.*
7. *Of Parents not being instituted Heirs by their Children.*
8. *Of Brothers and Sisters, in case dishonest Persons be instituted in preference to them.*
9. *Who are to be considered as dishonest Persons.*
10. *A Concubine.*
11. *Natural Children.*
12. *What are to be construed legal Reasons for disinheriting,*
13. *In Children;*
14. *And in Parents.*

THE real or essential part of a testament, or full last will, consists in bequeathing an inheritance (1), without which no will can exist (2); on which account it is usually inserted first of all, and in the first part of a will (3), after which follow the other bequests, and those directions which the heir is obliged to satisfy and execute (4); which, according to our manners, are enumerated before the inheritance as a proviso of what the testator wishes should be done and followed by the heir.

§ 1. Bequeathing inheritance is a last will, in which a testator institutes any one heir to his whole estate, with all rights, actions, and claims, both active and passive. (5)

Bequeathing an Inheritance defined.

§ 2. A testator may institute whomsoever he wishes to be his heir, without distinction; if they are but such as are not pro-

Who, and how many Persons may be instituted Heirs.

(1) § 34. Instit. de legat.
(2) § 2. Instit. de fidei commiss. hæred. l. 1. in fin. Ff. de vulg. & pupill. substit. l. ult. Cod. de jure Codicill.
(3) L. 1. Ff. de hered. instit.
(4) 116. Ff. de legat. 1. l. 36. Ff. de legat. 2. § 1. Instit. de legat.
(5) L. 24. l. 119. l. 138. l. 178. § 1. Ff. de verb. significat.

hibited by the law from inheriting by last will (1). Who such prohibited persons are we have shown at length in the preceding chapter.

A testator may likewise institute as many heirs as he pleases (2); so that an inheritance may be divided into so many shares as one wishes, which by the written laws was compared to one pound weight of twelve ounces (3); so that an inheritance was usually divided into twelve shares.

Division of an Inheritance, how to be understood.

§ 3. And it was a rule, that any testator may bequeath part of his estate by will; but if any one was instituted heir only to an inferior part, without any other person being nominated together with him, it was understood that the whole was included, and that the remainder became the acquisition of the instituted heir, because no one was instituted with him. And again, if there were more than twelve shares named, so much was deducted from each share, according to its extent, as would make it equal to the twelfth part (4); or in case of double the number, as much as was wanting to the computation of twenty-four, instead of twelve shares, which amounts to one and the same thing. A mere mistake in the calculation of the testator cannot impede or alter his expressed will and meaning, to which more regard is to be paid than to his words. For instance, if a testator had by his will nominated *four* particular persons to be his heirs, to each of whom he had bequeathed a *third* part; or *five* persons, to each of whom he had bequeathed a *fourth* part of his estate; the third part or fourth part of each ought to be diminished to a just fourth or fifth part, because it sufficiently appears that he intended to give to each of his nominated heirs an equal portion of his estate. (5)

Whether, and how far, Property may be bequeathed partly by Last Will, and partly left to be inherited pursuant to the Law of Succession.

§ 4. But with respect to the rule of acquisition (6), where any one (among us) is nominated heir to a certain share, without a joint heir to the remaining shares, the subtilty of the Roman law is not regarded; accordingly, in such case the remaining shares, to which no one was instituted heir, do not become an acquisition to the heir nominated and instituted, but remain and devolve upon him who is the testator's nearest relation by blood, pursuant to the law of succession; and it is not deemed con-

(1) Arg. l. 12. Ff. de judic. & l. 43. § 1. Ff. de procurat. junct. & fin. Instit. de hæred. instit. & § 24. Instit. de legat.
(2) § 4. Inst. de hæred. inst.
(3) § 5. Instit. de hæred. instit.
(4) § 5. Instit. de hæredib. instit. l. 7. Ff. de reg. jur. l. 13. Cod. de hered. instit.
(5) L. 15. Cod. de testam. l. 16. Cod. de fidei commiss. § 6 & 7. Instit. de hæred. instit.
(6) De jure accrescendi, vide Censur. Forens. lib. 3. c. 5. § 12.

tradictory when a testator leaves one part of his inheritance by a last will, and allows the other part to be inherited pursuant to the law of succession. (1)

If many and several heirs be nominated, each of them must bear the charges of the estate, according to their respective shares of inheritance. (2)

What Persons a Testator ought necessarily to institute as Heirs for a certain Portion.

§ 5. Among those whom a testator may institute as heirs, there are some persons whom he must necessarily institute as heirs for a certain portion, and whom he cannot disinherit but for special reasons: these are divided into three descriptions of persons; viz.

I. Parents, their children.

II. Children, their parents.

III. Brothers and sisters, each other in preference to dishonest persons. (3)

And first, with respect to parents; it is their duty to institute as heirs their children or further descendants in preference to others, either for the whole or at least for a certain share; whom, according to the Roman laws, they might not pass by silently in their wills, but were obliged to nominate them expressly as heirs for a certain share, or to disinherit them upon legal and expressed reasons, and declare them unworthy of such share; and in failure thereof, the entire last will became of itself null and void, together with whatever was contained therein, if the father had entirely omitted his children therein (4); but where the mother has been unjustly disinherited or passed by (and the passing silently by her is considered to be a disinheriting), the last will is annulled only so far as concerns the inheritance and the institution of heirs, upon a judicial complaint of the said children, if they were disinherited or passed by without legal reasons; the other parts of the said will remaining in full force. (5)

What Right Children have, where Parents

§ 6. But, among us, if both the father and the mother silently pass by their children, this is considered as a disinheriting; and

(1) See Grotius, Inleyd. lib. 2. c. 18. in fine. Christin. vol. i. decis. 305. n. 18. and 312. n. 2. and vol. iv. decis. 10. Gudelin de jure novissimo, lib. 2. c. 5. vers. ac. ex eo. Zypæ Notit. Jur. Belg. tit. de testam. in pr. Sande, lib. 2. tit. 2. def. 2. Vide infra c. vi. § 8. of this book. & Vinn. ad § 5. Inst. de her. inst. n. 7.

(2) L. 2. Cod. de heredit. act. l. 6. Cod. famil. erciscund.

(3) Novell. 18. c. 1. Novell. 115. c. 3, 4. l. 27. Cod. de inoffic. testam. Who are to be considered as *dishonest* persons, vide § 9. p. infra.

(4) Tot. tit. Ff. de lib. & posthum. pr. & § 1. & § 3. Instit. de exhæred. liberorum, l. 1. Ff. de injusto, rupto, & irrito acto testam.

(5) § ult. Instit. de exhered. lib. l. 1. Ff. de legat. præst. contra tab. bonor. possessit. Novell. l. 115. c. 3. in fin, tot. tit. Ff. Cod. de inoffic. testam.

have omitted to institute them Heirs, or have unjustly disinherited them.

the last will with respect to the other parts remain of effect, saving only the right of the children to have the bequeathed inheritance annulled, if disinherited or passed by without legal reasons (1). Children, born after the death of their fathers or mothers, have the same right according to Sande (2); in which case also, according to the Roman law, the whole last will becomes null and void of itself. (3)

Of Parents not being instituted Heirs by their Children.

§ 7. As parents cannot disinherit their children, so neither may children disinherit or entirely pass by their parents, but for legal reasons; and, upon their complaint likewise, the institution of heirs is annulled for their benefit (4). But this rule is to be understood, among us, with this limitation, viz. that it has effect in those places where parents inherit from their children by the law of succession, but not in those places where they may not inherit from their children by the law of succession; who, accordingly, having no right of themselves, may be passed by, according to Coren. (5)

Of Brothers and Sisters, in case dishonest Persons be instituted in Preference to them.

§ 8. But brothers and sisters have no such powerful claims upon each other; for they can only have the institution of heirs annulled for their benefit in the event of their being passed by and dishonest persons being instituted heirs in their stead (6); so that, in such case, the brothers and sisters may be disinherited and passed by. (7)

Who are to be considered as *dishonest* Persons.

§ 9. *Dishonest persons* are not only such as have been declared to be so by any preceding judicial sentence, but also those who lead such a life, that on that account the public do not consider them as honest people. (8)

A Concubine.

§ 10. And therefore a concubine may so far be considered as dishonest, that she cannot be instituted heiress while brothers and sisters are passed by. (9)

Natural Children.

§ 11. But whether the natural children of unmarried parents are to be considered as dishonest persons in such degree, that

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(1) Grotius, Inleyd. lib. 2. c. 18. vers. nor de Roomse Regten. Gudelin de jure novissimo, lib. 1. c. 13. vers. Quid moribus. & lib. 2. c. 5. vers. Posterior. Christin. vol. iv. decis. 20. n. 8. Neostad. Supr. Cur. Holland. decis. 100.

(2) Lib. 4. tit. 2. def. 2.

(3) § 1. Inst. quib. mod. testam. in firm. § 1. Instit. de exhered. lib. 3. § 1. Ff. de injusto rupto.

(4) L. 15. Ff. de inoffic. testam. l. 7. § 1. Ff. unde liberi. Novell. 115. c. 4. Sande, lib. 4. tit. 2. def. 4. vers. sed quam.

(5) Obs. 10. n. 24. Vide etiam l. 6. § 1. Ff. de inoffic. testam. junct. l. 8. Cod. eod.

(6) L. 1. Ff. l. 27. Cod. de inoffic. testam.

(7) Novell. 18. c. 1. Novell. 115. c. 3, 4. Vinn. ad § 1. Inst. de inoff. test. Zupthen § Broeder, n. 2. & 15. Claros § testam. quæst 50. & Vinn. dicto tit. n. 6.

(8) Vide Sichard. ad d. l. 27. Cod. de inoff. tetam.

(9) DD. ad. d. l. 27. Cod. de inoff. testam. Gomes. Var. Resolut. tom. 1. c. 11. n. 8. Cons & Adv. of Amsterdam, vol. iii. cons. 56.; and of Rotterdam, vol. iii. cons. 73.

they, having been instituted heirs in preference to brothers and sisters, may be deprived of such an inheritance; — the general opinion concerning them is, that since no fault can be attributed to them arising from their own act (1), according to Ezekiel (xviii. 19, 20.), they cannot be considered as dishonest persons. (2)

Disinheriting cannot exist between children and parents without legal reasons, which must not only be expressed in the last will, but, independently thereof, the causes of their being so disinherited must be proved. (3)

What are to be construed legal Reasons for disinheriting.

§ 12. What causes are legal and sufficient for disinheriting, both with respect to children and also with respect to parents, are left to the discretionary judgment of the judge, according to the example of those mentioned in the Roman law (4); and therefore, in order that it should not be effected upon too light grounds, and without knowledge of matters, our notaries are directed not to officiate in cases of disinheriting but in the presence of aldermen. (5)

The causes of disinheritance expressed in the Novel above referred to, are enumerated, with respect to children, as far as fourteen, and in the case of parents, to the number of eight; and according to their importance we are in the habit of judging in other similar cases. (6)

In Children;

§ 13. These causes of disinheriting children are as follows; viz.

1. If a child with an evil intention have struck his parents;
2. Or have made use of public slander against them;
3. Or have accused them of crimes punishable by corporal punishment, excepting such as concerns the government of the country or the welfare of the state;
4. If he commit roguery and crimes, or have been accessary thereto;
5. If he have endeavoured to deprive his parents of their lives by poison or other wicked means;
6. If a son have carnally known his father's wife or concubine;
7. If a child have made his parents to be suspected by others, to their great prejudice and loss;

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(1) L. 26. Ff. de pœn.

(2) See Paleot. Tract. de not. spuriisque, c. 55. & seq. Hartman Pistor. lib. 1. quæst 30. n. 36. & seq.

(3) L. 30. Cod. de inoffic. testam. Novell. 115. c. 3. See also the oath of Notaries, art. 5.

(4) Vide Novell. 115. c. 3. 4. DD. ad Auth. non licet. Cod. de lib. præterit. Gomes. 1. Resolut. 11. Jul. Clar. § testam. quæst. 41. n. 2. Menoch. de Arbit. Jud. Cas. 267. n. 6. Grass. Recept. Sentent. § testam. quæst. 42. n. 2, 3.

(5) See the Notarial Oath, art. 5.

(6) See Gomes. & Jul. Clar. d. locis. Grotius, Inleyd. lib. 2. c. 18. vers. welke oorsaken. & seq.

8. If a son, being able, have refused to release, or be security for, his imprisoned parents;

9. If a child, have by compulsion, prevented his parents from disposing of their property by last will and testament;

10. If a child have become a dishonest stage-player, and persisted therein;

11. If a daughter, whom the parents have endeavoured to get honestly married, lead a lewd life, and prostitute herself publicly, and persist therein; for those, who have themisfortune to be seduced by any young man, but do not continue in a vicious course of life, are not reckoned among the legally dishonest persons (1);

12. If children have neglected their parents while labouring under madness;

13. If, the parents being taken prisoners by the enemy, the children (being able) have not exerted their utmost efforts to procure their release;

14. If a child of parents professing the true religion fall into heresy, that is to say, into disbelief of christianity and the word of God, so that he cannot be included among any of the acknowledged religious sects, as was directed at the pacification of Ghent in the year 1576 (art. 23.); viz. that if any parents bequeath less to their children by will, on account of religion, than such children are entitled to, the deficiency shall in such case be made up through means of government. This regulation was lately renewed by the States of Holland, by a proclamation of the 4th May 1655; viz. That all Roman catholic parents having one or more children (one or more of whom shall not profess the Roman catholic religion) may not give a greater portion to their child or children so professing the said Roman catholic religion, either by testament, codicil, legacy, donation *mortis causâ* or *inter vivos*, or by contract, than to their child or children who are not of the Roman catholic religion. And in proportion as they shall be found to have acted contrary hereto, such children shall enjoy from the estate of their parents as much as any children of the Roman catholic religion who had been most favoured.

And in Parents. § 14. The legal causes, for which a child may disinherit or pass by his parents, are the following; viz.

1. If parents have accused their children of capital crimes;

(1) Arg. l. 6. § 1. Ff. ad leg. Jul. de adult. junct. l. 43. in pr. & § 1. Ff. de ritu nupt. l. 4. § 3. Ff. de his quæ not. infam.

2. If they have attempted to poison them, or by any other means to deprive their children of life;

3. If a father have carnal connection with his son's wife or concubine;

4. If the parents, through compulsion, have prevented their children from disposing of their property by last will;

5. If the parents have attempted to deprive each other of life, or of the use of senses, by poison or any other means;

6. If the parents have neglected their child in rage;

7. If the parents, possessing the ability, have not endeavoured to ransom their children when taken prisoners by the enemy;

8. If the father or mother of children, professing the true faith, falls into heresy or atheism.

All the above points are understood to be requisite for the purpose of disinheriting or passing by entirely; because the passing by up to a certain share is permitted, as will be shown in the following chapter.

If a child approves of his father's will, he has, nevertheless, the right of claiming the legitimate as well as the Trebellianic portion. (1)

(1) Neostad. dec. 3. Stokman, dec. 35. Hollands. Cons. p. 4. cons. 183. Concerning the nature of the Trebellianic Portion, vide infra, ch. xi. § 2. of this third Book.

CHAP. V.

Of the legitimate Portion and necessary Inheritance.

[Grot. 2. 18. 16. & seq.]

§ 1. *Legitimate Portion defined; and how much it is to Children, Parents, Brothers, and Sisters.*
2. *If one of several Children be disinherited, or refuse the Inheritance, whether and how it becomes an Increase to the other Children, whether in the Inheritance or in the Number of Children.*
3. *The legitimate Portion of Parents, how much it is, when they inherit, together with Brothers and Sisters; and whether, if Brothers and Sisters be disinherited, or refuse the Inheritance, it becomes an Increase to the Parents.*
4. *Whether any and what Part may be deducted from the legitimate Portion, or be carried to the Account thereof.*
5. *Whether Grandchildren may claim any and what legitimate Portion by Representation from their Grandfather and Grandmother or Ancestors.*
6. *Of the Right which Persons have, who have been unjustly disinherited or passed by.*
7. *Whether and in what Manner that Right is transmitted to their Heirs.*
8. *A legitimate Portion must exist in full Property, and cannot be incumbered with any Charges;*
9. *Unless for the Benefit of the Children themselves.*
10. *Whether and how it can be postponed for a certain time.*

IN the preceding chapter it has been said, that no parents may disinherit or entirely pass by their children in their last will, nor can children so disinherit or pass by their parents, nor brothers and sisters disinherit or pass by each other, in certain cases; but they must respectively be instituted heirs as to certain shares (1). We now proceed to consider to what share they must be so instituted heirs.

Legitimate Portion defined; and how much it is to Parents, Brothers, and Sisters.

§ 1. The just part, otherwise denominated the *legitimate portion*, to which they must necessarily be instituted heirs, is, with respect to children, if their number be *four* or less, one *third* part; and, if *five* or more, the half of what they would otherwise have inherited by the law of succession (2). With respect

(1) Novell. 18. c. 1. Novell. 113. c. 3, 4.

(2) Novell. 18. c. 1.

to parents, brothers, and sisters, it always remains a third part. (1)

If one of several Children be disinherited or refuse the Inheritance, whether and how it becomes an Increase to the other Children, whether in the Inheritance or in the Number of Children.

§ 2. A question has arisen, whether among five children, one of them being disinherited for certain reasons, or having for other causes refused the inheritance, should, however, make out one person in the number, and his share become an acquisition to the other children; viz. so that the other four should however draw the half, or whether the other must be reckoned as if he has had his share, and the share of the other children remains the same, and does not become greater than it would have been if the said fifth had inherited jointly? The opinions of the doctors are various on these points; but the most certain opinion concerning them is, that a disinherited person is reckoned as dead, and the legitimate share of the other children is reckoned without including in the number the person disinherited, in the same way as if he was not there; and according to the number of the others only it is calculated upon one third or upon the half (if they be four or five in number) of the amount which they ought to have inherited, without reckoning the person disinherited, whose share is an increase to the others in the amount of the estate, but not in the number of his person; with regard to whom the others, on their own account, are understood to acquire the remainder (2). But if one of the children refuses, and cedes the inheritance of his own accord, his share will likewise be an increase to the others in the enumeration of his person; so that if one among five refuses the inheritance, the other four obtaining the right of the fifth, ought to be reckoned for five, and their legitimate share will be calculated upon the half of what they ought to have inherited by the law of succession. (3)

The legitimate Portion of Parents, how much it is, when they inherit with Brothers and Sisters; and whether, if Brothers and Sisters be disinherited, or refuse the Inherit-

§ 3. In like manner it has been questioned, whether the disinheriting or passing by of brothers and sisters would increase the legitimate portion of parents who ought to have inherited with them? For example, whether, if brothers and sisters be disinherited or passed by, the legitimate portion of parents, (which otherwise, if they had inherited with brothers and sisters, would have been but a sixth part of the inheritance), would increase to

(1) Arg. Novell. 118. c. 2.

(2) L. 1. § pen. Ff. de bon. possess. contra tab. § 3. Instit. de Success. libert. Arg. l. 8. Cod. de inoffic. testam. l. 8. § 8. Mynd. l. 10. § 4. Novell. 22. c. 20. § fin. & c. 21. Gail. lib. 2. obs. 22. n. 11. Böer, decis. 104. n. 5, 8.

(3) Per. l. 1. Cod. quemadm. non petent. part. petent. accresc. l. 3. in fin. Ff. de bonor. poss. contr. tab. l. 20. Ff. de leg. l. 2. l. unic. § 10. Cod. de caduc. tollend.

ance, it becomes an Increase to the Parents.

a third part, as if there were no brothers and sisters? Concerning this point, also, there is a difference of opinion among the doctors: but with respect to the legitimate or legal portion of them, it is no more than a third part of what they would have inherited otherwise by the law of succession (1); with regard to whom the estate is not divided *per capita* according to the Roman laws (2), but is divided into two, whereof the one half is separately given to the surviving father or mother, and the other half to the brothers and sisters (3), who can and may likewise be disinherited, and have no right to legitimate portion, except in those cases where any dishonest person has been preferred to them, as stated in a former page; and therefore there is no doubt, among us, but that the legitimate portion of parents is and always remains one third part of what they would have inherited pursuant to the law of succession; and if there be brothers and sisters, whether they for their share had been disinherited or passed unnoticed or not, one sixth part of the whole estate; which is likewise asserted according to the written laws by Merlin and other civilians. (4)

Whether any and what Part may be deducted from the legitimate Portion, or be carried to the Account thereof.

§ 4. Whatever the children or any of them may have received, that is, of any value, during the lifetime of their parents, independently of their education, may be appraised and deducted from their legitimate portion (5). Notwithstanding any thing had been bequeathed to any one previously, by way of gift or as a legacy, it suffices that they have received it from the estate of their parents, howsoever it may have been given to them (6); and it is a common rule in this case, that whatever the children are indebted to each other concerning the inheritance of their parents, should be brought in before any division (as will be hereafter shewn), which may be carried to the account of their legitimate portion. (7)

To whom the right appertains of claiming this legal share of inheritance, so far as he has without any legal reason been passed by or prejudiced, may be sufficiently understood from what has been said in the preceding chapter.

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(1) § 3. Insfit. de inoffic. testam. in verb. quarta legitimæ partis. l 8. § 6. & § 8. Ff. de inoffic. test. l. 8. Cod. eod.

(2) Novell. 118. c. 2. Auth. defuncto Cod. ad Senat. Tertullian.

(3) Placaart, op t' stuk van de Successie ab intestato, art. 3.

(4) Vide Merlin de legitima, lib. 1. tit. 4. quæst. 7. Bachov. ad Treutler, disput. 14. thes. 15. lit. A. See likewise Cons. & Adv. vol. ii. cons. 115.

(5) L. 29. l. 36. Cod. de inoffic. testam.

(6) Arg. d. l. 29. & l. 36. Cod. de inoffic. testam.

(7) L. 20. Cod. de collat. & ibi DD. Novell. 18. c. 6. Polit. Ordonant. art. 29. Christin. ad leg. Mechl. tit. 16. art. 3, 4, 5. Cost. Antwerp. c. 47. art. 30. See this subject treated more fully, by Merlin, de Legitima, lib. 2. tit. 2. quæst. 1, 2. and by Peregrin. de fidei commiss. art. 36. n. 121.

Whether Grandchildren may claim any and what legitimate Portion by Representation from their Grandfather or Grandmother, or Ancestors.

§ 5. Further, with respect to the legitimate portion among children, it is to be observed, that grandchildren are likewise included, to whom appertains (by representation) an equal legal share from the estate of their grandfathers or ancestors (1); and from the share of the said grandchildren may likewise be deducted whatever their parents have received, because they cannot obtain that share *on their own account*, but on account of their parents, having their right by representation. (2)

Of the Right which Persons have, who have been unjustly disinherited or passed by.

§ 6. Whosoever has been entirely disinherited unjustly, or passed unnoticed, has a right to have the institution of heirs annulled (3), and the other bequests and whatever is contained in the will independently of the actual institution of heirs, can only remain (4), without distinction between disinheriting unlawfully and passing by silently, which among us amounts to the same, as we have shewn in the preceding chapter. If the father have passed by his son silently, his last will and testament is null and void; but if it contain a *codicilar clause*, the inheritance, with respect to which he was unnoticed, (after deducting the legitimate and Trebellianic portion), must be delivered to the instituted heir (5); but with respect to a child born after the death of his father, and passed unnoticed by the father *unknowingly*, his will remains effectual. (6)

But those who were taken notice of for less than their legitimate share can only claim whatever is wanting to make up their legitimate portion. (7)

Whether and in what Manner that Right is transmitted to their Heirs.

§ 7. The right of annulling a will, in which the inheritance has been unjustly withheld, or of completing whatever is wanting to the legal share of the inheritance bequeathed, is transmitted to the heir of him who has that right; but with the following distinctions, viz. *First*, That the right of annulling the will in which the legitimate portion has been unjustly withheld, is not transmitted to the heir, unless the action had been begun to be instituted or effected by the deceased, with an intention of proceeding therewith (8), unless they be grandchildren, who (as we have already seen) can institute such claim on their own account (9). *Secondly*, The said right ceases after the expira-

(1) § 4. Instit. de hæred. quæ ab intest. defer. l. 2. Ff. de suis & legitim. l. 34. Cod. de inoffic. test.

(2) Ibid. et vide Merlin. de Legitim. lib. 2. tit. 2. quæst. 13. n. 7, 8.

(3) L. 8. § 8. l. 19. Ff. eod.

(4) Novell. 115. c. 3. in fine.

(5) See Neostad. Dec. Cur. Holl. 17. Sande, lib. 4. tit. 2. c. 2.

(6) See Cons. Bat. part. 4. cons. 21.

(7) L. 30. Cod. de inoffic. testam. § 3. Inst. eod. Novell. 115. c. 5.

(8) L. 6. § ult. l. 7. l. 8. § 1. l. 15. § 1. Ff. de inoffic. testam.

(9) Per l. 34. Cod. eod.

tion of five years (1); but, when the right of completing the deficiency of the legitimate portion, or of whatever has been bequeathed less on that account, is likewise transmitted to the heir uncommenced, it does not cease but within one third part of one hundred years. (2)

A legitimate Portion must exist in full Property, and cannot be incumbered with any Charges;

§ 8. This legitimate portion must consist in a full and free property without any incumbrance whatsoever (3); so that, if any incumbrance be laid upon it, it would fall away of itself, and be considered as not existing (4). Further, it cannot consist merely in property without the usufruct, or in the usufruct alone (5); but in such cases the last will and testament will remain valid, and only the completion of the deficiency of the legitimate portion may be claimed; and so it was decreed by the court of Friezland. (6)

Unless for the Benefit of the Children themselves.

§ 9. But in case any incumbrance or obligation be charged thereon for the benefit of the children; or if they have been disinherited, not with the view of prejudicing them, but for their own benefit, and from good motives; for instance, as when to a son who is deeply involved in debt, the fruits only are bequeathed for his maintenance, and the property itself is left to his children, or to others, who certainly would give him the fruits for his maintenance, it would in such case remain effectual. (7)

Whether and how it can be postponed for a certain Time.

§ 10. Upon the same ground also the share of children's inheritance may be postponed for a certain time, as when the possession of the whole estate is bequeathed to the surviving father or mother, with direction to preserve the same for their children, until they become of age, provided they be properly educated and maintained until they become of age; because the expectation of the whole will amount to more than the legitimate portion; and in this way most of the proofs and agreements respecting pupils are made amongst us.

And in like manner husbands and wives were antiently

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(1) L. 8. § ult. l. 9. Ff. l. 16. l. 34. in fin. l. pen. § 2. Cod. de inoffic. testam.

(2) Arg. l. 8. § 8. Ff. de inoffic. testam. junct. l. 22. Ff. de adopt. l. 3. Cod. de præscript. 30. annor. See Mantic. de Conject. ultim. volunt. lib. 7. tit. 8. n. 10. Böer, decis. 250. Merlin. de Legitim. lib. 3. tit. 3. quæst. 7. Andr Gail. lib. 2. obs. 120. Christin. ad. leg. Mechlin. tit. 16. art. 26. n. 12. Neostad. Cur. Holland. decis. 3. n. 10.

(3) Novell. 18. c. 3. l. 32. & auth. seq. Cod. de inoffic. testam.

(4) See the above cited authors, and Gomez Var. Resolut. tom. 1. c. 11. n. 25. Gail. lib. 2. obs. 119. Christin. ad. leg. Mechl. tit. 16. art. 26. n. 11.

(5) Novell. 18. c. 3. l. 36. junct. auth. Novissim. Cod. de inoffic. testam.

(6) Vide Sande, lib. 4. tit. 7. defin. 1, 2. See likewise Gomez Var. Resolut. tom. 1. c. 11. n. 26. Gail. lib. 2. obs. 143. n. 4. in fine, & obs. 144. n. 1.

(7) L. 25. Cod. de inoffic. test. l. 18. Ff. de lib. & posthum. l. 12. § 2. l. 47. in pr. Ff. de bon. libert. l. pen. § Ff. de curat. furios. See also Mantic. l. 4. tit. 13. n. 13. Jul. Clar. lib. 3. Sentent. § testamentum, quæst 41. n. 7. Sande, lib. 4. tit. 2. def. 3.

allowed to bequeath reciprocally by last will, the usufruct of all the property of the deceased; provided the survivor educated the children according to their state; which usufruct ceased when the survivor entered into a second marriage (1); and so it was determined on the 17th December 1613, by the high court of Holland, in favour of Lady Elizabeth van Arkel, Lady of Waardenburgh, and Lord Thomas van Tienes, Lord of Heuklom and Casteren, impetrators in case of appeal against Adrian de Noyelles, knight; namely, that the usufruct bequeathed by Lord Otto van Arkel to his consort, of all his property, until his daughter should be fifteen years of age, ought to be received by the said Lady Elizabeth until that time.

(1) Handvesten van Zuyd Holland (Charters of South Holland) p. 500.

CHAP. VI.

Of bequeathing special Inheritances, and in what Manner the same is effected.

[Grot. 2. 18.]

§ 1. *Bequest, or leaving an Inheritance, defined; and in what Manner it is to be made.*
2. *The Error and Ignorance of the Writer cannot hinder the Desire of the Testator.*
3. *Difference between the leaving of Inheritance, and a Bequest.*
4. *Leaving and bequeathing, whether and when it is taken for leaving an Inheritance.*
5. *Who are included under the Word* Heir.
6. *Whether by the Word* he, *we are likewise to understand* she, *and whether by the Word* Son, *a* Daughter *is likewise to be understood.*
7. *Whether and how far Grandchildren are likewise comprehended among Children.*
8. *Whether, and how far, where several Heirs are instituted together, the Right of Augmentation has Effect.*
9. *Whether and when the Inheritance devolves upon the nearest Relation, in case of the previous Death of the Heir instituted.*
10. *Under what Restrictions, containing the Words* if, provided, *or* in order that, *&c. a Person may bequeath his Inheritance.*
11. *The* if, *which consists in Execution, must be in the Power of the Heir, either to do it, or to leave it undone.*
12. *An* if, *or Desire not to marry, whether and how far it may exist.*
13. *Whether what depends on the free Will, either to do, or to leave undone, can be limited under an* if; *as, to marry, or not to marry, except with the Consent of a Third Person.*
14. *An* if, *desiring a person to marry a certain young Man or Woman, whether and how far it can exist.*
15. *An* if, *imposed upon the Heir under a Penalty, whether, and how far it has Effect.*
16. *Whether and how far the claiming a Statement and Inventory of the Estate, or Security, can be prohibited by last Will with any Effect.*
17. *Whether, and how far the Words* provided, *or* in order that, *&c. differ from an* if.

THUS far we have treated of persons whom a testator may or must institute his heirs; it now follows, that we consider the nature of a special bequest, or leaving an inheritance, and in what manner it is effected.

Bequest, or leaving an Inheritance, defined; and in what Manner it is to be made.

§ 1. The leaving of an inheritance (*Erf-lating*), is an institution, by which any person transfers the management of his estate to another after his death. (1)

For this purpose, a clear declaration is required, together with the name or other certain description of the persons to whom such inheritance is appointed (2). But no particular words are limited, in which the leaving of such inheritance is to be written, provided it can be made fully to appear from the will, or meaning, to which more regard is paid in doubtful cases than to the exact propriety of the words (3). Hence, on account of the circumstantial desire of the deceased, we frequently proceed beyond the propriety of the words, and they are partially understood (4); especially as the notaries of our time are, for the most part, ignorant of the law, who are in the habit of using many phrases in an improper sense; and who, often from ignorant habit, add some words to make the will (as *they* suppose) more effectual, which words they themselves do not understand; and thus they not unfrequently oppose the testator's circumstantial desire or will.

The Error and Ignorance of the Writer cannot hinder the desire of the Testator.

§ 2. Therefore it is admitted as a rule, that the insertion of words, as well as the bluntness or ignorance of the writer, can not impede or prejudice the testator's desire, and the right of the instituted heir; if, on considering the same, the contrariety can appear (5). Agreeably to this rule, was the decision of the Court of Holland, at the end of July 1657, in the case of the heirs of Andries Dirksz van Zanen, in whose last will the notary who had drawn it up, had nominated the testator's nearest relations *ab intestato*; meaning to comprehend among them, as well the testator's nearest relations by the side of the father, as those by the side of the mother, whom the testator had clearly desired to institute as his heirs without distinction; amongst whom, however, those of the mother's side by virtue of these words; viz. "*the nearest relations ab intestato*," (that is to say, pursuant to the law of succession) being the nearest, would have excluded those relations by the side of the father, who, after proofs obtained of the testator's clear will and the

(1) L. 24. Ff. de verb. signif. l. 62. Ff. de reg. jur.

(2) L. 9. § 8. Ff. de hered. instit. l. 58. Ff. eod. l. 15. Cod. de testam. l. 35. § 3. Ff. de hered. instit. l. 12. Ff. de legat. 1.

(3) Coren. obs. 10. & cons. 2. l. 15. & l. pen. Ff. de legat. 1. l. 57. § 1. Ff. ad Senatus consult. Trebellian. l. 7. Cod. de instit. & substit.

(4) L. 101. in pr. & § 2. Ff. de condit. & demonstrat. d. l. 57. § 1. Ff. ad Senat. Trebell. l. 3. Cod. de instit. & substit. l. 69. Ff. de legat. 3.

(5) Arg. l. 7. & l. 24. Cod. de testam. Menoch. lib. 1. consil. 37. n. 112. Decii Consil. 399. n. 8. Gravet, consil. 196. n. 11.

notorious ignorance of the notary, were allowed to succeed together with the mother's relations.

Difference between the leaving of an Inheritance and a Bequest.

§ 3. The principal difference between the institution of heirs, which consists in the full management of the estate, and a mere bequeathing (1), which has no consequence but the enjoyment of the bequest, without any further management, will be treated of hereafter. This difference is chiefly distinguished by the words of institution and legacy, that is, *institution of heirs*, and *bequeathing*; although otherwise, the distinction between the institution of heirs and a bequeathing arises from the circumstances of the last will itself, as we have already shewn.

Leaving and bequeathing, whether and when it is taken for leaving an Inheritance.

§ 4. Hence we understand, that leaving and bequeathing, (which otherwise, when confined to a single thing, would not be considered as an institution of an heir) if added to the management of the estate, and if no one else had been appointed heirs, or otherwise if inserted among children and parents, to whom a testator is bound to bequeath at least a certain part by institution of heirs, would signify full institution of heirs.(2)

Who are included under the Word *Heir*.

§ 5. It is further to be remarked, that under the word "*heir*" in a testament or last will, we do not understand the very nearest, but those who would be the nearest by succession (3); as is shewn in a subsequent part of this work. (4)

Whether by the Word *he*, we are likewise to understand *she*; and whether by the Word *Son*, *Daughter* is likewise to be understood.

§ 6. Under the word "*he*" we likewise understand "*she*"; and therefore both a daughter and a son are intended. Further, under "he" and "he," we also understand "she" and "she;" that is, that daughters are intended (5); unless it can be collected from the circumstances of the will, that only sons are in the testator's contemplation, to the total exclusion of daughters (6). In the Latin language it is likewise so considered; namely, that among sons, daughters are understood to have been intended (7); but it cannot be made well applicable to our language, in which the words "sons" and "daughters" are always used distinctly.

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(1) L. 24. Ff. de verb. signif. l. 62. Ff. de reg. jur.

(2) On this subject see Gross. Recept. Sentent. § institutio, quæst. 14. n. 7. Vasq. de Success. progress. lib. 1. § 3. n. 13. DD. ad l. 48. Ff. de hered. instit. & auth. novissima. Cod. de inoffic. testam. See also Cons. & Adv. vol. i. cons. 158, 175, 265, 276.

(3) L. 170. Ff. de verb. signif. Bart. & DD. ad. l. 29. § 13. Ff. de lib. & posthum. Arg. l. 69. § 3. Ff. de legat. 2. Jul. Clar. § testamentum, quæst. 76. n. 13.

(4) Vide infra, c. viii. § 16. of this book.

(5) L. 45. Ff. de legat. 2. l. 62. l. 81. Ff. de legat. 3. l. 1. l. 116. Ff. de verb. signif.

(6) On this subject consult Mantic. de Conjectur. Ultim. Voluntat. lib. 6. tit. 15, & lib. 8. tit. 7. n. 1. in fin. and Sande, lib. 4. tit. 5. def. 9.

(7) L. 62. Ff. de legat. 3. l. 16. Ff. de testam. tutel. l. 116. Ff. de verb. signif.

§ 7. With regard to the question, whether grandchildren are likewise comprehended among children; it is to be observed, that where children are instituted heirs, grandchildren and further descendants are also understood, provided they be *the testator's own children and grandchildren*, but in no wise when he has mentioned in his will the children of another person, who is not his offspring, and between whom and himself, by the law of succession, no representation would have existed; unless it be made to appear, that he specially intended to include them therein (1). This construction is the more necessary, as, in our language, there is no other word, by which we can describe the sons and daughters of any other person; but we must necessarily use the word children of such or such person to describe them; because they cannot be called son or daughter without mentioning the father himself. And again, if a testator says "*the son of that man*," one would, in our language, understand the daughter to be excluded (2). Under the term "leaving an inheritance," two things are included; viz. 1. The thing inherited; and 2. The person who inherits. The nature of the thing inherited consists either in an entire inheritance, or in a separated portion.

Whether and how far *Grandchildren* are likewise comprehended among Children.

The *entire inheritance* belongs to the heir who is solely denominated heir to the whole; and if several persons be denominated together heirs of the whole, the inheritance is to be divided into so many and such large shares, as the testator had desired it. (3)

§ 8. I say, *to the whole*; because, if the testator had excluded any part, it would not, among us, belong to the heir instituted (agreeably to the Roman laws), but to the nearest relation by blood, under the law of succession, as is pointed out in the preceding chapter (4). So that, between several heirs instituted together, by the preceding death of one of them only, the right of augmentation or acquisition is effected with us; namely, so far as the testator had denominated them heirs for the whole, or for one part, together and inseparably: for instance, as if he had said, "*I institute John, Peter, and Paul, as my heirs to all my property to be left behind, or each for a third part thereof*;" or, if he had said, "*I nominate John for one third, Peter for one third, and Paul for one third, to be my heirs*;" or otherwise, "*I will, that John shall be my heir; I will, that Peter shall be*

Whether, and how far, where several Heirs are instituted together, the Right of Augmentation takes Effect.

(1) L. 220. Ff. de verb. sig. Zasius & Goeddeus ad l. 84. Ff. eod. in fin.
(2) L. 7. Ff. de Supellect. legat. Sande, ib. 4 tit. 5. def. 10.
(3) § 4, 5. Instit. de hered. instit.
(4) See Chap. v. § 4. p. 238. supra.

my heir; I will, that Paul shall be my heir." In such case, if any of them dies before the testator, or renounces the inheritance; or if it happens accidentally, that he could not or would not be his heir, his share (as the testator had proposed all and each of them before his other relations, who by the law of succession were the nearest, and would have divided amongst them his whole estate) will not devolve upon the other relations who would have become entitled thereto by the law of succession; but, by way of augmentation or acquisition, will devolve upon the other heirs jointly instituted. (1)

Whether and when the Inheritance devolves upon the nearest Relation, in case of the previous Death of the Heir instituted.

§ 9. If only one person have been instituted heir, and he, or otherwise all the heirs instituted together, happen to depart this life before the testator, the inheritance in such case will devolve upon the nearest relation, according to the law of succession. (2)

Under what Restrictions, containing the Words *if, provided*, or *in order that*, &c. a Person may bequeath his Inheritance.

§ 10. The quality of the institution with respect to the person of the heir, consists in the previous conditions laid upon him; for a testator may institute any one as his heir, either directly or under an *if*, which lies in his power, or depends on a certain case (3), or under an *in order that*, or *when* (4) he shall perform what has been imposed upon him; and likewise, until or after a certain time, that is to say, commencing from such a day, or until such a day. Under which first proviso, the nearest by succession enters upon the inheritance in the meantime, and keeps it so long, until that day when he delivers it to the heir instituted; and on the contrary, under the sesond proviso, the heir instituted possesses the inheritance until the limited day; which being come, he delivers it to the heir, who was entitled thereto by succession, which according to the Roman laws could not exist, because, as no one could leave his property, one part by leaving inheritance, and one part to be inherited by succession, likewise no one could leave an inheritance for a certain time, or to be possessed until a certain period, at one time by succession, and at another by instituting heirs. (5)

I say an *if*, or condition which lies in one's power, or depends on certain *cases*; in order that one may include two sorts of

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(1) Arg. auth. hoc amplius. Cod. de fidei commis. per. l. 31. & l. 53. Ff. de acq. hered. l. 66. Ff. de hered. instit. l. unic. Cod. de caduc. tollend. junct. l. 89. Ff. de leg. 3. l. 16. § fin. de legat. 1. § 8. Instit. de legat. et ibi DD. Christin. vol. i. dec. 57. n. 57. and dec. 200. n. 18. & seq. et post eum Adrian Basson. Tract. Quatenus hodie cesset jus accrescendi in institutionibus directis. circa fin. Sande, dec. 4. 4. 2. & 4. 5. 19.

(2) L. unic. Cod. de caduc. tollend.

(3) L. 10. § 1. l. 83. Ff. de condit. instit. § 9. Instit. de heredib. instit.

(4) L. 72. l. 7. l. 17. § 2. Ff. de cond. & demonstrat.

(5) L. 7. de reg. jur. § 9. Instit. de hered. instit.

conditions, the one consisting in the execution, the other depending on the external occurrence.

The *if*, which consists in Execution, must be in the Power of the Heir, either to do it, or leave it undone.

§ 11. An *if*, or condition that depends on the performance of the heir, must be such that it is in his power to do it; for if it be impossible for him to do it, as if the testator had said, if he could touch heaven with his finger, or cause the ocean to be dried up, or similar conditions, one would reject such condition, as not having been seriously intended by the testator (1). Such an *if* or condition, consists not only in doing or executing something, but it may also consist in a prohibition from doing something; in which case the inheritance may be immediately claimed, provided security be given to make restitution, if the heir does what was prohibited. (2)

An *if*, or Desire not to marry, whether and how far it may exist.

§ 12. An *if*, or condition, containing a prohibition from entering into matrimony, whether it be laid upon a man or woman, is likewise rejected as improper, excepting that the first deceasing of two wedded persons, may institute the survivor of either as heir, either for the whole or for a certain portion, until her subsequent marriage, with a direction, in case of such marriage, to make restitution of the said inheritance (3); which, though a common practice among us, is nevertheless to be understood in a very narrow sense, if it was clearly desired. Thus it was decreed on the contrary, by the court of Holland, in February 1657, in the case of Hendrik Meyster and William van Schilpenoord, as executors of the will of Claasje Willems, late wife of Balten Cornelisz van Gelder, in which the said Van Gelder had instituted his wife as heiress, with a desire that restitution of the inheritance should be made in case she departs this life a re-married woman; who, in the meanwhile was married to Adrian Cornelisz Vosbos, for some years; but the said Vosbos having died before her, and she afterwards having departed this life a widow, it was understood that she died un-re-married, and her marriage during the interval was not prejudicial to her.

Whether what depends upon the free Will, either to do or to leave undone, can be limited

§ 13. Further, whatever depends on a person's own liberty, either to do something, or to leave it undone, cannot be subjected effectually to an *if*, or condition (4); for example, that a person may not marry but with the pleasure and approbation of a

(1) Arg. § 33. Instit. de inutilib. stipulat. junct. l. 4. Ff. de hered. instit. l. 4. Ff. de lib. & posthum. l. 83. Ff. de condit. & demonstrat. Grotius, Inleyd. lib. 2. c. 18. vers. Na de Roomse Regten.

(2) L. 7. in pr. Ff. de condit. & demonstrat. l. 77. § 1. l. 79. § 2. Ff. eod.

(3) Arg. Novell. 22. et Auth. cui relictum. Cod. de indict. vid. toll. Vide also Pecc. de testam. conjug. lib. 1. c. 24. n. 2.

(4) L. 28. Ff. de condit. & demonstrat. l. 100. Ff. eod.

under an *if*; as, to marry or not to marry, except with the Consent of a Third Person.

third person (1); unless something was left to the consent of a third person, in order to bring any one from a loose and dissolute to a quiet life, and to make him prefer a good and honest matrimony, to a wanton and dissipated life (2); or, as when a grandchild is instituted heir by his grandfather, on condition that he should marry with the approbation and pleasure of his father; or, when any thing is bequeathed to a daughter, on condition that she marries with the consent and pleasure of her uncle. (3)

An *if*, desiring a Person to marry a certain young Man or Woman, whether and how far it can exist.

§ 14. If a testator institute a person to be his heir, on condition that he marries a certain girl, and he declares that he will not marry her, he will be deprived of the inheritance (4); but if the girl, on being solicited by him, refuses to be married to him, and if it was not in his power, or if she had died in the meantime, the said *if* or condition will be considered as having been complied with. (5)

An *if*, imposed upon the Heir under a Penalty, whether and how far it has Effect.

§ 15. The *if* or condition may likewise be imposed under a penalty of forfeiture (6), as in the following cases, (which are not unfrequent among us); when the testator desires that if any of his heirs instituted are not satisfied with whatever was bequeathed to them, and with that condition on which it was bequeathed to them; or if they happen to oppose any part of the said last will; that they shall in such case forfeit whatever was bequeathed to them; and if they be children, that they ought to be satisfied with their legitimate portion, in which is to be reckoned and enumerated whatever may be carried to the account relative thereto, &c. &c. But, in the construction of these conditions, an exception is made in favour of an heir who does any thing contrary to them, under the idea that he might have been prejudiced thereby in his right, or that he may legally refuse it. (7)

Whether and how far the claiming an Estate, or Inven-

§ 16. The following example will further explain the preceding positions: if any person who has been instituted an heir, to commence after the death of the longest liver of two consorts,

(1) L. 72. § 4. Ff. de condit. & demonstrat. l. 54. § 1. Ff. de legat. 1. Vasq. Illustr. controv. lib. 3. c. 94. n. 14. Grass. Recept. Sent. § legatum quæst. 50. n. 9.

(2) L. 6. & seq. Ff. de condit. et demonstrat. l. 47. in pr. Ff. de administrat. tutor.

(3) Arg. l. 92. Ff. de condit. & demonstrat. l. 12. § Ff. 1. Qui et a quib. manumiss. d. ult. Cod. de curat. furios. l. ult. Cod. qui & advers. quos in integr. restit. Cravett. lib. 1. cons. 1. & consil. 80. Anton. Faber ad Cod, lib. 6. tit. 23. def. 18.

(4) L. 2. Cod. de instit. & substit. Vasq. Illustr. controv. l. 3. c. 44. n. 4. junct. l. 19. Ff. de legat. 2.

(5) L. 23. Ff. de condit. & demonstrat. l. 39. Ff. de reg. jur. junct. l. 55. de condit. & demonstrat.

(6) Tot. tit. Cod. de his quæ pœnæ nomine.

(7) Arg. l. 27. Cod. ut in possess. legat. l. unic. Cod. de his quæ pœnæ nomine, l. 5. § 1. Ff. de his quib. ut indign. l. 40. Ff. de hered. petit.

has been prohibited (on pain of forfeiting his inheritance), from requiring from such survivor security for his possession thereof, or a statement and inventory of the estate; and if he can prove that it would otherwise be prejudicial to him; in such case, notwithstanding the prohibition, it may not be refused; because no one who prosecutes his right prejudices another, and no one can insert a condition in his last will which cannot exist in law (1). And so it was decreed by the court of Holland, in the case of the poor of Ackersloot against Nanningh Klaasz, on the 26th September 1613. (2)

tory of the Estate, or Security, can be prohibited by Last Will, with any Effect.

§ 17. Next to the *if*, comes a "*proviso*," or "*in order that*," which differs but very little from an *if*, excepting that it refers to some future event, and the inheritance or the bequest may be claimed previous to the fulfilment thereof, provided that security be given that it will be done and fulfilled; but the *if* must be previously complied with. (3)

Whether, and how far, the Words *provided*, or *in order that*, &c. differ from an *if*.

To this head may also be referred the limitation, how and in what manner the testator desires that his inheritance shall devolve from one to another; but as this question belongs properly to the head of leaving an inheritance to devolve subsequently upon another; it will be treated at length in the subsequent chapter.

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(1) L. 55. Ff. de reg. jur. l. 55. Ff. de legat. 1. Sichard. ad l. 13. Cod. de testam. l. 7. Cod. de annuis legat. l 10. Cod. de confirm. tut. Jul. Clarus § testamentum, quæst. 66. in fin. Roland à Valle, tract. de heredis inventar. ac ejus confect. quæst. 222. Neostad. Cur. Holland. decis. 20. et Suprem. Cur. decis. 33 & 91. Andr. Gail. lib. 2. obs. 145. Pecc. de testam. Conjug. lib. 5. c. 24. n. 3, 4. Menoch. de præsumpt. lib. 4. præsumpt. 98. Joh. à Sande, lib. 4. tit. 6. def. 1. & tit. 7. def. 9.

(2) Vide infra, ch. viii. § 18. p. 261.

(3) L. 2. Cod. de his quæ sub modo. l. 7. l. 40. Ff. de condit. & demonstrat. et ibi DD.

CHAP. VII.

Of the different Kinds of bequeathing Inheritances by Substitution.

[Grot. 2. 19.]

§ 1. Substitution *defined; and its Effect.*
2. *One Person in the room of many, or many Persons in the room of one, or many in the room of many, how to be appointed.*
3. *Their Share, in equal or unequal Portions, stipulated.*
4. *In Substitution, every thing is understood to be included, that has been expressed in the First Institution.*
5. *Whether and how far Substitution relating to Pupils or Minors is in force among us.*
6. *How and in what Manner the Substitution ceases.*

A TESTATOR may not only institute as many heirs as he chooses, but he may also leave his inheritance to as many members as he thinks proper. The former of these cases takes place, by the first hand, *by substitution*, and the latter, in order that a subsequent restitution should be made, so that it may pass from the one into the hands of another; which we properly denominate an entail, or *fidei commissum*, of which we shall treat in the following chapter.

Substitution defined; and its Effect.

§ 1. Substitution is an appointment or institution by which a second or third person is made heir in the vacant room of the first or second (1); as thus, I appoint John my heir; and if John be not my heir, I appoint Peter in his room; and if Peter be not my heir neither, I appoint Paul in his room to be my heir; and so forth, to as many times as the testator wishes (2); which instituted heir is an heir with as full a right as the heir first appointed would have been. (3)

Which event, namely, if John be not my heir, comprehends every event in which John may be no heir, either if he dies before the testator, or that he may be no heir in law, or if he renounces the inheritance and does not wish to be heir. (4)

One Person in the room of many, or many

§ 2. In like manner many persons may be instituted in the room of one, or one in the room of many or under many insti-

(1) L. 1. in pr. Ff. de vulg. & pupill. substit.
(2) L. 1. § 1. Ff. eod. pr. Instit. de vulg. substit.
(3) L. 43. § 2. l. 36. Ff. de vulg. & pupill. l. 29. in pr. Ff. de lib. et posth. pr. Instit. de vulg. & pupill. l. 20. § ult. Ff. de condit. instit.
(4) § 1. Instit. quib. mod. testam. infirm. l. 3. Cod. de hered. instit.

tuted jointly, each may be substituted under each, or the one under the other; with regard to which it is to be remarked, that when one person is instituted in the room of many, he does not come into the vacant place of each, but is then understood to have been instituted in the room of *all* of them, when only the last one of them is wanted. (1)

Persons in the room of one, or many in the room of many, how to be appointed.

§ 3. When only one person is appointed in the room of another, or many in the room of one, or in the room of many, or when amongst many they are instituted mutually to equal shares, there is no doubt but that each is to have the whole or such part for his share as he would have had where he has been instituted either alone or together with others, unless the testator had expressly appointed any special shares; but the question is, how it is to be undertood when under more heirs to unequal shares, they having been mutually instituted, in case of one being wanted, the others would divide amongst them *his* share? With regard to which case it is understood, that those who were instituted are to have such shares in the institution as those with whom they were instituted would have had in the first bequest; because, if in respect of the following members no shares be stipulated (2), it is understood that such shares are to be given as was expressed in the first institution; and so is likewise understood of the *if* and *provided*, which having been expressed in the first institution of heirs, is considered as tacitly repeated with respect to the further institutions of members, unless the contrary can be made clearly to appear from the will of the testator. (3)

Their Share, in equal or unequal Portions, stipulated.

§ 4. In Substitution, every thing is understood to be included, that is expressed in the first Institution.

§ 5. Besides this general institution there was a special institution by which a father might institute an heir for his minor or insane child, if he should happen to die under age, or without having the use of his senses (4); but as this right consists in that peculiar power which the Romans had over their children, it is not in use amongst us (5); excepting only that the parents may choose for their children, by ante-nuptial contracts, what law of succession they please, (of which there are two kinds among us), or they may direct anew how their property shall be inherited

Whether and how far Substitution relating to Pupils or Minors, is in force among us.

(1) L. 4. Cod. de impub. et aliis substit. Vide Anton Faber ad Cod. lib. 6. tit. 25. def. 11.

(2) § 2. Instit. de vulg. & pupill. l. 5. l. 24. Ff. de vulg. & pupil. l. 1. Cod. eod. l. 113. § 2. l. 30. § fin. Ff. de leg. 1. l. 134. § 1. Ff. de verb. oblig.

(3) Arg. 14. Ff. de legat. 1. et l. 1. Cod. de impub. et aliis substit. Anton. Faber, ad Cod. lib. 6. tit. 7. def. 3. Christin. vol. iv. decis. 13. n. 7.

(4) L. 4. l. 45. Ff. l. 9. Cod. de vulg. et pupill. substit.

(5) See Grotius, Inleyd. lib. 1. c. 6. vers. De Groote, and lib. 2. c. 19. in fine. Gudelin. de Jure Noviss. lib. 1. c. 13. vers. quid moribus, & lib. 2. c. 5. vers. adjecio.

by succession, which the children, having become of age, are understood to have approved of; provided that it was not otherwise directed by last will. (1)

How and in what Manner the Substitution ceases.

§ 6. The general substitution ceases or is annulled as soon as the inheritance is taken by the first heir. (2)

It ceases likewise, or falls away, if the heir substituted happens to depart this life before the first institutor, as the right of substitution is not transferred to the heirs; but it has this tacit condition, namely, that the person substituted must survive the person first instituted. (3)

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(1) See Neostad. de pact. antenupt. observ. 2. in not. vers. Sed hereditas; see also Grotius, Inleyd. lib. 2. c. 19. and *infra*, book iv. ch. xxiv. of this work.

(2) L. 5. Cod. de vulg. & pupill. subst. Junct. l. 6. Cod. de legat.

(3) L. 9. Ff. de suis et legitim. junct. l. 81. Ff. de acq. hæred. l. 8. in fin. Ff. de vulg.

CHAP. VIII.

Of Entailed and Incumbered Inheritances.

[Grot. 2. 20.]

§ 1. *Nature of a Trust (Fidei-commissum) or Entailed Inheritance.*
2. *By whom and to whom the same may be left.*
3. *In what manner it may be effected.*
4. *It is either expressed or tacit.*
5. *Nature of a tacit Entail, and when it takes Effect.*
6. *Whether and when a Prohibition of Alienation constitutes an Entailed Inheritance.*
7. *Of the Effect and Duration of a Prohibition from alienating Property out of one's own Generation or Relations by Blood.*
8. *Whether, with regard thereto, the Proximity of the Testator, or of the Heir is to be followed.*
9. *The Power of spending, disposing of, alienating, &c. one's own Property in an Entailed Inheritance, how far to be extended.*
10. *It may not be extended to any other Direction by last Will of the Possessor, or to a Gift in Contemplation of Death.*
11. *Whether and how far, in an Entailed Inheritance among Children, Grandchildren are understood to be comprehended.*
12. *Children placed under an if, whether and when understood to have been instituted also.*
13. *Children instituted together with their Parents, whether and how they are admitted to the Inheritance.*
14. *Of the Effect of Representation in an Entailed Inheritance.*
15. *Whether and when it may be extended out of the common Law of Succession.*
16. *Who are to be reckoned among the nearest Relations and Heirs.*
17. *Property, when comprehended under Usufruct.*
18. *Property and Usufruct, how to be distinguished in an Inheritance.*

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§ 1. A TRUST *(fidei-commissum)*, or entailed inheritance, is a bequeathing of an inheritance in which the heir is directed to cause the inheritance, after a certain time, or after his death, to be devolved upon another, either the whole or a certain portion thereof(1); and he to whom the inheritance is

Nature of a Trust (*fidei-commissum*) or entailed Inheritance.

(1) § 1. Instit. de fidei commissar. hereditat. et tot. tit. Ff. et Cod. ad Senat. Trebellian.

delivered, is full heir (1); but doubtful expressions ought to be explained in such a manner that the entail be rather excluded than introduced. (2)

By and to whom the same may be left.

§ 2. By whom and to whom such entailed inheritance may be left, and who may be encumbered therewith, is evident from what has been already said of institution of heirs, namely, of all those who may make last wills, and receive any thing by last wills. (3)

In what manner it may be effected.

§ 3. Such entailed inheritance may be made, either in direct terms, or under a casual *if* or condition, and likewise on a certain day and before or after a certain time; of the effect of such an inheritance we have treated in chap. vi. pp. 248, 249. §§ 15—17.

It is either expressed or tacit.

§ 4. An inheritance may be entailed either by express words, or it may be inferred *tacitly* from the testator's desire, without being confined to '*I will*,' '*I desire*,' '*I direct*,' '*I request*,' or similar special words (4). Among us this is usually expressed by a kind of proviso, viz. '*on condition that*,' '*under that charge*,' '*if however*,' and the like; and all words and modes of expression are customary for that purpose, provided the testator's intention can be clearly inferred from them (5); for, in an entailed inheritance, the testator's intention ought to be especially considered, but it is narrowly taken; for, in case of the least doubt, judgement is given in favour of the free inheritance, and against the entail; because all hereditary incumbrances are odious, and can suffer no extension. (6)

Nature of a tacit Entail, and when it takes Effect.

§ 5. It is considered as a tacit entailment, when the testator prohibits his heir by last will from making any disposal of his said inheritance; by which he is understood to wish that his nearest relations by blood should inherit the property by way of entailment (7); because the said words can serve for no other purpose. (8)

And likewise, when any one makes two last wills, and desires

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(1) § 3. & seq. Instit. de fideic. § 3. Instit. comm. hered. de legat. l. 2. Cod. communia. de legat.

(2) See Sande, dec. 4. 3. 20. the notes upon Coren, cons. 14. in fine.

(3) L. 2. & l. 103. Ff. de leg. 1. & § 24. Instit. de legat. junct. § 2. & § 10. Instit. de fidei-com. hered.

(4) L. 2. Cod. communia de legat. l. 21. Cod. de legat. l. 77. § 7. Ff. de legat. 2. l. 19. § 1. Ff. ad Senat. Trebell. l. 21. Ff. de fidei-commiss. libertat.

(5) L. 11. § 19. Ff. de leg. 3. l. 96. Ff. eod. l. 32. in fin. & de legat. 2. l. 57. § 1. Ff. ad Senat. Trebell. l. 16. Cod. de fidei-commiss.

(6) Arg. l. 19. Ff. de lib. & posthum. cap. odia de reg. jur. Sande, 4. 3. 20. Not. post. Coren. cons. 14. in fine.

(7) L. 74. in pr. Ff. ad Senat. Trebell.

(8) Arg. l. 87. § 2. l. 34. ult. Ff. de legat. 2. de l. 11. § 19. Ff. de leg. 3. Gloss. et. DD. ad l. 15. Cod. de fidei-commiss. See also Peregrin. de fidei-commiss. art. 1. n. 45. & seq. art. 11. Mantic. de conject. ultimar. volunt.

in that which was last executed, that the former should also take effect; in such case, we understand that the testator desired that the inheritance should be delivered by the person nominated in the *subsequent* last will to the person instituted in the *first* testament, and be satisfied by deducting for himself the Trebellianic or Falcidian fourth part (1); which, according to our practice, likewise takes effect by virtue of the usual codicilar clause, if the first testament is not expressly revoked and annulled by the second; because, by virtue of the said clause, it is understood that the first testament remains effectual in all points, in which it has not been altered or opposed by the subsequent last will, although the first testament is not specially repeated. (2)

Whether and when a Prohibition of Alienation constitutes an entailed Inheritance.

§ 6. With respect to the question, whether a prohibition of alienation constitutes a tacit entailment, it is understood in the *negative*, if no clause is added by the testator why, or no person is nominated on whose behalf he desires it (3). But if he had expressed his intention, or if it otherwise appears from his last will, that he made such prohibition, intending that the property which he should leave behind, should remain in the possession of his relations by blood, or his generation, in that case it is understood to constitute an entailment; and that the nearest of his generation or relation by blood has been instituted to have an entailed possession thereof (4). If prohibition of alienation out of the family immediately follows the preceding trust (*fidei-commissum*.), and goes as it were coupled with it, such trust is not extended, but the prohibition is managed according to the manner and conditions stipulated in the *fidei-commissum* or trust. (5)

Of the Effect and Duration of a Prohibition from alienating Property out of one's own Generation or Relations by Blood.

§ 7. Further, with regard to a prohibition of alienation, it is likewise to be considered, that if the testator had said, "*I will, that my property should not be alienated out of my generation or blood,*" without saying *how long* such entailment is to last, or how the property is to be divided, such entailment is not extended further than to the fourth member; the fourth member being nevertheless comprehended in such entailment, and even

(1) § 3. Instit. quib. mod. test. infirm. l. 29. Ff. ad Senat. Trebell. On the nature of the Trebellianic or Falcidian portion, see chap. xi. infra of this third book.

(2) Vide Book iii. ch. ii. § 17. p. 217. supra.

(3) L. 114. § 14. Ff. de legat. junct. l. 38. § 7. Ff. eod.

(4) D. l. 114. § 15. Ff. de legat. 1. l. 69. § 3. Ff. de legat. 2. Petr. de Petra de fidei-commiss. quæst. 5. n. 41. & seq. Mantic. de conject. Ultimar. Volunt. lib. 6. tit. 14. n. 24. Anton. Merend. lib. 4. Controv. c. 20. Peregrin. de fidei-commis. art. 14. n. 11, 12. & seq. Sande, de prohibit. rer. alienat. part 3. ch. 5. n. 5. Stokm. dec. 36.

(5) Sande, dec. 4. 5. 2. & de rer. alienat. page (mihi) 119.

the heirs of such fourth member cannot alienate (1). And likewise, the first member does not commence from the first heir, but from him upon whom the entailed property devolves after the death of the said heir (2). But if the testator had expressly desired, that the prohibition of alienating the property should be extended further than to the fourth member, in such case the testator's desire is to take effect (3). So it has been determined in Friezland; and Sande (4) and Molinæus (5) relate that it was so judged on behalf of the Prince of Wirtemberg; according to which distinction likewise is to be understood what Grotius proposes in his Inleyding, or introduction (6).

Whether, with regard thereto, the Proximity of the Testator or of the Heir is to be followed.

§ 8. If the testator had only said, "*I will that my property should not be alienated out of my generation or blood;*" or had used similar expressions, without stipulating how and to which person the same should devolve from the one to the other, it has been decreed, that the order of succession *ab intestato* shall take place, and that the property shall devolve not according to succession and to the nearest relation of the testator, but to those who are the nearest to the last possessor, from the one to the other as far as the fourth member aforesaid. For, when the testator, in an entailment and incumbrance, does not expressly declare how and to whom the same shall devolve, we understand, that he intended therein that the common law shall take effect, and that the inheritance shall go from the one of his nearest relations to the other (7). This point demands particular attention; because otherwise, where the testator's will is so made, the proximity of the testator but not of the heir is always followed. (8)

The Power of spending, disposing of, alienating, &c. one's own Property in an entailed In-

§ 9. As the alienation of property is on the one hand prohibited, in order to cause the inheritance to devolve by entailment, so very often on the other hand power is given to the first heir of an entailed inheritance in the meantime to spend, alie-

(1) See Novell. 159. c. 2. vers. quod autem, in verbis, post quatuor. Consult. van Hollandse Regts-geleerden, vol. i. cons. 251. Mantic. de Conjectur. Ult. voluntat. lib. 6. tit. 14. n. 24.

(2) Novell. 159. c. 2. dict. verb. Cons. & Adv. vol. vi. cons. 83.

(3) Covarr. Var. Resolut. lib. 2. c. 5. n. 4. Graas. § fidei-commis. quæst. 19. n. 2. Fusar. de fidei-commiss. quæst. 381. n. 17, 25. Fachin. Controv. lib. 4. c. 100. Mantic. lib. 8. tit. 2. n. 21. Maynard, l. 5. dec. 86.

(4). Lib. 4. tit. 5. def. 5.

(5) Consil. 1. n. 16.

(6) Lib. 2. c. 20. vers. Ende alwaar.

(7) L. 3. l. 8. Ff. de Jure Codicillor. Marc. Anton. Peregrinus. Tractat. de fideicommissis. art. 20. Clarus § Testamentum quæst. 76. vers. sed hic. See also Cons. & Adv. vol. i. cons. 63. Joan à Sande, lib. 4. tit. 5. def. 6.

(8) Arg. l. 32. § fin. Ff. de legat. 2. junct. l. 41. § 2. Ff. de vulg. & pupill. vide etiam Mantic. de Conject. ultim. volunt. lib. 8. tit. 12. n. 38. & seq. Anth. Tessaur. decis. 64. Anton. Faber ad Cod. l. 6. tit. 19. def. 6. & tit. 22. def. 27. Grotius, Inleyd. lib. 2. c. 20. n. 22. Van Leeuwen, Censura Forensis, lib. 3. c. 7. § 12.

nate and deal with the property in the same manner as with his own, but under this direction only; viz. that he cause whatever may be found remaining thereof after his death to devolve to the next heir. This often takes place among us between husband and wife; yet, although the words thereof are often placed broadly, they are nevertheless to be understood according to reason, namely, that such heir may not *needlessly* spend or give away the property, or otherwise squander the same, in prejudice of the heir on whom it is entailed. At all events, such property may not be diminished more than than three-fourth parts (1); and for the remaining fourth part, the heir on whom it is entailed must produce an inventory and give security (2). For, if such power of alienating had otherwise been given to spend only if necessary, or if it could be explained by similar words, it would only be extended to necessary maintenance; and it has no effect so long as such heir has other property upon which he can live and maintain himself. (3)

heritance, how far to be extended.

§ 10. The free power of being at liberty to alienate and deal with an entailed inheritance as with one's own property, cannot be extended further than to an alienation during life, unless by virtue of such power any direction concerning such alienation be given by last will (4). So it was understood by the high court of Holland, according to Coren (5); and afterwards, on the last day of October 1642, in the case of Peter Ambrosius van Brunsdorp and others, heirs of Geertruyd Hendriksz, Govert van Duffelen, against Dirk Cornelis van Leensvelt and Dirk Jansz van Vesanevelt, as executors of the last will of Hugo Koedyk deceased, in his lifetime burgomaster of the city of Leyden; in which case Mr. Koedyk, (who was instituted heir by his deceased wife to all the property of which she might die possessed, to do with the same according to his pleasure, precisely as a person is at liberty to do with his own free property; provided, that after his death, her relations should have half of all the property that might be left by her said husband), declared afterwards in a certain paper writing that

It may not be extended to any other Direction by Last Will of the Possessor, or to a Gift in Contemplation of Death.

(1) L. 54. Ff. ad Senat. Trebell. junct. l. 1. § denique. Ff. de aq. pluv. arcend. l. 24. Ff. de damno insect.

(2) Auth. contra quum rogatus. Cod. ad Senat. Trebell. See Mantic. de Conject. ult. volunt. lib. 10. tit. 4. n. 21. Peregrin. de fidei-commiss. art. 40. n. 46. & n. 50. Anton. Faber ad Cod. lib. 6. tit. 27. defin. 25. Andr. Gail. lib. 2. obs. 145. in fin. Neostad. Cur. Holland. decis. 20. Joan. à Sande, lib. 5. tit. 3. def. 4.

(3) L. pen. §. fin. & l. ult. Ff. de aliment. legat. arg. ad l. 54. Ff. ad Senat. Trebell. Peregrin. dict. art. 40. n. 49.

(4) Arg. ad l. 17. Cod. de Probat. DD. ad l. 54. Ff. ad Senat. Trebellian. Peregrin. de fidei-commiss. art. 40. n. 43. 50.

(5) Obs. 11.

there should be delivered to his female servant in full property on account of her faithful services, the right to a certain bond for four thousand gilders, reserving to himself the fruits and yearly income thereof so long as he should live. Whereupon, it was understood by the court, that notwithstanding the said Koedyk had considerably enriched the estate after his wife's death, by an inheritance which he acquired from his sister; yet the said donation may not be a charge to the relations and heirs instituted by his wife, and the defendants were condemned to credit the account of the estate therewith as if the donation had not taken place, the same remaining only a charge to the heirs by his side.

Whether and how far, in an entailed Inheritance among Children, Grand-children are understood to be comprehended.

§ 11. Whether and when, under the word "children," "grandchildren" are likewise understood to be included, has been shown in a preceding chapter (1), which is likewise to be understood for their benefit (2); so that in the encumbrance of an entailed inheritance among children, the grandchildren or further descendants are not to be included, unless it has been so expressed, or otherwise must necessarily follow from the meaning of the last will. (3)

Children placed under an *if*, whether and when understood to have been instituted also.

§ 12. When children are placed under an *if* or condition; as for example, when I say "*I institute John as my heir, if he has children;*" or else in this way, "*I make John my heir, and if he dies without children, Peter shall be my heir in his room;*" it is understood that in case John dies before the testator, his children would be called to be heirs before Peter (4). But whether the said children would be called to an entailed inheritance, and whether John, having enjoyed the inheritance, is bound to cause the said inheritance to devolve after his death upon his children, a distinction is to be taken; viz. that in regard to the testator's children and grandchildren, it is so understood, if it can appear from the circumstances that such was the meaning; for example, when I institute my son my heir, and if he dies without issue, I place another under him, it will be understood that the grandchildren were likewise intended, from the evident good will of the testator. (5)

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(1) See ch. vi. § 7. p. 245. supra.

(2) Vide Simon de Prætis, lib. 3. de interpr. ultimar. volunt. dubio. 3. solut. 1. n. 38. & seq. and Menoch. de præsumpt. l. 4. præsumpt. 94.

(3) See Joan vanden Sande, lib. 4. tit. 5. def. 9, 10, 11.

(4) Arg. l. 76. in fin. Ff. ad Senat. Trebell. l. 41. § 3. de vulg. & pupill.

(5) L. 102. Arg. Ff. de cond. & demonstrat. l. 30. Cod. de fidei-commiss. junct. l. pen. Ff. de leg. 1. l. 64. Ff. de legat. 2. l. 56. § 61. Ff. ad Senat. Trebellian. See also Grotius, Inleyd. lib. 3. c. 20. vers. Wanneer yemand zeid.

But in collateral relations or other strange heirs, it has no effect; because the *if* of itself has no operation, nor can it be called a material part of the testator's will, but is a mere addition where the *if* is subjected to the will; in which case those children placed under such *if*, are not considered further or otherwise than something else which may be placed under the *if*; for instance if I were to say, "*I institute John as my heir*, if at the *time of my death he possesses that house, or that horse*;" it would be ridiculous to say that the inheritance must follow when he possesses that house or horse (1), unless it can sufficiently appear from circumstances that such was the testator's desire. The same construction also obtains when the testator has specially incumbered the children placed under the *if*, with some condition (2), and so it has been repeatedly adjudged in many cases. (3)

Children instituted together with their Parents, whether and how they are admitted to the Inheritance.

§ 13. When children are placed together with their parents; for example, when the testator says, "*I institute John, his children, and further descendants, my heirs*;" it is not understood that they were called all alike, but the one before the other; and in case of non-existence or previous death of the one, the other is to come by entailment, in the room of those who had preceded; so that in like manner no direction of inheriting further by entailment from the one to the other can take effect, unless it clearly appears from the further circumstances (4); and so it was judged on the last day of April 1659, by the court of Holland, in the case of Korstiaan Dirksz van Zyl and others, plaintiffs, against the further heirs of Kryn Hendicksz van Swanenburg, defendants; in which case the said Kryn Hendicksz van Swanenburg had, among others, instituted as his heirs the children and grandchildren of Frank Meesz van Blommendal; and it was decreed that, during the existence of both, the children of the said Frank Meesz were only named, to the exclusion of the grand-

(1) L. 8. Ff. si quis omissa caus. testam. l. 16. in fin. Ff. de vulg. & pupill. l. 16. Ff. de heredib. instit. l. 19. Ff. quando dies legat. l. 1. Cod. de pact. l. 6. in pr. Cod. ad. Senat. Trebell. l. 17. § 1. Ff. eod. l. 29. § 10. Ff. de liber. & posthum. See also Gail. lib. 2. obs. 136. n. 18.

(2) See this subject treated at large by Mantic. de Conjectur. ultimar. voluntat. lib. 11. tit. 2 & 3. & lib. 10. tit. 8. n. 25. Menoch. l. 4. præsumpt. 89. Jul. Clar. lib. 3. sentent. § testamentum. quæst. 77. Gomez, tom. 1. Resolut. c. 3. n. 28.

(3) Vide Tessur. dec. 66. Ant. Faber, ad Cod. lib. 6. tit. 22. def. 3. n. 9. & def. 43. n. 4. Joan. à Sande, lib. 4. tit. 6. def. 5. Christin. vol. i. decis. 308. & vol. iv. decis. 46. Joan. Decker, lib. 3. dissert. 1. n. 34. Neostad. Curiæ Hollandiæ, decis. 22.

(4) L. ult. Cod. de verbor. signif. l. 32. § ult. Ff. de legat. 2. l. 8. l. 3. Ff. de jure codicillor. See Peregrin. de fidei-commiss. art. 20. Mantic. de Conject. ultim. voluntat. l. 8. tit. 14. n. 10. Joan. à Sande, l. 4. tit. 5. def. 6. Anton. Faber ad Cod. l. 6. tit. 22. def. 10. 11.

children, who were understood to have been named only in case of the previous death of their parents.

Of the Effect of Representation in an entailed Inheritance.

§ 14. With regard to the question, whether representation in which the children inherit in the room of their parents at the same time together with their uncles *per stirpes*, also takes place in encumbered and entailed inheritances, the common opinion is as follows; when the testator institutes his nearest relations his heirs by entailment, without excluding any one of them, or adding to them, in the division of the inheritance among them (1), we are to be guided by the common law of succession; and therefore representation ought likewise to take place in such manner, and so far as it would have taken place by succession without last will. (2)

Whether and when it may be extended out of the common Law of Succession.

§ 15. This representation, however, is extended beyond the members of representation expressed in the common law of succession, when it can be inferred either from the words or from the circumstances of the last will, that it was the testator's express desire that representation should be allowed; for instance, if he had instituted his nearest relations and heirs by succession, and had directed that representation should take place among them, we should understand from this, that in case of the previous death of any of them, even without the general representation of the law of succession, the children ought to come in the room of the parents who died before, together with the others; and that, even without the common representation, they were the nearest (3); and so it was determined by the high court of Holland, according to my opinion, delivered in writing on the 11th December 1664, in the case of Carl van der Pluym, residing at Leyden, impetrator of mandate in a case of possession against Artus Honinga, and others, respecting the will of Mathys Pietersz van Rynsburg, and Geertruyd Adrians van der Hal.

Who are to be reckoned among the nearest Relations and Heirs.

§ 16. It is a general opinion, that amongst the nearest relations are not understood the very nearest, to the exclusion of others, but all those who by the law of succession may inherit together; because those of the *generation*, *of the family*, *of the blood*, and

(1) L. 8. l. 3. Ff. de jure codicillor. l. 57. § 2. Ff. ad Senat. Trebell. l. 77. § pen. Ff. de leg. 2.

(2) See Joan. Castil. Soto Major. de Conjectur. Ultimar volunt. part. 3. c. 19. n. 214. Fachin. lib. 4. Controv. c. 48. Hieronim. Cæval. Specul. commun. opin. quæst. 196 & 762. Fuson. consil. 41. n. 66. et de fidei-commissaria substitut. quæst. 485. Tessaur. decis. 65. Gomez. ad l. tauri. 8. n. 17. & l. 40. n. 41. Fab. ad Cod. lib. 6. tit. 19. def. 10. et tit. 22. def. 24. Joan. Papon. lib. 20. tit. 3. arrest. 33. Sande, lib 4. tit. 5. def. 2.

(3) On this subject see Petr. Sanz. Tract. de divis. bonor. lib. 1. c. 6. n. 61.

the like, are taken for the nearest relations (1); and under the words "nearest relations, without exclusion," they are reckoned with regard to the law of succession, and not with respect to proximity in the members. (2)

Property, when comprehended under Usufruct.

§ 17. When any person has been instituted heir to the usufruct of any property, with power to spend, alienate, or dispose of the same, it is likewise understood that the property is vested in him, notwithstanding he may be directed to cause the remainder to be devolved upon a third person after his death (3); unless the said power had been limited to necessary maintenance only, or otherwise; in which case it is considered as a mere usufruct, and so it was understood by Neostad. (4)

Property and Usufruct, how to be distinguished in an Inheritance

§ 18. In like manner, if any one be instituted heir to the usufruct, without any other person being nominated, in whom the property is to be vested, he is likewise understood to have been placed to have the full usufruct, under which the vesting of the property is likewise comprehended, notwithstanding he has been charged to cause the said usufruct to be devolved upon a third person after his death; because in the last will the usufruct is taken as complete, which is not distinguished from the property, unless any special direction had been given with respect to the property; in which case only a mere usufruct is understood to be separated from the property. (5)

Whoever possesses any property under a trust *(fidei-commissum)* or entailment, to cause the same to be devolved upon another after his death, must not only deliver an inventory thereof, that is to say, upon oath, but he ought likewise to give security to make restitution and full delivery (6), even although

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(1) Arg. l. 32. § ult. Ff. de legat. 2.

(2) Peregrin. de fidei-commiss. art. 21. n. 9. & seq. Soto Major d. part 3. c. 19. n. 304. & 313. Fusar. de fidei-commissar. substit. quest. 485. n. 3. & n. 37. cum seq.

(3) DD. ad l. 13. Cod. de hered. instit. l. 19. Ff. de usufruct. Menoch. l. 4. præsumpt. 133. n. 4. Mantic de Conjectur. ultim. voluntat. l. 9. tit. 5. n. 14. Sande, l. 5. tit. 3. def. 4.

(4) Cur. Holland. decis. 20. Guid. Pap. decis. 352.

(5) Per text. in l. ult. Ff. de usufr. ear. rer. et ibi Anton. Faber, in ration. l. 34. § 7. Ff. de legat. 2. l. 15. Ff. de auro & argent. legat. l. 31. § 1. [Ff. de donat. Joan a Sande, lib. 5. tit. 1. def. 2. Andr. Gail. l. 2. obs. 143. n. 7. On this subject also, as well as whether and where property or usufruct is understood, see more fully in Covarruv. Var. Resolut. c. 2. n. 5. Menoch. de præsumpt. lib. 4. præsumpt. 133 & 141. Mantic. de Conjectur. ultim. voluntat. l. 9. tit. 2. n. 39. Joan. Castill. Soto Major. de usufruct. c. 8. n. 23. & seq. Hartman Pistor. practic. observat. 114.

(6) Brothers and sisters, however, are not obliged to give such inventory and security among each other, neither parents on behalf of their children. See Groeneweg. ad Grotium, lib. 2. c. 20. n. 27.

it should have been left at their option, if but any reason or suspicion to defraud or diminish be alleged (1); and so it was decreed by the court of Holland in the case of Maritge Kornelis, appellant, against Aris Jansz, on the 13th November 1617. (2)

(1) Arg. l. 7. de annu. legat. et l. 10. de confirm. tut. See also Jul. Clar. § testamentum, quæst. 64 & 66. Neostad. Sup. Cur. decis. 33 & 91.

(2) See also Cous. & Adv. vol. i. cons. 30. and what has been already stated in book ii. ch. ix. § 10. p. 140.; and in book iii. ch. vi. § 15, 16. p. 248. supra.

CHAP. IX.

Of Legacies and Bequests.

[Grot. 2. 22. & seq.]

§ 1. *A Bequest, by and to whom to be made.*

2. *Whether and how to uncertain Persons.*

3. *To Communities, Cities, Hospitals, and Meetings.*

4. *A Bequest to the Poor, by whom to be enjoyed, and who are to be considered as poor.*

5. *Whether a Bequest becomes void in consequence of a wrong or mistaken Nomination or Description of the Legatee.*

6. *If a Testator mentions Ten thousand Gilders as lying in his Chest, and if Five or Fifteen thousand be found, how the Bequest is to be understood.*

7. *If of Two Articles, one be bequeathed, without being distinguished, which is to be understood as so bequeathed.*

8. *What Goods may be bequeathed.*

9. *Whether and how the Property of another Person may be bequeathed.*

10. *Whether and how an encumbered or mortgaged Article is to be redeemed by the Heir.*

11. *How far the Bequest of an Article, which the Testator enjoys in common with another Person, can take Effect.*

12. *Whether and how Feudal Property can be bequeathed.*

13. *Whether and how far Usufruct may be bequeathed.*

14. *Whether the Usufruct of entailed Property is also to be comprehended in a Bequest of Usufruct.*

15. *Whether and how far a Testator can bequeath a Debt to any one.*

16. *What is to be understood under a Bequest of a Flock.*

17. *What Beasts are to be comprehended under a Bequest of Cattle.*

18. *Chattels, what.*

19. *What is comprehended under Household Furniture.*

20. *Jewels.*

21. *Gold and Silver.*

22. *What is included under a Bequest of Clothes.*

23. *Maintenance, what it is, and how to be understood.*

24. *Victuals, what, and how to be understood.*

25. *Appurtenances of Land and Dwelling Place, what.*

26. *When any Thing is understood to be bequeathed with its Appurtenances, although it has not been so expressed.*

27. *The Bequest of a House carries the Money which was lying ready to purchase a House.*

28. *Clothes include the Cloth*

and Stuff which were lying ready to be made up into Clothes.
29. *The Choice of any Thing having been bequeathed, whether a Person may chuse the best.*
30. *Whether, if a Horse or any Thing else from a particular Race or Breed, be bequeathed, the Legatee has the Power of chusing the best.*
31. *The Right to Property acquired, whether and how far it has Effect in a Bequest.*
32. *Of conditional Bequests.*
33. *Whether and when a Bequest to take effect by a certain Time, becomes void in case of previous Death of the Legatee.*
34. *When not.*
35. *Whether whatever is bequeathed as a Dowry, also becomes void in case of Death before Marriage.*
36. *Whether and when the Heir is to give Security for making Restitution of the Bequest.*
37. *Whether an Heir may enjoy the Legacy bequeathed to him with the Inheritance, and renounce the Inheritance itself.*
38. *Whether Substitution and Entailment in the further Succession have any Effect in Bequests or Legacies.*
39. *Within what Time Legacies are to be paid, and when the Loss of Interest can be claimed.*
40. *Whether and when yearly Bequests become void.*

TO the incumbrances under which the heir is placed, is also to be referred the restitution of the bequest contained in the testator's will for the benefit of any other person, and recommended to be extended to him (1). Even legatees may be encumbered with entails or trusts (*fidei-commissa*); but in such case care is to be taken that such trusts or entails be not paid before the time when the legatee himself receives his legacy. (2)

A Bequest, by and to whom to be made.

§ 1. A bequest is a voluntary gift recommended by the testator to his heir (3), which may likewise be made and taken by all those persons who are capable of making and enjoying under a last will (4); of whom we have fully treated in the preceding chapter.

Whether and how to uncertain Persons.

§ 2. This may be allowed not only to certain persons in particular, but also to uncertain persons, who are yet in expectancy,

(1) § 1. Instit. de legat. l. 5. Cod. eod.
(2) L. 78. Ff. de leg. 1. l. 70. Ff. de leg. 2.
(3) § 1. Instit. de legat. l. 36. Ff. de legat. 2. l. 116. Ff. de legat. 1.
(4) L. 116. Ff. de legat. 1. § 10. Instit. de fidei-commis. hered. junct. § 24. Instit. de legat. et l. 101. Ff. de legat. 1.

and of whom one does not know whether or not they will be in existence, or who they will be; for instance, when I say, "*I desire my heir to give to him who will give his daughter to my son in marriage, or to him who after my death will be the first burgomaster, a certain article,*" &c. (1), if there be a bare possibility that it can become certain: for otherwise, when any thing has been bequeathed to a person who is not *in esse*, nor can exist, it will become void of itself.

To Communities, Cities, Hospitals, and Meetings.

§ 3. A testator may likewise bequeath a legacy to any community, hospital, or to a tolerated and permitted meeting, which is accepted by the heads and managers thereof for the benefit of the community. (2)

A Bequest to the Poor by whom to be enjoyed; and who are to be considered as Poor.

§ 4. But as it is questionable which is the testator's meaning, and to whom a bequest to the poor ought to be paid, and whether the same ought to be paid over to all institutions for the poor with the same right; it is understood with regard thereto, that among us there are in every city special institutions for the poor, which we denominate the common poor-house, which are distinguished from other hospitals; and therefore, that it ought not to be shared by any other hospital (3), but belongs only to the common poor-house, because in common parlance hospitals and other institutions are not comprehended under the word poor. (4)

Whether a Bequest becomes void in consequence of a wrong or mistaken Denomination or Description of the Legatee.

§ 5. If any error be committed in the name and description of the legatee, or in the legacy itself; yet if we are certain of the testator's meaning from other circumstances, it will not amount to an obstacle (5), unless an error be committed with regard to the person or article entirely; for instance, as if he had nominated any one who was neither fully nor partly known, or instead of clothes had bequeathed household furniture; or, instead of gold, tin; or had mentioned an ox for an ass; in such case similar bequests will become void of themselves (6): and so it is understood, if an error be committed in the quality or quantity of the article bequeathed; as if any one were to say "*that house,*" "*that piece of land standing or situated there, which I have purchased from Peter;*" and if it be not bought

(1) § 25. 27. Instit. de legat.

(2) L. 32. in fin. l. 73. § 1. l. 117. l. 122. Ff. de legat. 1. l. 20. Ff. de rebus dubiis. l. 26. Ff. ad Senat. Trebell. l. 12. Cod. de hered. Instit. junct. l. 24. l. 49. § 1. & seq. Cod. de Episcop. & Cleric.

(3) L. 43. § 1. Cod. de Episcop. & Cleric.

(4) Arg. l. 7. § ult. Ff. de supellect. legat. l. 50. § ult. Ff. de legat. 3. l. 18. § 3. Ff. de instruct. vel instrum. legat. See Mantic. de conjectur. ultimar. volunt. tit. 3. tit. 8. n. 2.

(5) § 29. Instit. de legat. l. 75. § 1. in fin. l. 21. Ff. de legat. 2. l. 33. Ff. de condit. et demonstrat. & seq. l. 6. Ff. de reb. dub.

(6) L. 4. Ff. de leg. 1.

from Peter, but from Paul; or if the testator have named a piece of land of three morgen (or six acres), which in fact contains only two morgen (or four acres) (1): and so if a wrong cause be expressed; namely, as if the testator were to say, "*I bequeath to John, because he has well executed my affairs in France;*" which however he did not do, it will in like manner be no obstacle to the bequest. (2)

If a Testator mentions 10,000 Gilders as lying in his Chest, and if 5 or 15,000 be found, how the Bequest is to be understood.

§ 6. It is however doubtful whether what has been said of the quantity and quality of the article is also applicable to a bequest of a sum of money; for instance, if I said "*I bequeath to John the ten thousand gilders lying in my chest,*" and only five or twelve are found there; with respect to the first it is understood that if a certain specific sum of money be named, and independently thereof a certain place or other quality be described, in such case not the sum but the bulk itself has been bequeathed, however large or small it may be; so that in the case of a bequest of ten, if there is no more than five thousand gilders, it is considered to be the same as the testator had in contemplation. (3)

But with respect to the second case, as a smaller sum is always included in a larger (4); and as we believe that in such a case the testator had intended to bequeath only such part of the money, unless it appears that it was otherwise expressed; it will follow thence, that of the twelve which he had in his chest he intended to bequeath only ten, because one must judge according to the greatest probability of the will of the deceased (5), which in doubtful cases goes before the acuteness of the words. (6)

If, of Two Articles, One be bequeathed without being distinguished, which is to be understood as so bequeathed.

§ 7. If, of two things of the same kind, one has been bequeathed without mentioning which of the two is intended, it will be sufficient if the heir gets the worse; unless the choice had been left to him (7); of which we shall speak in a subsequent page.

What Goods may be bequeathed.

§ 8. All sorts of goods, which are transmissible among mankind, may be bequeathed by a testator. (8)

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(1) § 30. Instit. de legat. l. 33. l. 17. Ff. de condit. & demonstrat.

(2) § 31. Instit. eod. l. 2. Cod. de falsa causa adject.

(3) Per. l. 30. § 6. et l. 108. Ff. de leg. 1. § 10.

(4) § 1. Instit. mandati.

(5) Arg. l. 35. § 3. Ff. de hered. instit. l. 12. Ff. de legat. 1. l. 15. l. pen. Ff. eod. l. 57. § 1. Ff. ad Senat. Trebell. l. 7. Cod. de Instit. et Substit.

(6) On the two cases above stated, and especially with respect to the first, see post. Bald. Decium, Paris. Afflictum, Simoncem de Prætis, aliosque, Joan. del Castillo Soto Major Quotidianar. Controv. de Conject. ultimar. volunt. lib. 4. c. 54. n. 26.

(7) L. 39. § 6. Ff. de legat. 3.

(8) § 4. Instit. de leg.

§ 9. And thus, property belonging to another may be freely bequeathed (1); which, if it belong to the heir, there is no doubt but that he must comply with the bequest (2). But if it belongs to another person, the heir will be obliged reasonably to endeavour to obtain the same, or if it be not possible, to make good the value thereof. (3) Whether and how the Property of another Person may be bequeathed.

§ 10. Further, if any thing has been bequeathed to a person which has been mortgaged on behalf of another, or specially hypothecated, the heir will be obliged to redeem it (4); which is to be understood of hypothecation or incumbrance wherein the whole property can be redeemed. But if the bequest be incumbered with a certain quit-rent, or any thing acquired by inheritance from the testator's ancestors, or with other inferior rents, or if it be incumbered with any servitude, the legatee must be satisfied with the bequest as good and bad as it is. (5) Whether and how an encumbered or mortgaged Article is to be redeemed by the Heir.

§ 11. But when a testator has bequeathed to a legatee a certain article which he possessed in common with another person, without mentioning what share; it is understood if he had made use of the word *his*, that he meant no more than his shâre in that article (6); and likewise, although he had not made use of the word *his*, in doubtful cases it is understood, that he did not wish to charge his heir with the buying off more from the other joint owner, unless it appears that it was so expressed. (7) How far the Bequest of an Article, which the Testator enjoys in common with another Person, can take Effect.

§ 12. But feudal property cannot be bequeathed without the consent of the lord (8); and such a bequest is so utterly void, that the heir need not satisfy the value thereof, unless the testator had expressly desired him so to do. (9) Whether and how far Feudal Property can be bequeathed.

§ 13. A bequest may be made not only of full property, but likewise of a mere usufruct, the property of which is vested in another; as usufruct, an annuity, and annual advances (10); and it is understood of all fruits whatsoever. (11) Whether and how far Usufruct may be bequeathed.

§ 14. But whether any person under the usufruct of his property is likewise understood to have bequeathed the fruits of Whether the Usufruct of entailed Proper-

(1) § 4. Instit. de leg.
(2) L. 14. Cod. de rei vind. l. 3. Cod. de reb. alien. l. 31. Ff. de lib. caus.
(3) § 4. Instit. de legat. l. 14. Ff. de legat. 3. Vide Grot. 5. n. 49. & seq.
(4) § 5. Instit. de legat. l. 57. Ff. de leg. 1. Cod. de fidei-commiss.
(5) L. 70. in pr. & § 1. l. 116. § fin. Ff. de leg. 1. See Neostad. Cur. Holland. Decis. 11. See further respecting this singular case, Wesel ad Nov. ult. art. 20. n. 42. Consult. Ultraj. cons. 97. & seq. Holl. cons. 3. 191.
(6) L. 5. § ult. Ff. de legat. 1. junct. l. 10. Cod. si certum petatur.
(7) Arg. l. 67. § 8. Ff. de legat. 2. l. 36. in fin. Ff. de usufruct legat.
(8) Cap. de Success. feud. lib. 1. tit. 8. cap. qualiter olim feudum alien. pot. § 1. lib. 2. tit. 9.
(9) See Andr. Gail. lib. 2. obs. 154. Christin. vol. vi. decis. 28. and what is said supra, in book ii. ch. v. § 4. p. 118. concerning feudal property.
(10) Tot. tit. Ff. de usu, usufruct. & redit. & habitat. et tit. de annuis legat.
(11) L. 69. Ff. ad leg. Falcid. l. 29. Ff. de usufructu.

from Peter, but from ... ment, and under a direction to
piece of land of th... made, that it then only takes
tains only two ... cession lies on behalf of the heir
cause be exp...
"*I bequeath* ... likewise bequeath to any one the re-
France;" ... (2); and even what a person is indebted
no obstar... there only be, in the bequest, something more than
the debt (3). For example, if I bequeath
to any person one hundred gilders, to whom I was indebted to
pay one hundred gilders on a certain day; it is then under-
stood, that there is more in the bequest than in the debt, because
the bequest commences immediately after the death of the tes-
tator; or, after a refusal of payment thereof, interest must be
paid thereupon. (4)

If a Testator mentions 10,000 Gilders as lying in his Chest, and if 5 or 15,000 be found, how the Bequest is to be understood.

§ 6. ... the ... ber ... t

Again, a bequest may be made, either of a single thing, or of one body, comprehending many members; for example, of a flock, cattle, chattels, household furniture, agricultural implements, jewels, silver, gold, and similar.

What is to be understood under a Bequest of a Flock.

§ 16. A flock is a collection of cattle grazing together, or kept together in a stall; this, if increased or diminished, turns to the benefit or loss of him to whom the same was bequeathed. (5)

What Beasts are to be comprehended under a Bequest of Cattle.

§ 17. Under a bequest of cattle, are comprized all sorts of beasts, whether they graze together or not; as bullocks, sheep, horses, asses, and swine. (6)

Chattels, what.

§ 18. *Goods* comprehend all chattels and moveable goods whatsoever, that are found in a house; as clothes, linen, wool, household furniture, gold, and silver; and, in short, whatever belongs to the household. (7).

What is comprehended under Household Furniture.

§ 19. Under *household furniture*, is included whatever in a strict sense belongs to the service of the house, and is in daily use; viz. tables, chairs, benches, chests, &c. (8)

A question has been raised, whether under a bequest of house furniture, a golden bowl, pair of silver scales, or a cup, is

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(1) Arg. l. 149. Ff. de reg. jur. junct. l. 14. Cod. de rei vind. l. 3. Cod. de reb. alien. l. 67. § 8. Ff. de legat. 1. & l. 29. Ff. de fidei commis. Vide also Sande, lib. 4. tit. 4. def. 9. Zutphen, p. 527.

(2) § Instit. de legat. et tot. tit. Ff. de lib. legat. See also Mantic. de Conjectur. ultimar. voluntat. lib. 9. tit. 8.

(3) § 14. Instit. eod.

(4) L. 1. 2. Cod. de usur. legat. l. 3. in pr. Ff. de usu & usufruct. leg.

(5) L. 30. Ff. de usucap. § 16, 17, 18. Instit. de legat.

(6) L. 2. l. 29. § 6. Ff. ad leg. Aquil. l. 65. § 4. l. 79. Ff. de legat. 3. l. 38. § 4. Ff. de Ædilit. edicto.

(7) Arg. l. 7. Ff. si servit. vind. vers. Servius fatetur. l. 3. § 1. § fin. l. 6. l. 8. l. 9. l. 11. Ff. de supellect. legat.

(8) L. 1. l. 6. Ff. de supellect. legat.

uprised? But, from the circumstances of the testator's is constant use of those articles, a distinction is to be ther he used the same daily, or whether he kept ly for shew (1). And so it was decreed by the high according to Neostad. (2)

§ 20. *Jewels* include all the gold, silver, and precious stones, wrought for shew, as well as for the ornament of the body, which are distinguished from other gold and silver, such as pearls, diamonds, gold rings, and the like. (3) Jewels.

§ 21. Under *gold and silver*, is comprehended whatever is found in the estate of gold and silver, whether wrought or unwrought; besides the common household furniture and coined money. (4) Gold and Silver.

§ 22. A bequest of *clothes* carries with it whatever had appertained to the back, body, and convenience of any person, under which is comprehended neither gold nor silver (5), unless fixed or woven therein. (6) What is included under a Bequest of Clothes.

But when clothes are bequeathed to any one for his dress or necessary use, such bequest is to be taken according to the circumstances of the testator, or otherwise according to the circumstances of the testator and the legatee. (7)

§ 23. Further, *maintenance* comprehends every thing; viz. food, raiment, lodging, washing, and convenience, in sickness and in health. (8) Maintenance, what it is, and how to be understood.

§ 24. Under *food* are comprised only the necessaries of life, or eating and drinking; so that it does not comprehend either lodging or clothing. (9) Victuals, what and how to be understood.

Both are to last during the lifetime of the legatee, unless it was bequeathed by the testator for a limited time; for instance, if he had bequeathed the same to a minor until he came of age, we understand, that this bequest does not last longer than till his twenty-fifth year, which is reckoned as complete. (10)

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(1) L. 3. § 5. c. 4. l. 5. l. 6. Ff. de supellect. legat.

(2) Decis. 19.

(3) L. 25. § 10. Ff. de auro-argento. l. 39. Ff. eod.

(4) L. 1. l. 19. l. 27. Ff. de auro-argento. l. 4. & seq. Ff. de verb. significat. et ibid. Goedd. n. 35. Groenew. de legib. abrogat. ad l. 27. § 1. Ff. de auro & arg. legat.

(5) L. 2, 3. Ff. de auro et argento legat.

(6) L. 4. Ff. de legat. l. 19. § 4. Ff. de aur. et argent. legat.

(7) Arg. l. 12. § 4. Ff. de usu et habitat. Vide Mantic. de Conjectur. ultimar. voluntat. lib. 6. tit. 11. n. 17. & seq.

(8) L. 6. de aliment. et cibar. legat. l. 43. l. 234. § 2. Ff. de verb. significat. Vide Minsinger. centur. 3. obs. 12. Surd. de aliment. tit. 4. quæst. 4. Pecc. de testam. conjug. lib. 5. c. 25. n. 1.

(9) L. 21. Ff. de aliment. legat. d. l. 43. et seq. de verb. significat.

(10) Arg. l. 14. § 1. Ff. de aliment. legat. Vide Gomes. Var. Resolut. tom. 1. c. 4. n. 1. Surd. de aliment. tit. 8. privileg. 58. n. 4.

Appurtenances to Land and House, what.

§ 25. A bequest of *appurtenances to land and house*, includes all the tools used in husbandry without distinction (1); for example, if I say, "*I bequeath to John my lands and house with all their appurtenances*," this bequest will be understood to comprehend, not only all the household furniture, but likewise all tools belonging to or used in husbandry (2), and likewise the horses and cows belonging to the use of the said house and lands. (3)

The same construction is made of a bequest of a house with whatever is therein; that is to say, with the furniture and whatever was for the service and use of the house. (4)

When any Thing is understood to be bequeathed with its Appurtenances, although not so expressed.

§ 26. Sometimes also this takes place tacitly, although not expressly desired; so we understand that, under a bequest of a house, the garners and garden belonging to it, and used thereto inseparably with it, are likewise comprehended. (5)

The Bequest of a House carries the Money which was lying ready to purchase a House.

§ 27. And so it is likewise understood, that if I bequeath a certain house, which was not my property, but that the money had been ordered and was lying ready to purchase the same, that then the said money, instead of the house, belongs to such bequest (6); because such premeditated arrangement converts the money into a body which is understood to have been bequeathed by the last will. (7)

Clothes include the Cloth and Stuff which were lying ready to be made up into Clothes.

§ 28. And likewise, under a bequest of clothes is understood to belong the cloth or stuff bought by the deceased and intended to be made up into clothes (8); which construction may also apply to other similar occurrences. (9)

The Choice of any Thing having been bequeathed, whether a Person may chuse the best.

§ 29. Under bequests comprehending many things, is also included the option of chusing from a certain sort or race; for example, the choice of two or three pieces of land or houses, the choice out of horses, rings, or the like (10); in which case the legatee may also chuse the best. (11)

Whether, if a Horse, or any thing else of a

§ 30. The same rule also holds when, for example, a horse, a house, a ship, or similar article, without exception, or without

(1) Tot. tit. Ff. de instruct. vel instrum. legat.

(2) L. 12. § 1, 2. & seq. § 27. & § 39. Ff. de instruct. vel instrum. legat. l. 29. in pr. Ff. eod.

(3) L. 1, 2. Cod. de verbor. & ver. significat. Vide Menoch. lib. 4. præsumpt. 154. n. 14.

(4) L. 86. Ff. de leg. 2. l. 44. l. 91. l. 79. l. 101. Ff. de legat. 3. l. 32. § 2. Ff. de usufruct. Vide Menoch. l. 4. præsumpt. 129. n. 7. & seq. & præsumpt. 155. n. 3. Math. Coler. part. 2. decis. 145. Pecc. de testam. conjug. l. 5. c. 27.

(5) d. l. 94 § 4. & ult. Ff. de legat. 3. l. 53. § 1. Ff. de actionib. empt.

(6) Arg. l. 15. § final. Ff. de re judicat.

(7) L. 37. Ff. de verb. obligat. l. 51. Ff. de legat. 1.

(8) L. 22. & seq. Ff. de auro et argento legat. See also Pecc. de testam. conjug. lib. 5. c. 29. Nicol. Everhard. consil. 115.

(9) Arg. l. 19. § final. Ff. de aur. & argent. legat.

(10) § 23. Instit. de legat.

(11) L. 2. Ff. de optione vel elect. legat. junct. d. § 23.

leaving the choice, has been bequeathed, and the testator had several horses, houses, or ships. (1)

particular Kind or Breed, be bequeathed, the Legatee has the Power of chusing the best.

We may further apply to bequests whatever has been already said concerning inheritances, and therefore it is unnecessary to repeat our observations at large; we may however remark,

§ 31. *First*, That when an article has been bequeathed to more than one in equal or unequal shares, in case of want or prior death of any of them, the right of augmentation or acquisition takes place (2); unless the testator had prohibited it, or unless the contrary appears from his circumstantial will (3); for instance, among those to whom one and the same article has been bequeathed by one and the same testator, and among those alone, but not among those to whom different articles were bequeathed, although at one termination, nor among those to whom one and the same article has been bequeathed by several, nor among those to whom different parts of one and the same article are separately bequeathed. (4)

The Right to Property acquired, whether and how far it has Effect in a Bequest.

§ 32. And likewise the bequests may be made under a certain *if*, or upon certain condition, and likewise to take effect *by* or *at* certain time; and such *if* or proviso must be first fulfilled before the bequest can take effect, which in the meantime is postponed. (5)

Of conditional Bequests.

§ 33. But if the legatee dies without fulfilling such condition, or before such *if* had occurred or had been fulfilled, his heir will not enjoy the bequest (6). The same rule also takes place in bequests to take effect at a certain time (7); and if any thing had been bequeathed in order that something should be performed, or in case the condition consisted in leaving off something, the bequests may be claimed immediately, upon giving security that the same shall be performed or left off. (8)

Whether and when a Bequest, to take Effect by a certain Time, becomes void in case of the previous Death of the Legatee.

§ 34. But when the day or time annexed to the *if* or condition is certain, namely, that it *must* come, although it be uncertain *when*; for example, when I say, "*I institute John as my heir, provided that after his death* (*if he had married again*) *one thousand gilders be paid to Peter at once*," it is understood that

When not.

(1) d. § 22. Instit. de legat. Vide 16. Vinn.

(2) § 8. Instit. de legat.

(3) L. 84. § pen. Ff. de leg. 1.

(4) Ibid. et. l. 16. Ff. quib. mod. usufr. amit. l. 1. in fin. princip. Ff. de usufr. accrescend.

(5) § 30, 31. Instit. de legat. l. 72. § 6. Ff. de condit. & demonstrat.

(6) L. 1. § 2. l. 59. l. 71. § antequ. Ff. de condit. & demonstrat. Vide Coren. consil. 28. Sande, lib. 4. tit. 4. def. 7. quæst. 3.

(7) d. l. 1. § 2, Ff. de condit. & demonstrat. l. 4. l. 21. in pr. junct. l. 22. Ff. quando dies legator. Andr. Gail. lib. 2. obs. 132. n. 1.

(8) L. 7. Ff. de condit. & demonstrat. l. 40. in fin. Ff. eod. l. 3. Cod. de his quæ sub modo. Vinn. ad § 31. Instit. de leg. n. 5. Van Leuwen, Censura Forensis, lib 3. c. 5. § 35.

the right to this sum of money commences at the testator's death; so that, although the legatee happens to depart this life before the payment becomes due, he transmits the same right in the meantime to his heirs (1). The same construction likewise holds in the case of a bequest after the death of another, who, during the interval, has the usufruct. (2)

In like manner, if the testator had said, "*I bequeath to my niece one thousand gilders, which my heir shall pay to her when she attains her age, or enters into matrimony,*" this bequest, although the niece dies unmarried and under age, must be paid to her heir. (3)

Whether whatever has been bequeathed as a Dowry, also becomes void in case of Death before Marriage.

§ 35. Whatever has been bequeathed to any one as a dowry, is, in doubtful cases, considered as a condition, which must first be fulfilled before the bequest can have the commencement of its effect; so that in the meantime, in case of death, it will become null and void. (4)

Whether and when the Heir is to give Security for making Restitution of the Bequest.

§ 36. In the case of a bequest, when it is to take effect after a certain time which certainly will come, the testator has a right to make the heir give security, that when such time does arrive, he will receive it. (5)

Whether an Heir may enjoy the Legacy bequeathed to him with the Inheritance, and renounce the Inheritance itself.

§ 37. A question has arisen, whether, if any one has been instituted heir, to whom a certain article was also bequeathed, he may enjoy such legacy without accepting the inheritance? (6) This question is understood in the affirmative, unless it appear from the circumstances that the testator had made the bequest to him with that meaning; viz. if, or in order that, he should be his heir, and that he otherwise would not have bequeathed it to him. (7)

Whether Substitution and Entailment, in the further Succession, have any Effect in Bequests or Legacies.

§ 38. Further, whatever has already been said concerning the institution of heirs, and also with respect to substitution and the obligations of an entailed inheritance, applies to bequests; so that in them likewise, in case of want or previous death, the

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(1) § 2. Instit. de singul. reb. per. fideicommiss. relict. l. 79. in pr. Ff. de condit. & demonstrat. & l. 99. Ff. eod. Vide Peregrin. de fidei-commiss. art. 31. n. 22. & seq. & Mantic. lib. 4. tit. 5. n. 23.

(2) See this subject treated at length by Mantic. d. tit. 5. n. 23. & n. 24. Covarruv. Var Resolut. Vigl. ad § instit. de hered. instit. Sande, lib. 4. tit. 4. def. 7. & 13. Gail. lib. 2. obs. 31. n. 1. See likewise Cons. & Adv. Rotterdam, vol. iii. cons. 191. n. 6.

(3) L. 4. Cod. quando dies legat. l. 26. § 1. Ff. eod. Vasq. de Successionib. l. 3. § 29. n. 2. Gomez. Var. Resolut. tom. 1. c. 5. n. 26. Sande, dict. def. 7. quæst. 3.

(4) Arg. l. 71. § 3. de cond. & demonstrat. l. 21. & l. 22. Ff. quando dies legator.

(5) L. 1. § 6. & tot. tit. Ff. ut legator seu fidei commissor. Servand. nomine caveatur. See further on this subject ch. . supra, under the title of bequeathing inheritances.

(6) Arg. l. 87. cum seq. Ff. de legat. 1. junct. l. 12. Cod. de legat.

(7) L. 88. Ff. eod. See Joan. à Sande, lib. 4. tit. 4. def. 7.

one may be substituted in the place of another, and the legatee may be charged to cause the bequest to devolve upon another. (1)

Within what Time Legacies are to be paid, and when the Loss of Interest can be claimed.

§ 39. Bequests, for the payment of which no time has been fixed, must be satisfied by the heir immediately after the testator's death, or after a refusal of the legal demand, he must make an indemnification to the legatee for the loss of profit (2). If the will be found whole, inviolate, and in a proper condition, the legatees must be paid provisionally, if there should be any dispute among the heirs with respect to the will. (3)

Whether and when yearly Bequests become void.

§ 40. In the case of annual bequests, it is understood that *every year* constitutes a separate bequest, and the beginning of the year is reckoned sufficient to make the payment become due (4); so that, if a legatee to whom something has been bequeathed annually, happens to depart this life in the beginning of the year, the payment nevertheless must be made for the full year (5); and so it was determined by the court of Friezland. (6)

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(1) Tot. tit. Instit. de singul. reb. per fidei-commis. relict.

(2) L. ult. Cod. de usur. vel fruct. legator. Vide Peregrin. de fidei-commis. art. 49. n. 79. Anton. Faber, ad Codic. lib. 6. tit. 24. def. 14.

(3) Utrecht, cons. 1. p. 246.

(4) L. 4. in pr. Ff. de ann. legat. l. 11. Ff. eod. l. 10. Ff. quando dies legator.

(5) L. 12. § 1. Ff. quando dies legat. l. 5. Ff. de annuis legat. et ibi DD.

(6) According to Sande, lib. 4. tit. 4. def. 8.

CHAP. X.

Of entering upon and abandoning Inheritances, and of the Benefit of Inventory.

[Grotius, 2. 21.]

§ 1. *When and in what Manner the Right of Inheritance devolves upon the Heir.*
2. *In order to subject any one to pay the Charges of the Estate, it is not sufficient that he is the Testator's Child; but the entering upon the Estate, or the interfering with the same, must be proved.*
3. *Of the Obligations to which the Heir is subject.*
4. *Whether and when, tacit Transmission has Effect.*
5. *Introduction to the Estate, for whom and when necessary.*
6. *Time allowed for Consideration.—Benefit of Inventory defined;*
7. *To whom it belongs, and in what Manner it is to be applied for.*
8. *It is not granted so long as any of the Deceased's Relations by Blood wish to be full Heir.*
9. *Renouncing or abandoning an Inheritance, how effected.*
10. *Upon whom and in what Manner a renounced or abandoned Inheritance devolves.*
11. *An Inheritance cannot be renounced by those who by Succession are the nearest, and neither by Collusion with the Person substituted, nor with those who by Succession would be the nearest; but the Bequests must be paid, and the Entailment nevertheless effected.*

When and in what Manner the Right of Inheritance devolves upon the Heir.

§ 1. IN order to give effect to the last will of any one, or to the law of succession, it is not sufficient that such will was duly executed, and confirmed by the death of the testator; but the inheritance devolved upon the heir, either by virtue of such will or by succession, must be accepted by him by a clear declaration, or otherwise by his actually intermeddling with and undertaking management of the affairs of the estate, before he can obtain the right of the estate or become responsible for it (1); excepting, however, that children of the first degree are understood to obtain immediately and tacitly for their benefit the right of inheritance on the death of the testator, and from that moment (2); and in this respect we follow the practice of France,

(1) L. 20. in pr. et § 1. Ff. de acq. vel amittend. hered.

(2) Arg. l. 14. & tot. tit. Ff. de suis & legitim. hered.

under which the inheritance in the right line is transmitted immediately. (1)

In order to subject any one to pay the Charges of the Estate, it is not sufficient that he is the Testator's Child; but the entering upon the Estate, or the interfering with the same, must be proved.

§ 2. In order, therefore, that children may obtain and possess an advantageous inheritance, they have nothing else to prove but that they are the children of the deceased. But in prejudice of themselves, and to make themselves debtors for the charges of the estate, it is not enough that they be the children of the deceased, but it must further be proved that they have actually entered upon the estate and inheritance, or have conducted themselves as heirs; because a creditor, who must institute his right upon the heir's acceptance of or interfering with the estate, must prove it, and the mere denial on the contrary is deemed sufficient (2); and the desire of the deceased and the tenor of his last will must be executed within the year. (3)

Of the Obligations to which the Heir is subject.

§ 3. The inheritance being accepted and taken possession of by the heir, the right of the deceased in every point is transmitted to him, and he is then placed in the same situation in which the deceased was at his death. And this is to be understood, not only of the fruits and advantages of the estate, and of the rights which the deceased had against others, but also in all the rights which others had upon and against the deceased; so that it binds and obliges him with respect to all the charges and debts of the estate, which the creditors of the estate may demand of him, and for which he must answer; although the estate be insufficient, and indebted more than it amounts to (4); and likewise in the payment of the bequests, and in whatever the testator has directed his heir to execute (5); excepting only in whatever consists in doing, and concerns the person of the deceased, or in any crime committed by the deceased, for which no heir is answerable (6). For an heir is a person, who in every point manages the rights of the deceased. (7)

Whether and when tacit Transmission has Effect.

§ 4. But if there be any neglect in taking possession, the inheritance does not become void, but it is postponed until pos-

(1) See Argentr. ad Consuetud. Britann. art. 509. Böer. tit. 11. § 6. Tiraquel. dec. 2. n. 1. Christin. vol. i. dec. 170. n. 2. Zypæ Notit. Jur. Belg. tit. unde liberi.

(2) Arg. l. 10. Cod. de non. num. pecun. See also Menoch. l. 4. præsumpt. 99. n. 4. Anton. Faber. ad Codic. l. 6. tit. 12. def. 2, 3. Andr. Gail. l. 2. obs. 128.

(3) Novell. 1. junct. Auth. Hæc amplius Cod. de fidei commiss. & auth. Sed quum. testat. Cod. ad leg. Falcid.

(4) L. 8. Ff. de acquir. hered. l. 2. Cod. de hered. vel act. vend. l. ult. Cod. de hered. act. § 1. Instit. de perpet. & temp. act.

(5) Cod. de fidei-commis. And see, infra, book iv. ch. xiii. § 15.

(6) L. crimin. 26. Ff. de pœnis. Cost. Antwerp. tit. 36. n. 17. & 47. n. 7.; Cost. Mechlin. tit. 9. art. 14, &c.

(7) l. 24. Ff. de verb. signif. § 1. Instit. de hered. qual. & differ. l. 59. & l. 62. Ff. de Reg. Jur.

session is actually taken; so that an inheritance, although not yet taken possession of, is transmitted to the heir; and a *fidei-commissum*, or entailment, does not become void, because it was not enjoyed by the fidei-commissarius (1); and the possession of the deceased is, immediately after his death, prolonged in the person of the heir, and is transmitted against the lapse of time without interval. (2)

Introduction to the Estates, for whom and when necessary.

§ 5. And further, a tacit transmission is not effected but with regard to children of the first degree, as already stated, and which has also been distinctly confirmed by several statutes (3); whereas at Leyden and Oudewater it has no effect, but in heirs of the ascending line; in unmarried children when the father or mother is the longest liver, and in all children and further descendants when the stepfather or stepmother remains; but all other persons having obtained the right of inheritance must, if there be any question about it, prosecute their right on being legally introduced into the possession of the estate by the sheriff and two aldermen; and a person may go out of possession again in a similar way; and judgement is thereupon given in a summary way, and the adjudged possession is strengthened and confirmed notwithstanding any appeal or reformation (4). Which manner of putting in and out of possession takes place in most cities of Holland (5); and it is likewise followed in other adjacent provinces (6). But in Brabant the practice of France is followed; and the possession of the deceased is transmitted immediately to the nearest relation, who may seize the same upon security; and those who obtain any right thereupon by last will must prosecute such right at law. (7)

Time allowed for Consideration.

§ 6. On which account it was also very dangerous and doubtful to accept or renounce an inheritance immediately, to avoid the often concealed and unknown debts of those who make themselves great through vanity, as well as because a person would otherwise lose the benefit, of which, by a too hasty renunciation, he would often be deprived; and therefore a certain time was granted

(1) L. 19. Cod. de Jure delib.; as is treated of more extensively, respecting bequests which become void, by Covarruv. Var. Resolut. lib. 2. c. 2. n. 5. and by Joan à Sande, lib. 4. tit. 4. def. 7.

(2) Contra. l. quum heres. 52. Ff. de acquir. vel amitt. hered. Zypæ Not. Jur. Belg. tit. unde liberi vers. successio.

(3) Arg. l. unic. Cod. de edict. div. Adrian. tollend.

(4) Vide Keuren van Leyden (*Statutes of Leyden*) art. 185; Oudewater, art. 133.

(5) See Neostad. Decis. Cur. Hollandiæ 55. in fin.

(6) Vide Cost. Utrecht, rubric. 23. art. 14. & seq.; the Local Laws of Overyssel, c. 1. tit. 8.; the Local Laws (Landregten) of Veluw and Veluwen-Zoom. c. 33. Ordonnantie op de manier van procedeeren binnen Aarnhem, (ordinance upon the manner of proceeding at Arnhem) art. 28.

(7) On this topic see Cost. Antwerp. tit. 47. Cost. in Zuid Holland, p. 495.

to the heir for consideration, within which time he could enquire into the circumstances of the estate, and likewise, after deliberation and advice had, could declare his meaning (1); but since, even persons, who have well and fully deliberated, are often greatly and innocently misled on account of unknown encumbrances and secret inconveniences of the estate, a more certain means was afterwards granted by the Emperor Justinian, in the *right of the benefit of inventory*, that is, a legal list or description of all the goods of the estate; which being made according to the prescribed rule (2), the heir is not obliged and incumbered for more than the goods and income of the estate may extend to, and the honour of the deceased is protected and preserved as much as possible.

Benefit of Inventory defined;—

§ 7. This is approved of and observed among us; and being an extraordinary remedy, and a privilege of favour granted to an heir who considers the estate devolved upon him under the denomination of a doubtful inheritance, application ought to be made to government for it, before the inheritance is accepted. And among other things, the petitioner ought, within fourteen days after obtaining the same, to cause a proper inventory to be made of all the goods, moveable as well as immoveable, actions and credits, in the presence of a notary and two witnesses; and moreover, to cause the moveable goods to be appraised by sworn appraisers of the place where the house of demise occurred (3), and to give security for due payment of the creditors and legatees, before he enters upon any thing, upon the penalty of being considered as full heir; which payment he may then make with the money which he has ready, and to such persons as he pleases, according to the exigency of the case, so far as the same will extend, provided security be demanded to make restitution, if it be afterwards found requisite, according to the placaats or proclamations referred to below (4). Such situation having been obtained, all the creditors of the estate, and all those who mean to oppose, are summoned before the government of the place, to appear on a certain day, in order, that after proclamation and publication against the uncertain or unknown creditors (should there be any) the said letters may upon due enquiry be confirmed, and be admitted as good according to

To whom it belongs, and in what Manner it is to be applied for.

(1) L. 1. & l. 5. de jure delib.
(2) L. ult. Cod. de jure deliberandi.
(3) In the original *Sterf-huys*, i. e. the house where some person is lately deceased. It is only properly called so, while the corpse of the deceased is yet unburied.—EDITOR.
(4) See Plac. Oct. 20, 1541; March 19, 1544; and July 12, 1611.

their form and tenor; or otherwise, as shall be found expedient. (1)

But from this application are excused hospitals for the benefit of the poor in Holland and West Friezland, which by resolution of their high mightinesses the states of Holland and West Friezland, on the 20th of December 1635, upon the remonstrance of the almoner of the city of Amsterdam, were allowed (when goods happen to devolve upon them on the death of any of those persons who were maintained there) to enter upon and dispose of the same without benefit of inventory, and without such hospitals being obliged to pay the creditors of the said deceased more than the goods yielded, although they appear and declare themselves within one year after the death of the deceased. And in case no one appears within the space of one year, to claim any thing against the deceased, or from his goods, the said creditors will be deprived of their right to the said seized goods, without being allowed to claim any action against the same, or against the said hospitals, neither then nor at any future period. And the superintendants of the said hospitals will be obliged to issue proclamations at the usual places, containing the death of the person, and a citation to all those who intend to claim any thing from the same within the said time.

At what time this benefit is to be applied for, no mention is made in the edicts, so far as they have any relation to the republic of Holland; and therefore they may always be made within proper time before the entering upon and management of the estate (2); so that it is left to the discretion of the judge according to Sande (3); which, in the eternal edict of the king of Spain, relative to Brabant and Flanders, in the year 1611, art. 10, above cited, was limited to three months.

It is not granted so long as any of the Deceased's Relations by Blood wish to be full Heir.

§ 8. This benefit is not granted so long as any one of the relations by blood of the deceased wishes to enter upon the estate as full heir (4); provided he be of the kindred of the deceased; on which account even a husband will not be admitted to his deceased wife's inheritance. So it was judged by the court and high court (5). Some writers are of opinion, that he ought to

(1) See Instruct. van de Hove (*Instruction of the Court*) art. 229; ampliation of the instruct. art. 5. Zyp. Notit. Jur. Belg. de Jure delib. & benefic. invent. Christ. vol. iv. decis. 23 & seq.

(2) Arg. l. ult. § 2, 3. & 11. Cod. de Jure deliberandi.

(3) Lib. 4. tit. 12. def. 2.

(4) See Christin. ad leg. Mechlin. tit. 16. art. 50. & vol. iv. decis. 210. Zyp. Not. Jur. Belg. de Jure delib. in fin.

(5) Vide Neostad. Decis. Supr. Cur. Holl. 7. & Pecc. de testam. conjug. Chassan ad Consuet. Burg. rubr. 7. § 13. n. 1. in verbis ad secundum.

stand likewise on an equal degree with those who will accept the inheritance under the benefit of an inventory (1). But in order that any thing which has been granted to any person by favour, may not be turned to his prejudice, the party obtaining the same may in such case, if any of the relation will behave himself as full heir, abandon the privilege so obtained, and may alter his intention and enter upon the inheritance itself fully (2). And although an heir, under the benefit of inventory, is not bound to make any further satisfaction than the means of the estate extend, he must nevertheless fulfil all the transactions of the testator (3). But, since means established for good purposes are often misused to the prejudice of creditors of insolvent estates, so in several cities particular provisions were made against such fraudulent proceedings. (4)

§ 9. An inheritance, which has devolved upon any one either by last will or by succession, may be renounced by an express declaration, or be abandoned tacitly. (5)

Renouncing or abandoning an Inheritance, how effected.

§ 10. When the inheritance, which has devolved upon any one by last will, is renounced, it devolves to the benefit of the nearest heirs *ab intestato*; and the entire testament becomes void in consequence thereof, together with whatever has been desired therein (6); unless the same was confirmed as to the further points by the *codicillar clause*, by virtue of which the bequests and other parts of the will remain in full force, except as to the inheritance therein contained. (7)

Upon whom and in what Manner a renounced or abandoned Inheritance devolves.

§ 11. If any one, to the prejudice of the bequests or obligations inserted in the last will, renounces the inheritance left to him by such will, in order that he may, by the right of succession, enjoy the whole estate free and without incumbrance, he is bound to fulfil the bequests and obligations as much as if he had accepted the inheritance by last will (8); or, as if he had received money to renounce the inheritance; or otherwise did so out of favour, in order that a substituted heir, or those who are the nearest by the law of succession, may enjoy the inheri-

An Inheritance cannot be renounced by those, who by Succession are the nearest, neither by Collusion with the Person substituted, nor with those who by Succession are the nearest; but the Bequests

(1) According to Christin. ad Leges Mechlin. tit. 16. art. 40. n. 7. art. 50. n. 3. Vall. de reb. dub. tract. 30. n. 16. Papon. lib. 21. tit. 10. art. 2. Neostad. d. decis. 7. Rebuff. ad const. reg. de liter. oblig. art. 3. gloss. 2. n. 34. Pecc. de testam. conjug. lib. 1. c. 35.

(2) According to Charond, lib. 6. respons. 35. Sande, lib. 4. tit. 12. def. 3. Kinscot. respons. 12. Zypæ ut supra.

(3) According to Neostad. Cur. Holl. dec. 7. n. 3.

(4) See Keuren der stad de Leyden, art. 204.

(5) § 2. & § 7. Instit. de hered. qualit. & differ. l. 57. Ff. de acq. vel amitt. hered. & tot. tit. Cod. de repud. vel abstin. hered.

(6) L. 181. Ff. de reg. jur. l. 9. Ff. de testam. tutel. l. 17. Ff. Si quis omiss. caus. testam. l. 2. in fin. Cod. eod.

(7) L. ult. de Codicill. DD. ad l. 3. Cod. de testam. Vide Gail. lib. 2. obs. 134. n. 3. Joan à Sande, lib. 2. def. 2.

(8) L. 1. Ff. l. 1. 3. Cod. Si quis omiss. caus. testam.

must be paid, and the Entailment nevertheless effected.

tance free and without encumbrance; in which case they are both bound and responsible to satisfy the bequests and the obligation of transmission; so that the possessor of the property must be first sued (1). It is likewise applicable to codicils and imperfect testaments, by which any one incumbers his nearest relation by succession with any bequest or obligation of transmission, who also, notwithstanding the renunciation of the inheritance, are bound to satisfy the bequests and obligations, so far as the goods will extend. (2)

CHAP. XI.

Of the Falcidian and Trebellianic Portion.

[Grot. 2. 23. 30. & 2. 20. 5.]

§ 1. *Nature of the Falcidian Portion.*
2. *Of the Trebellianic Portion, and when it is to take place.*
3. *Whether and when the same may be prohibited.*
4. *It cannot take place against the Poor.*
5. *It ceases in that Part which is bequeathed as a legitimate Portion.*
6. *Whether and when it is lost by neglecting to take an Inventory of the Estate.*
7. *A Deduction of the Trebellianic or Falcidian Portion, may only take place as to the First Heir, unless he has made no Use of that Law.*
8. *What may be included in the Trebellianic and Falcidian Portions.*
9. *Whether a Son charged with the entire Cession of his Inheritance, excepting his legitimate Portion, may also deduct the Trebellianic Portion; and how it is to be calculated among Five or more Children.*
10. *Whether it is to take place among the other Descendants;*
11. *Or among Parents.*
12. *Tax of the Twentieth Penny by whom to be paid.*
13. *What is the* law of issue (3), *and who are liable to it.*

Nature of the Falcidian Portion.

§ 1. IN order that an heir should not be too unwilling to accept an inheritance incumbered with legacies or trusts, it is introduced for the benefit of such an heir, that he may deduct

(1) L. 1. in fin. l. 4. Ff. eod.
(2) L. 6. Ff. Si quis omiss. caus. testam.
(3) *Regt van Erfuwe*, a certain tax so called.

from all legacies standing against him according to his share, under the denomination of *Falcidian*, so much, that, besides the debt incurred by the deceased, he may retain the fourth part of the estate, or of that part of the estate in which he is appointed an heir (1), and even of a donation *mortis causâ*. (2)

Of the Trebellianic Portion; and when it is to take place.

§ 2. In like manner, a person who charged with the cession and trust *(fidei-commissum)*, if only one fourth part of the estate or less remains with him, may deduct the Trebellianic part, that is, an equal fourth part, before he delivers over the inheritance (3); in which fourth part is also calculated the profit enjoyed by him (4); except among children of the first bed (5). However, the same heir shall remain answerable for the debt of the estate according to the proportion of his fourth part (6), but not for any legacies (7); so that if the share of the person, who is appointed heir by last will and testament, amounts to more than one fourth part, he shall be answerable as to the *debt*, according to the proportion of his share, but as to the *legacies* for so much as he enjoyed more than the fourth part. (8)

Whether and when the same may be prohibited.

§ 3. Such deductions shall not take place if it is prohibited by the deceased (9), excepting among children of the first renter, as such prohibition does not affect them (10). And it is understood by the court of Holland, that this deduction is tacitly prohibited, if the deceased has entirely forbidden the embezzlement of the goods. (11)

It cannot take place against the Poor.

§ 4. Likewise such deductions are not to take place among churches and hospitals (12), even not in children of the first bed, as was decreed by the high court on the 7th June 1631, in the

(1) Tot. tit. Ff. & Cod. ad leg. Falcid.
(2) Carpz. def. for. par. 1. cap. 1. d. 1. Vinn. ad. pr. de leg. Falcid. n. 8.
(3) Tot. tit. Ff. & Cod. ad Senatusc. Trebell.
(4) L. 22. Ff. eod.
(5) L. 6. Cod. ad Senat. Trebell. See Joan. à Sande, lib. 4. tit. 7. def. 5, 6. Christin. vol. i. decis. 318. num. 30. Anton. Fab. ad Cod. lib. 6. tit. 27. def. 4. Andr. Gail. lib. 2. obs. 133.
(6) § 7. inst. de fidei-commiss. & Vinnius. ad § 9. num. 1.
(7) Lib. 2. Ff. ad Trebell. et ibi DD.
(8) L. 1. § 17. Ff. ad Senat. Trebellian. Vide Vinn. ad § 7. Inst. de fid. her. n. 6.
(9) Auth. sed. quum testator. Cod. ad. leg. Falcid. Christin. vol. i. decis. 316.
(10) L. jubemus 6. Cod. ad Senat. Trebel. Mantic. de Conjectur. ultimar. voluntat. lib. 7. tit. 11. num. 7. Fachin. Controv. lib. 12. cap. 11. See also Sande, lib. 4. tit. 7. defin. 5, 6. & Vinn. ad § 7. Inst. de fideic. hæred. n. 2.
(11) Neostad. Cur. Holland. decis. 5. in fin. Coren. observ. 39. num. 8. Grot. Introd. lib. 2. cap. 23. and lib. 2. cap. 16. vers. tot. voordeel. Mantic. de Conjectur. ultimar. volunt. lib. 9. tit. 14. num. 16. Menoch. de presumpt. lib. 4. praesumpt. 196. num. 25. & seq. See also Joan van Sande, lib. 4. tit. 7. def. 10.
(12) Auth. Similiter. Cod. ad leg. Falcid. & ibi DD. Commun. Vid. omnino Leeuw. Cens. For. 5. n. 4. Sande, 4, 7, 10. in which he shews that this system is not generally admitted as a true one. Guidon. Papæ, decis. 188. Andr. Gail. lib. 2. observ. 119. num. 7. Covarruv. in cap. Reynaldus 18. § 3. num. 7. Merenda, lib. 2. Controv. cap. 31. Grot. Inleyd. lib. 2. cap. 23. vers. tot voordeel. Christin vol. i. decis. 320. num. 16, 17, 18.

case of the burgomaster and governors of the city of Leyden, in their capacity of superintendants of hospitals and houses for the poor of the said city, and the governors of the orphan house of the city of Amsterdam, against Adrian Willemsz Wittert, as attorney for Anna de Quesnry, widow, and appointed heir of Mr. Dirk Cornelis Bareutaz van Wieringe.

It ceases in that Part which is bequeathed as a legitimate Portion.

§ 5. This deduction also ceases in legacies or bequests which absolutely must be made; such as a legitimate portion, or any thing bequeathed by a woman previous to entering into an antenuptial contract. (1)

Whether and when it is lost, by neglecting to take an Inventory of the Estate.

§ 6. Some lawyers were of opinion, that if an heir who administers the inheritance, remains in possession thereof, without taking a regular inventory of the estate, he forfeits the right of deducting the one fourth part thereof. But most lawyers confine this only to the Falcidian portion, and after deducting the legacies (2), and not to the Trebellianic, that is, the deduction of inheritance obtained by gift, donation, &c.; as it is decreed by the court of Holland, according to the common opinion of the doctors. (3)

A Deduction of the Falcidian or Trebellianic Portion may only take place as to the First Heir, unless he has made no use of that Law.

§ 7. And it is to be understood that those deductions may only once take place as to the first heir, and no farther (4); unless the first heir has not made use of this right of deduction, in which case it is also understood that a second and other heirs may always do the same upon inheritances obtained by gift, donation, &c. (5)

What may be included in the Trebellianic and Falcidian Portions.

§ 8. In this fourth share may also be calculated what the heir has obtained for and on behalf of the deceased, either by legacy, donation, or in any other way (6); also the profit enjoyed by him (7), excepting as to children of the first venter or bed, as stated before; but with this difference, that in the Trebellianic portion, that is, the deduction of inheritance obtained by gift, donation, &c. which is to be understood under the denomination and the title of the inheritance given, but not of that which has been obtained as a legacy, which is only to take place in the Falcidian portion, and deduction of the legacy itself. (8)

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(1) L. 36. in pr. Cod. de inoffic. testam. l. 81. § 1. Ff. ad leg. Falcid.

(2) Arg. authi. sed. quum testator. Cod. ad. leg. Falcid. Novell. 1. cap. 2.

(3) Vide Neostad. decis. Cur. Holl. 3. in fin. See also Christin. vol. 1. decis. 317. num. 4. Mynsinger centur. 3. obs. 60. Mynard. lib. 5. decis. 62.

(4) Lib. 47. Ff. ad l. Falcid. l. 22. § Ff. ad. Senat. Trebell.

(5) Arg. l. 1. § denique vers. inde Neratius & ibi. Bart. & DD. Ff. ad Senat. Trebell. See Anton Faber. ad Cod. lib. 6. tit. 27. defin. 1.

(6) L. 22. § 2. l. 91. l. 93. Ff. ad leg. Falcid.

(7) L. 22. Ff. ad Senat. Trebell.

(8) Arg. l. 91. Ff. ad l. falcid. l. 30. l. 73. Ff. ead. see Duaren, lib. 2. disput. 10. Fachin, lib. 5. contr. cap. 15.

§ 9. It was a point of doubt among the lawyers, whether a son charged with the entire cession of his inheritance, may be entitled to deduct a double portion, that is, both his legitimate and his Trebellianic portion; and latterly it was jointly agreed, that he may do so according to the ecclesiastical law (1). About which a new dispute arose, viz. how such double portion should be calculated, and whether in case of five or more children, whose legitimate portion only amounts to half of the estate, the Trebellianic portion may also be deducted. Baldus and others answer in the negative (2). But others (3) admit, that in such cases, over and above the half of the legitimate portion, the Trebellianic portion may also be deducted according to the ecclesiastical law; and according to which the legitimate portion is first deducted, as a debt of the estate, and from the remainder one fourth part of the Trebellianic portion is calculated. (4)

Whether a Son charged with the entire Cession of his Inheritance, excepting his legitimate Portion, may also deduct the Trebellianic Portion; and how it is to be calculated among Five or more Children.

But in our daily practice, in order to avoid such disputes, means have been found out, when there is room for both the legitimate and the Trebellianic portion, always to bring it without distinction upon the half, and neither more nor less; so that in such cases the one is included in the other, as was decreed by the court of Holland in the case of Gerbrand Gerritz against Reynout van Ooyeer, in February 1620, and which is still daily observed (5). Whence it follows, that the deduction, which in such cases exceeds more than the half, may also take effect as to the children of the first bed. (6)

§ 10. This right of double deduction extends to grandchildren and further descendants, unless it is explicitly prohibited by last will. (7)

Whether it is to take place among the other Descendants;

§ 11. But with respect to parents, it was decreed on the 4th November 1616, in the suit between Aefgen Jans and Christiaan van der Meulen, that on receiving a legitimate portion,

Or among Parents.

(1) Ita tenent, Ferrar. infor. lib. ex substitut. tit. 50. Gloss. 7. num. 5. in verb. post. fidei-commiss. Alexander, cons. 22. viso processu. vol. ii. curz. Senior cons. 43. Atque ita per totum mundum observari testatur. Guido Papæ Decisionum Delphinat. quæst. 52. See Fachin, lib. 5. controv. cap. 2 & 3. Gail. lib. 2. observ. 121. Grot. Inleyd. lib. 2. cap. 20. vers. Hoeuel. Neostad. Cur. Holland. decis. 3. num. 3. & decis. supr. cur. 21. & cur. Holland. 17.

(2) Bald. cons. 94. lib. 2. quem sequitur. Covarruv. in cap. Raimut. § 11. num. 6. Decius cons. 228. and others who are quoted by him. Crivell. decis. 107. num. 10.

(3) Such as Anton. Thesaur. decis. 192. Cujac. lib. 8. observ. cap. 3. Fachin. lib. 5. cap. 3. Christin. vol. i. decis. 245. & decis. 315. Anton Faber. de Error. Pragmat. decad. 9. error. 9. & Cod. Sabaud. lib. 6. tit. 27. defin. 4. num. 5. Neerl. Adv. vol. i. cons. 10.

(4) Cap. Rainut. & Rainald. tit. decretal. de testam.

(5) According to Groeneweg. ad Grot. lib. 2. c. 20. n. 19.

(6) Sande, lib. 4. tit. 7. defin. 3, 4, 5.

(7) See Anton. Fab. ad Cod. lib. 6. tit. 27. defin. 4.

which is their lawful share, they have no right to claim the Trebellianic portion. (1)

Tax of the Twentieth Penny, by whom to be paid.

§ 12. It is to be added, that upon all such deductions a certain tax was imposed for the benefit of the sovereign; and that it was fixed by the States of Holland, on all immoveable goods, which *ab intestato*, or by testament, codicil, legacy, *donatio mortis causâ*, &c. devolve upon any one from the side of his collateral relations or other strangers, first at the fortieth penny (2); afterwards at the thirtieth penny (3); and now at the twentieth penny (4); to be levied upon all such goods as may be appraised by the competent court where the goods are situated (5); which impost was extended on the 27th Sept. 1653, by a placaat or proclamation of the States of Holland, not only to all inheritances obtained from collateral relations, but also to those obtained from the ascending lines without distinction, upon immoveable goods as well as upon mortgage bonds, and other hypothecary obligations.

What is the *Law of Issue*, and who are entitled to it.

§ 13. In many cities in Holland it is permitted, either by statutes or according to the antient custom, that all strangers who come to inherit in the city where they live, either by last will or by right of succession, shall pay out of their inheritance the tenth penny, for the benefit of the town, previous to their exporting the goods so inherited by them from the town. The same tax will be levied from the burghers or citizens when they wish to depart from the town, and export their goods also, by refusing to perform the services and duties he is bound to his country. This is called the *law of issue*. See the statutes of Leyden (art. 83.), and the statutes of the 13th July 1493, 3d Nov. 1555, and 14th Nov. 1542; which statute was also made for the town of Delft, but was lost by the fire in that city, in the year 1536, as may be seen in another statute of Emperor Charles V. made for the said town, on the 27th March 1545, by which the former impost was renewed, to exact the twentieth penny upon all goods received by succession, or otherwise exported from the town of Delft, and also to receive from the inhabitants, on exporting goods from the same town to other places, such duties as the magistrates of such places whither the goods are going, would exact from the inhabitants of Delft, either the tenth, twelfth, or fifteenth penny. And as to the inhabitants of Leyden, it is declared by a decree of the court of

(1) Contra, Ant. Faber. de defin. 4.
(2) Vide Plac. of the 22d Dec. 1598.
(3) Plac. Dec. 18, 1599.
(4) Plac. Aug. 18, 1640.
(5) Ibid. art. 4, 5, 6.

Holland, on the 17th Feb. 1527, between Jacob Deimen and Jan Janz Zeeuw, issue-masters of the town of Leyden, against Floris van Boshwysen, that the governors of Leyden are entitled to enjoy the *law of issue* on all goods and inheritances which are inherited by persons living out of the town of Leyden, and in other places, from persons who live in the town, and die, and have goods there, though such inheritance devolves from a mother upon a child, or though the same heir is the child of a burgher, it shall nevertheless be liable to pay the tenth penny upon the inheritances exported by him. The same law, however, is mostly observed against each other, in towns which have the same right; and there were different agreements on this very point, as it may be seen by the statutes of Amsterdam, of the year 1613 (1), in which is inserted a letter from the town of Groeningen, dated on the eve of St. John the Baptist, 1553, and which declared that all persons who are entitled to any inheritance or goods in their own town, or within the liberty of their cities, may receive the same free from any taxes, if their burghers and inhabitants may again demand and receive such goods and inheritances in their own countries or cities free; and it is also decreed by a certain contract entered into between the city of Haarlem and Amsterdam, on the 17th April 1464, that if any of the burghers of Amsterdam shall be entitled to any goods or inheritances within the city of Haarlem, they may receive the same, and do therewith as they please, without paying any poundage, either to the city of Haarlem, or to any other person on behalf of the said city; and further, that all burghers of Amsterdam, who come to settle at Haarlem, may at all times re-export their goods duty-free, provided that the burghers of Haarlem shall enjoy the same privilege in the city of Amsterdam. There is likewise an agreement made on the 4th March 1427, between the city of Oudewater and Delft, in which the city of Oudewater promises to the city of Delft, that no poundage shall ever be charged to the burghers of Delft upon the inheritance which they may come to inherit in the jurisdiction of Oudewater, unless the burgomasters of the city of Delft demand and receive the same from the burghers of Oudewater.

So that the same right at present is not further or otherwise in force than against those, who equally make use of this privilege against each other; and this has of late taken place at

(1) p. 36.

Leyden, against the inhabitants of Middelburg, because the people of Middelburg have exacted the same duty or privilege of the inhabitants of Leyden.

It is also decreed by the court of Holland, that moveable goods shall only be subject to the right of issue, because the moveable goods remain in the town where they exact the taxes thereof; and it is likewise decreed, that all ascending and descending lines, or lawful heirs, shall be exempted from paying the tax of the twentieth penny upon the same right of issue. (1)

CHAP. XII.

Of Succession, and its different Divisions.

§ 1. *In what case Succession takes place.*
2. *Divisions of the Right of Succession.*
3. *Distinction between inheriting* per capita *and* per stirpes.
4. *Illegitimate Children, how to be considered.*
5. *How the Succession goes in the descending Line where there are Children or Grandchildren of several Marriages.*
6. *Order of Succession in the ascending Line.*
7. *Order of Succession among collateral Heirs.*
8. *Of the Law of Succession in Holland.*

In what case Succession takes place.

§ 1. IN case no heir is instituted by the last will, the next of kin becomes entitled to the inheritance, each according to the degree in which he is related to the deceased; for so long as the last will can take its effect (2), the heirs at law cannot inherit, and the right of succession takes place only in case the inheritance cannot be inherited by virtue of any last will. (3)

The next of kin are divided into *descendants*, *ascendants*, and *collaterals*. Of these, descendants and ascendants are related to each other, and from one descent to another are computed by degrees, by a lineal line, upwards and downwards; and the collaterals ascend to the common stock from the collateral line, from the person claiming the inheritance to the person from whom he is descended, and descend again in a collateral degree

(1) L. 5. l. 30. Ff. de lib. & posthum. 7. § 1. Ff. unde lib.
(2) L. 89. Ff. de Reg. Jur.
(3) L. 39. Ff. de acquir. vel amittend. hered.

from one degree to another, to the persons from whom he derives his relationship; which makes so many different degrees as there are issues between them. (1)

§ 2. Thus the right of succession is divided into three different modes, viz. into descendants, ascendants, and collateral heirs. Divisions of the Right of Succession.

Of these, the descendants inherit the property of the deceased in preference to the ascendants and collateral heirs. (2)

§ 3. Among the descendants are included the legitimate children and grandchildren (*ad infinitum*); so that the children of the first degree have the inheritance *per capita*, or by the head, in equal portions; and the grandchildren or further descendants in the room of their parents for one head, together with those who otherwise would be related in a nearer degree to the deceased, which we call inheriting *per stirpes*, or by representation, that is, by substitution in the place of the deceased, whom they represent. (3) Distinction between inheriting *per capita* and *per stirpes*.

§ 4. I say, *legitimate children*; because illegitimate children, that is, those who are not born in legal matrimony, cannot inherit any thing from their parents, as I have already distinctly shewn (4); with this exception, however, that bastard children inherit likewise from their mother equally with other children, according to the adage, a "mother makes no bastard." (5) Illegitimate Children, how to be considered.

§ 5. If a person leaves behind him a number of children and grandchildren, the issue of several marriages, in such case they inherit, without any distinction, the property of their common father or mother, like other children; but, however, they receive first what their deceased father or mother has brought from the estate of the first marriage into the estate of the second marriage, in case they are distinctly to be ascertained (6); but if they are mixed together in such a way that they cannot be ascertained, in such case, they are also, by virtue of the tacit community of goods (of which we shall treat hereafter), to be divided between them in equal portions, without any distinction whatever. How the Succession goes in the descending Line, where there are Children or Grandchildren of several Marriages.

§ 6. After the descendants come the ascendants; who, if they are single, for instance, as father or mother, grandfather or Order of Succession in the ascending Line.

(1) On the subject of Consanguinity, see book i. ch. viii. pp. 36—41. supra.

(2) Novell. 118. in pr. & cap. 1. l. 7. § ult. in fin. Ff. Si tab. testam. null. extab.

(3) § 6. & § fin. Instit. de heredit. quæ ad intestat. defer. l. 3 Cod. de legitim. hered. § 2. Instit. de hered. qualit. et differ. l. 1. § 2. l. 2. Ff. de suis et legitim. d. Novell. 118. c. 1.

(4) Vide book i. ch. vii. pp. 33, 34. supra.

(5) L. 2. l. 4. Ff. unde cognati. l. 29. § 1. Ff. de inoffic. testam. § 3. de Senatus consult. Orphitiano.

(6) L. 3. Cod. de secund. nupt. & Auth. subject. l. 8, 9. Cod. eod.

grandmother, in such case they inherit alone; but if father or mother on the side of the deceased are alive, and likewise brothers or sisters, in such case they inherit jointly with the brothers and sisters (1); which is also extended to brothers and sisters' children *per stirpes* or representation; next to these come the grandfather and grandmother, or either of them; and so on from one to another, to the exclusion of relatives of a more distant or remote degree, among whom no representation takes place. (1)

Order of Succession among collateral Heirs.

§ 7. After them come the collateral heirs (2), among whom, first, (according to the Roman law), full brothers and sisters and their children, by representation, take first, to the exclusion of those who are only related on the side of the father or mother (3); next to them come half-brothers and sisters (4); and after them the next of kin, to the exclusion of all other and further relations. (5)

As however the practice and customs of our own country, as well as those of other countries, differ from those of the Roman law, the foregoing notice of it may suffice. We shall therefore proceed to treat of the right of succession, as it exists in our own country in particular.

Of the Law of Succession in Holland.

§ 8. In Holland and North Holland, from time immemorial, two different sorts of law have been practised with regard to the right of succession, viz. one that is partly in common with or approximates to the law of the Friezlanders, which is called *aasdom-regt* (6), and another that is partly common or approximates to the law of the Zealanders, which is designated *schependoms-regt*, in proportion as the countries situated in Holland are nearer to the Northern part of Friezland, and to the Southern part of Zealand, the origin of which is treated by Grotius (7), and by Vinnius (8). The ground of the aasdom-regt was the rule, *the next in blood inherits the property*; and the ground of the law of Zealand was, *that the property does not ascend, and that it goes to him from whom it is derived.* At length the States of Holland and North Holland, by a public edict in the year 1580, tried to consolidate the same into one system of law, which has been acted upon by some, though not

(1) Novell. 118. c. 1, 2. Novell. 127. c. 1.
(2) Novell. 118. c. 3.
(3) Novell. 118. c. 3. Auth. hoc. ita. Cod. com. de Success.
(4) Novell. 118. c. 3.
(5) Novell. 118. c. 4.
(6) Concerning the meaning of the word *Aasdom-regt*, vide supra, book i. ch. 2. § 23. p. 14.
(7) Inleyd. lib. 2. c. 28.
(8) Vinn. ad § 5. Instit. de success. cognat.

by all; for the inhabitants of the Northern Rhine have not altogether abandoned their antient custom of the *schependoms-regt*; and again, those of the *Dyk-Graffschap of Rhineland*, and their dependencies, situated on the south-west as well as the north-east of the Rhine, who have practised from time immemorial the *aasdoms-regt*, have not yielded to the general statute law.

And therefore the States, by a placaat concerning the right of succession *ab intestato*, enacted on the 18th December 1599, have granted to the said countries a particular law, departing in some respects from the general statute law, and composed both from the *aasdom* and *schependoms-regt*.

Thus there are in use two different kinds of law of succession, and therefore distinction should be made between the general statute law enacted by the said political edict, and which adheres for the most part to the old *schependoms-regt*, and between the particular law of the countries and cities that, by the placaat of the 18th December 1599, have in some degree retained the old *aasdoms-regt*; each of which will be treated hereafter.

The countries and cities that adhere to the placaat of the 18th December 1599, are Haarlem, Leyden, Amsterdam, Alkmaar, Hoorn, Enchuyser, Edam, Woerden, Naarden, Monnikeadam, Modenblik, Muyden, and Purmerent; as also the Dyk-Graffschap of Rhineland, the country of Woerden, on the eastern and northern side of Rhineland and the country of Woerden, except Waddingsveen, Rewyk, Buskoop, Sluypwyk, Blommendaal, and Middelburg.

With respect to moveable property, the law of the place where the person dies is followed; but with regard to immoveable property, the law of the place where the property is situated is observed: whereas the statutes or local laws, so far as they speak of the right of succession, are *real*, that is, that they look more upon the *property* than upon the *person*; and therefore they cannot be extended any farther than to the property, which is situated within their jurisdiction. Hence it follows, that on account of the diversity of places and customs, where the property is situated, and the demise takes place, one and the same estate is divided and inherited in different ways.

This, according to the old aasdoms and schependoms-regt (1), is so strictly observed, that if a child resident in the place where the aasdoms-regt is practised, comes only to play at the place where the schependoms-regt is observed, and there suddenly

(1) Art. 9.

departs this life, or is stabbed dead, in such case the property of the child is to be inherited according to the schependoms-regt. (1)

Hence it may be reasonably doubted whether, since the aasdoms and schependoms-regt are in some degree observed among us, the same ought not also to take place *generally* among us? But since the said aasdoms and schependoms-regt are not adopted by us any farther than as the same are contained in the political ordinance, and in the placaat of succession *ab intestato*, and no farther; therefore the same cannot take place among us: and the said instruction of aasdoms and schependoms-regt serves for no other purpose than to the guidance of a person who is desirous of investigating the obsolete aasdoms and schependoms-regt; and therefore, in such cases, we should follow the custom of the place where the deceased child's parents had their fixed and last place of abode (2); and so it is frequently held by the court of Holland, as well as by other provincial courts. (3)

I say, *a fixed place of abode*; for the bare residence of any one, which very often happens, for a short time, cannot make it his place of residence; as, for instance, a person that is attacked with any disorder, on account of the heat of the weather goes into the country, or for some other cause lives out of the city, but with the full determination of remaining and living there, without any intention of returning back, and so make it his residence. (4)

In the same light they are also viewed, who, on account of any official situation (as that of a councillor, a president, an advocate, a captain, a magistrate, or a student in pursuit of his art or science), come to live in another place; who cannot be considered as having changed their place of residence; for they do not possess such place of residence of their own accord, but solely on account of their respective situations. (5)

Those who depart from Holland to India, are on the same ground considered as never having left their *fixed* place of abode, but to have quitted that country with the intention of returning home again (6); and therefore their property is divided according to the

(1) Art. 9.

(2) Arg. tit. Cod. ubi de hered. ag. oportet.

(3) Vide Christin. vol. 2. decis. 166. Cost. Antwerp. tit. 47. art. 16. Cons. & Advys. vol. ii. cons. 22. & vol. 1. cons. 152.

(4) L. 17. § 15. Ff. ad Municipal. junct. l. 4. Cod. de divers. offic. & appar. jud. l. 5. Ff. de captiv. & postlimin. revers. l. 26. § 2. Ff. ad Municipal. Vide Menoch. de arbitr. jud. cas. 86. n. 2. & seq.

(5) L. 13. Cod. de dignitatib. l. ult. Cod. de incolis. Ff. 14. ad municipal. See Johan. Zanger. de except. part. 2. c. 1. n. 34.

(6) Arg. l. 7. Cod. de incol. & l. 203. Ff. de verb. signif.

law of the place where they had their last fixed place of abode in Holland, according to the act of declaration of the States General of the 2d December 1634, at the request of Jan Kroen, residing at Middelburg in Zealand, on the point of the succession of those that depart from these countries to the East Indies; by which it is enacted, that on board of the licensed ships, where at the place of abode no new law on the point of succession is introduced, if the inhabitants of these countries, proceeding on their voyage, happen to depart their life during their voyage, their inheritance *ab intestato* should be regulated according to the laws and regulations of the places of the province whence they proceeded on their voyage, and of which they are an inhabitant. But it has since been enacted by the edict of the aforesaid States General, concerning this subject, that the law of the political ordinance, with the interpretation of the 15th May 1594, shall be observed in all countries and cities, and also by all individuals in the East Indies, (under the direction of the East India Company; and it was probably confirmatory of the ordinance granted to the East India Company in the year 1629 and 1636); and it is probably with that view, that the political ordinance is enacted as a general law all over the whole country, with the exception only of those who upon their application are allowed a particular law by the placaat of the year 1599, which ought strictly to be observed, and not extended to any other places besides those which are named and expressed in the same.

CHAP. XIII.

Of Succession according to the Municipal Law, and especially according to the particular Law of Schependom (Schependoms-regt.)

[Grot. 2. 28.]

§ 1. *How Succession is to be understood in doubtful Cases according to the Schependoms-regt, or Law of Schependom.*
2. *How and in what manner in the descending Line.*
3. *Whether and when Father and Mother inherit by Succession.*
4. *Whether, when, and in what manner, Brothers and Sisters, their Children and Grand-children, inherit among each other according to the Law of Schependom.*
5. *Whether and where the Descendants of Brothers' and Sisters' Children inherit before others, according to the Law of Schependom.*
6. *Whether and when Grandfather and Grandmother become joint Heirs according to the Law of Schependom.*
7. *When and in what manner, among Collateral Relations, the next of Kin excludes the others, or, being related in an equal degree, come to inherit* per capita.
8. *Of the Right of Succession in Zealand.*
9. *In the Country of Arkel.*
10. *In the Country of Heusden.*

How Succession is to be understood in doubtful Cases, according to the *Schependoms-regt*, or Law of Schependom.

§ 1. WITH regard to the municipal laws in the political ordinance of the year 1580 (art. 19), which is observed in Holland and every where else (except in those towns and places where by the placaat or proclamation of the year 1599, a special succession is granted), it is to be considered as a rule, that whatever is not expressed in the same ordinance is to be arranged and interpreted, not according to the Roman law, but according to the law of Zealand, and the rule, that the property ought to return to the party from whence it came (1), ought to be taken in a very strict sense, and be understood only in succession without any last will. For if, in the last will, the next of kin is named without exclusion, one must understand, that such next of kin is to be considered according to the Roman succession; since the law of succession cannot take place so long

(1) Polit. Ordonn. art. 19.

as there exist a last will, which in doubtful cases is to be interpreted against the law of succession (1). So that, contrary to the 27th art. of the same law, it should be understood that parents were nearer than others. (2)

How and in what Manner in the descending Line.

§ 2. According to this municipal law are the descendants, that is, children and their descendants by representation, without and before all others (3), which agrees with the Roman law. (4)

Whether and when Father and Mother inherit by Succession.

§ 3. If the father or mother are both alive, in case of want of descendants, they are the universal heirs of their children. (5)

In case of want of one of them, the property goes entirely on the side of the deceased relation. (6)

Whether, when, and in what manner, Brothers and Sisters, their Children and Grandchildren, inherit among each other, according to the Law of Schependom.

§ 4. And first, brothers and sisters (7), both of the full as well as of the half blood, inherit each in an equal proportion. The explanation of the Political Ordonnance of the 13th May 1594, says, *that the same* devolves upon their children and grandchildren by representation, provided they are related to the deceased; so that, the marriage from which the deceased is born being dissolved, neither the parents nor any ascendants nor collateral relations who are related to the deceased, are entitled to the inheritance or any the least part thereof (8). So that, in case of want of relation on the side of the deceased, the inheritance would go to the government (9), contrary to the written law, pursuant to which the ascendants, not only father and mother, but likewise ascendants in a still higher degree, are preferred before the collateral relations. (10)

If both father and mother are dead, the inheritance is to be divided into two equal parts (11), a just moiety of which devolves on the father's side, and the other part goes to the mother's side, without making any observation on whose side there has been more property; and it goes also to the brothers and sisters, both of the full and of the half blood, their children and grandchildren, by succession (12); and that in such a manner that the half sisters and brothers, their children and grandchildren, divide equally between full brothers and sisters, their children and

(1) L. 39. Ff. de acq. vel. amitt. hered.
(2) Arg. l. 1. § 6, 7, 10. Ff. unde Cognat. l. 92. Ff. de verb. sign.
(3) Polit. Ordonn. art. 20.
(4) § 2. Instit. de hered. qualitat. et differ. § 1. et seq. Instit. de hereditatib. quæ ab intestato deferuntur. tot. tit. Ff. et Cod. unde liberi. l. 1. § 2. et seq. Ff. de de suis et legitim. hered. Novell. 128. cap. 1.
(5) Polit. Ordonn. art. 21. l. 15. Ff. de inoff. l. 8. Ff. si tab. testam. null. extjunct. Novell. 118. cap. 2.
(6) Polit. Ordonn. art. 27.
(7) Ibid. art. 23.
(8) Ibid. art. 26. Verklar (*Explanation*) vers. Dat niet alleen.
(9) Grot. Inleyd. lib. 2. c. 30. n. 5.
(10) L. 16. § 7. Ff. de grad. et affin. l. 4. § 2. Ff. de in jus vocando d. Novell. 118. cap. 2.
(11) Polit. Ordon. art. 23.
(12) Ibid. art. 22.

grandchildren, and they are included from the full brothers and sisters, agreeably to the Roman law. (1)

For example, if there are half brothers and sisters on both sides, viz. on the side of the father as well as on that of the mother, the half is to be divided between the full brothers and sisters with their children or grandchildren, together with the brothers and sisters, their children and grandchildren, on the side of the father; and the other moiety will be divided among the brothers and sisters, their children and grandchildren, on the side of the mother. But if there are on one side half brothers and sisters, in such a case the full brothers and sisters, their children and grandchildren, previously take to themselves the one part of the deceased's estate, and afterwards they divide the other half among the half brothers and sisters, their children and grandchildren, by succession. (2)

For want of descendants, including father and mother, full brothers and sisters, the estate is likewise divided into two parts, and is again first divided into two equal parts between the half brothers and sisters on the side of the father, and the half brothers and sisters, and their children and grandchildren, by succession; but if there were half sisters and brothers, their children and grandchildren, the same will be equally divided between the next of kin on the other side, who are the nearest according to the municipal laws. (3)

Whether and where the Descendants of Brothers' and Sisters' Children inherit before others, according to the Law of Schependom.

§ 5. If there are no descending relations, neither father nor mother, nor brothers nor sisters, of the whole or half blood, the nearest descendants of the brothers and sisters grandchildren, being of the fourth generation, succeed to the inheritance (4); saving the distinction between those who are related on both sides, and those who are related only on one side of the deceased. (5)

Whether and when Grandfather and Grandmother become joint Heirs, according to the Law of Schependom.

§ 6. If there is no offspring of the brothers and sisters children, the effects of the deceased devolve first upon the grandfather and grandmother of both sides, if they are alive (6); but even if one of them be wanting, and the bed be divided, the share of the heir that is wanting devolves upon those who are closely

(1) Novell. 84. c. 1. § 1. Novell. 118. c. 3. Auth. post fratris cod. ad legitim. hered.

(2) Verklar op de Politic. ordonn. near the beginning.

(3) Politic. ordonn. art. 27. facit. Novell. 118. c. 3. vers. his autem non extantibus. cum seq. Auth. post. fratris. cod. de legitim. heredib.

(4) Polit. Ordonn. art. 24 & 28. Verklar. vers. Dat de descendenten.

(5) Verkl. op de Politic. Ordonn. vers. Ende dat gelyke; contra d. Novell. 118. c. 3. § fin. junct. auth. post fratris cod. de legitim. heredib.

(6) Politic. ordon. art. 25 & 26. Verklar. vers. Dat niet alleen. contra d. l. 16. § 7. Ff. de grad. & affinib. & Novell. 118. c. 2.

related to the grandfather and grandmother of the deceased; viz. it devolves, first upon the uncles and aunts of the deceased, and their children by succession (1); observing, however, this distinction, that if any of such next of kin be of the half bed or blood, such a one will be entitled to the half, as already previously observed with respect to brothers and sisters. (2)

When and in what manner, among collateral Relations, the next of Kin excludes the other, or, being related in an equal Degree, come to inherit *per capita*.

§ 7. On failure of them, the descending relations (excluding the other, who are closely related to the deceased) inherit by succession (3), in the manner above stated; viz. the estate must be divided into two equal parts, one half of which reverts to the relations on the side of the father, and the other half to the relations of the mother; those descending from the half bed will be entitled to the half.

Of the Right of Succession in Zealand.

§ 8. In the province of Zealand, for the most part, the law of Schependom is observed, agreeably to the political ordinance above mentioned, and also in conformity to the rule that *property does not ascend*, but goes to that side *whence it came* (of which nothing further is mentioned), as is recorded in the Instructie van Aasdoms en Schependoms regt (or instructions concerning the law of Aasdom and Schependom), which is a compilation by different persons, and of very little authority.

In the Country of Arkel.

§ 9. The same law is observed in the country of Arkel, of which Gorinchem is the capital, excepting upon the two following points; viz. first, whenever the father and mother die, leaving only one child, and again, if this child die without issue, during the life of his surviving father or mother, the surviving parents inherit the one half, and the other heirs of the deceased (from whom the property descended), inherit the other moiety; secondly, whenever the marriage bed is broken, and many children are left behind, the estate is divided as in South Holland, half and half, but if one of the children had died, the half of the property of the child devolves upon the surviving father and mother, while the other half goes to the other brothers and sisters.

In the Country of Heusden.

§ 10. In the country of Heusden, which belongs to Holland, there is an old law, to the following effect:

That children are the lawful heirs of their parents, and survivors of their parents possess the property by enjoying the benefit thereof.

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(1) Polit. Ordonn. art. 24 & 28.
(2) Ibid. art. 23. Verklar vers. Ende dat gelyke.
(3) Ibid. art. 28.

The children come in the room of their father, when the property of their grandfather and grandmother is divided.

If brothers and sisters of one bed depart this life without children, their property devolves upon the surviving brothers and sisters, but not upon the children whose parents had died.

If any one dies without leaving children, neither sister nor brother, nor father nor mother, the uncles and aunts succeed to the property, but not the children of the uncles and aunts whose parents had died.

Half brothers and sisters are preferred before uncles and aunts.

On failure of the descending line, all the property is inherited by the nearest ascendants. (1)

In the diocese of Utrecht and Gelderland, the written laws are for the most part in force; we shall not therefore treat particularly of their laws.

All the placaats of the several provinces, relative to the law concerning the succession to the property of deceased persons, may be seen in the collection of M. Van Voorm.

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(1) Vide Costuym. van Heusden, art. 47, 48, 49, 50, 51, 52.

CHAP. XIV.

Of Succession according to the (Aasdoms-regt) Aasdoms Law in particular.

§ 1. *In what manner the Succession according to the Aasdom's Law, is to be regulated in doubtful Cases.*
2. *How in the descending Line.*
3. *How in the ascending Line; and in what manner Brothers and Sisters jointly inherit.*
4. *Explanation of the Third Article of the Placaat issued in the Year* 1599.
5. *How Brothers and Sisters, both of the full and half Blood, inherit, as well as their Children and Grandchildren.*
§ 6. *When and whether Representatives may have a Right to the Inheritance.*
7. *In what manner the Inheritance devolves upon Ascendants beyond the First Degree.*
8. *The next Issue of Brothers and Sisters Grandchildren.*
9. *How and when Uncles and Aunts inherit.*
10. *After them follow the next of Kin; how and in what manner the Relationship is to be considered.*

§ 1. WITH regard to the particular law of the towns respecting the succession, granted by the placaat or proclamation of the 18th December 1599, it is to be considered as a general rule, that *whatever is not expressed in that placaat, cannot be regulated or explained according to the Aasdoms or Schependoms law, or according to the political ordonnance of the year* 1580; *but according to the Roman written law, which was mostly observed* (1). In this as well as in several other instances, the same laws ought to be observed.

In what Manner the Succession, according to the Aasdoms Law, is to be regulated in doubtful Cases.

§ 2. In treating this subject, the children and their further issue *ad infinitum*, are to be considered in the first place, provided they are legitimately born. (2)

How in the descending Line.

§ 3. In failure of descendants, the whole inheritance devolves upon the father and mother, both being still alive. (3)

How, in the ascending Line; and in what Manner Brothers and Sisters inherit.

Upon the death of one of them, whether the father or the mother, the survivor divides the whole of the inheritance, together with the brothers and sisters of the deceased, whether

(1) Vide Placaat, tit. successie, art. 14.
(2) Ibid. art. 4. l. 7. in pr. Ff. de bonis damnatorum. l. 7. in fin. Ff. si tabul. testam. null. ext. l. 15. de inofficios. testam. l. 13. Cod. de legitim. hered.
(3) Plac. tit. successie ab intestat. art. 2. Junct. d. ll.

of the full or of the half blood, and their children and grandchildren by succession, in two equal parts. The surviving father or mother takes the half, and the brothers and sisters the other half, as before (1); provided that they consist of the children and grandchildren of the half brothers and sisters who have died. In the placaat, art. 3, it appears that only the father or mother, and the brother and sister of the deceased, are entitled to the inheritance, but not the grandfather or grandmother, who follow after the full and half brothers and sisters, their children and grandchildren (2). If, on one side, only the children and grandchildren of the half brothers and sisters are alive, in such case the grandfather or grandmother, or others of the ascending line, divide the inheritance, together with these, into two equal parts.

If there are no full brothers or sisters alive, the surviving father or mother inherits all the goods, left by the deceased, and has the preference before the other collateral relations, though there were children and grandchildren of the deceased's full brothers and sisters, or those of their half-brothers and sisters (3); which is founded upon the law of aasdom, that the goods must devolve upon the next of kin. (4)

Explanation of the Third Article of the Placaat issued in the Year 1599.

§ 4. With regard to the words of the said third article, viz. "*if there are no brothers or sisters of the full blood alive, whether the surviving father or mother would inherit all the goods in preference to the half-brothers and sisters?*" some arguments having arisen, and particularly as to the meaning of the first sentence of the said article, viz. "*if one of both, either father or mother, died, the survivor, together with the brothers and sisters, whether of the full or half-blood, will be entitled jointly to the inheritance;*" after due consideration on this point, some jurists are of opinion that the first sentence is altered and annulled by the second one, in so far, that before the court of Holland a dispute arose touching the said third article of the placaat, and the query was, "if any one die, leaving behind a father and a half-brother on the mother's side, or a mother with half-brothers on the father's side, who are equally entitled to the property of the deceased, whether in such a case the father or the mother alone may inherit the whole, to the exclusion of the half-brothers?" Upon this, in the case of Maria Dirksz, widow of Ysbrand Dirksz, it was considered

(1) Plac. tit. successie ab intestat. art. 3.
(2) Plac. art. 7. contra Novell. 118. c. 2. l. 26. § 7. de gradib. & affinib. l. 4. § parentes. Ff. de in jus vocando DD. & Gloss. in dict. cap. 2. Novell. 118. in verb. parentes.
(3) Plac. art. 3. in fine.
(4) Facit Novell. 118.

and declared on the 3d November 1608, that the father and mother only are entitled to inherit, to the exclusion of the half-brothers and sisters. But again, in the case of Adrian Jacobsz residing at Warmond, and in the cause between the guardians of Jan Jorisz the orphan of Jan Jorisz, against Cornelis Gesbrandsz, in consequence of his marriage to Magtelt Jacobsz, defendant, all of Hoorn, this point being taken into consideration, it was declared that a half-brother on the father's side was entitled to inherit the half part of his half-brother's goods, leaving the other half to the mother of the deceased; both which decisions were confirmed by the high court on the last day of June 1625, and on the 20th March 1625, which determined that the last clause of the before-mentioned article must correspond with the first clause, and be observed accordingly; with this explanation, that the following words of the last clause of the said third article, viz. "*if there are no full brothers and sisters alive, the surviving father and mother are universally to succeed to all the goods left behind by the deceased, although there are half-brothers and sisters alive,*" shall have reference only to half-brothers and sisters not related to the deceased on the side he died, by which the difference of these two clauses ceases. (1)

How Brothers and Sisters, both of the full and half Blood, inherit, as well as their Children and Grandchildren.

§ 5. If there be no survivor, the full and half-brothers and sisters, and their children and grandchildren, are to succeed to the inheritance; with this difference however, that in case there are no full brothers and sisters, and half brothers and sisters on the side of the father and mother, or children and grandchildren, by succession, the whole estate is to be divided into two equal parts, of which the full brothers and sisters and their children and grandchildren divide the half between themselves, and the half-brothers and sisters and their children and grandchildren on the brother's side; and the other half between the half-brothers and sisters, and their children and grandchildren, on the side of the mother. But if there are only half-brothers and sisters, and their children and grandchildren, of one side only, the full brothers and sisters and their children and grandchildren have a right to deduct the first half part for themselves, and in the other half part they are to share equally with the before-mentioned half-brothers and sisters, and their children and grandchildren, as is directed by the common country law. (2)

If there are no full brothers and sisters, nor any children and grandchildren of them, the estate is also divided into two equal

(1) Vide Coren, obs. 29, 30.

(2) Plac. art. 4. tit. Succession.

parts, one half of which goes to the half-brothers and sisters, and their children and grandchildren, on the side of the father, and the remaining half to the half-brothers and sisters and their children and grandchildren on the side of the mother, if there are any (1); but if there are only half-brothers and sisters, and their children and grandchildren, of one side only, the estate is to be divided as before-mentioned into two equal parts, conjointly with the grandfather or grandmother or the ascending generation related to the deceased on the other side (2); so that the half-brothers and sisters, and their children and grandchildren, inherit the half, and the next ascending relation or relations of the other side inherit the other half *per capita*, or head for head.

Whether and when Representatives have a Right to the Inheritance.

§ 6. Here it is to be observed, that among the collateral relations no succession is maintained: whenever they come to inherit, if they are nearly related to the deceased, such as the brother's and sister's children; that is, when there are no surviving brothers or sisters of the deceased, they are entitled to inherit *per capita* and *not per stirpes*, although there may be besides them several children of one or more of the deceased's brother's or sister's children (3); and so on in every collateral relation. Of this a good example may be seen in the third article of the placaat referred to; where the surviving father or mother, if there are no brothers or sisters alive, inherit all the goods of their child, though there are children or grandchildren of the brother and sister of the deceased; here it is to be observed, that it has relation to children or grandchildren of the first deceased brother and sister, if there are no brother or sister of the deceased alive, to succeed to the property of the deceased, as it is stated in the first clause of the said article; viz. that brothers and sisters, and their children and grandchildren, inherit jointly, which two clauses of the said article must be attended to with that distinction, otherwise they would appear contradictory to each other.

In what manner the Inheritance devolves upon Ascendants beyond the first Degree.

§ 7. When father and mother, full and half brothers and sisters, have no issue, the goods devolve, first, for the whole, upon the nearest ascendants in the right line, who in an equal degree inherit *per capita*, to the exclusion of distant relations, although there were on the one side both grandfather and grandmother, and on the other side grandfather or grandmother only

(1) Plac. art. 5.
(2) Ibid. art. 6.
(3) Ibid. art. 11, 12.

surviving, which is also to take effect as to other acending relations (1); whence it will appear, that the grandfather or grandmother, as also brothers and sisters and their children and grandchildren, do not inherit, but are excluded from such inheritance (2); because in the ascending line no representatives are admitted, as it is contrary to nature that a higher ascendant should come in the room of the descendants as a representative, or, in other words, that the children should come in the room of the parents, who are still alive.

The next Issue of Brothers' or Sisters' Grandchildren.

§ 8. If there are no ascendants, the nearest descendants of brothers' or sisters' grandchildren inherit *per capita*, to the exclusion of all other collateral relations, without making any distinction whether they are of one or two beds. (3)

How and when Uncles and Aunts inherit.

§ 9. After the issue of brothers' and sisters' grandchildren come the uncles and aunts of the deceased, *per capita*, as also their children, as representatives, likewise without distinction either of one or two beds. (4)

If there are no uncles and aunts alive, then come their children in the first degree (who are commonly termed *sisters' children*), *per capita*, as also the grand-uncles and grand-aunts, if there are any, together with them, *per capita*, without distinction. (5)

After them follow the next of Kin;—how and in what Manner the Relationship is to be considered.

§ 10. Afterwards follows the next of kin, on this condition, that those who are equally related inherit all the goods of the deceased, the nearest excluding the distant relation, without division, or making any distinction whence and through what means the goods had been derived. (6)

But, in order to know who is the next of kin, which is particularly to be observed in case of death, according to the general code of the country, it is necessary to be well acquainted with the number of relations and their members, which is either in the right line ascending and descending, or in the collateral line; *first*, ascending to the common pedigree, and then descending to those whose relationship is in question, calculating every birth as a member, which may be easily effected by the following rule, "*How many persons, so many degrees excepting one*;" otherwise, for the convenience of those who are unacquainted

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(1) Plac. art. 7.
(2) Contra, Novell. 118. c. 2.
(3) Plac. art. 8. & arg. Politic. ordonn. art. 28. contra. d. Novell. 118. c. 3. in fin. junct. authent. post fratres. Cod. de legitim. hered.
(4) Plac. art. 9. Neerl. Adv. vol. 1. c. 51.
(5) Plac. art. 10.
(6) Plac. art. 22 & 12.

with the calculation of the degrees and members, reference may be had to Grotius (1), and also to the former part of this work, which treats particularly on consanguinity. (2)

CHAP. XV.

Of Succession, according to the Grounds of the Schependoms and Aasdoms Law in common.

[Grot. 2. 28.]

§ 1. *The Two different Laws of Succession prevalent in Holland, how to be distinguished.*
2. *Two different Defects of them.*
3. *How to prevent such Defects.*
4. *The Nature of* Supplement, *how far it is to be calculated, and when it is to take place.*
5. *Whether and in what Point this Supplement differs, with respect to the Inheritance* per Stirpes.
6. *How far the Consanguinity is calculated in the Right of Succession, if it goes beyond the Tenth Degree, contrary to the Opinion of Grotius and others.*
7. *Among us, Husband and Wife cannot inherit from each other, in case of Death, for want of Relatives.*

THUS far we have treated of inheritance by succession, as it is practised in these countries in particular.

The two different Laws of Succession prevalent in Holland, how to be distinguished.

§ 1. In order to distinguish the grounds of which, (forasmuch as the same is adopted differently in Holland, as we have seen in the two preceding chapters), the following rules may be of service to judge at all times without trouble, concerning the proximity of the laws of Holland in cases of succession.

I. According to the common municipal law, pursuant to the order of council, the bed being divided, the goods are always to go to the side of the person demised, but are never to ascend nor to revert. (3)

II. The next offspring of the brothers' and sisters' child's children, are, according to the political ordonnance, to go before grandfather and grandmother, both being yet alive; who, accord-

(1) See Grotius, Inleyd. lib. 2. c. 27. where the calculation is made from member to member.
(2) See Book I. ch. viii. pp. 36-41. supra, and the Table of Consanguinity thereto annexed.
(3) Polit. Ordon. art. 27.
(4) Ibid. art. 24, 28.

ing to the placaat on proclamation of the year 1599, (art. 8.) are to go before uncle and aunt.

III. The representation or *supplement*, according to the placaat, takes place only in unequal degrees, in the offspring of the descending line *ad infinitum*, and in the collateral line in brothers' and sisters' child's children, uncle and aunt's children (1), which, according to the political ordonnance, likewise takes place in the same line *ad infinitum*. (2)

IV. Further, those who stand in equal degree, and are equally near, are to inherit equally; and, in unequal degrees, the nearest are to go before, to the exclusion of all others.

§ 2. V. In each of these laws of succession, a manifest defect is discernible; for, Two different Defects of them.

First, In the law of the political ordonnance, the surviving father or mother in succeeding to the goods of their children (the greatest part of which often comes to them from their own estate, or from their parents, and next of kin) are excluded by the most distant relatives of the children, and never inherit any thing from their children; so that, on failure of the same, their estate would fall to the lord of the land. (3)

Secondly, According to the Aasdom, or particular law allowed by the placaat of the year 1599, to particular towns, the surviving father or mother inherits all the goods of their children, without any thing going to the side of the deceased father or mother, from whom the whole or the greatest part has come.

§ 3. Both these defects in the particular law of succession, in the country of Arkel, of which Gorinchem is the capital, has been properly and rightly remedied in the following manner; viz. when the father or mother dies, leaving a child behind, and afterwards the said child dies during the life-time of the surviving father or mother, without leaving children, in such case the parents who are alive share the one half, and the heirs of the demised the other half, as already stated in chapter xiii. § 9. p. 295, supra. How to prevent such Defects.

Further, with respect to the above mentioned common municipal law, as also to the particular law of the towns in Holland, regarding the law of succession, there remains very little to be remarked in addition; and that little consists principally in the

(1) Plac. art. 11.
(2) Pol. Ord. art. 28.
(3) See Grotius, Inleyd. lib. 2. c. 30.

supplement or *representation* of children in the place of their parents, and in *collatione bonorum*, that is, the bringing in or deduction of what has been received before.

The Nature of *Supplement*; how far it is to be calculated, and when it is to take place.

§ 4. *Supplement* or *representation* is, when the children inherit in the place of their parents or ancestors, equally and jointly with their uncles or other friends who stand nearer in relationship to the deceased. How far this takes place has already been distinctly shewn; viz. to brothers' and sisters' child's children, and uncle and aunt's children being included therein. (1)

But it was granted to the people of Rotterdam, by a special charter, in the year 1604, that within their country, and also in Schieland, the right of representation shall take place two degrees further, as well in descendants of the deceased great-uncle and great-aunt, as in descendants of uncle and aunt.

I say, *in their parents' place equally with their uncles and aunts*, with respect to the placaat; because, according to the same, the representation in equal degree, and when those who are to succeed to the inheritance stand equally near to the deceased, does not take place; but all of them inherit in that case *per capita* (2). But, according to the law of succession of the political ordonnance (3), by which the right of inheriting by *supplement* or *per stirpes* is stipulated, there is no difference made between the direct and indirect lines. Hence it results, that the phrase of *representation* and *supplement* is by many conceived to be equivalent to the word *stirpes*, or to inherit *per stirpes*, when many persons together draw a certain part of the inheritance as if it were with one hand, in order to divide the same among them, which frequently, when representations occur, is likewise inherited *per stirpes*; and, consequently, that is thus considered by many without distinction, which ought to be considered distinctly; viz. that in the law of succession according to the place, the same are both distinctly excluded, as is to be seen in the eleventh article. But according to the law of succession of the political ordonnance (4), it seems the same is distinguished in such manner that there does not occur a supplement, yet they inherit *per stirpes*.

Whether and in what point this Supplement differs with respect to the Inheritance *per Stirpes*.

§ 5. Therefore it is not always certain that, whenever representation occurs, then they also inherit *per stirpes*; and again, whenever they inherit *per stirpes*, that then the representation would occur; because, when a child's child, together with his uncle

(1) Pol. ord. art. 28. Plac. art. 9. 12.
(2) Plac. art. 11.
(3) Art. 28.
(4) Ibid.

and aunt, or more, comes to inherit the goods of his deceased grandfather, in that case the child's child comes of course by representation, but as it draws as much as either his uncle or aunt, therefore they inherit altogether *per capita*, and it cannot be properly said that such child's child is to inherit *per stirpes*. And further, when the deceased has no other and nearer relations than children of different brothers or sisters, of one brother two, of the other three, of the third four, and so on; in such case, all the said brothers' children inherit *per stirpes*, that is, the two children of the first brother take one third part, the three children of the second brother one third part, and the four children of the third brother one equal third part, of all the goods of the deceased, without any representation or supplement occurring in such case; they all come individually for themselves. (1)

We have said, that besides those who are not included in the political ordonnance, or in the placaat of succession, the next are to go first, to the exclusion of the other further relations. This is to be understood, in as far as any one can compute the relationship of another *ad infinitum*, although it be of the most distant branch (2), contrary to the opinion of some (3), who have misunderstood the Roman law (4); where it is said, that any person may by the right of agnation be admitted to the inheritance of another, although he is in the tenth degree, which is there considered as endless, without any exclusion; because it very seldom happens that any one is the nearest of kin in the tenth degree, so that the inheritance shall fall first to the lord of the land, if no one is to be found who can compute a relationship with the deceased, how distant soever he may be (5); because, although it very seldom happens that any one's family goes to the tenth degree, or that any one has no nearer relations than those who stood to him in the tenth degeee, it is yet possible to occur amongst extensive families; one instance of this kind is given by Covarruvius (6), who mentions, that in Spain there was a place containing about a hundred families, all descended from one person, who was still alive. So also, here in Rhineland, in the village of Soetermeer, in the year 1574, the

(1) Pol. Ord. art. 28.
(2) § 3. Instit. de legitim. agnator. Somen. l. 2. § 1. Ff. de suis. & legitim.
(3) See Grotius, Inleyd. lib. 2. c. 30. and, after him, Groeneweg. de legib. abrogat. § 5. Instit. de Success. cognat.
(4) In d. § 5. Instit. de success. cognat.
(5) Per text. in l. unic. Cod. unde vir. & uxor. junct. § 3. Instit. de legitim. agnat. success. & § ult. Instit. de servil. cognat. 118. c. 3. in fine.
(6) Tom. 1. part. 2. de Matrimonio, c. 6. § 10. n. 13.

party deceased was Dirk Jonge Jan Kok, who left behind by his wife Kommertje Jans, both children and grandchildren and further descendants, one hundred and eighty-three persons, who (with the exception of three) were all alive at the death of Kommertje Jans, in the year 1602. Their tree of consanguinity is to be found in different places, and underneath it the following verses:

"Dit geslagt van Dirk Jonge Jan Kok was groot,
Voor Kommertje Jans, syn huisvrouwen dood,
By haar levend lyf honderd en drie-en-tagtig personen,
Waaronder waren even juist so veel dogters als sonen:
Daar van Kommertje moeder, groot-moeder, en over-groot-moeder is geweest,
Dees waren op Kommertjes sterf-dag nog al in levendelyve,
Behalven drie, die hier so lang niet en mogten blyven,
Sodat op den dat Kommertje van haar pyn genas,
Het getal van haren bloede nog hondert en tagtig was,
Die alle haar moeders, groot-moeders, en over-groot-moeders dood verheyden,
Tot dat sy haar in haaragt-en-tnegentigste jaar ten grave gelyden."

That is, "The issue of Dirk Jonge Jan Kok was numerous; before the death of his wife Kommertje Jans, her issue consisted of one hundred and eighty-three persons; among whom there were as many sons as daughters; of whom Kommertje was mother, grandmother, and great grandmother. And they were still in existence at the death of Kommertje, with the exception of three who departed this life; so that, on the day that Kommertje died, the number of her issue was still one hundred and eighty, who were all living at the death of their mother, grandmother and great grandmother, and they conducted her to the grave at the age of eighty-eight years."

And Juliana Countess of Stolburg, consort of Count William of Nassau, mother of Prince William I., saw, in her seventy-fifth year, one hundred and twenty-three, both children and grandchildren. (1)

Among us, Husband and Wife cannot inherit from each other, in case of Death for want of Heirs.

§ 7. According to the Roman law, on failure of relations by blood, the surviving wife inherited (2), during whose life-time no devolution took place (3); but such right of succession does not prevail in these countries, it having been abolished by the

(1) Hooft, Historie, p. 907.
(2) Tot. tit. Cod. unde vir et uxor.
(3) L. ult. Cod. de legitim. hered.

community of property between husband and wife, independently of which the consorts could not inherit at the death of either of them (1); excepting only, that in some parts of Gelderland the survivor remains in possession of the usufruct of the moveable property, and at other places the husband or wife receives, before the children or heirs, whatever belongs to his or her body or peculiar use. (2)

CHAP. XVI.

Of Contribution for Goods received.

[Grot. 2. 28. 8.]

§ 1. *Contribution of Goods received, by whom to be made, and of what Property.*
2. *Whether it takes place in the Division of an Estate, against the surviving Father or Mother, of a Dowry received by them.*
3. *How far Grandchildren are liable to make Contribution of Goods which they or their Parents have received.*
4. *How far Children are liable to make Contribution of all such Gains accrued to them while under the Care of their Parents.*
5. *Whether a Gift is to be contributed in Holland,*
6. *In Zealand, France, and Brabant.*
7. *Whether a Present to a Godchild is to be contributed at a general Division.*
8. *Expences of Education, whether and when they are to be contributed.*
9. *Whether and when the Purchase Money of a Place or Office is to be contributed.*

§ 1. IF children or grandchildren have received any goods or sums of money on account of gift, promoting them in marriage, trade, merchandize, or otherwise, and if they afterwards divide the goods with the joint heirs of their parents or ancestors, they must in such case, before any division is made, contribute those goods received by them, or the real value of them, at such rate as it stood at the time when they received the same (3). It also takes place in an inheritance by last will, or

Contribution of Goods received, by whom to be made, and of what Property.

(1) Grotius, Inleyd. lib. 2. c. 30. Neostad. Supr. Cur. Holl. decis. 7. Christin. vol. vi. decis. 62.

(2) Vide Cost. Utrecht, rubric. 24; Antwerp. tit. 41; Mechlin, tit. Succession. art. 13. and 14. & seq.; Brussels, art. 249. and 252.; Bergen-op-Zoom, art. 18, 19, & 20.

(3) L. pen. § 1. Cod. de collat. l. 17. Cod. eod. l. 1. & tot. tit. Ff. de collat. dot. l. 6. l. 12. l. 19. cod. de collat. See Wurmser, Pract. tit. 42. obs. 2. num. 8. Andr. Gail. lib. 2. obs. 91. num. 5, 6.

by succession, unless the testator has expressly forbidden it (1); or unless any person is nominated an heir, who by succession cannot be an heir, and consequently the right of contribution cannot take place (2). The same also obtains in ascending or collateral relations (3). The right of contribution, on account of equality and amity between the children, is also still in force; and as it nearly agrees with the Roman law, it is not necessary to enter minutely into it in this place. We shall therefore treat only of such parts, as the different sentiments of the doctors on some occasions have rendered uncertain. Among these it is particularly questioned, whether besides giving up the dowry, inheritance, or otherwise that they have received, children are also bound to contribute the profits which they have made upon them. It is understood that they are *not* bound to do it, except only from the time that they were in default to make such contribution immediately after the death of the deceased (4); and it is daily observed with regard to separation and division. (5)

Whether it takes place in the Division of an Estate, against the surviving Father or Mother, of a Dowry received by them.

§ 2. But whether contribution of a dowry, gift, or otherwise, which the children have received, is also subject to the division and separation between the surviving father or mother, and the children, is doubtful; because, by virtue of the community of property between man and wife, the dowry of the children is concerned as well with the mother as with the father (6); whence it follows, that whatever the children have received in marriage with respect to the survivor, who is the joint contributor for the half in the same, they shall not be obliged to give it back. It is expressly declared in the political ordinance of the year 1580, (art. 29.) that such contribution is not only to go to the benefit of the children, but also to the benefit of the surviving father and mother, which also agrees with the statutes of Zealand. (7)

How far Grandchildren are liable to make Contribution of Goods, which they or their Parents have received.

§ 3. We have said *of children or grandchildren*, by which is to be understood, not only whatever the grandchildren enjoy from the estate of their grandfather or grandmother, but also that which their parents have received, in so far as they were heirs of their parents; because they are in such case understood

(1) Novell. 18. § illud. quoque auth. ex testamento cod. de collat.
(2) Arg. l. 1. § 5. cod. de collat.
(3) Gloss. & DD. ad l. 1. Cod. de legitim. hered. Gomes. ad l. tauri. 29. num. 9. Böer. decis. 302. num. 3.
(4) Papon. lib. 21. tit. 7. de collation. arrest. 4. Carpzov. Defin. Forens. part. 2. constit. 30. defin. 19. & part. 3. constit. 11. defin. 14. Imbert. in Enchirid. Jur. Gall. verb. collationis exceptio.
(5) See Vinn. Tract. de Collation. cap. 12. in fin. & cap. 16. num. 10. Christin. vol. i. decis. 178. n. 1.
(6) Contra. l. ult. cod. de dot. promiss.
(7) Cap. 2. art. 22.

to have filled the place of their parents (1), particularly if they inherit jointly with their uncles. (2)

How far Children are liable to make Contribution of all such Gains accrued to them, while under the Care of their Parents.

§ 4. If children make any gain by means of their labour, while under the care of their parents, the same belongs to the parents in full property (3). But if they shall be obliged to bring in to the common estate after their parent's death, any gain made and retained by themselves, or some particular thing which they may have enjoyed from their parents more than the other children, it must be considered to be a hard case; particularly as it is deemed just and proper that the children who by their labour and gain have enriched the estate, shall on its division, receive from it previously some gratuity, or as much as according to the opinion of good people may be allotted to them, as we have already observed in Book II. ch. 7. § 7. p. 125, supra.

Whether a Gift is to be contributed in Holland.

§ 5. It is strongly disputed whether a single gift given by the parents to their children is to be contributed again (4). But it seems, that it need not be restored, unless it has been given erroneously by the father to the son; but not if he has granted the same as a jointure, or for any other purpose. (5)

In Zealand, France, and Brabant.

§ 6. But in Zealand, such gifts must be contributed again (6); and the same is also practised in France (7); and it was decided likewise in the high court of Brabant, according to Christin. (8)

From all which it plainly appears that the children cannot be charged with the expences defrayed for any repast or wedding; because such expences were not made on account of the child, but on account of the guests; and consequently no money or the value thereof was paid to the children. (9)

Whether a Present to a Godchild is to be contributed at a general Division.

§ 7. It was also decreed by the high court, that a present given to a godchild must be excluded from a division, because it has no concern whatever with the parents, but was only given

(1) § 6. Instit. de hered. quæ ab. intestat. defer.

(2) L. 56. § ult. Ff. ad leg. falcid l. 29. Cod. de inoff. testam. See Merlin. de legitim. lib. 2. tit. 2. quest. 13. Anton. Fab. ad Cod. lib. 2. tit. 3. defin. 17. Petr. Heig. part. 1. quest. 24. num. 37, 38. Tessur. decis. 237.

(3) § 1. instit. per. quas person. Arg. l. 5. § 7. de agnosc. lib. ut supra diximus.

(4) See Fachin. lib. 5. cap. 80. Faber, ad Cod. lib. 6. tit. 4. defin. 4. Broukh. cent. 3. assert. 68. Gudelin. de Jure Novis. lib. 2. cap. 19. Cujac. lib. 9. observ. 171. Christin. vol. 1. decis. 178. num. 11.

(5) Arg. l. pen. § 1. Cod. de Collat. Bald. in auth. ex testam. Cod. num. 2. Vasq. lib. 2. de Success. resol. § 19. num. 35. Socin. junior, lib. 1. cons. 54. num. 5. Philipp. Decius, ad d. l. pen. Jacob. Menoch in add. ibid.

(6) Keur. van Zealand, art. 22. Everhard. cons. 183. num. 10.

(7) Chassan. ad consuetud. Burg. tit. de Success. rubr. 7. § 5. num. 41. & seq. Molin. ad dec. in auth. ex testam. Cod. de Collat. & cons. 59. num. 4.

(8) Vol. i. decis. 178. num. 11.

(9) In l. 1. in verbis quum etiam. Cod. de Negot. l. 1. § 16. Ff. de Collat. l. 5. § 6. Ff. famil. ercisc. l. 21. § 1. Ff. ad municipal. Neerl. Consult. 2. d. cons. 69. Supl. de coll.

to the children, and did not proceed out of their parents' estate (1). But in the case of Klaas Hals and his creditor, before the court of Holland, at Delft, in the year 1603, and according to the same case, it was afterwards decreed, that such presents appertain to the parents, and consequently must go to the creditors; probably, because the Emperor Charles V., by edict of the 7th October 1531, prohibited any one from insisting upon godfathers having any presents or profits on the occasion of baptizing their children, and at the same time further prohibited godfathers from giving any thing, on pain of forfeiting such presents, and double value of them, excepting to needy persons, to whom, for mercy's sake, presents may be given. But as the same ordinance was only proclaimed to restrain luxury and splendour, as appears from the subsequent placaat of the 30th January 1545 (wherein it was again allowed that presents may be given, but only to the amount of three Carolus gilders, and no more, on pain of being condemned to pay four times the value of them; and which order was also not enforced, but became entirely in disuse); therefore it may be understood, that presents to a godchild, at least of a trifling value, appertain to the children, and not to the parents, and consequently are not subject to any division, but they may retain the same as a token of remembrance.

Expences of Education, whether and when they are to be contributed.

§ 8. In the same manner it is questioned whether the expences incurred by a father for the education of his son at school, or defrayed otherwise, are to be contributed; and it is likewise understood, that the same need not to be repaid (2), unless it can be made to appear, that the father had expressly desired it. (3)

Whether and when the Purchase Money of a Place or Office is to be contributed.

§ 9. But with respect to the expences incurred by a father in procuring or purchasing a situation for his son, a distinction must be made: if it is a respectable situation, but still incumbered with certain difficulties and burthens which must be borne by the son while executing his office, and from which no profit would arise to his heirs after his death, in such case whatever has been expended for the purpose of obtaining such a situation, need not to be restored or contributed. (4)

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(1) Arg. l. 17. Cod. de collat. honor.

(2) L. 50. Ff. famil. erciscund. l. 1. § 16. Ff. de collat.

(3) Arg. l. ult. Cod. de dotis promiss. Carpzov. def. Forens. part. 3. const. 11. def. 17. 19. 20. Gomes. ad l. taur. 29. n. 16, 17. Imbert. Enchirid. Juris. Gall. verb. impensæ in studiis. Christin. ad leges Mechlin. tit. 16. art. 4. n. 5. Vian. de Collat. c. 13.

(4) d. l. 1. § 16. Ff. de collat. & ibi Gloss. & Barthol. Cujac. 3. observ. 30. Facit. l. 20. § 6. Ff. famil. erciscund. l. 39. § eod. l. 21. § 1. Ff. ad. municip.

We do not also include upon good grounds the expences incurred by a father in promoting his son *ad gradum Doctoratûs* or *Licentiatûs*. But if any situation or employment has been obtained, which produces a certain profit, or an annual income, it would then undoubtedly be observed, that whatever was diminished from the estate in procuring the same, ought to be contributed by the son before any division takes place (1); particularly if it was such a situation (as there are many in our country) which can be sold, and may be transferred to another after the death of the possessor, on paying a certain sum by the successor to the widow or heirs of the deceased, as an acknowledgement. (2)

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(1) L. pen. in pr. de collat. Cod. de inoffic. testam. l. 7. & 11. de prox. Sacr. Scrin.
(2) L. ult. Cod. de pignor. l. 30. § 2.

COMMENTARIES

ON THE

DUTCH-ROMAN LAW.

BOOK IV.

CHAP. I.

Of Obligation in general, and its several Divisions.

[Grot. 3. 1.]

§ 1. *Of an Engagement producing a Liability to Action.*
2. *Whence it arises, and of how many Sorts.*
3. *A Promise defined, and how it exists.*
4. *Wherein a Promise consists.*
5. *A Promise without a Cause is inconsistent.*
6. *A reasonable Cause in Transactions, how to be understood.*
7. *Obligation arising from Agreement, of how many Sorts.*
8. *A tacit Obligation through Construction of the Law, how effected.*
9. *An Obligation from unequal Causes, how effected.*

§ 1. HAVING treated of persons and their several distinctions, and also of things and their several sorts or divisions, as well as of the law respecting property, we now come to treat of the right which any one has against any person to enjoy from him any benefit or deed (1); which is commonly denominated an *action*, or *obligation*. Of an Engagement producing a Liability to Action.

An engagement producing a liability to action arises from promise or unequal causes. An obligation through promise is effected either by express agreement, or tacitly through construction of the law, similar to agreement.

(1) L. 3. Ff. de obligat. & action. pr. Instit. eod.

Whence it arises, and of how many Sorts.

§ 2. An *express obligation* is contracted through an agreement, by which, from civil intercourse, one person promises to another any thing similar to what has been given or done to him, with the design that the other should accept of it and thereby obtain a right against him.

A Promise defined, and how it exists.

§ 3. A *promise* is what one offers to do for, or to give to another, without its being exacted from him, and without being under any obligation; which, if made in earnest and accepted, binds the promiser to fulfil it according to the common proverb; "a promise makes a debt." (1)

I say, *if it be in earnest and is accepted*; because a promise made in jest, and which was neither preceded by any application nor followed by acceptance, gives to another no right of obligation. (2)

Wherein a Promise consists.

§ 4. But a promise is what any one, from a *reasonable cause*, that is, as we said above, similar to what was given to or done for him, makes to another on his application, and acknowledges to owe him in return. (3)

A Promise without a Cause is inconsistent.

§ 5. For, otherwise, a mere promise without a certain cause, gives no one any right to acquire thence an action against the promiser. (4)

A reasonable Cause, in Transactions, how to be understood.

§ 6. I say, *a reasonable cause*; which is to be understood of a cause which in its sort is good and permitted; such as a loan, purchase, hire, and the like. And it need not always be narrowly proportioned, because the least circumstance makes a thing of greater or smaller, and of less or more importance (5), and renders the same dependent upon the efficacy of the transaction, the intercourse of people, gain, and profit; so that from the nature of the transaction the one is liable to be misled by the other with respect to the right value of the goods, if such misleading be not too great. (6)

Obligations arising from Agreements, of how many Sorts.

§ 7. Obligations arising from agreement are of three sorts; and consist of a transaction which occurs through an act, through a writing, or through an arbitrary agreement.

A tacit Obligation through Construction of Law, how effected.

§ 8. A tacit obligation is effected through construction of law; whereby any one, through an act, binds himself to another in the same way as if he had made an agreement with him. (7)

(1) l. 1. l. 7. § 7. Ff. de Pact. l. pen. Cod. eod.

(2) l. 7. § 4. Ff. de pact. l. 19. Ff. de ædilit. edict. l. 5. Cod. de contrab. & commit. stipulat.

(3) l. 5. § 1. Ff. de verb. obligat. pr. & § 1. Instit. de verb. obligat.

(4) l. 25. § ult. Ff. de probat. l. 13. Cod. non num. pecun. l. ult. Cod. de condict. ex pact.

(5) l. 52. § 2. vers. Respondi. Ff. ad. L. aquil.

(6) l. 16. § 4. Ff. de Minorib. l. 22. Ff. locat. l. 8. Cod. de rescind. vendit.

(7) Pr. Inst. de oblig. quæ ex quasi contract

§ 9. An obligation from unequal causes is effected, on account of benefit derived, or on account of another's loss caused through offence, or something similar to offence; for, on account of benefit derived, one is obliged to indemnify what one would not owe through transaction; and on account of loss caused to another wilfully, one is obliged to make an indemnification, although one had not derived benefit therefrom. (1)

An Obligation, from unequal Causes, how effected.

These different sorts of obligation in particular will be separately treated under their proper heads.

CHAP. II.

By whom, and through whom, Obligation is effected; and of what Matters.

[Grot. 2. 6.]

§ 1. *Nature of an Obligation through Agreement, and how many sorts there are.*
2. *Who may bind themselves by Agreement, and who not.*
3. *Minors, whether and how far.*
4. *No third Person to be bound by Agreement.*
5. *The Clause,* or the Holder hereof, *in obligatory Letters, how to be understood, and how far it has effect.*
6. *In what case a third Person can be bound by Agreement.*
7. *Right of Obligation how to be obtained by any others than our Children or Servants.*
8. *Whether and how far Parents are bound for their Children's Offences.*
9. *How far an Owner is bound for the Master of his Ship, or a Merchant for his Factor or Manager.*
10. *Masters of Ships and Innkeepers, how far bound for their Servants.*
11. *How far a Father is bound for the Loan of Money to his minor Son.*
12. *What Sort of Matters may be transacted by Agreement, and what not.*

§ 1. AN obligation through agreement is a mutual transaction of two persons, by which they effectually bind reciprocally for the benefit of one or both. (2)

Nature of an Obligation through Agreement, and how many Sorts there are.

(1) L. 74. Ff. de reg. Jur. l. 155. Ff. eod.

(2) Pr. Inst. de obligat. l. 1. § 1. Ff. de pact. l. 19. Ff. de verb. signif.

I say, *for the benefit of one or both*; because one kind of obligations with respect to the persons who are bound thereby, is single, and binds only on one side; such is a single promise, in which one party is creditor and the other debtor: and the other kind of obligation is double, in which each party binds on his side (1), and consequently must do or give something mutually, such as in purchases and sales, hiring and letting, which constitutes both creditors and debtors.

An obligation is effected by and for one's self, or by and for another.

Who may bind themselves by Agreement, and who not.

§ 2. An obligation against one's self may be effected by every one who is not prevented by incapacity or other prohibition. All obligations must be effected by a free and full exercise of the will; so that it cannot be effected where the exercise of the understanding is prevented, as by mad and raging persons, and young children, who are not bound either by promise or by acceptance(2), and those who were born deaf and dumb (3). Further, likewise no one is bound by any thing which he does completely by mistake, or being misled (4); in so far that neither mad and raging persons, nor young children, whose understanding is weak, are considered bound through crime. (5)

Minors, whether and how far.

§ 3. The persons who are prohibited from binding themselves are those who are under curators, to whom, on account of their disposition for squandering and their dissolute life, the administration of their property is prohibited (6), and others beyond childish minority, who, without the knowledge and consent of their guardians, may not bind themselves (7); with this difference, however, that they by acceptance on the side of another may well acquire something, but they cannot bind themselves on behalf of another further than for so much as they are thereby really benefited (8), excepting through crime; for example, if any one being a minor defrauds his master's till or chest, it must be made good out of his property (9), whereby they are bound as well as others; although the punishment is sometimes mitigated on account of their youth. (10)

(1) L. 10. l. 108. Ff. de verb. signif.
(2) L. 2. § 3. Ff. de Jure codicill. l. 40. Ff. de reg. Jur. l. 5. Ff. eod. l. 1. § 12. Ff. de obligat. & act. § 10. Instit. de inutilib. stipulat.
(3) § 7. & 12. Instit. de inutilib. stip.
(4) l. 116. § fin. Ff. de reg. Jur. tit. Ff. & Cod. de dolo malo.
(5) d. § 10. Instit. de inutilib. stipul. 12. Ff. ad leg. corn. de Sicar.
(6) l. 1. in pr. Ff. de curat. furios. l. 10. in pr. Ff. eod.
(7) Pr. Instit. de author. tutor. l. 9. Ff. eod. l. 3. cod. de in integr. restit. minor.
(8) l. 5. l. 9. Ff. de auth. tutor. § 2. Instit. quib. alien. licet. See also Book I. ch. xvi. pp. 88. et seq. supra.
(9) See Neerl. Advys. 1. c. 39.
(10) § pen. Instit. de obligat. quæ ex delict. l. 17. § 1. Ff. de minorib. l. 111. Ff. de reg. jur.

No third Person to be bound by Agreement.

§ 4. In the description of an obligation it is said, *by which one person binds another*, because, by an obligation through agreement, a person can bind only himself and his heirs, and in nowise a third person; in respect to whom such agreement would be ineffectual. (1)

The Clause, *or the Holder hereof*, in obligatory Letters, how to be understood, and how far it has Effect.

§ 5. Nor does this make any alteration in what is mostly contained in our obligatory letters, especially among merchants, viz. "*which amount I promise to pay to N. or the holder hereof*;" by which we understand that the holder of the letter may be paid, not as an attorney or agent, but in his own right (2). For, in such case, the holder or bearer is reckoned as the principal, and the attorney of his affairs, *et tanquam procurator in rem suam*; who, on proving and declaring that he obtained it legally, can claim payment from the debtor without the opposition of any one, and can do with the said debt as he would do with his own (3). But it is to be remarked, that the doctors do not all agree in this point, viz. whether or not the holder is obliged to prove his true and lawful acquisition thereof; thus it is asserted by some, that his possession must be considered lawful so long as the illegality thereof is not pointed out; but on this subject the opinion of the majority is, that any person who claims any thing upon an obligatory letter which is not in his name, may not be heard, because the letter can be beneficial to no one but him whose name is expressed and mentioned therein (4); on which Baldus says, that he who is named therein can have no benefit therefrom, unless he acquired a proper right to it (5). Christinæus expressly says (6), that it would be unjust that a holder of the letter should be entitled to claim a right under it, unless it appears that the letter had come into his hands with the consent of the person concerned, whose name it contains; because such obligatory letter may be easily stolen or lost, and possession may be acquired of it, without the knowledge and against the will of the proprietor; and therefore Neostad (7) says, that upon the same grounds it was decreed by the Court of Holland, that the holder of a letter, having no

(1) L. 17. § 4. 1. Ff. de pact. l. 38. § 17. l. 126. § Chrysogonus. Ff. de verb. obligat. § 4. § 19. Instit. de inutilib. stipulat.

(2) Vide Damhouder, Prax. Civ. c. 97. & c. 133. Pecc. de Jure Sistend. c. 3. n. 7. Sande de Act. Cessione. c. 2. n. 17. Radelant, Cur. Traject. decis. 56.

(3) Arg. l. 1. Cod. de obligat. et act. Vide Neostad. decis. Cur. Holland. 10. Nicol. Everhard. cons. 2. 19. Grotius, 3. 5. 7.

(4) L. 21. Cod. de probat. & ibi DD.

(5) See Alexander in l. possideri n. 11. & seq. de acquir. poss. Scraccha in tract. de adjecto. part. 4. quæst. 8. & Dom. Nicol. Everhard. in consil. 219. Late tractant, & post eum, Christinæus, vol. i. decis. 286. & ad leges Mechlin. tit. 1. art. 48.

(6) Decis. 286. n. 7.

(7) Decis. 10.

transfer thereof, can have no right, nor claim any thing; and so it was determined by the High Court of Holland in April 1652, in the case of Johan van Leeuwen, alderman of the city of Leyden, as curator of the estate of Johan Wyngaard senior, against Catharina van Toornvliet, widow of Dirk Zegers van Kampen. In this case, a certain obligation of the said Jan Wyngaard, due by government, was pawned by another person, without his knowledge, to the said Dirk Zegersz van Kampen, and money was borrowed thereupon, (of which we shall treat more fully at its proper place); but the said obligation contained a better exception, namely the words, "*or the* LAWFUL *holder hereof*," in consequence of which such doubt may be prevented with more certainty.

As an agreement cannot be made for the benefit of a third person, so one can neither bind a third person through a transaction (1); but Vinnius (2) and Groenewegen (3) are of the contrary opinion, and maintain that it agrees best with our customs; so that, if I had agreed with another that a third person should give him, or do something for him, it will not in the least bind that third person; but it is understood that I would be obliged however to cause it to be effected, or, on failure thereof, to make satisfaction for so much as the other in consequence thereof would be in want, according to the declaration of good men, if or because it was not effected. (4)

In what case a Third Person can be bound by Agreement.

§ 6. What has been said in § 4, that no obligations in favor or prejudice of a third person can be effected by agreement, has these exceptions, viz. unless he is concerned in the matter, or unless he who transacts it was in our power, or unless he was authorized by us (5); such as are our children, who are in our power, or our servants, who act under our direction and authority, by whose acts we are effectually bound, and are obliged to answer for them; as, on the other hand, through them we obtain all actions and rights (6), excepting in obligations through crime; for no one need suffer for the crime of another, but every one must make amends for his own offence.

§ 7. Right of Obligation, how to be acquired by any others than our own Children or Servants.

Whether and how far Parents are liable for

§ 8. Therefore, in law, parents are not bound for crimes of their children, whether minors or of age, nor children for those

(1) § 4. & § 20. in fin. Instit. de inutil. stipulat.
(2) Ad § 4. instit. de inutil. obs. n. 3.
(3) Ad § 18. eod.
(4) DD. ad l. 38. Ff. de verb. obligat. Vide Vinnius ad § 3. inst. de inutilib. stipul. n. 1. Marant. disput. 7. Bronkhorst. cent. 4. assert. 40. Mantic. de ambig. Convent. lib. 14. tit. 34. n. 11. Faber Cod. lib. 8. tit. 26. def. 10. n. 4. 8. Tussch. practicabil. Concl. vol. iii. concl. 16.
(5) Arg. § 18. Instit. de inutilib. stip. l. 17. § fin. l. 18. Ff. de pact. tot. tit. Ff. et Cod. mandati.
(6) Tot. tit. Instit. quod. cum eo qui in alien. potestat. Vide Coren. observ. 23.

of their parents (1); but if children commit offences and are condemned to pay heavy fines, who have no property to satisfy the same, and if the parents do not voluntarily pay such fines, in that case the pecuniary fines will be commuted into corporal punishment; and they will either be subject to be whipped, or confined upon water and bread, or to such other punishment as, by inflicting corporal pain, can bridle them (2); and other people are not further bound for their servants on such occasions beyond the amount of their wages. (3) their Children's Offences.

The charters granted by the Empress Margaret to the people of Kennerland and Schieland in the year 1346, say, that a minor child may forfeit no more than his body, and ten pounds of his parents' property. And likewise the charters in Amsteland, Gayland, and those of Schoonhoven, import that no children boarding with their father and mother, may forfeit more from their parents' property than ten Dutch pounds; and likewise in the southern part of Holland, that the child of a man born in his father's country, who is of age and not provided for out of his house, may forfeit from the property of his father and mother ten pounds, and no more. Whence a contradiction arises, namely, how at the said places it was granted by way of favour, gift, or privilege, where, however, according to the common law, as before, the children may forfeit nothing whatsoever from the property of their parents. Others are of opinion, that the Counts had intended thereby to remove the doubt whether the legitimate portion of children can be forfeited on account of their offences; but since, in such cases, the crime would incumber the parents who committed no crime, and the legitimate portion does not devolve and become due until after the death of the parents (4), it is more probable that the Counts intended orphans, being *minors*, who are in the possession of their paternal property, and whose punishment, on account of their youth, is often remitted, or otherwise mitigated (5); undoubtedly the said charters can have no effect with regard to the parents, excepting when by any order or statute any peculiar fines are imposed upon the parents, if they do not keep their children so

(1) Exek. xviii. 4. 20. l. crimen. 26. Ff. de pœnis. Cost. Antwerp. tit. 36. n. 17.; Mechlin. tit. 9. art. 14.

(2) Per text. in l. 5. Ff. Cod. de in jus vocando. l. 1. § fin. Ff. de pœnis. l. 7. § 3. Ff. de juriedict. l. 6. in fin. de sepulc. violat. juxta vulgare ac tritum illud. *qui non habet in ære, luat in pelle.*

(3) L. 35. Ff. de noxal. act. l. 3. § 1. Ff. de peculio.

(4) Vide Schneid. ad tit. de obl. quæ quasi ex delict. § Si filius familias. n. 2. & Perez ad Cod. de proscript. n. 12.

(5) L. 2. Cod. si advers. delictum. junct. l. 37. Ff. minoribus. & l. 10. Ff. de pœnis.

as to prevent them from transgressing the statutes; and if such fine exceeded ten pounds of Holland, (which seldom occurs), and it being so, it will suffice for the parents at the aforesaid places to pay ten pounds, which amounts to ten gilders, each of twenty stivers, by virtue of their charters. The statute which binds the parents for the fines incurred by their children, is contained in the customs of Antwerp (1); and in the charters of Amsterdam the statute is, that the parents shall be obliged to pay for their children a fine of twelve stivers, if during the hour of exchange they play there or commit any riot. (2)

How far an Owner is bound for the Master of his Ship, or a Merchant for his Factor or Manager.

§ 9. A creditor who had transactions with any one to whom a ship was trusted by an owner, or who was placed by his master as factor or manager of any merchandize concerning the ship, or such merchandizes alone; such creditor antiently had the option, whether he would call upon the owner of the ship, or his substitute, the merchant, or his manager, for payment (3), and prosecute them at law; and if there were several owners or merchants, in that case each of them was bound for the whole. (4)

But this usage has not been adopted among us, it being prejudicial to trade; and one is obliged always to call upon the owners or the merchants themselves, and sue them at law (5); neither is it in use in Holland, (where trade is at present, and has for a long time since been prosperous); viz. that where there are many owners and partners, each shall be bound for the whole; but, on the contrary, it was introduced, that many joint owners of a ship together may not be called upon for payment further than for the value of the ship, and the amount of the property which she contains; and each is bound separately, and no further than for his respective share in the trade (6); and it is sufficient if they deliver and bring up what they have in common, in satisfaction of the decree for the whole: and so it was decreed by the high court in Holland. (7)

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(1) Tit. 36. n. 17.

(2) Vide Ordon. van. de Beurse (Ordonnance of the Exchange) art. 3. and also Recueil van Rosenboom, page 195.

(3) L. 1. § 17. Ff. de exercit. act. l. 6. § ult. Ff. Nautæ caupon. Stab. l. 5. § 11. Ff. de Institutor.

(4) L. 1. § fin. l. 2. l. 3. § 4. Ff. de exercitor. l. 12. § ult. & l. seq. de institutor. act.

(5) Vide Costal. ad L. ult. Ff. de institor. act. & ad d. l. 1. § 17. Ff. de exercitor. Christin. vol. iii. decis. 33. n. 9. Coren. observ. 28. n. 47. & seq.

(6) Vide Grotius de Jure Belli, lib. 2. c. 11. n. 13. Grotius, Inleyd. lib. 3. c. 1. n. 39.

(7) Vide Coren, observ. 40. vers. de gedaagdens. Christin. vol. i. decis. 165. n. 11. & decis. 108. n. 9. Gail. lib. 2. obs. 24. n. 9. Hector Felic. de Societat. c. 30. n. 32. Cons. & Adv. part. 2. cons. 235. & part. 3. cons. 321. Vide infra, ch. 39. § 7.

§ 10. All masters of ships and innkeepers, who receive a compensation for the use of their ships or lodgings, are bound to take care, and are responsible for whatever is brought in their ship or house; and they are (1) not only bound for their own acts, but also for those of their servants, and likewise for their passengers, and for all those who are in their ship (2); so far that the master of the ship or innkeeper must be responsible, especially for the goods which are received into their ship or inn, unless they were damaged or lost without their neglect (3). But with respect to the masters of our daily vessels, who carry wares to the market, on whose account great disputes arose, and who often denied that the goods on account of which such disputes arose, were delivered, or fully trusted to them; and which, on the other hand, were asserted by the good people bonâ fide to have been received on board the said vessels, or to have been delivered to their servants; which goods, however, were again proved not to have been received, or at least not well delivered, and which often caused great uncertainty to the judge; various excellent provisions were made concerning them at many places, to the following effect; viz. that an exact entry should be made of all packing goods, by a person appointed for that purpose, as well as of the date, the name of the master of the vessel, and of the persons to whom they were directed; to which entry full credit is to be given when ever any disputes arise about property.

Masters of Ships, and Innkeepers, how far bound for their Servants.

And further, the masters of ships and large vessels, as well as their servants, on behalf of the said masters (who are responsible for them), must every year give good security to a certain amount, for whatever may concern their service.

§ 11. But although a person is understood to bind himself effectually through those whom he has in his power, yet no person may lend money to a son who is under the power of his father, in order thereby to bind the father tacitly, or upon condition that it should be repaid with interest when the son should have attained his age, or become his own master; and such lender has no right to demand it again, either from the father or from the son (4); which law, according to circumstances, is still in force among us, with respect to those who are so far

How far a Father is bound for the Loan of Money to his minor Son.

(1) Vide Sande, 3. 6. 9. l. 27. § 9. Ff. ad leg. Aquil.

(2) L. 1. in pr. § fin. l. 2. naut. caupon. Stabular. Vide Pecc. ad d. l. 1, 2. & seq. Christin. ad Leges Mechlin. tit. 8. art. 15. n. 4.

(3) Vide Christin. ad tit. 8. art. 15. n. 11, 12. Pekkius ad rem nauticam, p. 22. & ibi Vinnius.

(4) Tot. tit. d. & Cod. ad. Senat. Maced. § pen. Instit. quod cum eo qui in aliena potestate.

under the power of their parents, and must be reckoned as minors. (1)

And so it was enacted in several cities; viz. at Haarlem, that no one may credit or lend any young persons who are under twenty-five years of age, any sum exceeding ten stivers at one time, on pain that no justice shall be done upon whatever has been credited or lent exceeding that amount; and also at several other places. And it was likewise enacted at Utrecht, on the 18th February 1657, that no one may sell liquors to children *under* fourteen years of age, although they can pay for them, exceeding one bottle of beer to allay their thirst; and likewise that no superintendents of tennis-courts should admit boys under fourteen years of age to play at tennis, upon pain of forfeiting twenty-five gilders. And with respect to other minors *above* fourteen years of age, it was enacted, that no innkeepers, sellers of liquor, or superintendents of tennis-courts, may sell any liquor to them upon credit, on pain that no justice shall be done thereupon; the further preceding publication (made against young people contracting unnecessary debts without the consent and in spite of their parents and near relations) remaining in force. But the said prerogative does not avail when a father allows his son to carry on his own trade, or otherwise makes him his own master. (2)

What Sort of Matters may be transacted by Agreement, and what not.

§ 12. The matters which may be transacted by agreement, are as follow; viz. all matters, the transaction of which is not prohibited, as well promises to do a thing, or to cause it to be done, as to deliver something immediately consisting of articles. It is not, however, sufficient that a defaulter pays the deficiency for promises to do a thing, or to cause it to be done, to any one who suffers in consequence of its not having been effected (3); but such defaulter may be compelled by imprisonment to perform what he has promised (4); excepting in matters in which a person has not or cannot have any right (5), or in such as proceed from shameful or dishonest causes (6), or which militate against the common cause or the general right (7); wherein are

(1) Vide Tulden. ad tit. quod cum eo qui in aliena potestat. cap. ult.

(2) L. 1. § 1. l. 3. ult. Ff. ad Senatus Consult. Macedon. Vide Sande, lib. 3. tit. 2. defin. 2.

(3) Secundum l. 14. 72. 84. & l. 112. junct. § uit. de verb. obligat.

(4) L. 11. § ult. Ff. de legat. 3. l. 21. § 4. Ff. de novi op. nunciat. Vide Instruction of the High Court, art. 275.; ampliation of the High Court of Holland, art. 14; Ordonnance van de Regts verd in de Steden (ordonnance concerning jurisprudence in the Cities) art. 31, 32.; Cost. Antwerp. c. 68. art. 42. 43. Christin. vol. i. decis. 223. n. 8.

(5) § 1. 2. Instit. de inutilib. stipulat.

(6) § 24. Instit. l. 27. § 4. Ff. de pact.

(7) L. 28. § 7. in pr. l. 38. Ff. de pact.

included transactions of future inheritances from people still in existence. (1)

Further, no justice is done among us in cases of gaming debts, and whatever has been promised in consideration thereof (2); neither upon wagers depending on mere accidents, and not reciprocally beneficial. (3)

CHAP. III.

In what manner Promises are made, and of their Effect.

§ 1. *Promises, how made among us.*
2. *How many Sorts of Promises there are.*
3. *Of the Effect of a simple Promise.*
§ 4. *A Promise to be fulfilled on a certain Day, how it binds.*
5. *Nature and Effect of a conditional Promise.*

§ 1. PROMISES and engagements are made among us in different ways, by which the condition may appear, and in different words, which may effectually bind; for nothing is so proper to men as to fulfil what has been bespoken reciprocally, and nothing is so difficult as to oppose one's promises (4). Our ancestors antiently considered no matter of such importance as that of keeping one's promise, and the fulfilling what has been promised once. In this respect they were always considered as an example to other nations, as a people whose words might be trusted (5). A promise made by a father to his children, that he will neither sell nor make a present of his property to any one, will not prevent him from disposing freely by last will. (6)

Promises, how made among us.

§ 2. Every stipulation or promise is made to be performed, either *simply*, or at a *day certain*, or *conditionally*. (7)

How many Sorts of Promises there are.

(1) L. 19. l. ult. Cod. de pact. l. 61. Ff. de verb. oblig. Vide infra, ch. xxiv. §11. Sande, lib. 4. c. 5. n. 19.

(2) L. 5. de condict. ob turp. caus. junct. l. 1. Cod. de aleatorib. Cost. Antwerp. tit. 54. art. 17. & seq. Keuren van Leyden, art. 44. Neostad. Cur. Holl. decis. 58. Grotius, Inleyd, lib. 3. c. 3. vers. Gelyke twyfeling.

(3) Vide Grotius, Inleyd. lib. 3. c. 3. vers. alhier ontstaat. and Groenew thereon, & de legib. abrogat. ad l. 108. Ff. de verb. obligat. See this subject treated more at large infra, book iv. ch. xiv. § 5.

(4) L. 1. Ff. de pact. l. 1. Ff. de constit. pecun.

(5) Tacit. Annal. lib. 13. Cluver. antiq. Germ. lib. 1. c. 19. vers. Universæ. Grot. Inleyd. lib. 3. c. 1.

(6) See Everardi Cons. 6.

(7) § 2. Instit. de verb. obligat.

Of the Effect of a Simple Promise.

§ 3. The effect of a promise made to be performed *simply*, is, that acquires its commencement immediately, and the acceptor thereby acquires without delay a right and an action (1), according to the rule, that "where no time is stipulated, it may be claimed immediately;" unless the fulfilling of the matter itself requires some time, such as the delivery of immoveable property, or the promise of fulfilling something at another place, which includes so much time as is requisite to comply therewith properly. (2)

A Promise to be fulfilled on a certain Day, how it binds.

§ 4. Promises to be performed at a *day certain*, are to be judged differently; viz. In promises to be fulfilled at a certain time or day, which *is* certain, the right and action thereto also commence immediately, and are transmitted to the acceptor's heirs; but such performance cannot be claimed before the time is actually expired, or before the day appointed actually arrived (3); and it is understood, that the day which is named in the promise is included, and must be terminated before the debt becomes due or may be claimed (4). But if it was uncertain whether and when the day would come, it will amount to a condition, and the promise will not be considered as confirmed before the day actually comes. (5)

Nature and Effect of a conditional Promise.

§ 5. In like manner the condition, under which the promise was made, must be fulfilled, if it be honest and possible, before that promise acquires its force; if it consisted only in a hope, or if it may occur. But if the proviso or condition was dishonest or impossible, no right may or can be constituted thereupon. The condition may also be, that one will not do a certain thing, or that a certain thing will not occur; which, in order that it may not be endless, depends mostly on a certain person or on a certain time; such as, if he does not go to the East Indies, or if this or that event does not occur within such a time; in which case the expiration of that time must be waited for, and in the lifetime of the person, whose neglecting to do something which is placed under a condition, does not make the promise due, because, so long as he lives, it is uncertain whether it will become due (6). But if the neglecting of it was put in the power and will of the promiser, he may, upon giving

(1) Ibid. & l 14. Ff. de reg. jur. l. 56. § 4. Ff. de verb. obligat.
(2) § fin. instit. de inutil. stipulat. l. 73. Ff. de verb. oblig. l. 105. Ff. de solut. l. 21. § 1. de constit. pecun.
(3) L. 213. de verb. signif.
(4) § 2. Instit. de verb. obligat. junct. § ult. Instit. de inutilib. stipulat. l. 42. Ff. de verb. obligat.
(5) L. 17. § 2. l. 72. § 7. Ff. de condit. & demonstrat.
(6) § 4. Instit. de verb. obligat. l. 27. & l. 115. Ff. de verb. obligat.

security that he will not do it, demand the debt in the mean time, and may enjoy what was promised. (1)

A promise, by which any one promises, *if*, or *so much as he shall desire*, is void, because no action can be instituted against any person who is not bound further than he chuses. (2)

Promises are, otherwise, taken very narrowly and literally, provided that they do not in the least incumber the promiser, and no extension thereof is suffered against him further than is clearly expressed therein; but the words are always construed in prejudice of the contractor, in whose power it was to express the agreement more clearly. (3)

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(1) L. 7. Ff de condit. & demonstrat. l. 40. in fin. Ff. eod. l. 2. Cod. de his quæ et ab modo.

(2) L. 8. Ff. de oblig. & act. l. 17. Ff. de verb. oblig. l. 108. § 1. Ff. eod.

(3) L. 38. § 18. l. 99. Ff. de verb. oblig. l. 39. Ff. de pact.

CHAP. IV.

Of Joint Debt and Security.

[Grot. 3. 3.]

§ 1. *Binding one's self together with another, of what Effect, and how far it is applicable; and when a Person is bound for the whole, or for his Share.*
2. *Security or Surety defined; and who may be Sureties, or not.*
3. *For what Sort of debts Security may be given.*
4. *Whether any one remaining Security for more than, or something else besides what the debtor owes, is under obligation.*
5. *Suretyship must take place clearly, with full Knowledge, and premeditated Design.*
6. *No one may become Security for a Crime subject to corporal Punishment.*
7. *What Privileges are allowed to Sureties.*
8. *When they are to cease, and may not be used.*
9. *When this is understood to be the case through Renunciation of such Privileges.*
§ 10. *Whether a Creditor by suing the Debtor releases the Security.*
11. *Whether a Security may be called upon, before Execution against the Debtor.*
12. *Renunciation of the said Privileges how to be effected.*
13. *What Privileges a Security has, to obtain Indemnification against the Debtor and Joint Security.*
14. *Cession of Action, or Transfer of Claim, whether, when, and against whom necessary.*
15. *Before or after Payment.*
16. *When and through what Means Suretyship terminates or becomes void.*
17. *Whether and when a Security may demand to be released from his Suretyship before Payment.*
18. *Whether and when the Security is released through Prolongation of the Time of Payment.*

NO one (as we have already seen) can promise any thing that shall bind another effectually (1); but a person may make a promise which shall bind himself, together with another, and for another. (2)

Binding one's self together with another,

§ 1. When several persons have bound themselves together as debtors, it will be sufficient if each of them pays his share,

(1) § 2. Instit. de inutil. stipul.

(2) Tot. tit. Ff. de duob. reis. & de fidei jussor.

which speaks only of security (Novell. 99. c. 1. junct.); but, according to the common opinion and usual practice, it may likewise be extended to two or more debtors (1), unless each of them had bound himself severally and for the whole (2), or had clearly renounced the *beneficium divisionis*, that is, the privilege of dividing the debt (3), (as mostly occurs amongst us); and likewise if the other joint debtors were evidently unable, or abroad (4). Which is to be understood of two or more who bound themselves together as debtors, each for the whole and the one for the other, but not of those who merely bound themselves together for one thing, which often takes place among us. (5)

of what Effect, and how far it is applicable, and when a Person is bound for the Whole, or for his Share.

And so, if any one had bound himself like the debtor under renunciation of the *beneficium ordinis et excussionis*, that is, of previous execution against the debtor, he may be called upon before execution is taken out against the debtor himself (6). But when the execution is carried into effect, he may point out property of the debtor, if there be any.

§ 2. It frequently happens that others bind themselves for him who promises; and the persons who thus bind themselves are called *securities* or *sureties*; and are generally required by creditors for their greater security. (7)

Security or Surety defined;

All persons may be sureties, who may with effect bind themselves for any thing, excepting women; who need not adhere to such engagement, in consequence of a special privilege granted to them, which is denominated the benefit of the *senatus consultum vellejanum*, by which it was first established (8), and in which they are likewise reckoned to be comprehended when they bind themselves as debtors for another, or take for their own the debt of another (9); unless they renounce the same (10); and especially not for the loans of money made to their husbands, which was likewise granted to them as a special privilege, and is denominated the *beneficium auth. si qua mulier* (11), unless they

and who may be Sureties, or not.

(1) Per Auth. hæc ita Cod. de duob. reis junct. l. 11. Ff. eod. Vide Neostad. suprem. cur. decis. 97. Christin. vol. iv. decis. 178. n. 13 & 14. & vol. 5. decis. 213. n. 8. & seq. Gudelin. de Jure Noviss. lib. 3. c. 11. vers. de duob. Gail. lib. 2. obs. 28. n. 5. in fin.

(2) See Grotius, Inleyd. lib. 3. c. 3. n. 54. Cost. Antwerp. tit. 63. artic. 2. Handvest. van Zuid Holland, p. 409. Novell. 69. c. 1. & ibi DD.

(3) Arg. l. 1. Ff. de serv. export.

(4) Auth. præsentit. Cod. de fide jussor. Auth. hoc ita. Cod. de duob. reis.

(5) Gloss. in dict. auth. hoc. ita Sichard. ibid. n. 4. in fin. & seq.

(6) See Cost. Antwerp. tit. 63. art. 1. Christ. ad Consuetud. Mechlin. tit. 7. art. 15. Fach. lib. 8. c. 54. Gail. lib. 2. obs. 28. n. 2. 6.

(7) Pr. Inst. de fide jussor.

(8) L. ult. § 1, 2. Ff. ad S. C. Vellejan.

(9) L. 1. in fin. pr. Ff. l. 4. & l. 14. Cod. ad senat. Vell.

(10) L. pen. Ff. de pact.

(11) Cod. ad St. Vellejan.

have likewise specially renounced the same. But since, among us, a woman is also effectually obliged and bound by and for the debt of her husband, although she did not specially bind herself for it, (as we have shown in another place) it has at present no effect, except when such engagement has been prohibited to the husband by ante-nuptial contract, of which we have also treated more extensively at its place.

And it is to be observed, that such renunciation must be made expressly in a public or legal writing; and it must further appear therein, that they are well informed of their privilege, and of the effects thereof (1); otherwise, a mere renunciation would not be sufficient (2). And it is to be further observed, that under the renunciation of the privilege of the *senatus consultum vellejanum*, the other privilege of *authent. si quæ mulier* is not included; but each must be effected separately and with distinction. (3)

For what Sort of Debts Security may be given.

§ 3. Security may be given for all debts whatsoever (4), with the exception of crimes subject to corporal punishment (of which we shall treat hereafter); and likewise for the debt of a minor (5), and for the debt of a woman, or of others, who may avail themselves of any privilege against the said debt, it being sufficient for this purpose, that they themselves really and *bonâ fide* owe the same (6). But, for a debt which may not be demanded, and is void of itself, or for any one who is in no wise indebted or bound, the security will likewise not be bound, because a security is not bound for more or otherwise than the debtor. (7)

Whether any one remaining Security for more than, or for something else besides what the Debtor owes, is under Obligation.

§ 4. Therefore a security being asked to be security for money, answering for wheat, will not be bound, on account of the misunderstanding of the case.

Upon the question whether a security having been taken for more or for something else than the debtor owes, would also be bound for as much as the debt amounts to; for instance, when any one becomes security for twenty, and the debt amounts but to ten; it was finally understood that he would be so

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(1) But Groeneweg. (ad l. antiquæ Cod. ad S. C. Vell.) is of opinion, that this solemnity is not necessary if it appears from their handwriting, or in any other way, that they, being informed of this prerogative, renounce it.

(2) L. antiquæ 23. Cod. ad Senatus Consult. Vellejan. Sande, lib. 3. tit. 11. def. 2.

(3) See Sande, d. lib. 3. tit. 11. def. 4. And. Gail. lib. 2. obs. 77. Joan. Zanger. de except. part. 3. c. 11. n. 204. Berlich. Conclus. part. 2. conclus. 21. n. 20. Anton Teasaur. decis. 222.

(4) § 1. Instit. de fidejussor. l. 8. l. 12. § 1. l. 16. § 3. de fidejussor.

(5) L. 127. Ff. de verb. oblig.

(6) See Herbaj. rer. quotidian. c. 13. § 21. Carpzov. definit. forens. part 2. constit. 15. def. 7.

(7) L. 8. § 7. Ff. de fidejuss. junct. l. 46. Ff. eod. § 5. instit eod.

bound (1). But since, among us, a mere promise binds fully, it must also thence follow, that he who became security in the case above stated for *twenty*, would not only be bound for the *ten*, but also that the creditor, by virtue of the said promise, may give his debtor ten more upon the said security. (2)

Suretyship must take place clearly, with full Knowledge, and premeditated Design.

§ 5. But it is to be observed (as we said above, concerning other promises), that such bail must be effected with full knowledge and premeditated will; otherwise, if any one says, "that man is a sufficient man, your debt will be paid to you, if it amounts to as much again;" or by such manner of speaking, strengthens another's belief, it may not in law exist as bail (3). But Neostad (4) relates, that at Antwerp there is a custom among merchants, that he who strengthens another's credit especially, is thereby understood to remain a security, and must be answerable for him.

No one may become Security for a Crime subject to corporal Punishment.

§ 6. According to practice, no one may become security for another, who is imprisoned for some crime, subject to corporal punishment, although it was allowed to the people of Kenmerland, by several charters (5); and formerly, in Holland, such bail had crept in (6). For, a certain person having promised, upon forfeiture of life and property, to bring back his son to prison, and the son having afterwards made his escape, he was obliged himself to go to prison, and was declared to have forfeited both life and property. But as he said that he made such promise from natural love and affection, he prayed for remission, and was released upon paying to government one thousand Dutch schilden (or shields) for the engagement of life and property.

By a charter of Albert Duke of Bavaria, it was granted to the people of Amsterdam, in the year 1387, "that for any crimes or acts which may be committed by a citizen of Amsterdam, no officers may imprison, apprehend, vex, or molest the

(1) Arg. l. 11. § 1. de constit. pecun. & l. 33. Ff. Mandat. See Fachin. lib. 8. contr. c. 51. Wesemb. parat. Ff. de fide juss. n. 5. Bronchorst. cent. 4. assert. 53. Gomez. resolut. tom. 2. ch. 13. n. 2. vasq. contr. lib. 1. ch. 40. n. 5. Vinn. ad § 5. inst. de fidejussorib.

(2) See Couvarr. ad cap. quamvis de pactis in 6.

(3) L. 2. § 6. Ff. Mandati. § 6. Instit. eod. See Christin. vol. i. decis. 110. l. 2. Ff. de proxenet. l. ult. Cod. quod cum eo qui in alien. potestat. l. 12. § 12. Ff. mandati. l. 7. § ult. cum legib. seq. Ff. de dolo. Costal. ibid. Christin. vol. 1. decis. 111. & vol. iii. decis. 34. n. 6. Pyr. Maur. de fidejuss. part. 2. sect. 3. c. 4. Chassan. ad Cons. Burgund. rub. 5. § 2. vers. Son principal oblige. Cons. & Adv. part 1. cons. 242 & 277.

(4) Decis. suprem. cur. 5.

(5) Handvest (*Charters*) in Kenmerland, pp. 24. 42. 89.

(6) Vide Rysten van de Rekenkamer, (*Index of the Account Chamber*) A. 1. D. 1. fol. 34, 35. vers. item. A. 2. fol. 34. verso & D. 2.

life or property of a citizen of Amsterdam, so far as he can give sufficient security, according to the discretion of the aldermen, that he will stand to and abide the law upon any demand which such officers may make against him, with the exception of cases of murder, arson, rape, and robbery; and if a citizen opposes the government with arms, or commits an offence within the ditch of Reygersbroek, at the old Amstel, and against the rabbits in Goyland." Which privileges, although they are expressed generally, are nevertheless not to be understood otherwise than as alluding only to petty offences, that are not subject to corporal punishment, and of which the judgment is at the discretion of the judge; because, if any one binds himself to deliver up an offender, he makes himself liable to suffer for the offence of such offender, if he does not appear; and on failure of his appearance, it will be as difficult to find him, as to find the offender himself, and offences consequently would go with impunity (1); and so likewise, from the exceptions of the privileges granted to Amsterdam, it sufficiently appears; and experience also teaches us, that they are even not allowed but in matters subject only to pecuniary fines, concerning which it is judged, that the bailiff is not entitled to any thing further; in which case, among us, the prisoners on giving security to a certain amount (if it may be so understood), are released from prison according to circumstances, pursuant to the customs of Utrecht (2); viz. that in all crimes subject to the punishment of life and limbs, and to be publicly exposed upon the scaffold, whipping, or the like, the prisoner is not to be released upon bail; unless the officer had made a *civil conclusion*, and the judge is of opinion that it ought to be so. And the edict of King Philip, of the year 1570, (art. 52.) which in criminal cases is still followed and observed among us, contains the following words: "if the crime be not too heavy, the prisoners shall be released on condition of appearing again upon bail, *fidejussoor* or *juratoir*, according to the circumstances of the person and crime."

What Sort of Privileges are allowed to Sureties.

§ 7. A person who is surety for another, has the following privileges; viz.

I. He may not be called upon before execution has been carried into effect against the debtor.

II. If several persons have become security with him, he has a right to divide the debt, and it shall suffice if he pay his

(1) L. 51. in fin. Ff. ad leg. aquil. (2) Rubr. 36. art. 1.

share (1). This is called the *beneficium ordinis et excussionis*, and the *beneficium divisionis*.

III. All real and effectual exceptions and defences which the debtor may make (2), will likewise in general (3) avail the security, except in the defence which concerns his person only. (4)

IV. A person who has given security for a debt upon a mortgage, may not be called upon before execution has been carried into effect against the mortgage (5). Such was the general law antiently in these countries, although the mortgage had come into a third hand; and therefore it was renewed by several proclamations of King Philip, on the 21st February 1564, the 16th January 1574, and the 24th of March 1584; as was proved by a great number of witnesses at Amsterdam. (6)

V. A surety paying for the debtor, may desire from the creditor a transfer of all the right and claim, which he had against the debtor or the other joint security. (7)

A person who has given security under renunciation, being condemned and threatened with execution, may point out property of the principal debtor found under the same judge, with this effect, namely, that in case the *gainer* (8) cannot get payment from those goods, that the security then must satisfy him. (9)

§ 8. The privileges of execution against the principal debtor, and division of debt amongst several sureties, cease in the following cases; viz. When they are to cease, and may not be used.

I. If the debtor or joint surety is abroad, or evidently unable. (10)

II. If any one has become security for or together with another security, who was not personally bound, viz. for or together with a woman or a minor. (11)

III. When the said privilege has been premeditately renounced, as mostly occurs among us. (12)

(1) § 4. Instit. de fidejussorib. l. 26. Ff. eod.

(2) L. 7. § 1. Ff. de except. l. 1. Cod. eod. l. 32. l. 46. Ff. de fidejussorib. l. 2. Cod. quæ res pign. oblig. non possit.

(3) That it does not avail *always*, see l. 32. Ff. de pact. & Bruneman thereon.

(4) D. l. 7. in pr. Ff. de except. See also Valent. Franc. tract. de fidejussoribus c. 3. n. 24. & n. 98. & seq. See also l. 21. in fin. Ff. de pact.

(5) Novell. 4. c. 1. Auth. præsente. Cod. de fidejussor. & Auth. hoc. si debitor. Cod. de pignorib. & hypoth.

(6) As appears among the Charters of that place, p. 177. See also Hering de fidejussor. c. 20. n. 28. Valentin. Franc. de fidejussor. c. 5. n. 176. Hartman Pistor. obs. 80. n. 3.

(7) L. 11. Cod. de fide jussorib. l. 17. Ff. de Solut. & ibi DD.

(8) In the original *triumphant*.

(9) See Netherl. Adv. 1. c. 31.

(10) Auth. præsente. Cod. de fidejussor. l. 6. Ff. de dolo malo. § 4. Instit. de fidejussor. See also Andr. Gail. lib. 2. obs. 29. n. 14. Radeland. Decis. Ultraject. 99. n. 7.

(11) L. 25. l. 48. Ff. de fidejussor. See Gail. obs. 27. n. 25. Joan à Sande. lib. 3. tit. 10. def. 2.

(12) Arg. l. pen. Cod. de pact.

When this is the case through Renunciation of such Privileges.

§ 9. And it is likewise understood that he renounces the said privileges, who binds himself as security, and as debtor and joint debtor, each for the whole. (1)

In like manner, those who deny their security, or who being called as security, neglect to avail themselves of this privilege, are understood to have forfeited the said right, precisely as if they had renounced the same. (2)

Whether a Creditor, by suing the Debtor, releases the Security.

§ 10. A question has arisen, whether a creditor, in consequence of his suing the debtor, without molesting the security, will thereby be understood to recede from his security? It is understood, that the security is *not* released thereby (3); and so it was decided by Neostad. (4)

Whether a Security may be called upon, before Execution against the Debtor.

§ 11. A caution or a security for indemnity, or surety for the deficiency or loss which any one may suffer through the debtor's incapacity, or through the inferior value of the property mortgaged, need not renounce such privilege; because he is not further or otherwise bound than for the deficiency and the loss which the creditor might have suffered, so that the claim against him does not begin before the ultimate execution against the debtor or the property mortgaged. (5)

Renunciation of the said Privileges, how to be effected.

§ 12. The renunciation of these privileges must be effected *clearly* and with *special denomination*, and no general renunciation of all privileges is sufficient, though such a general renunciation is often inconsiderately added by the writer, without persons considering or knowing what right they had; and therefore it ought also to appear that they are well informed of their said privileges, and particularly in what the effect of the renunciation exists. (6)

What Privileges a Security has, to obtain Indem-

§ 13. The security having paid for the debtor, may at any time demand from him the amount so paid, together with all

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(1) Arg. l. 5. Ff. de usuris. l. 109. Ff. de leg. 1. l. 1. § 1. Ff. quod quisque juris. See Pecc. de Jure, c. 4. n. 9. Gail. lib. 2. obs. 28. n. 2. 6. Radelant. Cur. Trajectin. decis. 99. n. 8. Lambert Goris, ad consuetud. Valav. c. 17. art. 1. Gloss. 3. n. 5. Cost. Antwerp. c. 63. art. 1.; Mechlin. tit. 7. art. 15. Christin. thereon, & vol. i. decis. 135. Costuymen in Zuid. Holland. (Customs of the Southern part of Holland) of the year 1570, delivered to the Court Holland, art. 34, contained in Beschryvyng van Zuid Holland (or the description of the southern part of Holland) p. 536. Vide tamen. Anton Fab. lib. 8. tit. 28. def. 22.

(2) L. 10. § 1. Ff. de fidejussorib. l. 12. Cod. eod. l. 37. Ff. de minorib. See Thesaur. Decis. Pedemontan. 50.

(3) Arg. l. 23. & l. pen. Cod. de fide jussorib.

(4) Cur. Holland. decis. 6. Radelant. decis. Ultraject. 22. Berlich. decis. 119. n. 5. & Capic decis. 119. n. 7.

(5) L. 116. Ff. de verb. oblig. l. 15. § 1. Ff. de fidejussorib. See Anton. Faber ad Cod. lib. 8. tit. 28. def. 46. Gail. lib. 2. obs. 27. n. 13.

(6) See Ant. Faber ad Cod. l. 8. tit. 28. defin. 31. n. 3. Berlich. pract. conclus. part. 2. con. 22. n. 2. & seq. Coler decis. 220. n. 28. & seq. et de processib. executib. part. 1. c. 10. n. 440. Gail. lib. 2. obs. 27.

costs and damages incurred and suffered on that account (1); although such right was not transferred to him by the creditor. (2)

nification against the Debtor, and Joint Security.

§ 14. But against the joint securities he has no right, unless the right of the creditor had been first transferred to him in the same way as he had against the joint securities (3); and it is not sufficient for such purpose, that he delivers into his hands the handwriting, but the transfer of the said right must be made *clearly* and *expressly*, as is testified of the general practice in this case by Petr. Heig (4) and John Zanger (5); and it is to be understood against the joint security with respect to the debt only, but not the charges incurred relative thereto, excepting only those charges which have been incurred against him since the transfer was made, because he acquires right only from that period against the joint securities (6); unless they had reciprocally promised in the security-bond to release each other from the said bail, (which often happens amongst us); in which case no transfer will be necessary, but the securities will be bound to each other as two debtors, to release reciprocally each for his share. (7)

Cession of Action, or Transfer of Claim, whether, when, and against whom, necessary.

§ 15. It is asserted by many, that this transfer of right and claim must be made by the creditor on behalf of the security, and against the joint security, *before* the payment is made by the security, and that the payment being made, and the debt being thereby in a manner discharged, no transfer can be made subsequently; which is also the opinion of Grotius. (8)

Before or after Payment.

But the case being considered upon the ground of the law, the contrary is found to be true, namely, that the transfer *may* be made by the creditor at *any* time, and therefore also after payment; it being a tacit mutual transaction, in which, by the payment of the security, the creditor becomes bound on his side to transfer the claim on behalf of the security, which, although the payment was made on the side of the security, does not prevent him from demanding of the creditor, that he should

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(1) § 6. Instit. de fide jussor. l. 20. l. 53. Ff. mandati. l. 23. l. 35. Ff. eod.

(2) Arg. l. 38. Ff. de edict. l. 19. Ff. qui pot. in pig. See Hartmann Pistor. obs. singul. 79.

(3) L. 39. Ff. de fidejussorib. et ibi DD. Everhard. Consil. 1. Math. Coler. de process executiv. part 1. ch. 10. n. 423. Nicol. Vander Hoog. Singul. Jur. 68.

(4) Part 1. quæst. 38. n. 53.

(5) De except. part 2. ch. 16. n. 45.

(6) Arg. l. 39. Ff. de fidejussor. Bart. ad l. 76. Ff. de solut. Hartman. dict. obs. 79.

(7) Arg. l. 2. Cod. de duob. reis. l. 32. Ff. de duobus reis.

(8) Inleyd. lib. 3. c. 3. vers. Een borg. betaalt. hebbende.

cause satisfaction to be made for the obligation under which he was on his side on account of the said payment (1); and it may rather be said, that the transfer of the claim cannot be demanded before the payment has been made; because a security acquires no right of indemnification, unless he has truly paid (2); and Neostad (3) relates, that the court of Holland was also of that opinion.

When and through what means Suretyship terminates or becomes void.

§ 16. The bail terminates, and the security is released, by the payment of the debt, by the renovation of the debt, by commixtion, remission, and other means of immediate release, without which a bail is lasting, and is transmitted to the heirs of the security until thirty years; with this difference only, that each of the heirs is responsible only for his share. (4)

Whether and when a Security may demand to be released from his Suretyship, before Payment.

§ 17. The surety cannot demand to be released from his bail, before payment or other annihilation of the debt, both on account of the difficulty in which the debtor would be in seeking for another security, and also because the creditor need not release the surety, although another security, who is as good as, and even better than the first, should be offered to him (5).

On the other hand, there are some exceptions by which a security can also be released before payment, or without making payment; viz.

I. If the debtor delays the payment from time to time, and the creditor does not exert himself to obtain payment; in which case the surety, to prevent himself from being always incumbered with the bail, may, after the lapse of a few years, according to his discretion, insist upon the creditor's recovering the debt, or releasing him from the bail. (6)

II. If a debtor begins to squander his property, and to spend it needlessly, or if his affairs begin to become considerably in-

(1) On this subject there is an express text in l. 36. Ff. de fidejuss. junct. arg. ex l. 11. Pf. de act. empt. & l. 14. Ff. de heredit. vel act. vend. & l. 6. Cod. de heredit. vel act. vend.

(2) Castrens. ad l. 45. de fidejuss. Gomez. Var. Resolut. tom. 2. c. 13. n. 10. Gail. lib. 2. obs. 29. To this opinion adhere also Hartmann Pistor. obs. sing. 44. Joan à Sande, de action. cessione, c. 7. n. 11, 12. and Carpzov. defin. Forens. part 2. constit. 17. def. 16.

(3) Cur. Holl. dec. 12.

(4) L. 37. Ff. de fidejuss. l. 93. § fin. Ff. de solut. l. fin. cod. de pact. § 2. Inst. de fidejussorib. l. 4. § 1. Ff. eod. l. 10. Cod. Mandati. l. 1. Cod. Si cert. pet. l. 1. Cod. de hered. act. l. 56. Ff. de condit. & demonstrat.

(5) Arg. l. 10. Cod. Mand. l. 38. Ff. eod. cap. fin. extr. de fidejuss. l. 14. de constit. pecun. l. 45. § 1. Ff. de mand. l. 14. l. 22. l. 51. Ff. eod. See Jacob Cancer, Var. Resolut. part. 2. c. 5. n. 159. Nicol. van der Hoog, Singul. Jur. 51.

(6) Arg. l. 3. in fin. Ff. ut in poss. legator. l. 9. Ff. solut. matrim. l. 10. Cod. mand. l. 38. § 1. Ff. eod. See Valentin. Franc. de fidejussorib. c. 5. n. 559. & seq. Andr. Gail. lib. 2. obs. 29. n. 3. Sande, Decis. Frisic. lib. 3. tit. 10. def. 7. Neerl. Adv. vol. i. cons. 8.

volved and distressed, the surety may compel him to pay his debt, or to release him from his bail. (1)

III. A surety, who bound himself for a debt to be paid at a certain time, may likewise (the time being expired) demand to be released from his bail. (2)

§ 18. In like manner, where a surety has bound himself for the payment of a certain sum, to be made at a certain period, no time or prolongation may be given to the debtor without the previous consent or knowledge of the surety. (3) But the security would thereby be released from his bail (4); and so it was likewise decreed by the court of Holland on the 30th July 1610, in the case of the guardians of the children of Hendrick Buyteweg, impetrator in the first instance against Egbert Jansz Timmerman; in which case, the creditor, having made a subsequent agreement with his debtor, and prolonged the time of payment, on condition of paying interest, the surety caused notice to be given to the creditor to recover his money, or that he otherwise would not continue bound as security; and as the creditor did *not* take care to recover his money, he the surety (the debtor having in the meantime been reduced to poverty) was released from the claim of the money for which he had become security. From this case we may also perceive, that if the debtor neglects to pay in due time, or that the creditor does not exert himself in recovering the debt, thinking that he is sufficiently secured by the surety, that then such surety has a right to make the creditor recover the arrears due, and to make the debtor pay, or otherwise to be released from the bail which he has given. (5)

Whether and when the Security is released, through Prolongation of the Time of Payment.

Other and more numerous exceptions may be seen in the authorities referred to below. (6)

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(1) Cap. fin. extr. de fidejuss. l. 10. Cod. Mandati. Valent. Franc. c. 5. n. 567. Gail. obs. 29. n. 8. Berlich. decis. 287. n. 13. Ant. Faber. ad Cod. lib. 8. tit. 28. def. 39.

(2) l. 10. junct. l. 1. § 1. Ff. depositi l. 53. in pr. Ff. de fidejussorib. l. 3. Ff. de compensat. See Hartman. Pract. tit. 30. obs. 9. Ant. Faber. lib. 4. tit. 26. def. 24. 26.

(3) See the Sentence of the Court of Holland in the cause between Mr. Van Buttingen and Mr. Pieter Van Dam, dated 4th June 1677, in Bell. Jurid. p. 543. & seq.

(4) See Sande, lib. 3. tit. 10. def. 5.

(5) Vide Sande, l. 3. tit. 10. def. 7. And. Gail. l. 2. obs. 30. n. 3. & n. 11. Damhouder, de Tut. & Curat. c. 6. n. 66. Christin. ad Leges Mechlin. tit. 7. art. 16. n. 3, 4. Radelant decis. 46.

(6) See Valent. Franc. de fidejuss. c. 5. n. 559. & seq. Andr. Gail. l. 2. obs. 29. Berlich. decis. 261. n. 8. Gomez. Var. Resolut. tom. 2. c. 13. n. 10. in fin.

CHAP. V.

Of an effectual Agreement, and its Division.

§ 1. *An effectual Agreement defined.*
2. *How many Sorts there are.*
§ 3. *Of what Effect it is, and how it binds any one.*

An effectual Agreement defined.

§ 1. AN effectual agreement is, when an agreement alone is not sufficient; but, independently thereof, the immediate delivery of an article must follow before the same is fully confirmed.

How many Sorts there are.

§ 2. Such agreements consist of loans for comsumption, loans merely for use, the placing into custody, mortgaging, exchanging, rewarding, acting in consideration of a reward, and acting in consideration of another act (1). In an effectual agreement, among us, is included the purchase of immoveable goods, which is not otherwise considered as completed and confirmed, but when lawfully delivered before the judge of the place. (2)

Of what Effect it is, and how it binds any one.

§ 3. In an effectual agreement the effect of the obligation consists in and receives its commencement through the delivery of the goods; not, however, that one cannot be bound thereto by agreement and promise (which in that case would belong to another sort of transaction, of which we shall treat in a subsequent page,) but because the matter's passing over is of itself alone sufficient thereto, without any further promise; so that before the delivery of the article there is no obligation; and in case of a person's changing his mind, he may recede so far as the matter remains entire (3); unless, independently thereof, any reciprocal promise was made, whence any obligation may be attached thereto. (4)

(1) Tot. tit. Instit. quib. mod. re contrah. obligat. l. 5. & tot. tit. Ff. de præscript. verb.

(2) See Plac. May 9, 1529. and also Book ii. ch. vii. § 4. pp. 123, 124. supra.

(3) L. 5. Ff. de condict. caus. dat. non secut.

(4) L. 3. Cod. de rer. permut. l. 27. Cod. de pact.

CHAP. VI.

Of a Loan for Consumption.

[Grot. 3. 10.]

§ 1. *Nature of a Loan for Consumption.*
2. *In what it consists, and in what manner it is effected in the Loan of Money.*
3. *How in other Articles that may be measured and weighed.*
4. *A Loan for Consumption, how effected.*
5. *Whether and when, for such a Loan, the immediate Delivery of the Matter is required.*
6. *It is charitable, and without Gain.*

Nature of a Loan for Consumption.

§ 1. A LOAN for use or consumption is effected when a certain article that admits of being measured, numbered, or weighed, is delivered to any one, with the intention that the receiver should afterwards return as much of the same sort, and of the same value, as the giver wishes (1): among the articles that admit of being measured, numbered, or weighed, the loan of money is reckoned the principal sort for use. (2)

In what it consists, and in what Manner it is effected in a Loan of Money.

§ 2. According to the Roman law, the money which one person has lent to another, need not be returned exactly in the same sort (3), which is also adopted so far among us, that even those who promised a certain sort of money may pay with another or inferior sort of money, without distinction, if it be but current, for the amount of their debt according to the common and approved currency (4); unless it was expressly agreed otherwise in the transaction (5); or unless any one who is indebted a large amount, merely with the intention of vexing his creditor, picks out bad and very small coin. (6)

How in other Articles, that may be measured and weighed.

§ 3. With regard to other wares, which are measurable or ponderable, and come into transaction by being measured and weighed, the loan for use can likewise be made of them, for

(1) L. 2. Ff. de reb. cred. Vinn. ad pr. Inst. quib. mod. re contr. oblig. Grotius, Inleyd. lib. 3. c. 10. in pr.

(2) L. 30. Ff. de leg. 1. & l. 14. in pr. Cod de non numer. pecun.

(3) Vide Vinnius. d. loco. n. 11.

(4) Accurs. in l. 35. Bald. in l. libera. n. 6. in vers. Nota. Cod. de Sentent. & Interloc. omnium jud. Leonin. consil. 31. n. 4. Grotius, Inleyd. l. 3. c. 10. n. 18. & c. 14. n. 39, 40. Christin. vol. iii. decis. 1. n. 1. & vol. i. decis. 215. n. 8. Cost. Antwerp. tit. 64. art. 5. Cons. & Adv. part 1. cons. 216. & part 2. cons. 125. Everhard. consil. 240. n. 15.

(5) See this subject treated at large, supra, book ii. ch. xiii. § 3. p. 159. Grotius, d. loc. n. 19. & n. 41. Christin. d. vol. i. decis. 215. n. 10. & decis. 391. & vol. iii. decis. 43. n. 3. Zypæ de redit. vers. Cæterum.

(6) Vide Cost. Antwerp. d. tit. 64. art. 5. Pinell. ad rubr. Cod. de rescind. vend. part 1. c. 3. n. 17.

instance, of oil, wine, grain, and also bread and beer,—if the same be returned in the same sort and value; such as bread and beer at present, for which a certain price and weight were fixed, and according to which they may always remain one and the same with respect to the sort, and may be returned at any time. (1)

A Loan for Consumption, how effected.

§ 4. A loan for use is understood to be effected, both tacitly and by express words; especially in the loan of money, wherein by counting out a certain reasonable sum of money, it is understood that a loan has been effected for use, although it be not expressed therein. (2)

Whether and when, for such a Loan, the immediate Delivery of the Matter is required.

§ 5. Neither is an immediate delivery of the property always necessary to constitute such loan (3); but it is sometimes sufficient if it has already been delivered in consequence of another consideration, and is confirmed anew, or if the delivery be made *per fictionem brevis manus*, that is, *by a brief hand*, in consequence of an order of conveyance from another having authority. (4)

It is charitable and without Gain.

§ 6. All loans for use are in their nature charitable; so that one cannot enjoy and claim more than even as much as that what was lent out; unless it be agreed otherwise (5), which, however, is never understood to be tacitly included, but must be effected expressly, as in other transactions. (6)

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(1) L 35. § 5. Ff. de contrah. empt. junct. l. 2. § 1. Ff. de reb. cred. & ibi Bert.

(2) Arg. l. 3. Ff. de reb. credit. & ibi Glos. & DD.

(3) L. 11. § 1. l. 30. Ff. de reb. cred.

(4) L. 9. § fin. l. 11. l. 15. Ff. de reb. cred. junct. § 44. Instit. de rer. divis.

(5) L. 3. l. 6. Cod. Si cert. pet. l. 3. Cod. de usur.

(6) L. 8. Ff. de eo quod certo loco.

CHAP. VII.

Of Interest.

[Grot. 3. 10.]

§ 1. *Interest defined.*
2. *Rate of Interest.*
3. *How to be computed.*
4. *How long it is understood to run.*
5. *Payment of Interest establishes the Legality of the Debt.*
6. *Interest upon Interest, in what cases allowed.*
§ 7. *No Preference to be given to Creditors for more than Three Year's Interest.*
8. *In what Cases Interest is tacitly understood to run.*
9. *Whether Arrest will check the Course of Interest.*
10. *Interest, in what Cases payable on Bequests and encumbered Inheritances.*

§ 1. WHAT is agreed to be paid for the use of the money lent, is commonly denominated *interest*, or the gain upon the money, because it mostly consists in money; by which the borrower, besides re-paying the same with the like sort and value, further engages to pay as much as the lender is deprived of, on account of his not having the use of that property; this is by some denominated *usury*, but improperly. Interest defined.

§ 2. But in order that what the lender is deprived of, in consequence of not having the use of his money, may not be esteemed too high, nor amount to an improper gain, or usury, strictly so called; it was ordained by a proclamation of the 4th October 1540, that merchants should lend out their money upon no higher interest than eight per cent. (1); and, if any thing was mortgaged for the security of the principal, then the high court decides no more interest than the sixteenth penny (2); although the court in such cases used also to allow seven per cent. (3) And it was expressly directed by a statute at Amsterdam, on the 25th April 1614, that any one having any amicable pawn in his hands, may claim no higher interest than six and one-fourth per cent. Rate of Interest, what.

§ 3. Where, however, it has not been stipulated and expressed how much and how high interest should be paid, it is computed at so much as it is usual to contract for, according to How to be computed.

(1) Secundum l. 26. Cod. de usur.
(2) Coren, obs. 4.
(3) See Coren. d. obs. 4. in not. Grotius, Inleyd. lib. 3. c. 10. n. 29. & ibi notata.

the custom of the country or place where the contract is made (1); against which custom an error was committed in the consultations of the Dutch Jurists. (2)

How long it is understood to run.

§ 4. The length of time, during which interest is understood to run, must also be judged from the contract: so, that if I say, "*I promise you such a sum as I borrowed of you, to repay in May next, with the interest thereof:*" and though I do not pay punctually, you cannot, according to the strictness of the law, claim more or further interest than until May. But it will be necessary for that purpose to mention, "*with the interest from this day's date until full payment;*" for, wherever any obligation comes, it must be expressed in clear words, without which it cannot be extended (3). And so it was decreed in the case of Pieterje Pietersz, plaintiff, against Claas Jacobsz Koek-bakker: but it was afterwards determined in the case of Dirk Janz Pyt, and confirmed by the high court, on the 4th January 1620, that when any one lends his money for one year, and stipulates for interest thereby, the said time is not added thereto, to stipulate the interest, but to have back his money lent; which, if it runs for a longer time, must be tacitly understood to be renewed, as if it had been agreed between them that the said interest should continue to run which had been agreed upon; and that therefore it must be understood, that the interest stipulated until that time is to run further, after the stipulated time; and so, in the case of a debtor, who had neglected to pay on demand being made, whereby he is understood tacitly to consent, that the further interest should continue to run. (4)

So, in the case of a person who promised interest only till certain time, (as, for one year) if, after the expiration of that time, he continued to pay that interest annually during several years, he would in consequence thereof likewise be indebted the said interest of the following years; and in such case it is likewise understood, that such agreement had been tacitly renewed, and it was so judged by Sande. (5)

Payment of Interest establishes the Le-

§ 5. But whether any one, who without any contract has paid an annual interest during some years, would thereby be bound

(1) Arg. l. 1. & l. 37. Ff. de usuris. junct. l. 3. § 1. Ff. de contr. tutel. et utili action. contra, l. 31 & l. 41. § ult. Ff. de usuris.

(2) Consultatien van de Hollandse Regtsgeleerden. vol. i. cons. 273. See Groeneweg. ad d. l. 31. Ff. de usuris. Christin. vol. i. decis. 293. n. 1. & seq. Neostad. Suprem. Cur. decis. 3.

(3) L. 99. Ff. de verbor. oblig. See Sande, lib. 3. tit. 14. def. 2. argt. l. creditor 7. Cod. de usuris.

(4) Facit. l. 12. Ff. de usur. junct. l. 12. Cod. de contra. vel commit. stipulat. See Ant. Faber. ad Cod. lib. 4. tit. 24. def. 1.

(5) Lib. 3. tit. 14. def. 4. Antius. Faber. ad Cod. lib. 4. tit. 24. def. 1.

to pay further the said annual interest; it is understood, that in such case the legality of the debt is thereby sufficiently confirmed; because no one is supposed to pay several times and often what he was not indebted; unless he could prove that he did not owe the same, and had paid it from an imaginary cause (1). And it is likewise customary in some places, where any one has lent money (without agreement for interest) to be repaid at a certain time, and receives interest thereupon, without receiving at the same time the principal amount, that such person tacitly binds himself thereby to receive an annual interest, and is not entitled to demand the principal, but can demand to make it *hypothecary*, according to the common proverb "*once interest always interest*" (2). But this does not agree with our practice, according to which, in an annual rent sold, from the nature of the purchase, the redemption is only in the choice of the seller and the debtor of the rent (as we have already seen (3)); but in other common interests, the lender alone has the power, after proper notice, of refusing the continuation of the money lent out by him.

gality of the Debt.

§ 6. *Interest upon interest* cannot be taken, although the interest due had remained so long unpaid (4). It is however allowed at Antwerp (5), and is customary amongst us in annual arrears of interest due to the country or state, the interest of which may be again added to the principal and increased. (6)

Interest upon Interest, in what Cases allowed.

In like manner, a guardian, who has any money of his ward's in his hands, and does not lay out the interest in arrear for the benefit of the ward within a certain time, is likewise obliged to pay interest upon the said interest (7). But where the interest had remained so long unpaid, that the same added together amounts to more than the principal itself, the remaining interest may not be claimed, and the course of interest then ceases. (8)

§ 7. By a proclamation of the 26th October 1572, it was established for the benefit of creditors, that on money secured and pledged, preference should not be given to others for more

No Preference to be given to Creditors for more than Three Years Interest.

(1) Arg. l. 6. Ff. de usuris. See Pyr. Maur. tract. de Salut. c. 37. Anton. Faber. ad Cod. l. 8. tit. 4. def. 7. Joan à Sande, lib. 3. tit. 14. def. 4.

(2) To the prevalence of this custom at Utrecht, G. Wassenaar bears testimony in his Pract. Notar. c. 11. § 3. 6.

(3) Vide supra, Book ii. ch. xiii. pp. 158—161.

(4) l. 29. Ff. & l. ult. Cod. de Usuris.

(5) According to Leoninus, cons. 13. n. 4. vers. Transgrediendo.

(6) Christin. vol. i. dec. 49. & vol. iii. dec. 43. n. 6. & ad leges Mechlin. tit. 22. art. 9. n. 23. in addit.

(7) L. si tutor. & in l. tutor. § usuræ & § si usuras. Ff. de administrat. tutor. Vide supra, Book i. ch. xvi. § 8. p. 95. Cons. & Adv. vol. ii. cons. 145.

(8) L. 10. Ff. de usuris. l. 27. Cod. eod. Vide Groeneweg. ad. d. l. 27. Joan à Sande, lib. 3. tit. 14. def. 5. in fine.

than three years interest; but it is not observed, except at some places where it was likewise established by special statutes. (1)

In what Cases Interest is tacitly understood to run.

§ 8. It is a common rule, that no one can legally be charged with any interest, except upon an express agreement (2); but there are several exceptions in which interest is tacitly understood to run, and interest can likewise be demanded without an agreement upon what has been judicially demanded, and not paid in proper time (3); in which case interest runs from the day of litigation (4); and the debtor who does not agree with his creditor respecting the debt, may release himself by submitting it to the court, and suppress the course of such and other interest. (5)

Whether Arrest will check the Course of Interest.

§ 9. But whether arrest and *a closed hand* (*gesloten hand*), as well as depositing the money in court, would check the course of interest, is a question concerning which the doctors are by no means agreed: for example, whether a debtor is bound to pay interest to his creditor when the debt has been arrested under him, or when he has been prohibited from paying, or when he does not know any certain person to whom he may pay freely. And the general opinion of all the doctors respecting this question is (6), that in such a case he owes no interest; because no one, without any agreement or neglect, owes interest (7); and that legal prohibition considers any one without fault and penalty (8). Provided nevertheless, that if on the other side it be proved, or if there otherwise was reason for suspecting that the debtor in the meantime had used the money, and made or could have made his profit thereby, and the contrary be not proved by him; namely, that he had kept it without the use and fruit thereof; in such case the debtor, notwithstanding the arrest and closed hand, cannot well avoid paying the interest (9). And so it was understood by the high court in the year 1652, in a cause between the heirs of Adrian Jansz van Koudekerk and Mr. Philip van Cromstryen, which case I have seen maintained as far as in revision.

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(1) See Statutes of Leyden of the 21st April 1626. See the new Statutes, art. 125.

(2) L. 3. & l. 6. Cod. Si cert. pet. l. 3. Cod. de usuris.

(3) L. 17. Si pupillo Ff. de usuris.

(4) Christin. vol. iii. defin. 45. n. 2, 3. Sande, lib. 3. tit. 14. def. 1.

(5) L. 1. § ult. l. 7. l. 6. l. 19. Ff. de usur. Sande, lib. 3. tit. 14. def. 8.

(6) Felin. in cap. constitut. 193. extra de rescript. n. 12.

(7) L. 17. Si pupillo l. 32. § in bonæ fidei. Ff. de usuris. l. 87. § usuras. Ff. de legat. 2.

(8) Gloss. in l. 4. Ff. de condit. triticiaria. Felin d. loco. Guid. Pape. decis. 340. n. 3. Tusch. conclus. practicabil. tom. 6. conclus. 480. n. 10. & seq.

(9) Arg. l. 14. Ff. de condict. indeb. & l. 226. Ff. de reg. jur. junct. l. 34. Ff. de usuris. & l. 23. Ff. de pignorat. act. Carpzov. Def. Forens. part. 2. constit. 30. Def. 24. in fine.

Interest, in what Cases payable on Bequests and encumbered Inheritances.

§ 10. On bequests and encumbered inheritances, which are not paid when due, interest must likewise be paid, as already shown at large in book iii. ch. 9. § 39. p. 273, supra.

Interest runs upon the Instalments of Purchase Money.

§ 11. It is likewise understood, that interest runs upon the instalments of the purchase money of houses and lands, which is not paid at its proper time, although it had not been agreed, according to this rule, "*money and pawn may not be in one and the same hand* (1)." But in these cases such interest has no right of preference or mortgage, as was understood by the court in the case of Jan Dirksz van Keulen against Willem Willemsz van Nieupoort, on the 11th November 1609; and that such interest does not proceed from contract, but from the construction of the law. But it has been established at several places by statutes, and is still customary, that interest, upon the payment by instalment of the purchase money of houses and lands in arrear (where no interest was stipulated), does not begin to run until three months after the payment of each instalment becomes due. So it was ordained at Leyden, on the 22d June 1617; viz. that all instalments proceeding from the purchase of houses, grounds, and premises, according to the agreement and promises contained in the executed title-deeds thereof, should be paid when the payments respectively become due, into the hands of the creditor, or the persons having a right to them; and that no delay thereof should be granted by the pacifiers or tribunals, unless proper interest be paid by the debtors, at the rate of the twentieth penny in a year, to be computed from three months after the respective expirations, until the full payment shall be made. (2)

When Interest ceases.

§ 12. Interest ceases on payment of the principal, and also in the same manner as the obligation for the principal itself (3). But as to the question when interest in arrear is understood to cease, and whether the same is understood to have been discharged upon receiving the principal, without any protest or declaration of reservation of right; it is understood so in the case of tacit interest, which one would be indebted without agreement (4); but not of interest which is due in consequence of an express contract. (5)

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(1) Facit. l. 5. Cod. de act. empti.

(2) Vide Niewe Keuren (New Statutes), art. 124.

(3) l. 9. l. 11. l. 19. Cod. de usur. § 1. Instit. quib. mod. tollit. obligatio.

(4) l. 49. § 1. Ff. de act. empt. l. 4. Cod. depositi. l. 8. in fin. & l. ult. Ff. de eo quod certo loco. l. 6. § ult. Ff. de leg. commissor.

(5) d. l. 49. § 1. Ff. de act. empt. & l. 8. Ff. de eo quod certo loco. See Pyr. Maur. tract. de solut. oblat. & retent. c. 12. Anton. Faber. ad Cod. l. 4. tit. 24. def. 5. Joan. à Sande, lib. 3. tit. 14. def. 10.

CHAP. VIII.

Of the Bank of Loan, or Pawn (Lombard).

§ 1. *Nature of the Bank of Loan, or* Pawn (Lombard.)
2. *Under whose Care, and by whom to be managed.*
§ 3. *The Measure and Tax of the Gain and Interest.*
4. *Loans upon Pawns, when and how to be redeemed.*

Nature of the Bank of Loan or *Pawn* (*Lombard*).

§ 1. FROM the common course of interest is excluded the bank of loan, otherwise denominated the *pawn* (*Lombard*), where every one may pawn his property upon loan for a reasonable amount daily and weekly, according to the value of the property pawned, for which the pawnbroker (1) may take for his trouble and advance of money, a reasonable gain. For this purpose there are certain persons appointed by the government, besides whom no one is allowed to take pawn upon such loan; and in order that the said gain may not be estimated too high, it is limited to a certain amount.

Under whose Care, and by whom to be managed.

§ 2. The superintendence of such loans was antiently committed to the bishops, as appears by the records of the council of Trent (2); but after the abolition of the papal laws, and of the ecclesiastical tribunal among us, the said superintendence was (by a resolution of the States of Holland of the 17th November 1578 and 11th April 1584) given and recommended to the magistrates of every city; "and all such christian, political, and reformed orders and means, relative to the said loan, were to be sought for, placed, and maintained for the best convenience, and with the least prejudice of the needy public, so that with honour and profit to the same the management may take place."

In some places, such banks of loan are established by and on behalf of the city, and managed by people appointed for that purpose, with certain salaries; and the profit is laid out for the benefit of the public, or distributed yearly to the common poor. In other cities it is farmed out under certain regulations and conditions for a certain amount, to be paid yearly for the benefit of the poor.

(1) *Tafel houder* (Table holder) in the original.

(2) Session 22. c. 8.

§ 3. And the measure of the gain belonging thereto is observed, and the interest upon the money unemployed (with which the pawnbrokers ought to be provided for the accommodation of every one), for their trouble in counting out and receiving back the money, the risk of loss in appraising the pawns, the wages of their servants, and other expences, is usually taken at the highest rate; and where any annual farm is fixed at 24 and 21 per cent. yearly, at the lowest rate, and where the bank of loan is kept by and on behalf of the city itself at 18, 16, and 12, and likewise where it is at ten or eight, or otherwise generally at 18 per cent. yearly, pawnbrokers must keep their boxes well supplied with money, and must provide for all further trouble and expences.

The Measure and Tax of the Gain and Interest.

§ 4. These pawns upon loans may be redeemed by the debtors at any time when they please; provided that, when they redeem the property and return the money borrowed, they pay such interest as is in arrear, according to the time elapsed; but in order that the pawnbroker should not be detained too long with the property upon which the loan was made, and the interest does not exceed the value of the property, people are not allowed to leave their pawns longer than a year and six weeks; and whoever does not redeem his pawn within the said time, it is publicly sold as a perquisite, and the overplus given to the common poor funds, where the proprietor may still come and fetch it within certain time, which time in some places is limited to within three years.

Loans upon Pawn, when and how to be redeemed.

CHAP. IX.

Of Bottomry and Insurance.

[Grot. 3. 11. & 3. 24.]

§ 1. *Bottomry defined, and by whom to be contracted.*
2. *Whether and when by Masters of Ships, without the Authority of their Owners.*
3. *Insurance of Ship and Cargo, defined.*
4. *How and to what Amount to be effected.*
5. *For what Damage or Loss obliged.*
6. *What Goods may be insured.*
7. *Whether and when Goods and Merchandize, already perished or damaged, may be insured.*
8. *Of Insurance upon good and bad News.*
9. *No Time to be granted for the Purpose of touching at any other Port; nor the Voyage to be altered by the Party insured, except in case of Necessity.*
10. *When the Right of Insurance commences and ceases, and how it is to executed.*

FROM the common course of interest are also excluded loans of money, by which the lender takes upon him the risk of the sea; on which account he may contract for so much more interest as the risk and danger of sea (according to the circumstances of the place and time) can be estimated beyond the common course of interest, not only at ten or twelve but even at twenty per cent., less or more. (1)

These are *Bottomry* and *Insurance*.

Bottomry defined, and by whom to be contracted.

§ 1. *Bottomry* is the lending of money upon the keel of the ship, to be repaid with certain interest if the ship arrives safely, which may be contracted not only by the owners of the ships, but also by the masters of ships, who may borrow on their own account as much as they require, when abroad, for the performance of their voyage; but in this country no masters of ships may contract any bottomry, except upon the clear will and consent of major part of the owners, unless they can obtain from some of their owners no money for the purpose of fitting out their ships; in which case the masters of ships, on account of such unwilling owners, may take so much money upon bottomry as their share in the ship amounts to. (2)

§ 2. Whether and when, by Masters of Ships, without the Authority of their Owners.

(1) Tot. tit. Ff. & Cod. de nautico fœnore junct. Novell. 106.

(2) See Recueil van de Costuymen tot Amsteldam (Collection of the customs of Amsterdam), c. 52. art. 1 & 7. Wisbuyse Ze-regten (Maritime laws of Wisbuy), art. 40. Ordonantie der Ze-regten (Ordinance of maritime laws) of King Philip, of the year 1563, tit. van Schippers en Koopluyden, art. 12. and tit. Assurantie, art. 19.

§ 3. Insurance is a contract, by which one party in consideration of a stipulation undertakes to indemnify the other against the risk of the sea or water, fire, enemy, pirates, or other misfortunes which may befall the ship and her appurtenances, or the goods or merchandize embarked on board her, until she arrives safely at the place of her destination. Insurance of Ship and Cargo defined.

The peculiar rights and qualities to be observed in an insurance, are especially the following.

§ 4. I. The goods insured must be brought, according to their real value and loaded with knowledge. (1) How and to what amount to be effected.

II. No one may cause his ship and equipage to be insured for him and his joint owners against the danger of water, fire, enemy, pirates, or other accidents, to a further amount than for half the value thereof (2); which sum by the customs of Amsterdam was increased to two-third parts (3); and with respect to merchandize and goods, at least the tenth part of the value thereof, which the same cost by purchase or otherwise, must remain uninsured; provided, that the merchandize at Antwerp amounts to upwards of a thousand Flemish pounds (and according to the customs of Amsterdam, to upwards of two thousand pounds) belonging to one person; who may cause the whole of the remainder to be insured; of which only the tenth part of the said thousand or two thousand pounds are to remain uninsured. (4)

§ 5. III. If the insured property happens to be spoiled or damaged of itself, without any external cause, in such case the insurer is answerable for the same. (5) For what Damage or Loss obliged.

§ 6. IV. All merchandizes may be insured, with the exception of freight and hire of masters of ships and the crew, and stores of ships, persons, lives, gunpowder, lead, provisions, or other similar articles, which are consumed. (6) What Goods may be insured.

§ 7. We may likewise cause to be insured ships, wares, goods, and merchandize, which at the time of the insurance were already perished, robbed, and spoiled, if the person who caused the insurance to be effected were ignorant of it; or if there were such a distance that he could not know of it, namely, three miles computed for two hours. (7) Whether and when Goods and Merchandize, already perished or damaged, may be insured.

(1) See the Ze-regten (Maritime laws) of King Philip, of the year 1563, tit. Van verseker, art. 10.
(2) Ibid. art. 8.
(3) Rec. Cost. Amst. ch. 30. art. 10.
(4) Ze-regten van Koning Philips, A.D. 1563, tit. Van versekering, art. 11. Rec. Cost. Amst. ch. 30. art. 11.
(5) Cost. Antwerp, tit. 54. art. 15.; Cost. Amst. ch. 30. art. 27.
(6) Ze-regten van Koning Philips, tit. van Versekering, 8, 9. Cost. Amst. ch. 30. art. 10, 11, 17, 24.
(7) Ze-regten, tit. van Versekering, art. 4. Cost. Antwerp. tit. 54. art. 10. Cost. Amst. ch. 30. art. 20, 21.

Of Insurance upon good and bad News.

§ 8. Whereof clear information is to be given, how long the ships were out, and what was the last news thereof; which is denominated insurance upon good and bad news; for otherwise an insurance made three months after the departure of ships in Europe, Barbary, or the neighbouring parts, and, at places more distant, six months after the departure, would be null and void, and cannot exist. (1)

No Time to be granted for the Purpose of touching at any other Port, nor the Voyage to be altered by the Party insured, except in case of Necessity.

§ 9. V. The person who caused the insurance to be effected, may not cause the master of the ship freighted by him to touch at any other port, or take his course to any other port, or cause the voyage specified in the policy of insurance to be made longer or altered; in which case the insurance will be of no value, unless the master of the ship was obliged out of necessity to touch at any other port, without the order of the insurer. (2)

When the Right of Insurance commences and ceases, and how it is to be executed.

§ 10. VI. The insurance commences from the time that the ship is ready to sail, and the insured goods are brought upon the wharf or shore or in the boats, in order to be thence loaded on board the ship, until the same arrive at the port, and be safely unloaded within the time of twenty-four hours; and whatever loss or accident may happen in the meantime, the person who caused the insurance to be made ought to give proper information thereof to the insurer, and to prove the same; which being effected, the insurer after three months, upon security being given to make restitution if it be subsequently found otherwise, must make indemnification for the property lost or perished, so far as the same was insured. And if a ship or property in Europe, Barbary, or the neighbouring parts, remains away during a year and a day, and at more distant places during the time of two years, without any intelligence being received in the meantime, the said ship and goods are considered as lost; and information may be given thereof to the insurers, and after the expiration of three months, payment may be demanded as aforesaid. (3)

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(1) Cost. Antwerp. tit. 54. art. 8. Cost. Amst. ch. 30. art. 6.

(2) Ze-regten, tit. van Versekering, art. 6. Cost. Antwerp. tit. 54. art. 12. Cost. Amst. ch. 30. art. 7.

(3) Ze-regten, tit. van Versekering, art. 13. Cost. Antwerp. tit. 54. art. 4. 5. 7. Cost. Amst. ch. 30. n. 4. 5. 28. 33.

CHAP. X.

Of Loan for the Use of the Borrower.

[Grot. 3. 9.]

§ 1. *A Loan for Use defined.*
2. *By whom and for what Purpose it takes place.*
3. *To what the Borrower is obliged, and what Indemnification is to be made by him.*
4. *To what the Lender is obliged.*

§ 1. A LOAN for use (*Bruik-Leen*) is a transaction whereby something is lent for certain use without any gain; provided such thing be returned after its use. (1) A Loan for use defined.

§ 2. This transaction may take place on the part of all those who (as we have already shewn) may effectually bind themselves; viz. concerning all goods both moveable and immoveable (2), which are such, of which the use does not consist in the consumption of the article itself (3); unless an article, subject to be worn out, be lent to some one to make a fine shew therewith (4). The borrower is obliged, after using the article lent, to return the same precisely in the same state in which it was, whether good or bad. (5) By whom and for what Purpose it takes place.

§ 3. Whatever loss or accident happens to the article borrowed by the least neglect, the borrower must make good (6); and in case he used the article borrowed otherwise than was promised, it is considered as theft (7). But this does not agree with our daily observations, which is more careful of the good name of the parties concerned in the transaction (8); and that, in case of misuse or notorious neglect, it is sufficient if the loss or damage be made good to the lender (9). For an accident *without fault*, or if the lender be in the meantime negligent to receive back the article lent, and it be damaged, the borrower will not be answerable. (10) To what the Borrower is obliged; and what Indemnification is to be made by him.

(1) § 2. Instit. quib. mod. re contrah. oblig. l. 1. l. 8. Ff. commodat.
(2) L. 5. § 6. l. 1. § 1. Ff. commodat.
(3) L. 3. § ult. Ff. eod.
(4) L. 3. § fin. l. 4. Ff. eod.
(5) § 2. Instit. quib. mod. re contr. oblig. l. 7. l. 5. § 9. Ff. commodati.
(6) § 1. Inst. quib. mod. re contr. oblig.
(7) § 6. Instit. de oblig. quæ ex delict.
(8) Arg. l. 38. Ff. ad leg. Jul. de adulter.
(9) L. 3. § 2. Ff. commodati.
(10) L. 18. in pr. & § ult. Ff. commodat. l. 5. § 4. & §. 7. Ff. eod. l. 52. § 1. Ff. ad leg. aquil.

To what the Lender is obliged.

§ 4. On the other hand, although the lender derives no gain from his loan, he is nevertheless obliged to allow the borrower the use of the article until the limited time, or for a reasonable time; and if he intentionally lent the latter any thing, which is either not good, or does not answer the purpose for which it is to be used, he will be obliged to indemnify the loss which the borrower may thereby sustain (1), and likewise the expences which had been *bonâ fide* incurred, beyond what the use thereof was worth, and required for that purpose. (2)

CHAP. XI.

Of Deposits, or Things given in Trust. (3)

[Grot. 3. 7.]

§ 1. *Nature of a Deposit.*
2. *Laying under the Law defined, and of how many sorts.*
3. *Willingly.*
4. *Unwillingly.*
5. *Sequestration under a Third Person, what it is, and when necessary.*
§ 6. *The Difference between laying under the Law, Sequestration, and giving of a Thing into Custody.*
7. *Consignation Money, what.*
8. *Of the respective Obligations of the Depository, and of the Party intrusting the Deposit to him.*

Nature of a Deposit.

§ 1. THE making of a deposit, or giving into custody (*Bewaar-geving*), is a transaction by which any one receives another's property, to keep gratuitously, in order to return the same when the party intrusting it shall desire it. (4)

It does not admit of a question among us, whether giving into custody can exist likewise with respect to *immoveable* property; for, if a piece of land or a house, about which two persons do not agree, can be placed under the care and management of the judge (5), why then should not the same (when there is no difference about it), be said to have been given into custody, and be denominated, giving into custody, whenever it is recommended to the superintendance and care of any person. (6)

(1) L. 17. § 3. l. 18. § pen. & l. pen. Ff. commod.
(2) D. l. 18. § 2. Ff. commod.
(3) *Bewaar-geving*, in the original, answering to the *Depositum* of the Roman Civil Law.—EDITOR.
(4) L. 1. Ff. depositi. § 3. Instit. quib. mod. re contr. oblig.
(5) Instruct. van den Hove. art. 39. l. 5. & seq. l. 17. Ff. depositis.
(6) Arg. l. unic. Cod. de prohibit. sequestratione pecun. c. 1. de sequestrat. in clementin.

§ 2. Next to giving into custody, follows laying under the law. Laying under the Law, what it is, and of how many Sorts.

Laying under the law is a way of securing a doubtful or a disputable article, by placing it under the care of the judge: and this is of two sorts, *willingly* or *unwillingly*.

§ 3. Laying under the law is performed *willingly*, when my debtor will not receive what I am indebted to him in the manner in which I wish to give it to him; or likewise if I do not know whom to pay, and any dispute arises in consequence, then I may cause it to be tendered to him legally, with open purse and sounding money, and may lay it under the care of the judge, at the expence of him who is found to be in the wrong, in order thereby to stop the course of interest. Willingly.

This transaction is so narrowly watched, that the *mere* tendering and offering to deposit under the law, is not sufficient to prevent the course of interest, but the actual depositing under the law must follow it, and the debtor must in reality get rid of it (1), as pointed out in chap. 7. § 4. supra, p. 340.

Which money may be received by the creditor upon giving security, but of which he is bound to make restitution, if it be afterwards found that another has a better right to it, together with the interest thereof; because the person obliged to make restitution of any thing must do so, with the fruit and interest enjoyed by him, or which might have been enjoyed by him. (2)

§ 4. Laying under the law *unwillingly* is, whenever a disputable article is laid under the care of the court, *provisionally*, pursuant to an order given by a judge to any one. (3) Unwillingly.

§ 5. This takes place on account of different reasons (4); for example, if there be any apprehension that those who have dispute concerning the article in question, would take forcible possession thereof from each other; or if it be apprehended that the same will be rendered useless in the meantime; or when it may not be trusted to the possessor, and he cannot give security (5); in such case, the property about which there is any difference is not only placed under the judge, but also under a third person; which is commonly denominated *sequestration*, and the person who accepts of it is called the *sequestrator*. (6) Sequestration under a Third Person, what it is, and when necessary.

(1) L. 1. § ult. l. 7. Ff. l. 6. l. 19. Cod. usuris junct. l. 34. Ff. eod. & l. 23. Ff. de pignorat. act. l. 14. Ff. de condict. indebiti. l. 226. Ff. de reg. jur.

(2) L. 38. § 4. Ff. de usur. junct. l. 88. § final. Ff. ad leg. Falcid. l. final. Cod. de petit. heredit. Vide Sande, lib. 3. tit. 14. def. 12.

(3) L. unic. Cod. de sequestr. pecun.

(4) L. 13. § 3. Ff. de usufr.

(5) L. 22. § 8. Ff. solut. matrim. l. 7. § 2. Ff. qui satis.

(6) L. 5. et seq. l. 17. Ff. depositi. l. 110. Ff. de verb. significat.

Difference between laying under the Law, Sequestration, and giving of a Thing into Custody.

§ 6. It differs therein from giving into custody, that any thing given into custody is accepted for nothing, and in sequestration, or laying under the law, the person who accepts it is paid; and whatever is given into custody can be claimed at any time, but whatever is under sequestration not before the decision of the case; and whatever is laid under the law cannot be claimed otherwise but by giving security: in point of law there is, further, very little if any difference between them (1).

Consignation-money, what.

§ 7. In laying under the law, salvage-money is paid usually, which one denominates consignation-money; and for every Flemish pound a double stiver or a half per cent. is paid; but in sequestration it is discretionary.

Of the respective Obligations of the Depositary, and of the Party intrusting the Deposit to him.

§ 8. The depositary, or he who receives a thing into his custody, is obliged to keep the same together with his own, and to return it when the party who had intrusted the same to his custody, or otherwise when the difference between the litigating persons is removed, together with all interest and fruits arising therefrom; and if any damage takes place through his notorious neglect or breach of trust, he must make an indemnification accordingly; and on the other hand, the depositary has no other claim to indemnification, but for whatever he necessarily and properly expended (2), except in the cases of laying under the law, and sequestration, in which the depositary or receiver into custody is paid for his trouble and services, as above stated.

(1) l. 5. § 1. l. 9. l. 17. Ff. depositi.

(2) l. 1. § 24. Ff. depositi. l. 32. Ff. eod. l. 5. l. 23. Ff. depositi.

CHAP. XII.

Of Pledge and Mortgage.

[Grot. 3. 8. & 2. c. ult.]

§ 1. *A Pledge defined.*
2. *It may be made of moveable or immoveable Property.*
3. *A Mortgage defined, and how many Sorts there are.*
4. *General or Special Mortgages, how to be effected.*
5. *What Agreements and Contracts are usual therein.*

A Pledge defined.

§ 1. PLEDGING is an agreement, by which a person deposits some goods as security for his debt. (1)

It may be made of moveable or immoveable Property.

§ 2. Some pledges are of moveable property, others are *hypothecations* or mortgages of immoveable property, and are bound without actual delivery; which however are mostly considered as such without distinction; but, in strictness, those only are considered as mortgages which take place by writing, and before the magistrates of the place where the transaction is performed, or where the property is situated. Pledges are likewise effected but slightly and privately, as an amicable pledge or pawn.

A Mortgage defined, and how many Sorts there are.

§ 3. A mortgage is likewise made by agreement, or otherwise tacitly, through construction of law.

Mortgage by agreement is either of all property *generally*, or of this or that property *in particular*, otherwise denominated *special hypothecation.*

General or Special Mortgages, how to be effected.

§ 4. A slight transfer of a special mortgage, or special hypothecation of immoveable property, is insufficient; but it ought to be certified in writing by the magistracy of the place, and there be entered in a general register; and independently thereof, the fortieth penny upon the amount, with which it is encumbered, or for which it is mortgaged, is to be paid on behalf of the country (2). But for a general hypothecation, it is sufficient if it be effected only before a judge in the province of Holland, without distinction, provided the fortieth penny be paid (3). But on account of the uncertainty of what it is actually bound for in particular, the payment of the fortieth penny was not fixed further or otherwise thereupon, but when the full debt was contracted for others, and the payment thereof

(1) § ult. Instit. quib. mod. re contr. oblig. l. 238. § 2. Ff. de verb. signif.
(2) Plac. May 2, 1529. Grotius, Inleyd. lib. 2. part 48. n. 36 & 37.
(3) Polit. Ordon. art. 35. Plac. den. 40 penn. art. 1. 10, 11.

was not observed. And it was allowed to the city of Amsterdam, as a privilege, for the benefit of trade, that the general hypothecations, which are there denominated *Schepen Kennis*, or bonds executed before aldermen, should have a right similar to that of special hypothecations, and be entirely excused from paying the fortieth penny: and a general hypothecation effected under another government, of immoveable property situated there, may have no force, according to the grant of the 8th March 1594; so that in that city, a general hypothecation which was not subject to the payment of the fortieth penny, had the priority over a later special hypothecation, and was equivalent to a special hypothecation, with the exception only of the *Kusting brief* (1); as appears more extensively in the grant above referred to. Therefore, at Amsterdam, only general hypothecations (or *schepen-kennis*) are made; and the people, without paying the fortieth penny, had the same right of special hypothecations, which at other places were encumbered with the fortieth penny; but in consequence of the complaint of other cities, the said grant, by a general advertisement and command of the states of Holland, of the 5th February 1665, was so far annulled, that no mortgage either general or special, howsoever it may be denominated, should enjoy any preference either upon moveable or immoveable property, but only so far as the fortieth penny was paid thereupon to government at the time the mortgage was executed.

General and special mortgages (or general and special hypothecations) are effected commonly in express words, as thus, "*upon the mortgage especially of*, &c. *and further generally*," &c.; and general mortgages thus, "*upon the mortgage generally of all property*," &c.

But if certain immoveable property be sold, upon which an annual rent is left, or otherwise if it be incumbered with an annual charge, as with a quarter of a measure of butter, or a measure of wheat, to be contributed yearly from the produce of certain land, one would understand that the said property or land was specially bound for it without any further agreement (2); and so it was judged likewise by Sande. (3)

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(1) *The Kusting Brief* was a bond whereby it appears that the purchaser of a house or farm is still indebted for it to the seller.

(2) Covarruv. in cap. Raynut. § 10, n. 8. versic. est tamen dubium. Alciat. in l. plebs. § pignus. Ff. de verbor. significatione. Matth. de Afflict. decis. 162. n. 6. Boër. Decis. 66. Molinæ. ad consuetud. Paris, tit. 2. § 53. Gloss. 2. n. 9.

(3) Lib. 12. tit. 3. def. 8.

§ 5. The agreements in pledging or mortgaging were various; but the following, besides the common agreement, is only in use with us, viz. that the fruits of the property thus mortgaged are to follow the creditor for the interest of the principal indebted to him, if the debtor only reserves the power to redeem his property at any time (1). In which case, if the fruits of the mortgaged property amount to more than the interest of the principal for which the property was mortgaged, the overplus ought to serve as part payment of the principal (2). Tacit hypothecation is that, which is effected by the construction of law, and goes before all other later hypothecations, as is treated of in particular, in the following chapter.

What Agreements and Contracts are usual therein.

(1) Zypæ Not. Jur. Belg. de pignor. act. Sande, lib. 3. tit. 12. def. 11. vulgo Antichresis dicta. Vide Molinæ. de Usur. quæst. 35. n. 259 & seq. Gail. 2. obs. 3.

(2) Per. l. 14. Cod. de usuris. Sande, lib. 3. tit. 12. def. 10.

CHAP. XIII.

Of tacit Hypothecation and Right of Preference.

§ 1. *Of Pledge or Mortgage.*
2. *What Property may be mortgaged, and by whom.*
3. *Mortgage of a Bankrupt, how far it may exist.*
4. *Whether, and how far, another man's property may be mortgaged.*
5. *Whether, and how far, an Article or Thing can be mortgaged in which any thing else is concerned.*
6. *Whether what has been mortgaged by one Person can be mortgaged to a Third.*
7. *Of the Right of Preference under several similar Hypothecations or Mortgages, and the Order to be observed relative thereto.*
8. *Of tacit Hypothecation by Construction of Law; when and in what cases it has place.*
9. *What Right of Preference Funeral Expences have; and what are to be reckoned among them.*
10 *What Privilege the State has before or together with others.*
11. *A Ward or Pupil upon the Property of his Guardian, or surviving Father or Mother.*
12. *What Privilege House-rent or Rent of Land has together with or before other Debts.*
13. *The Ship and Merchant's Property how hypothecated to the Master of the Ship, Factors, and others.*
14. *What Privilege of Hypothecation Women have upon their Husband's Property, to receive Indemnification for Property brought in by them.*
15. *Legatees and Heirs of entailed Property upon the Goods of the Estate.*
16. *How far, at Amsterdam, a mere Engagement not to alienate, binds the Proprietor.*
17. *Among several Mortgages having the same Right, what Privilege exists.*
18. *What Right a special Mortgage has.*
19. *What Right a general Mortgage has, and how far it extends against a third Possessor.*
20. *What Right public Instruments and notarial Bonds have, and what are to be considered as such.*
21. *What Preference Servants' Wages have over other Debts.*
22. *Whether and how far Interest in Arrear is preferred with the Principal.*
23. *Right of Separation, what; and what Privilege it introduces.*
24. *How to proceed for the Purpose of selling the Property mortgaged.*

Of Pledge or Mortgage.

§ 1. THE right of mortgage or pledge is the security, that the party lending money thereupon shall receive satisfaction from the mortgaged or pawned property, before another person who has no older or better right for his debt.

What Property may be mortgaged, and by whom.

§ 2. This mortgage may be effected upon various goods, both moveable and immoveable (1), and upon all income which one derives from any goods, such as usufruct, fee farm, quit-rent, and hereditary servitude (2); and likewise by and through all those who may alienate their property, and bind themselves and their property effectually; of which subject we have already treated.

Mortgage of a Bankrupt, how far it may exist.

§ 3. A mortgage, executed by a bankrupt to the prejudice of his creditors, just before his bankruptcy, may not exist, especially of moveable property. Against such fraudulent transactions various regulations have been made in several cities, limiting a certain time before the bankruptcy or disability for effecting such mortgage; of which we have already treated at large. (3)

Whether and how far another Man's Property may be mortgaged.

§ 4. No one can mortgage the property of another man, so that the proprietor thereof shall suffer loss in consequence of such mortgage (4), excepting in the case of things that are pawned or mortgaged in our banks of loans, which takes effect even though it belongs to another. Yet, in order that no one should be deceived in future through the fault or neglect of any one, in trusting his property to an unfaithful person, it is likewise introduced, that if any person without authority sells, mortgages, or in any other manner alienates the property entrusted or lent to him, in such case the proprietor of such property shall neither have nor claim any right against him who obtained the same upon good faith, excepting only to redeem the property for the price for which it was sold or mortgaged. (5)

Whether and how far an Article or Thing can be mortgaged, in which any thing else is concerned.

§ 5. If any person mortgaged or incumbered part of an article respecting which he was concerned with another, in such case, according to the written laws, if the division was made afterwards, the one part as well as the other was considered as incumbered with the mortgage (6). But subsequently, in order to diminish lawsuits (7), it was likewise introduced, that the mortgage and incumbrance shall remain only upon that part of the article which, when the division was made, became the

(1) L. 238. § 2. Ff. de verb. signif.
(2) L. 21. Ff. de pignor. l. 1. Cod. si pign. pignori dat. l. 4. Cod. quæ res pignori.
(3) Vide book ii. c. vii. § 8. pp. 125, 126, supra.
(4) L. pen. Cod. si aliena res pignor. l. 1. Cod. si pignus pignor. datum sit.
(5) Cost. Antwerp, tit. 58. art. 5. Neostad. suprem. cur. Holland, decis. 86. Groeneweg. ad § 16. Inst. de obl. quæ ex del. Matth. Paræm. Jur. paræm. 7. n. 7. Van. Leeuwen, Censur. Forens. lib. 4. c. 7. § 15.
(6) L. 7. § ult. Ff. quibus mod. pign. vel hypothec. solv. l. 31. Ff. de usu & usufruct. legato. l. 3. § ult. Ff. qui pot. in pignor. l. 6. § 8. l. 7. § ult. Ff. communn. divid. l. 10. § ult. l. 20. Ff. eod.
(7) L. 21. Ff. de reb. cred. l. 53. Ff. de cond.

share of the debtor (1); and so it was understood by the court of Paris (2), and by the court of Holland. (3)

Whether what has been mortgaged to one Person can be mortgaged to a Third.

§ 6. Mortgaged and encumbered property, although the creditor is not master thereof, may however, for the benefit of trade, be even subsequently mortgaged by the creditor to a third person; which will be valid in the same manner, so long as and until the first mortgage be redeemed. (4)

Of the Right of Preference under several similar Hypothecations or Mortgages, and the Order to be observed relative thereto.

§ 7. The preference among several mortgages or hypothecations is as follows: viz. With respect to a tacit hypothecation (which by right and construction of the law appertains to any one, and ought to have the preference, together with the special hypothecations, according to their time and order), this order and distinction is observed, namely, that the special hypothecation is preferred where it is older.

Of tacit Hypothecation by Construction of Law; when and in what cases it takes place.

§ 8. A tacit hypothecation belongs to him who levies tribute, upon tributary property, in satisfaction of the tribute (5); and likewise to the holders of title or ground-deeds, proceeding from the purchase of houses, premises, lands, or ships, which are specially mortgaged for the same.

Secondly, to the officers or other persons who have laid out money to keep in repair roads, dikes, small banks, mills, and similar works. (6)

Thirdly, to those who have lent money to any one for making the necessary repairs in a house or ship, or for keeping in necessary repair certain work upon such house, ship, or other goods (7). Or, otherwise, if any one had lent money to another, either to build or to purchase a new house, he would have no right thereupon before other debts, unless it was expressly agreed (8). And it must appear, in both cases, that the money lent had *really* been laid out for such reparation or building in the following manner; viz. that the creditor himself has counted the money to the carpenter, bricklayer, or other workmen, and has a receipt for the same, or in similar manner. (9)

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(1) Facit. l. 13. § 17. Ff. de act. empt.

(2) See Mornac. ad d. l. 7. § ult. Ff. quib. mod. pign. vel hypothek. solv. Annæ Robert. Rer. Judicat. lib. 3. c. ult. in Frisia, and Sande, lib. 3. tit. 12. def. 27.

(3) Neostad, decis. 16. vers. secunda quæstio.

(4) L. 1, 2. Cod. si pignus pignori dat. sit.

(5) Arg. l. 1, 2, 3. Cod. sine sensu vel reliq.

(6) Neostad cur. Holl. decis. 24 & 35.

(7) L. 1. Ff. in quib. caus. pign. vel hypoth. tacit. l. 25. Ff. de reb. author. jud. possid. Arg. l. 46. Ff. de damno insecto. l. 2. Ff. de ædific. privat. Groenw. ad l. 5. Ff. qui pot. in pign. Cons. Antwerp. c. 66. art. 44.

(8) See Hartman Pistor. lib. 3. quæst. 15. Cujac. ad l. 7. Cod. qui potior in pignor. Anton. Faber ad Codic. lib. 8. def. 10.

(9) Ut post Mornac. ad l. 5 & seq. Cod. qui potior in pignor. Joan à Sande, lib. 3. tit. 12. def. 5.

What Right of Preference Funeral Expences have; and what are to be reckoned among them.

§ 9. Fourthly, funeral expences have preference over all the property of the deceased; under which is to be reckoned whatever had been laid out for the burial, according to the circumstances of the deceased (1). By the doctors are included therein, likewise, the mourning clothes for the widow and children, according to the circumstances of the deceased (2); but by the court of Holland, with respect to the preference of the creditors of Uldrick van der Dusse, the charge for the widow's mourning was rejected, on the 19th October 1615; and it was likewise so understood by the high court, upon the preference of Baudouin de Vaux, on the 7th April 1629 (3); so that those who wish to mourn must do so at their own expence.

Further, under the head of funeral expences are reckoned the fees of doctors, surgeons, and the medicines of the apothecary to whom the deceased died indebted (4) (and so it was likewise understood on the 21st May 1612, on behalf of the doctors who attended Dirk Schout, doctor of law); but with this distinction, that the funeral expences and other debts incident to the death of the deceased are borne by the heirs and on the side of the deceased (5). But the expences of the doctor and apothecary, incurred during the life-time of both husband and wife, are carried to the account of the common estate. (6)

What Privilege the State has, before, or together with, others.

§ 10. Fifthly, the state has a preference for the debt, and upon the property, of those who had any management of the revenue of the country (7); whose right is also used by renters and excisemen, under this restriction; namely, that they ought to institute their right and prosecute the same without delay within six months after the rent is expired. (8)

And likewise poundage and other common revenues of the country have a preference over all old incumbrances and rents, which I would likewise understand, in the same way as in all other rents and excises, to be in force only for one expired year, conformably to the above cited resolution of the

(1) L. 14. § 1. l. 45. Ff. de religios. & sumpt. funer.

(2) See Christin. ad leg. Mechlin. tit. 16. art. 35. n. 11. in addit. Nicol. Everhard. cons. 198. n. 19. Jacob Coren, obs. 38. n. 29, 30. in notis.

(3) Jacob Coren, d. obs. 38. n. 41.

(4) Christin. ad leg. Mechlin. tit. 16. art. 35. n. 4. & tit. 13. art. 13. in addit. Chassan. ad consuet. Burgund. Rubric. 4. § 9. vers. Sumptusve funebres. n. 6. Surd. Decis. 255. n. 25. & seq. Carpzov. Def. Forens. part 1. const. 28. def. 43. 45. Gratian. Disceptat. Forens. c. 94. n. 14. & seq.

(5) See Christin. ad leg. Mechlin. tit. 16. art. 35. n. 1. Everhard, consil. 232. n. 13.

(6) See Chassan. ad consuetud. Burgund. rubric de Juribus, 4. § 9. vers. sumptusve funebres.

(7) See Sande, lib. 3. tit. 12. def. 1.

(8) Interpretatie en Resolutie van de Staten van Holland (Interpretation and Resolution of the States of Holland), March 22, 1625.

states, unless it appears that it was otherwise understood by the court and the high court, and that it is still observed so every where. (1)

And so the cities, included thereunder at the Hague (2), have a preference, for the poundage of the years in arrear, over all other hypothecary creditors. But with respect to the poundage in the country, it was established by resolution of their high mightinesses the states of Holland and West Friesland, on the 7th June 1605, that the collectors must demand it from, and sue, those who occupy the lands, and may not recover from the proprietors or their lands further than the eighth penny, namely, within the period of three months after the expiration of every year; and that after the expiration of such three months, they should have no right against the proprietors or their lands, unless within the said time they had properly and finally taken out execution without connivance; which, on the 1st August 1658, was prolonged by the said states from three months to a whole year.

But with respect to the fortieth penny fixed upon the alienation of immoveable property, which commences only from the date of the transaction entered into by the parties, it is to be understood, that the preference begins only from the time of the alienation: and that therefore all older incumbrances until that time are to be preferred; and then the fortieth penny is to follow; and so all incumbrances subsequently incurred, and the interest likewise of older principal sums, which become due after the date thereof, must follow after the said fortieth penny. (3)

A Ward or Pupil upon the Property of his Guardian, or surviving Father or Mother.

§ 11. Sixthly, a pupil has a right of preference against the property of his guardian, for the loss suffered through negligence in his office (4), and likewise against the property of the man with whom the pupil's mother (being guardian of her children) married (5); and moreover, against the property purchased with her money (6). And the children of the former marriage have a tacit hypothecation upon all the property of their father or mother, as a security for whatever they obtained from their deceased father or mother (7); unless the mother of the children was not guardian of her children; or previous to her second marriage had produced a proper account, and another guardian had

(1) Coren, observ. 17.
(2) The original expression is, *den Hage daar onder begrepen.*
(3) See the Sentence of the Court of Holland between Pieter Leenaarts Jongevink and Thomas Dammas, of the 22d October 1608.
(4) L. 20. Cod. de administ. tutor. l. 5. § 4. l. 9. § 1. Ff. eod.
(5) L. 2. Cod. quando mulier tutel. offic. l. pen. cod. in quib. cas. pig. vel hypoth.
(6) L. 7. in pr. Ff. qui potior in pignor. l. 3. Ff. de reb. eor. qui sub tutel.
(7) L. 8. § ult. Cod. de secund. nupt.

been placed over her children, in which case it cannot be effected. (1)

§ 12. Seventhly, a person who lets a house has a right upon whatever is brought and kept therein (2); but not upon the goods which a person who rents the house has in his hands to work, such as silk, &c. (3); which also has effect among us with respect to a person who lets lands, although it was not specially agreed (4). In such sort, however, that the goods must be found and detained upon the ground of the house let or premises, or being carried away prosecuted and arrested immediately, according to the common proverb, "*moveable goods are not subject to prosecution*" (5). And the goods of the second tenant found upon the ground of the house rented by him, are bound to the first landlord for as much as the second rent or hire amounts to (6). And so it was determined by the court, that a proprietor having caused the fruits, cattle, and moveable property of the occupier of his ground to be seized thereon, has also the preference in the country, although the fruits were carried away from the ground and kept, namely, upon all the proceeds of the fruits, cattle, and tools of husbandry, for his rent or land duties, in the case of Jeronimus van Staalkerken, esquire, against Adrian Vincent, on the 20th November 1607.

What Privilege House-rent and Rent of Land has together with or before other Debts.

Eighthly, cities, upon the property of their directors concerning their offices (7); which is also extended to other inferior colleges, viz. churches, hospitals, orphan houses, and institutions for the poor, &c. (8) And it was likewise granted to the East and West India companies, upon the money wherein the directors thereof are concerned. (9)

§ 13. Ninthly, the ship and merchant's property are bound to the master of the ship and crew, for their freight and other charges. (10)

The Ship and Merchant's Property, how hypothecated to the Master of the Ship, Factors, and others.

(1) See Sande, lib. 3. tit. 12. def. 2.

(2) L. 2. cum seq. Ff. in quib. caus. pign. vel hypoth. tacit.

(3) Anth. Matthæus de auctionib. page 244.

(4) Contra, l. 4. Ff. de pact. l. 4. in pr. junct. l. 7. Ff. in quib. caus. pign. vel hypoth. Vide Vinn. ad § 7. Inst. de Act. Utr. Cons. vol. 1. c. 63. & seq.

(5) See Grotius, Inleyd. lib. 2. tit. 48. n. 21. Cons. & Adv. cons. 196. part 1. Zypæ Not. Jur. Belg. de pignor. act. in fin. Christin. vol. 1. decis. 274.

(6) L. 11. § 5. de pignorat. action. Cons. & Adv. vol. 5. cons. 52.

(7) Vide Neguzant de pignorib. 4. membr. 2. part. princ. n. 119. Montan. de tutelis, c. 31. effect. 2. n. 9. Sande, lib. 3. tit. 12. defin. 1. text. est in l. 4. Cod. ex quib. caus. major. l. 1. & l. ult. Cod. quo quisque ordine conven. l. 3. Cod. de jure reipubl.

(8) Arg. l. 32. Cod. de Episcop. & cleric. junct. Novel. 123. per quam d. l. 32. circa fin. corrigitur. Vide Ferd. Vasques. controv. part 2. lib. 1. c. 9. n. 8, 9. Wesemb. Parat. ad tit. Ff. in quib. caus. vel hypoth. n. 5. Bacchov. Tract. de pign. lib. 1. c. 9. n. 3. Cons. & Adv. vol. 4. cons. 364, 365.

(9) See the *Octroy* (Grant) of the States General of the 20th March 1602, art. 32.; and of the 3d June 1621, art. 38.

(10) See Wisbuys. Ze-regten, art. 57. Ordinance of King Philip, October 31, 1563. tit. Van Schippers, art. 13.

Tenthly, the ship, which appertains to the master, is bound to the merchant for indemnification of his goods sold by the master of the ship, provided that the merchant prosecutes it within a year; and if the ship comes into the hands of a third person, proof must be made thereof through the seal of the master of the ship. (1)

Eleventhly, a factor has a preference upon the merchandize of his constituent for money due to him, or for the amount for which he has signed for him (2); and a partner, by virtue of the partnership entered into by him, has also a preference upon the goods belonging to that partnership, not only for the liquidation of the common charges of the partnership, but also for whatever is due to him for his share therein. (3)

What Privilege of Hypothecation Women have upon their Husband's Property, to receive Indemnification for Property brought in by them.

§ 14. Twelfthly, a wife has a preference upon the property of her husband to secure whatever was brought in marriage by her (4); which, so far as concerns the property brought in marriage by her, is by some extended to the allowing her the same right of preference to all other tacit or special older hypothecations, for indemnification of property brought in by her; whereof a precedent was decided by the aldermen of the city of Leyden on the 22d March 1641, on behalf of Odilia Bets, widow of Mr. Marten Van Egmond, doctor of law; by which she was decreed to have the preference above his pupil's mother's inheritance, which was in the custody of the said Van Egmond as father and guardian. But the greater part of the modern authors, who have written concerning our customs and local laws, have rejected it as an unjust preference, tending entirely to the prejudice of a third person: and it is now so much passed by, that a woman, on account of the property brought by her in marriage, has only an equal right with other tacit or special hypothecary creditors, under which the oldest is preferred (5). The reason assigned by modern authors for thus rejecting the preference of wives, is this; viz. that the preference granted to them by the law can neither prejudice nor remove the right of another, which he has acquired by a previous agreement. (6)

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(1) Wisbuys. Ze-regten, art. 40.

(2) See Neostad. decis. cur. Holland 45. Recueil van de Keuren en Costuymen van Amsterdaam (Collection of the Edicts and Customs of Amsterdam), tit. 37. art. 24. Cons. & Adv. vol. 1. cons. 203.

(3) L. 27. l. 38. § 1. l. 63. § 5. l. 65. § 14. l. 67. § 2. Ff. pro socio. Hector Felix Tract. de Societate, c. 31. n. 24. Cons. & Advys. vol. 6. cons. 6, 7, 8. & vol. 4. cons. 284.

(4) L. unic. § 1. Cod. de rei uxor. act. l. 12. Cod. qui pot. in pignor. Plac. Oct. 4, 1540, art. 6. in fin.

(5) See Gloss. & DD. in d. l. 12. Cod. qui pot. in pignor. Schneiduin ad § 29. inst. de act. n. 58. Faber ad cod. eod. tit. def. 16. Gail. lib. 2. obs. 25. n. 10.

(6) Arg. l. 2. § si qui a principe. Ff. Ne quid in loco public.

And it is to be considered that such preference has no effect among us, except the gain and loss during the marriage are expressly excluded by ante-nuptial contract; or when the wife, having stipulated therein her free choice, has renounced the community after her husband's death (1); or if the alienation of his wife's property was expressly prohibited to the husband by ante-nuptial contract (2). But whether and how far such agreement takes effect to the prejudice of a third person, will be treated of subsequently, under the title of ante-nuptial contracts.

Legatees and Heirs of entailed Property, upon the Goods of the Estate.

§ 15. Lastly, all legatees and heirs to entailed property have a claim upon the property of the deceased for the payment of bequests and goods bound (3). And so the heirs to entailed property have a right to demand, upon eviction, and to recover their inheritance from such immoveable property as was left by the testator, although it be in the possession of a third person, or alienated further; and they are preferred thereupon to all others (4). But as this was too hard to a third person who had *bonâ fide* become possessed of such property, it was enacted by an edict of the states of Holland of the 30th July 1624, that no clause of *fidei-commissum*, substitution, prohibition of alienation, or of any other similar incumbrances of immoveable goods or hypothecated rents, inserted in any last will, codicil, ante-nuptial contract, separation, donation *inter vivos*, *causâ mortis*, or any other agreement, should have right of hypothecation, unless they were brought at the place and to the court of justice under which the said immoveable property is situated, and the rents were fixed; and then, on account of the right of minors, which in similar cases mostly intervenes, as well as other circumstances, it was found contradictory, and could not be well brought into practice, so that it became again entirely out of use, and it was even understood in *contradictorio judicio* that it could not take place.

How far, at Amsterdam, a mere Engagement not to alienate binds the Proprietor.

§ 16. At Amsterdam a statute exists, which (it seems) is observed there for the benefit of trade, viz. that a mere obligation inserted in testaments, codicils, and other last wills,—for example, that the goods which the testator shall leave behind him should never devolve by death, nor be alienated from his blood, &c.—does not impede the heirs of such testator from selling or alienating the property left to them under such clause, for their

(1) Neostad de pact. antenupt. obs. 9, 16. Grotius, Inleyd. lib. 1. c. 5. n. 40.
(2) Neostad. dict. tract. obs. 21. Grotius, Inleyd. lib. 1. c. 5. n. 39.
(3) § 2. Instit. de Legat. l. 1. Cod. Commun. de Legat.
(4) Ibid.

benefit, or in case of necessity, in order with the proceeds thereof to carry on their trade, or to pay their other debts, and likewise to dispose thereof by last will in the manner they please. This statute is still in force. (1)

Among several Mortgages, having the same Right, what Preference exists.

§ 17. Amongst several hypothecary creditors having equal right, the oldest always has the preference, according to the proverb, *he who comes first is first served* (2); and, among such creditors, those having a tacit hypothecation have in every respect similar right with those having a special hypothecation or mortgage. (3)

What right a special mortgage has.

§ 18. A special mortgage upon immoveable goods always takes precedence of a general mortgage upon various goods, although it be older (4); but if any one had effected upon one and the same day two hypothecations or mortgages of similar right, it has been doubted which of them is to have the preference; and it is understood that he, whose mortgage has been first recorded, is to have the preference, so far as a proper book and memorandum is kept thereof; because such preference can be created in an hour, and even in a moment (5). There is, however, an exception to this rule at Amsterdam; where, by a peculiar grant of the 8th March 1598, the Roman law so far prevails, that there is no difference between a general and a special mortgage, but the oldest is preferred (6); on which subject we shall hereafter treat more extensively.

What Right a general Mortgage has, and how far it extends against a third Possessor.

§ 19. A general mortgage takes precedence of all other unsecured debts (7). But whether and how far it takes effect against a third possessor, may be a subject of consideration amongst some; on this point it was enacted by the statutes of Leyden of the year 1583, (art. 71.) that a possessor of any houses or premises by private title of purchase (if there be any general incumbrances upon such houses or premises) cannot be released, unless for three years he had *bonâ fide* been in quiet and peaceable possession of such house or premises, without being molested or exhorted by those who may claim the right of general hypothecation upon the property so bought by him; but since the daily customs, and general edicts and ordinances of the country, give all purchasers of immoveable property the right of special mortgage, and fully

(1) See Rosenboom's Recueil van de Keuren van Amsteldaam, c. 44. art. 7.

(2) L. 2. 4. 7. 8. 11. Cod. qui pot. in pig. l. 10. 11. ff. eod.

(3) L. 8. 9. Ff. qui pot. in pignor. l. 2. Cod. de privileg. fisci. Neostad. Cur. Holl. decis. 35.

(4) Contra. § 2. Ff. and l. 9. Cod. dict. tit. Polit. Ordon. art. 35.

(5) See Sande, lib. 3. tit. 12. def. 16. Mornac. ad rubric. Ff. qui pot. in pignore.

(6) See Grotius, Inleyd. lib. 2. para. fin. n. 49.

(7) See Polit. Ordin. art. 35.

secure them in the full property thereof before all others who have not obtained a similar right by special hypothecation, (provided the deeds of transfer thereof be executed before the court of justice of the place where the said property is situated, according to the edict of the Emperor of the 9th May 1529, and the fortieth penny be paid independent thereof upon the purchase or right value thereof for the benefit of the country, according to the edict of the States of the 22d December 1598); the abovesaid statutes against the general edicts and customs cannot deprive a third person of his right, unless the same have been in due form approved of by the States: as I have often seen that the court had passed by and annulled similar statutes of cities, which were in prejudice of a third person, or militated against the general right of the country. And it was decreed by the court with respect thereto, on the last day of June 1609, in the case of Reyer Boot against Cornelis Florisz, and in the case of Catherine Cornelis against Jacob Christian Molswyk, on the 23d July 1612, and likewise in the case of Jacob Cornelis Vaas against Dingman Maartens, on the 4th December 1615, that a general mortgage does bind no longer than the property remains with the debtor. (1)

Concerning moveable property there is no doubt whatsoever. As soon as it comes into a third hand with proper title, according to the customs of these countries, it becomes fully vested in him according to the rule *mobilia non habent sequelam*, that is, moveable property is not subject to prosecution; whether the same be really delivered into the hands or by transfer, or be appropriated in consequence of legal transfer by any one, although he allows the same to remain *precario* in the possession of him who makes the transfer, that is to say, at his application, if it be clearly conditioned in the transfer. So that, with respect to transferred and other alienated property, no right of proceeding or tacit hypothecation takes place (2). An exception, however, is made in favour of bills or bonds upon a ship already made or still to be made for the purpose of securing the proffered purchase of the said ship, or for the payment of the timber with which the ship had been built; for which the said ship is understood to be hypothecated, and to remain so although she had come into the possession of a third person (3). The same practice, accord-

(1) On this subject, see the opinion of Grotius, in Cons. and Advys. vol. 4. cons. 174.

(2) See Grotius, Inleyd. lib. 2. c. 48. vers. maar indien; and a *Turbe* (order?) respecting the same, made at Amsterdam, May 31, 1631, inserted in the Cons. & Adv. vol. 4. cons. 175.

(3) Per. l. 18. § 2, 3. Ff. de pign. act.

ing to the customs of Rhineland, is observed with respect to cattle and horses, &c. sold, if it be so conditioned. (1)

What Right public Instruments and notarial Bonds have; and what are to be considered as such.

§ 20. Public instruments, viz. notarial bonds and others, with their obligations, have in law the same right upon *moveable* property as a special mortgage has over immoveable; and they take precedence of mere notes of hand; but over immoveable property they have no right (2); so that the binding with respect to immoveable property, in use amongst notaries, has no effect in a notarial obligation. And, by an edict of the 5th February 1665 it was ordained, that no mortgages, whether general or special, of what denomination soever they may be, should have any preference either upon moveable or immoveable property, actions or duties, unless the fortieth penny be paid thereupon at the time of the execution thereof, notarial obligations likewise being included; so that, according to that edict, such privilege is to have no further effect, unless (as is in the case of immoveable property) the fortieth penny (2½ per cent.) had been paid upon it: but as that proclamation was merely made on account of the judicial bonds at Amsterdam, where, according to the grant given to that city on the 8th March 1598, the general mortgage had as much right as the special; on which account at that place only a general mortgage was given, which was there denominated *Schepen Kennis*, (or a bond executed before aldermen); and thereby the right of the fortieth penny was rendered entirely void; and in order to satisfy the people of Amsterdam, who would not otherwise allow that proclamation, the notarial bonds respecting moveable goods were also inserted therein; but the payment of the fortieth penny thereupon is not observed, whence one would infer, that the old right of preference of notarial obligations (otherwise denominated public instruments) is tacitly allowed, in the same way as was understood with respect to the registering of trust or entailed property, and other legal hypothecations ordained by proclamation of the year 1624, upon penalty of forfeiture of the right, viz. that as it was not brought into practice, the former right was again allowed and re-established.

But, among us, bonds mortgaging moveable property do not bind further than the property remains in the possession of the debtor, according to the rule, "*moveable property is not subject to prosecution;*" so that if the same had come into the hands of a third person through lawful acquisition, it would, according

(1) Cost. Rynl. art. 48.

(2) Plac. Emp. Charles V. May 9, 1529. Neostad. Decis. Cur. Holland, 19.

to the custom of these and neighbouring countries, be free and unincumbered (1). But in Rhineland the contrary is observed, according to the grounds of the written laws (2); namely, when any one purchases any moveable property, and for the debt thereof executes a bond specially mortgaging the goods purchased, the holder of the said bond has then a right of preference upon the said property, to the best of his knowledge, for obtaining the same (3); and if his bond contains a clause, that, in case of non-payment, he may seize such property again as his own free property, he then comes and seizes the property with the court messenger of the place, although the same had already been sold to a second or third person (4). In which case the bond was granted only privately. (5)

A mere handwriting or note of hand, certified by the signature of three credible witnesses, has also the right of public instruments, and takes precedence of running or simple contract debts: as it was decided in April 1619 upon the application of the aldermen of Leyden (and since observed there), by A. van Berendregt, J. van Vermeren, and P. van Veen. (6)

It is questioned by some, whether the clause "*under obligation according to law,*" inserted in a bond, is sufficient, and is equivalent to saying "*under obligation of person and property*" (7), on which account it will be more certain to state in express terms the obligation of persons and property.

What Preference Servants Wages have over other Debts.

§ 21. At some places it was introduced with a good view, that servants should have the preference for their wages, upon the goods of their masters, before all other running or simple contract debts, if at the time of death or bankruptcy, they were found at the house and in the service of such masters (8). This point, however, is still uncertain among us, there not being any express enactments concerning it. (9)

With these exceptions, there is no right of preference, but all running or simple contract debts come in concurrence and right of mixture, each being equally near, according to the extent of the amount of his debt. (10)

(1) See Cons. & Advys. vol. 3. cons. 147. n. 1. 3.
(2) Arg. l. 1. § 1. Ff. de Salv. inter dict. junct. § 41. Instit. de rer. divis.
(3) Cost. Rynland, art. 48, 49, 50.
(4) Ibid. art. 48, 49.
(5) Ibid. art. 50.
(6) See Grotius, Inleyd. lib. 2. tit. 48. n. 33. Cons. & Adv. vol. 1. cons. 232. and 235. and Cons. Const, vol. 3. cons. 97. Jacob Coren, observ. 38.
(7) Cons. & Adv. vol. 1. cons. 267. et seq. Bell. Jur. p. 432.
(8) Matth. de Auct. l. 1. c. 20. n. 6.
(9) Vide Wesembec. Parat. ad tit. Ff. de privileg. Creditor. n. 5. Berlich. Conc. Practical. p. 1. conclus. 64. n. 66, 67, 77. and 79. Carpzov. def. forens. part. 1. Const. 28. def. 24, 25, and 33. Coren. dec. 200. n. 8. Hartman. Pistor, p. 1. quæst. 8.
(10) L. 32. Ff. de reb. auth. jud. pos. l. 10. Cod. qui pot. in pig. l. 12. § 2. Ff. eod.

Whether, and how far, Interest in arrear is preferred with the Principal.

§ 22. Those, who have a preference concerning a principal sum, are likewise preferred respecting the interest in arrear upon that very principal; but in order that good people might not be deprived of their debts through too great an accumulation of interest in arrear, particular regulations were made at many places, and likewise by an edict of the 26th October 1572, viz. that a creditor should not be preferred with more than three years interest, unless the said interest had been converted into principal, and unless a mortgage had been granted for the same. But, according to Zypa and others (1), it was never observed, except at the places where it was expressly introduced by statutes (2); and there is a statute at Gouda, that a creditor who allows the payment of the debt due to him by instalment, for the purchase of house or land, to be in arrear for the period of three years, may not be preferred to other creditors, with the principal and instalments, even upon the ground whence the debt arose. (See also ch. vii. § 7. p. 341.

And it is likewise to be observed, that although interest ought to be paid on debts payable by instalments, and upon houses or lands which are not paid for at their proper time, though such interest should not be expressly stipulated (3); yet such interest has no right of preference *together with* the principal unless it was expressly stipulated, and the property was specially bound for the same as well as for the principal; as was decreed by the court of Holland in the case of Jan Dirksz van Keulen against Willem Willemsz van Nieuport on the 11th November 160.

Right of Separation, what; and what Privilege it introduces.

§ 23. Besides the preceding privileges, there is another in behalf of creditors, viz. that if an *heir* is under suspicion of insolvency or bankruptcy, and they are under apprehension that through a mixture of his estate with the estate inherited by him, they will suffer loss; but that they can be paid well from the goods of the former estate; they may, within five years after possession taken of the said estate, still cause the goods of the inherited estate, so far as they continue the property of the heir, to be separated from his own property, and they may recover therefrom alone the debts due to them, without any of the said heir's creditors having any share of their debts whether contracted before or afterwards (4); although the said goods were, in the mean time, pawned by the heir on behalf of his creditors and

(1) Zypæ Not. Jur. Belg. tit. de reditib. ann. vers. fraudib. vero. Faber, Cod. qui potior in pign. defin. 8. n. 5. Coren, obs. 18.

(2) Keuren van Leyden, art. 125.

(3) Per. l. 5. Cod. de Actione empti.

(4) L. 1. § 10. 12. L. 2. and tit. Pf. de separat. bonor.

incumbered in particular, whereas the right of dividing the estate is a legal hypothecation, which, as well as other legal hypothecations, must have the preference before special later hypothecations and writs with seals.

How to proceed, for selling the Property mortgaged.

§ 24. Execution being taken against the debtor, the mortgaged or hypothecated property is sold to the highest bidder by order of the judge, by a door-keeper or judicial messenger having previously proffered, proclaimed, and advertised the same, which is performed in the manner described by Merula and others (1); which being performed, the proceeds (instead of the property) is divided among all those who have any right thereto, according to the order and equity appertaining to each, by way of preference (2): provided security be given for the restitution thereof at any subsequent time, if, upon calculation, it be found otherwise requisite. (3)

CHAP. XIV.

Of Exchanging, Rewarding, Acting in Consideration of a Reward, Acting in Consideration of an Act, and whatever appertains thereto.

[Grot. 3. 31.]

§ 1. *Giving and giving, giving and doing, doing and giving, doing and doing.*
2. *Of Exchanges of Money.*
3. *In what Cases a Person may repent of, or recede from, a Transaction.*
§ 4. *In what Cases any thing paid or agreed to be paid may be reclaimed.*
5. *Gambling and betting, how far binding.*
6. *Whether Gifts, &c. for obtaining any Office may be reclaimed.*

Giving and giving, giving and doing, doing and giving, doing and doing.

§ 1. THERE are some other transactions which are confirmed by the matters passing over, and which have no peculiar name (4); these transactions are of four sorts, viz. 1. The giving of a thing, in consideration of something to be given in return by another person; 2. The giving of something in consideration of

(1) Vide Merula, Prax. Civ. lib. 4. tit. 95. c. 2. & seq. Papegay, page (mihi) 396. & seq. Damhouder, Prax. Civ. c. 258. & seq.

(2) See Wieland, Prax. Civil. lib. 10. c. 7. Damhouder, Prax. Civil. c. 260. Merula, Prax. Civil. lib. 4. tit. 95. c. 14. Herbai, lib. sing. c. 6. in fin.

(3) See Instruct. Cur. Holland. art. 192. in fin.

(4) L. 1. § 1 & 2. Ff. de præscript. verb. l. juris gentium. Ff. de pactis.

something being done in return by another; and 3, 4. The doing of something in consideration of something to be given or done by another in return; to which no other name can be given besides those of exchanging, rewarding, acting in consideration of a reward, and acting in consideration of an act. (1)

Of Exchanges of Money.

§ 2. But giving on account of something having been given, which consists in a mere cause, is denominated *exchanging* (2); under which term is included the exchange of money; for which purpose, as among us many sorts of money are not current, and may not be received, on pain of being forfeited, certain persons were admitted and appointed, for the convenience of good people at every place; who, by virtue of a certain order and instruction of the generals of the mint concerning the same, receive such money according to its intrinsic value, and exchange the same for other money. (3)

And it is customary among the merchants, in order to avoid risk, that any one owing money at another place, pays the same to any person here, who can cause such sum of money to be paid at such said place by his factors or attornies, out of what he has outstanding there (4); which we denominate bills of exchange, but which properly comes under the heads of giving orders and assignations (5); whereof will be treated in the sequel.

In what Cases a Person may repent of, or recede from, a Transaction.

§ 3. According to the Roman law, in these nameless transactions, so long as the matter remained whole, and nothing was either given or done on either side, both parties repenting the transaction may annul the same (6); but because, according to the spiritual law, (which in this respect is followed by us,) a person acquires a full right in consequence of a mere promise, which is made from a premeditated design, as we have already stated (7), so repentance or change of mind and receding from such promise, are at present excluded in these and in all other transactions, unless it was otherwise expressly agreed (8). But he who has already fulfilled the agreement on his side, has a right to make

(1) L. 5. § 1, 2, 3, 4. Ff. de præscript. verb.

(2) L. 5. § 1. de præscript. verb.

(3) The ordinances made concerning this matter, are to be seen amongst the ordinances of Maximilian, of December 14, 1489; of the Emperor Charles V., February 4, 1520; of the Earl of Leicester as Governor of the Netherlands, August 4, 1586; Edicts of the States General, Dec. 11, 1589, January 3, 1595; March 21, 1606; July 6, 1610; and March 7, 1619; and of the States of Holland of December 19, 1603.

(4) Tot. tit. Ff. & Cod. de eo quod certo loco.

(5) On this subject, see Chapters xxvi. and xxvii. of this Book.

(6) L. 5. Ff. de cond. causâ data, caus. non secut.

(7) See book iv. ch. i. in fine, p. 314 supra.

(8) See Cost. Antwerp, tit. 53. art. 4. Grotius, Inleyd. lib. 3. c. 6. in fin. & c. 31. n. 13. Gomez. Var. Resolut. tom. 2. c. 8. n. 4, 5. Manic. de ambig. lib. 1. tit. 8. n. 17 & seq.

his party fulfil the same on the other side (1), and need not be satisfied with the interest, if the fulfilling was in the power of the other, but he may compel his party by imprisonment to do what he had promised. (2)

§ 4. And, independently thereof, if the first fulfilling consists in giving, then he who fulfilled it has the choice whether or not he will compel the other thereto as aforesaid; or whether what was given by him should be reclaimed, which in these agreements is understood to have been tacitly contracted; in which there is a double obligation; *first*, an express obligation, in which is to be performed what has been contracted and promised; and *secondly*, a tacit consequence, viz. that what has been given must be returned, if what has been promised does not follow thereupon, if the non-fulfilment occurs through fault or neglect of the promiser, and the accomplishment was in his power; but if it was not in his power, viz. if he be hindered therein, without any fault on his part, through an unexpected accident, for example, if I had promised to provide any one with food and drink during his life, and he having paid the money agreed for, died in the mean time while he was preparing to come, the said money cannot be reclaimed; and even if the money had not been given, it may be claimed when the time expires during which he could have come, and was not hindered nor refused therein by me. And likewise all other agreements, implying that whatever had been given without a debt, or if too much had been given, may be reclaimed. So also may be reclaimed what any one had given to perform an unpermitted or otherwise dishonest act, namely, if the dishonest cause is only on the side of the undertaker, although the agreement had been fulfilled; even as if it was tacitly contracted that what the laws do not allow the undertaker to detain should be returned. (3)

In what Cases any thing paid or agreed to be paid, may be reclaimed.

But if the dishonest cause is on both sides, the payment made for the same remains effectual. (4)

§ 5. For the same reason, the winner in betting and gambling transactions cannot legally recover the gain credited by him;

Gambling and betting, how far binding.

(1) l. 4. l. ult. Cod. de permutat. l. 5. Cod. de obligat. & act.

(2) See Instruct. van den Hagen Rade (Instruction of the High Court), art. 175. Ampliation Instruct. van den Hove van Holland (Ampliation of the Instruction of the Court of Holland), art. 14. Ordonantie op de justitie inde steden en ten platten landen (Ordinances relative to Justice in the Cities and Country), art. 31 & 32. Cost. Antwerp. c. 68. art. 42 & 43. Christin. vol. 1. decis. 223. n. 8.

(3) l. 5. § 1. Ff. de præscript. verb. l. 4, 5. 7. Cod. de rer. permutat. tot. tit. Ff. et Cod. de condict. causa data caus. non secuta. l. 10. Cod. de condict. ob. caus. dat. junct. Caroc. tract. locati de medici, part 2. quæst. 162. & seq.

(4) Tot. tit. Ff. de condict. indebiti.

and again, no right is allowed to him who has already paid it to reclaim it again: so that he who lent money to another for the purpose of gambling or betting, has no right to reclaim it. (1)

By the statutes of Leyden of the year 1583 (2), and also by the new statutes (3), and by those of Oudewater (4), and likewise by the statutes of Utrecht of February 10, 1657 (5), no justice is done upon betting, even if any bonds had been granted for it, and not even if the bonds contain any other cause.

But if any one had been grossly misled by a false gambler, and had lost by gambling a large amount, to the prejudice and decay of his family, or had given no money but his cloak or clothes in payment, he will obtain redress therein through equity. (6)

Of the same nature is the betting, which with us has the same right (and concerning which there are likewise special statutes at several places); unless the betting was such that the benefit and utility of both consisted therein, such as insurance, bottomry, and the like, of which we have already treated (7). Which is likewise customary in France, where wagers that depend merely on the cause itself are not permitted (8); and no wagers have effect there except where pawn or money had been laid (9); especially, because, according to the Roman laws, it is subject to great consideration whether it may have effect, because such transactions have no cause of themselves: and those who agree to do a thing without any cause, are understood to deal without good faith; although such person at the time of the transaction commits no fraud (10). Dr. Joannes Fredericus Helvetius having taken from Peter Hendriksz Eyerkoper one rixdollar, to pay one hundred rixdollars if the said Peter Hendriksz dared to speak to the Protector Cromwell, and the said Peter Hendriksz having thereupon departed to England and spoken with the Protector; the said Helvetius was condemned afterwards to pay the said one hundred rixdollars.

(1) Arg. l. 2. § 11. Ff. Mandati. Cost. Antwerp. tit. 54. art. 17. 19. Grotius, Inleyd. lib. 3. c. 3. n. 117. Christin, vol. 2. decis. 200. n. 1. Clar. § ludus. n. 7. and Rebuff. ad Constit. reg. in proœm. Gloss. 5. n. 56.

(2) Art. 130.

(3) Art. 144.

(4) Art. 129.

(5) Art. 9.

(6) l. ult. vers. sed nec. Cod. de aleator. Arg. § ult. Instit. de his qui sui vel alien. jur. sunt.

(7) See ch. ix. pp. 346—348. supra. And also Grotius, Inleyd. lib. 3. c. 3. vers. Alhier onstaat. Cost. Antwerp. tit. 54. art. 3. Zypæ Not. Jur. Belg. de Religion. in fin. Christin. vol. 2. decis. 200. n. 5. Perez, Cod. de aleator. in fin.

(8) Charond. Memorabil. verb. contractus, & verb. gage.

(9) Carol. Loseau, lib. 4. deguerpissement. c. 3. n. 13.

(10) l. 2. § 3. Ff. de dol. mali. et met. except. l. 25. § fin. Ff. de probationib.

Michiel Mortier and Andries Van Der Hoog promised to each other, by a notarial act, that the longest liver of them should enjoy from the estate of the party first deceasing, ten thousand gilders; and Van Der Hoog having first died, his heirs were condemned by the high court to pay the said amount. (1)

In some places, under this sort of transactions are likewise included debts due for drinking; as at Utrecht, where it was enacted, on the 18th February 1657, that no debts for drinking should remain unrecovered for a longer period than six months; and that for drinking, no cloaks nor any thing else may be detained, upon the penalty of twenty-five gilders, and the immediate return of the pledges so detained. And by the new statutes of Leyden (2) it is ordained, that no justice shall be done upon debts due for drinking, although bonds have been granted for the same.

§ 6. Whatever has been given to any one to have his vote for the purpose of obtaining any office, may likewise be reclaimed (3). But with us, all gifts which in anywise savour of corruption and intrigue, are entirely prohibited and unpermitted, and severe provisions were made by special proclamations (4), both against those who by promising any gifts to any person avail themselves, and also against those who receive the same. (5)

Whether Gifts, &c. for obtaining any Office, &c. may be reclaimed.

CHAP. XV.

Of Obligations or Engagements in Writing.

§ 1. *Nature of Agreements in Writing, or Obligations, and how they are effected.*
2. *They are ineffectual without an adequate Cause.*
3. *Provision of Sequestration; what, wherein, and when it is effected.*
§ 4. *Exception of the Money not having been counted, whether and when it has Effect.*
5. *Renunciation of that Exception, how to be understood, and of what Effect.*

§ 1. AN engagement in writing is a transaction, which is confirmed only by the writing. It is effected by bonds granted before aldermen, by obligations executed before a

Nature of Agreements in Writing, and how they are effected.

(1) Vide Bell. Jurid. p. 60, et seq.
(2) Art. 143.
(3) Tot. tit. Cod. de suffrag.
(4) Christin, vol. 3. decis. 6. Zypæ Not. Jur. Belg. tit. de suffrag.
(5) Plac. van de Staten Generaal, July 1, 1651. Plac. van de Staten van Holland (Proclamation of the States of Holland) against the secretary Mus and others, February 16, 1652; as appears more extensively in Heemskerk's Batav. Arcad. p. (mihi) 764.

notary and witnesses, and likewise by a mere note of hand signed by the party so binding himself.

All other transactions are likewise executed before a notary by instruments in writing, not because writing ought to be a *real* part of the transaction, but merely for memory's sake, and for better proof of the transaction (1), and in nowise because such transactions as these would be of no value without them; unless it was expressly agreed that such transactions should not exist before they had been properly reduced into writing and confirmed, which seldom takes places. (2)

They are ineffectual without an adequate cause.

§ 2. Respecting bonds executed before aldermen, we have already treated largely in the preceding part of this work: and with regard to other obligations, every thing is applicable to them which we formerly said concerning engagements, whether general or special, but with this exception, viz. that in order to remove all suspicion of fraud, the cause of the debt must be expressed therein, because obligations, which contain no cause, are ineffectual (3). This rule is still in force among us, unless it be among merchants or other persons, whose dealings and respectability exclude all suspicion of fraud. (4)

Provision of Sequestration, what, wherein, and when it is effected.

§ 3. The party, to whom application is made, in consequence of his own signature, must admit or deny his signature, or the execution of the instrument (5), and if he cannot deny it, he is provisionally, that is, previously condemned to lay up the money demanded thereupon, and likewise to deposit it with the creditor, upon bail of restitution if afterwards it be otherwise decided by definitive sentence (6). I say, *upon bail*, because it frequently occurs that the person, to whom it is adjudged *provisionally*, subsequently proves to be unable to make restitution if by a definitive sentence it be otherwise understood; and if such bail be not given, the amount adjudged ought to remain under the judge, or be secured under another (7). This mode of provisional decision, otherwise called *sequestration*, is by some taken very narrowly, because it is said to have been introduced out of law, or against

(1) L. 38. Ff. de oblig. et act.
(2) L. 4. Ff. de fid. instrum. l. 4. Ff. de pignor.
(3) L. 25. in fin. Ff. de probat. l. 13. Cod. non numer. pecun.
(4) See Papon, lib. 10. tit. 2. art. 2. Cost. Antwerp. tit. 53. Damhouder, Prax. Civil. c. 174. Rebuff. ad Constit. reg. de Chirograph. in præfat. n. 67. Cost. Utrecht, rubric. 7. art. 6. Damhouder, Prax. Civ. c. 71. Wieland, Practic. Civ. tit. 2. c. 19. and tit. 3. c. 5. n. 19. Ordon. & Cost. Friesland, tit. 15.
(5) See Merula, Prax. Civil. lib. 4. tit. 37. c. 2. n. 3.
(6) Merula, ut supra. Cost. Antwerp. c. 56. art. 1. Rebuff. ad Constit. reg. de Chirograph. in præfat. n. 66.
(7) L. 3. § 5. Ff. de Collat. Bonor. l. 5. § 2. Ff. de Carbon. edict.

the general right; but such pretext arises rather from ignorance of the Roman laws than from truth (1): for, according to the Roman laws likewise no delay, nor security of the debt, which is acknowledged, or of which the legality can appear publicly, is admitted under any exception; and on that account it is likewise concluded, and pleaded in similar cases, to confess or deny, and provisionally to be sequestrated; whereupon only the sequestration is grounded, namely, that any one, who cannot deny his signature of debt, may have no delay; and whatever he can allege against it must immediately appear, or if he alleges any thing which requires a subsequent investigation, he must lay the amount under sequestration (2), which is not out of the law, but introduced upon the foundation of the law (2). But the holders of bonds, who have not demanded interest or payment for a period longer than ten years or more, and who on that account have not been paid, cannot obtain sequestration in consequence of such bonds (3). Whether an heir will be under the obligation of admitting or denying the signature of his deceased ancestor, in order to be thereupon condemned provisionally, is doubtful, because no one can be certain of the *personal* transaction of *another* (4): and it is likewise observed in the court of Friezland, that an heir is not obliged to admit or deny the signature of the deceased, to be condemned in consequence thereof previously or by way of sequestration (5). But in France, where the practice of sequestration originated, the heir must admit or deny the signature of the deceased (6); which is also observed amongst us. And in such case it is commonly added, at least, *bonam fidem agnoscendo*, that is, to admit upon good faith, or to confess or deny the effect of the bond and the consequence thereof, or the like (7). By the court of Gouda, a similar provision was refused upon a bond, which the heirs denied to have been signed by the deceased (8). Against this mode of provisional decision or sequestration there are many exceptions by which the same (although arising from notorious and public obligations) are opposed, according to Sande (9), and of which we shall subsequently treat in Book V.

(1) L. 4. § 3. l. 31. Ff. de Re Judicat. l. 10. Ff. de Pign. Act. l. 6. § 1. Ff. quib. mod. pignor. vel hypoth. l. 21. § ult. Ff. eod. Vide Bald. ad d. l. 9. § 3. Ff. de pignorat. act. Tiraquell. de retractu. § 3. ad verb. à payer. Gloss. 3. n. 14. & seq.

(2) L. 4. § 3. Ff. de Re Judicat. l. 10. Ff. de pign. act.

(3) See Cons. & Adv. vol. 6. p. 656.

(4) L. Marcellus. § 2. Ff. de actione rerum amotarum.

(5) See Sande, lib. 1. decis. tit. 8. def. 1.

(6) Vide Joan Imbert. lib. 1. Inst. Forens. c. 29. in verb. Chirographum.

(7) Imbert. Instit. Forens. lib. 1. c. 35.

(8) Vid. Bell. Jur. p. 331. & seq.

(9) Lib. 1. tit. 8. def. 3.

Chap. xix. Whereas some people, hoping and trusting that the money, which they acknowledge in their notes of hand to have received, would be paid to them, do often grant such writings under their hand, previously to the money being counted down or paid to them; and whereas such loans, or the payment of such money do not follow afterwards, it will be sufficient in law, when they say within two years, that the said money was not counted or paid to them; in which case the creditor must prove that such money had been paid; but after the said two years such debtor cannot avail himself of such statement, but must prove the same to the satisfaction of the law, according to the opinion of Accursius, Bartholus, and others. (1)

Exception of the Money not having been counted, whether and when it takes place.

§ 4. But since, for the benefit of trade (which ought to have rapid progress, and in which the least delay may cause a great loss), the sequestration and previous securing of debts resulting from notes of hand or obligations which cannot be denied, was introduced in these countries, it falls away of itself, according to Vinnius (2): and therefore it was often determined by the court of Holland, that the debtor may not avail himself of the exception of the money not having been counted down or paid to him, but that even within the two years he is obliged to prove the same (3), which likewise agrees with the practice of other countries. (4)

Renunciation of that Exception, how to be understood, and of what Effect.

§ 5. Independently thereof, the exception of the money not having been counted or paid, is usually and mostly renounced in obligations, and thereby the creditor is surely released from proving that the money was paid; which however is to be thus understood, viz. that the debtor does not bind himself thereby, that he will not avail himself of the exception of the money, not having been counted to him, but that having proposed it, he is obliged to prove it, like all other exceptions. (6)

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(1) Ad l. 3. et l. 14. Cod. de non num. pecun. Gomez, 2. resolut, 6. n. 7. Schneid, ad tit. Inst. de liter. oblig. Bronkhorst, 2. assert. 22. Perez ad Cod. tit. de non num. pecun. n. 14. Faber ad tit. Cod. eod. def. 1. Christin, vol. 3. decis. 37.

(2) Ad tit. Instit. de liter. oblig. n. 12. in fin.

(3) Facit. l. ultim. Cod. de Apoch. public.

(4) See Cost. Antwerp. c. 56. art. 11. 12. Zypæ Not. Jur. Belg. tit. de except. Gudelin. de Jure Noviss. lib. 3. c. 6. in fin. Rebuff. ad Constit. reg. in proœm. Gloss. 5. n. 59. et de Chirograph. art. 2. n. 68. Imbert. Enchirid in verb. Confession. Mantic. de ambig. Convent. lib. 18. tit. 6. n. 22. Sande, lib. 3. tit. 2. def. 1.

(6) Sande, lib. 3. tit. 2. defin. 1.

CHAP. XVI.

Of arbitrary Engagement of Obligation.

In what an arbitrary Obligation consists, and its Divisions.

AN arbitrary obligation is an agreement between two persons, entered into *boná fide* and with sincere intention, that the one should thereby bind the other effectually, without requiring thereto any writing or transfer. (1) In what an arbitrary Obligation consists.

Of this kind are buying, selling, hiring, partnership, the giving of authority, trusts, and matrimony. (2) Its Divisions.

CHAP. XVII.

Of Purchases.

§ 1. 9. *A Purchase, when accomplished.*
2, 8. *On whom the Benefit or Risk attending the Sale falls.*
3. *When the Property sold becomes vested in the Purchaser.*
4. *Whether and when the Credit of the Purchaser is followed.*
5. *Sale on Abatement how to be understood, whether for ready Money, or upon a certain Day.*
6. *Requisites to a valid Purchase and Sale.*
7. *Whether it is necessary that a Memorandum should be made of the Transaction.*
10. *Who may buy and sell.*
11. *Noblemen do not forfeit their Privileges by carrying on Trade.*

§ 1. THE purchase is understood to be accomplished as soon as the price and the mutual condition has been fixed, although the money had not been paid nor the delivery of the article made (3); unless a real misunderstanding had taken place in the article sold, namely, when any one had exposed for sale copper for gold, or the one was taken for the other, in which case the purchase is void of itself, because the right condition of the article sold is wanting (4); but if the misunderstanding arises only con- A Purchase, when accomplished.

(1) § 1. Instit. de obligat. ex consensu. l. 2. Ff. de oblig. et act.

(2) Pr. Inst. de oblig. ex consensu. l. impias Ff. de Reg. Jur.

(3) L. 2. § 1. Ff. de contrah. empt. 1. § 2. Ff. de rer. permutat. l. 8. Ff. de pericul. & commod. rei vend. pr. Inst. de empt. et vend.

(4) L. 9. in pr. & § 2. l. 14. Ff. de contrah. empt. l. 41. & § 1. Ff. eod. junct. l. 83. § 1. Ff. de verb. oblig.

cerning circumstances relative to the quality, it remains effectual. (1)

On whom the Benefit or Risk, attending the Sale, falls.

§ 2. Hence it follows, that the benefit or risk which by accident or otherwise might fall upon the property sold, concerns the purchaser, although the property had not been delivered (2); because, the purchase being completed, the purchaser has a right immediately to become proprietor, and therefore is considered as if he was already a proprietor; unless the seller, on demand made to him for the same, had failed to make the delivery (3); in which case, he is understood to take the risk of the property upon him (4). The risk of the property sold is likewise upon the seller, if the purchase be made on certain condition, so long as the condition has not been fulfilled (5), viz. if I buy certain wine or grain at another place, to be delivered in Holland or elsewhere, and if some accident happens on the road to the said wine or grain in carrying them over, the loss will fall upon the seller; for the purchase of whatever is capable of being measured, numbered, or weighed, and is sold by measure, number, or weight, is not understood to be fulfilled before the measuring, counting, or weighing has actually taken place; and therefore the risk of what has been sold, until then, falls also upon the seller, in the same way as if the purchase had been made under such condition. (6)

When the Property sold becomes vested in the Purchaser.

§ 3. The property sold becomes vested in the purchaser, *only* when the purchase money promised is paid, although full delivery had followed; so that the seller, so long as the purchase money is not paid, retains his property, and has a right to lay claim to the property sold (7), unless such property had been sold upon trust and credit, and the seller had followed the word of the purchaser (8); in which case, after delivery, he has no further right to lay claim to it (8), although the purchaser afterwards becomes bankrupt, without paying the purchased money promised (9); provided only that when it appears that such purchaser had previously meditated to abuse the trust of the seller, in such case

(1) L. 10. l. 14. Ff. de contrah. empt. l. 21. § 2. Ff. de act. empt.

(2) § 1. Instit. de empt. vend. l. 10. l. 11. Ff. Cod. de pericul. & commod. rei vend.

(3) Arg. l. 15. l. 174. Ff. de regul. jur.

(4) L. 15. § ult. Ff. de rei vend. l. 39. § 1. l. 47. § ult. l. 108. § 11. Ff. de leg. 1. l. 2. Cod. de usur. fruct. & fruct. legat. Ant. Faber, ad Cod. l. 4. tit. 24. def. 24. n. 3. & tit. 40. def. 8. n. 9. Gomez. Var. Resolut. tom. 2. c. 2. n. 34.

(5) § 4. Inst. de empt. vend. l. 80. § 2. Ff. de act. empt.

(6) L. 8. Ff. de peric. & comm. rei vend. l. pen. cod. eod.

(7) § venditæ vero res et traditæ. § 41. Inst. de rer. divis. Keuren inden lande van Voorn (Statutes of the Territory of Voorn), art. 51.

(8) § 41. Inst. de rer. divis. in fin. l. quod vendidi 19. Ff. de contrah. empt.

(9) Gail. lib. 2. obs. 15. in pr.

it is to be understood, that the property purchased, whether on credit or for ready money, (notwithstanding the delivery and the credit followed) remains vested in the seller; because in such a case the article is not so much considered as delivered, as the dealing is considered fraudulent, as is justly observed by Gail. (1)

§ 4. Whether and when the credit of the purchaser is followed, is to be inferred among us from the transaction, whether it takes place for ready money at the delivery, or upon a certain day: a transaction that may be said to take place for ready money, does not convey with it any credit; and again, whatever takes place to be completed on a certain day, cannot exist without credit.

Whether and when the Credit of the Purchaser is followed.

And in order that the right of pursuing the property, bought for ready money but not paid for, should not continue too long to the prejudice of a third person, and be used against him who in the mean time by lawful acquisition might have obtained a title thereto, it was limited by statutes to certain time in several cities; as at Amsterdam, within six weeks, according to the statute of the 31st January 1658, and at Leyden within fourteen days, according to the statute of that place of the 8th May 1659, within which time the goods sold must be pursued, upon forfeiture of the right.

§ 5. Whence this doubt may arise, whether whatever is sold among merchants upon abatement, is to be understood to have taken place for ready money, or to be effected upon a certain day. In this case a distinction ought to be made, whether, when the transaction took place, one was under the obligation of making the abatement, or whether one was allowed to abate; that is to say, to make abatement if the payment be made in ready money.

Sale on Abatement, how to be understood; whether for Ready Money or upon a certain Day.

If the purchaser is obliged to abate, such transaction cannot be considered in any other light than as having taken place for ready money: but if he has it in his choice either to make abatement, or to wait for his time, then if he does not pay the money directly, deducting the amount of the abatement, it would seem that the credit of the purchaser had been followed.

But in doubtful cases it is considered as having taken place for ready money; as was often decreed by the court of Holland.

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(1) Ibid. See also Cons. & Adv. vol. 1. cons. 222. 245. 253. 285, 286. vol. 2. cons. 127. Cons. Amstel. vol. 3. cons. 2. vol. 6. cons. 2. Cost. Antwerp. tit. 58. art. 7. Papon. lib. 18. tit. 5. art. 46. Everhard, Consil. 209. n. 9. Neerl. Adv. 1. c. 42. Neostad. Suprem. cur. decis. Handvesten tot Amsteldam, A.D. 1624. p. 98. 108. Recueil van de Keuren & Costuymen tot Amsteldam, cap. van præferentie, 57. art. 6.

Requisites to a valid Purchase and Sale.

§ 6. A purchaser claiming the goods sold, is obliged previously to pay the seller the purchase money (1); and likewise the seller claiming the purchase money from the purchaser, is obliged previously to fulfil the transaction on his side, and to deliver the goods sold to the purchaser (2); but if they do not trust each other, it will suffice if the purchase money be deposited in the hands of the judge, or of a third person, to be chosen for that purpose by both parties. (3)

Whether it is necessary that a Memorandum should be made of the Transaction.

§ 7. Although in buying and selling, a memorandum or writing often passes between the parties, it is not necessary, as already stated concerning other transactions in general; unless it was expressly otherwise agreed. (4)

But in these countries it must be understood of immoveable property only; whereas, by proclamation of the Emperor Charles V. in the year 1519, it was introduced that no sale or alienation of immoveable property should be valid before and until the same had been lawfully transferred before the magistrate of the place where such property is situated (5), and the fortieth penny had been paid thereupon. (6)

§ 8. Whence this doubt arises, whether *at present* the risk of loss and benefit of fruit, which might fall upon such property before the legal transfer has been made in that way, would concern the purchaser; but as the express meaning and sense of the above proclamation was merely to provide for the benefit of good people, that they be not deceived by clandestine transfers or mortgages, it was often understood by the high court upon the explanation of the said placaat, that so far as thereby the transfer, sale, and incumbrance made otherwise, is thereby declared null and void, it is only applicable to a third person, and not to the transactors themselves, as already stated at large (7): so it follows thence, that it can be productive of no alteration even on that account, but that at present the loss and benefit arising from the immoveable property before the transfer, will come to the risk of the purchaser; and so it was understood by the court of Holland, according to Groenewegen. (8)

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(1) L. 13. § 8. Ff. de act. empt.
(2) L. 5. in fin. Cod. de evict. L. 25. Ff. de empt. et ibi Bart. Costal. et alii Wesenbec. eod. paratitl. n. 6.
(3) L. 39. Ff. de solut. in fin. et ibi Bart. Castrens. et alii. Gloss. in l. 13. § 8. in verb. Retinere potest. in fin. Ff. de act. empt. Franc. Curt. in Tractat. de Sequestrat. quest. 1. n. 12. in fine.
(4) Grot. Inleyd. lib. 3. c. 14. n. 58. Wesemb. ad. pr. Instit. de empt. vendit. Neostad. de pact. antenupt. obs. 18.
(5) Grotius, Inleyd. lib. 2. c. 6. n. 17.
(6) Plac. van den 40 penn. art. 11.
(7) See Book II. ch. vii. § 4. pp. 123. 124. supra.
(8) Tract. de Legib. Abrogat. § 3. Instit. de empt. vend.

§ 9. All purchases, therefore, of immoveable property ought to be reckoned as incomplete before the legal transfer has actually taken place. The purchaser or seller may not, however, within that time retract, but may be compelled judicially, by virtue of their agreement on the one side, to make the transfer, or on the other side to receive the same, except only at Leyden; where the purchaser or seller of any property sold privately may always retract, so long as the said purchaser has not been confirmed by a memorandum of aldermen (1). But on account of rash deviations from purchases made upon good consideration, those who wish to retract from purchases, were directed by the new statutes of Leyden, (art. 112.) to pay the twentieth penny upon the purchase money agreed for; and it is a general custom in the country, that all transactions which took place in an inn, or during intoxication, may be broke within twenty-four hours, upon payment of the purchase of wine, with exception of public sales that took place on fixed days. (2)

Who may buy and sell.

§ 10. No distinction at present exists as to the parties who may purchase and sell, or concerning what goods may be purchased and sold; but every one is at liberty, who has the free disposal of his goods, to alienate by sale all goods which are alienable, for as the principal welfare of these countries depends upon trade, the same was not introduced without necessity but out of necessity, namely, that every one may derive benefit by purchasing and selling (3); and all articles, which are not prohibited, may be bought and sold by every one, to whom it is not prohibited.

Excepting that at some places and in some cities, certain ordinances and regulations were made relative to trade, which are to be observed upon pain of incurring forfeitures; and unless such regulations are complied with, a purchase is considered of no value (4); and in order that merchandizes should not be falsified, and that trade and manufactures may continue in a flourishing state, some merchandizes are not entirely prohibited, but submitted to certain regulations (5). Thus, at Leyden and other cities, where manufactures and trade are carried on, certain places and companies have been established, where and by whom such articles are manufactured conformably to the

(1) Keuren van Leyden, A. D. 1583. art. 68.
(2) Grotius, Inleyd. lib. 3. c. 14. n. 8. Cost. Rynland, art. 94.
(3) § 2. Vers. jus. autem Instit. de Jure nat. gent. et civil. junct. l. 16. § 4. Ff. de minorib.
(4) Cost. Antwerp. tit. 51. art. 2.
(5) Zypæ Notit. Jur. Belg. tit. de colleg. artif.

order, and the stamp appointed for them must be proportioned and tried. So, however, that all merchandizes and wares may, on paying the taxes fixed upon them, be carried and exported freely to all countries, and even to the enemy, according to Christin (1), with the exception of instruments of war and ammunition or other articles of contraband, which may be carried out of the country to our allies, but not to the enemy (2); which in our country was often prohibited by several placants.

Noblemen do not forfeit their Nobility by carrying on Trade.

§ 11. With regard to the persons who are permitted among us without distinction to carry on trade, a question may arise whether noblemen reserving their nobility, may carry on trade; but since trade is the sinew of our country, upon which its prosperity entirely depends, it is therefore allowed to every person as a general right, so that one may not speak of it with contempt but with great praise and respect; hence it follows that it cannot be any hinderance even to the nobility, nor on that account ought any disrespect to be shewn to them, but noblemen notwithstanding reserve their nobility, rights, and privileges (3); in order that nothing that has been introduced by the law or custom as a permitted thing, can be subject to any punishment, especially if it consists in public dealing and trade by wholesale; and if they refrain from carrying on any trade of the inferior sort, such as where handicraft, labour, or dirtiness are mixed with, or otherwise if they do not transact their own business but cause it to be transacted by others; so it was judged by Christin. (4)

(1) Vol. 3. dec. 64. n. 7.
(2) Ibid. n. 6. Vide Matthæus de Crimin. lib. 48. tit. 4. c. 4. n. 1. Zypæ, tit. quæ res exportari non debeant.
(3) l. 4. Cod. ad leg. Jul. de adulter.
(4) Vol. 3. dec. 196. n. 6, 7. Antos. Fab. Cod. lib. 9. tit. 29. def. 3.

CHAP. XVIII.

Of the Consequence of Purchase, and of Warranty.

[Grotius, 3. 15.]

§ 1. *Delivery of what has been sold, how to be made.*
2. *Freeing and warranting; what it is, and how to be made.*
3. *Of Warranty; by whom, how, and when it is to be effected.*
4. *Of giving Surety; whether and when a Person is obliged to do it.*
5. *Effect of Delivery upon a Decree prayed for, and how it is to be done.*
6. *Under or over Measurement of Lands, whether and when to be indemnified.*
7. *The Clause in the Condition of Sale, "without Measurement," of what Effect, and how to be understood.*
8. *Land, described by a certain Measurement in the Clause, but sold without Measurement, may not differ more than fifty Rods.*
9. *How and of what Lands it is to be understood.*
10. *For what Defects in the Article such Indemnification is to be made.*
11. *What Kind of Indemnification is to be made for Defects in a Horse.*
12. *What with respect to Cattle for Slaughter.*
13. *What with respect to Swine.*

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§ 1. THE consequence of purchase is the right to have a full and free delivery, cession, or transfer of the goods sold; the purchase of which being completed, the seller may be compelled, if it be in his power (1), and he may not avail himself of the deficiency and loss sustained through the non-delivery (2), unless such delivery was not in his power; in which case he may avail himself of the deficiency (3). In what manner it is to take place with respect to moveable and immoveable property, vide supra, Book II. ch. vii. § 2—4. pp. 123—126. Delivery of what has been sold, how to be made.

I say, *full and free delivery*; because the seller is not only obliged to deliver whatever he has sold, or is understood to be included in the sale, with all the rights belonging to it (4), but independently thereof, to free and warrant the property sold. (5)

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(1) L. 11. § 2. Ff. de act. empti.
(2) Ibid. et ibi. DD. Pinell. ad l. 1. Ff. de bon. matern. part. 3. n. 25. Covarruv. Var. Resolut. lib. 2. c. 19. n. 1. Cost. Antwerp. tit. 51. art. 9. Neostad. Suprem. Cur. dec. 82.
(3) D. l. 11. § 2. Ff. de act. empt. See Cost. Utr. rub. 27. art. 7. Neostad. Supr. Cur. dec. 82.
(4) L. 3. § 1. Ff. de act. empt. l. 20. Ff. de rei vind. l. 20. Ff. de acquir. rer. dominio.
(5) L. 2. l. 3. § 1. l. 11. § 2. Ff. de act. empt.

§ 2. Concerning the steps necessary to be taken for procuring and detaining the full and free property of a thing purchased, and in default thereof for making restitution, and for indemnifying the purchaser beyond the purchase money, as much as the purchase was of consequence to the purchaser, or otherwise, according to the advice of good people, to fulfil what is wanting thereto, the reader is referred to Grotius (1); unless it was expressly otherwise contracted or specified that the property should be delivered in the condition in which it may be found; in which case it will be sufficient that the seller return the just price thereof. (2)

Of Warranty, by whom, how, and when it is to be effected.

§ 3. If in consequence of a third person having any right to or being concerned in the said property, the purchaser be in anywise judicially molested, timely notice thereof being given to the seller, he is obliged to execute the right on behalf of the purchaser; which is denominated a warranty (3). If such notice be neglected to be given in time to the seller, the purchaser will have no right to any indemnification (4); unless it appears unquestionably neither the claimant nor the seller had any right to the property sold, and that the purchaser engages to prove it, in which case the seller is likewise obliged to indemnify the purchaser without any preceding notice (5). For a similar warranty the purchaser is sometimes provided with good securities if it be contracted, and likewise for the full payment, if the purchaser be molested by a third person with respect to the property sold, or if any certain difficulties hang over his head. But, besides these, he is not obliged in law thereto. (6)

Of giving Surety; whether and when a person is obliged to do it.

§ 4. But at some places in Holland it is customary that the seller is likewise obliged to give security without any previous contract. (7)

At Oudewater, proclamations are made on three Sundays; and, independently thereof, securities are given; who warrant

(1) Inleyd. lib. 3. c. 14. vers. Tot. Waaring, et c. 15. vers. Onder Waren. d. l. 11. § fin. Ff. eod. vide l. 59. et ibi Busium. Cujac. et Duaren. in l. 38. § 3. Ff. de verb. oblig. l. 61. Ff. de Ædilit. Edicto. l. 15. § 1. Ff. de evict. Christin. ad leg. Mechlin. tit. 13. art. 38. n. 2. Gail. lib. 1. obs. 116. n. 7. Zypæ, Notit. Jur. Belg. de empt. et vend. in fin.

(2) See Neostad. Suprem. Cur. decis. 88.

(3) Tot. tit. Ff. et Cod. de evict. Carballin. Tract. de Evict.

(4) L. 53. in fin. Ff. de evict. l. 8. l. 20. God. eod. in fin. Cod. de periculo et commodo rei vend. See Menoch. de Arbitrar. Judic. centur. 3. cas. 224. Hartman. Pistor. obs. 228. Math. Coler. part. 1. dec. 27.

(5) Arg. l. 11. § 6. in pr. Ff. de act. empt. Ant. Faber, ut supra. Covarruv. lib. 3. Var. Resolut. c. 17. Molin. Consuetud. Paris. § 44. n. 25. Christin. ad Leg. Mechlin. tit. 13. art. 38. n. 12.

(6) L. pen. § ult. Ff. de pericul. et commod. rei vend. l. 24. Cod. de evict. l. 18. § ult. Ff. de peric. et comm. rei vend. Censura Forensis, part i. c. 19. n. 11. et seq. See also Ante keningen op de Cost. Rynland, art. 38.

(7) See Coren, cons. 3.

rant and indemnify the property sold during ten years against any foreign claim, and during a year and day against any claim of the said place. (1)

In Rhineland, the seller must likewise give security. (2)

At Leyden, the sellers of any houses, or of any immoveable property, must give security; and there the purchaser must also give security for the purchase money, if not paid immediately, unless otherwise agreed in the transaction (3); and likewise at Rotterdam, unless it was otherwise agreed. But in giving such security, it will be sufficient if the seller binds his house, lands, or premises for that purpose, if he has any; and if the same be found sufficient without any fraud whatsoever. (4)

Effect of Delivery upon a Decree prayed for, and how it is to be done.

§ 5. But, if any one has sold his property, and is not able to give security *pro evictione*, or if the purchaser is apprehensive that afterwards any additional servitude or incumbrances will be laid upon the property bought, in that case, for the security of the purchaser, it is often agreed, that the seller shall be obliged to deliver the property upon a decree of the court made upon application, or upon a decree of the court where the property is situated, by which the seller is confirmed as the proprietor of the property sold. And also others who may afterwards institute any claim upon the said property, are (after proclamations made, on three market days and Sundays, at the place where the property is situated, and in the country in the farthest villages surrounding the same) entirely deprived of their claim thereto (5), which is only to be understood to have effect in that way against all unknown persons; but so far as it concerns those whom one knows or can know to have any claim, either of debt or service, upon the property sold, they ought to be specially summoned, and no default can be granted against them in consequence of such general summoning (6); so that the proprietor of the next premises and others, against whom one entertains any apprehension, namely, that they can or may in time claim any right of property, tacit or special mortgage, or other service, must be specially summoned when the decree is effected (7). Moreover, if the property sold has any secret de-

(1) See the Statutes there, art. 57.
(2) Keuren van Ryuland, art. 28.
(3) Keuren van Leyden, art. 116.
(4) See the Statutes there.
(5) The mode of proceeding in this case is given in the Papegay, p. 448. et seq.
(6) Per l. 6. Cod. de remiss. pignor. et ibi Gothofred. junct. l. 26. § 7. Ff. de fidei commiss. libertat. et l. 47. Ff. de Re Judicat. See also Marant. Prax. Aur. part 6. de citatione, ejusque requisit. n. 89. & seq. Damhouder, Prax. Civ. c. 57. n. 9. Gail. lib. 1. obs. 47. Mynsinger. lib. 2. obs. 47. Leonin. cons. 14. n. 9.
(7) See Papegay, p. 440. et seq. edit. 1668, and the Nieuwe Keuren (New Statutes of) Leyden, art. 117.

fect, by which the purchaser was deceived, he has this remedy, viz. that if the property sold has such a defect that the purchaser, if he knew it, would not have purchased it, he may in that case, within six months, compel the seller judicially to take back what he sold, and return the purchase money (1): but if the effect was such, that he would notwithstanding have bought it, the purchase remains effectual; and he may only claim, within a year, what he would have given less, if he had known of the defect. (2)

Under or over measurement of lands; whether and when to be indemnified.

§ 6. Whatever has been sold as being of a certain weight, number, or measure, must be delivered according to the just measurement, number, or weight, or the deficiency must be made good: for which purpose, among us, all measures and weights must be publicly marked and made of equal size before they may be used. This is denominated *assizing;* and to remove all disputes and controversies, public scales and weighing masters for weighing, and sworn measurers, numberers, and gaugers, for the purpose of measuring, numbering, &c. are appointed; in whom full credit is placed with respect to measures and weights between the parties reciprocally; and by them certain sorts of merchandizes must be weighed, numbered, and measured, on pain of forfeiture. And with regard to weighing, whatever weighs more than ten pounds, must be brought there and weighed; for which purpose, special statutes were enacted in every city, that differ very little from each other.

The Clause in the Condition of Sale, "without Measurement," of what effect, and how to be understood.

§ 7. In order to avoid the obligation of making indemnification for any defect, goods are often sold in their actual state, whether good or bad, which is denominated *pushing off with the foot;* in which case one is obliged to nothing else but to deliver the goods sold as good and bad as they are (3). Which agreement is mostly made in the sale of lands or premises when a party is not certain of the right extent thereof, in these words; viz. "*by the bulk, without measurement, and pushing off with the foot, without being answerable for any deficiency or overplus,*" and so forth; whereby we understand that the goods are sold by pieces, by the bulk, and not by measure (4). And in such case no indemnification can be claimed, how much soever the overplus or deficiency thereof may be. (5)

(1) L. 1. § 8. l. 2. l. 49. Ff. de Ædilit. edict.

(2) L. 1. l. 6. l. 2. l. 14. § fin. Ff. eod. l. 43. § 1. Ff. de contrab. empt. Zyp. Notit. Jur. Belg. tit. de empt. vendit. in pr. Christin, vol. 3. decis. 97. Tulden et Faber, Cod. de Ædilit. edict.

(3) L. 4. in fin. l. 10, 11. Ff. de heredit. vel action. vendit. Christin. ad Leg. Mechlin, tit. 13. art. 38. n. 19.

(4) Ex l. qui fundum. 40. § 2. Ff. de contrab. empt.

(5) Vide Mantic. lib. 4. tit. 17. Pinell, part 3. c. 2. Fachin. lib. 2. c. 27. Faber, l. 4. tit. 28. def. 2. Coren, obs. 19.

But if any estimate of measurement had been added thereto, for example, if the seller had said *large about*, &c. *but by the bulk without measurement*, &c. one ought then to make distinction; namely, whether the seller had expressed the measurement wrongly, from notorious ignorance, and had acted therein *bonâ fide*; or whether he did so knowing it to be otherwise, in order to deceive the other, in which case he will be obliged to make indemnification. (1)

Land described by a certain Measurement in the Clause but sold, notwithstanding without Measurement, may not differ more than fifty Rods.

§ 8. As however it is frequently uncertain, whether the seller knew better or could have known better, there is a custom on that account in Rhineland and Delftland respecting such transactions; viz. that whenever any measurement had been fixed or nominated, notwithstanding all agreements, how effectual soever they may be, whatever is wanting to or is above the measurement of the lands must be made good, so far as it differs more than fifty rods from the expressed survey, although the money was not agreed to be paid upon the survey, but for the piece or the extent. (2)

How and of what Lands it is to be understood.

§ 9. Which custom is to be understood of lands sold by acres, of an extent of six hundred rods of Rhineland, and less in proportion, but not of small spots, sold by single rods, such as are gardens, kitchen gardens, and *staul gronden* (tenter-grounds?) which often do not contain an extent of one hundred rods; unless of similar proportions, in pieces sold by one hundred rods or inferior measurement, one wishes to say, that as in lands nominated by acres, with the clause, "*by the bulk and without measurement*," one-twelfth part of a morgen (3) may differ, and likewise in smaller spots sold by one hundred rods with the same clause, "*by the bulk and without measurement*;" the measurement may differ by virtue of the said clause, one-twelfth part of one hundred rods, more or less, which appears more extensively in the memorandum upon the customs of Rhineland. (4)

For what Defects in the Article sold, Indemnification is to be made.

§ 10. We have said, *of a secret defect*, by which the purchaser was deceived; because the seller need not make good a visible defect in something sold by him, with respect to which the purchaser must trust himself. (5)

What Indemnification is to be made for Defects in a Horse.

§ 11. Therefore, among us, in the purchase of horses, in which the defects are most visible to those who have a knowledge of

(1) L. 1. Ff. de action. empti in fin. d. l. 1. l. 6. & l. 39. Ff. eod.
(2) Vide Cons. & Adv. vol. 1. 207. Coren. obs. 19. Neostad. Cur. Holl. decis. 18.
(3) A *morgen* of land comprizes about two acres.
(4) Art. 95.
(5) L. 1. § Ff. de Ædilit. edict.

them, it is considered as permitted, if the one be deceived by the other in sales and purchases, excepting only in secret blindness, sprain, spavin or gall, which defects are not well externally visible, according to the common rule, "*perfect in six, that is, four good feet and two good eyes.*" (1)

What with respect to Cattle for Slaughter.

§ 12. If any one sells a beast for the purpose of being slaughtered, and which does not answer the purpose, because one cannot judge of it externally, the seller must allow so much of the purchase money to be deducted, as the superintendant of slaughtered cattle judges the same to be of less value, unless it be so infected, that the same is not fit for food; which is also to be judged by the superintendants of slaughtered cattle, who are appointed for this purpose in every city; in which case the cattle may be returned, and the whole price be claimed back. (2)

What with respect to Swine.

§ 13. But with respect to swine, because one can judge of them upon an inspection of the tongue, the seller is free at many places, when the tongue has appeared clean.

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(1) L. 4. § 3. Ff. eod.

(2) L. 3. § 1 & 3. Ff. de Ædilit. edict.

CHAP. XIX.

Of Appropriation by redeeming.

§ 1. *Nature of Appropriation by redeeming, upon Agreement.*
2. *Whether it is to be reckoned as a Second Purchase; and whether the Appropriator is obliged to pay the Fortieth Penny for the Second Time.*
3. *When that Right ceases.*
4. *Appropriation without Agreement, what it is, and how many Sorts there are.*
5. *How it must be effected.*
6. *Generally of Feudal Property, Rents, and outstanding Debts.*
§ 7. *Specially, at what Places customary.*
8. *How the Proximity is to be reckoned.*
9. *Right of Detention defined.*
10. *Appropriation in Partnership of a Ship.*
11. *In what Goods, and when Appropriation has effect.*
12. *In private Sales, how to be understood.*
13. *By whom the Appropriation may be effected, and who has the Preference among several Appropriators.*
14. *Bailiffs or Sheriffs have no Right of Appropriation.*

§ 1. TRAFFIC is carried on in different manners; and sometimes includes a subsequent agreement, or second transaction (1), among which the right of appropriation is the principal, whether it proceeds from agreement or from tacit construction of the law. The right of appropriation upon agreement is, when it is agreed that the purchaser shall be obliged again to transfer the property sold to the seller, when the latter pleases, or also within a certain time, for the same price; or in case it should be sold again, that the seller must always be the nearest to purchase it if he chuses; in which case the fruits found upon the land must also be enjoyed by him (2), and even the crop, which in the meantime might have grown thereupon. (3)

Nature of Appropriation by redeeming, upon Agreement.

§ 2. It is however, doubtful, whether in such agreement the subsequent transferring of the property is considered as a new purchase, and whether the incumbrances laid upon the sale of

Whether it is to be reckoned as a second Purchase, and

(1) Toe. tit. Cod. de pact. inter empt. & vend. compos.

(2) L. Cod. de pact. inter empt. & vend. compos. l. 22. Ff. de præscript. verb. l. 13. Ff. de act. empt. Christin. vol. iii. decis. 90. n. 1, 2.

(3) Arg. l. 7. de acquir. rer. domin. l. 23. § 5. Ff. de rei vind. l. 23. § 1. Ff. de ædilit. edict. l. 6. & l. 16. Ff. de in diem addict. See Tiraquell. de retract. convent. n. 92. sub fin.

whether the Appropriator is obliged to pay the Fortieth Penny for the second Time.

immoveable property among us, such as the fortieth penny, or other similar duties, ought to be paid for the second time. But as the subsequent transfer does not break the contract, but confirms it subsequently (1); and as such incumbrance and agreement appears to be a real part of the transaction (on which account also the property is sold for so much less as the same is worth to the seller) (2); so it is to be understood thence that the seller upon the said appropriation, or the subsequent transfer, owes no fortieth penny or similar duties, excepting that he ought to indemnify the first purchaser for the charges incurred on that account. (3)

When that Right ceases.

§ 3. This right of appropriation ceases if the stipulated time is expired; but if no time was fixed whether and when it is to have effect, it will become void in that case. (4)

Appropriation without Agreement, what it is, and how many Sorts there are.

§ 4. Independently of this agreement, there is another right of appropriation, which was introduced throughout these countries by construction of the law and custom; by which the purchaser of any immoveable property is obliged within a certain time to cede the same to the nearest relation of the purchaser, or others having the same right, for the same price, which in old Dutch is denominated *appropriation* (*naasten*), *approaching or imitation* (*naderen* or *na doen*), and the second purchase is denominated *appropriation*; so that the second purchaser, provided he does what the first did before, becomes the nearest thereto.

How it must be effected.

§ 5. The practice and custom of the right consists in the following particulars; viz. that those who may appropriate and will do it, must cause the bailiff and two aldermen of the manor to appear upon the land or in the house which is to be appropriated, and in their presence touch the grass and ground; whereupon he appoints one of the law-days for the purchaser to appear and allege his purchase, and then the appropriator is obliged to do within twenty-four hours, whatever the purchaser did and was obliged to do before him; and if it be required, he must declare upon oath that he appropriates the property for himself, and with his own money, and he must likewise pay the wine-purchase twice, and the earnest-penny once (5). In

(1) L. 7. § 5. Ff. de pact. l. 21. § si tibi Ff. de act. empt.

(2) L. 79. Ff. de contr. empt.

(3) Vide Tiraquell de retract. convent. § 6. Glos. 2. n. 4, 5. & seq. See further Gomez. var. resolut. tom. 2. l. 2. Christin. vol. iii. decis. 90. n. 3.

(4) Vide Christin. vol. iii. decis. 86. n. 5, 6, 7. & DD. ibi alleg. Gail. lib. 2. obs. 17. n. 4, 5.

(5) Vide Dambouder, Prax. Civ. c. 265. n. 15 The Statutes of Ryland, art. 28, 29. Reinking. de retract. quæst. 6.

this transaction it is further to be observed, that the appropriator is obliged to pay to the first purchaser, besides the purchase money, the interest also upon the same from the time that it was paid, unless it be set off against the fruits enjoyed; and he must likewise satisfy and make good all charges for meliorations and other necessary charges *bonâ fide* made by the purchaser to the property purchased before the time of the appropriation (1); whereas the first purchaser may suffer no loss by the appropriation, and the appropriator without distinction ought to do what the purchaser has done before, and then only place himself in the situation of the purchaser, which is mostly the case in the purchase of outstanding debts which produce no fruits, and may be set off against the interest of the purchaser's money, as was specially enacted by the statutes of Rotterdam.

Those statutes are either *general*, that is, are in force throughout Holland, or *special*, that is, are in use only at some particular places.

Generally of Feudal Property, Rents, and outstanding Debts.

§ 6. A *general appropriation* belongs to the county of Holland, with respect to feudal property sold, which may detain the said feudal property before the transfer is made. (2)

A debtor may likewise appropriate the debt which any one claims against him within the year, for the same price for which it was sold, to be computed from the time that it came to his knowledge; unless it having been offered to him, he had refused once (3). But this kind of appropriation has not such solemnity as the appropriation of immoveable goods, and it is sufficient thereto if it appears to have been effected in writing before a notary and witnesses, or otherwise. And a possessor of property (whether moveable or immoveable), on which any rent has been specially fixed, has the appropriation thereof within the year, if the said rent be sold to a third person. (4)

But at Amsterdam such rents must be sold publicly, and the purchaser must afterwards offer the same and the price thereof to the proprietor of the house or land to which the rent or farm is attached; who in such case within twenty-four hours may appropriate the purchase, provided he pays the one hundredth penny; and he who has appropriated such rents, may not sell the same to a third person, but ought to annul the bill of yearly

(1) Statutes of Rynland, art. 30.
(2) Vide Grotius, lib. 2. c. 16. n. 3. and lib. 2. c. 42. vers. Ten derden. Christin. vol. 6. decis. 23.
(3) Vide Grotius, Inleyd. lib. 3. c. 16. n. 18. Goris. adversar. tractat. 3. part 1. c. 4.
(4) Arg. l. 22. Cod. Mandat. Cost. Rynland, art. 57. Christin. vol. 3. decis. 49. n. 13, 14. Cons. & Adv. vol. ii. cons. 159.

rent (1). If the purchase was made at a sale by execution, the appropriation must be effected within twenty-four hours. (2)

At Leyden it is customary to offer such rents, whether upon moveable or immoveable property; and likewise all bonds, to those upon whose houses or premises they stand, and to the debtor and his securities who are bound for the same, who then within eight days thereafter must declare whether they wish to appropriate the purchase or not, and if it be afterwards found that the tender was made at too high a rate, they may within a year and six weeks still effect the appropriation (3). Whenever any houses or premises are sold by execution at Amsterdam, to which more rents or impositions are attached than they could fetch by the sale, in that case those whose debts or rents could not be satisfied therefrom, may appropriate the sale within six weeks, provided they pay the purchaser the one hundredth penny of the principal, and then the oldest creditor goes before all others; and whoever effects the appropriation, his debt is entirely hereby annulled. This sort of appropriation likewise has effect in ships sold by execution, but it must then be effected within twenty-four hours. (4)

All property which is sold by execution at the Hague, may be appropriated by the creditors having better right than the purchasers; but if the property has been purchased by one creditor, and the same is appropriated by the other, the appropriator must satisfy the first purchaser, who must himself follow his right of preference: so it was decided by the court, and the sentence of the Hague was confirmed between Lenard Ketting and Jacob Willemsz, in November 1619.

At Rotterdam, the appropriation of rents, or bills of yearly rents upon any houses or premises, likewise prevails; viz. within six weeks after the proprietor of the houses or premises has given information by the messenger, and through him who purchased the rent; provided that he, besides the purchase money for which the said rents were bought, pays interest thereupon at the rate of the sixteenth penny, from the time that the said purchase money was paid; and also the double wine purchase, or the earnest penny of the same, was effected in truth, and not further; and the same practice obtains with respect to bonds, obligations, &c. (5) See the statutes there.

(1) Willekeuren (arbitrary Statutes) p. 132. edit. 1639.
(2) Ibid. page 134.
(3) Keuren van Leyden, art. 121.
(4) Willekeuren, p. 274. edit. 1662. Recueil van de Keuren & Cost. Amst. tit. 35.
(5) Keuren van Rotterdam.

Specially, at what Places customary.

§ 7. But at Gouda and Oudewater the appropriation does not prevail with respect to rents and debts.

The places where the special right of appropriation is observed (although not every where in the same manner) are Delftland, Rhineland, and the territory of Voorn. In Kenmerland the right of appropriation does not prevail, as appears in the customs of Kenmerland (1); where the nearest of the seller's relations, within the year after they got notice thereof, may appropriate, provided they declare that they do it for themselves.

How the Proximity is to be reckoned.

§ 8. It is doubtful in what manner the proximity is to be reckoned. In the statutes and customs above cited, nothing certain has been expressed concerning it; but the general opinion is, that with respect to the appropriation, one ought in every point to follow the proximity, and the nearest to the appropriation according to the law of succession; and that he who is the nearest to inherit the seller's property by succession, is also the nearest to effect the appropriation. (2)

Right of Detention defined.

§ 9. At Leyden the right of appropriation does not prevail; but whenever any houses are sold there with the right of detention, the seller and purchaser must tender the appropriation to the lord having the right thereto, who then has twenty-four hours for consideration, unless the said houses were sold by execution; and if the lord who has the right of detention afterwards finds that the second purchase was offered to him at too high a price, he may still within a year effect the appropriation, or claim back what he gave too much for the same. (3)

Appropriation in the Partnership of a Ship.

§ 10. At Rotterdam, if any one of the joint owners of a ship, and likewise the steersman, sell their shares of the ship to strangers, to whom the ownership of the said ship does not belong, the others, whether steersman or owner, or any of them, who may desire it, may appropriate for themselves all such shares as were sold, for such amount or price, and to be paid at such terms, as the said ship was sold for; provided, however, that the appropriation thereof must be effected within fourteen days after notice was given of the sale by a messenger to the steersman and his factor; and the same mode is to be observed between masters of ships and the owners of trading ships navigating from the harbour of that place, or such as belong to that place. (4)

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(1) p. 214. edit. 1652.
(2) Vide Grivell. decis. 40. Berlich. pract. conclus. part. 2. conclus. 39. n. 26. 30. 31. Tiraquell. de retract. lign. § 1. Gloss. 9. n. 81. post. pr. & § 11. gloss. 2. n. 18. & § 13. Gloss. unic.
(3) Keuren van Leyden, art. 120.
(4) Keuren van Rotterdam.

At Gouda and Oudewater the appropriation does not prevail, excepting in rents and debts, of which we have already treated.

At Woerkum the appropriation does not prevail; neither in the southern part of Holland (1), excepting within three days after the last publication made in the church. (2)

In what Goods, and when Appropriation has Effect.

§ 11. Appropriation prevails with respect to all immoveable goods, not only in hereditary property, upon which the said right is specially grounded (3), but also without distinction in all sorts of goods, whatsoever they may be, and likewise hereditary goods devolved at the death of any one from abroad, and likewise goods purchased (4); it is likewise to be understood of goods sold; but in bartering, appropriation has no effect. (5)

Under the things thus subject to appropriation are also reckoned as immoveable goods all tributary property, yearly rents, and all other duties imposed upon immoveable goods, and for which the immoveable goods might have been bound; subject to the difference above stated with respect to actions and hypothecated rents (6). But it is questionable whether it also prevails with respect to feudal property, quit-rents, tributary property, or tithes; and, according to law, the appropriation of the *dominus directus*, or the lord paramount, is to have the preference; because the property is not possessed, and does not devolve otherwise but with such incumbrance.

In private Sales how to be understood.

§ 12. It is to be observed in particular, that appropriation prevails only in private sales; but if the sale be effected publicly after the affixing of advertisements, or after publication properly made on three church or market-days, the appropriation has no effect. (7)

But with respect to the question, whether in case the property which was exposed for sale publicly, but remained unsold, and which was subsequently sold within the year after it was so exposed, without the appointment of any subsequent day for sale or public exposure, the appropriation would in consequence

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(1) Vide Charters (*Handvest*) of that place, pp. 88. 279. 287. 363. and pp. 254. 279. 394. of the new edit.

(2) Ibid. p. 196. and of the last edit. p. 504.

(3) Tiraquell. de retract. gentilit. § 1. Gloss. 7. Georg. Tholosan. Syntag. Jur. lib. 16. c. 2.

(4) Grotius, Inleyd. lib. 3. c. 16. vers. Dit Regt.

(5) Chassan. ad consuet. Burg. des restricts. 10. § ex vendition. 9. vers. quid autem in permutatione. Cons. & Adv. vol. 1. cons. 257.

(6) Tiraquell. de retract. municip. § 1. Gloss. 6. n. 11. & seq. Christin. ad leg. Mechl. tit. 11. art. 25. Zypæ Notit. Jur. Belg. de hered. vel act. vend.

(7) Grotius, dict. loco, n. 5. Keuren van Rynland, art. 36. Neostad. Sup. Cur. decis. 29.

thereof be prevented, as in the case of a public sale; it was well understood so by a decision (*turbe*) of the 29th January 1591, on the 29th meeting of bailiff and men, and inserted in their meeting-book; but a difference having arisen concerning the same, and the question being brought before the court of Holland between Mr. Willem Halling and Jacob van Beveren, doctor of law, lord of Swyndregt and bailiff of Dordrecht, it was directed by the court of Holland, on the 2d July 1654, to prove again the observation thereof; because, although the said decision (*turbe*) was made at the request of Reynier van Amsterdam, doctor of law, the case however, which was to be decided there, was settled by agreement, without full cognizance thereof being taken, or terminated *in contradictorio judicio*; of course the reasons upon which the said decision (*turbe*) was grounded, were not deemed sufficient by many, namely, that the appropriation ought to cease when the bailiff receives his poundage, and therefore the bailiff's receiving the poundage would either give or take away the appropriation; which was to be so understood for the purpose of removing the bailiff's right of appropriation, which they formerly (although unjustly) wished to introduce as if the said pretended right was thereby bought off, but in no wise with respect to the right of appropriation of the friends and relations of the seller; and independent of the said institutions of the said customs and decision (*turbe*), we may plainly perceive that the witnesses were all bailiffs, which entirely tends to establish thereby their own privilege, and to maintain their pretended right of appropriation; which subsequently (as will be hereafter shewn) was entirely refused to them, and a certain ground was established for their receiving their poundage within the year after the sale; which case, however, was decided in prejudice of the appropriation, and the said custom was approved of; but the case having afterwards come in appeal before the high court, the said sentence, upon hearing all those who maintained the contrary on the 17th November 1657, was confirmed on the 22d December 1657 next following.

But in the territory of Voorn, the appropriation prevails in public sales also, if the nearest relations commence it within three market-days' or sundays' publications, or, if they were abroad, within the year after their return, or after they acquired knowledge thereof. (1)

(1) Vide Keuren van Voorn, art. 59. Neostad. d. decis. 29.

By whom the Appropriation may be effected; and who has the Preference among several Appropriators.

§ 13. If several persons effect the appropriation at one and the same time, those would be preferred who even before the purchase had jointly used the fire (1) of the land sold, or otherwise those who were the nearest; but if one had effected the appropriation after another, the first would have the preference, although he was not the nearest by blood. (2)

In Rhineland, if the nearest relation does not effect the appropriation, those are also permitted to effect it who jointly use the fire of the land sold (3); after the nearest relations and those who jointly used the fire of the place, some bailiffs of the place have the said right within six weeks after the year, which right some lords of manors also have at those places where the nearest relations have not the appropriation. (4)

Bailiffs or Sheriffs have no Right of Appropriation.

§ 14. But with respect to bailiffs and sheriffs in Rhineland, it was understood *in judicio contradictorio*, that they have no right thereto; because no statute granting it is in existence, it being merely a custom which crept in without the will of the prince, and consequently corruptly to the vexation of the people; and so it was determined in the case of Simon and Hugh Jansz, impetrators in case of appeal against Gerrit Adriaansz Oudshoorn, sheriff of Soetermeer, defendant, and of the same Gerrit Adriaansz, impetrator of mandate of penalty against the said Simon and Hugh Jansz, defendants, on the 25th April 1614.

A purchaser or seller, fearing any appropriation right, may cause the property bought to be legally offered to him, who, either by agreement or pursuant to the local law as aforesaid, would be entitled to the right of appropriation; which being once refused by him, may not be again allowed to be appropriated; because every one may renounce his privilege, and having done so, he cannot again avail himself of it, and he who has once made his choice, whether he will or will not be a purchaser, cannot afterwards alter it. (5)

But with respect to the question whether any one who has a right of appropriation would otherwise, in consequence of his having assisted in making the bargain or the transaction relative to the purchase (as if he was present at it, and in confirmation

(1) The original of this obscure expression is, *de welke gemengder veur hadden gelegen*.—EDITOR.

(2) Vide Statutes of Rynland, art. 24, 25, 26, 27, and 34. Grotius, d. loco. Handvest. van Zuid-Holland (Charters of the southern part of Holland) p. 196. and p. 504. of the new edition. Georg. Tholosan. Syntagm. Jur. lib. 26. ch. 13. n. 6. 7.

(3) Keuren van Rynland, art. 25.

(4) Vide Grotius, d. loco. post. n. 16. Keuren van Rynland, art. 35.

(5) L. penult. Cod. de pact. l. 14. §9. Ff. de ædilit. edict. Facit. text. in l. 122. § 3. Ff. de verbor. oblig. l. 2. & l. 29. de opt. legat. Vide Menoch. de arbitr. judic. lib. 2. cas. 37. Sande, lib. 3. tit. 4. def. 4.

thereof had subscribed thereto, &c.), be considered as having renounced his right of appropriation, it was understood that it would *not* deprive him of his right of appropriation, nor be prejudicial thereto, but that the renunciation thereof ought to be made expressly (1); and so it was judged by the court of Friesland. (2)

CHAP. XX.

What Conditions, under a Purchase, may exist, and what not.

§ 1. *What Conditions to be made in Purchases.*
2. *Of Sales by involuntary Decrees or Executions.*
3. *Monopoly is prohibited.*
4. *Trade or Transaction by Adventure.*
5. *Redress in case of Deception, in Purchases for more than the Half, how to be understood; and when it has Effect.*
6. *Of Deception in Drunkenness.*
7. *No Redress granted against public Sales.*

What Conditions to be made in Purchases.

§ 1. ALL sorts of conditions may be made in purchases, which are honest and not prohibited by the laws (3); among these some are peculiar, and commonly in use in sales; viz. that the purchaser shall continue as tenant for some years, and have the use of the property sold (4); and also that the purchase shall have effect, unless within a certain time another person offers more. (5)

Of Sales by involuntary Decrees or Executions.

§ 2. To these conditions, among us, goods sold by execution and involuntary decrees, also by candle, are tacitly subject; and such purchases are held ineffectual, if, at the confirmation of the decree before the court of Holland, any one offers more before the seal is taken off from the wax. (6)

Sometimes it is also conditioned, that the purchase shall be of no effect if the purchase money be not paid within a certain time; which time being expired, the seller has always the choice

(1) Arg. l. 9. Ff. de pignor. act. & l. 34. § Lucia. 2. Ff. de legat. Vide Tiraquell. de retract. lib. 1. § 30. Gloss. 1. n. 4. Hartmen. Pister. l. 3. quest. 17. n. 12. & seq.

(2) Vide Joann. van de Sande, l. 3. tit. 15. def. 8. For a further discussion respecting the right of appropriation, see Gratius, Inleyd. lib. 3. c. 16. Georg. Tholosan. in Syntagm. Jur. lib. 26. per tot. Christin. ad Leges Mechlin. tit. 11. & vol. 3. decis. 55. & seq. Zyp. Not. Jur. Belg. Tiraquell. & Reinking de retractu. Gail. lib. 2. obs. 19.

(3) L. 79. Ff. de contrah. empt. § 5. Ff. de pact. l. 13. Cod. eod.

(4) L. 75. Ff. de contr. empt.

(5) L. 1. Ff. de in diem addict.

(6) Grotius, Inleyd. lib. 3. c. 14. n. 72. See the mode of proceeding in the new Papegay, p. 464. & seq. edit. 1668.

whether he will cause the purchase to take effect, or whether he will take the property back as unsold, and retain the earnest money, and whatever further sum might have been paid thereon (1), for which again the *seller* retains the fruits enjoyed. (2)

And in like manner may no conditions be made in purchases which are dishonest, improper, or militate against common observances. (3)

Monopoly is prohibited.

§ 3. For which reasons, among us, monopoly and the causing of dearth are expresly prohibited, not only by the written laws, but also by various proclamations and ordinances, in all transactions, trade, handycraft, or shopkeeping. (4)

Trade, or Transaction by Adventure.

§ 4. At Leyden every one may recede within twenty-four hours from all trade or transactions by adventure, on giving notice thereof in the meantime to the other party; provided he pays the wine-purchase money (*Wynkoop*), if any was fixed thereupon (statutes, A.D. 1583, art. 86): and on the 29th of September 1599, an ampliation was made thereto, enacting that all trade entered into upon the life or death of a third person, notwithstanding he is within the same jurisdiction wherein the purchaser and seller are, would be invalid without his consent.

At Amsterdam, and also at Naarden, purchases effected to be paid upon certain hazardous conditions, are considered as wagers, and are null and void. (5)

The intention of purchasers and sellers is always to make profit by buying and selling (6); of course, without that intention the inclination of purchasing and selling would entirely cease. But to prevent one person from fraudulently and covetously enriching himself too much at the expence and loss of another, this exception is granted; viz. that those who in any transactions were defrauded of more than the half, should obtain assistance and redress against such fraud upon a civil petition to the high court. (7)

§ 5. Redress in case of Deception, in Purchases for more than the Half, how to be understood; and when it takes Effect.

The whole transaction, however, is not thereby annulled; but it is sufficient if he who deceived and misled the other

(1) L. 2, 3, 4. Ff. de lege commissor. l. 25. Ff. de heredit. petit. Grotius, Inleyd. lib. 3. tit. 14. n. 77. & seq.

(2) L. 4. § 1. Ff. eod.

(3) § 24. Instit. de inutilib. stipulat. & tit. Cod. de monopol. & conventu negat. illicito.

(4) Vide Plac. Oct. 7, 1531; Oct. 4. 1540; and Jan. 31, 1562. See this subject treated more at large by Grotius de Jure Belli, lib. 2. tit. 12. n. 16. Christin. vol. iii. decis. 98. & ad leges Mechlin. tit. 2. art. 27. Damhouder, Prax. Crim. ch. 134. Zyp. Notit. Jur. tit. de monopol. Rebuf. ad constit. reg. tom. 2. de magist. artific. & monopol. prohib. art. 4. Glos. 2. Georg. Tholosan. Syntagma. juris. lib. 25. c. 14.

(5) Keuren Amstel. p. 308. edit. 1613.

(6) Arg. l. 16. § 4. Ff. de minor. & l. 22. § ult. Ff. locati.

(7) L. 2. Cod. de rescind. vend. Grotius, Inleyd. lib. 3. c. 12. Sande, lib. 3. tit. 4. def. 9. & seq.

returns the overplus of the value of the property sold, and which he had received; or the purchaser ought to pay as much as the property purchased was worth more than the amount paid by him, if the property was purchased for half less or more than the value. (1)

This remedy likewise takes effect in all dealings (2), of which we shall treat hereafter; but whether it also takes effect in sales held upon a decree and in the presence of the judge, is a point concerning which there is a difference of opinion among the jurists (3). In Savoy and Friesland however it is understood in the affirmative (4). But since, among us, the judge acts in respect thereto with so much care (which of course excludes all suspicion of fraud), no notice is taken thereof (5); of which there is no doubt whatsoever with respect to involuntary decrees, and sales by candle, and by taking off the seal from the wax (6). But it is to be observed, that this assisting remedy (7) has no effect in merchandizes depending on *good luck*, and which at the time of the transaction could expect only an uncertain result, although the one or the other might afterwards accidentally happen to be a loser for more than half the value: because the deficiency or fraud is always considered at the time of the transaction and in respect thereto alone a redress has effect. (8)

§ 6. With regard to private sales, at which, the inhabitants of our country, through much internal heat, are commonly as much inclined to liquor, and therefore not less desirous than others in the midst of *innocent* drunkenness to mislead and deceive the unwary by sales and purchases, and thus to acquire a profit; independently of this remedy, it was introduced throughout Rhineland, and at many places in Holland, that a person might always recede within twenty-four hours from transactions which took place in inns or during intoxication, provided the purchase of wine (*Wynkoop*) used or promised be paid. (9) Of Deception, in Drunkenness.

(1) Vide Gloss. & DD. ad l. 12. Cod. de rescind. vend. in verb. elegerit. Grotius, Inleyd. lib. 3. c. ult. n. 19. & c. 27. n. 7. How, in what manner, and by whom such valuation is to be made, see Sande, lib. 3. tit. 4. def. 16.

(2) Vide Pinell. de rescind. vend. lib. 2. part. 1. c. 1. n. 1—7.

(3) Arg. l. 16. Cod. de rescind. vend. Vide Christin. vol. iii. decis. 67.

(4) Vide Faber, Cod. lib. 4. tit. 30. def. 4. Sande, lib. 3. tit. 4. def. 12.

(5) Arg. l. 4. Cod. de remiss. pignor. Grotius, Inleyd. lib. 3. c. ult. n. 11. Cost. Antwerp. tit. 60. n. 12. Imbert. Enchirid. in verb. decret. in addit.

(6) Vide Neostad. Suprem. Cur. decis. 75. Cons. Utrecht, part 2. cons. 25.

(7) l. 2. Cod. de rescind. vend.

(8) l. 8. Cod. de rescind. vend. Vide Pinell. ad l. 2. eod. art. 1. c. 4. n. 18. in fin. Sande, lib. 3. tit. 4. def. 6.

(9) Vide Grotius, Inleyd. lib. 3. c. 14. n. 8. Burgund. ad Consuetud. Fland. in proœmio. n. 5. and particularly Customs of Rynland, art. 94.

All trade carried on at Wormer and Gisp, during intoxication, is invalid and entirely void. By the statutes of Leyden it was enacted in the year 1583 (art. 68.) that no private trade in immoveable goods should be considered valid until a proper acknowledgement, transfer, and statement, had been made before the aldermen; but that a person may nevertheless always recede therefrom within that time. To prevent, however, this from taking place too rashly, it was established by the new statutes in the year 1658 (art. 112.) that a person receding from such purchases should pay the twentieth penny upon the purchase, one half on behalf of the person wishing to render the purchase effectual, and the other half on behalf of the poor.

No Redress granted against public Sales.

§ 7. Which in every respect is to be understood of private trade, because such means of exceptions of fraud, drunkenness, or other deception, cannot be available in public sales, where every thing is publicly sold to the highest bidder by an authorized writer and crier, without any suspicion of fraud or deception; and every one must so far stand to his word (1), that, in exposing any goods for sale, all publications until the stroke is given with the palm of the hand are considered to be effectual, and those who bid less are not released by another who bids more, but the seller has the choice to allow the purchase to the highest bidder and to whom he pleases; and if any dispute arises between two or more, who of them bid before the other, the crier is believed in that respect upon his word, or in case of doubt, the goods are exposed for sale another time, without releasing the former bidders (2); which among us, for the sake of better security, is usually inserted in the conditions of sale.

(1) Arg. l. 13. Cod. de transact.
(2) Arg. l. 9. Ff. de in diem addict. l. 9. Ff. de publican. & vectigal. et ibi. DD. Vide Boër. decis. Burdigal. decis. 248. Rebuff. ad Constit. Reg. tom. 2. Tract. de præcon. licitat. art. 7. Gloss. unic. n. 12. Papon. l. 13. tit. 9. art. 25. n. 10.

CHAP. XXI.

Of the Hire of Houses and Lands.

[Grot. 3. 19.]

§ 1. *Hire defined.*
2. *When considered as effected.*
3. *Whether and when any Writing is required in hire.*
4. *How to use any Article taken in hire.*
5. *Incumbrances and Charges by whom to be borne.*
6, 8. *Whether and when Hire expires; and when it is understood to be tacitly prolonged.*
7. *Whether and when Hire expires before the Time.*
9. *For how many Years a Lease can take effect.*

§ 1. HIRE is a transaction, by which the use of an article, or the use of any work or performance, is promised for a certain amount. (1) Hire defined.

§ 2. This transaction is chiefly made concerning immoveable goods, dwelling houses, or ground for agriculture. When considered as effected.

As purchases are understood to have been made as soon as the purchase money is agreed upon; so hire is likewise reckoned to be confirmed as soon as the amount of the rent or hire is fixed. (2)

It is not necessary that any writing should be made thereof (3); which according to general opinion with respect to houses let remained unaltered, and a common voucher is sufficient for the same.

§ 3. But with respect to lands, the writing seems to have become an essential, at least a necessary part of the hiring (4); which usage prevails also at Utrecht with respect to letting houses. (5) Whether and when any Writing is required in Hire.

§ 4. The tenant is bound to use properly the property hired, in the same manner as it was used before (6); so that any one having taken on hire a spot of pasture ground may not use it for the breeding of cattle or for erecting any thing. (7) How to use any Articles taken in Hire.

Whatever has been taken on hire may be given over to another, unless it was otherwise agreed; which, so far as relates to dwelling houses, was expressly prohibited in some cities

(1) L. 1, 2. Ff. de locat. & conduct.
(2) Pr. Inst. locat. cond.
(3) l. 24. Cod. eod.
(4) Vide Proclamation of Emperor Charles, against husbandmen and farmers, of the 13th January 1515. Political Ordinance, art. 30, 31. 33.
(5) Cost. Utrecht. tit. 7. art. 13.
(6) Arg. § 5. Instit. de locat. cond.
(7) Arg. l. 35. § 1. Ff. locat. Vide Bartol. ibid. n. 3. Tussch. vol. ii. practicab. conclus. 623. n. 3. & seq. Littera C. junct. l. 13. § 48. l. 27. § 1. Ff. de usufruct. and Cons. & Adv. vol. i. consult. 215.

by statutes; for the person who lets the house would be considerably prejudiced, it being a matter of great difference by whom and in what way a house is inhabited. (1)

At Rotterdam, whoever hires any houses, garners, sheds, rooms, cellars, or other dwelling places, may not let the same to another without the consent of the person who let them to him, nor take any one to board and lodge with him; and if the persons who let and hire cannot agree, the matter is referred, if necessary, to the discretion of the court of justice. (2)

And also at Amsterdam, if any one hires a houses, he is bound to live in it, and cannot let the same to another without the consent, will, and knowledge of the proprietor, or the person who let it; who is always to have the choice whether he will detain it for him or not (3). The same practice also obtains at Utrecht, Gouda, Middelburg, Hartogen-Bos, and other places. (4)

Incumbrances and Charges by whom to be borne.

§ 5. The common incumbrances and charges imposed by the country, city, or village, upon goods let out, are as to lands or houses only borne by the person who lets them (5); unless any incumbrances be laid upon the fruits themselves, which in such case are to be borne by the tenant and by no other person (6), unless it was otherwise agreed.

In like manner, it is commonly contracted in letting lands, that the rent shall be paid free of every charge whatever; such as poundage and charges for dikes, sluices, and mills, banks, dams, and works upon the public roads, which are to be defrayed by the countries.

But with respect to the renewing and enlarging of banks, digging up ditches, renewing wind and water mills, and the impositions laid upon the country on that account, it was understood and resolved by the superintendents of dikes and chief inspectors of Rynland on the 16th October 1634, that notwithstanding the above contracts, such expenses and impositions, upon the lands let out for four or five years, should be borne, two parts by those having the use of the same, and one part by

(1) Vide Grotius, Inleyd. lib. 3. c. 19. n. 27. Gloss. & Bald. in l. 6. Cod. locat. Christin. ad leg. Mechlin. tit. 8. art. 10. n. 2.

(2) Keuren van Rotterdam.

(3) Recueil van de Keuren der Amsteldaam, c. 51.

(4) Keuren & Cost. Utrecht, tit. 25. art. 10.; Gouda & Middelburg in Zealand, tit. Huyringe, art. 5.

(5) Arg. l. 7. de publicam. Charond. Pandect du droits franch. lib. 2. c. 32. Garsias de expens. & meliorat. c. 14. n. 18. Tusch. vol. ii. practicab. conclus. 617. Litera C. Pinell in l. 1. Cod. de bon. matern. part. 2. n. 72.

(6) Arg. cap. 26. in verb. sicut Colonus, extr. de decimis Charond. d. loco.

the proprietor; and with respect to lands which were hired for three years, half should be borne by those having the use of them, and half by the proprietors; and with respect to lands hired for two years, two parts should be borne by the proprietors, and one part by those having the use of them; and in the case of lands the hire of which will expire at the termination of the current year, such charges shall be borne entirely by the proprietors alone, and those having the use will be under the obligation of paying the same, provided what they pay be deducted from the proprietor's account as aforesaid.

Whether and when Hire expires; and when it is understood to be tacitly prolonged.

§ 6. The time stipulated being expired, the hire expires also, but the hiring of houses is tacitly understood to be prolonged, if the person who lets them allows the tenant to remain therein unmolested at the termination of the lease (1); but it is uncertain how long such lease is prolonged. Grotius (2) is of opinion, that in such a case it is understood to be prolonged and renewed for the same period for which the premises were before let; but, on the other hand, the general opinion of the doctors (3) is, that the prolongation is understood to be but merely for that period during which the tenant remained in the hired property beyond and since the termination of the lease, by tacit permission of the landlord, at the rate of the former rent, and no further. And so it was judged by the court of Mechlin, according to Christin. (4)

But the following practice is observed at many places; viz. The tenant in similar cases may not be put out of the house before the time is expired; but according to a reasonable decision of the judge, proper time ought to be allowed to him, within which he may provide himself with another house. (5)

And it is therefore customary at many places, that the person who lets the property and the tenant, are bound to give notice to each other within proper time (usually within three months before the lease expires), that the lease will cease; in Friezland, before new year's day (6); at Utrecht, before Christmas eve, or at the utmost, within fourteen days after. (7)

If the tenant, or the person who granted the lease, happens to depart this life before the expiration of the lease, the rent must be satisfied by his heirs, excepting in mortgaged property,

(1) l. 13. § fin. l. 14. Ff. & l. 16. Cod. de locat. & conduct.
(2) Inleyd. lib. 3. c. 19. n. 4.
(3) Ad d. l. 13. § ult. Ff. locati.
(4) Ad Leg. Mechlin. tit. 8. art. 8. n. 10. and vol. iii. decis. 116. n. v. 3.
(5) Cost. Antwerp, tit. 59. art. 12. Keuren tot Leyden, art. 132. Cost. Utrecht. rubr. 25. art. 7.
(6) Vide Sande, lib. 3. tit. 6. def. 4. Menochius, l. 3. præsumpt. 85. n. 42.
(7) Keuren tot Utrecht, tit. 25. art. 7.

or where the property is not fully vested in the person who granted the lease, in which case the lease expires at the death of him who granted the same (1). And likewise in prebendal or vicarial property, where the possessor, who has let any lands belonging to a prebend, departs this life, it is understood, that the lease thereby expires, because no one can cede a greater right to another than he himself possesses (2), as was decreed by the Court of Holland, in the case of Andries Jasperz van Vesanevelt, requirer of re-hearing against Claas Jansz van Tetrode, on the 22d July 1611. (3)

Whether and when Hire expires before the Time.

§ 7. Independently of the preceding cases, it also happens that the lease is out within the stipulated time; and so it is in law, if the property be sold, or be given to any one, or otherwise bespoken, in which case the hire ceases thereby (4), if the tenant gets proper and timely notice thereof from the purchaser or receiver of the gift. (5)

But, in Holland and in the neighbouring places, a common rule prevails, that hire goes before purchase, and that, without distinction, not only the heirs of the deceased, but also the purchaser or receiver of the gift, must satisfy the hire of his predecessor. (6)

At Oudewater the tenant must leave the property on receiving notice to that effect four months before the year of the lease expires; reserving his right against the person who granted the lease. (7)

And at Amsterdam, and also at Leyden, with respect to houses sold by execution, the lease lasts only until the month of May next ensuing; the tenant reserving his right against him who granted the lease. (8)

The lease also expires when the proprietor, out of necessity, or on a certain occasion, is obliged to repair, or build again the house, or when he can prove that he himself is in want of the house, to be used by himself. (9)

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(1) § fin. Instit. locat. conduct. & l. 10. Cod. eod. l. 12. & l. 35. § 1. usufructu junct. l. 9. § 1. Ff. locati.

(2) l. 54. Ff. de reg. jur.

(3) Arg. d. l. 9. § 1. Ff. locati & ibi. Gloss. & Costal.

(4) l. 9. Cod. & l. 32. Ff. locat. conduct. l. 25. § 1. Ff. eod.

(5) Arg. l. 17. § 3. in fin. Ff. commod. Sande, lib. 3. tit. 6. def. 1.

(6) Neostad. Cur. decis. 30. Grotius, Inleyd. lib. 3. c. 19. in fin. Cost. Antwerp, tit. 59. art. 1.; Mechlin, tit. 8. art. 1. & Christin, ibid. Gudelin. de Jure Novissimo, lib. 3. c. 7. verse finitimus, in fine. Keuren van Leyden, art. 122.

(7) Vide Keuren van Oudewater, art. 60.

(8) Wille Keuren van Amsteldam, pp. 272. 661. edit. 1662. Keuren van Leyden, art. 122.

(9) l. 3. Cod. locat. cap. penult. extr. eod. Costal. in l. 30. Ff. locati. Pypon. l. 10. tit. 3. art. 3. 7.

Moreover, the lease also expires when the tenant does not properly use the property hired (1), provided it be so decided by the judge upon cognizance taken thereof (2); provided that proper time be granted to the tenant, within which he can provide himself with another place (3); or if, the lease being made for some years on condition that the rent should be paid on fixed periods without any delay, the tenant be negligent in satisfying the same in due time. (4)

§ 8. At some places it is customary with respect to habitations and lands which are let on lease, that so long as the tenant pays well, the person who lets them may not let them again to another, without giving the preference to the first tenant. (5)

And in the territory of Upper Maese and its vicinity, a new tenant is not easily to be found for a habitation and lands, if it does not appear that the former tenant will cede the same, or if he be not otherwise prevented from remaining in the property hired; which, however, having been frequently corruptly introduced without any reason by the husbandmen for their peculiar benefit, the court of Holland judged and understood, that the proclamation of the Emperor Charles V., issued on that account on the 15th January 1515, was still in force; whereby it was ordained, that no former tenant should in any way molest the new tenant on account of any subsequent lease, on pain of being corporally punished for it, unless it was expressly otherwise agreed (6); and by the political ordinance (art. 31.) an ampliation was made to the said proclamation, namely, that no one should desire the hiring or second hiring of any lands except by public writing or under the proper hand of the proprietor; and it was not only prohibited by the thirty-second article, on pain of corporal punishment, that no old tenant should hinder the new one, but by the thirty-third article a certain penalty was also imposed on those who use lands without a contract of hire (7); the conclusion against whom appears in the new Papegay (7): which proclamation by the States of Holland, was renewed on the 26th September 1658, and a subsequent ampliation was made thereof, which is contained in

(1) l. 3. Cod. locati.
(2) l. 176. Ff. de R. Jur. Fachin. l. 1. c. 95. Brunkhorst. cent. 1. assert. 82. Christin. ad Leg. Mechlin. tit. 8. art. 8. n. 7. & vol. iii. decis. 117. n. 10, 11, 12.
(3) Arg. l. 17. § 3. commodati. Sande, lib. 3. tit. 6. defin. 1.
(4) l. 3. Cod. locati, junct. l. 56. & l. 54. § 1. Ff. eod. l. 10. § 11. Ff. de publican & vectigal.
(5) See examples of such customs, in Gomez. tom. 2. resolut. cap. 3. n. 5. Minsinger. centur. 4. obs. 23. Boër. Decis. 107.
(6) l. 32. Cod. d. locat. & conduct.
(7) p. (mihi) 37.

a certain letter of Philip Duke of Burgundy, to the stadholder and counsellors of Holland, Zealand, and Friezland, of the 11th January 1454, of the following tenor; viz. "Whereas the knighthood, nobility, and good cities of our countries of Holland and Friezland, have caused it to be represented to us, that in many places of our said country, the farmers and tenants, when they have had the lands of any one on hire, after the expiration of the lease, fall in and use by force and violence the said land against the will and consent of the proprietor of the land; alledging upon their own authority, and without any ordinance of us, or any made on our behalf relative thereto, as it ought to be, that they are entitled to have a subsequent lease of the said lands; and further, when the proprietors of the said lands look out for new farmers, then the antient farmers threaten the new ones, and keep them in such fear or awe, that no one dare hire such lands, whereby the proprietors of those lands suffer great loss and are very much prejudiced: And whereas they have humbly petitioned us to make provision against such practices: So we, not wishing that such forcible means and violence should be submitted to or remembered hereafter, do command and enjoin you, as earnestly as we may, that you will, upon good and mature deliberation, enact and make on our behalf public statutes and ordinances upon a certain heavy penalty, such as you may deem expedient, in such manner as shall prevent a repetition of the said violence, and that you do correct the transgressors without any compromise, in order that they may serve as example to others," &c.

For how many Years a Lease can take effect.

§ 9. A lease may be effected for as many years as a person desires (1), and even for ever; but since, among us, no immoveable goods can be immediately incumbered or bound, except before the magistracy of the place where the property is situated (2); and since such a long lasting lease incumbers and binds the property itself, it is understood by some, that in such hiring the same solemnity ought to be observed, as is usually observed in alienating and incumbering immoveable property; and therefore, a lease granted for immoveable goods longer than for ten years, canot exist so far as it exceeds the said ten years, unless such lease was executed lawfully before the magistracy of the place; because in leases for so long a time, the same solemnities and observations are required, which have effect in aliena-

(1) L. 10. Cod. locati.

(2) Plac. May 9, 1529.

tions (1); but, since the solemnities of alienation, for other peculiar views, are considerably altered among us, I dare not introduce them for observation. Simon van Groeneweg (2) relates a good example thereof in the case of Gerrit Jansz Opperman of Delft, impetrator against Coenraad Jansz, cloth manufacturer, decided by the court of Holland on the 18th May 1600. But it was afterwards understood otherwise, and is at present entirely obsolete, especially in property belonging to abbeys and to the clergy, which are commonly let for ten, twenty and more years without distinction. Lastly, whatever has already been said concerning purchases, also has effect in hire, according to circumstances. (3)

CHAP. XXII.

Of Work or Service-Hire.

[Grot. 3. 20.]

§ 1. *Hiring or binding one's self into another's Service, or hiring a Beast, how to be understood.*
2. *What Kind of Order exists in taking in Hire, or hiring out, and in Performance of Services between Masters and Male and Female Servants and other Workmen.*
3. *Also between Merchants, Masters of Ships, and their Crews.*

IN the definition of hire we said that it was a transaction by which the use of an article or service of any work or performance is performed for a certain amount; because it consists as well in an act as in the use of any article. (4)

§ 1. And so the service or labour of a man or beast is hired out and accepted of for a certain profit; in which agreement is not only included whatever the contract clearly infers, but also whatever, independently thereof, belongs to such act or work in equity. (5)

Hiring or binding one's self into another's Service, or hiring a Beast, how to be understood.

(1) Covarruv. Var. Resolut. lib. 2. c. 16. n. 1. DD. ad l. 1. & ult. Ff. Si ager vectigales. Mantic. de tacit. & ambig. lib. 5. tit. 4. n. 5, 6. Sande de prohibit. rerum alienat. part. 1. c. 1. n. 45. Christin. vol. i. decis. 130. n. 11, 12, 13. & decis. 183. n. 6, 7. Papon. l. 1. tit. 13. art. 4.
(2) Ad Grot. lib. 3. c. 19. n. 21.
(3) Pr. Inst. & l. 2. Ff. locati conduct. l. 19. l. 20. Ff. de act. empt.
(4) L. 1. Ff. locati.
(5) § 5. Instit. locati.

What kind of Order exists in taking in Hire, or hiring out, and in Performance of Services between Masters and Male and Female Servants and other Workmen.

§ 2. And therefore a master cannot, without lawful reason, dismiss his servant before the expiration of the time, without paying him his full wages (1); and, on the other hand, a servant is obliged to serve his or her master or mistress faithfully until the expiration of the time; against which disservice and irregularities with respect to running away from their hire and service, it was provided by proclamation of the 8th May 1608, by the court of Holland, and also by the proclamation of the States of Holland between apprentices and their masters, of the 2d September 1597, and by the statutes of Leyden (2), as well as by the statutes and customs of Amsterdam (3), and by their arbitrary statutes it was clearly directed, among other orders, that a servant or handycraft-man who hires himself to do any work or service, may not leave the same without legal cause, to be determined at the discretion of the aldermen of Leyden, upon penalty of twenty pounds; and no person who has knowledge thereof may take or hire such servant or workman before his time is expired, upon penalty of being bound to indemnify the loss of those by whom they were first hired; at Leyden upon the same penalty of twenty pounds. When any male or female servant whosoever rises against his or her master or mistress at Rotterdam, on account of any work or ill temper, the master or mistress may dismiss and pay them in proportion to the term served by them. (4)

Also between Merchants, Masters of Ships and their Crews.

§ 3. With regard to navigation, and to the service and hire relative to the same between merchants contracting freight with masters of ships and ships' company, custom and the extensive trade in these countries have introduced a special right, in which are followed the careful institutions of the maritime laws of Wisbuy, the ordinance of the Emperor Charles V. upon the maritime laws of the 19th July 1551, and of King Philip of the end of October 1563; to which is added the ordinance of the States of Holland respecting the herring fishery and the great fishery, dated 12th April 1588, 2d April 1605, and 15th February 1619; from which Grotius composed the twentieth chapter of the third book of his introduction to the jurisprudence of Holland, where he has treated at large concerning hire between masters, owners, freighters of ships, and ships' companies. (5)

(1) L. 24. § 2. l. 38. l. 55. § fin. Ff. locat. conduct.
(2) Art. 137.
(3) Ch. 51. art. 24. & seq.
(4) Keuren van Rotterdam.
(5) Grot. Inleyd. lib. 3. c. 20. See also Anselm. Codex. Belgic. tit. Schippers & Ze-regten. Neerl. Adv. 1. c. 53.

CHAP. XXIII.

Of Partnership and Community of Goods.

[Grot. 3. 21.]

§ 1. *Partnership defined, and its different Kinds.*
2 *Community of all Sorts of Goods, when understood to have been tacitly contracted.*
3. *Whether and how Community exists between Husband and Wife.*
4. *Whether it exists also in feudal Property, and in Trust or Entailed Goods.*
5. *Whether and how far such Community exists in a Second Marriage.*
6. *Whether and how far it exists with respect to Debts contracted before the Marriage.*
§ 7. *Whether and when between a Widow or Widower, and his or her Children of the former Marriage.*
8. *Whether it also extends to the Second Marriage; and in what Manner, in such Cases, the Estates ought to be divided and shared.*
9. *Whether such Community exists also in Inheritances and Donations.*
10. *What Proportion of Gain and Loss is given in Community of certain Property.*
11. *When the Community ceases, and is terminated.*

§ 1. *PARTNERSHIP* exists when a person contracts with others community of property or service, with the intention of making a profit thereby. (1) Partnership defined; and its different Kinds.

Community exists when it is effected without agreement, and effectually (2); which distinction being duly considered, these two subjects may be considered together.

Partnership may be entered into, generally, of all property, or of certain property in particular, and also of some single species of commerce (3). This consists also of unequal shares, so that the one person has a greater share in the partnership than another, and consequently also a greater share in the profits and loss than the other, in proportion to what he has contributed (4), unless the shares of profit and loss were stipulated, which in such case ought to be followed (5). But no person can contract for a share in the profit, without sharing the loss;

(1) l. 1. & tot. tit. Ff. pro socio.
(2) l. 4. in pr. Ff. pro socio.
(3) l. 5. in pr. Ff. pro socio. pr. Instit. eod.
(4) § 1. Inst. de Societate junct. l. 29. § 1. Ff. eod.
(5) l. 30. Ff. eod.

this kind of agreement is by the lawyers denominated *societas leonina*, and cannot exist in law. (1)

Partnership may also be entered into of money or other trade of one person, and the service of another (2); in which case the loss upon the goods is borne by him who caused the same. (3)

Further, partnership or community of all property is both of the future as well as of the present property, or simply of the present property alone. (4)

Community of all Sorts of Goods, when understood to have been tacitly contracted.

§ 2. Community of all sorts of goods, as well future as present, is understood to have been entered into only when it is *expressly* spoken of all sorts of goods. (5)

But sometimes it also happens that it is understood to have been effected *tacitly* (6), viz. when such community is actually made, because the existence of any thing is not only understood to have been effected by utterance of words, but also by acts (7); such as, when brothers, after the death of their father, remain together in the undivided possession of their property, not only of the property which has devolved upon them from their father, but also of all other property, in community of gain and loss, and neither of them having in the meantime required any account, proof, or residue. (8)

Whether and how Community exists between Husband and Wife.

§ 3. And thus a community of property is actually effected among us between husband and wife (who made no ante-nuptial contract), of all sorts of goods, both future and present; and by virtue thereof, as soon as the marriage is solemnized, every article, in what way soever acquired by the one, ought to be divided with the other, even as if it was expressly contracted. (9)

A community of property is also effected of property situated in a country where such community does not exist (10), unless a young man under the age of twenty-five, or a young woman under the age of twenty, had entered into matrimony with any one, without the consent of their parents, relations, or the government; in which case, such community will not exist according to the edict of the Emperor Charles V. of the 4th Oc-

(1) l. 29. § 2. Ff. pro socio.
(2) § 1. Instit. de Societate.
(3) § 2. Instit. eod.
(4) § 4. Inst. eod. l. 3. § 1. & l. 73. & seq. Ff. eod. l. 7, 8, 9. Ff. pro socio.
(5) Ibid.
(6) l. 4. Ff. pro socio junct. l. 2. Ff. de pact.
(7) l 25. Ff. de testam. militari.
(8) Arg. l. 32. § 1. Num. quid interest. Ff. de legib. Faber. ad cod. tit. pro socio, def. 3.
(9) Juxta l.1. § 1. l. 3. § 1. Ff. pro socio. Vide Wesel. de comm. bonn. See Vinn. ad pr. Inst. eod. n. 3. Grotius, Inleyd. lib. 2. c. 11. n. 4. & lib. 3. c. 21. Neostad. de pact. antenupt. obs. 9. in notis. and Goris. advers. de Societat. conjug. c. 1. Handvesten van Zuid-Holland, p. 530. Cost. Amsterd. in civile saken, Jan. 3, 1570, art. 5.
(10) Nicol. Burgund. ad consuet. Flandr. tit. 1. n. 15. Goris. ch. 6. verse 8. Coren, decis. 20.

tober 1544, (art. 11.); and it will exist only so far as such community may tend to the benefit of the minor, because the words of the edict speak only against those who have attained their majority, and who come to deceive the minor with the inducement of such marriage (1). This community begins and takes effect as soon as the marriage is confirmed in the church, or before a justice, although no carnal knowledge had followed; as was determined by the supreme court of Holland. (2)

Whether it exists also in Feudal Property, and in Trust or Entailed Goods.

§ 4. Feudal property, and other property, whether trust (fidei-commissary) or entailed, are not included in this community, except so far as relates to the fruits (3); and therefore it was understood that this community does not prevail among counts, barons, and other the principal nobility, whose property chiefly consists thereof. (4)

Whether and how far such Community exists in a second Marriage.

§ 5. It is however questionable whether this general custom of community of goods between husband and wife also prevails in the second marriage, when there are children of the first marriage; because, according to law, a widow or widower, having children of the former marriage, may not give or bequeath more to his or her second consort than a child's portion (5). But, because the said *law only prohibits* the giving or bequeathing something directly to the second consort, to the prejudice of the children of the former marriage, besides a child's portion, the lawful community between husband and wife, which may be both beneficial as well as prejudicial to the children (it occurring without the intervention of the consorts, and as it were of itself), is not understood to be included in such second marriage (6). And besides, the practice of the above-cited law, *hac edictali Cod. de secund. nupt.*, was not introduced and known in this country until about the year 1529, according to Neostad (7), and therefore it could not annul the very antient right of the

(1) Per l. fin. Ff. de legat. 1.

(2) See Neostad. de pact. antenupt. obs. 15, 16, 17. as is said heretofore, vide supra, book i. chap. xiv. § 3. p. 71, 72. See further of this subject Christin. vol. iii. decis. 51 & 52. & ad Leg. Mechlin. tit. 16. art. 29. & seq. Grotius, Inleyd. lib. 3. c. 21. & seq. & lib. 2. c. 11. Goris ad vers. de Societat. conjugal. Sande, lib. 2. tit. 5.

(3) Arg. lib. 2. feudor. tit. 26. vers. In generali. Cons. & Adv. vol. iii. cons. 34. & vol. iv. cons. 25. n. 1. & cons. 131. Bort van de Hollandse Lenen, vol. ii. p. 11. & p. 33. 2d edit. Goris, de Societate Conjugali, c. 3. Coren. consil. 25. n. 27. Neostad. de Pact. antenuptial. obs. 14. & Cur. Holland. decis. 5. Cons. & Adv. vol. i, cons. 30.

(4) Vide Neostad. de pact. antenupt. obs. 9. in notis, vers. Sub-specie dotis.

(5) Per l. hac Edictali Cod. de secund. nupt.

(6) Arg. l. 13. Ff. de Famil. erciscund. See post Ludovic. Roman. & Tiraquell. Petr. Pecc. de testam. conjug. lib. 2. c. ult. n. 8.

(7) Obs. de pact. antenupt. 4. in notis vers. et licet.

said community; but, on the contrary, the said law being more recent, ought in every point to be regulated according to the same, and in all doubtful points ought to give way to it. On this account, therefore, the said community of property prevails both in the second and following marriages as well as in the first marriage, although there are children of the former marriage; and also so far, that those, who marry with a widower or widow, having children of the former marriage, (besides the half which appertains to them by virtue of the said community) may receive a child's portion more by last will (1). And so it was determined by the high court of Holland, on the 22d May 1586, in a suit between Gerrit Lourisz and company, impetrators in a case of appeal, and Elizabeth Cornelis Gysbregts, widow of Louris Gerretsz (2). And also by the court, in the suit between Pieter Willemsz, impetrator in case of appeal against Grietge Franckens, defendant, on the 28th May 1612; and in a similar case on the 8th October 1614. And it was likewise so determined by the court of Utrecht, on the 25th June 1646, in revision, between the heirs of Klaas Elbertsz and the heirs of Barent Evertsz, on the 2d April 1653, in the case of the widow and children of Daniel van Horn. (3)

Whether and how far it exists with respect to Debts contracted before Marriage.

§ 6. Whether this community between husband and wife also prevails in debts contracted prior to the date of the marriage, is discretionary, and subject to consideration, which during the marriage is not doubtful, because as the one has a share in the acquisition of the other, he ought also to assist in bearing the loss and incumbrances, as is asserted by Chassan (4). But the principal question consists in this; viz. whether such engagement is so far effectual after the marriage has been dissolved by death. And it is understood that the survivor cannot be called upon to pay debts contracted by the deceased, *prior* to the date of the marriage, *after* the dissolution of the marriage; because, at the time the debt was contracted, the deceased had no authority to bind his or her spouse, as the community, on account of which the survivor at the time of the marriage, was also made indebted, ceases, and is entirely annulled by the death of the other: it follows, that such creditors ought to take the consequence upon themselves, for having suffered the whole

(1) Vide Christin. vol. i. decis. 271. n. 11.
(2) Coren. obs. 30. n. 29. in margine.
(3) Vide Van Someren, tract. de Jure Novercar. c. 1. n. 1. See also Cons. & Adv. part 1. cons. 31. 47. & 48.
(4) Ad consuetud. Burgund. rubr. 4. § 9. vers. de tous debites, n. 8. See also Lambert Goris adversar. de societate conjugali, ch. 4. n. 14.

of the marriage to pass by without prosecuting their right; and they can have no claim upon the survivor, who is not bound further or longer. (1)

§ 7. When a widower or widow, having children, remains in the possession of the estate without dividing the same, in that case half of all the accessions to the estate after the death of either of the consorts, belongs to the children; and they need not assist in bearing the loss which might have been incurred in the meantime, nor will the incumbrances, or any thing else which may be laid by the survivor upon the estate, concern the children; and so it is asserted as a general law of several nations and countries by Sande (2). And it was clearly ordained by the orphan statutes of the city of Delft, that the survivor, whether father or mother, remaining in the possession of the common estate, without proving to the register of orphans' estate, the inheritance of his or her children, and causing their paternal or maternal inheritance to be registered, will be obliged to give to the children the half of all acquisitions subsequent to the death of the first deceased father or mother (3). I say, *a general law of several nations and countries*, because it was introduced against the common law, for the benefit of young and innocent children, and for the punishment of careless parents; and therefore it is understood by many, that where there are no such special statutes and customs, the community of property ceases at the death of either of the consorts (4), as it was frequently understood by the court of Holland, and the high court; and so it was decided by the court of Friezland, according to the written Roman laws (5); and by some it is confined only to gain obtained by the survivor, and is not extended to any inheritance or gifts. (6)

Whether and when between a Widow or Widower, and his or her Children of the former Marriage.

§ 8. But with regard to the questions whether this tacitly prolonged community is also transmitted to the second consort, whether a widow or widower who remains with the children of

Whether it also extends to the Second Marriage; and in

(1) Vide Neostad. de pact. antenupt. obs. 12. in fin. Chassan. ad consuetud. rubr. 4. § 12. Vide infra, book v. ch. iii. § 13. and Censura Forensis, lib. 4. c. 23. § 20.

(2) Vide Joan a Sande, tit. 5. def. 9. See also Grotius, Inleyd. lib. 2. c. 13. Zypæ. Not. Juris Belg. lib. 5. tit. de jure dotium. § 1. Cost. Antwerp. c. 41. art. 93. Ordonantie van de Weeskamer, tot. Alkmar & Edam, tit. 2. art. 28.; Amsterdam, art. 21; Leyden, art. 25. 27.; Dordrecht, art. 56, 57.

(3) See Cons. & Adv. vol. iv. cons. 16. n. 2. Turbe voor den geregte in den Hage, April 7, 1554. Cost. Utrecht, rubr. 23. art. 4. Land-regt van Over-yssel, vol. ii. tit. 2. art. 15. Goris de Societat. conjugal. tract. 1. ch. 9. Chassan ad consuetud. Burgund. rubric. 4. § 2.

(4) Arg. l. 59. Ff. pro socio l. 65. § 9. Ff. eod.

(5) Sande, l.b. 2. tit. 5. def. 9.

(6) Keur-book der Stad Delft, p. 101. Ordonn. Utrecht, tit. 23. art. 4. Land-regt van Over-yssel. Cost. Mechlin. tit. 16. art. 34. Cost. Antwerp. tit. 41. art. 93.

what manner, in such cases, the Estates ought to be divided and shared.

the former marriage in the possession of the estate, without dividing it, and in what manner, after the dissolution of the second marriage, the division and distribution of the said estates must be taken; it is understood in the affirmative; viz. that the said community of the children of the former marriage is continued also, and is transmitted to the second marriage entered into by their father or mother, according to what is said more extensively by Argentre and Mornac (1). But in what manner in a similar case the estates are to be distributed and divided, the doctors are by no means agreed. Thus some of them (2) are of opinion, that they are only to be reckoned *two* estates; and therefore divided in two equal shares, between the children of the former marriage and the second consort; because the said children, with their father or mother, being jointly in community, only bring jointly one share into the second community (3). Others, on the contrary, understand that in a similar case there will remain *three* distinct estates; and that the second consort marrying with any one who has children of the former marriage, without taking care to have the estate of their deceased father or mother properly separated from the estate of the surviving widow or widower (4), must attribute that occurrence to themselves, and cannot avail themselves of the above quoted laws, to avoid any second relationship or community being forced upon him or her against his or her will; and therefore, that the said community must be divided into three shares, of which the one third part belongs to the children of the former marriage, on account of their father or mother who died previously, and the second third part, on account of their surviving father or mother, as is asserted and declared by Imbert (5); viz. that it was so determined by the parliament of Paris, upon a meeting of skilful persons in France, on the 23d December 1529, and 7th September 1552. And in a case of a similar nature, a suit having arisen before the high court of Holland, the same decision is expected in a few days.

Whether such Community exists also in Inheritances and Donations.

§ 9. Further, it is not certain whether such community is understood to be applicable also to inheritances and donations. The affirmative is maintained by Grotius (6); but other lawyers

(1) Vide Argentr. ad consuet. Britann. art. 418. Gloss. 5. and Mornac. ad l. 64. Ff. pro socio. See also Joan. à Sande, lib. 2. tit. 5. def. 9.

(2) Costal. ad l. 19. Ff. pro socio. Goris adversar. tract. 1. c. 9. n. 14. Johann. Pipon. lib. 5. tit. 2. art. 6.

(3) Arg. l. 19. Ff. pro socio. & l. 47. § 1. Ff. de reg. jur.

(4) Arg. l. 19. Ff. de reg. jur. junct. § final. Instit. de societat.

(5) Enchirid. Jur. Gall. vers. Societas an præsumatur.

(6) Inleyd. lib. 3. c. 13. in fine.

(whose opinion is most probable), say, that it only has effect in such acquisitions and gains as have their origin from the common estate (1). And there is a very clear statute respecting it at Delft (2), Utrecht, Antwerp, and Over-yssel (3). But by the bye-laws of Leyden, (art. 25, 27.) of Amsterdam, (art. 21.) of Briel, (art. 48.) of Alkmaar and Edam, (tit. 2. art. 28.); it *has* effect likewise relative to inheritances and donations acquired from strangers; otherwise where there are no such special statutes and customs, it is understood that the community of property is separated at the death of either of the consorts (4); and that the children in such a case are entitled to no more than to the inheritance of their deceased father or mother, with the fruits thereof, so far as the same can be ascertained (5). And so it was adjudged by the court of Holland. (6)

What Proportion of Gain and Loss is given in Community of certain Property.

§ 10. Community of certain property in particular, or for a certain portion, consists of the gain or loss of the community; viz. for such share as is expressed in the contract of the partnership (7), whether it be equal or unequal, and whether the one has a greater share in the community than the other, or not (8); as usually occurs when the one brings into the community property or cash, and the other contributes thereto his art or labour; yet so that the one does not take upon him alone all the loss, and the other all the profit, or a share in the profit without any risk of loss, which sort of community cannot exist (9). If no share of gain or loss be expressed, it is reckoned according to the share of the property, or value of what one has brought into the community. (10)

When the Community ceases, and is terminated.

§ 11. The community ceases at the death of the partner (11), and does not extend itself to the heir (12), unless it was otherwise contracted, or was otherwise conditioned in the community, or unless the business or management in which the community consists has been executed, or else effected by mutual cession, and also by cession of one of the partners in

(1) Vide Christin. ad leg. Mechlin. tit. 16. art. 24. Zypæ Not. Jur. Belg. tit. de jure dot. in verb. communio. Busius ad l. 59. Ff. pro socio. Sande, lib. 2. tit. 5. def. 9. arg. l. 65. § 9. Ff. pro socio.

(2) Keur-boek, p. 101.

(3) See Cost. Utrecht. tit. 23. art. 4. Cost. Antwerp. tit. 41. art. 39. Land-regt van Over-yssel, vol. ii. tit. 2. art. 15.

(4) Per l. 59. pro socio.

(5) L. 65. § 9. Ff. sod. l. 20. § 3. Ff. de hæredit. petit.

(6) Vide Cons. & Adv. vol. 1. cons. 105. 161. Cons. & Adv. Rotterdam, vol. iii. cons. 47. See also Sande, lib. 2. tit. 5. def. 9. Goris adversar. de Societ. conjugali, c. 9.

(7) § 1. Instit. de Societate.

(8) Ibid. & § 2. Instit. de Societate, l. 30. in fin. Ff. pro socio.

(9) L. 29. § 2. Ff. pro socio.

(10) § 3. Instit. de Societate.

(11) L. 4. § 1. l. 35. l. 52. § 9. Ff. pro socio.

(12) § 5. Instit, de Societate.

spite of the other, if it be effected in time, and while the matter is still in existence. (1)

The community between husband and wife terminates and ceases when the marriage is terminated and dissolved; unless the survivor as holder of the estate, had continued to possess it undistributed and undivided, of which we have already treated. In such case the estate is divided equally; and the question which is agitated among the doctors, respecting the restitution and compensation for the fruits, does not at present come into our consideration; but the goods, in whatever state they were found at the time of the dissolution, ought to be separated and divided into two equal parts, without any difference whatever.

And it is so narrowly looked into, that a wife or husband is not allowed to enjoy any thing from the common estate for mourning; but if either of them wishes to go into mourning, he or she ought to pay for it, and to do it at his or her own expence (2); and again, the funeral expences, and whatever belongs thereto, ought to be borne on the side of the deceased (3); and therefore the consorts or their heirs are at liberty, after the dissolution of the marriage, to insist reciprocally upon the goods being brought in which were given in marriage (if they were not brought in), and even with interest (4); and likewise to demand indemnification for the goods which remained out of the community, and which were sold by the husband during the marriage, or had otherwise perished and become damaged through his fault and neglect. (5)

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(1) L. 65. § 3. 5. 6. 10. Ff. pro socio. Arg. l. 35. Ff. de reg. jur. § 4. Instit. de Societate.

(2) Vide Cost. Antwerp. tit. 47. art. 28. Coren. obs. 38. n. 45.

(3) Vide Grotius, Inleyd. lib. 2. c. 11. n. 13. Costuymen van Zuid-Holland, p. (mihi) 537. art. 40. Facit. l. 23. l. 27. in pr. & § 1. & seq. l. ult. § 9. Cod. de Jure delib.

(4) Vide Peccius de testam. Conjug. lib. 2. ch. 4. Neostad. de pact. antenuptial, obs. 11 & 14. Grotius, Inleyd. lib. 2. c. 12.

(5) Vide Neostad. observation 20. Grotius, d. loco.

CHAP. XXIV.

Of Ante-nuptial Contracts.

[Grotius, 2. 12. Van Leuwen, Censura Forensis, 1. 12.]

§ 1. *Of the Effect of an Ante-nuptial Contract.*
2. *Women have a free Choice to adhere to the Community of Gain or Loss, or not.*
3. *The Gain or Loss being excluded from Community of Property, how far a Wife is bound independently thereof.*
4. *Whether and how far a Prohibition to a Husband from disposing, alienating, or incumbering the Wife's Property, inserted in an ante-nuptial Contract, may exist to the prejudice of a Third Person.*
5. *Whatever has not been expressly conditioned in the Ante-nuptial Contract, follows the Community.*
6. *What is to be reckoned among Gain and Loss.*
§ 7. *Whether Bail is also to be reckoned under Gain and Loss.*
8. *In a Second Marriage with a Person having Children of the former Marriage, to contract for no more but for a Child's Portion.*
10. *The Benefit of Ante-nuptial Contract is forfeited through Adultery.*
11. *How far an Ante-nuptial Contract has the Effect of a last Will, and exists as last Will.*
12. *How to be annulled.*
13. *How far and in what manner Donations and Dowries, have effect among us.*
14. *Whether, and how far Donations and Presents given during the Marriage, between Husband and Wife, are effectual.*

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§ 1. AS the circumstances of people are often very unequal, and the risk of loss, which is to be expected from such community, is often very great; so before the solemnization of the marriage, provision may be made, by which we can depart from the community as much as we may wish, and the one or the other party may stipulate for certain benefits, excepting that one cannot stipulate to share in the acquisition to be made during the marriage, without being obliged to bear the loss. This sort of transaction is by the lawyers denominated *Societas Leonina*, and may not exist in law (1); excepting that a wife may stipulate to have a free choice, in order that after the dis-

Of the Effect of an ante-nuptial Contract.

§ 2. Women have a free Choice to

(1) Per l. 29. § 2. l. 30. ff. pro socio. § 2. Inst. eod.

adhere to the Community of Gain or Loss, or not.

solution of the marriage, she may have half a share of the gain and loss if she wishes, or else may take for herself the goods brought in by her (1). This is only allowed to the wife as a peculiar privilege, contrary to the ground of the general law, in order that if she survives her husband, she should not be deprived and bereft of her means in her life-time, by her husband's fraud or loss; and therefore it must be taken very narrowly; so that her heirs, in case she dies before her husband, should not be allowed to use the same right, although it was so stipulated; because, what is granted to any one as a special privilege, cannot be extended from one case to another, or from one person to another (2); and so it was judged by the supreme court of Paris (3), which is to be understood of collateral heirs, or other unrelated persons; because, with respect to a child or children, *et hæredes suos*, it is understood that such right of chusing is also transmitted to them in the same manner as it is understood in other privileges relative to donations; because the said privileges were granted as well on account of children as on account of wives; and so the decision of the court of Paris (4) is to be understood, by which it is declared that such right of chusing is transmitted to their heirs also, where heirs are understood to be child or children or further descendants, *et hæredes sui.* (5)

The Gain or Loss being excluded from a Community of Property, how far a Wife is bound independently thereof.

§ 3. But, if the community of property, gain and loss, be excluded, the wife may however after the husband's death, be called upon for the payment of half of the debts incurred for the maintenance of the family, reserving only her action against the heirs of her husband, if there be any (6); as was determined by the court on the 6th November 1603, in the case of Cornelis Jacobsz, cloth merchant, and company, against Mrs. Maria Diert; and on the 26th March 1607, in the case of the Countess van Solms, against several of her creditors.

Whether and how far a Prohibition to a Husband from disposing, alienating, or incum-

§ 4. With regard to the agreement between husband and wife made by ante-nuptial contract, by which the husband is prohibited from incumbering, charging, or alienating the property brought in marriage by his wife (excepting by consent of the

(1) Vide Neostad. de pact. antenupt. obs. 9. Grotius, Inleyd. lib. 2. c. 12. n. 7. Carpzov. defin. forens. part. 3. constit. 10. def. 12.

(2) § 6. Inst. de Jure nat. gent. & civ. l. 1. § 2. Ff. de constit. princip.

(3) Desid. Herald. Rerum Judicat. lib. 2. c. 18. nr. 6.

(4) Vide Joan. Papon. lib. 15. arrest. tit. 4. art. 12.

(5) See however Groenewg. ad l. 4. Cod. de dot. prom. Wesel. ad Nov. Ult. art. 8. Zutph. p. 409.

(6) Arg. l. 33. l. 78. § 2. Ff. de jure dot.

said wife) the doctors have justly questioned, whether such a contract can exist in law, and whether such incumbrance or alienation, made contrary to the said agreement, ought not however to take effect in respect to a *third* person; because a wife is reckoned under age, and is placed entirely under the guardianship of her husband, as we have already shown (1). To which it is to be added, that the general law of nations is not removed by a *particular* treaty between two nations; which rule prevails also in special statutes and customs; if what is done against the same militates against good morals (2), or against manly worthiness, or otherwise if mistrust would arise therefrom between husbands and wives, as is asserted by Bartolus (3); whereto is also applicable the text in l. alia causa 14. § eleganter. Ff. Soluto Matrim.; where Ulpian puts the query upon the following case:—If a husband had bound himself by ante-nuptial contract, that he will not only be bound according to his ability, but independently thereof *in solidum* also, that is, for the whole, whether such contract can exist? And he determines it in the negative, because it militates against good morals and manly duty and worthiness; whence Baldus remarks, that no obligation can be effectual, by which a man is deprived of the honor and duty which his wife owes him; therefore the law prohibits security from being demanded for the restitution of the dowry; or, if securities were given, they are not bound (4). The reason of this decision is, because no mistrust should exist in marriages.

bering the Wife's Property, inserted in an ante-nuptial Contract, may exist to the Prejudice of a Third Person.

On the other hand, according to general custom, the free management belongs to the husband without distinction, as well of the property which came from his wife, as that which he brought. Further, a married woman cannot dispose of her own property by donation *inter vivos*, which likewise prevails, although the community of property, brought and inherited, was excluded by ante-nuptial contract. And to the husband, nevertheless, belongs the free management of property brought by his wife, provided that, at the dissolution of the marriage, in such cases, the alienation and diminution of the property (brought on the one or other side) must be made good; which custom, as it concerns the honour and duty of a husband, cannot be opposed by his wife by contract, as mistrust of the wife would otherwise arise therefrom respecting the duty of her husband, because it

(1) See Book i. ch. vi. p. 31.
(2) L. 38. Ff. de pact.
(3) Ad d. l. 38. n. 4, 5.
(4) Tot. tit. Cod. ne fidejussor. dot. dent. & ibi. Bart. et DD.

would be as if she would not trust her property to him to whom she has trusted her body and herself; and although, according to the custom of the country, husband and wife are permitted to contract, that no community of property should exist; yet, as all ante-nuptial contracts mention in Holland, it nevertheless would be something un-heard of, and would exceed the bounds of good manners, if a husband having the right, dignity, and authority over his wife, and the free management of his wife's property, should in that management be prejudiced by contract, especially when between husband and wife the community of gain and loss is not excluded; which is of such force that the management and alienation made by the husband of the wife's property stands good, and that the wife can only claim the property which at the dissolution of the marriage remains still unalienated and is in existence; provided only, that wives, for loss and deficiency sustained reserve their right against the heirs of the husband and the further privileges granted to them for the purpose of having restitution of their dowry before other creditors of the estate. (1)

Groenewegen (2) makes the following distinction: that whenever a wife excludes the community of property by ante-nuptial contract, or desires by contract to have again from the estate the property brought in by her, free; it only takes effect so far as the same is not alienated or incumbered by her husband during the marriage; and for the property alienated or incumbered, she has only an action against her husband or his heirs, to have restitution made thereof, on account of the general right of community; but if, independently thereof, she had expressly prohibited by contract the alienation or incumbrance of her property by her husband, that then in such case the alienation or incumbrance of her property, made by her husband with respect to a third person, should also be considered null and void. There is, however, no occasion for this distinction; unless such prohibition was publicly proclaimed, which the words of Grotius quoted by Groenewegen seem to infer (3), when he says, "A wife can contract, that her husband shall have no administration of her property; and, in consequence thereof, if he endeavours to alienate or incumber it, she may judicially prohibit it;" and, therefore, with respect to this point,

(1) Vide supra, Book iv. ch. xiii. § 14. p. 362.

(2) Ad l. 30. Cod. de Jure dot.

(3) Vide Grotius, Inleyd. lib. 1. c. 5. n. 39.

it is fully admitted among us, on account of the general lawful guardianship and full administration of the husband over his wife's property, and also for the reason above cited, as the most probable opinion, that the alienation of the wife's property, made by her husband, (notwithstanding the contract against it) ought to be effectual with respect to a third person, the wife reserving her action against her husband or his heirs; unless the prohibition from alienating the property, &c. was publicly proclaimed, or, otherwise if there had been any fraudulent transaction therein; because it is scarcely possible that one can know what contracts might have been privately made between husband and wife; which rule with respect to incumbrance or hypothecation must also be followed, unless a special privilege concerning it was granted to wives before all other creditors of the estate. (1)

§ 5. Nevertheless, whatever has not been further stipulated by ante-nuptial contract, follows the said community (2); so that, although the community of property was excluded, community would still exist of the fruits, interest, gain and loss acquired and incurred during the marriage (3); and so it was decided by the court in the cause of Hendrick Jansz van Berkel against Kryn Gerritsz Landman, on the 19th November 1619. (4)

Whatever has not been expressly conditioned in the ante-nuptial Contract, follows the Community.

If, however, the community had not been entirely excluded by ante-nuptial contract, but only in case of certain occurrence, (for example, when it is only said in such a case, if no children be procreated by the said marriage, &c.), it is then understood that in all other cases the said community prevails. (5)

§ 6. When we speak of gain and loss, or when it is tacitly intended, the inheritances, acquisitions, or similar profits or incumbrances are not included therein. (6)

What is to be reckoned among Gain and Loss.

§ 7. But it is doubtful whether, under the clause of gain and loss, is also included the bail or security which a man might have entered into for another during the marriage, and whether a wife or her heirs are also bound to bear half the loss thereby

Whether Bail is also to be reckoned under Gain and Loss.

(1) Vide ch. xiii. § 14. of this book, & 362, supra. See also Neostad. de pact. antenupt. obs. 21. Joan. à Sande, lib. 2. tit. 5. def. 8. vers. Si mulier.

(2) Vide Grotius, Inleyd. lib. 2. c. 12. Neostad. d. tractat. obs. 4. 23. Coren. obs. 30. & cons. 25. l. 22. Ff. solut. Pecc. de testam. conjug. lib. 1. c. 6. Neerl. Adv. vol. 1. c. 9. Mantic. de tacit. & ambig. conv. lib. 3. tit. 9. n. 11. Argentr. ad consuetud. Britann. art. 418. Gloss. 1. n. 5.

(3) L. 9. Ff. pro socio. Neostad. pact. antenupt. obs. 4.

(4) See also Joan à Sande, lib. 2. tit. 5. def. 8. Argentr. d. art. 418. Gloss. 1, n. 7, 8.

(5) Coren. decis. 30.

(6) L. 7, 8, 9, 10, 11. Ff. pro socio. Zypæ Notit. Jur. Belg. de Jur. dot. in verb. plerumque. Coren. cons. 18, Christin. ad Leg. Mechlin. tit. 16. art. 18, n. 2. Weesel. de connub. bon. soc. tr. 2, c. 2.

incurred; and with reference to this point, it was decreed by the court of Friezland that a wife is not under such obligation, but that it must be borne on the side of the husband only (1); and it should also, in strictness of law, mostly prevail (2), being grounded upon this maxim, that, according to strictness and the customs of some places (as in Friesland, Guelderland, and elsewhere), a husband may not alienate or incumber his wife's property without her consent (3), and that the entering into bail is considered in some degree as an unnecessary incumbrance; but whereas the grounds of our Dutch marriages are, that a wife is entirely placed under the guardianship of her husband, and cannot herself either charge or incumber her own goods, but the husband must appear in judgement for her, who may manage, alienate, or incumber her goods, or otherwise deal with them according to his pleasure, without requiring his wife's consent thereto, (as we have elsewhere fully shewn); and that the husband incurring any debts, for what cause soever it may be, the wife also becomes bound involuntarily for the same (4); so on that account it will be understood among us, that the bail entered into by the husband ought to be reckoned as common loss, and that therein the wife or her heirs are bound also for the half; whereto is also applicable, that bail was introduced amongst mankind for the benefit of trade and support of the common cause; and that, as a husband becomes security for another, so another becomes again security for him, and thereby the credit of the common estate is strengthened; and so it was determined in the year 1651 by the lords and doctors of law Reynier Paauw, counsellor in the high court, and Gerard Kromon and Gualter de Raad, counsellors in the court of Holland, as arbitrators in the case between the heirs of Ary Joviz Beys of Schiedam, plaintiff, and the heirs of Katlina Jemans his wife; but by others it was understood otherwise; so that there are different opinions touching the above question.

In a Second Marriage with a Person having Children of the former Marriage, to contract for no more than for a Child's Portion.

§ 8. A husband or wife, entering into matrimony with a widow or widower having children of a former marriage, can only marry together, and thereby remain in community of property, as we have formerly shewn; but if they enter into ante-nuptial contract, they may not contract or enjoy more thereby

(1) Vide Sande, lib. 2. tit. 5. def. 8.
(2) Vide Barbos. de matrimonio, ad l. 1. Ff. solut. matrimonio, part 3. n. 61. et seq. Pet. Sams. lib. 2. de honor. divis. c. 13. n. 12. & seq.
(3) Sande, lib. 2. tit. 4. def. 2.
(4) Grotius, Inleyd. lib. 1. c. 5. ver. Uit Kragte.

than a child's portion (1): and not only that the second consort of a widow or widower having children of a former marriage may not enjoy by ante-nuptial contract, last will, donation, or otherwise, more than a child's portion, but also that nothing may be bequeathed to the children of the former marriage, parents, or others, besides the aforesaid child's portion (2). Whatever is given to the second consort beyond it, comes to the advantage of the children of the former marriage alone (3); and so it was decreed by the high court in the case of Adriana de Ruysser residing at Veer, impetrator in case of appeal, against Jacob Pietersz, defendant, on the 31st June 1620, and between Philippus de Bacchere, litigating as a prisoner and plaintiff against Anthonis Thysius, on the 3d June 1634 (4): but with regard to the questions whether a person may not bequeath something to the children procreated by the second marriage besides the aforesaid child's portion, and whether the said law prevails also with regard to them? it is understood that the said law, l. hac edictali 6. Cod. de secund. nupt. does not prohibit it; and that natural affection for the children, (as well for those of a former as those of a subsequent marriage, and among them for the one more than for the other), removes all fraud; and that therefore something may be bequeathed to them as pre-legacies (5), and that the children with respect thereto have nothing to complain of so far as they are not prejudiced in their legitimate portion (6); and so it is usually understood. (7)

§ 9. When a child's portion is bespoken for any one by ante-nuptial contract, if any or all of the children of the former marriage depart this life during the second marriage, it is subject to consideration whether and how that child's portion ought to be reckoned between the survivor and the heirs of the said father or mother on the death of its father or mother; and it is to be understood with respect thereto, that such child's portion ought

(1) l. hac edictali, 6. Cod. de Secund. nupt. Wessel ad Nov. Ultr. art. 10. Neerl. Adv. p. 1. cons. 45. Coren. observ. 30. n. 29. 54. in margine. Neostad. de pact. antenupt. obs. 4. in not. in verbis. portio in fin. Pecc. de testam. conjug. lib. 2. c. 18. n. 8.

(2) Juxta l. 3. Ff. de donat. inter vir. & uxor. l. servo legato. § si testator. Ff. de leg. 1. & l. Sejus. & Agerius. 27. Ff. ad leg. Falcidiam.

(3) Novell. 22. ch. 27.

(4) Vide Cons. & Adv. tom. 3. cons. 86.

(5) Per text. l. fin. Ff. de his quib. ut indign.

(6) Arg. Novell. 22. c. ult. junct. l. 5. Cod. de inoff. donat. Nov. 92. & Auth. unde et si parens subject. l. 6. Cod. de inoff. testam.

(7) Vide Gabriel. conclus. lib. 2. conclus. 13. n. 30. Jacob Cancer. lib. 3. var. resolut. c. 2. n. 197. vers. autem mater. Mantic. de tacit. & ambig. Convent. lib. 12. tit. 33. n. 9. Joan à Sande, lib. 2. tit. 3. def. 6. And. Gail. lib. 2. obs. 82. n. 9.

to be reckoned according to the number of children who are in existence at the time of the death, whether it be then less or more; as the ante-nuptial contract, so far as it treats of inheritance, has the effect of a last will, which is confirmed by death, and then only has its commencement (1), unless it was expressly contracted otherwise. In respect to which time the loss is also reckoned, which the children of the former marriage suffer by the second marriage (2), and also of the legitimate portion of children (3), whereupon is also grounded the said l. hac edictali 6. Cod. de secund. nupt. vers. ita tamen; and, moreover, the children of the second marriage are also enumerated together with the children of the former marriage in taxing and ascertaining the said child's portion, and in diminution of the same (4); whence it follows also, on the other side, that in case of the previous death of any of the children of the former or subsequent marriage, the said child's portion must increase (5); but if all the children to whom the consort looked at the time when the ante-nuptial contract was made, are dead, and if the last will has been grounded on the supposition of leaving a child or children without intending to exclude further or otherwise his or her heirs; in that case, by the death of all the children, the condition contained in the ante-nuptial contract ceases, as it were in consequence of a fresh occurrence, which was not in contemplation, or mentioned therein; which case then, as a *casus omissus*, must be settled and decided according to the common local laws; so that the community of property in that case would prevail as if no ante-nuptial contracts had been made (6); and therefore the said estate ought to be divided into two portions, or otherwise reckoned as if one child had remained in existence, which in such case will agree in the main point. (7)

The Benefit of ante-nuptial Contract is forfeited through Adultery.

§ 10. If either of the consorts commits adultery, he or she will forfeit thereby, for the benefit of the injured party, whatever either of them would otherwise have been entitled to by the local law or ante-nuptial contract (8); as is more fully shewn in the preceding and subsequent parts of this work. (9)

(1) L. 5. Cod. de pactis convent. super dotem.
(2) Vide Novell. 22. c. 28.
(3) L. 6. cod. de inoffic. testam.
(4) Vide Novell. 118. c. 1.
(5) Arg. l. 10. Ff. de reg. jur. l. unic. § 4. Cod. de caduc. tollend. l. 65. § ult. Ff. pro socio.
(6) Arg. l. 27. § pactus. et ibi DD.
(7) Vide Jacob Mærtert. tract. de secund nupt. quæst. 62, 63.
(8) Vide Political Ordonnance, art. 18. in verb. als ander sins naar regten. junct. Novell. 117. c. 8. § 2. c. 9. § 4.
(9) Vide supra, book i. ch. xv. § 1. p. 83, 84. and infra, ch. xxvii. § 8.

§ 11. Although it is appointed by the written laws that no person can obtain any inheritance by compromise (1), and although an agreement for a future inheritance canno t existin law (2); yet, according to the custom of these countries, a person may dispose of all property, and also of a future inheritance, by ante-nuptial contract as well as by last will (3); because in this way the inheritance cannot be properly said to devolve by compromise, as is observed by Neostad (4); provided that the stipulations of future inheritances, made by ante-nuptial contract, should not be irrevocable, but should have as much effect as an inheritance by last will (5), and should be as revocable as last wills are, and consequently that they should not impede the free testamentary dispositions.

How far an ante-nuptial Contract has the Effect of a Last Will, and exists as Last Will.

But it is to be observed, that ante-nuptial contracts have not the force of last wills in such sort that they should prevent the first or following successors and descendants from disposing, by last will or otherwise, of the said property; but if they were made so, they will exist and take full effect *then* only when it does not appear to have been directed otherwise by last will of those children, or of those who were in the meantime concerned therein. (6)

§ 12. It is further to be remarked, that ante-nuptial contracts cannot be annulled otherwise than by last will and revocation by *both the consorts jointly*, in which, however, there is this inconvenience, that the said will being again annulled by either of the consorts, and whatever is contained therein becoming null and void in consequence thereof, the ante-nuptial contract is understood thereby to be re-established in its former full vigour, as if it had never before been annulled; so that one can never be certain of such revocation and annulling; and as such re-establishment can be effected not only secretly by either of the consorts, but even after the death of either of them, it is still in the power of the survivor, although the ante-nuptial contract

How to be annulled.

(1) l. pactum quod. dotali. 15. Cod. de pact. l. 4. Cod. de inutilib. stipul. Vide supra, book iii. ch. ii. § 13. p. 215.

(2) l. 61. Ff. de verb. oblig. Vide Mastert. de Just. Rom. l. 1. dubit. 40. & seq.

(3) Vide Polit. Ordon. art. 29. in fin. in verb. Heudlykse Voinvaarden. And. Gail. lib. 2. obs. 126. n. 6. Berlich. part 2. Conclus. practicab. c. 51.

(4) Observ. rer. jud. 2. in not. in pr.

(5) l. 5. Cod. de pactis super dotem. Neerl. Adv. vol. i. c. 13.

(6) Vide Coren. obs. 20. n. 16. & seq. & consil. 9. n. 45. & seq. Neostad. de pact. ante-nupt. obs. 1, 2. & ibi notat. Pecc. de testam. conjug. lib. 1. c. 6. n. 2. Wesenbec. paratit. Ff. de pact. dotal. n. 4. Fab. ad Cod. lib. 5. tit. 9. def. 6. Boër, decis. 204. Tessaur. decis. 225. Everhard. consil. 128. & consil. 129. n. 1, 2. Fred. à Sande, ad consuetud. Feud. Gelriæ, tit. 2. c. 3. Carpzov. defin. forens. part. 2. constit. 43. def. 1. 2. 5. 6. Joan. à Sande, lib. 2. tit. 2. def. 7.

was formerly annulled jointly by will, to render that revocation again void, and so far as it relates to them, to adhere to the ante-nuptial contract. So it was judged by the court of Holland, in the case of Henrik Meyts, as husband and guardian of Mrs. Adriana van Naaldwyk, against Jonkheer Balthasar and Guido van Gistelen, on the 3d July 1609, and by the high court, on the 31st July 1610.

To prevent such uncertainty, some are of opinion that it is more adviseable that such revocation should not be made by last will, but by an indenture before a notary and two witnesses; which in itself seems to answer the purpose in some way, because all deeds are effectually annulled in the same way as they were made (1). But when the community of property, introduced by the general local law of the country, has been once departed from by ante-nuptial contract, it cannot be again introduced by any subsequent condition; and the consorts, independently of the ante-nuptial contract once entered into, cannot give or allow reciprocally any donations, privileges, or any thing whatsoever, excepting by way of last will (2), (as will be shown more at large in the following chapter), so the aforesaid consideration is entirely useless (3); and at all events, any one who has irrevocably annulled his ante-nuptial contract, by way of mutual contract, may have redress against the same by civil petition; and the ante-nuptial contract can be brought to the former state. And so it was determined by the high court, in the case of Geertjen Jansz, wife of Hendrik Jansz, against the said Hendrik Jansz, on the 30th June 1609.

In like manner with respect to the query, whether the community of property being excluded by ante-nuptial contract, such community of property would again find place by a mere revocation of the said contract, as if no ante-nuptial contract was made; it is understood that the local law, and by virtue thereof the existing community of property, having been once departed from, it cannot have place again; and that if the consorts will benefit each other reciprocally, they ought to do it expressly by a subsequent disposition; so that by annulling the ante-nuptial contract, all the benefit conditioned thereby ceases, and no benefit can in anywise be derived therefrom, unless it is expressly made by last will (4); and so it has often been de-

(1) l. 35. Ff. de reg. jur.
(2) Facit. l. 6. Cod. de donat. antenupt. & tot. tit. de donat. inter virum et uxorem.
(3) Vide Groenew. de legib. abrog. ad l. 11. Cod. ad Senat. Vellejan. & ibi DD.
(4) Arg. tot. tit. de donat. inter vir. & uxor.

cided (1): in which sense is to be understood what Groenewegen alleges on the senatus consultum Vellejanum. (2)

How far, and in what Manner, Donations and Dowries, have Effect among us.

§ 13. The statements contained in the written laws respecting dowries, morning gifts, &c. have very little or no effect among us: but the ante-nuptial contract and stipulation must be made before the marriage is consummated, and must be followed in every point; or if no condition or ante-nuptial contract were made before the consummation of such marriage, the aforesaid general local law prevails, by which all property between the husband and wife is held in community (3); excepting only that the jewels given by the bridegroom to the bride at the wedding, or as a morning-gift between persons of honour, are understood to have been given and allowed to remain as the wife's own property through a tacit condition, especially if the community of property be excluded (4); and the wife gets her dowry which she contracted to have free, with or without fruits, so as they were found in existence; and no charges incurred by the survivor during the marriage, are allowed to be discounted, even if it was for the melioration of the property, or for the recovery of the fruits. (5)

Whether, and how far Donations and Presents, given during the Marriage, between Husband and Wife, are effectual.

§ 14. For this reason also, gifts and presents between husband and wife are, among us, null and void (6); if, however, a husband had given any thing to his wife, or a wife to her husband, and had persisted therein until his death, such gifts having the nature of donation in contemplation of death, may take effect as a *donatio mortis causâ*. (7)

And likewise, whatever the wife lays out for any office or rank or dignity for her husband, remains of value, so far as it was necessary for the support of the marriage. (8)

And further, the clothes and jewels which the husband gives for the attire and ornament of his wife, are understood to be proper gifts, and may be received, so far as they do not exceed the convenience and ability of the husband. (9)

(1) Vide Annæum Robert. Rer. Jud. lib. 4. c. 1. Christin. ad Leg. Mechlin. tit. 9. art. 11. n. 12. in notis. Frederic à Sande de Feud. Geld. tract. 1. tit. 2. c. 3. n. 15. Gois, advers. tract. 1. c. 8. n. 4. & seq.

(2) Ad l. 11. Cod. ad Senatus consult. Vellejan. See also Coren. consil. 26.

(3) Vide Gudelin. de Jure Novis. lib. 1. c. 8. vers. ult. & Zypæ Not. Jur. Belg. tit. de Jure dot. Grotius, Inleyd. lib. 2. c. 11, 12. Vinn. ad § 3. Instit. de donat. n. 7.

(4) Vide Cons. & Adv. vol. ii. cons. 208.

(5) Vide Neostad. de pact. antenupt. obs. 20. in fin.

(6) Tot. tit. Ff. & Cod. de donat. inter virum & uxorem.

(7) l. 32. § 2, 3. de donat. inter vir. & ux. l. 25. Cod. eod. Mantic. de Ambig. Conv. lib. 21. tit. 7. Grotius, Inleyd. lib. 3. c. 2. n. 13.

(8) l. 4. cum seq. Ff. de donat. inter vir. et uxor.

(9) Arg. l. 18. l. 40. & seq. Cod. Mantic. de ambig. conven. lib. 22. tit. 4. & tit. 6. Cost. Antwerp. ch. 41. art. 53.

CHAP. XXV.

Of Promise of Marriage.

[Grot. l. 5. 23. Van Leuwen, Censura Forens. l. 11.]

§ 1. *A Promise of Marriage, what, how made, and of what Effect at present.*
2. *Legal Causes for Departure from such Promise.*
3. I. *Secret Promises, without the Knowledge and Consent of Parents, whether, and how far effectual.*
4. *Narrative of the Law Suit between Gerard Bikker, Sheriff of Muyden, and Miss Alida Koninks.*
5. II. *Through Deception, upon a fraudulent Statement of Property made by the Bridegroom.*
6. III. *In case of Elopement of either, and unbecoming Manners with another.*
7. IV. *Through natural Defect, Mutilation newly caused, or Deformity.*
8. V. *Through Prescription.*

A Promise of Marriage, what, how made, and of what Effect at present.

§ 1. A PROMISE of marriage consists in a mutual transaction, and promise of a future marriage (1). It is made and confirmed like all other transactions which are fulfilled by mutual consent (2), and is generally confirmed by mutual exchange of a token, commonly with some coin, or a coin of uncommon value, denominated a *pledge of marriage* (3). But it is not necessary, as the promise may be effectual without it; and, upon the production of it, without any further testimony or proof, the promise is not deemed admissible. The following are the actual effects of a promise of marriage among us, viz. One cannot recede from it without the consent of the other party; but such engagement and treaty must be fulfilled, the promised marriage consummated, and the unwilling party may be compelled thereto by detention and imprisonment (4); especially if a daughter has been lain with or has become pregnant in consequence of a preceding promise of marriage. So it was determined by the aldermen of Leyden, in April 1655, in a suit between Daniel Bateman and Lysbeth van der Weyde, in which sentence the following clause was especially inserted: "*The aldermen having previously heard the declaration of the plaintiff, that she had connexion with the defendant, and in consequence*

(1) l. 1. Ff. de Sponsalib.
(2) l. 2. Ff. eod.
(3) Arg. l. 5. de Sponsalib.
(4) Vide Everhard. Cons. 178. n. 7. cum seq. Christ. vol. 3. decis. 124. n. 44. Zanch. de Matrimonio, lib. 1. disput. 29. n. 4. Gutier. de Jurament. Confirm. part 1. c. 51. n. 4. Perez, ad tit. Cod. de Sponsal. n. 9, 10.

thereof doubted whether she was not pregnant, do condemn the defendant to marry *the plaintiff in facie ecclesiæ, &c.*" So that if any one be condemned to marry a woman with whom he had connexion or who was pregnant by him, he shall not be admitted to appeal against such sentence after the lapse of the *fatalia appellationis* (1); unless a legal cause for departing from such promise intervenes, or unless a minor for some reasons obtains relief against it *beneficio restitutionis in integrum.* What such reasonable and legal causes are, see the doctors referred to below. (2)

§ 2. Legal causes for departure from such promise.

§ 3. Amongst us, the following are the principal reasons for departing from a promise of marriage: First, if a son, who is actually of age, had made a clandestine promise of marriage without the knowledge of his parents, he cannot at present (if made against their will) be compelled to fulfil his promise in case he wishes rather to obey them (3); as has often been determined and now lately was decreed by the High Court, in the case of Gerard Bikker, sheriff of Muyden, assisted by his father Andries Bikker, antient burgomaster of the city of Amsterdam, impetrators in case of appeal against Alida Koninks, on the 27th May 1651. But if such mere dislike of parents would be sufficient, without their being obliged to allege any reasons for it, a question arises, whether it can be extended so far, that a person in such situation will be freed and released therefrom *in foro conscientiæ,* (as we term it), or will thereby be at liberty in the mean time to engage himself to a third person? It would be against reason, and contrary to the ecclesiastical laws, to which we at present listen with great deference in matrimonial causes; and the inference to be drawn from the words of the quoted sentence is, that the said Mrs. Koninks was not entirely, but for the present time, prohibited from availing herself of the marriage promise made to her. In this case, likewise, there were several occurrences proceeding from interest, which were the subject of conversation almost throughout the whole country; and amongst the doctors it was very sharply argued whether, as in the case of minors, in which clandestine promises made without the knowledge of parents, *beneficio restitutionis in integrum,* even if confirmed by oath, are entirely annulled, rendered ineffectual, and considered void, so

I. Secret Promises, without the Knowledge, and Consent of Parents, whether and how far effectual.

(1) Vide Neostad. Suprem. Cur. Holland. decis. 52.

(2) Vide DD. ad l. 5. Cod. de Sponsalib. Zanchez. de Matrimonio, lib. 1. disput. 48. Gutier. Tract. eod. c. 24. et seq. Mantic. de Ambig. Convent. l. 3. tit. 17. Menoch. de Arbitr. Jud. Cas. 455. Christin. vol. 3. decis. 124. n. 3. cum seq.

(3) Vide Zanchez. de Matrimonio, lib. 1. disputat. 13. n. 1.

that in consequence thereof no right whatever can be claimed thereupon, of which several instances have constantly occurred, the same result is understood to be applicable to cases in which persons of full age are concerned; and whether they would be null and void *ipso jure?* As it would require too long a discussion were we to detail the reasons of their opinions in this place, we shall confine ourselves to a relation of the particular circumstances of the said suit, so far as we have been able to inquire into them.

Narrative of the Lawsuit between Mr. Gerard Bikker, Sheriff of Muyden, and Miss Alida Koninks.

§ 4. The circumstances of the said case were as follows: The said Gerard Bikker had paid his addresses for a long time to Miss Alida Koninks, and had bound himself to her, as well verbally as by many letters in writing, and lastly, on the 16th of June 1648, (when he attained the age of twenty-five) had again bound himself to her by oath and marriage promises in writing, which promises were again repeated by him and confirmed on the first of May 1649, by an act written and subscribed by himself, when he was not only past twenty-six years of age, but had also obtained the office of sheriff of Muyden. In which last act, he acknowledged and declared, "that although his father, in "the year 1649, had made him subscribe a certain act, purport- "ing that he had acknowledged that he promised to marry no "one, and that he was making love to no one, and that he "would not do it without the consent of his parents, &c.; that "the said act however was granted out of respect to his father, "but not from his own free will, and consequently that he, "before God and his conscience, is bound to fulfil his said mar- "riage promise, and understands that his parents could not nor "ought to prohibit the marriage with her, as he (at the time "he made his said promise) was of age, and therefore considers "the said act which he wrote and subscribed out of respect to "his father, as null and void, and revokes and annuls the same "so far as it may be still necessary; and that he again and anew, "upon the honour and probity of his office of sheriff, and instead "of a solemn oath, does make his promise of marriage to her "the said Alida Koninks, with this addition, namely, that "within a few days, and when she pleases, he will commence "the fulfilment of the aforesaid marriage promise, and with her "enter into the said intended state of matrimony, according to "the solemnities of the proclamations and customs in use in these "countries, whereto binding himself, &c." And he subsequently persevered therein in several letters, always calling her his *deer*, his dearest, his well-beloved, his wife, and his future lady (*dros-*

trirne): and in token of irrevocable confirmation thereof, they both received the lord's supper at Amsterdam, at one and the same table, and in the said persuasion.

Nevertheless, in consequence of the advice of his father as it seems, in his name, and with the assistance of his parents, in August 1649, he addressed himself to the provincial court of Holland, and obtained from the same a certain mandate, whereby the said Alida Koninks was summoned before the commissioners of the said court, and on the day appointed, a suit was commenced against her, to have the said promise of marriage existing between him and her declared null and void, and she was prohibited from availing herself of it against him, for the purpose of compelling him by virtue thereof to marry her, or to prevent his entry into matrimony with another lady; as the said promise of marriage was made without the knowledge and against the will of his parents, and therefore ought to be considered as clandestinely and unlawfully made; and since the consent of parents is not only required to a legal marriage out of respect, but necessarily *per DD. Comm.*; that it would be in his power to deviate and recede therefrom, without her being entitled to any action on that account, to compel him to fulfil his promise.

In reply it was alleged, on the other side, by Miss Alida Koninks, that similar promises of marriage having been made by a person of age after so many years intercourse, out of his free will and conscience, and having been confirmed in such an uncommon way, could not be reckoned as a clandestine marriage promise, and much less as an improper one, and that neither for him nor for his parents any reason could be available to recede therefrom, nor could she be deprived of or hindered in her right in consequence of their refusal to have the same fulfilled, either in law, or according to the practice of those countries. And, on her side, not only was a contrary conclusion taken, but it was also concluded upon a claim in reconvention, "that the said "Gerard Bikker should be condemned upon honourable and "reasonable terms, at the discretion of the court, to proceed to "the fulfilment of his said promises, and to marry her *in facie* "*ecclesiæ*, according to the proclamations and customs of these "countries; and that his parents, so far as it would be necessary, "should be condemned to allow and suffer it." In consequence of this decision, the provincial court on the 3d June 1650, by a definitive sentence, rejected his demand *in convention*, and condemned him in *re-convention* to marry her *in facie ecclesiæ* upon

honourable and reasonable terms, at the discretion of the court; and decreed that his parents, so far as it would be necessary, should allow and suffer the same. But the said case having been brought in appeal into the High Court, it was taken into further consideration upon the declaration of the said Gerard Bikker, purporting "that as his parents, having obtained know-"ledge of the above case, had plainly informed him that they (for "several important reasons with which he Gerard Bikker was not "acquainted) formerly found themselves greatly injured, and would "never allow the said marriage, he had resolved to please his "parents therein, and therefore to deviate from the cause which "injured them; declaring, that he does not intend nor would do "any thing in similar cases which would displease his parents, "&c." Whereupon the sentence of the said Provincial Court was reversed by the High Court on the 27th May 1651; and on taking into consideration the paternal power and the respect due to the same in a very narrow sense, and doing justice anew, the said Miss Alida Koninks was prohibited from availing herself of the marriage promises (both written and verbal, mentioned in the suit more extensively) in such manner as to compel him by virtue thereof to marry her against his will and against the consent of his parents, rejecting for the present the further demand and conclusion of both parties, as well in convention as in re-convention, made before the said Provincial Court. But as the said Gerard Bikker and his parents were not satisfied with this decision, and were specially endeavouring to have the said promise of marriage entirely annulled and declared void, in order that he might notwithstanding enter into matrimony with another without impediment; he prayed for an interpretation of the said sentence; viz. that the court should declare him to be at liberty (with the consent of his parents) to marry another; and that she the said Alida Koninks should not be at liberty to prevent it, nor, after the death of his parents, to compel him to marry her by virtue of the said promises; and it was interpreted and declared on the 13th March 1652, that, if his parents persist until their death in their dislike and opposition to his marriage, and if he himself persists until and even after the said death of his parents in his respect and obedience to them, that he should not be liable to be constrained by virtue of the said promise of marriage, either during the life-time nor after the death of his parents, to marry her *in facie ecclesiæ*; but that if, either during the life-time or after the death of his parents, he should wish to enter into matrimony with any other woman, the said

Alida Koninks would be at liberty (as well upon this as upon the former decree) without hinderance to oppose such marriage; he and his parents reserving the defence and maintenance of their right against her. In this interpretation the obedience and respect due to parents, and their refusal and dislike, were maintained in a very strict sense, so that on that account he was not to be compelled, but not on account of his personal concern itself; nor could he be released entirely from the promises made by him, and under that cover be allowed, notwithstanding the same, to enter into matrimony with another.

But as, in the said interpretation, the further right of the said Alida Koninks was not fully pointed out to her, but only that she (with respect thereto) was left unprohibited and at full liberty to state her objections; the said Gerard Bikker and his parents reserving their right to defend themselves; so the said Gerard Bikker in May 1652, addressed himself for the third time to the High Court, and prayed by petition that it should be declared by a marginal decree (1), that if he happens to resolve to marry another, he should be at liberty to do it; and that she would not be at liberty to prohibit the same, &c.; ascribing a wrong effect in his allegation to the said clause "*for the present*," namely, that it was only to be understood until by the court it should be decided otherwise or subsequently, and without any other intention; and if she means to have any reason to the contrary, that she would be obliged to allege the same within a certain time after notice was given. Whereupon the contrary having been alleged by her, and among other things, that the aforesaid clause "*for the present*," as she hoped, had only its view until the death of his parents, and at all events could not be further interpreted to his benefit, excepting that he should not be at liberty to marry another against her will and consent, so long as she remained unmarried, and should behave herself honestly and blameless; and, she further, taking a contrary conclusion, demanded in reconvention, that by decree of the High Court it should be declared, that he, by virtue of his frequent promises of marriage, was obliged to enter into the state of matrimony with her, and that he therefore should be condemned (in case he wishes to marry), that he would not be at liberty to do it with any one else but with her, by virtue or in consequence of the said promises. And thereupon the case was reciprocally contested in writing, and the proceedings being completed, the aforesaid

(1) *Appointement Marginal* in the original.

plaintiff's prayer was rejected on the 23d February 1655, with compensation of costs; and in the meanwhile the mother first, and afterwards the said Andries Bikker, the father of the said Gerard Bikker, departed this life, who it was said disinherited the said Gerard Bikker by last will in case he should break the promises of his obedience made to him, or should at any time happen to marry the aforesaid Miss Alida Koninks.

Thereupon, the case having been again recommenced by the said Gerard Bikker, after his father's death, in revision, as he did not like to remain unmarried, and until then could not resolve to enter into matrimony, against his father's declared will and his promised obedience, with the said Alida Koninks, and (as one wished then to explain it) being desirous to satisfy his conscience and his father's will, prosecuted the case to the utmost; and thereupon also, under the clause of relief, on the side of the said Alida Koninks, a prayer being made for revision (inasmuch as the decree of the provincial court was not fully confirmed), it was at last, on account of the great consequences, taken into consideration, that by similar means, under cover and secret understanding with one's parents, through such mere dissent, without the required legal reasons, the children of many honest people would be liable to be deceived and misled, contrary to the meaning of the third article of the political ordinance ("But if the parents appear, and so forth"), it was understood and declared in revision, on the 23d February 1656, by the high court, and the gentlemen, the doctors of law, William Goes, Jacob van der Graaff, and Adrian van Almonde, counsellors in the provincial court; Arend van der Dussen, counsellor and pensionary of the city of Leyden; Cornelius van der Dussen, counsellor and pensionary of the city of Schiedam; and Nicolas Raad, burgomaster of the city of Hoorn; that the said sentence of the high court of the 27th May 1651, and the interpretation of the said sentence which followed thereupon on the 23d March 1652, were erroneous; and that the court annulled the said sentence with the subsequent interpretation; and, correcting the errors found therein, the court declared that the defendant was not aggrieved by the sentence of the provincial court, pronounced as well in convention as in reconvention, on the 3d July 1650, with compensation of costs: the condemnation contained also, that he should marry the said Miss Alida Koninks upon honourable and reasonable terms, at the discretion of the court, *in facie ecclesiæ*, and so forth; and the said Gerard Bikker, in compliance therewith, on the

14th May 1656, married the said Miss Alida Koninks, in the church at Muyden.

II. Through Deception upon a fraudulent Statement of his Property, made by the Bridegroom.

§ 5. *Secondly,* A daughter has legal cause to retract her promises, if the bridegroom had promised a large sum of money as a dowry; and afterwards, on the contrary, is found to be incumbered with many debts; in which case the bridegroom will, without any effect, demand the fulfilment of the promises from the person to whom he himself does not fulfil his own promises (1); or if the father of the bridegroom, in the mean time, before the promises are fulfilled, becomes bankrupt, as was determined by the court of Holland. (2)

III. In case of Elopement of either, and unbecoming Manners with another.

§ 6. *Thirdly,* If one of the parties, before the fulfilment of the engagement, elopes with another person, the other party is allowed freely to retract the promises made, and to marry another. (3)

IV. Through natural Defect, Mutilation, or Deformity.

§ 7. *Fourthly,* The promise is also void, if, after the engagement, one of the contracting parties through natural defect is found to be incapable of procreation (4); or through sickness or defect has become maimed or deformed. (5)

V. Through Prescription.

§ 8. *Fifthly,* The right of marriage promises ceases through prescription; when either of the parties, being duly admonished to fulfil his or her promises, neglects to fulfil the same for upwards of two years: in which case it is understood, that if the other party subsequently makes a promise of marriage to another, that then the first promises are considered as annulled and void (6); unless he was abroad, or was prevented by sickness or any other necessity, in which case the time is prolonged to three, four, and more years, according to circumstances. (7)

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(1) Cap. de illis. 2. extr. de Condit. Apposit. Desponsat. cap. Frustra. 75. de Reg. Jur. in 6.

(2) See Papegay, p. (mihi) 39. et seq.

(3) c. Quemadmodum 25. extr. de Jurejurand. Zanch. de Matrimonio, lib. 1. disput. 57. et 65. n. 9.

(4) l. 10. cum. Auth. seq. Cod. de Repud. l. 39. § 1. Ff. de Jure dotis.

(5) Vide Zanch. de Matrimonio. lib. 1. disput. 57. n. 4.

(6) l. 2. Cod. de Sponsalib.

(7) l. pen. Ff. de Sponsalib. junct. l. 2. Cod. de Repudiis. Various and very numerous other causes for changing or breaking Marriage Promises may be seen in Zanch. de Matrimonio, lib. 1. disputat. 48. et seq. usque ad fin. Gutier, eod. c. 24. cum seq. Mantica. de Ambig. Convent. lib. 3. tit. 17. Menoch. de Arbitr. Jud. cas. 455. Christin. vol. 3. decis. 124. n. 3. et seq.

CHAP. XXVI.

Of Authorization, or giving full Powers to a Person.

[Grot. 3. 12.]

§ 1. *Authorization, or giving full Power, defined.*
2. *General or special.*
3. *How to be executed, for swearing, and transferring immoveable Goods.*
4. *Of an Authorization, with full Power to do every thing which the Constituent can do.*
5. *Of an express or tacit Authorization.*
6. *Who may give and accept Authority or full Power.*
7. *For what Things.*
8, 9. *The Person who accepts the Charge, whether and how far bound; and for what he is responsible.*
10. *To what the Constituent is bound.*
11. *When the Charge and full Power ceases.*

Authorization, or giving full Power defined.

§ 1. THE giving of full authority or full power is a transaction by which any one accepts a commission to do something for another without contracting for any gain (1); such as giving power to any one to purchase or sell something for another, or to transact some business for another, which is returned with a grateful acknowledgment at discretion, but not as a debt. (2)

General or Special.

§ 2. The giving of authority is either *general*, for all sorts of things, and for whatever may occur; or *special*, for some particular thing (3), especially in things which, on account of their peculiar execution, are not understood to appertain to a general charge, such as in accepting or renouncing inheritances (4), or the taking into possession to sell and deliver any property (5), granting discharges (6), making agreements (7), taking oaths (8), and the like, which cannot be executed without a special charge; unless the attorney before the confirmation thereof had taken the power upon himself, and the confirmation had followed there-

(1) l. 1. & tot. tit. Ff. & Cod. mandati.
(2) l. 6. in pr. Ff. mandati.
(3) l. 1. § 1. l. 60. Ff. de procurator. l. 11. § ult. Ff. de pignorat. act.
(4) l. 25. § 5. Ff. de acq. heredit. tit. Ff. de acquir. vel amitt. possess.
(5) l. 63. Ff. de procuratorib.
(6) l. 28. Ff. de pact.
(7) l. 13. Ff. eod. l. 7. Cod. de transactionib.
(8) l. 17. § ult. Ff. de jurejurando.

upon, in which case the transaction will exist as if the constituent had directed it to be done from the beginning. (1)

§ 3. With regard to cases, in which the execution requires any solemnity or necessary observances, another cannot be authorized; unless, together with the authorization, the said solemnities and observances be effected; such as taking an oath, in the name and soul of another, which sort of charge is not perfect unless the constituent himself had properly taken that very oath, evidence of which ought to appear in the power of attorney, upon which the attorney may take another oath (2). And many jurists are likewise of opinion, that powers of attorney for transferring immoveable property must be executed before a court of justice, and that the execution thereof before a notary and witnesses is not sufficient; because the transferring itself requires such exceution. So it was enacted by the 119th statute of the city of Leyden, viz. "That no deeds of transfer, or hypothecation of any immoveable goods, should be sealed by aldermen upon any other procuration but such as should be executed before the courts of justice of cities, villages or towns, having the power to witness the sealing of transfers, alienations, or hypothecation of immoveable property." How to be executed for swearing, and transferring immoveable Goods.

§ 4. A general authorization is also *single*, by which the attorney is merely directed to transact all the affairs of the constituent; or it is also with the additional clause, "to transact freely in all his affairs, and to do every thing what the constituent being present can or may do." (3) Of an Authorisation, with full Power to do every thing which the Constituent can do.

§ 5. Others again, are such as take place *expressly*, either verbally or in writing (4); and there are also such as are effected *tacitly* and actually, viz. as if I, being present, allow another with my knowledge and consent to transact my affairs (5). Further, the giving of authority, whether special or general, is such as belongs to judicial cases (6), of which we shall treat hereafter at its proper place; others again are such, as belong to things out of law and to common transactions (7), which are the topics now under discussion. Of an express or tacit Authorisation.

§ 6. Authority may be given and received by all persons who act freely, and can bind themselves effectually (8), viz. concerning Who may give and accept Authority or full Power.

(1) l. ult. Cod. si major. fact. rat. hab. & ibi DD. l. ult. Cod. ad senatus consult. Macedon. l. 60. Ff. de reg. jur.

(2) Vide Carpzov. def. forens. part 1. Constit. 12. def. 12. Berlich. part. 1. conclus. 29. n. 24.

(3) l. 58. l. 60. & l. 63. Ff. de procuratorib.

(4) l. 1. § 1. Ff. mandati. l. 25. Ff. de acq. hered.

(5) l. 6. § 2. l. 18. l. 53. Ff. mandati.

(6) Tit. Ff. de procurat.

(7) l. 33. in pr. & § 2. Ff. de procurat.

(8) l. 12. § 6. l. 39. Ff. de obligat. & act.

Of what Things.

all matters and acts which are honest and not prohibited by the law. (1)

The Person who accepts the Charge, whether and how far bound, and for what he is responsible.

§ 8. No one need accept the charge given to him if he does not chuse it (2); but having once accepted it, he is bound to execute the same: hence a mutual obligation arises, viz. on the part of him who accepts the charge, that he should not go beyond the same, but well and faithfully execute it (3); and if he exceeds his charge, he will be bound to indemnify the loss without being allowed to deduct or to have any indemnification of the charges incurred contrary to order (4); and he is understood not to have gone beyond his commission who does something which belongs of *course* to the execution of his commission (5), or something else, by which, in reference to the matter, the constituent is as much interested in the act, as if it was expressed in the power given. (6)

§ 9. The attorney thus constituted may also assign over his commission to another person (7), although the power given to him does not contain any substitution, as is commonly and especially expressed in powers of attorney for judicial matters, unless the execution by the person to whom the matter was intrusted is of material importance, or if it be a matter which requires a special charge, which may not be intrusted to another without a power of substitution. (8)

To what the Constituent is bound.

§ 10. On the other hand, the constituent is bound to confirm whatever is done by virtue of his power, and to indemnify the attorney for all the expences incurred by him in executing such commission, and to make good to him all loss and interest, and independently thereof, to make him a reasonable compensation for the loss of his time and labour. (9)

When the Charge and full Power cease.

§ 11. The power ceases in the following manner, viz.

I. As soon as the charge is executed; so that the constituent need not confirm whatever is done afterwards. (10)

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(1) l. 6. § 3. Ff. mandati. § 7. Instit. mandati.

(2) l. 22. § ult. l. 27. § 2. Ff. mandati. § pen. Instit. eod. l. 5. Cod. de obligat. & act.

(3) § 8. Inst. de mandato. l. 46. § 4. Ff. de procurat. l. 10. in pr. Ff. mandati. l. 22. l. 35. l. 60. l. ult. Ff. mandati.

(4) l. 13. l. 19. Ff. rem ratam haberi. l. 36. § 2. Ff. mandati. l. 12. Cod. eod.

(5) Arg. l. 62. l. 65. Ff. de procuratoribus.

(6) l. ult. § ult. Ff. mandati.

(7) l. 8. § 3. Ff. mandat.

(8) Arg. l. 5. Ff. de jurisdict. l. 10. Cod. de pact. See Wurmser, Pract. tit. 5. obs. 1. n. 1. Christin. ad Leg. Mechlin, tit. 1. art. 25.

(9) l. 11. l. 18. l. 20. Ff. mandati. l. 19. § pen. Ff. de negot. gest. l. 12. § 9. l. 22. § 2. l. 26. § 6. Ff. mandati. l. 23. in fin. de reg. jur. l. 1. & tot. tit. Ff. de extraord. cognitionib.

(10) l. 13. Ff. de pact. l. 86. Ff. de solut.

II. By the death of either of the parties. (1)

III. By a timely notice of discontinuance on the pat of the attorney (2), or by a revocation of the constituent while the matter is still entire (3), or by a mutual discharge. (4)

CHAP. XXVII.

Of Bills of Exchange and Assignation.

[Grot. 3. 13.]

§ 1. *Transaction by Bills, what it is, and what Action arises therefrom.*
2. *When a Bill is accepted, whether and how far it binds.*
3. *In Case of Non-acceptance, what is to be done, and what Right the Holder has against the Drawer.*
4. *Whether, and how it may be accepted in Honour of the Subscriber, and what Right it has.*
5. *Assignation of a Bill, what; and what Effect it has.*

§ 1. TO the granting of power appertains also the transaction by bills, and assignment thereof. A transaction by bills is an agreement in use amongst merchants, by which any one receives a certain sum of money for a certain gain, and engages to cause the same to be paid at a certain time and place to another. Hence a double action arises (5), viz. one against the drawee, for all merchants are bound to accept bills of exchange drawn and sent by those having the management of their affairs (6); and the *other* against the drawer himself, for what he draws upon any one who accepts, and causes the same to be satisfied, or otherwise indemnifies the deficiency suffered in consequence thereof (7). For this purpose, any one to whom a bill drawn upon him is offered, ought either to accept the same for payment, or to refuse it (8); but, having accepted it, he is bound to pay it on the day fixed; or if he is prosecuted at law for nonpayment, he is condemned, in consequence of the accept-

Transaction by Bills, what it is, and what Action arises therefrom.

§ 2. When a Bill is accepted, whether and how far it binds.

(1) § 10. Instit. de mandato. l. 26. § 3. Ff. mandati.
(2) l. 22. § ult. l. 23. § 2. Ff. mandati.
(3) l. 12. § penult. l. 15. Ff. mandati.
(4) Arg. l. 35. l. Ff. de reg. Jur. § ult. Instit. quib. mod. tollitur obligatio.
(5) Arg. l. 1. Ff. de pact. l. 5. Cod. de obligat. et act.
(6) l. 5. § 11, 12, 13. Ff. de inst. act. Vide Cost. Antwerp. c. 55. art. 1.
(7) l. 1, 2. Ff. de eo quod certo loco.
(8) Arg. § 11. Instit. mandati.

ance, to deposit the amount claimed, upon giving security for restitution, if by a final judgment it should be otherwise understood (1).

In case of Non-acceptance, what is to be done, and what Right the Holder has against the Drawer.

§ 3. But if the bill be refused, the holder of it is obliged to enter a protest against it instantly, or within three days after, and to demand legal indemnification of the loss sustained thereby; which being transmitted to the drawer in time, he is bound to make good the bill of exchange, with all the loss incurred thereupon (2).

If such bill be accepted, but not paid in due time, the said protest and indemnification of loss ought likewise to be made in time, that is within eight or ten days, or a certain short time after; otherwise the holder will lose his right against the drawer of the bill (3).

This mode of drawing bills is so strictly observed amongst merchants, that the refusal of them puts the drawer or the drawee out of credit; and thence we infer, either that he is unable to pay, or that his affairs are falling to decay.

Whether and how it may be accepted in honour of the Subscriber, and what Right it gives.

§ 4. Therefore, if a bill of exchange be not accepted by the drawee, a third person may accept the same in honour of the drawer; who, from such acceptance, is also bound in the same manner as if it was drawn upon him; provided that the right against the drawee, and the persons against whom the protest was made, and also against the drawer, be ceded to him, in order that he may have his action against them (4).

An Assignation of a Bill, what; and what Effect it has.

§ 5. An assignation is a mere pointing out, which does not bind in itself (5), unless it be also accepted by the debtor pointed out (6); of which we shall treat more at large in its proper place.

(1) § 11. Inst. Mandat. Cost. Antwerp. c. 56. art. 1. Cost. Amsteldaam, c. 50. art. 2.

(2) Cost. Antwerp. c. 55. art. 8. Cost. Amsteld. c. 50. art. 3, 4.

(3) Cost. Antwerp. c. 55. art. 9. Cost. Amsteld. c. 50. art. 5.

(4) Arg. l. 39. Ff. de negot. gest. § 11. Inst. de mandato. See Cost. Antwerp. c. 53. art. 5. Cost. Amsteld. c. 50. art. 10, 11.

(5) l. 21. Ff. de novation.

(6) § 3. Instit. quib. mod. l. 11. Ff. de novation.

CHAP. XXVIII.

Of Obligations which are equivalent to those which arise from Agreement.

[Grotius 3. 26.]

§ 1, 2. *Nature of such an Obligation.*
3. *How Guardians are bound.*
4. *Of Appropriation in Rhineland.*

§ 1. AN obligation, amounting to that which arises from agreement, may be made of all sorts of acts, by which one person binds another without any agreement, as if an agreement had been made (1). Nature of such an Obligation.

§ 2. Such an obligation is produced by undertaking and executing the affairs of another person, whether one transacts the affairs of an absent friend out of friendship, and without any order, or whether the execution of another's affairs proceeds in consequence of a certain order or service; such are guardians, procurators, attornies, agents, and the like (2). And so, all those who undertake the affairs of another, whether by order, or out of friendship, are tacitly bound to do therein whatever reason and propriety require for the benefit of the affairs so undertaken, and to produce a good account thereof; which, on the other hand, binds the other, whose affairs are transacted, to make good whatever was laid out for that purpose, or otherwise in equity to make an indemnification for the loss and hinderance thereby suffered. (3)

§ 3. In like manner, guardians of pupils are obliged to produce an account, vouchers, and residue (4); and, independently thereof, to be answerable, and make indemnification for whatever, through their neglect or unfaithfulness, either remains un-executed, or is lost or damaged (5): and, on the other hand, those who are to maintain themselves by their labour, independently of the expences incurred by them, are also reasonably remunerated for their loss of time, if they desire it. (6) How Guardians are bound.

(1) Inst. de oblig. quæ quasi ex contr. nasc.

(2) § 1. Inst. de oblig. quæ ex quasi contr. nasc. et tot. tit. Ff. et Cod. de negot. gest.

(3) l. 2. l. 19. § 4. Ff. de negot. gest. l. 45. Ff. eod.

(4) l. 1. Ff. de eut. et rat. distrah.

(5) Ibid. et l. 18. Ff. de tut. et rat. distr. l. 4. l. 7. Cod. arbitr. tut.

(6) Aug. l. 7. Ff. testam. quemadmod. aper. junct. l. 33. in pr. Ff. de adminis. tutor.

Of Appropriation, in Rhineland.

§ 4. Also those who purchase any immoveable property in Rhineland or other places, where such custom prevails, are made subject to the right of appropriation; by which he is tacitly bound to cede the purchase to any of the nearest relations of the seller, within a certain time, if it be applied for; of which we have already treated. (1)

CHAP. XXIX.

Of Division of Community, Inheritance, and Lands.

[Grot. 3. 28.]

§ 1. *Division of Community, and Separation as well of the Use as of the Property.*
2. *Division of Ground in the Use of Lands.*
§ 3. *Division of Ground, and Separation of Lands belonging in Property.*
4. *Division of Lands bordering upon each other.*

Division of Community, and Separation as well of the Use as of the Property.

§ 1. UNDER this obligation is also reckoned whatever arises from community similar to partnership, such as is the division of community and the division of inheritance, which consists in this, viz. that those, who possess something with another in community and undivided, whether in consequence of community, joint inheritance, or the lands bordering upon each other, or otherwise, howsoever it may be, is obliged to separate and divide it whenever his joint partner wishes it. (2)

A division of community, as well of possession as of property, must be effected in equal shares, in every thing that is divisible into shares (3); and in such things as do not admit of division, a distinction is to be made between those of which a person has only the use, and those that belong to a person in property. With respect to the use or possession, it is mostly divided according to the time, during which one had the use of it, if every one is entitled thereto equally; or else by raising the price, and to the highest bidder of the joint possessors, and it is also left at their choice either to give or to take it (4), as the statutes of the country dictate it, whether specially or other-

(1) Supra, ch. xix. p. 389.
(2) l. 14. § 2. Ff. commun. divid. l. 14. Ff. pro socio.
(3) § 4. Inst. de offic. Jud.
(4) l. 19. § fin. Ff. commun. divid. Vide Menoch. de arbitrar. Jud. l. 2. cent. 5. cas. 442. Christin. vol. 3. decis. 116. n. 13.

wise (1); but if any one may have a larger property therein, he is to have his choice to have the possession or the use of it for a certain time, or to allow it to another for the price offered to him, giving security for the same, or to cede to the other the smaller property which he has therein. (2)

§ 2. In Rhineland, when any lands are situated so that the hire thereof is blended together, and the lease thereof expires without any new lease being granted, the use thereof is divided out by the bailiff and the court of justice, at a convenient time, according to the utility thereof, to each his share, until the same is leased out again; viz. pasture ground, commonly in May, to pasture cattle— Division of Ground in the Use of Lands.

A mare with a foal and a calf, for	2 pasture grounds (schaar).
A mare alone, for -	1 ditto.
A horse of two years, for -	2 ditto.
Three winter horses, for -	2 ditto.
A winter horse and a calf -	1 ditto.
A cow, for - -	1 ditto.
A calf of one year, for -	1 ditto.
Three beasts of two years, for	2 ditto.
Five calves, for - -	1 ditto.
Four ewes with a lamb -	1 ditto.
Eight lambs- - -	1 ditto.

A winter horse with a calf of one year to be calculated for one pasture spot of ground; and one morgen (3) is commonly calculated for two pastures; but *wrense* (4) foals, a foal of three years, oxen, bulls of three years, scabby sheep, horses whose hinder legs are shod, and castrated hogs, are not calculated for any certain or fixed extent of pasture ground.

Hay land is commonly pastured at St. Olave's eve; lands fit for tillage, or arable lands, at St. Peter's eve *ad cathedram*; and after-math, hemp, and drained lakes, with turnips, whenever they are useful. (5)

§ 3. This mode of dividing pastures, is very common at some places, especially in Brabant and Gelderland; and with respect to the town or country common drained lakes, and outside dikes, it is a constant use. Division of Ground, and Separation of Lands held in Property.

(1) Vide Cost. Antwerp. tit. 47. art. 2. Keuren tot Leyden, art. 123. Handvesten in Zuid-Holland, p. 409. art. 31.

(2) L. 34. § 2. Cod. de donat. l. 3. cod. comm. divid. Sande, lib. 4. tit. 11. def. 4. Keuren tot Leyden, art. 123.

(3) About two acres of ground.

(4) No corresponding English term can be found for this word.

(5) Vide Cost. Rynland. art. 51, 52. Turbe van Baljuwen welgeboren mannen van Rynland, October 24, 1515; Handvesten van Zuid-Holland, p. 409, (& p. 535. of the new edition by Jacob van Oudenhoven). Grot. lib. 3. c. 28. vers. van landen.

The proper separation and division of property is also effected into portions and equal shares; and whatever is not divisible into portions, must also follow those that have the greatest share; provided an indemnification be made to the others (1); or if the shares are equal, they must follow those who offer most: and he who remains possessor thereof must pay what he promised in ready money, provided that he who cedes his share is obliged to give good security, as in the case of sales (2). This is also effected by drawing lots, or by a proposal to take or to cede (3). But if it be not convenient to the one to purchase the property, or to take the use thereof as aforesaid; in such case he is not obliged in law to take the property, or to allow the same to the other for such a trifling price as might have been offered to him to make him accept or cede it: but in case of dispute, the property ought to be sold to the highest bidder by public sale, or be let. (4)

All the preceding observations are mostly applicable in common houses, which cannot, without loss or inconvenience, be divided into portions, like land or other property.

The common mode of dividing or separating lands or grounds is by the length, but not in the breadth or crosswise, beginning from the sea or river side. (5)

A Division of Lands bordering upon each other.

§ 4. A division of inheritance or premises may be taken in a double sense, and is two-fold: the first is of joint inheritance; and the other of grounds bordering upon each other, or having the use of one fire.

To the separation or division of a joint inheritance is applicable what has been said above of other property held in common.

At some places, according to the rule laid down by the spiritual law (6), it is an antient custom, that where there are two children, the eldest proposes the shares, and the youngest chuses (7): but it was neither adopted by the Roman law (8), nor by the practice and customs of these countries. (9)

(1) l. 6. § 7. commun. div.

(2) Vide Keuren tot Leyden, art. 123. Arg. l. 14. Cod. famil. erciscund.

(3) Vide Cost. Antwerp. tit. 47. art. 42. Keuren tot Leyden, art. 75. Cost. Mechlin. tit. 16. art. 47.

(4) l. 3. in cod. comm. divid. et ibi Bald. Castrens. Zalicet and Azo in summ. n. 6. in fin. Jason. ad § quædam ao. instit. de actionibus, num. 60. Zypæ Notit. Jur. Belg. tit. fam. erciac.

(5) Vide Gratien, Inleyd. lib. 3. c. 28. vers. op veel plaatsen. Turbe beleyd op de 50, Costuyme in Rynland, Nov. 18, 1561, p. (mihi) 19.

(6) Gen. xiii, 9. c. 1. extr. de Panch. & ibi canon.

(7) Vide Augustin de Civitate Dei, lib. 16. c. 20. in fine.

(8) Gail. lib. 2. obs. 116. & Wesemb. Parat. D. famil. erciac. n. 9. Fachin. lib. 6. c. 39. Menoch. de arbitr. Jud. Cas. 123.

(9) Vide Christin. ad. 2. decis. 122. n. 1. Zypæ Not. Jur. Belg. tit. famil. erciac. in pr.

From the division of lands bordering upon each other, or situated next to each other, without a certain boundary, arises a tacit obligation to suffer the antient division to be renewed and declared good, so far as the same can be ascertained by letters, notes, witnesses, or old reports (1): or, in failure thereof, new divisions and boundaries are made. This is commonly done according to rule (2), upon the survey and statement of sworn surveyors and architects, appointed by the judge at his discretion (3); in which, for the sake of propriety, some part is frequently attributed to the one more than to the other, provided it be made good with money and proportioned (4). All lands are reckoned from the middle of the ditch. (5)

But, whether any and what places must be left open, between dwelling houses and buildings, appears in certain antient special statutes which are in existence in the cities; but the greatest part thereof are altered and annulled; so that houses and dwelling places are at present built either too near and touching each other, or upon the common walls on both sides. (6)

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(1) l. 8. l. 11. Ff. fin. regund. Vide Wesenbec. parat. eod. n. 7. Mascard. de probat. concl. 394. & seq.

(2) l. 3. Cod. fin. regund.

(3) Vide Christin. vol. 2. decis. 185. n. 4. Vinn. ad Wesemb. paratit. finium regund. d. n. 7.

(4) l. 2, 3, 4. § 5. Ff. fin. regund.

(5) Gloss. in l. 2. § 1. verb. confinio. Tusch. vol. 2. practicabil. conclus. 694. litera C. & vol. 4. conclus. 448. litera F.

(6) Keuren van Leyden, art. 104. & seq.

CHAP. XXX.

Of Gifts and Presents.

[Grotius, 3. 2.]

§ 1. *Gifts, what, and of how many Sorts.*
2. *Whether, and in what manner confirmed by Acceptance.*
3. *A Gift exceeding the Amount of Five hundred Gold Gilders of Rome, whether and how it may exist.*
4. *To what it amounts in our Coin.*
5. *Whether a Gift exceeding the Amount of 500 Roman Gilders, lawfully made, will become entirely void, or for so much as exceeds that Amount.*
6. *Presents of all Property, whether and how far they may exist.*
7. *Whether and when Presents become void and may be cancelled.*

AS in the case of agreements, any one, who out of liberality promises something to another as a gift, becomes bound to the acceptor to fulfil that promise (1). A present is a voluntary delivery of a certain article, which is made to any one without any cause. (2)

Gifts, what, and of how many sorts.

§ 1. Some gifts are such as pass through the hands of living persons (3), while others are made for the sake and in contemplation of death, viz. when any one on his death-bed, or in contemplation of death, gives something to another to keep for himself, should the donor die of that sickness, or otherwise if he survives to return, or not to enjoy the same; provided he departs this life before, without revoking the same (4); wherein the right of bequests by last will is followed. (5)

Whether and in what manner confirmed by Acceptance.

§ 2. Others again are such, as are effected immediately; and others, under a certain direction; in which case, if it be not complied with, whatever was given may be reclaimed. (6)

In order to constitute a valid gift or present, the acceptance of it is also required, without which the gift is void (7); which acceptance may be effected before a notary by another person

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(1) l. 35. § ult. de conditionibus. § 2. Instit. de donat. l. 3. Ff. et l. 6. Cod. de obligat. et act.
(2) l. 29. Ff. de donat. l. 82. Ff. de Reg. Jur.
(3) § 2. Instit. de donat.
(4) § 1. Instit. de donat.
(5) § 1. Instit. de donat. l. 17. in pr. Ff. de mort. caus.
(6) l. 1. et tit. Cod. de donat. quæ sub modo. l. fin. Cod. de revocand. donationib.
(7) l. 10. l. 26. Ff. de donationib.

in our behalf and by our direction (1); and also by letters of acceptance, in case the persons be not present (2); which acceptance, as soon as it is effected, makes the gift exist in its full strength; and thereupon an action may be instituted (3). So that if the persons, to whom the gift is made, depart this life before such acceptance, their heirs acquire no right to such gift, but it becomes cancelled. (4)

A gift, exceeding 500 gold gilders of Rome, whether and how it may exist.

§ 3. In order to restrain excessive and inconsiderate liberality, it was introduced by the written laws, that no present exceeding the amount of five hundred gold gilders of Rome may exist, unless it be made and confirmed publicly and lawfully in writing before the court of justice of the place (5); and whether it still prevails amongst us, or not, is doubted in vain, as it has no where been annulled at any time; excepting only as all public writings, which formerly were usually executed before the court of justice of the place, are now without distinction executed among us before a notary and two witnesses, and fully confirmed. Whence it follows, that such presents, if likewise made before a notary and witnesses, are to be considered lawful.

To what it amounts in our Coin.

§ 4. It is, however, a point much contested among the learned of our time, how much the said five hundred gold gilders of Rome will amount to, in money current amongst us. With respect to this point, those who compute the value by the weight of the said gold gilders of Rome, according to the weight not of the money pounds, but according to the apothecaries weight, which remains still unaltered, are more certain; according to which pieces of gold lxxii. make one pound weight (6); which pounds are equivalent to the apothecaries weight (in which only xii. ounces are reckoned for one pound), weighing about xiii. ounces of the present money weight, of which weight six gold gilders of Rome weighed one ounce of gold; which being doubled twelve times, the lxxii. thereof make one pound gold of twelve ounces. In order to equalize this to our mint and money weight, it is to be observed, that one pound of gold ducats, of xvi. ounces, is valued at about seven hundred gilders, which being divided into xvi. ounces, every ounce of gold amounts to about xliv. gilders; from which, if we deduct the difference of xvi. to xii. ounces (one fourth part), which the present money pounds

(1) l. 4. Ff. eod. Joan. à Sande, lib. 5. tit. 1. def. 1. Christin. vol. 1. decis. 86. n. 7, 8. and decis. 185. n. 66.
(2) l. 10. Ff. l. 6. Ff. Cod. de donat.
(3) l. 3. Ff. de obligat. et act. l. 6. Cod. eod. junct. l. 35. § ult. Cod. de donat.
(4) Sande, lib. 5. tit. 1. def. 1.
(5) l. 27. l. 32. Cod. de donat. junct. l. pen. Cod. eod.
(6) l. 5. Cod. de susceptorib. junct. l. 2. Cod. de veter. numismat. potest.

have more than the pounds of Rome, there will still remain about xxxiii. gilders; to which, if we add one thirteenth part, which the Roman xii. ounces weighed more than the present xii. ounces money weight, there will remain according to the said weight, every ounce of gold being in proportion to the present money weight, about xxxvi. gilders in value, which being divided into six parts, every seventy-second part of a pound amounts to the just value of six gilders.

So that, according to the said computation, every Roman gold gilder, according to our current coin, would amount to the value of six gilders or one pound; which agrees with the double gold Carolus gilder, or an ancient écu of France, weighing about a sixth part heavier than a gold ducat; of which the five hundred gilders would amount to three hundred gilders. But as the said valuation consisted of five hundred gold pieces, such as were then in common use, each of them was worth as much as one hundred stivers, then also in use (1); which stivers are equivalent to about as much as a braspenning (2) used to be worth; and among us no other gold pieces are in use, or ever were, that come near the value thereof. As a Dutch gold ducat of five gilders in value, amounts also to one hundred common stivers, it is not without reason very exactly computed at five hundred ducats, that is, two thousand five hundred gilders, and so the same is valued by the court of Friesland (3), and at present also in Germany according to Carpzov. (4)

Whether a Gift, exceeding the Amount of Five Hundred Roman Gilders, lawfully made, will become entirely void, or for so much as exceeds that Amount.

§ 5. A question has arisen, whether a gift of more than five hundred ducats would at present be entirely null and void on account of its not having been lawfully made? It is understood that it would be of effect so far as it amounts to that sum, and that whatever may exceed the same only would become null and void. (5)

Presents of all Property, whether and how they may exist.

§ 6. Otherwise, donations, how great soever they may be, although of all the property of the donor, may be and remain effectual (6); provided they be properly made; which is only understood of the *present property*; because a donation of future property prevents the making of last wills, and therefore may not exist in law (7); excepting only that a donation of *all* property, or of

(1) l. 5. § 6. de his qui effud. l. pen. et ult. §. Ff. de in jus vocand. l. 47. Ff. de manumiss. sectam.

(2) Equal to about five farthings of English money.

(3) Vide Resolutiones, lib. 1. tit. 11. def. 3.

(4) Elucubrat. Responsor. tit. 17. responsa. 56.

(5) Arg. l. 34. in pr. l. 35. § 3. in fin. Cod. de donat. l. 21. § 1. Ff. eod. Novell. 162. c. 1. §. Illud etiam. Vide Jul. Clar. lib. 3. Sententiar. §. donatio. quæst. 17. n. 2. Anal. Gail. lib. 2. obs. 5. n. 8.

(6) l. 17. §. 1. Ff. quæ in fraud. creditor. l. 35. §. 4. Cod. de donat.

(7) Vide Mantic. de tacit. et ambig. Convent. lib. 12. tit. 16. Ant. Fab. ad Codic. lib. 8. tit. 56. def. 9. Julius Clarus, lib. 4. Sentent. § donatio. quæst. 19. Tessaur. decis. 99.

a *great part* thereof, by any one having no children, or who probably thought that he would never have any, is understood to be null and void or revoked, if he afterwards procreates and leaves children, who may reclaim such donation; because such a condition is understood to be therein tacitly included. (1)

§ 7. Other donations may likewise be revoked and become null and void, through great ingratitude and mischief committed against the donor; for example, if the donee wishes to deprive the donor of his life, or beats him, or publicly slanders and injures him, or if the donee will not assist him with the necessaries of life when in great property. (2)

Whether and when Presents become void and may be cancelled.

CHAP. XXXI.

Of Average.

[Grot. 3. 29.]

§ 1. *Average defined, and its different Sorts.*
2. *By whom to be borne; who may avail themselves of it; and of what Goods.*
3. *For what Sort of Loss.*
4. *What Kind of Appraisement is to be made of Goods saved, lost, or damaged, in order to make an Indemnification upon Average.*
5. *Acceptance of Inheritance, how far binding.*
6. *Particularly in restoring what had been received without Cause, or overpaid.*

§ 1. IN the same manner as in the case of community of property, merchants of a freighted ship, whose merchandizes and goods arrive safely, are bound to make an indemnification to those whose merchandizes and goods, by being cast overboard or otherwise on behalf of the ship, were lost, spoiled, or damaged (3). Among us, this indemnification is denominated *average*, the import of which term appears in the letter of Marcus Zuerius Boxhorn, written to professor Vinnius upon his observations *ad Petri Pecci Rem Nauticam*, translated by myself, with a subsequent reference to the Treatise on Average, composed by Quintyn Weitsen. Average is of two sorts; one of which is

Average defined, and its different Sorts.

(1) l. 8. Cod. de revocand. donat. l. 102. ff. de condit. et demonstrat. l. 30. Cod. de fidei-commiss.

(2) l. 10. Cod. de revocand. donationib.

(3) l. 1 & 2. Ff. ad leg. Rhod. de jact.

common, and the other is denominated *gross average*. *Common average* includes all common charges, exclusive of necessity and shipwreck, viz. pilots, wages, tolls and charges upon ships and merchandizes paid for coming and going along the river, which are borne only on account of the cargo, each according to its value.

Gross average is the indemnification of all loss on account of goods thrown overboard, cutting away masts, anchors, cables, ropes, baggage, tackle and rigging, done during time of danger, for the preservation of the ship; which is not only borne by those who loaded the goods, but also by the ship and crew, and the value thereof. (1)

By whom to be borne; who may avail themselves of it; and of what Goods.

§ 2. All those parties who are concerned in the preservation of the ship, are obliged to make this indemnification, according to the extent in which they are concerned. And in this appraisement are included all wares and merchandizes on board, and also the value of the ship and tackle, and likewise of the money and jewels which any one has about him (2), with the exception only of the clothes a person is actually wearing. (3)

From this kind of average are excluded all provisions; because, in case of want on the voyage, these are considered as common property, and are divided among the crew. (4)

We say *of all loss*, because this indemnification not only takes effect in the case of merchandize thrown overboard, but also in all losses that are sustained for the preservation of the ship, as well with respect to ship as crew and otherwise, and likewise when the master, with the general consent, has caused the ship to run ashore. (5)

For what Sort of Loss.

§ 3. We say, *with the general consent*; because the master of the ship is not permitted, without the consent and approbation of the merchant or his factor (if he be on board), or else, in case of his absence or refusal, with the consent of the major part of the ship's company, to cast any thing overboard; who, on their arrival on shore, are heard thereupon under oath, whether or

(1) Vide Quintyn Weitsen, Tract. van Avarie (Treatise on Average), vers. avarie is tweder hande. Wisbuyse Ze-regten (*Maritime Laws of Wisbuy*), art. 12. 21. 25. 28. 60. Schips-regten (Ship-laws) of Emperor Charles V. of the year 1551, art. 41. & of King Philip of the end of October 1563, tit. van schip-breking, art. 4. & seq.

(2) l. 2. § 2. Ff. ad leg. Rhod. de jactu.

(3) Schips-regten van Koning Philips, tit. Schip-breek, Zewerp. art. 7. Quintyn Weitsen, Tract. van Avarie, vers. Quastie of het geld, & vers. Alle de Bootgesellen. Jacob Coren, obs. 41. n. 3. in not.

(4) l. 2. l. 3. in fin. Ff. ad leg. Rhod. de jactu. Vide Grotius, de Jure Belli, c. 2. n. 6.

(5) Schips-regten van Koning Philips, A. D. 1563. tit. Van de Schippers, vers. Het schip heeft doen stranden, art. 4.

not it was effected during a time of danger, and with the general consent; because no indemnification is made for whatever perishes in consequence of tempest and stress of weather, or in consequence of loss suffered; and care must also be taken, as much as possible, that the heaviest and least valuable articles are, in the first instance, cast overboard. (1)

Whatever is paid to pirates, to ransom goods, is also to be included in this indemnification (2), but the loss of whatever is taken separately, and is ransomed afterwards, is charged upon the ransomed goods only, and those to whom the same belongs (3); unless the master of the ship points out any goods in justification of the other goods, in which case the said ransoming, as being effected for the common benefit, ought to receive indemnification (4). *For the preservation of the ship;* because, if the ship be not preserved, and if the boat with part of the goods is only saved, and the ship perishes, no indemnification is made. (5)

What Kind of Appraisement is to be made of Goods saved, lost, or damaged, in order to make an Indemnification upon Average.

§ 4. For this indemnification two sorts of value and appraisement are to be considered, viz. on the one side, the lost and damaged, and on the other side the goods saved; the goods saved, according to their value at the place to which they were destined, and the goods lost, according to their *probable* value, and for which others bought such, if they had not reached half the voyage; but if they had gone further than half the voyage, they would also be valued according to what they would have been worth at the place to which they were destined, deducting the freight and charges which might have been incurred thereupon (6). And the money is computed, not according to the currency, but according to their weight and *real* value (7). Which taxation being thus made, an equal calculation is made according to the same, namely, what and how much the goods saved ought to bear in the indemnification of loss sustained, wherein the goods lost are also reckoned according to their value: so that the proprietor of them ought to assist also in bearing his own loss together with others (8). In calculating such indemnification, the bill of lading

(1) l. 2. § 1. Ff. ad leg. Rhod. de jact. Wisbuyse Zeeretgen, art. 12. 20, 21. 38, 39. Schips van Koning Philips, d. tit. van Schip-breek, art. 4. & seq. & art. 8. Weitsen, Tract. van Avarye, vers. 't Gunt by Tempeest.

(2) d. l. 2. § 3. Ff. ad leg. Rhod. de jact.

(3) Ibid. Weitsen, Tract. van Avarye, vers. En de huit het gunt voorsz.

(4) Arg. d. l. 2. in fin. pr. Ff. ad leg. Rhod. de jactu. Weitsen van Avarye, Nu is de questie.

(5) l. 4. in pr. vers. contra. Ff. ad leg. Rhod. de jact. Vide Strach. de Nav. part 2. n. 19.

(6) l. 2. § 2. & § 4. Ff. ad leg. Rhod. de jact. Weitsen, van Avarye, vers. In de taxatie. Coren, obs. 41. n. 4. in not.

(7) Schips-regten van Koning Philips, tit. Schip-breek, art. 7. Weitsen, van Avarye, vers. Quæstie of 't geld.

(8) l. 3. § 2. ad leg. Rhod. de jact. Weitsen, van Avarye, vers. Nu is de vraag.

1 followed; and if any one, independently thereof, has any costly article of small bulk in his chest, he ought to give information of the same to the master of the ship, before the casting overboard is effected, or otherwise the said chests when cast overboard, and in the taxation thereof, are to be considered as if the same was not therein. (1)

Acceptance of an Inheritance, how far binding;

§ 5. Under this sort of tacit hypothecation, similar to an agreement, is also reckoned the acceptance of an inheritance, by which the heir is bound to satisfy all the debts and charges of the estate, and bequests, to the creditors and legatees, in the same way as if he had dealings with them. (2)

particularly in restoring what had been received without Cause, or overpaid.

§ 6. And likewise to make restitution of whatever was received without cause, too much or more than was due (3); of which we have already treated, supra, book iii. ch. x. § 8. p. 275.; and book iv. ch. xiv. § 4. p. 371.

CHAP. XXXII.

Of Obligations arising from Crime.

[Grot. 3. 32.]

1. *Crime, what; and how to be considered.*
2. *Whether and when the Will is considered as the Deed itself.*
3. *Whoever gives Direction to another, or gives Advice and Assistance, is also guilty.*
4. *Protection of one's Person, Honour, or Property, not punishable.*
§ 5. *Excess in Drunkenness excuses no one.*
6. *Young Children, mad, foolish, or insane Persons, do not incur any Penalty.*
7. *Nature of the Obligation arising from Crime.*
8. *By whom Complaint is to be made, and by whom Cognizance is to be taken.*
9. *Crimes how distinguished among us.*

Crime, what, and how to be considered.

§ 1. OBLIGATION arising from crime is, when any one, by the commission of a crime, incurs the punishment fixed for the same by the laws.

(1) Schips-regten van Koning Philips, tit. Schip-breek, art. 5. Wisbuyse Zeregten, art. 28. Weitsen, van Avarye, vers. Quæritur in de meeste. This subject is also treated at length in Quintyn Weitsen's Tractaat van Avarye, and in my annotations on it, which were translated into Latin by the learned Math. de Vicq, doctor of law.

(2) l. 5. § 2. Ff. de oblig. & act. l. 8. l. 37. Ff. de acq. hered. l. 3. § fin. Ff. de reb. auth. judic. poss.

(3) § 7. Instit. de offic. Judicis. l. 33. Ff. de condict. in debiti.

Crime, considered in general, is all punishable transgression of the laws, wilfully and from an evil mind, which is very narrowly considered: so that where no public fraud or evil intention is mixed with the deed, it cannot be punished as a crime (1). But, though a gross neglect is no fraud in a strict sense, and is not to be considered as a crime, yet it is punishable, but with less severity, and also discretionally, especially if it took place about gross and heavy crimes. (2)

Whether and when the Will is considered as the Deed itself.

§ 2. And so in many cases, the will is considered as the deed itself; and although not perpetrated, is punished in the same manner as if it had been committed, viz. if there was a real intention to perpetrate the same, and by some means or other, it was prevented or hindered (3), for example, when any one attacks another with arms, with the design of murdering him, and by some means or other is disappointed and prevented from executing such design; or if he had prepared poison to poison another, or had thrown down a woman with intent to ravish her, &c. the design is, in these cases, considered as if it was executed, because there was the will and intention to perpetrate it; and the actual perpetration was prevented or hindered, contrary to his will (4). In most cases, however, this offence is punished with less severity than is commonly inflicted on the criminal who has actually perpetrated the crime (5). An exception, however, is made in the case of a violation of the supreme power, in which the mere intention is highly punishable (6): but otherwise the mere will or intention, without proceeding to any act, is not punishable. (7)

Whoever gives Direction to another, &c. is also guilty.

§ 3. Whoever directs, instigates, or advises and assists another to commit any offence, is equally as guilty as the offender himself. (8)

Protection of one's Person, Honour, or Property, not punishable.

§ 4. Whoever does any thing to protect his person, or for the preservation of his honour or property, is not punishable for it (9). Hence it is concluded, that a person may freely kill a night robber; and an adulterer found near his wife or daughter, may be

(1) l. 7. Ff. ad leg. Cornel. de Sicariis. l. 1. in pr. Ff. Si famil. furt. fecis. dicatur. Gail, lib. 2. obs. 109. n. 1.

(2) l. 1. sed si clava. l. 3. § Sed ex senatus cons. l. 4. § 1. Ff. ad leg. Cornel. de Sicariis. Ant. Math. de criminibus. l. 1. c. 1. n. 2.

(3) l. 14. Ff. ad leg. Cornel. de Sicariis. l. 5. cod. ad leg. Jul. Majestat.

(4) l. 1. Ff. ad leg. Corn. de Sicar. l. 7. Ff. eod.

(5) Arg. l. 1. § ult. Ff. de extraord. cnminib. Vide Jul. Clar. § fin. quæst. 29. Farinac, tom. 1. quæst. 17. n. 48. Gomez. tom. 3. resolut. c. 3. n. 11. Gudelin. de Jure noviss. lib. 5. c. 17. Zypæ Notit. Jur. Belg. tit. ad leg. Corn. de Sicar. & ad l. Jul. Majestat. Anton. Math. de Criminibus, lib. 48. tit. 3. c. 2. n. 7. & c. 6. n. 9.

(6) l. 5. cod. ad l. Jul. Majestatis. l. unic. cod. si quis Imperat. male dixerit.

(7) l. 18. Ff. de pœnis.

(8) l. 11. Ff. de injur. l. 15. Ff. ad leg. Corn. de Sicar. l. 50. § pen. Ff. de furt.

(9) l. 3. Ff. de justit. et jure.

killed and wounded in a fit of rage; as is more fully stated, infra, ch. xxxiv. § 11. p. 467.

Excess in Drunkenness excuses no one.

§ 5. In petty or common offences, excess in drunkenness is admitted in excuse (1), but it is not admitted in excuse of any great crime, such as killing, wounding, or the like; of which we shall treat more at large, infra, ch. xxxiv. § 8. p. 466.

Young Children, mad, foolish, or insane Persons, do not incur any Penalty.

§ 6. Young children, who have not yet attained the knowledge of good and evil, are not considered as committing any offence, and go with impunity on account of their ignorance (2), and likewise all mad, foolish, and insane people, who do not know what they are doing. (3)

Nature of the Obligation, arising from Crime.

§ 7. From crime proceed two kinds of obligation; the one incurring punishment and penalty on behalf of the complainer, and the other to make indemnification to the person damaged.

By whom Complaint is to be made; and by whom Cognizance is to be taken.

§ 8. The complaint, and the right to punish and fine (vulgo, *de calange*), appertains to the county, and to those appointed to execute the same and act therein, and they represent the person of the count: for example, the procurator general, all sheriffs, and bailiffs of cities and villages, &c.; and all those who were prejudiced by the crime are entitled to indemnification, and for so much as they were actually damaged, and no further.

Crimes, how distinguished among us.

§ 9. All crimes are properly distinguished; some are considered to be against the supreme power and government (4); some against the life, body, natural liberty, honour and good name; and some against or concerning property.

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(1) l. 6. Ff. de re militari. Vide Jul. Clar. § final. quæst. 60. n. 12. Andr. Gail, lib. 2. obs. 110. n. 24. Menoch. de arbitrar. Jud. Cas. 316.

(2) l. 12. Ff. ad leg. Corn. de Sicariis. Vide Damhouder, Prax. Criminal. c. 42. Menoch. de Arbitrar.

(3) l. 12. Ff. ad leg. Corn. de Sicariis. l. 4, 5. Ff. de reg. jur. l. 9. Ff. ad leg. Pomp. de parricid. l. 14. Ff. de offic. præsid. Farinac. Prax. Criminal, quæst. 93. n. 19. Menoch. de præsumpt. l. 6. præsumpt. 45.

(4) Crimen Læsæ Majestatis.

CHAP. XXXIII.

Of the Violation of the Supreme Power; including the Murder of Princes and High Treason; Sacrilege, Embezzlement, Concussion, Corruption of Justice, and of the State Government, the Coining of Base Money, Knavery, and Monopoly.

§ 1. *Of the Violation of the Supreme Power.*
2. *In what Manner punishable.*
3. *Heavy Punishment for the Murder of Prince William.*
4. *Punishment of the Year 1619 against the Supremacy of the Country, and of the Year 1623 for Treason against Prince Maurice.*
5. *Blasphemy, what; and how punishable.*
6. *Sacrilege, what; and how punishable.*
7. *Embezzlement, what; and how to be punished.*
8. *Of* Concussion, *or Extortion.*
9. *Corruption, what; and how to be punished.*
§ 10. *Ignorance in a Judge, not punishable.*
11. *Error of an Advocate; whether punishable, and under what Circumstances.*
12. *Falsification, and false Coinage; what, and how to be punished.*
13. *Of common Falsification or Forgery; and in what Manner punishable.*
14. *Perjury, whether and how punishable.*
15. *Knavery, what; and how punishable.*
16. *Prevarication, what; and how to be punished.*
17. *Of Monopoly.*

Of the Violation of the Supreme Power.

§ 1. CRIME against the supreme power and government is *crimen læsæ majestatis*, or a violation of the supreme power; and it is the greatest crime which can be committed by any person. It comprehends not only the murder of kings or princes (which according to the circumstances of the crime cannot be punished with too great severity); but also all sorts of conspiracies, treasons, and whatever else is done and committed in defiance and to the prejudice of the prince of the country or the public out of anger (1): so that here the will is taken for the deed, although it be not actually executed. (2)

Of this crime those are also guilty who being privy to the treason have not discovered it.

In what Manner punishable.

§ 2. The common punishment for violating the supreme power, is the sword (3), confiscation of property (4), and extir-

(1) l. 1. & seq. Ff. ad leg. Jul. Majestat.
(2) l. 5. Cod. ad Jul. Majestat.
(3) d. l. 5. Ff. ad leg. Jul. Majestat.
(4) § per Contrarium instit. de hereditat. quæ ab intestato deferunt.

pation of the name and family (1), unless the circumstances of the crime aggravate the punishment thereof to quartering the body into four parts, breaking upon the wheel, burning, or strangling, or mitigate the punishment to whipping, branding, banishment, or similar greater or inferior punishments, according to the exigency of the case, at the discretion of the judge.

Heavy Punishment for the Murder of Prince William.

§ 3. There are several precedents, of our time, of heavy punishments for the murder of princes; Balthazar Gerards, who shot Prince William of Orange, stadholder and general of these Netherlands, in his room at Delft on the 14th July 1584, was punished in the following manner, viz. his hand, with which he did it, was first scorched with a red-hot closing iron and burned; next the flesh was burnt and pinched off six times with red-hot tongs in several parts of the arms, legs, and other more fleshy parts of his body; after which he was hewn alive into four pieces, beginning from the lower part of his body; and, the belly having been cut, his heart was taken out and thrown into his face; and, after his head was severed, the four parts of his body were hung upon four bulwarks, and his head was placed upon a post on the steeple of the school-house, and all his property was declared to be confiscated. (2)

Punishment of the Year 1619 against the Supremacy of the Country, and of the Year 1623 for Treason against Prince Maurice.

§ 4. And several sentences were likewise pronounced in the year 1619 against those who were said to have offended against the supremacy and government of the country, and to have forfeited their property. And in the year 1623 several heavy executions took place of the persons who conspired together, and formed a plot to kill Prince Maurice of Orange, also stadholder and general of these Netherlands, both against those who were themselves guilty of that design, and also against those to whom it had been discovered, but who did not give information of it in time (3). Among the inferior sorts of violation of the supreme power are included blasphemy, sacrilege, embezzlement, concussion, corruption of justice, and of the government of the state, falsification, or forgery, knavery, and monopoly.

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(1) § publica autem. 3 Inst. de publicis jud.

(2) See a full account of this transaction in the *Historie* of Samuel van Meteren, in Book xii.; and in the *Nederlandse Historien* of Peter Borre, Book xviii. p. 55.

(3) For an ample detail of this transaction, and of the persons who were implicated in it, as well as an account of the punishment inflicted on them, see the Nederlandse Historien of Aitzema, Book iii. p. 393. See also the Judicial Sentence of the city of Utrecht against Mr. John Liefting, who had spoken wickedly of the High Government. Bell. Jur. p. 611.

§ 5. Blasphemy is all sorts of cursing and violation of the name of God and his sacred word; of which some are of greater and others of less consequence. Blasphemy, what; and how punishable.

Blasphemy which is of greater consequence, is the public and premeditated denial and violation of the majesty of God, and His power; and the ill-use of His holy name and word. Of this crime are guilty all atheists, all exorcists who in the name of God curse and bless men and cattle, all soothsayers and jugglers, &c. These offenders, according to divine and secular laws, are punishable with death (1); but with us, according to the example of neighbouring countries, these offences are seldom considered so enormous, and are mostly corrected by banishment, cutting off the hand or fingers, piercing the tongue, or similar inferior punishment (2). Concerning these offences it was ordained by the Emperor Charles V. both in the ordinance of the realm respecting life and death, of the year 1530 and 1532 (art. 106.) as well as in the edict of the 7th October 1531 issued in and over the Netherlands (art. 23.) which is still in force among us, no other law having been enacted in that respect, as follows, viz. "so we have prohibited every one, as we do prohibit them by these presents from blaspheming God Almighty, upon penalty that those who deny, decline, and scorn God, shall be apprehended and kept in strict confinement; and that their tongue be publicly pierced upon a scaffold without grace."

Blasphemy which is of inferior consequence, is that which occurs more from bad habits than from bad design and wicked intention; such as happens in mere cursing and swearing, slandering, and scolding; which is so common with some persons, that they do not know what they say. This offence, agreeably to the said edict of the Emperor Charles V. (art. 43), is punished according to the exigency of the case, either by confinement upon bread and water, or by fine. And so it was prohibited by the citizens of Utrecht on the 12th June, and by those of Haerlem on the 8th December 1653, and by those of Leyden on the 15th May 1655; who prohibited mere cursing and swearing (which otherwise was done with impunity) upon a certain fine.

§ 6. Sacrilege, in a strict sense, is the crime of taking any thing dedicated to divine worship; the punishment of which, Sacrilege, what; and how punishable.

(1) Levit. xiv. 13, 14. Novell. 77. c. 1.
(2) See Damhouder, Prax. Crim. c. 61. n. 13. & 22. Anton. Math. de Criminib. lib. 48. tit. 10. n. 6, 7.

according to the written laws, is different, but mostly the forfeiture of life. (1)

Embezzlement, what; and how to be punished.

§ 7. Embezzlement is committed by those who unfaithfully rob the poor funds, or other funds of the country or city, of which they are servants and managers (2). The punishment of this crime was banishment (3). But those who made use of the money of the state or public, of which they had the administration, without public breach of trust, were punished with inferior punishment, and by the restitution of three times the value (4). But, at present, the punishment of such crimes is almost left at discretion, viz. In inferior crimes, they are punished by the privation of their offices and services, and in crimes of a more aggravated nature, in which public falsification is mixed (as is often the case), by corporal punishment, banishment, and restitution of twice the value. (5)

Of *Concussion*, or Extortion.

§ 8. Concussion is an extortion of contributions or something else, in an improper way, by the officers and servants of government from the common people, from whom they extort more than they are indebted. These offenders are dismissed from their offices, and also further punished at discretion (6). In this class of offenders are also comprehended any who introduce a new general contribution in their own name, without being authorized thereto. (7)

Those who, in order to obtain any offices concerning the government of the country, have induced persons having the requisite power to consent thereto by gifts or presents, and also judges or magistrates allowing themselves to be bribed or prevailed upon for some purposes by gifts or presents, were antiently punished for it with death; and among the first laws of the twelve tables, this was the principal, *Si judex arbiterve juris datus ob rem dicendam pecuniam accepit, capitale esto;* that is, if a judge or arbitrator of the laws accepts money for the judgment of the case, the punishment is capital; from which punishment, although mitigated by some and altered to a fine (8), we have deviated but very little; and it was so wisely provided therein, that at

(1) l. 4. § 2. & l. 6. in pr. Ff. ad leg. Jul. peculat. See Boss. Prax. Criminal. tit. de Sacrilegiis. n. 1. Jul. Clar. lib. 5. Sententiar, § Sacrilegium, n. 1. in fin. Georg. Tholosan. Syntagmat. Jur. lib. 33. chap. 14. n. 8. vers. et generaliter.

(2) l. 9. § 2. Ff. ad l. Jul. peculat.

(3) l. 3. Ff. ad l. Jul. peculat.

(4) l. 2. l. 4. § 5. Ff. ad l. Jul. peculat.

(5) See Damhouder. Prax. Criminal. c. 117.

(6) Arg. l. 1. Ff. de Concuss. See Damhouder. Prax. Criminal. c. 131.

(7) l. 1. § 3. Ff. ad l. Jul. ambitus. l. ult. Ff. de vi publica.

(8) l. unic. § 1. Ff. ad leg. Jul. de ambitu.

many places no one was ever accused thereof, and I dare say were never overcome. Those who, with us, degrade themselves in this respect, would forfeit their office, and be judged incapable of and unfit for any state offices and services, and would further be banished or corporally punished at discretion.

The lords of the high and provincial court of Holland are likewise, in particular, sharply prohibited from enjoying from the suitors any gifts or presents of any the most trifling description whatsoever, upon pain of forfeiting their offices, and also of arbitrary correction; and they ought, on that account, to declare every year upon oath, that neither by themselves nor by their wives, children, domestics, or others belonging to them, have they knowingly enjoyed any thing, and they ought to bind themselves *eodem sacramento*, to take care that it does not occur.

Corruption, what; and how to be punished.

§ 9. If in the mean time there be any or the least suspicion, they ought to purge themselves of it by oath, and direct and compel the suitor, on whom the suspicion falls, in the name of the court, to declare upon oath, that he neither gave nor promised to give any thing to any one member of the court or their servants. The person who corrupts and is found to have done so, either before or after pronouncing of the sentence, forfeits, in consequence thereof, what he gave or promised, on behalf of the poor, and also incurs a penalty, proportioned and equal to the value of the matter which he has to transact, besides arbitrary correction, infamy, and disqualification from bearing at any time any offices or benefices. But if the suitors, before they are accused thereof, faithfully inform the court, before contestation of suit, what they had given, or what had been extorted from them by any one for the purpose of promoting their cases, they are to be liberated from the said fines. (1)

Ignorance of a Judge, not punishable.

§ 10. But if, through ignorance in a judge or otherwise, an unjust sentence be pronounced, the judge will not be responsible for it; but those who think themselves aggrieved thereby, will be obliged to avail themselves of an appeal, or the higher jurisdiction of another judge. (2)

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(1) See Instruct. van den Hogen Raad, art. 10. Nader ampliatie van d' Instructie, (subsequent ampliation of the instruction), tit. ult. art. 1, 2, 3. & seq. Placaat (Proclamation) of the States General, July 1, 1651; and of the States of Holland against the Greffier Mus, and others, February 6, 1652. Cost. Utrecht, tit. 1. art. 11. Keuren van de Stad Leyden, art. 2, 3, 4. & seq. Handvest (charter) of Albert Duke Bavaria, granted to the city of Amsterdam in the year 1387. Jacob van Heemskerk, Hollandse Arcadie, p. 755. & p. 485. of the last edition.

(2) Vinn. ad § 1. Instit. de obligat. quæ quasi ex delict. Christin. vol. 4. decis. 95. n. 4. Zypæ Notit. Jur. Belg. de appellat. vers. in alquibus.

Error of an Advocate; whether punishable, and under what Circumstances.

§ 11. Likewise, an advocate, who commits a mistake, is not responsible for it (1); for although it does not become and is a disgrace to an advocate, (to whom it is a disgrace to be ignorant of the laws) (2) still it would be too hard, that, in such a vast sea of discord, and in a knowledge of every matter and multiplicity of lawsuits, they should be obliged to answer so strictly upon every point in particular, unless they could be convicted of public fraud.

Falsification and false Coinage, what; and how to be punished.

§ 12. Falsification, belonging to the violation of the supreme power, is false coining of the emperor's own coin, committed by the appointed mint-masters, and clipping and other fraud committed by others, which were punished with less severity, but mostly capitally, with the sword (3). Whence it seems to have proceeded, that in antient times, in these countries, false coiners were burnt with fire without distinction, and likewise boiled in oil, according to what appears in the antient local laws of Friezland (4), viz. "It is the custom throughout Germany, that the thief is punished with the gallows; the murderer and incendiary causing death, with the wheel; manslaughter and robbery, with the sword; and the falsifier with the kettle." It appears likewise in the customs of Utrecht (5), where it is said more distinctly, "Whoever falsifies the coin of the lord, either by clipping, counterfeiting, colouring, or otherwise; or whoever coins false coin, shall forfeit the body, namely, clippers by the gallows, and false coiners by fire." On mature consideration of these laws (since with us the images or arms of the emperors or magistrates have no value of themselves), we may justly understand that all common false coins, made by others than the coiners themselves, should fall into a sort of common falsification, and that the parties so offending ought to be punished in like manner.

Of common Falsification, and in what Manner punishable.

§ 13. Common falsification includes all sorts of acts, by which any one counterfeits any writing, or erases, or unfaithfully falsifies, or weighs or measures with any false smaller measure or bad weight (6). The punishment of which offences, on account of the uncertainty of the circumstances, is severe; and as the com-

(1) Christin. vol. 4. dec. 95. n. 4. Argentr. ad Consuetud. Brittan. art. 33. Neostad. de pact. anten. dec. 1. n. 14. & seq.

(2) l. 2. § 43. Ff. de origin. Jur.

(3) l. 1, 2. Cod. de falsâ monetâ. l. 8, 9. Ff. ad l. Cornel. de fals. Junct. l. 6. Ff. ad l. Jul. Majestat.

(4) Omlandse Land-regten, l. 7. art. 48.

(5) Rubr. 41. art. 2.

(6) l. 1. § 4. & 6. l. 9. § pen. l. 16. § 1. l. 23. l. 25. l. 28. l. 29. l. 31. Ff. ad leg. Cornel. de fals.

mon interest is deeply concerned therein, it is punished with the sword, but mostly by banishment and confiscation of property (1). In some places these offences are punished by cutting off the right hand, cutting off the ears, branding in the face, and similar punishment (2). According to a proclamation of the emperor Charles of the 30th January 1545, such offenders were to be punished with the gallows, which in process of time was mitigated into banishment and whipping. At present falsification is mostly punished among us by public whipping, with the false letters hung over the head, and by subsequent banishment and confiscation of property. (3)

Perjury, whether and how punishable.

§ 14. Those who are convicted of perjury, are declared to be dishonest and perjured; and, independently thereof, after indemnification made to the injured party, are punished corporally according to circumstance (4). Such an one was by sentence of March 31st, 1516, condemned by the Court of Holland to have the first joint of his two forefingers cut off, besides paying a fine of 20 Philippus gilders, in the case of Adrian van Borsselen, knight, constable and bailiff of Woerden, impetrator in case of reformation against Jan Martyr. (5)

Knavery, what; and how punishable.

§ 15. All crimes, by which any knavery or fraud is committed, and which have no particular name, *quod crimen stellionatus dicitur* (6), are also punished with an extraordinary punishment at discretion (7). And so, in Friezland, a certain Englishman who carried about for sale silver chains and likewise copper chains gilt, which he passed off for gold, and dealt in them, or otherwise deceived the good people therewith, by means of a gold chain which he had among the heap, and made use of as a sample, was publicly exposed with one of those chains about the neck, and afterwards whipped and banished. (8)

Prevarication, what; and how to be punished.

§ 16. To this class of offences also belongs the unfaithfulness of juridical advocates and counsellors, who communicate to the opposite party what had been confided to them by their clients, and thus serve first the one and then the other; which we denominate prevarication, and which is punishable at discretion, by dismission from office, and by being declared to be dishonest,

(1) l. 22. Cod. ad leg. Corn. de fals.
(2) Arg. Novell. 17. c. 8. & Novell. 42. c. 1.
(3) See Gudelin. de Jure Noviss. lib. 5. c. 20. vers. aliud crimen. Damhouder. Prax. Criminal. c. 119. & seq. Christin. vol. 4. decis. 119. n. 11, 12.
(4) See Rittershus. de diff. Jur. lib. 6. c. 9. in fin. Damhouder, Prax. Criminal. c. 5. n. 19. Jul. Clarus. § perjurium, n. 11. Menoch. de arbitrar. Jud. cas. 319. n. 23. & seq.
(5) Vide Sententie Boek, p. 56.
(6) l. 3. § 1. Ff. de crimine stellionat.
(7) l. 3. § 2. Ff. & l. 1. Cod. de crimine stellionatus.
(8) See Sande, l. 5. tit. 9. def. 8. Menoch. de arbitrar. Judic. lib. 2. cas. 383. & Jul. Clarus. § final. quæst. 83. vers. Si quis imposturam.

and by banishment, confiscation of property, or similar punishment. (1)

Of Monopoly.

§ 17. Monopoly, or dearth caused by the fraudulent buying up of provisions to the prejudice of the public interest, is punished by banishment or confiscation of property (2).

CHAP. XXXIV.

Of Crimes against Life, and of Murder.

[Grot. 3. 33.]

§ 1. *Murder, what; and how punishable.*
2. *Of Parricide and Infanticide.*
3. *Exposing Children, how punishable.*
4. *Those who allow themselves to be bribed to kill another, how punishable.*
5. *Those who seek to deprive any one of his Life with Poison, how to be punished.*
6. *Magicians and Soothsayers, who; and how they are to be punished.*
7. *Murder through Neglect, without Design, how punishable.*
8. *Murder perpetrated in excessive Drunkenness, how to be punished.*
9. *Those who go out armed, with Design to kill another, how punishable.*
11. *Necessary Defence, what.*
12. *Suicide, whether, and when punishable.*
13. *Those who drown themselves cannot be punished, but ought to be inspected.*
14. *Of the Punishment of Murder in which several Persons are guilty.*
15. *Indemnity to Persons who have suffered Damage in a Murder; whether, and how to be given.*

Murder, what; and how punishable.

§ 1. CRIME against life is murder, which is commonly taken for all deeds by which one person improperly causes the death of another human being (3); and since in the punishment of crimes, on account of the varying circumstances which either aggravate or mitigate the punishments (which are otherwise certain), much is left to the discretion of the judge (4); so,

(1) l. 1. § 1. l. 3. § 2. Ff. de prævaricat. l. 4. § 4. Ff. de his qui notant. infamia. See Menoch. de arbitrar. Jud. c. 323. n. 5. 8. Boss. Prax. Criminal. tit. de prævaricat. num. 2. Farinac. tom. 1. tit. 1. quæst. 4. n. 15.

(2) l. unic. Cod. de Monopoliis. Plac. October 7, 1531; Oct. 4, 1540; and July 31, 1562. See the Proclamations respecting provisions, and the notes made by Mr. Dirk Graswinkel concerning the same.

(3) l. 7. § 6. Ff. ad leg. aquil.

(4) Zyp. Notit. Jur. Belg. tit. de pœnis. Gudelin. de Jure Novis. lib. 5. c. 15.

in punishing murder, many things ought also to be considered, as how, in what way, by whom, and to whom it has occurred, in order to distinguish whether the same ought to be ordinarily or extraordinarily punished, that is to say, whether it is to be punished with more or less severity than the common punishment; for, as many circumstances often make the punishment of death lighter, and cause it to be mitigated to banishment or other inferior punishment, so other circumstances may also aggravate the punishment to hanging, burning, breaking upon the wheel, and the like; which circumstances consist much in the difference between the time, place, the manner of committing it, the cause of the crime committed, and distinction of persons, as well of those who commit it, as those who suffer it. (1)

The *ordinary* and common punishment of a murder, committed wilfully with a wicked design and malicious intention, is beheading. (2)

The *extraordinary* and peculiar punishment is two-fold; viz. either more and greater, or inferior.

The greater punishment takes place in all homicides in which murder and mere violence is mixed with it.

Of Parricide and Infanticide.

§ 2. Also, in parricide or infanticide the punishment is, according to customs of every place, almost peculiar (3); but, among us, those who murder their fathers, (and in this class of criminals are included all those who kill their parents, their children, their consorts, or others of their nearest relations by blood), are mostly broken upon the wheel (4); their bodies are dragged upon a hurdle, and placed upon a wheel. Women who kill their children are often strangled with a rope, and their bodies are placed upon a post. (5)

Exposing of Children, how punishable.

§ 3. But those who lay or expose their children abroad to hazard, are mostly punished by whipping, branding, and banishment, or with less severity, according to discretion; which is to be understood of such as from poverty leave and expose their children in public places, where they may immediately be found, and may be maintained either by those who find and take them,

(1) l. 9. § 11. Ff. de pœnis. The circumstances above alluded to are treated by Gail. lib. 2. observ. 110. Clarus, § Homicidium, n. 1. & seq. Boss. Prax. Criminal. tit. de Homicid. num. 68. & seq.

(2) § 5. Instit. de public. Jud.

(3) On this subject see Gudelin. de Jure Novissimo, lib. 5. c. 17. vers. pen. Damhouder, prax. crim. c. 87. n. 3. Perez. ad Cod. de his qui parent. vel lib. occid. n. 3. Anth. Math. de Criminib. lib. 48. tit. 6. c. ult. n. ult. Wesemb. paratit. Ff. ad leg. Pompejan. de parricid. n. 5. Gomez. resolut. tom. 3. c. 3. n. 3. Clar. § parricidium. n. 5.

(4) § 6. Inst. de publ. jud.

(5) Vide Tessaur. decis. 13. Anton. Faber. Cod. lib. 9. tit. 11. Berlich. Practicab. Conclus. part. 4. conclus. 7. n. 20. & seq. Sande, lib. 5. tit. 9. def. 3.

or otherwise by the public; but those who, without any necessity, lay down their children in a solitary place, where they may die of hunger and cold, are punished with death. (1)

Those who allow themselves to be bribed to kill another, how punishable.

§ 4. Those who allow themselves to be bribed to kill another, both the briber and the person bribed are punished with greater severity (2); and commonly by placing their bodies upon a wheel, by breaking upon the wheel, quartering the body, and similar punishment; and so, on the 5th April 1664, at Amsterdam, one John Nieuwkerk, who was bribed by a certain jew, and had shot to death another jew, for a certain trifling gain, was strangled half to death and afterwards broken upon a wheel, and his body was placed upon a wheel. (3)

Those who seek to deprive any one of his Life by Poison, how to be punished.

§ 5. Those who seek to kill any one with poison, are also punished with the sword, although the person should not die thereof (4); at some places the men are placed upon a wheel, and women are covered with something hollow in a tub of water. (5)

Magicians and Soothsayers, who; and how to be punished.

§ 6. Soothsayers, and persons accused of sorcery, were antiently burnt alive (6); but as, after many grievous examples of our time, it was at last found that such offences consisted only in the mere imagination of some unnatural power, which in reality did not exist, and that those who believed such things were themselves sufficiently enchanted; so similar cases are at present dismissed from our tribunals. And it is likewise taught by all orthodox expositors of the holy scripture, and asserted as a foundation of an orthodox christian belief, that one should not attribute any unnatural or supernatural power to any human being, not even to the devil and evil spirits; nor ascribe to any or the least effect and temptation, any strength or power besides that which is allowed to them by God. Whatever has been effected by any renowned magicians, has always proved to be false: and the Lord said to Moses (7), "Regard not them that have familiar spirits, neither seek after wizards, to be defiled by them; I am the Lord your God;" and (8) "The soul that turneth after such as have familiar spirits, and after wizards, to go a whoring after them, I will even set my face against

(1) Arg. l. 15. Ff. ad leg. Corn. de Sicariis. l. 4. Ff. de agnosc. vel alend. lib.

(2) l. 15. § 2. Ff. ad l. Corn. de Sicar. l. 1. § 3. Ff. l. 7. Cod. eod. c. 1. verb. mandaverit de homicidio in 6.

(3) See Julius Clarus lib. 5. Sentent. § assassinium, n. 4. Damhouder, Prax. Crim. c. 85.

(4) l. 3. Ff. ad leg. Corn. de Sicar. leg. 28. § venenarii Ff. Cod. § item. lex Cornelia. Inst. de publ. jud.

(5) See the Criminal Ordinance of the Emperor Charles V. of the year 1530 and 1532, art. 130.

(6) Arg. l. 3. Cod. de maleficis.

(7) Lev. xix. 31.

(8) Lev. xx. 6.

that soul, and will cut him off from among his people;" and (1), "Surely there is no enchantment against Jacob; neither is there any divination against Israel;" that is, against believers. So that since the reformed religion was introduced into these countries, no witchcraft or ghosts are found, neither are there any more people found, nor are there any people more known, who appropriate to themselves any sorcery or supernatural effects; because, according to our doctrine, no belief is placed therein; whereas in other countries, such impositions abound as a punisment of their superstition. It is not that it occurs there more than in these countries, or that more unnatural things are done there; but people are found there who attribute to themselves similar power, and by a false appearance shew something (as if something exists which does not), and which others through superstition admit; or perhaps the evil spirit is permitted by God to tempt the unbelievers in their unbelief more there than here. In truth, we see that, among believers, such ghosts are not found which others complain of, and say that they have met with them. We do not find that there is a single man who could ever effect any thing unnatural; and even that those who have pretended to do so, andimagined that they could do something, were convinced of their own deceit and falsity. There *were* some who rubbed the skull and joints with some ointment, in consequence of which they fell into a stupified impotency, and imagined that they flew out of the chimney upon a broomstick; and on recovering their senses, fancied and made others believe, that they had performed wonders, notwithstanding they had not quitted their place (2). What strange things are shewn by those who go about with the juggler's bag, and play out of the budget, which on being discovered, are deemed nothing. Such people were the wise men and the sorcerers or magicians of Egypt, who were called by Pharaoh to imitate the miracles which God caused to be shewn to him by Aaron (3), who by some dextrous art, shewed as if their rods (like that of Aaron), had also changed into serpents; which, however, in truth was not the case, and which clearly appeared in the second trial, where Aaron by God's command, caused the dust of the earth to be changed into lice, which they tried to imitate, but they could not, and their enchantment was found false; so that they

(1) Numb. xxiii. 23.

(2) Several occurrences of this kind are related by the counsellor H. van Heemskerk, in his Batavise Arcadia, p. 49. & seq.

(3) Exod. vii. 11.

themselves acknowledged therein the power of God (1). And it is no less a fable that the ghost of Samuel should have been raised through the power of the sorceress (2), which was not seen or acknowledged by Saul himself; but he was persuaded by the sorceress that she saw him; whom he (having strayed from God, through God's righteous will), honoured instead of Samuel; and having fallen on his face, put questions; to which having been prepared by the woman, in consequence of the proposal of Saul himself, and by what had already taken place, sufficient answers could be given, without our being obliged to admit them to be supernatural predictions of future events, that are known to God alone. For which also Jesus the son of Syrach, is reprimanded, because he admitted that Samuel himself, after he departed this life, had prophesied and predicted the end of Saul (3). But although it is not admitted as a truth by orthodox people, and clearly appears to have consisted in nothing but deceptions; yet on account of the superstition nourished among bad and silly people, such magicians, soothsayers, and others, who go about with some conjuring words, or attribute them to themselves, are punished on account of their conceitedness and superstition, by whipping, banishment, or the like punishment. (4)

Murder, through Neglect, without Design, how punishable.

§ 7. Less than ordinary punishment is inflicted in homicide, which has not happened wilfully or intentionally, but merely through neglect (5), which is punished according to discretion. (6)

Murder, perpetrated in excessive Drunkenness, how to be punished.

§ 8. Formerly, excessive drunkenness used to excuse a person from evil design, and from the common punishment (7). But, with us, it is not taken into consideration; and the old proverb takes place; viz. "That what a man does when drunk, he ought to make amends for when sober" (8). In the proclamations of the Emperor Charles, October 7, 1531, (art. 15.) and January 30, 1545, it is clearly directed, that for homicide committed during drunkenness, no pardon or remission should be

(1) Exod. viii. 18.
(2) 1 Sam. xxviii. 11.
(3) Ecclesiasticus, xlvi. 22.
(4) See Joan. van den Sande, lib. 5. tit. 9. def. 8. and particularly Jacob van Hoemskerk, who has treated this subject at large in his Hollandse Arcadia, p. 113. (p. 49. & seq. of last edition.)
(5) l. 7. ad leg. Corn. de Sicar.
(6) Arg. l. 1, § sed si Clava. & l. 3. § Sed ex Senatus cons. l. 4. § 1. Ff. ad leg. Corn. de Sicar.
(7) l. omne. 6. § per vinum Ff. de re militari. quod confirmat. Gail. lib. 2. obs. 110. n. 24. in fine. Clarus § final. quæst. 60. n. 12. Gomez. resolut. tom. 3. c. 1. n. 73. Menoch. de arbitrar. Judic. casu 316. Tiraquell. de pœn. temp. cons. 6.
(8) See Andr. Gail. lib. 1. obs. 110. Damhouder, Prax. Crimin. c. 84. Gudelin. de Jure Novissim. lib. 5. c. 17. vers. quum ebrietas. Zyp. Notitia Jur. Belg. tit. de abol. vers. & quamvis.

granted; and being granted, should be considered as improperly granted, and should not be confirmed, but be punished with greater severity. It was likewise directed in the articles of war, of the 13th August 1592, (art. 67.) to the soldiers and warriors, among whom it easily occurs; and therefore, at Delft, in May 1651, upon advice taken from the court and high court, the person of Zybert van der Have, who having committed manslaughter in a fit of excessive drunkenness, notwithstanding great intercession, and every imaginable regard tending to excuse him, could not escape the ordinary punishment, but was publicly beheaded upon the scaffold. (1)

Those who go out armed, with a Design to kill another, how punishable.

§ 9. Any person who goes out armed with design to wound another, not at present punished for it; unless he had already committed any act of hostility, and had already begun to execute his design, which in such a case is punished at discretion. (2)

The punishment, therefore, against those who draw a knife to wound another (which formerly was either not inflicted, or used to be very small), is now aggravated and increased at some places very wisely to two and three hundred and more gilders; because such conduct differs but very little from the deed, and can scarcely be avoided. (3)

§ 10. If any person perishes, in consequence of any thing happening without any neglect and fault, in a proper and permitted way, it is not punishable. (4)

Necessary Defence, what.

§ 11. And likewise, if any person kills another in necessary self-defence, that is to say, being under the necessity and urged to defend and protect his own life, or the lives of his wife or children, or his property, against violence, he will not be guilty of murder (5); and, in such a case he will obtain personal security from the supreme government (6). Under necessary defence is also reckoned defence against a nocturnal robber (7), and also against a ravisher of women. (8)

(1) Vide Papegay, p. 399. (p. 481. of last edition). Zurk, Cod. Bat. p. 259. in notis. & Nareden des tweden druks 1727.

(2) Gudelin. de Jure Novis. lib. 5. c. 17. vers. mox dictum. Zyp. Notit. Jur. Belg. tit. ad leg. Cornel. de Sicar. vers. & quia. & tit. ad leg. Jul. majest. vers. in tumultibus. Perez. Cod. ad leg. Cornel de Sicar. n. 5, 6. Sande, lib. 5. tit. 9. defin. 11. Anthoni. Math. de Criminib. lib. 48. tit. 5. c. 1. n. 3. c. 3. n. 11. & tit. 6. c. 1. n. 7. tit. 18. c. 4. n. 13. Faber ad Cod. de pœnis. defin. 20. Gomez. tom. 3. resolut. c. 3. n. 11. 30. Clarus § fin. quæst. 92. Farinac. Prax. Crimin. quæst. 124.

(3) Cons. & Adv. vol. ii. c. 194.

(4) § 3, 4, 5. Instit. ad leg. aquil. l. 11. l. 31. Ff. eod.

(5) l. 1. Cod. unde vi. l. 1, 2, 3. Cod. ad leg. Cornel de Sicar.

(6) See Papegay, p. (mihi) 388. in fine. and p. 472. of the last edition.

(7) l. 4. § 1. Ff. ad leg. aquil. & l. 9. § ad leg. Corn. de Sicar.

(8) Arg. l. 3. Ff. de Justit. & Jure. Grotius, de Jure Belli, lib. 2. c. 1. n. 7. Less. de Justitia & Jure, lib. 2. c. 9. dubit. 12. n. 76.

In like manner any one is at liberty, for necessary defence of himself as well as of those belonging to him, to arm himself against night-robbers, and those who beset the public roads in order to deprive any one of his property, and to kill them freely (1). This permission takes place in all sorts of violence and necessary defence, and may be extended to every one who attempts to deprive another of his life, so that he cannot escape without defending himself (2). And in like manner one may freely kill a thief whom one finds at night upon one's estate, and by day if he further intends to defend himself with arms, without being obliged to warn him by calling out; because it is not required by the proclamation of the States of Holland of the 16th December 1595; the 19th March 1614 (art. 7.); where it is allowed, in the following words: "For so far as any of the said thieves (being detected at night in the offence by a landlord or any of his family) shall be killed or wounded, we understand, that nothing shall be forfeited thereby" (3). Therefore, the laws permit us to withstand all violence (being under the necessity) with violence (4); in so far, that a husband, finding his wife in adultery, may kill her with the adulterer; as a father may the ravisher of his daughter, without being liable to any thing (5). This, however, does not agree with our manners, which fixed the punishment of adultery, and ravishment with will, to a fine (6), though it is still maintained by some; but whether and in what manner such offenders are to be punished among us, we shall state in the subsequent part of this work.

Suicide, whether and when punishable.

§ 12. With respect to the case of a person who kills himself, and wilfully causes his own death, whether and in what manner he is to be punished; this point is to be considered; viz. That the death of such is not punishable, unless it legally appears, that he designedly killed himself, out of malice after the commission of a crime, in consequence of a remorse of his con-

(1) l. 1. C. quando liceat unicuique sine judice se vind. l. 4. Cod. ad leg. Corn. de Sicar.

(2) l. 3. Cod. eod.

(3) l. 9. Ff. ad leg. Corn. de Sicar. & l. 4. § 1. Ff. ad leg. aquil. See further Clarus § homicidum. n. 47. Grotius de Jure Bell. lib. 2. c. 1. n. 12. Perez. ad tit. Cod. ad leg. Cornel. de Sicar. n. 42.

(4) l. 3. Ff. de Just. & Jure. Perez. ad tit. Cod. quando lic. unicuique sine jud. n. 3. See also Grotius, de Jure Belli, lib. 2. c. 1. & Inleyd. lib. 3. c. 33. n. 27, 28, 29. Christin. vol. ii. decis. 162. See likewise Cons. & Adv. vol. iv. cons. 11. n. 7. & cons. 40.

(5) l. 20. & seq. Ff. ad leg. Jul. de adult. auth. Si quis Cod. eod. l. 30. Ff. ad leg. aquil. Numbers, ch. xxiv. v. 7, 8. Clarus § homicid. n. 49. See further Couvarr. de matrimonio. part. 2. c. 7. n. 7. Less. de Just. & Jure, lib. 2. c. 9. dub. 5. Zypæ. Not. Jur. Belg. tit. de raptorib. virgin. in pr. Gudelin. de Jure Noviss. lib. 5. c. 18. vers. præter eas.

(6) Ut recte Notat. Groeneweg. ad l. Gracch. 4. Cod. ad leg. Jul. de adult.

science, to avoid punishment; but those who deprive themselves of their life, without being guilty of any previous crimes, merely from despair, are not considered as punishable (1), according to the great privilege granted by the Lady Maria of Burgundy, March 13th, 1476, to the people of Holland, and the grant of King Philip to those of Kenmerland, of the 24th March 1561; in which it is clearly said, that no officers should molest any person with respect to his body or property where one finds a person dead, under the pretence that such dead person had killed himself and deprived himself of his own life; unless it be legally found previously, that such person had deprived himself of his own life designedly and out of malice; and so it was determined on the 30th September 1616, in the cause between the guardians of the children of Peter Fransk Suydervliet against Abert Storm van Wena, doctor of law; and since the reformation it has always been so decided by the court of Holland. (2)

The punishment then of those, who after the commission of previous crimes, designedly deprive themselves of life, is, that their property is declared forfeited, and their corpse shall be dragged upon a hurdle, and hung to a gibbet. (3)

Those, who drown themselves, cannot be punished, but ought to be inspected.

§ 13. Those who have drowned themselves, or those who perish otherwise, or are found dead, may not however be carried away from the place where they were found, before proper inspection has been made by the magistracy of the place; to which is applicable what is said in the aforesaid privilege of Lady Maria, (art. 45.) and in the grant of King Philip to those of Kenmerland, given on the 12th of March 1455, (art. 3.) importing, "that one may draw any one out of water, whether alive or dead, without any forfeiture; but, if any person be found dead, in that case one shall lay again his feet in the water." (4)

Of the Punishment of Murder, in which several Persons are guilty.

§ 14. If a homicide be committed in fighting, in which more than one were accomplices, and it cannot be known by which of them the wound was inflicted, they are all punished for it discretionally, but with less severity than the common punishment

(1) Juxta l. 1. & 2. Cod. de bon. eor. qui mortem sibi consciv. & l. 3. in pr. & § seq. Ff. eod.

(2) See Cons. & Adv. vol. i. cons. 352. and vol. iii. cons. 142.

(3) See Handvesten in Zuid-Holland, p. 193, and p. 502. of the new edition of Oudenhoven; Cost. Antwerp. c. 16. art. 3. Gudelin. de Jure Noviss. lib. 5. c. 17. in fine. Zyp. Notit. Jur. Belg. tit. de bonis eor. qui mortem sibi consciv. Perez ad Cod. n. 3. Damhouder, Prax. Criminal. c. 88. n. 1. Grotius, de Jure Belli, lib. 2. c. 19. n 5. Rec. der Keuren & Costuym. tot. Amsteldam, c. 13. art. 6, 7, 8.

(4) See Groeneweg. de legib. abrogat. ad tit. Cod. de bonis eorum qui mortem sibi consciverunt. Handvest. van Kenmerland, pp. (mihi) 47. 64.

of death (1); unless they had all gone out with such design and had attacked the person slain, in which case they are all punished with the punishment of death (2). Besides this judicial punishment, the manslayer is bound to pay the funeral expences to the relations of the person slain, and also if any further loss or charges were occasioned by the crime, but not for the life, which cannot be appraised (3); excepting only that amends ought to be made to the widow, children, or others, who used to be maintained by the labour of the person slain, for the loss so sustained by them, by way of pension for life (4), to be computed according to the age of the person slain. (5)

Indemnity to Persons, who have suffered Murder, when and how to be given.

§ 15. And no distinction is made with regard to this, how the slaying had occurred; but it is sufficient thereto, that it had occurred through any person's neglect (6). The coachman or bargeman, therefore, are in like manner obliged to make compensation if any one happens to perish through their neglect (7); and so, if any one has a wild beast which was accustomed to do harm, and he had neglected to secure the same, and if any person happens to die in consequence thereof (8); and also those from whose house any thing has fallen or has been thrown, by which any person happens to suffer damage, or is injured or killed (9); which topic will be discussed in a subsequent chapter.

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(1) L. 1. § 3. Ff. ad l. Cornel. de Sicar. l. fin. Ff. Cod. junct. l. 5. Ff. de pœnis. See Andr. Gail. lib. 2. observ. 109. Damhouder, Prax. Criminal. c. 76. n. 24. Joan. Sande, lib. 5. tit. 9. defen. 5.

(2) Arg. l. 1. § 3. l. 7. Cod. ad l. Corn. de Sicar. l. 15. Ff. Cod. Andr. Gail. d. obs. 109. n. 10. Damhouder, Prax. Crimin. c. 67. n. 27.

(3) l. 3. Si quadrup. pauper. fecis. dicat.

(4) Juxta præscriptum. l. 68. Ff. ad leg. Falcid.

(5) l. fin. Ff. de his qui effud. § 1. Instit. de obligat. quæ quasi ex contract. Jul. Clar. 7. final. quæst. 58. n. 32. Grivell. decis. 25. Sande, lib. 5. tit. 9. defin. 5. in fin.

(6) l. 11. l. 44, 45. Ff. ad leg. Aquil.

(7) l. 8. § 1. Ff. ad leg. Aquil. § 8. Instit. eod. l. 29. § 2. Ff. eod.

(8) l. 40. l. 41. Ff. de Ædilit. edict. § 1. Inst. si quadrup. paup. fecisse dicat.

(9) Tot. tit. Ff. de his qui dejecerint vel effud.

CHAP. XXXV.

Of Crime against the Body.

[Grot. 3. 34.]

§ 1. *Crime against the Body defined.*
2. *How punishable.*
3. *Edicts and Penalties concerning fighting.*
4. *Fighting Duels antiently permitted.*
5. *Binding over to keep the Peace; what it now is, and what was the antient Practice.*
§ 6. *Duels and Combats at present highly punishable.*
7. *Injuring Parents, either by Words or by Deeds, highly punishable.*
8. *Resisting Officers, Messengers, and Doorkeepers, &c. in their official Capacities.*
9. *Indemnification to be made to wounded, maimed, and injured Persons.*

§ 1. CRIME against the body is any hurt or detriment done or caused to the body of any person, such as beating, maiming, drawing blood, wounding, and the like. (1) Crime against the Body, defined.

§ 2. The punishment of this crime in some places is very trifling; and only a pecuniary penalty, according to the ordinances and edicts relative to fighting, drawing blood, and wounding, antiently established for this purpose, which are still observed in many places, and especially in the country, where the same has not been clearly aggravated. How punishable.

§ 3. Antiently, if any one lamed another, it was fixed at five pounds of Holland, unless the lamed person had entirely lost a hand, a foot, or an eye; in which case it was fixed at ten pounds of Holland. Edicts and Penalties respecting Fighting.

Fighting with staves or prohibited weapons, and likewise drawing a knife or sword, was fixed at one pound; a blow with the fist, at ten shillings of Holland. (2)

Pursuant to the charters of Goyland and Amsteland, granted by Duke of Albert in the year 1387, these fines were a little mitigated. In Kenmerland, for a wound mentioned in the statute, of the length of a nail of two of the first fingers, a penalty of one pound of twenty-six stivers was to be paid; a black eye was indemnified for two shillings: the breaking of a bone, that

(1) l. 27. § 27. Ff. ad leg. Aquil.

(2) See Charters (Handvesten) of Count William, granted to Amsterdam in the year 1347. See also the Charters of the southern part of Holland (Handvesten van Zuid-Holland) p. 200, and pp. 258. & seq. of the new edition.

is to say, beating out a tooth where no flesh is attached to it, or so many bones as a wounded man loses from his head or his body, that one may hear them when thrown in a bason, the offender is to pay a fine of one crown for every bone; but the lord was to have no more than one pound. For depriving a person of a finger or a thumb, or an eye, or a tooth with flesh, so that it is entirely out, the offender is to pay a fine of ten pounds. A wound which goes through the trunk of the body, is to be considered nine wounds contained in the statute; but if it be through and through again, it is considered eighteen wounds contained in the statute. (1)

Pursuant to the penalties imposed for fighting, in the southern part of Holland of the year 1605, a wound of the head or other wound of the length of a joint and a nail deep, is fixed at ten pounds; larger or other deeper wounds, by which the wounded person was in danger of life, or when any one was made lame, or else when some violence was committed to any one, was fixed at ten pounds, besides arbitrary correction (2). In Zealand, whoever is wounded, so that the stab went through, it is to be computed at ten blows; for every blow five shillings, if he be not a nobleman; and if a nobleman, twenty shillings; and every *bone-blow* shall be reckoned for four blows upon the flesh. (3)

By the statutes of Leyden of the year 1583 (4), the drawing of a sword was fixed at three gilders; drawing out blood, six gilders if done by day, and nine gilders if after the night-clock had struck; a wound along one joint and a half mentioned in the statute, ten gilders if inflicted by day, and twenty if after the night-clock. But on the 1st September 1639, in an enlargement of the said statute, arbitrary correction was added thereto, or corporal punishment, according to the exigency of the case; and every one was further prohibited from drawing any knife or other weapon against another person in earnest, upon forfeiture of twenty-five gilders besides arbitrary correction or corporal punishment, according to the circumstances and enormity of the offence, were added thereto. (5)

Pursuant to the statutes of Oudewater, a blow with the fist was fixed at one pound; and when any person makes use of

(1) Handvesten van Kenmerland, p. 181.

(2) Keuren in Rynland, art. 83 & 84. Handvesten van Zuid-Holland, p. 435. & pp. 558 & seq. of the new edition.

(3) Keuren in Zealand, c. 4. art. 14. and c. 5. art. 5, 6.

(4) Art. 157 & 158.

(5) Niewe Keuren der stad Leyden, art. 171.

knives, sticks, canes, stones, or such other instruments, without wounding, two pounds; but if any one be wounded, or blood be drawn therewith, it was fixed at four pounds, not including the knives; and wounding with prohibited arms, such as daggers (1), bread-knives, or similar instruments, was fixed at ten pounds. (2)

At Amsterdam, Haarlem, and other places, in order to prevent all misfortunes, and to bridle the stubborn the better, the penalties upon drawing sword and knife were augmented to two and three hundred gilders, or other heavy punishment, according to the exigency of the case; and with regard to those who are unable to pay, it was enacted, that the guilty person should be conveyed to the house of correction or other workhouse, until he earns the said amount by his labour. (3)

Fighting Duels, antiently permitted.

§ 4. Fighting a duel upon a challenge, seems antiently to have been a matter of indifference, and permitted, as appears from certain old accounts of charges incurred in the combat fought between William van Leeuwen, residing at Alphen, and one Boudyn Jansz, residing at Delft, esquires, found in the account chamber of the county; which, on account of its antiquity, and the circumstances therein contained, is remarkable. The tenor of it is as follows:

William van Leeuwen challenges Boudyn Jansz to fight on the Monday following the second Sunday after Easter.

William arrives again at Delft, on May day, and speaks to the other with a pair of gloves.

William arrives at Delft on Monday, on Saint Odulphus's day, for the other challenge, also with a pair of gloves.

William arrives at Delft, on Monday, in the evening of Saint James's day, and challenges for the third time, likewise with a pair of gloves.

William comes to Delft, on Monday after Saint Giles's day, for the fourth challenge, and Boudyn receives the gloves, likewise a pair of gloves.

	£	s.	d.
Amount of charges, - - - -	18	0	1
To William van Leeuwen, and Kophase, his fencing master, given for their expences during			

(1) *Prismen* (literally bodkins) in the original.

(2) Keuren der Oudewater, art. 215.

(3) See Recueil van Keuren & Costuymen tot Amsteldam, c. 11. art. 24, 25. Keuren van Leyden, art. 170.

	£	s.	d.
the last week, when he was learning to fence, for their daily wages; for every hour in the day sixpence, amounting to twenty-one schilden (shields) - - - - - -	6	1	4
Item, for ten ells of red orange cloth, which William, and Kophase, his master, had for their camp coats, each ell ten shillings sixpence, amounting to - - - - -	5	5	0
Item, for two back-swords (*bockswarden*), and one shield (*bocklaar*), used in learning to fence -	1	4	0
Item, for twelve pairs of gloves used during the last week, every hour a pair in the week they were learning, every pair eight-pence, amounting to	0	8	0
Item, for a messenger sent from Delft by land, to the Viscount, giving him notice to have the circle made, for his reward - - - -	0	2	8
Item, to Geerl, of Heer Jansz, clerk, and Gerret van Woerden, the messengers of my lords, for a journey to Leyden on horseback, for the measure of the back-swords and their appurtenances, for expences, for every night twenty-two pence, amounting to - - - -	0	14	8
Item, for three girdles used in the combat, amounting to - - - - -	1	0	0
Item, for the sword used in the combat, paid by Kophase - - - - - -	2	13	4
Item, to the messenger who fetched it from the Hague to Leyden, his wages - -	0	0	0
Item, for a pair of cloth breeches used in the combat fought - - - - -	0	6	4
Item, to William van Veen and Jan Bogge, for expences incurred by them at the Hague, when they proceeded to the council, and to Messrs. Janne, to enquire where the combat was to be fought, whether at Delft or at the Hague, and to enquire from the watchmen of Griet who would watch the circle - - - - -	16	0	0
Item, to William van Leeuwen, for expences incurred at the Hague during the last week, when he fought, being the amount which he was in want of, independent of his daily allowance, with Kophase, his master - - - -	1	0	0

	£	s.	d.
Item, for the buckle and shield to Mr. Simon, the image-engraver at Delft - - -	2	8	0
Item, for a pair of gloves used when he fought the combat - - - - -	0	1	4
Item, for a camp chair - - -	0	13	4
Item, to Jan de Vos of Leyden, the interpreter -	0	0	0
To offering money and confession money, given to the parson and the sexton, who said the mass when he was going to the camp - -	0	0	6
Item, to the poor, for praying to God in church -	0	8	0
Item, to the footman of my Lords the Counts, who brought a horse from the Hague, used by the champion to ride to the circle, for drink money to the said footman on his return home - -	0	6	8
Total -	£ 56	19	0

Which being added together, according to the present computation and enumeration (one Dutch pound being reckoned at fifteen stivers, one Dutch shilling for one blank (1), or twelve of our pence and twelve deniers for one stiver), will amount to forty-two gilders thirteen stivers and fourteen pence. The above named William Van Leeuwen and Boudyn Jansz were, in the year 1363, chief inspectors of dikes, &c. of Rynland.

Binding over to keep the Peace; what it now is, and what was the antient Practice.

§ 5. The practice described in the preceding section afterwards became not only obsolete, but a severe punishment was also established and introduced against those who challenged others to fight, in order to prevent similar mischief; and whenever any dispute arose between two or more persons, from which any offence was apprehended, upon a complaint preferred, or otherwise *ex-officio* if it be known, such persons were required to keep the peace by the judges of the place; and they were directed on behalf of government, on pain of imprisonment or other heavy penalty, to keep the peace until the difference should be settled or decided; which was at first introduced by the charter granted by Philip Duke of Burgundy to the countries of Holland and Friezland, on the 9th August 1446; viz. "That whenever in the said countries any fighting occurs "between any persons, of what state or condition soever they "may be, from which killing, lameness, or wounds are the "consequences, the relations of both parties, who are not also "concerned, nor have been on the field fighting, shall, imme-

(1) A sort of coin.

" diately after the fighting, have a good established peace during " six weeks, in order that every one of both sides, who is " desirous of peace, may cause peace to be sought for, and do " as they shall deem it necessary. And should any one on " either side be wronged within the said six weeks, it shall be con- " sidered as a violation of the peace, and as if it had been done " in violation of a good peace subscribed to." In which charter it is moreover directed, that in all cities of the said country, where proclamations are usually issued, the said ordinance should be proclaimed, for the purpose of being better observed; in consequence of which, at many and several places, good provisions have been made by proclamations, concerning binding over to keep the peace (1). The statutes and customs of the city of Leyden, of the year 1400, enact, " that of all disputes occurring within or without Leyden, between the burghers, from whom peace is required; or where people were wounded, or were left without wounds, such peace should last as long as the period for which it was required and given, whether they die or live, unless within that period a reconciliation takes place, when the period of peace will be expired." Which matter, as well as the manner of binding over to keep the peace, is subsequently explained by the said statutes of the year 1545, at the end, and of the year 1583 (2), " That every one of the court, in general, may require such peace, and bind people over to keep it, or to receive the same, being required thereto or not, in the manner following:

" I exhort you to keep the peace of my gracious lords and " the cities; and command you to observe the same from the " present time, until the next following law-day, during the " whole day; and this you are to do upon criminal and civil " correction of the justice."

And those, who were so laid under the peace, were obliged to proceed immediately to their places of abode, or, if a stranger to his inn, without going out of it: and if a person wished to lay another under the peace whom he could not find nor reach, it was announced, either at his place of abode or opposite his door, to his neighbours, in the presence of two witnesses. (3)

(1) Vitle Handvest. & Costuym. van Zuid-Holland, pp. 464. 466. & 475. Handvest. & Cost. van Kenmerland, p. 48. Rubr. van vrede der onschuldige magen. Keuren in den lande Voorn, art. 110. & 123. Recucil der Costuym. tot. Amsteldam. c. 12.

(2) Art. 63.

(3) Cost. Amst. c. 12. Cost. van Zuid-Holland, p. 194. et seq. Land-regten & Gewoonten des Graafschaps Zutphen (local laws and customs of the county of Zutphen) tit 4. where the same is also in use, Regten & Gewoonten der stad Deventer (laws and customs of the city of Deventer) vol. iv. tit. 2.

Duels and Combats at present highly punishable.

§ 6. But since severe provisions were made in Holland against duelling and reciprocal challenges, and against whatever could give the least cause thereto; viz. striking, throwing, scolding, slandering, &c.; the mode of laying and keeping under peace above described has become unnecessary and obsolete. (1)

Injuring Parents, either by Words or by Deeds, highly punishable.

§ 7. The punishment of the crime against the body by fighting or throwing, is more severe and extraordinary if the crime be attended by some other evil deed, namely; if attended with violence, design and intention to deprive any person of life, and the like. And in like manner a son, who strikes his father or mother, or otherwise injures by words or deeds, is punished at discretion with greater severity, according to circumstances (2); especially if the complaint be preferred by the parents themselves against their children; when it may be extended so far as corporal punishment, and even to life, according as the circumstances of the crime may require (3). The same practice was also in use according to the Roman laws; but as personal slavery (which was in force among the Romans) does not exist among us (4), this law does not extend to a servant that had either struck or slandered his master.

Resisting Officers and Messengers, Doorkeepers, &c. in their official Capacities.

§ 8. In like manner those are punished with greater severity according to circumstances, who maltreat, oppose, or molest any officers, messengers, door-keepers, or other public persons, on account of their office; especially those who bear any office of respectability. (5)

Indemnification to be made to wounded, maimed, and injured Persons.

§ 9. With regard to the amends or compensation to be made to the wounded, mutilated, or injured persons, although no one is understood to be master of his own joints, and no price can be set upon the body of a human being; yet such a person is entitled to receive an indemnification of the surgeon's bill, and the loss and damage sustained by him, both during the cure as well as afterwards, if the defect be continual; and also for pain, smarting, and disfiguring of the body, if it be desired, according to discretion. (6)

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(1) See the Proclamation of Prince Maurice against duelling, issued in the year 1610; and the Proclamation of the States of Holland of the 20th March 1657. See also Keuren in Zeland, c. 4. art. 18.

(2) l. 1. § 2. Ff. de obsequiis parentibus and patron. præstand.

(3) See Clarus § fin. quæst. 83. n. 11. vers. & ita illam Ægid. Boss. practic. Criminal. tit. de injuriis, n. 30. Concerning this subject an eminent advice is contained in the Cons. & Adv. vol. iv. cons. 30. given by Mr. J. Moons.

(4) See Book I. ch. ii. § 1. p. 5, 6.

(5) See Cons. and Adv. Rotterdam, vol. iv. cons. 96.

(6) See Grotius, Inleyd. lib. 3. c. 34. in pr. Groeneweg. de legib. abrogat. ad l. ult. Ff. de his qui effud. vel dejecer.

CHAP. XXXVI.

Of Crimes against Natural Liberty.

[Grot. 3. 35.]

§ 1. *Violence, what, and how punishable.*
2. *Of Rape.*
§ 3. *Of Burglary.*
4. *Ravishing and forcible Abduction.*

Violence, what, and how punished.

§ 1. BY virtue of natural liberty, every one has a right that no one should do him any wrong or injury. (1)

The crimes, by which any one suffers wrong or injury against his freedom, are all violence wrongly done to any one.

Violence is done either with arms in hands, and with the assistance of men, or without arms. (2)

Rioters, and those who commit public violence, are commonly punished with the sword; others with lesser punishment. However, considering that such a crime is never or very seldom committed *singly*, but is mostly accompanied or connected with one or more other crimes; the punishment is for the most part uncertain, and is regulated according to the consequence or importance of the crime connected with it (3). And this crime is properly considered to be committed by every one who does assault another with intent to rob him of what is his, either with or without weapons, in or on the high road, on the land or at sea; which is not always punished with sword and the gallows, but likewise often with fine and other severer punishment, according to circumstances. (4)

Of Rape.

§ 2. Rape is punishable by the neck or with the sword (5), and the person constuprated has a right to reparation according to circumstances. (6)

Although the committing of a rape is prevented or defended, they who assault any woman with intent to commit such

(1) l. 1. § Inst. de injuriis. l. 5. Ff. eod.
(2) Tot. tit. Ff. de vi publica aut privata.
(3) See Damhouder, Prax. Criminal. cap. 100. num. 8. Perez. ad tit. leg. Jul. de vi. in fine. Consult. & Adv. part. 1. cons. 320. in fine. Clar. § sin. quæst. 83. n. 4.
(4) Vide Gudelin. de Jure Novissimo, lib. 5. c. 19. vera. videamus.
(5) l. 1. § 2. de Extraord. Criminib. l. 29. § ult. ad l. Jul. de Adult. Neostad. Cur. Holland. decis. 47. in fine. Damhouder Prax. Crimin. c. 92. n. 3. Deuteron. ch. xxii. v. 25. Zypæ Notit. Jur. Belg. ad leg. Julian. de adulter. vers. Stupro.
(6) Clar. § Stuprum. n. 3. Papon. lib. 22. tit. 9. art. 9. Damhoud. d. c. 92. n. 6. Neostad. Supremæ Cur. decis. 51. Sande, lib. 2. tit. 1. defin. 10.

rape, are nevertheless whipped and banished (1). Other cohabitations or constuprations without violence, are among us scarcely liable to punishment (2); only, that if the spinster is actually violated, the violater ought to marry her, or compensate the deflouring of her with money according to the circumstances of both parties (3); unless a very young girl in her innocence is grossly misled or cohabited with, by a guardian or other person, to whose discipline and care she is recommended, in which case they are punishable by whipping, banishment, and confiscation of property (4). Upon which ground at Haarlem, a schoolmaster, who had defloured one of his scholars, was whipped and banished, according to the testimony of Groenewegen (5). And at Leyden in July 1655, William Pas (who was a married man, and had defiled a shop girl at his house), over and above the common fine and punishment of adultery, was banished out of the fort for several years.

Of Housebreaking.

§ 3. Burglary or housebreaking, publicly done, is punishable by the cord.

Ravishing and forcible Abduction.

§ 4. He who forcibly carries away a daughter, is subject to lose his life (6). But if it be done with her consent it is not punishable. (7)

All accessaries, or such as have assisted in carrying away, are punished with the same punishment (8). So also are those who do assist with their counsel and advice, though mostly with less severe and smaller punishments (9); of which there is a remarkable and well known example, in the abduction of Katryn de Orleans, by Hans Diederik de Mortangie, committed at the Hague in April 1664; against whom uncommon proclamations, directed to all princes, were issued, with the offer of a reward of two thousand rix-dollars for the apprehension of himself, and of two hundred rix-dollars for the apprehension of his accom-

(1) Sande, lib. 5. tit. 9. defin. 11. Arg. l. 1. Ff. ad l. Corn. de Sicar.

(2) Arg. C. Scienti 27. Extr. de Reg. Jur. in 6.

(3) See Grot. Inleyd. lib. 3. c. 35. vers. tit. beslapen (of Cohabitation).

(4) See Boss. Prax. Criminal. tit. de Coïtu Damnat. n. 67. Damhoud. Prax. Criminal. c. 94. n. 8, 9.

(5) Ad tit. Cod. si quis eam cujus tutor fuer. corrupt.

(6) l. unic. Cod. de raptu virgin. Papon. lib. 22. tit. 6. art. 8.

(7) Cap. penult. extr. de raptor. c. 49. cons. 27. quæst. 2. c. 95. n. 18. c. 5. cons. 36. quæst. 2. Arg. l. 3. § 5. de lib. Hom. exhib. c. scienti 27. et ibi. Din. et Pecc. de Reg. Jur. in 6. Hypol. de Marsil. cons. 61. n. 21. et seq. Bajard in addit. ad Clar. § Raptus, n. 16. et seq. Zanch de matrimon. lib. 7. disputat. 12. n. 10. Mascard. de probat. conclus. 1260. n. 28. Rittershus. de Differ. Jur. lib. 6. c. 5. vers. deinde. Gomez. ad l. tauri, 80. n. 44. Consult. & Adv. part 2. cons. 293. Damhouder. Prax. Criminal. c. 95. n. 18. Anthon. Matth. de Criminib. lib. 48. tit. 4. c. 2. n. 12. Keuren in Zeland c. 4. art. 6.

(8) d. l. ult. § 2. verb. vel quicunque opem Cod. de raptu virginum.

(9) Arg. Novell. Leon. 53. in verb. Et si non nuptæ.

plices; upon which he escaped from Kuylenburg, with the assistance of Mr. Van Langerak, who was therefore, on the 20th May 1664, dismissed from his estate and situation of captain of the horse, and for five years was banished from Holland and West Friezland; and who, being again arrested at Bremen, at or about the time he was to be delivered over, escaped in an unexpected manner; but his servant, who was an accomplice, was sentenced on the 13th May 1664, to be hung on the gallows, which sentence was accordingly executed: and the coachman, on account of his not being acquainted with the law, and other excuses that he was forced to it, was tied to a post and whipped, and banished, besides having all his property confiscated.

The ravished daughter may marry her ravisher (1); but it is not clear that the crime is annulled. (2)

Incendiaries, and those who wilfully break open the public dikes and dams, are considered to offend against the high authorities and the common interest, and are therefore punished with greater severity, as will be shewn infra, ch. xxxviii.

CHAP. XXXVII.

Of Crimes against Honour and Good Name.

[Grot. 3. 36.]

§ 1. *Slander, what; and how to be compensated.*
2. *Of Infamous Libels.*
3. *An Action for Injury, within what time lost.*
4. *Of Injury, or Crime against Honour and good Name, by Deed.*
5. *Ravishment.*
6. *Compensation to be made for defiling a Woman, and how it is to be proved.*
§ 7, 8 *Adultery, how committed, and how to be punished.*
9. *Of Incest.*
10. *Of Sodomy.*
11. *Public Fornication, how to be punished.*
12. *Concubines.*

NEXT to life, nothing is more precious than our honour, and the good opinion which another has of us; in which we are often injured by others, either by words or deeds.

(1) Cap. ult. extr. de Raptorib. Rittersh. de Different. Jur. lib. 1. c. 21. Anth. Math. de Criminib. lib. 48. tit. 4. c. 2. n. 16.

(2) See Groenewegen ad l. unic. § 1. et 2. Cod. de raptu virgin.

§ 1. Slander is the damaging or injuring of any person's honour by words; by word of mouth, or by giving any information in writing in his presence or absence, and either secretly or publicly (1). This offence is usually repaired by honourable and profitable amends. Slander, what; and how to be compensated.

Honourable amends is, when the slanderer owns his guilt, prays God and justice for forgiveness, and declares that he knew nothing of the person of whom he had slandered, but what was honourable and virtuous. (2)

Profitable amends consists in the following particulars: viz. the slandered person stipulates for a certain sum of money, offering an oath that he would not suffer similar slander or injury for so much or more. (3)

Which amount is mostly desired for and on behalf of the poor, or otherwise, according to the judge's discretion, is adjudged to the poor; so that the sheriff or the public has no peculiar right to an action of injury or slander, or to institute a criminal suit on that account, unless it be an uncommon calumny, in which the public is interested on account of the consequences; on which account banishment or other heavier punishments are applicable (4). But at some places the bailiff has also a right to a certain trifling fine for slandering, as in Rhineland, to a fine of ten gilders (5); but no one is prohibited from returning injuries by word of mouth with injuries by word of mouth; neither does any action arise therefrom for either party, and such abusive words are considered as adjusted and finished. (6)

§ 2. Against infamous libels or defamatory writings several proclamations have been issued at different times; the latest of which (dated July 7, 1615, December 22, 1618, January 16, 1621, and May 4, 1624), contain a penalty of one hundred gilders for the first time, and for the second time double that amount, together with corporal punishment. Of infamous Libels.

§ 3. The action arising from slander or injury is lost by the silence of one year (7); but this is only understood of slander or injury done by words, but not by deeds, such as blows with An Action for Injury, within what Time lost.

(1) l. 1. § 1. l. 5. § 9. l. 15. § 2, 3. Ff. de injur.
(2) Zypæ Notit. Jur. Belg. tit. de injuriis Papon. lib. 8. tit. 3. art. 18. Papegay, p. 94. et seq.
(3) § 7. Instit. de injuriis & DD. allegat.
(4) See Joan. à Sande, lib. 5. tit. 8. def. 5. Carpzovius defin. forens. part 4. constit. 42. defin. 2.
(5) Cost. van Rynland, art. 14.
(6) Barbos. Loci Comm. l. 9. c. 62. § 8.
(7) Lib. 5. Cod. de injur. Neostad. Cur. Holland: decis. 27.

the first, or similar offences, against which no prescription lies until after the expiration of thirty years. (1)

Of Injury, or Crime against Honour and good Name, by Deed.

§ 4. Crime against honour and good name by deed and by works or injury, consists of all crimes by which another is prejudiced in his honour and good name.

This occurs in different ways; the principal of which consists of dishonour against the body and members, namely, the ravishing of a woman, dishonouring and adultery, incest and copulation against nature, and whatever belongs thereto.

Of Ravishment.

§ 5. Woman-ravishment is the ravishing and dishonouring of a woman by violence and against her will, of which we have spoken in the preceding chapter: the same is punished with death; and to the ravished belongs indemnification, according to the circumstances of both paries.

Compensation to be made for defiling a Woman, and how it is to be proved.

§ 6. But whoever dishonours or deflours a girl without violence, is only obliged to marry her, or to make amends and repairs in money for deflouring her, according to his choice and the circumstances of both parties, in a very strict manner, with so much as the girl would require more as a dowry on account of the deflouring in order to marry her with her equal (2); and so it was judged in the court of Holland in the case of Ellert Vom against Mrs. Geertruyd Schepels, on the 10th May 1616.

If the woman be with child, the man must pay the charges of child-bearing (3); but the child is to be maintained at the common expence of both, unless one of them had no means or be unable to do it (4); but an action for deflouring a woman, and the charges of child-bearing, is prescribed against in five years. (5)

Therefore, a woman is not credited when she declares that a person has lain with her, even if she had declared it in labour, should such a person deny it (6); provided he is willing to purge

(1) Cur. Holl. decis. 13. Sande, lib. 5. tit. 8. def. 3. Mysing. cent. 1. obs. 84. & cent. 5. obs. 77.

(2) Arg. l. 60. 69. § 4, 5. Ff. de Jure dot. Exod. xxii. 16, 17. Deut. xxii. 28, 29. c. 1 & 2. extr. de adulter. Surd. de aliment. tit. 1. quæst. 10. n. 30. Christin. ad Leg. Mechlin. tit. 18. art. 6. n. 8. See Clarus § Stuprum. n. 3. Papon. lib. 22. tit. 9. art. 9. Damhouder, c. 92. n. 6. Neostad. Supr. Cur. decis. 52. Sande, lib. 2. tit. 1. defin. 10.

(3) Christin. ad leg. Mechl. tit. 18. art. 6. n. 3.

(4) In what manner the reparation and amends are to be computed, see Mehoch. de Arbitrar. Jud. cas. 288. n. 16. in fin. & seq. Covarruv. de Sponsal. part 2. c. 6. n. 19. Lessius de Justitia et Jure, lib. 2. c. 10. dubit 2. n. 11.

(5) Cons. Bat. vol. 1. cons. 148.

(6) Vide Grot. Inleyd. lib. 3. c. 3. n. 12. et seq. Tessaur. Dec. Pedemont. 3. concl. 6. n. 4. Alex. Cons. 157. circa primum. lib. 5. Bald. cons. 437. lib. ult. Boër. dec. 299. Cons. & Adv. Amsteldams, vol. iii. cons. 156.

himself by oath, and to declare that he had never lain with her (1), especially if she had not previously sworn the child to be his; and so it has often been determined by the court. But if it be known that he had lain with her, the woman is credited in pointing out the father (2), although he owns that he had lain with her only a month or a year previous to her delivery (3). So it was often understood by the court and the high court in Holland, that a young man, being ready to declare by a dictated oath that he had not dishonoured or carnally known the girl, and the girl being also willing to confirm the contrary thereof, the declaration of the young man properly made is admitted in preference to the declaration of the girl (4). This takes place particularly when a woman says that she is with child by a married man. (5)

If any one boasts that he has lain with a girl, merely for the purpose of injuring her thereby, he is punished at the judge's discretion, independently of his making amends for the injury done to her. (6)

Adultery, how committed, and how to be punished.

§ 7. Adultery is the dishonouring of a man's wife; which occurs, when a married woman copulates with another man out of marriage, whether he be also a married man or a free person; but, according to the written laws, a man commits adultery only with another married woman (7); but according to the divine and ecclesiastical laws no distinction is made with respect to a man (8), which are followed by us. By the Romans adultery was punished with death (9), which sentence is still inflicted in Germany; though among us it is corrected by disgracing, banishment, and pecuniary penalty in the following manner. (4)

§ 8. When a married man is caught in adultery, either with a married or unmarried woman, or an unmarried man with a married woman, such man is declared to be actually infamous and perjured; and he forfeits his office and rank, if he has any, and is moreover declared to be incapable of serving in any rank or office within these countries or cities. And if the adultery had been committed by a married man with a married

(1) Sande, lib. tit. 10. def. 2. Christin. ad Leg. Mechlin tit. 18. art. 5. Cost. Antwerp tit. 45. art. 5. Gail. lib. 2 obs. 97. n. 12. Faber. ad tit. Cod. de adult. def. 6.

(2) Christin. d. tit. 18. art. 4.

(3) d. art. 4.

(4) According to J. Vermeren and J. Goes, contained in the Cons. and Adv. Rotterdam, vol. iii. cons. 87.

(5) Antons. Fab. ad Cod. tit. de testibus, defin. 49.

(6) Sande, lib. 5. tit. 8. def. 5.

(7) l. 6. § 1. l. 34. § 1. Ff. de adult. & l. 101 l. 225. Ff. de verb. signif.

(8) See Matt. v. 27. et xix. 9. Marc. x. 11. Canon. nemo. 4. caus. 31. quæst. 4. Canon. non mæchaberis. 15. Canon. præcepit. 19. caus. 32. quæst. 5.

(9) l. 30. in fin. Cod. ad l. Jul. de adulter. l. 18. Cod. de Transact. § 4. Instit. de public. Jud.

(4) Van Leeuwen, Censura Forensis, lib. 5. c. 37.

woman, they are both, independently thereof, banished from these territories for the period of fifty years; but if the adultery had been committed by a married man with an unmarried woman, the man, besides losing his office, forfeits a fine of one hundred gilders for the first time, and for the second he is banished for the period of fifty years, and pays a fine of two hundred gilders; and according to the latter proclamation, each party also forfeits one thousand gilders. These fines were divided into four, by the proclamation of the 11th September 1677. And the unmarried woman is to be confined upon bread and water, for the first time, for the period of fourteen days, and for the second to be banished from the country for the period of fifty years.

Further, if an unmarried man commits adultery with a married woman, he shall also be confined upon bread and water for the period of fourteen days, and also forfeit a fine of one hundred gilders for the first time, and for the second be banished for life. Besides which penalties the injured party, whether man or woman, reserves his right against the adulterer, either for a separation of the marriage, or otherwise for damages or correction, according to the laws (1), in the following manner; viz. the adulterer forfeits for the benefit of the party injured, whatever he would have acquired from the property of his consort, as well according to the local law, as by ante-nuptial contract or otherwise (2). And so it was decided by the court of Holland, in the case of Albert Wierd against Anna Pietersz. on the 19th February 1609. (3)

According to the written laws, a man who detected his wife in adultery, was allowed to kill her, together with the adulterer; and a father might kill the ravisher of his daughter, without penalty (4); but it is a question whether it ought still to prevail.

Clarus is of opinion, that it *ought* to prevail still (5); but as such toleration does not agree well with the grounds of our government, and as it would appear hard and unjust to the mildness and proportioned equality of our conutry and people,

(1) See Polit. Ordonn. art. 15, 16, 17, 18. and of Zealand, art. 30.

(2) See Polit. Ordonn. art. 18. in verb. ander sints na regten, junct. Novell. 117. c. 8. § 2. et c. 9. § 4. Cost. Antwerp. c. 41. art. 29, 30, 31, 32. Damhouder, Prax. Criminal. c. 89. n. 28. Christ. ad Leg. Mechlin. tit. 2. art. 13. n. 11. 13. Couvarr. de Sponsal. part. 2. c. 17. § 6. n. 1. 4. Papon. lib. 22. tit. 9. art. 1.

(3) Vide supra, ch. xxiv. § 10. p. 424. and book i. ch xv. § 1. pp. 83, 84.

(4) l. 20. et seq. Ff. ad leg. Jul. de adult. auth. Si quis. Cod. eod. l. 30. Ff. ad leg. Aquil.

(5) § homicidium n. 49. Grotius, Inleyd. lib. 3. c. 33. in fine. Cons. & Adv. vol. i. cons. 331.

such an occurrence is considered by others with more reason as a misfortune; and though an adultery with another man's wife, and a ravishment of another person's daughter (1), in consequence of the innate passions, are not to be contemplated with good eyes, yet such a deed is justified, viz. that it ought not to be punished exactly with the common punishment of murder, but with an inferior punishment, yet it ought not to be entirely acquitted or tolerated (2). And it would be more certain to petition for abolition or pardon for the same, which would be easily granted.

A case in point occurred lately in the person of Jan Joostensz Bax, residing at the manor of Voorschoten, who coming home after midnight, and finding a certain Christian Semartin his neighbour, also a married man, with his wife in bed (of whose adulterous conversation there had been great suspicion), driven to rage, and being highly provoked, assaulted the said Christian Semartin and wounded him in such a manuer that he died thereof soon after; and being apprehended on that account by the bailiff of Voorschoten, and while abolition or pardon was prayed for on his behalf from the States of Holland, he was released by the nobility of the said manor of Voorschoten, upon bail, after taking the advice of lawyers, on the 26th January 1665, and until now he has been left free and unmolested; so that therein the written laws were mostly followed, and the aforesaid deed, according to the example of Phineas (3), was held to be good and unpunishable.

§ 9. Incest is a copulation of two persons, who on account of their being related by blood or affinity, may not enter into matrimony together, whether such copulation takes place in marriage or out of it. Of Incest.

Those who are detected therein are punished in the same manner as adulterers (4). But it is doubtful whether, as we have mitigated the punishment of adultery to a pecuniary penalty and disgrace, that punishment ought also to prevail. Groenewegen (5), seems to desire that it should still be punished in the same way as adultery. But I would understand that incest ought to be punished with greater severity than common

(1) Arg. l. 38. § 8. Ff. ad Leg. Jul. de adult.

(2) Ita tenent Gudelin. de Jure Noviss. lib. 5. c. 18. vers. præter, circa fin. Perez. ad Cod. tit. ad leg. Jul. de adulter. n. 23. Anthon. Math. de Criminib. lib. 48. tit. 3. c. 7. n. 15. Christin. ad leg. Mechlin. tit. 2. art. 13. n. 19.

(3) Numb. v. 6. et seq.

(4) Gloss. et DD. ad L. 38. Ff. ad leg. Jul. de adult.

(5) De Legibus abrogat. ad l. 6. Cod. de incest & inutilib. nupt.

adultery; and that the mitigation of the punishment in adultery may not be extended to equal or heavier cases like incest, without an express law; particularly as the political ordinance (art. 18.) expressly enacts, that all punishments and penalties contained in the imperial and written laws against ravishment, dishonouring, incest, and the like, were to remain undiminished and unviolated, especially when it is committed in adultery, as it commonly happens (1). And so on the 19th November 1612, Cent Adriansz, who had lived with his mother in adultery and incest, was condemned by the court of Holland to be whipped and banished, with confiscation of all his property.

Of Sodomy.

§ 10. Wicked and bestial intercourse of men with men (*latine, sodomiticum scelus*) is punished with fire; and such persons are burnt alive to ashes. (2)

But with some, who treat this crime with somewhat less severity, they are first hung, and then burnt (3); whereof we have seen an example in our time at Rotterdam.

In the year 1686, such offenders were suffocated in a tub of water in gaol, both at Utrecht and also at Amsterdam, upon the advice of the advocates Buys and Ypelaar. But this evil deed (as Graswinkel (4) denominates it), broke through and prevailed in such a degree in the year 1730, that the States of Holland, on the 21st July in that year, issued a proclamation against it, and enacted, that the punishment should be inflicted publicly, before the eyes of the people, in order to deter them; and about forty were punished in a few months within these provinces, with death, but in different ways. (5)

But if any one be found to have had connection with a beast, he together with the beast are burnt without excuse. (6)

Public Fornication, how to be punished.

§ 11. The dishonesty and unchasteness which may further be committed between any persons, cannot be well punished publicly, except that public prostitutes who copulate with any one without distinction, for the sake of foul gain, and those

(1) d. l. 38. Ff. ad leg. Jul. de adulter. l. 5. Ff. de question. & arg. l. unic. Cod. de rapt. virgin. See Damhouder, Prax. Crimin. c. 96. n. 4. Math. de Criminib. tit. de incest. c. 6. n. 5, 6.

(2) Damhouder, Prax. Crimin. c. 96. n. 12. Gudelin. de Jure Noviss. lib. 5. c. 18. vers. transeo. Clarus § Sodomonia, n. 4. Papon. lib. 24. tit. 10. art. 6. Argent. ad Consuetud Britt. artic. 588.

(3) Ut tradunt Guenoys in addit. ad Imbert. Pract. Judiciar. lib. 3. ch. 32. n. 31. Autumn confer. du droict. franc. ad l. 31. Cod. ad leg. Jul. de adulter.

(4) Van de Oppersteman, (on the Supreme Power) vol. ii. p. 328.

(5) For an account of the number of persons so punished, together with those summoned and banished, see the Europische Mercurius of that year.

(6) Levit. xx. 15, 16. Gudelin, loco supra citato. Damhouder, c. 96. n. 14. & 15. Perez. Cod. ad leg. Jul. adult. in fin. Clarus § fornicatio, n. 27. Papon. lib. 22. tit. 7. art. 1.

who for the purpose of having intercourse with them, endeavour to seduce the children of honest parents, are punished according circumstances, and turned out of the country or city (1). In many places, according to the example of Italy, Spain, and other countries, public prostitution was antiently connived at, but as abominable; and that foul trade was confined to some corner or other, publicly and notoriously, without the prostitutes being allowed to reside any where else; which, to prevent the exposition of those who to their shame and disgrace frequented the same, was at that time deemed sufficient, and not adviseable to be further prohibited. In the antient statutes of the city of Leyden, of the year one thousand four hundred, and previous to it, we find the following enactment; viz.

" That any wench, leading a public life at Leyden, should " reside at two places; namely, the one place beginning from " the south side of the fortification from the gate of the Hague, " as far as the ditch of Jan van den Wouden, which is called " *Schelu Truyden*, or the Green Hares Ditch, and further " behind the ditch Van den Duelen (where they live with their " whoremasters), as far as the fortification within that square. " And the other place or place of abode they shall have " within those empty premises behind Codden, beginning from " the corner of the fortification where Truytjen Trompers used " to reside, along that side from Codden Lane, as far as Saint " Nicholas's Lane, and further from those sides of the Miracle " Lane, and no where else. If any wench, leading such public " life at Leyden, resides any where else, except within those two " places aforesaid, such wench shall forfeit to the lord three " thousand stiens (2), and on behalf of the city three thousand " stiens, or twenty-four blows with the ferule for every thousand, " and shall moreover work at the fortifications of the city."

§ 12. Whoever cohabits with another out of lawful marriage, in all probability conversing like married people, they shall, for the first month that they keep house or live together, forfeit each a fine of fifty gilders; for the second month one hundred; and for the third month two hundred; and for so much longer as they live together, they shall be banished for the period of ten years from the country of Holland and Friezland, and shall further be fined according to the circumstances of the persons. (3) Of Concubines.

(1) See Damhouder, Prax. Crimin. c. 89. n. 43, 44. & c. 90. a. 1. Christin. ad Leg. Mechlin. tit. 2. art. 14. Clarus § fin. quæst. 68. n. 23. Gomez. ad leg. tauri. 8. n. 73.

(2) A certain coin, antiently current.

(3) See Polit. Ordonn. art. 3. Polit. Ordonn. of Zealand, art. 29. Christin. vol. iii. dec. 144. n. 3. Zyp. et Acton. ad tit. de concubit.

CHAP. XXXVIII.

Of Crime against Property, and of Theft.

[Grot. 3. 37.]

§ 1. *Theft defined.*
2. *Of Robbery.*
3. *Of the Punishment of Theft, and whether it may be punished with Death.*
4. *Of Child-stealing.*
5. *Of stealing Cows, Horses, or Sheep.*
6. *Theft of Instruments and Tools belonging to Husbandry, how to be punished.*
7. *Theft of Trees and Fruits of the Field.*
8. *Thieves in Gardens, how punishable.*
9. *Of Pickpockets.*
10. *Of Incendiaries.*
11. *Piercing or breaking of Dikes, &c. how punishable.*
12. *Punishment of those who harbour Thieves.*

NEXT to life, body, honour, and good name, (by violating which honesty is mostly prejudiced) follow, among those things which are dear and valuable to us, the goods which we possess in property.

Crime against or concerning property, consists of all deeds whereby another is defrauded or prejudiced in his property, which occurs in many ways: but what especially is to be reckoned as crime, are such deeds whence (besides the indemnification of loss or injury committed) arises a peculiar punishment, to which (among others) all thieves and robbers are especially subject; and likewise those who by false or other bad means seek to rob another of the property belonging to him.

Theft defined. § 1. Theft is a secret and deceitful transaction and detention of another person's property (1).

Of Robbery. § 2. Robbery is public theft blended with violence. (2)

Of the Punishment of Theft; and whether it may be punished with Death. § 3. Mere theft was not punished by the Romans with greater severity than the restitution of twice or four times the value to the person from whom any thing was stolen (3); but afterwards, the complaint and prosecution for crimes became with us a general office of the county; and the punishment of crimes, on account of the varying circumstances of cases, times, places, and occasions, was left more and more to the discretion of the secular

(1) § 1. Inst. de oblig. quæ ex delict. Whether any one stealing from distress for want of food is to be exempted from punishment may be seen in Vinnius ad § 1. de oblig. quæ ex delicto, n. 4.

(2) Pr. Instit. de vi bonor. raptor.

(3) § 5. Instit. de obligat. quæ ex delicto.

judge to mitigate or aggravate the same (1); for the sword of justice was given by God into the hands of the magistracy, in order to vindicate with a moderate punishment, that is to say, as an example to deter from evil, not only those who actually commit evil, but also those who *would* otherwise commit it, if not punished in that way (2). And so theft, and every thing depending thereon, were with us punished with less or greater severity, according to circumstances, by whipping, branding, banishment, and also by hanging, as is distinctly stated in the subsequent part of this work. The view above taken is, however, contradicted by some writers, who, misunderstanding politics, according to the examples of the old testament, and the laws of Moses (3), wish to establish it as a fundamental rule; viz. that the magistracy are not permitted to punish theft with death; because it is not exactly commanded in the holy scripture; whereas the worldly changes of people, times, places, persons, emergencies, &c. do not permit one to fix the punishment of crimes by laws or commands in a certain and unalterable way; and which were neither fixed in a certain and unalterable way, even during the time of the old testament as appears from various examples; and, among others, the thefts which during the time of Moses were punished by a restitution of four or five times the value (4), were punished by a restitution of sevenfold the value during the reign of king Solomon (5); and by Joshua it was punished by stoning to death and burning (6). And the prophet David (7), being asked by Nathan what that man deserved, who, to save his own, took his neighbour's lamb, answered, " as the Lord liveth, the man that hath done this thing shall surely die, and he shall restore the lamb fourfold." But it was always (8), from time to time, more and more recommended, and left free to the magistracy and political government, to mitigate or aggravate the punishment of crimes according to the circumstances of times, places, and persons; because the circumstances of crimes are so different and mutable, that the punishment of the law cannot be limited by certain and unalterable punishment; but according to the circumstances of place, time, and manners, ought at one time to be mitigated, and at another to be aggravated, pursuant to a just equity; for

(1) l. 13. Ff. de pœnis.
(2) See Rom. xiii. 4. Zypæ Notit. Jur. Belg. tit. de pœnis. Gudelin. de Jur. Noviss. lib. 5. c. 15. verse ult. Damhouder, Prax. Crimin. c. 55. n. 4, 5.
(3) Exod. iii. et Deut. v. and elsewhere.
(4) Exod. xxii. 1.
(5) Prov. vi. 31.
(6) Josh. vii. 24.
(7) 2 Sam. xii. 5, 6.
(8) Isa. i. 26.

which purpose the sword was given into the hands of the magistracy (1). The theft, which at first was punished slightly and by a restitution of four or five times the value, is with us justly also punished with death. It is not that the crime is in itself more and greater now than it antiently was; but because the property of things being with us so much more precise and divided than of old, if it be not restrained in this present wicked and corrupted time, by greater and heavier punishment, no one would be secure of his property,

("Vivitur ex rapto, nec hospes ab hospite tutus,
Non socer a genero, fratrum quoque gratia rara est."
That is,
"They live by rapine; no man is free or secure in his property,
No child excuses his father, no brother benefits his brother.")

especially of such property which one cannot otherwise protect than by such punishment; namely, cattle on the field, agricultural implements on the tilled ground, and similar articles. For who would be able to live in the church, or even at his house, free, and without apprehension, if the wicked could be sure of escaping the punishment of the law? on which account the Lombards, first of all, justly began to punish the third theft with death, which afterwards was introduced throughout Italy, Germany, Spain, and other adjacent places (2); according to which precedent the common thieves, among us, were whipped and banished for the first offence; for the second, they were whipped, branded, and banished; and for the third, on being found guilty, they were hung upon the gallows until they were dead. But robbers were for the first time punished with hanging until they were dead; and house-breaking attended with violence is, on account of the evil intention, punished with death for the first time, according to proclamations of December 16th, 1595; July 19th, 1607 (art. 11.); March 19th, and September 16th & 17th, 1614 (art. 2. & 8.) But the said punishment is mostly mitigated, and it is rarely that any person is condemned to die for mere theft. (3)

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(1) Rom. xiii. 1.

(2) Vide Jul. Clarus, l. 5. Sentent. § furtum. n. 8. Menoch. de arb. Jud. cas. 295. n. 17. et seq. Alphonso de Azevedo ad Constit. Reg. Hispan. lib. 8. tit. 11. l. 7. n. 91. et seq. Peinlich. Halsgerigt van Kayserkarel (Jurisdiction of life and death of the Emperor Charles V.) A.D. 1530 & 1532. art. 159. Damhouder, Prax. Criminal. c. 112. n. 33. Joan. à Sande, lib. 5. tit. 9. def.

(3) Arg. l. 16. Ff. de pœn. See Damhouder, Prax. Criminal. c. 112. Gudelin. de Jure Novissimo, lib. 5. c. 19. et lib. 3. c. 13. vers. sed observ. Zypæ Notit. Jur. Belg. tit. de furt. Perez. Cod. n. 22. Consult. & Adv. part. 1. cons. 321.

§ 4. *Child-theft*, or the stealing of children, which deprives and carries away young children from their parents with intention never to restore them, was at first punished with less severity; but, pursuant to the later Roman laws, with death (1); with which the civil laws of Moses agree (2), which are strictly observed in Germany according to Carpzovius (3). In these countries it seems to be an uncertain punishment, and much is left to the judge's discretion, on account of the varying circumstances; and, therefore, when it does not appear so clear that such child-stealing had taken place with the design of ill-treating the children, or of never restoring them again, the said crime is seldom punished more severely than by whipping and branding. (4) Of Child-stealing.

§ 5. For stealing cows, horses, or sheep, thieves are punished, for the first time, with the gallows, and their goods are confiscated (5); because cattle on the field cannot be secured otherwise than by the heaviest punishment. (6) Of stealing Cows, Horses, or Sheep.

§ 5. The damaging or stealing of instruments and tools belonging to husbandry from fields, were also punished more severely than other thefts (7); and also those, who have robbed any mills, pileworks, sluices, bridges, ploughs, and waggons, or similar works; and, pursuant to the proclamation of the States of Holland, of the 16th and 17th September 1614, against thieves and thefts (art. 3.) they are punished with death and confiscation of property. Theft of Instruments and Tools belonging to Husbandry, how to be punished.

§ 7. Whoever had lopped or cut off another man's trees by night, or at an improper time, we have seen whipped publicly with one of the trees cut off over his head (8); and by a proclamation of the Emperor Charles V. of the 30th June 1546, it was directed, that whoever during the night robs or steals the fruits standing on the field, should be punished with death. But by the States of Holland, on the 18th July 1608 and 8th July 1651, it was prohibited, upon penalty of inferior corporal punishment at discretion. Thus those who find any person on their land busy in robbing the fruits, may likewise drive the offender out of it by wounding him on his body. Theft of Trees and Fruits of the Field.

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(1) l. ult. Ff. & l. fur. Cod. ad leg. Fal. de Plagiar.

(2) Exod. xxiv. 7. & xxi. 26.

(3) Prax. Crim. part. 2. quest. 83. n. 90. et seq.

(4) See Groenewegen de legib. abrogat. ad § 10. Instit. de pub. Judic.

(5) Plac. van de Staten van Holland, Dec. 26, 1595; March 19, and Sept. 16 & 17, 1614, art. 3.; and July 8, 1651.

(6) See Damhouder, Prax. Crim. c. 115. n. 1. Christin. vol. iv. dec. 203. n. 4. Zypæ Notit. Jur. Belg. de abigeis. & Peræ Cod. eod. Sande, lib. 5, tit. 9. def. 9.

(7) Arg. agricultores Cod. quæ res pignori obligari.

(8) Arg. tot. tit. Ff. Arbor. furt. Cæsar.

Thieves in Gardens, how punishable.

§ 8. Garden-thieves, who leap over ditches or climb over inclosures to steal the fruits of trees and vegetables, are mostly whipped and banished, at discretion. (1)

Of Pickpockets.

§ 9. Pickpockets, on account of the theft being trifling, are mostly whipped and banished. (2)

Vagabonds are confined and fed upon bread and water, and turned out of the country, according to the proclamation against the gypsies, lepers, beggars, and vagabonds, first issued by the Emperor Charles V. on the 7th October 1531, and subsequently renewed by the States of Holland on July 21st 1581, Oct. 19th 1586, May 4th 1588, Dec. 16th 1595, March 19th 1614, March 4th 1636, May 12th 1649. (3)

Of Incendiaries.

§ 10. Incendiaries, with us, are commonly strangled; their faces are scorched with flaming fire, and their bodies placed upon a wheel (4). By others the written laws are strictly observed, according to which they are burned with fire. (5)

Piercing or breaking of Dikes, &c. how punishable.

§ 11. The same punishment is likewise inflicted on those who wilfully bore or cut through dikes, so that the country is inundated (6); but with us they are punished less severely, and according to circumstances, at discretion; yet, on account of the importance of the dikes, the punishment of this offence is also extended to death and confiscation of all property. (7)

Punishment of those who harbour Thieves.

§ 12. Those who detain thieves and rogues intentionally and wilfully, and lodge them, are punished in the same manner as thieves, pursuant to the proclamations of Dec. 16th 1595 and March 14th 1614, (art. 4.); and such offenders are punished at discretion, according to the circumstances of the case. (8)

And those are treated in the same way who fraudulently purchase stolen property for a trifling price (9). Such an offender was publicly whipped at the Hague on the 18th October 1652, notwithstanding he was of a good family and honest parents, according to the old proverb, "the receiver is as bad as the thief."

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(1) Arg. l. 82. § 1. Ff. de furt. l. 27. § 25. et seq. Ff. ad l. aquil. See also Placaat van de Staten van Holland, July 8, 1651.

(2) Arg. l. 7. Ff. de extraord. criminib.

(3) See also Damhoud. Prax. Criminal. c. 112. n. 53.

(4) According to Groenewegen de legib. abrogat. ad l. 28. § 12. Ff. de pœnis.

(5) l. 28. § 12. § Ff. de pœnis. l. 10. Ff. ad leg. Corn. de Sicariis. l. 9. Ff. de incend. ruin. et nauf. See Damhouder. Prax. Criminal. c. 105. Anton Math. de criminib. ad tit. 5. l. 8. Ff. c. 6 & 7.

(6) l. unic. Cod. de Nili. aggerib. non rumpend.

(7) See Damhouder, Prax. Crim. c. 106. Placaat van de Staten van Holland, Nov. 23, 1675.

(8) Ut recte docet Menoch. de arb. Jud. cas. 348. Farinac. Crim. quæst. 30. n. 94. & 96. Gomez. resolut. tom. 3. c. 3. n. 5.

(9) See Damhouder, Prax. Criminal. c. 119. Plac. March 19, 1614.

CHAP. XXXIX.

Of Obligation arising from Causes similar to Crime.

[Grot. 3. 38.]

§ 1. *Obligation arising from Causes similar to Crime, what; and how it occurs.*
2. *Under what Obligation those Persons are, from whose House something is thrown or poured out.*
3. *Under what Obligation a Master of a Ship or Innkeeper is to their Passengers on Board and to their Guests.*
4. *A Physician mistaking in his Profession, under what Obligation he is; and how punishable.*
5. *A Waggoner driving his Waggon too fast.*
6. *If any Damage be caused to any one by any Animal, what Indemnification the Proprietor of such Animal is obliged to give.*
7. *When a Ship overturns or runs down another Ship.*
8. *If Two Waggons, &c. meet each other, how One of them ought to go out of the Way.*

§ 1. OBLIGATION arising from causes similar to crime occurs either by an act of those whom we have in our power or service, or through loss which another suffers from us, or through our property; for which loss we are bound to make an indemnification in the same way as if we ourselves did it; but we are not liable to punishment (1), because it does not extend further than to the person of him who offended; as we have shewn more at large *supra*, book iv. ch. ii. § 7. *et seq.* pp. 318, &c.

Obligation, arising from Causes similar to Crime, what, and how it occurs.

§ 2. By the act of another we are bound to indemnify the loss which any one suffers in his body, clothes, or otherwise, in consequence of any thing being thrown or poured out of our houses by any of our household (2); because every one must be answerable for the act of any of his family or servants, and for whatever is committed by them. (3)

Under what Obligations those are, from whose House something is thrown or poured out.

§ 3. In like manner, the master of ship, or an innkeeper, is responsible for the loss which voyagers and travellers suffer in the property brought by them into the ship or inn, whether such

Under what Obligation a Master of a Ship or Innkeeper is,

(1) Tot. tit. Inst. de oblig. quæ quasi ex delict. l. 26. Ff. de pœnis.
(2) Tot. tit. Ff. de his qui effud. § 1. Instit. de obligat. quæ quasi ex delicto.
(3) Arg. § fin. Inst. de oblig. quæ ex quasi delicto.

to their Passengers on board, and their Guests.

loss be occasioned by their servants or by other guests, or by voyagers or travellers taken on board the ship or into the inn. (1)

A Physician mistaking in his Profession; under what Obligation he is, and how punishable.

§ 4. It is disputed whether a physician, who through neglect and ignorance had given some medicine to a patient which has done him harm or caused his death, would be punishable for it; some are of opinion (as this can very seldom be detected, and their errors are, as it were, covered with earth), that the punishing of physicians has become obsolete; however, in law, they are obliged to make amends, and may be punished for it according to discretion of the court. (2)

A Waggoner driving his Waggon too fast.

§ 5. A waggoner who drives too fast, and wounds any one, forfeits (besides indemnification) the waggon and horses, unless the officer (but those of the chamber of government can do it), compromise; and if any one remains dead, he is to have remission (3). For damage caused by our property we are bound to make indemnification, whether it be caused by animate or inanimate property, such as, through our beasts, horses, dogs, hogs, ships, waggons, &c.

If any Damage be caused to any one by any Animal; what Indemnification the Owner of such Animal is obliged to give.

§ 6. If a beast belonging to any person whomsoever, causes any loss to any one, indemnification must be made for the same, or the beast must be given for it (4); but if the beast be naturally wild, or otherwise in the habit of doing harm, (for example, if a dog be in the habit of biting, or a horse in the habit of kicking behind, or the like), the proprietor will be obliged to make full indemnification for the loss sustained, and the delivering up of the beast would alone not be deemed sufficient (5). And if a beast is found upon another person's ground, the same may be put within a fence or cage impounded, until the proprietor, after making indemnification for the loss and charges incurred, releases the same from the pound or cage. (6)

When a Ship overturns or runs down another.

§ 7. If any man's ship runs down another, and if it was in his power to prevent it, or if it had occurred through his neglect or fault, he ought to make good the whole loss sustained (7); but if it had occurred by storm and through stress of weather, or

(1) l. et tot. tit. Ff. Naut. Caupon. Stab. et tit. furti advers. nautas. Vide supra, ch ii. § 10. of this book, p. 321. Whether and how far a judge or an advocate comes under obligation through culpable neglect similar to crime, see ch. xxxiii. § 11. of this book, p. 460. supra.

(2) Arg. § 7. Instit. de leg. aquil junct. l. 1. § 1. Ff. de var. et extraord. cognito. Damhouder, Prax. Crim. c. 77. n. 28.

(3) Vide Papegay, p. 481.

(4) § 8. 11. Instit. si quadrup. pauper fecisse dicatur. l. 8. § 1. Ff eod. l. 39. Ff. ad l. aquil. Costal. in l. 1. Ff. eod.

(5) l. 40 l. 41. Ff. de Ædilit. Edict. § 1. Inst. si quadr. paup. fecisse dicatur.

(6) Vide Grotius, Inleyd. lib. 3. c. 38. n. 14. Zypæ Notit. Jur. Belg. ad leg. aquil. vers. pecus. Handvesten van Kemmerland, p. (mihi) 204. Keuren van Rynland, art. 138. Keuren van Voorn, art. 76. et seq.

(7) l. 29. § 4. Ff. ad leg. aquil.

otherwise without his fault, in that case the loss is borne by the masters of ships on both sides half and half (1), without distinction, whether the loss had been incurred at sea or in the harbour, as it respects the loss of the *ships*; but with respect to the loss of the *goods* on board such ships, a distinction is made between navigators proceeding out to sea and those navigating along the shore, viz. the loss amongst those navigating out at sea is also borne half and half, but not amongst those navigating along the sea-shore (2); and the amount of half the loss of or damage to the ship, caused by running her down at sea, and of the goods which were therein at the time the accident occurred, must be borne and indemnified upon calculation half and half, in proportion to the value of the said ship and goods (3); such indemnification is to be computed upon whatever loss was really occasioned by the ships touching each other, but not otherwise. (4)

And therefore where a certain ship had been rendered unfit for sailing, in consequence of another ship having run foul of her, so that she could not remain with the fleet, in consequence of which she fell within twenty-four hours into the hands of pirates off Dunkirk, it was decided by the high court in Holland, that the owners of the ship taken were entitled to recover from the ship which had caused the damage, and from her owners, the loss sustained in consequence of the latter having run foul of her, but nothing more. This judgement was given at the end of July 1633, in a cause between Leendert Bouwens, in his litigating capacity, as impetrator of arrest, against Jan Claasz, defendant.

If Two Waggons, &c. meet each other, how one of them ought to go out of the Way.

§ 8. And so waggoners are also bound to indemnify each other for the loss which they cause to one another in driving by and running against the waggons (5); and therefore it is observed as a rule among them to go out of the way for each other in time; viz. that those who have not passed by so far as half the road and journey between them both from one station to the other, should go out of the way for the other that had first arrived, and had passed over the half; and likewise, on a narrow road where two waggons cannot go backwards for each other,

(1) Vide Proclamation of the Emperor Charles V., 1551, art. 46.; of King Philip, 1563. tit. van Schepen die elkander beschadiegn. Vide Wisbuy. Ze regten, art. 27. 48, 49, 50. 71. West-Cappel, art. 16. Neostad. decis. 48. 49. Coren. obs. 40. n. 1. et obs. ult.

(2) Vide Advysen, Certification en Gewysdens rakende het vergoeden van de Schade der Binnen-lands-vaarders. Vide etiam Bell. Jurid. p. 331.

(3) Vide Coren. obs. 42. and ch. ii. 49. of this book, p. 320. supra.

(4) Arg. l. 21. § 3. Ff. de act. empt.

(5) Arg. l. 29. § 2. Ff. ad l. aquil.

the one which rode the smallest distance ought to be drawn backwards for the other to such a place where they can retreat for each other. And a cart with two wheels must always, without distinction, go out of the way for a coach; and with respect thereto, this discretion is further used, viz. that an empty waggon must make way for another which is loaded, especially during harvest, when the waggons coming from the field very heavily laden with hay and corn cannot well make way for another without danger; and, moreover, a common waggon generally must make way for a coach with four or six horses. The loss arising from a contrary behaviour ought to be indemnified by the transgressors of the said rules. (1)

CHAP. XL.

Of the Means whereby an Obligation ceases, and of Payment, Set-off, Renovation, and Assignment of Debt.

§ 1. *Payment, how to be made, and how to be proved.*
2. *Compensation and Retention (or Set-off), what, and in what Cases they have Effect.*
3. *Discharge by delivering up a Note of Hand, how to be understood and decided when such Note has been lost or mislaid.*
4. *Payment, to whom to be made, and whether it may be made to a Male or Female Servant.*
5. *Whether Payment may be made before the Time.*
6. *A Creditor must demand Payment from his Debtor at his House.*
7. *Of Remission of Debt.*
8. *Of Prescription of Debt.*
9. *Of Renovation of a Debt.*
10. *Of Assignment of a Debt.*
11. *Of Bills of Exchange.*

THE engagement being fully confirmed and obtained by all due means, the contractor has a right to have satisfaction thereof; which satisfaction consists especially in paying or satisfying that to which the obligation tends (2). Satisfaction of a common debt is effected by payment, or a voluntary discharge; in the case of a crime or fault, by punishment and fine, or through forgiveness of such fault; each of which topics will be treated separately.

(1) Vide Nicol. van der Hoog, singular. jur. 21.

(2) Tot. tit. Ff. et Cod. de Solution.

Payment how to be made, and how to be proved.

1. For the payment and satisfaction of common debt, there is exactly required what the engagement implies, whether it consists in doing or giving; (1)

Compensation and Retention (or Set-off), what; and in what Cases they have Effect.

§ 2. Excepting only, that the debtor can bring in payment thereof by compensation and set-off, what the creditor is indebted to him *in* something of a similar nature and commodity, provided it appears without difficulty (2). Which set-off, although it ought to be alleged by means of exception, nevertheless actually diminishes the debt, and has its effect; so that the running rents and interest are thereby actually diminished, and cease from the time the creditor becomes indebted in something of the same nature and obligation. (3)

To this head also belongs the right of retention of what I have in my possession, and obtain on account of my debtor for the payment or set off of what he owes me, which is specially applicable to goods deposited and trusted, upon which any expences are incurred (4), such as stuffs, which are delivered into the hands of any one to manufacture, cloth, camlet, and other goods; which manufactured goods may be retained for and set off against the wages and charges incurred on account of them, or for similar stuff (5). But for similar reasons it is likewise extended to all sorts of matters and actions (6). This right is also used by masters of ships and waggoners for their freight, wages for keeping, and charges incurred (7); and in like manner innkeepers may retain the goods of their lodgers, and take away the uppermost garment for whatever has been spent. (8)

So also, advocates and intercessors of the law (9) may retain the documents of the suit until they are paid (10). In like manner also one may detain the goods of a third person for the expences *bonâ fide* incurred on account of the same. (11)

(1) l. 2. § 2. Ff. de reb. credit. Grot. 3. 39.

(2) l. 1. Ff. et l. 4. Cod. de compensat. l. ult. § 1. Cod. eod. et ibi DD.

(3) d. l. 4. cod. de compensat. junct. l. 4. l. 11. l. 12. Ff. eod. Grot. Inleyd. l. 3. c. 40. n. 10, 11. Faber, l. 4. tit. 23. def. 4. Christin. vol. iii. defin. 39. n. 3. & 4.

(4) Arg. l. ult. Cod. depositi.

(5) Arg. l. 15. Ff. de impens. in res dotales fact. l. 26. § 4. Ff. de condict. indebiti. l. 25. et. seq. Ff. de procuratorib. l. 5. de dote prælegat. l. 9. § 2. Ff. de acq. rer. dominio. l. 5. Cod. de rei vindicat.

(6) Arg. tit. Cod. etiam ob chirographar. pecuniam pignus retineri posse.

(7) Bald. ad l. ultim. n. 1. Cod. commodati. Coler. de processib. executivis. part. 1. c. 2. n. 241.

(8) Bald. ad l. 5. n. 5. Cod. locati. Negusant. de pignor. part. 2. memb. 4. n. 138. Math. Coler. de process. executivis. p. 1. c. 2. n. 254.

(9) *RegtwoorSpraken*, in the original.

(10) Per text. et Gloss. in l. 12. Ff. de vi et vi armata. l. 25. in fin. Ff. de procurator. l. 14. § 1. Ff communi. Gail. l. 2. obs. 12. n. 5.

(11) Dict. legib. Faber ad Cod. l. 3. tit. 22. def. 15. Sande, l. 3. tit. 15. def. 5. Radelant. decis. 100.

Discharge by delivering up a Note of Hand; how to be understood and decided when such Note has been lost.

§ 3. Payment of a debt is proved by a receipt or hand-writing of the creditor, and likewise by the bonds and engagements returned to the debtor, being found in his hands, unless it be otherwise proved by the creditor (1); for although the hand-writing be found in the hands of the debtor torn and erased, it does not thence follow that he has *really* paid, because it may take place without the creditor's knowledge, whether he lost it, or whether it was stolen from him; and the creditor must therefore be allowed to prove the contrary if he can. (2)

In which case he is likewise allowed to declare upon oath, that the hand-writing was really lost, or had been missed; whereupon the debtor must grant him a new bond, on receiving an assurance that if the former is forthcoming, he will not be called upon to pay the same. (3)

Payment, to whom to be made; and whether it may be made to a Male or Female Servant.

§ 4. The payment must be made into the creditor's own hands, or into the hands of his attorney, otherwise it will produce no release (4); so that no one may pay freely the male or female servant of another, or the children instead of their parents, without a receipt in the hand-writing of the creditor (5); unless (where he is engaged in trade) such payment is made to the persons to whom his shop and till or the daily receipt and disbursement are entrusted. (6)

Whether Payment may be made before the Time.

§ 5. No payment can be made before the time is expired at which such payment ought to be made, if the day had been inserted for the benefit of the creditor; because, until that day, the rents or interests run for his benefit, except with the consent of such creditor (7). It is therefore a common custom, that money yielding interest and annual rent, may not be redeemed, except upon a previous notice of three months, or at least of six weeks, before the annual payment becomes due, or otherwise one understands that it has been prolonged for a year more, unless it was expressly agreed that the redemption may be effected at any time; in which case one may also (during the interval after a similar preceding notice and declaration that the

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(1) DD. ad l. Labeo 2. Ff. de pact.

(2) L. 24. Ff. de probat. Vide Costal. ad d. l. 1. Ff. de pact. Angel. ad § hoc amplius n. 10. Instit. quib. mod. tollit. obligat. Ferrar. in form. libell. in act. hypoth. in verb. Exceptionem solutionis. et ibi Masuer in addit. Lud-Romain consil. 146. n. 13. Petr. Anchoran. lib. 2. quæst. 69. lib. 2. obs. 37. n. 5, 6, 7, Nicol. Everhard. consil. 132.

(3) l. ult. Cod. de fide instrum. l. 57. Ff. de administr. tutor. Andr. Gail. l. 2. obs. 37.

(4) l. ult. Cod. de negot. gest.

(5) l. 34. § 4. Ff. de solut.

(6) l. 7. § 1. Ff. de inst. act. See Guid. Pap. decis. 173. n. 3. Ant. Faber, ad Cod. l. 8. tit. 30. def. 29.

(7) l. 38. § 16. l. 50. l. 41. § 41. l. 13. § 2. Ff. de verb. obligat. l. 70. Ff. de solut.

money is no longer wanted), make payment, and effect the redemption; provided so many rents be added to the principal as may be in arrear, according to the time elapsed.

A Creditor must demand Payment of a Debtor at his House.

§ 6. He who is unwilling to pay may likewise be compelled to pay interest and rents for the non-payment (1). But it does not commence sooner than from before the production of witnesses in court (*litis contestatio*) or legal demand, because the debtor is not bound to bring to the house of the creditor what he is indebted, but the creditor must come to his house to fetch it, or cause to be fetched, unless it was otherwise agreed (2), as is usually done in fixed yearly rents, in which it is contracted that the payment should be made, or caused to be made, at the house and into the hands of the holder exactly at the time. (3)

Besides the payment and exact satisfaction of whatever is contained in the obligation, with the consent and will of the creditor, the obligation is usually annulled, either by remission, renovation of debt, or by assignment of it to another person.

Of Remission of Debt.

§ 7. Remission of debt may be effected in two ways, viz. one, which actually occurs, is a promise to make no demand, in the same manner as if the obligation had been satisfied, the other is that which is effected by the law (4). So that, according to the imperial and ecclesiastical laws, a husbandman or hireling, who, by the waters breaking in, or on account of war, fire, or other great loss occasioned to what he has hired without his neglect, could gather or enjoy few or no fruits, to such an one his promised annual rent would be entirely or in part remitted (5). The same rule also holds with respect to renters of the common lands of the country or city (6); especially when something has been repealed which had been contracted by the ordinance or conditions whereupon the farm was sold. (7)

Of Prescription of Debt.

§ 8. This remission is likewise effected by prescription; when, a certain time being expired, the debt is considered as discharged and satisfied (8). It is not, however, clear, after what

(1) l. 17. § si pupillo. Ff. de usuris.
(2) l. 18. Ff. de constit. pecun. et ibi. Gloss. & DD.
(3) See Pecc. de Jure Sistendi, c. 9. n. 2. Van besetten ende hand-opleggen, c. 9. n. 2.
(4) Grotius, Inleyd. lib. 3. c. 4. n. 1.
(5) l. 15. § 1. si merces. l. 25. § vis major Ff. locati. l. licet. 8. Cod. eod. See Mornac. ad d. l. 15. Ff. et Anton. Faber ad d. l. 8. Cod. locati. Covarruv. pract. quæst. tom. 2. c. 30. n. 1. vers. ob rem, et ibi allegat.
(6) l. forma. § 1. Ff. de censibus. Bald. ad d. l. 8. Cod. locati. Cravett. consil. 94. n. 3.
(7) See Cons. & Adv. Rotterdam. vol. iii. cons. 105.
(8) l. 2. Cod. de præscript. 30 annor. Grot. Inleyd. lib. 3. c. 46.

time such prescription runs. The general opinion is, that it is effected by a third part of one hundred years (1). But according to the Roman laws, it is effected in thirty years, as already stated. (2)

The ordinance of the city of Gouda, of the year 1607, (art. 99.) says, that the aldermen ought not to do justice in the case of debts or bills of yearly rent, upon which nothing has been received for thirty-three years, if the defendant denies it, and upon oath alleges that he has discharged it. And in the same ordinance (art. 96 & 97.) it is enacted, that where the holder of a bond cannot prove payment thereof to have been demanded for ten years, the defendant shall upon his oath stand acquitted, and the aldermen shall not do justice thereupon; and likewise the heirs of him who executed it, if no payment had been demanded from them for two years after his death, unless the holder thereof could allege any legal exceptions.

All pecuniary fines are prescribed against within the year; and all penalties for smuggling must be demanded within the year. (3)

Of Renovation of a Debt.

§ 9. Renovation of debt is, when the obligation is satisfied by entering into another obligation in its stead; by which the preceding is annulled. (4)

Of Assignment of a Debt.

§ 10. Assignment of debt is when the debtor is released, and the obligation is satisfied, by the transmission of the right which he had to another debtor of his (5). But it must be attended by a clear discharge and acceptance, otherwise it will not serve as a satisfaction, according to the proverb, "assignment is no payment" (6); otherwise, if the first debtor by such transaction does not clearly appear to be released and freed, it would only be considered as mere demonstration; and although accepted, yet the first debtor may be called upon. (7)

Of Bills of Exchange.

§ 11. On which account also, among us, bills of exchange do not release the first debtor until they are paid. (8)

(1) Grot. ibid. n. 8. Goris, Adversar. Miscell. c. 9.

(2) Supra, book ii. ch. viii. § 7. pp. 132, 133.

(3) Plac. van de Gemene Midlen, Sept. 4, 1603. See Cons. & Adv. vol. iii. cons. 116, 117. and also book ii. ch. viii. § 6. p. 132. supra.

(4) l. 1. ff. de Nov. See Mant. de tacit. & amb. conv. l. 17. per tot. Grotius, Inleyd. lib. 3. c. 43.

(5) l. 11. Ff. & l. ult. Cod. de Nov.

(6) l. 21. Ff. de novat. et delegat. Grotius, lib. 3. c. 44.

(7) d. l. ult. Cod. & l. 21. Ff. de novat. Neostad. Cur. Holl. decis. 38. Cost. Antwerp. tit. 64. art. 2.

(8) Neostad. Suprem. Cur. Holl. decis. 12. Cost. Antwerp. tit. 55. art. 4. Concerning bills of exchange, see ch. xxvii. of this book, pp. 439, 440. supra.

Among the various modes of making satisfaction, some improperly reckon the payment of money into court; because it cannot serve as a satisfaction, so long as it is not declared to be such by decree of the court. In what manner this is performed, and what effect it has, see ch. xi. of this book, pp. 350—352, supra.

CHAP. XLI.

Of Cession of Estates, Letters of Respite or Delay, Sureté des Corps, etc.

[Grot. 3. 51.]

§ 1. *Cession of Estate, what.*
2. *How and by whom to be made.*
3. *Of what Effect.*
4. *Of Sureté des Corps.*
5. *Nature and Effect of Letters of Induction or Delay.*
§ 6. *Whether the same can exist without Security.*
7. *Whether and when the major Part of the Creditors can compel the inferior Number to allow Delay or Remission of the Debt or of any Part thereof.*

§ 1. ALTHOUGH the creditor can compel his debtor by law to satisfy and pay his arrears; yet those who have more debts than they can pay, have certain means by which they are allowed to prevent the prosecution of their creditors beyond their abilities to pay their debts. These are, cession of the estate, *sureté des corps*, letters of respite or attermination, that is, delay, granting time, and several others. Cession of estate is a voluntary cession, by a debtor, of all his property, on behalf of his creditors, in order thereby to be free from imprisonment, and to avoid being under the obligation of paying his debts beyond the extent of his ability. (1) Cession of Estate, what.

This mode of assisting debtors was not known during the time of Count Floris; for, in the charters of Waterland, in the year 1288 (2), it is enacted, that if any one is indebted more than he is able to pay, and does not pay the same within two weeks, he shall be kept in the custody of the messenger, and afterwards submitted to the power of the creditor; who may

(1) l. 7. Cod. eod. l. 4. Ff. de cessione bonor. § ult. Inst. de actionibus. Van Leeuwen. Censura Forensis, lib. 4. c. 46.

(2) p. 7.

make use of him without hurting his body, and so detain him until he is paid, or otherwise compromises the matter with him. Similar to this are the enactments contained in the *arbitrary statutes* of Amsterdam (1); viz. that to those who are appropriated for debt, water and bread shall be given, and their skin shall not be hurt; and they shall lie in the castle of the lord; and that water and bread shall be given by him who is desirous of such appropriation, &c.

How and by whom to be made.

§ 2. In order to enjoy the right of cession of the estate, an application must be made to the supreme government for permission, and letters with committimus, that is, confirmation to the magistrates of the place where the petitioner resides; or if he resides in the country, to the court of the nearest inclosed city; before whom, the letters having been granted, the debtor must cause all his creditors to be summoned to see the letters obtained by him approved of, and a curator appointed for his estate; and there an inventory and description are to be delivered, containing all the debts and actions, upon an affidavit that he has concealed or detained no property, except the clothes which he has in daily use, in order to have the said letters acknowledged by the said magistrates, as having upon inquiry been well or wrongly obtained. (2)

No cession of the estate is granted to those who have incurred debts through their own fault (3); nor to those who have fraudulently concealed their property, and deceitfully contrived to render themselves unable to pay. Such persons are usually denominated *bankrupts*, who are not worthy of that privilege, and of whom mention is made in the proclamation of Emperor Charles, of the 7th October 1532, and 4th October 1540.

According to the Roman laws, all women were *ipso jure* free in their persons, and might not be imprisoned for debt incurred without their fault (4); but at present it is not taken into consideration, and execution, with detention of their persons, is carried into effect both against a woman as well as against a man. And so, in the case of a certain woman of Enkhuysen, who obtained letters of cession, but being accused of fraud when the

(1) Willekeuren tot Amsteldam, p. (mihi) 222.

(2) Vide instructie van den Hoge Raad (Instruction of the High Court) art. 23.; of the Court of Holland, art. 227.; ampliatie, art. 6. Grotius, Inleyd. lib. 3. c. 51. vers. wy seggen. Papegay p. (mihi) 201. et seq. Plac. May 19, 1554. Zypæ Notit. Jur. Belg. tit. qui bon. ced. poss.

(3) l. § fin. de pœnis. l. ult. Ff. de in jus vocando. Christin. vol. iii. decis. 125. n. 5. 19. See also Schneidwin ad Instit. de actionib. § fin. n. 19. Papon. lib. 10. tit. 10. arrest. 8. Grivell. decis. 78. and Grotius, Inleyd. lib. 3. c. 51. vers. wy vertrokken, who add several exceptions to that above stated.

(4) Auth. hodie Cod. de exhibit. reor.

same were to be confirmed, the court of Holland, on the 9th October 1582, condemned her provisionally to be closely imprisoned. (1)

§ 3. This cession having been effected, the debts are not thereby entirely annulled; but if the debtor acquires any property *subsequently*, he is obliged to pay as much as he can afford beyond the necessaries of life (2), except that if he, besides the voluntary cession, was under the obligation of suffering any disgrace; in which case he is understood to be entirely free. (3) Of what Effect.

Thus at Leyden and Rotterdam no cession of the estate is granted, unless the petitioner appears shortly after the confirmation thereof, and stands before the town-house in his undermost clothes three successive days, upon a place of the height of three or four steps, every day one hour, namely, from half past twelve to half past one at noon (4); and the most recent creditors have the preference before the oldest, upon property acquired after the cession was obtained. (5)

§ 4. Otherwise, if the debtor has hopes that he shall be able to settle his estate, he may apply for liberty of person, which is usually called *sureté des corps*, for the space of three, four, five, six, or more months, within which time he shall not be molested in his person by his creditors. (6) Of *Sureté des Corps.*

§ 5. Or else he prays the court of Holland for letters of *induction* or *attermination*, that is, consent to a delay or respite for the time of five years, provided security be given for the payment, with *committimus* in the manner above stated (7); however, without that, the securities given before *in singulis causis* may be released through cession or *letters of respite*, unless they had also made prayer, and were inserted therein (8); especially if they (as mostly occurs amongst us), had duly renounced the *beneficium ordinis divisionis & excussionis*, which is to be Nature and Effect of Letters of Induction or Delay.

(1) Vide Neostad. Suprem. Cur. dec. 57. Radelant. Traject. dec. 54. n. 6, 7. Gudelin. de Jure Novissimo, lib. 5. c. 14. Zypæ Notit. Jur. Belgic. tit. de execut. rei Jud. l. 2. vers. sed. A. Robert. rer. Judicat. lib. 2. c. 7. Rebuff. ad constit. Reg. de literar. oblig. art. 11. Gloss. 4. Perez. ad Cod. de custod. rerum, n. 6. in fin. Gulier. Practic. quæst. 25. Gomes. ad l. tauri. 62.

(2) l. 4. Ff. de cessione bon. § ult. Instit. de action.

(3) Vide Guid. Pap. decis. 343. Brun. de Cessione. quæst. 3. in pr. n. 6. Georg. Tholosan. Syntagm. Jur. lib. 22. c. 8. n. 7. l. 13. § 7. Ff. de his qui not. infam. l. 4. Cod. ex quib. caus. infamia irrogator. l. 12. & seq. Ff. sol. matrim. Vinn. ad § ult. Instit. de action. n. 3.

(4) Octroy voor die van Leyden, July 1531; van Rotterdam, 1519.

(5) Vide Cons. & Adv. 5. D. cons. 79.

(6) Vide Kinschot. in tractatu de securitate corporis.

(7) See § 2. p. 502. Papegay, p (mihi) 185. Rebuff. ad constit. reg. tom. 2. de litter. dilator. Kinschot. tract. de solution. induciis.

(8) Arg. § 6 Instit. de Jure naturali gent. et civili. l. 1. ultim. Ff. de constit. princip. junct. § fin. Instit. de replicat. l. 7. in pr. & § 1. Ff. de except.

taken into consideration; for the petitioner would otherwise have no benefit of such letters to him, if the securities remain responsible; who, if execution be taken out against them, may point out the property of the debtor; and therefore the same must also be prayed for by them, in order that they may have a like delay, namely, with the insertion of this clause, "*as well for himself, as for his securities already given.*" Otherwise the said securities remain bound after the delay, and it is not understood that by giving new securities any *novation* is effected. (1)

Whether the same can exist without Security.

§ 6. If the petitioner cannot find security, some are of opinion that a *juratory caution*, that is, a *promise sworn to*, will be sufficient (2). But it is not so certain in law, because the words thereof require sufficient security; neither is it admitted among us, but on the contrary it is directed by the proclamation of the Emperor Charles V. of the year 1544, (art. 35.) "that no letters of respite and attermination of debts should be granted, to compel the creditors to consent to the granting of delay for paymen,t without security." (3)

Whether and when the major Part of the Creditors can compel the inferior Number to allow Delay or Remission of the Debt or of any Part thereof.

§ 7. Further, this delay is not allowed to the petitioner, but upon the previous consent of his creditors, who are heard thereupon, or the major part of them, to be reckoned not according to the number, but according to the greater amount of the debt, whom the inferior number of creditors must follow, in consequence of being outvoted; which by some is also extended to a remission of part of the debt, but it is not admitted amongst us, where no one can be compelled to forgive any debt or any part thereof, according to the expressed text of the proclamation of Emperor Charles of the year 1544, above referred to (4); and even when the delay is outvoted, namely, whether and when it is to have effect, the case is left to the discretion of the judge either to allow or refuse the same (5); and it has no effect when any one of the creditors has a better right than another, namely, in case he has security or mortgage, who, on account of the assent of another having an inferior right, cannot be compelled. (6)

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(1) Vide Cons. & Adv. vol. ii. cons. 135.
(2) Arg. Nov. 112. c. 2. & Nov. 134. c. 9. Gail. lib. 2. obs. 47. n. 8.
(3) Vide Neostad. suprem. cur. dec. 53.
(4) l. 7. § ult. l. 8. Ff. de pact. l. ult. Cod. qui bon. ced. poss. in fin. Vide Zanger. de except. part. 2. c. 12. n. 2. Berlich. dec. 235. part. 2. Anton. Tessaur. dec. 186. Jacob. Coren. consil. 8. Zyp. Notit. Jur. Bel. tit. qui bon. ced. poss. et tit. de pact.
(5) Per Gloss. & DD. ad l. 7. § 19. Ff. de pact. Coler. part. 1. c. 14. n. 15. Struccha de decoctorib. part. 6. n. 5 & 21. Zanger. de except. part. 2. c. 12. n. 2. & seq.
(6) Vide Valentin. Franc. de fidejuss. c. 3. n. 174. Math. Coler de process. executiv. part 1. c. 4. n. 17. Joh. Zanger. de except. d. part. 2. c. 12. n. 2. Berlich. Decis. part. 2. decis. 235. n. 36, 37.

CHAP. XLII.

Of Redress.

[Grotius 3. 48. & 52.]

§ 1, 4. *Redress, in what Cases to be granted.*
2. *By and to whom to be applied for.*
3. *When it takes its Commencement.*

OBLIGATIONS being fully and properly confirmed, in the manner described in the preceding chapters, they ought to be fulfilled; but if it happens that they were entered into with persons who were incapable of binding themselves, or if any other deception, fraud, or impropriety were blended therewith, the debtor would have *his* exceptions against them; and upon his application, redress would be granted to him, and he would be placed in his former condition by the supreme government.

Redress, in what Cases to be granted.

§ 1. Such redress is granted against all sorts of injuries and deceptions, and likewise in improper engagements and extorted promises confirmed with solemn oath. (1)

By and to whom to be applied for.

§ 2. Application must be made for this redress to the supreme government, represented by the supreme council, with *committimus* to the daily judge of the petitioner (2) in the following manner, viz. that until the redress has been confirmed or approved of by the daily judge upon cognizance taken; the engagement in the meantime is to have its full effect and continuance upon security. (3)

When it takes its Commencement.

§ 3. According to the written laws, all redress must not only be commenced within four years after the grievance, but also be completed (4); but at present it is sufficient if it be commenced within four years, although it be not completed until a long time afterwards (5); and it is often granted to persons for some reasons, without distinction, even after four years. (6)

(1) l. 1. § & tot. tit Ff. et Cod. ex quib. caus. major. Vide Perez. ad tit. Cod. si advers. vend. in fin. Gudelin. de Jure Noviss. lib. 3. c. 14. vers. non immorabor. Rebuff. ad constit. reg. in proœm. Gloss. 5. tom. 1. n. 50. Gail. lib. 1. obs. 25. Mynsing. cent. 3. obs. 99. See further Groeneweg. ad l. Ff. ad municip.

(2) Vide Ampliatie van d'Instructie, art. 7. Grotius, Inleyd. lib. 3. c. 48. n. 7, 8. Christin. vol. ii. decis. 119. n. 1. & decis. 134. Zypæ Not. Jur. Belg. de in integr. restitut.

(3) Contra. l. 1. Cod. in integr. restitut. postulat. Neostad. Suprem. Cur Holland. decis. 73. Sande, lib. 1. tit. 8. def. 4. Christin. vol. ii. decis. 137. Cost. Antwerp. tit. 56. art. 13. Cod. Fabr. d. tit. in integr. restit. postulat. def. 1.

(4) l. ult. Cod. de temp. in integr. test.

(5) Vide Christin. vol. ii. decis. 139.

(6) Teste Groeneweg. ad d. tit. Cod. de tempor. in integr. restitut.

§ 4. The cases or occasions in which such redress is granted are almost unlimited: we shall here point out the principal ones.

I. If any one entered into any engagement or made any promise out of great fear or urgent necessity (1). So, a person is excused, and obtains redress, who, being in danger of death, made any promises or engagement for the purpose of preserving his life; such as the example which Christinæus (2) relates fully to have occurred at Antwerp in his time, where a certain young woman, being in danger of her life upon the ice, had promised a bargeman's mate, if he could release her from that danger, that she would marry him; having escaped the danger by his assistance, and being afterwards called upon to fulfil her promise, she refused it, but instead thereof offered him a present of a large sum of money for the danger in which he put himself and for the service done to her; and which by the court was likewise adjudged to be sufficient.

II. Whenever fraud existed in any transaction whatsoever (3); and also without fraud, if either of the dealers had been prejudiced in more than half of the profits acquired in trade (4); as we have already shewn more at large in ch. iv. § 12. of this book.

III. If the engagement was made by or on behalf of a minor, in the presence of his guardians, or otherwise effectually, he may pray for redress against the same, because a minor ought not to be prejudiced by any act of his guardian (5); otherwise, if the engagement consisted in his own deed, it would be void of itself, and no redress would be required.

And also, if a foreigner through negligence or otherwise had suffered or incurred any loss, he may have redress against the same (6); and further in all other reasonable causes (7), which are too numerous to be mentioned here.

Against obligations, which arise from crimes, even minors can obtain no redress in law (8), although the punishment is often mitigated in consideration of youth (9); which, however, in respect to minors, is to be understood of great and uncommon crimes subject to corporal punishment (10);

(1) Tot. tit. Ff. et Cod. quod. met. caus.
(2) Vol. ii. decis. 114. in fin.
(3) Tot. tit. Ff. de dolo malo.
(4) Tot. tit. Cod. de rescind. vend.
(5) Tot. tit. & Cod. de integr. restit. minor. Neerl. Adv. 1. c. 26. Van Leuwen, Censura Forensis, lib. 4. c. 43.
(6) l. ult. et tot. tit. Cod. de restit. milit. et eor. qui rei publ. caus.
(7) l. 1. § 1. et tot. tit. Ff. et Cod. et quib. caus. major.
(8) Tot. tit. Cod. si advers. delict.
(9) l. 37. Ff. de minorib. junct. l. 10. Ff. de pœnis.
(10) l. 1. 2. Cod. si advers. delict.

but if a mere command and order in a common case had been transgressed by a minor, he may obtain redress against it if it was not attended by fraud and petulancy (1); and it is at the discretion of the judge to decide according to the exigency of the case, whether a minor is to be punished for the offence committed by him with an ordinary or extraordinary and inferior punishment. (2)

And so the fine and punishment are often remitted or mitigated to a debtor in an offence which is not enormous, nor wilfully committed, in consideration of his poverty (3); which is daily supplicated by petition, and according to circumstances remission or alteration is granted. (4)

CHAP. XLIII.

Of the Punishment of Crimes, and of Pardon, Abolition, quitting the Country, and Remission.

§ 1. *Pardon or Remission, in what Cases to be granted.*
2. *Of Abolition.*
3. *Of quitting the Country.*
4. *Of Pardon and Remission, and whether and in what Manner they are to be distinguished.*
5. *Of the Confirmation of Letters of Pardon or Remission.*
6. *Of Letters of Safe Conduct.*

OBLIGATIONS through crimes are satisfied by the execution of the punishment, deserved with or by the commission of the same; the nature and different kinds of which will be distinctly treated in the following book, under the title of punishment and fines; unless remission or pardon be granted by the government of the country, or those who are authorized to grant the same by such government. And as the obligation through crime extends in some cases only to a pecuniary fine, and sometimes also to a bodily pain; so the satisfaction thereof consists either in a pecuniary fine or bodily punishment.

(1) l. 9. § 5. Ff. de minorib. Tuld. ad Cod. si advers. delict. n. 3.

(2) Vide Clar. Prax. Crim. q. 60. n. 2, 3, 4, 5, 6. Gomes. tom. 2. Var. Resolut. c. 1. n. 55, 56. et seq. Menoch. de arbitrar. Jud. lib. 2. cas. 329. n. 19. Tessaur. decis. 161. Math. Colerus, decis. 162. n. 8. Sande, lib. 5. tit. 9. def. 4.

(3) l. ult. § fin. Cod. de modo mulctarum. junct. l. illicitas. 6. § ult. Ff. de officio præsid. See further Tiraquell. de pœnis temperandis caus. 33. & Menoch. de Arbitr. Jud. cas. 182.

(4) See Papegay, p. (mihi) 405.

Among fines are understood to be included pecuniary fines, which are all of one and the same sort, greater and smaller.

Punishments are of many sorts. Some of them are capital punishment, in which the life of the criminal is forfeited; and others are common corporal punishments. (1)

Capital punishments, again, are of several sorts; viz. beheading, hanging, strangling, burning, breaking upon the wheels, and similar greater or inferior punishments. (2)

Common corporal punishments are, whipping, branding, banishment, confiscation and forfeiture of property, and the like (3); which will be discussed at length in the subsequent part of this work.

Pardon or Remission, in what Cases to be granted.

§ 1. Pardon or remission used to be granted in matters differing from murder; and so Jan de Brasser obtained remission on the 17th March 1517, having uttered some improper words; but it prevails mostly in crimes against life or body, with this distinction, whether the crime has been committed murderously, that is, wilfully and by lying in wait, and the offender being aware of the matter, but the person slain *not* being aware of the matter; or whether it was done fighting, with permitted or unpermitted, or with similar or dissimilar weapons; by whom the cause of fighting was given; and whether the murder was committed with design and from an evil mind, or through negligence, or in defence of one's life; for, otherwise it appertains to no supreme power to forgive public crimes, or to leave them unpunished, as the sword was not put in vain in their hands, but to punish according to justice those who commit offences without being reconciled. (4)

Of Abolition.

§ 2. If the offences be committed in necessary defence, or if attended by such trifling negligence, that the same need not be punished, and the offender seeks to avoid the disgrace and suspicion which might unjustly be attached to his person, he may pray for abolition thereof, that is, for *a wiping out and annulling of the fact*, as if it had not taken place; to which no subsequent confirmation or emigration is required, but with this addition,

§ 3. Of quitting the Country.

viz. that he in the mean time gives security for ever, if the fact admits of composition, that is, if it be not publicly punishable, or otherwise for certain time, and usually for half a year, in order to obtain pardon or remission in the mean time; but abolition prevails mostly in other cases, though not in murder.

(1) l. 6. § 2. Ff. de pœnis.
(2) l. 2. Ff. de pœnis. junct. l. 8. Ff. eod.
(3) l. 4. l. 7. Ff. de pœnis.
(4) l. 14. Cod. de pœnis. lib. 51. § 2. vers. quod. si quis. Ff. ad l. aquil. Numbers, xxxv. 29. 31. 33. & seq.

Of Pardon and Remission; and whether and in what Manner they are to be distinguished from each other.

§ 4. Pardon is a full forgiveness of the offence committed, out of a peculiar consideration.

Remission is nearly the same, and of the same effect, excepting only that letters of remission are granted, when, in the absence of the offender, any occurrence of banishment or otherwise had taken place, which in such case is annulled, besides the remission of the offence.

Of Confirmation.

§ 5. The letters of pardon or remission having been granted, ought to be confirmed before the court, for which purpose the nearest relations and friends of the person slain must be summoned to see the said letters of remission produced, and to prove if they chuse that the same were wrongly obtained, or otherwise to be reconciled to the offender upon a reasonable declaration (1); and in case the relations are unwilling to be reconciled, the court effects the reconciliation on their behalf according to reason (2). To this case some writers wish to make applicable, that if a thief condemned to be hung, who, if the halter should break, and he should fall to the ground alive, but half hung, would as it were, through an immediate release, become free in consequence thereof; and that he undoubtedly ought in such a case to obtain remission if he had before made public declaration of his innocence. (3)

But neither such public declaration, nor the occurrence following immediately thereupon, are admitted by us, nor credited to be any holy secret; and all similar persons are not merely condemned to be hung, but to be *punished with the rope*, until death follows; and in case of such an accident, they will be hung a second time, with double rope; according to the example which Hieronymus Cagnolus relates to have occurred in his time. (4)

Neither is it allowed among us, that a woman, out of love for the person whom she intends to marry, should release him from the gallows or punishment of death by her entreaties. (5)

Of Letters of safe Conduct.

§ 6. The reverence due to churches, images, holy and consecrated places, was antiently indulged to such a degree, that if any offender soever could take refuge there, he obtained full

(1) Vide Zypæ Notit. Jur. Belg. tit. de abolition. & remission. vers. ante gratiam.

(2) See further Papegay, pp. (mihi) 470-488.

(3) Lucas de Penna is of that opinion, ad l. 5. Ff. de panis & l. 1. C. de desert. occult. eor.

(4) Hieronim. Cagnol. ad l. 125. Ff. de reg. jur.

(5) Vide Nicol. van der Hoog, singular. jur. 59. Paul. Bus. ad l. 26. § ult. Ff. ex quib caus. major.

freedom (1). This practice was first adopted from the holy scriptures (2), without distinction, by the imperial resolution of the council of Aurange (Orange), in the year 444, and was afterwards inserted into the ecclesiastical or spiritual code of law (3). But since, among us, in consequence of the reformation, no holiness or dignity is attributed to churches, besides the mere performance of divine service, more than to any other public place, that freedom was not only lessened with respect to the persons of public thieves, robbers, murderers, heretics, violators of supreme power, bankrupts, and other offenders, (as is contained in the ordinance of King Philip, of the year 1570, art. 66.): but it also ceased and terminated entirely. And moreover, the delivery made by Rudolph van Diepholt, bishop of Utrecht, upon the complaint of the secular judge, and constraint of Philip Duke of Burgundy, at the end of February 1424, was publicly published in the high tribunal of Rynland, which then was still the only high tribunal of the common country; and in the same tribunal it was renewed, in consequence of the abuse and encroachment thereupon, by order and special letter of his imperial majesty, of the 14th January 1525; namely, "That whenever any one, on account of any "crime committed by him, proceeds to the churches or church-"yards, he may not be protected by the freedom of the church; "and that our beloved lord the Duke of Burgundy, Count of "Holland, may freely cause such offender to be taken from the "churchyard without being considered to have violated it, or "being interdicted on that account; and the freedom of the "church shall likewise not be available to any person who, "with premeditated design, murders any one, when notoriously "proved against him, nor to those who were banished by our "beloved Lord the Duke aforesaid, or by the courts of justice "in the country-manors, on account of evil deeds, when they "have offended against the Prince of the country, or his "country, which we call *crimen læsæ majestatis*, or similar "offences."

Which very nearly agrees also with sound reason and holy scripture, according to which the guiltless and those who innocently commit an accidental or unfortunate offence, are protected in the free cities against the violence of the nearest rela-

(1) Tot. tit. Cod. de his ad eccl. confug. & l. unic. de his qui ad statuas. Vide Polydor. Virgil. de rer. invent. lib. 2. c. 12. Augustin. de Civitate Dei, lib. 1. c. 34.

(2) Numb. xxxv. Deut. xix. 1 Kings i. 50. Exod. xxi.

(3) Cap. eos. 6. distinct. 87. Cap. constituimus 86. caus. 7. quæst. 4.

tions of the person slain, when they seek to revenge his blood (1), but in no wise so that the government be thereby prevented from punishing or letting an offender go free (2); therefore, the misusing of the said liberties, contrary to sound reason, according to the pleasure of mankind, is condemned by Johan Ferrar (3); and it militates entirely against the divine law (4); and it is rightly observed by Covarruvius (5), that it can in no wise be maintained from the divine law (6). But as no one is permitted to do justice to himself (7), of course no liberation is known (excepting pardon, abolition, remission, or emigration), which would withhold from the offender the hands and compulsion of justice; unless any baron or count, through his extensive power, wishes to protect him out of favour, or for other reasons, in his county, or within his territories (which protection is commonly termed a *safe conduct*); which is often granted to bankrupts and other offenders, to the great prejudice of the republic, for a certain acknowledgement, in the county of Kulenborg, in the liberties of Ryanen, and elsewhere. And I am also informed, that the Lord of Warmond has a right to grant a similar safe conduct for the space of fourteen days. With respect to which it is to be observed, that as such liberties were very often abused, the Count of Kulenborg, on account of the concealment of Hans Didrik de Mortangue, (who, after the violent abduction of the young Lady Catherine D'Orleans, committed on the 17th March 1664, at the Hague, made his escape from Kulenborg, through protection of the Count), was threatened by the States of Holland, pursuant to the resolution of their High Mightinesses, on the 2d April 1664, that, in order that they might have redress for similar excesses, the gates of the city of Kulenborg should be taken out, and the drawbridges be fastened, or that instead thereof stone bridges, and in addition thereto two breaches more should be made in the walls, in order by that means to have and keep an open access into the said city, without hindrance, &c.; and for that purpose the said city was surrounded by armed troops; and by a deed bearing date in May 1664 next following, he bound himself, and promised, that in future he neither would give nor

(1) Vide Numb. xxxv. 27. Ames. de Casib. Consc. lib. 5. c. 34. n. 17.'
(2) Exod. xxi. 14. 1 Kings ii. 29.
(3) See his Praxis Pap. tit. 52. Gloss. 1. n. 47.
(4) Jerem. vii. 11. Matt. xxi. 12.
(5) Lib. 2. c. 20. n. 2. vers. secunda conclusio.
(6) Vide Damhoud. Prax. Crim. c. 106. n. 21. who opposes the opinion of Rebuffus, who pretends that such liberty was established by God, and that therefore the revenge for crimes committed is left to God, and the government placed by him.
(7) Rom. xii. 17.

grant safe conducts to capital delinquents, malicious bankrupts, and similar persons who come from the united provinces into the city or county of Kulenborg, but that he would detain and deliver them on first demand of the Lords the States of the said provinces, of the courts of justice, or of the magistrates of the cities thereof, in order that they might be punished within the said provinces and cities according to the exigency of the case, &c.

Whether and how far such free cities may exercise their right, the reader is referred to the authorities cited below (1). If any one dies before the inflicting of punishment, he retains his good name, and the crime is annulled by his death, with the exception of the crime of *læsæ majestatis* or high treason. (2)

(1) See Georg. Tholosan. Syntagm. Jur. lib. 33. c. 21. 22. Rebuff. ad constit. reg. tom. 2. tit. de immunitat. eccles. Covar. Var. Resolut. lib. 2. c. 20. Zepper de legib. Mosaic. l. 2. c. 7. & l. 4. c. 14. Ames. de casib. consc. lib. 5. c. 34. quæst. 6. Polydor. Virgil. de rer. invent. lib. 3. c. 12. Martyr. loc. commun. class. 4. c. 14. n. 33.

(2) l. ult. ad l. Jul. maj. Groeneweg. ad l. 6. de publ. Jud. Mattheus de Crimin. tit. 19. c. 3. Grotius, 3. 32. 22.

COMMENTARIES

ON THE

DUTCH-ROMAN LAW.

BOOK V.

CHAP. I.

Of Judges and their Tribunals, and whatever appertains thereto.

§ 1. *Of Judges, and their Office.*
2. *Of Tribunals, and where they are to be held.*
3. *Of the Office of Bailiff.*
§ 4. *The antient Mode of holding a Court of Justice.*
5. *Of the Office of a Secretary, and what it antiently was.*

SINCE every one is infected with the natural weakness of self-love in the division of things and distinction of property and possessions, and therefore cannot, nor may, do justice to himself (1); so necessity has introduced impartial judges in every city and village, by whom cases between two or more persons are to be decided according to justice, and before whom, at places appointed for that purpose, the litigating parties are judicially to institute and defend their mutual causes; and from them, after a full hearing of both parties, they are to expect the issue and final judgment thereof.

Of Judges, and their Office.

§ 1. It is by no means certain, who and what persons have administered justice among us from the beginning, in the capacity of judges. It is, however, probable, that as the supreme power and government were vested in the states of this country from the beginning, the administration of justice and the execution thereof rested entirely with the said states, according to the

(1) l. unic. cod. ne quis in sua causa jud.

example of the Roman kings, and so it has been testified respecting the counts of Flanders (1); and it appears in several old charters, that at the commencement it was also exercised by the counts of Holland, but in consequence of the increase of population, and the incumbrances and difficulties which, independently of that increase, arose from the government of the country, the said office was too burthensome, and the conveniency too small and of little importance; and therefore the prince of the country, being incumbered with the care of the government of the country and whatever appertains thereto, was under the obligation of trusting the administration of justice to others, in whom he had confidence; and, consequently, every city and every village or manor obtained in the course of time their own special judges, who, in order that they should continue impartial and unsuspected of conspiracy or fraud, are renewed and re-established every year, antiently by the highest power, but at present by the supreme power of every particular place. Thus, in some places seven persons, and in others eight, are chosen out of the most respectable and affluent families, and among them lawyers are mostly preferred, as being most fit for such offices; and in cities where trade is carried on, and many disputes arise concerning trade, the most respectable merchants are added to the magistracy; besides whom they have a general counsellor of justice, who is denominated a *pensionary*, and also some of the principal practitioners in the law, who for a certain annual salary assist them with their advice in difficult cases (2); and in the country the judges, in difficult cases, consult two or three impartial lawyers, at the expence of the litigating parties; these are usually denominated *aldermen*. (3)

In cases subject to corporal punishment the bailiffs, and in ordinary cases the sheriffs, have a right to prefer accusations and complaints; to whom are added the fiscal and procurator general, who have a right to prefer similar complaints in the name and on the behalf of government in ordinary cases, before the high court, and in other cases by preference, when they detect an offender in the commission of the act, and also in case of prescription of other crimes left unpunished (4). A similar office was borne by Pilate respecting the accusation of Christ, whose office it was to accuse him; and he having also ende-

(1) By Nicol. Burgund. ad consuetud. Flandr. tract. 9. n. 13.

(2) Arg. l. 2. § 5. Ff. de senatus consult.

(3) Concerning the origin and jurisdiction of Aldermen, vide pp. 12-14. supra.

(4) Instruct. art. 8, 9. Ff. de offic. procurat. Cæsar.

voured all means of accusations to please the people, publicly declared more than once that he found him not guilty, and delivered him up to the judges under such protestation and testimony; so that he is erroneously called by some persons versed in scriptures, "stadholder" and "chief judge," whereas he was only fiscal and prosecutor in the name and on behalf of the stadholder, as is asserted out of Tertullian, Josephus, and Tacitus, by Jacob Cujacius. (1)

Of Tribunals, and where they are to be held.

§ 2. The place where justice is administered, is commonly denominated the *tribunal*; because, antiently, it consisted of four sorts of offices, namely, a judge, a plaintiff, a defendant, and a sheriff, who demands justice; and there is a town-house where justice is publicly administered on certain days and periods, by some on the road and in the streets, under certain separate roofs, as is still in use in Guelderland in the country; and so the charter granted by Duke Maximilian to the people of Holland, on the 26th May 1480, (art. 9.) contains the following clause, viz. "That no bailiffs, sheriffs, nor dikereeves, within "the cities, nor in villages, should administer justice; but in "a public court of justice outside, on the road, or in a house "where no provision nor liquor is sold; and that the adminis- "tration of justice should not be commenced, nor should the "court meet but in proper time at sun-rise, before noon, and "not before nine o'clock; and whenever the court meets, and "the administration of justice has been begun, that the tribunal "should not be dissolved, nor the administration of justice be "postponed one or two hours, or more or less, before the ad- "ministration of justice is finished; and if they administer "justice otherwise, it would be of no value." This regulation, however, has become so completely obsolete among us, that, in the country, justice is almost every where administered, and the court held in an inn.

Of the Office of Bailiff.

§ 3. In every tribunal there is a sheriff who convenes the meeting, that is, who causes the aldermen to assemble, and from them demands justice through the litigating parties; for the word "*schout*" (sheriff) is derived from "*schuld*" (debt), and he is so denominated, because he is a person who recovers common debts. And, according to Grotius (2), in antient manuscripts, instead of "*schuld*" and "*schuldig*" (*debt* and *in-*

(1) Observ. lib. 19. obs. 13.

(2) Inleyd. lib. 2. c. 28. vers. die den oorsponk.

debteel), we find *schoud* and *schoudig*. The sheriff also had a right to recover the small pecuniary fines or penalties due to the lord, which are still denominated *the fines of the "schout"* (or sheriff); but higher fines and penalties, the cognizance of which belongs to well-born men, were (as they now are) recovered by the bailiff almost in the same manner; but both these offices are executed in the cities, where the aldermen administer justice, without distinction, and in villages and manors which have no general office of bailiff, mostly by one and the same persons, who in the cities are termed *chief officers*, and in the country *bailiff and sheriff*, who officiate both in common cases under the jurisdiction of aldermen, as well as in punishable cases that are subject to the jurisdiction of the well-born men; and independently thereof, the sheriffs in the country have the right to confirm with the seal of the lord or of the manor all indentures, transfers, certificates, and other documents executed before aldermen. The bailiffs also draw the one third penny of all penalties forfeited in the manors in corporal and criminal cases; for the two other parts of which they were obliged to account to the count. And the sheriffs had, in the name of the lord of the manor, a right to the second purchase of all sales of immoveable goods; whence the right of poundage of a farthing and stiver arose, and among some, of something more upon every gilder, upon all public sales of immoveable goods, which seems to have had its origin for the purpose of buying off the same; concerning which a sentence was pronounced by the court of Holland in favour of the sheriff of Soeterwoude, on the 14th February 1535, between Jacob Willemsz of Leyden, impetrator in reformation, on the one side, and Antonis Paats, sheriff of Soeterwoude, defendant, on the other side, in which the sixteenth penny was adjudged to him upon the proceeds of sales of all immoveable goods sold publicly, or exposed for sale publicly within the year. A similar sentence was pronounced for the sheriff in Schieland on the 24th February 1629 (1). Concerning the origin of sheriffs in the southern part of Holland, Jacob van Oudenhoven gives us an account in his description of the southern part of Holland (2); which also contains a sen-

(1) Both the sentences above noticed may be seen in the first volume of Sententien, en gewese saken, van den Hogen en Provincial en Raad. (Sentences and decided Cases of the High and Provincial Courts) pp. 269. 309. See further, Papegay, p. 65. & seq.

(2) Beschryving van Zuid-Holland, pp. 449, 450.

tence of the court of Holland of the 22d December 1598, in a suit between the lord Jan van Duyvenvoorde, lord of Warmond, and impetrator in the first instance, and Foy of Broukhoven, bailiff of Rhineland and procurator general, concerning the right of the lords of manors and the bailiffs appointed by them. With respect to the right concerning common fines between bailiffs and sheriffs, the reader is referred to the customs of Rhineland. (1)

The antient Mode of holding a Court of Justice.

§ 4. Antiently the sheriff used to assemble the court of justice in the following manner; viz. after he had caused the aldermen to be assembled on the appointed law day, before noon, (of which day he previously caused a proper entry to be made) at the place where justice was usually administered; he asked, whether the court was assembled in good time of the day, and whether he, as holder and complainer, might proceed at law and recover his and his lord's fines; to which the first alderman answered; "I think the day is so far advanced, that "you may assemble the court of justice according to the laws "of the country; so far as I have proceeded, if no one is of "a contrary opinion." Whereupon the sheriff cried out, "Is "any one of a contrary opinion? May I here assemble the court "of justice according to law? I ask it once, twice, thrice, and four "times; and as no one has any legal objection thereto, I assemble "the court on behalf of my lord, on behalf of my neighbours, and "of myself." Having done this, the bailiff commanded the people to keep silence, and exhorted them in these words: "I "desire contentment, and I prohibit discontentment; I com- "mand, that no one speak before this tribunal, unless he speaks "in a respectful manner, and with the consent of the lord or "judge, according to what is right. I command that no one "should approach too near to the judge, nor stand too near "him, nor address him in words or deeds, nor with any mat- "ter whatsoever. I command whatever may be helpful to this "tribunal; I prohibit whatever may cause hindrance. I com- "mand it on behalf of the lord, once, twice, thrice, and four "times, upon the highest penalties fixed thereto." This being effected, the sheriff demanded whether any one had any matter to be proceeded with judicially, after which the parties pleaded; which being done, he asked the first alderman what the justice of the case is, and said, "I ask you that judgement?" Judgement being accordingly given, he asked the others, one after

(1) Costuymen van Rynland, art. 10.

another, "whether they follow it?" and having collected the votes, he pronounced the judgement. (1)

But the whole of the proceedings above described, is not so strictly observed at present; nor are the proceedings restricted to certain words or strict observations. The power however of assembling the court, of keeping the litigating parties in proper order, of recovering the fines and penalties due to the lord, of demanding judgement, and of collecting the votes, remain as they antiently were.

With respect to the day of assembling the court in Kenmerland, the sheriff may not postpone the day longer than a fortnight (2); neither may he cause the aldermen to meet more than twice a week, viz. on Tuesdays and Fridays; on which days the neighbours may likewise plead against each other (3). In order, however, to avoid the law days being protracted too long, it was introduced into the country, that a law day should be held once at least in every fortnight; and so it was also resolved by assent of the high tribunal in the southern part of Holland, in the year 1433 (4). What further right and justice are done by the sheriff, appears in a certain sentence of the court of Holland, between the bailiff and the sheriff, pronounced at Ryswik on the 5th November 1632. (5)

Of the Office of Secretary, and what it antiently was.

§ 5. Each tribunal has also a sworn scribe, who reduces every thing into writing, publishes the decisions to the people, and grants copies thereof to those who require them. He is denominated a *secretary*; but this office is not of any great antiquity; at least it is unknown in the country, where the decisions and decrees of judicial cases are given verbally, and are pronounced by the sheriff (6). Hence we infer, that secretaries or clerks were antiently unknown, and that all cases were settled by the sheriff with his aldermen in a summary way, in the name of the Count. This mode of proceeding was first introduced from the papal laws (7); and we find it in the old statutes of the city of Leyden, of the year 1400; where it was resolved by the sheriff and eight aldermen, "That whoever makes any acknowledgement respecting any wager or offer, the plaintiff and

(1) See a more full account of this antient mode of proceeding in Handvesten en Costuymen van Zuid Holland (Charters and Customs of the southern part of Holland) pp. 517. & seq. and in Regten en Costuymen in Kenmerland (the Rights and Customs of Kenmerland), pp. 190. 200. & 290.

(2) Costuym. van Kenmerland, p. 191.

(3) Ibid. p. 67.

(4) Costuym. van Zuid-Holland, p. 455.

(5) Concerning the further jurisdiction of Bailiffs, see Book i. ch. ix. § 14. pp. 46, 47. supra.

(6) Cost. in Zuid-Holland, p. 449.

(7) Cap. quoniam extra. de probat. & cap. statutum § notarium de rescript. in 6.

" defendant should deliver their pleadings in writing to the " clerk within two days after they make other acknowledgement; " and that whoever does not deliver his pleadings as aforesaid, " should forfeit his right."

The secretary's office is, to keep pertinent entries of whatever is alleged before the tribunal between the litigating parties, for or against, with good distinction of cases, persons, and times. These entries are denominated *notes*; and, when the pleadings are completed, he is to read to the judge whatever was produced by the litigating parties, to reduce the decisions into writing, and to cause the same to be revised and confirmed by the judge; which being done, he is then to inform the suitors thereof, and to keep proper records of every transaction, in order that he may be enabled to grant copies of them at any time when required. (1)

Further, secretaries are to keep themselves impartial, and not to interfere in any manner whatsoever with the votes and decisions; nor may they give any information to either party, of any thing relating to the case of the other, except the pleadings; neither may they plead for the suitors. (2)

CHAP. II.

Of Jurisdiction or Law-Constraint.

§ 1. *Jurisdiction, how to be exercised.*
2. *Jurisdiction, that has been given to any one, cannot be ceded to a third Person.*
3. *Jurisdiction defined, and its different Sorts.*
§ 4. *Of general or special Jurisdiction, and how far it extends.*
5. *By whom to be exercised.*
6. *Of the Badge or Ensign of Criminal Jurisdiction.*

IN order that disputes concerning matters may be properly founded according to mutual law and arguments, and be terminated and executed; together with jurisdiction, there was also given to the judges a *law-constraint*, or power of causing their

(1) d. cap. quoniam 11. vers statuimus extr. de probat.

(2) l. 1. Pf. de prævaricat. Vide Placaat, van de Staten van Holland, August 1, 1603, where it is ordained, that *no Bailiffs or Secretaries of any Court should allow themselves to be used as pleaders therein.* See also Handvesten en Costuymen in Zuyd-Holland, p. 456.

judgments to be obeyed (1): for, in jurisdiction we understand to be included whatever appertains to the execution of the law, without which the jurisdiction would be of no effect. (2)

Jurisdiction, how to be exercised.

§ 1. The manner in which jurisdiction is maintained and exercised through law constraint is peculiar to almost every place, and such jurisdiction takes its form according to the manners and institutions which prevail there; excepting that this is general and usual among all, namely, that the jurisdiction of life and death, as well as the other branches of jurisdiction, may be ceded and given to another; so that, at present, the jurisdiction of life and death is exercised without distinction by all governments to whom any jurisdiction is granted: excepting only that in the country, in villages, which have no special jurisdiction of life and death, the aldermen have only a *single* jurisdiction; and the jurisdiction over life and death in the same is exercised by the well-born men, who take cognizance of criminal cases and capital crimes, while the aldermen have the cognizance only of common cases. (3)

Jurisdiction, that has been given to any one, cannot be ceded to a third Person.

§ 2. A question has arisen, whether the jurisdiction granted to any one by another, may be ceded again by him to a third person? And it is understood in the negative at present; and it is an established rule, that no one else can cause any jurisdiction to be exercised by a third person, but those who have it of themselves (4), or those whose commission or institution contains a clear power of transferring the same to a third person, as the barons have among us. (5)

Jurisdiction defined, and its different sorts.

§ 3. According to the opinion of the doctors, jurisdiction was divided into many kinds, but it may be best distinguished into *criminal*, that is, such as has the cognizance of punishable offences; and *civil*, that is, such as takes cognizance of all other ordinary cases; unless it be distinguished into, 1. *High*, that is, jurisdiction having the cognizance of capital crimes, and of offences subject to corporal punishment; and, 2. *Middle jurisdiction*, which takes cognizance only of pecuniary fines and of some other excluded cases, as the appointing of guardians, providing for widows and orphans, appointing notaries, and the like; and, 3. *Low jurisdiction* over all other common cases of suitors. In this manner they are divided, according to the example of the

(1) Arg. l. 2. de jurisdict. et l. 1. in fin. Ff. de offic. ejus.

(2) l. ult. in fin. Ff. de offic. ejus cui mand.

(3) Vide Gudelin. de jure noviss. lib. 4. c. 2. & lib. 5. c. 13. in fin. Vinn. de jurisdict. c. 2. n. 8.

(4) l. 8. Ff. de jurisdict.

(5) Vide Bronkhorst, ad. l. 70. Ff. de reg. jur. Vinn. de jurisdict. c. 3. n. 7.

French, by Jan Bottelier (1). Otherwise, jurisdiction might be divided into as many sorts as the law itself, which is either *divine* or *human*, *spiritual* or *secular*, the *Law of Nations*, the *Civil Law*, *General* or *Special*, such as concerns *Feudal Property*, or such as has no relation thereto; or otherwise to as many sorts as judges are distinguished from each other, namely, into justices of courts, of towns, of villages, of spiritual, secular, and martial affairs, and of the common rights of citizens. But all these may be referred to the two above-mentioned sorts, viz. *criminal* and *civil*, that is, jurisdiction of *punishable* or *common unpunishable cases*.

Of general or special Jurisdiction, and how far it extends.

§ 4. Jurisdiction, with respect to the exercise thereof, is either *general* or *special*.

General jurisdiction is that which extends throughout the whole country; such as the jurisdiction of the court, or the high court in Holland, which is exercised throughout the whole country.

Special jurisdiction is that which is confined to certain places and districts, such as between cities, villages, or manors, among which each has its special jurisdiction, which is separated from the other by certain boundaries. Besides this limitation and division, no one may exercise any jurisdiction, but each must confine himself to his own territories, or otherwise it is *ipso facto* void and of no effect. (2)

By whom to be exercised.

§ 5. In cities the jurisdiction is exercised by aldermen, without distinction of high or low, criminal or civil; but, in the country, a distinction is made between criminal and civil cases; for there, civil or unpunishable cases only are settled by and before aldermen, and the criminal and punishable cases are decided by the well-born men; concerning whom we have already treated at large, in Book i. ch. ii. § 20—25. pp. 12—15.

Of the Badge or Ensign of Criminal Jurisdiction.

§ 6. The badge or ensign of a jurisdiction, with power to inflict punishment, was formerly a sword; which was carried before the magistrate who possessed such jurisdiction: whence it is also denominated the *power of the sword* (3). But, among us, the bailiffs and sheriffs, in the administration of justice, whether sitting or walking, have a long switch in the hand, dyed red; on which account the country sheriffs are, in several places, denominated the *Red Rods*.

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(1) Summe Rural, c. 6. § natuyrlijk. & c. 272. et seq.

(2) l. ult. Ff. de jurisd. Vide Pecc. van besetten en hand. opleggen, c. 21.

(3) l. 3. Ff. de jurisd.

CHAP. III.

Of Plaintiffs and Defendants.

§ 1. *Plaintiff, who.*
2. *Defendant, who.*
3. *Whether and when any one can be compelled to be Plaintiff or Defendant, and whether a Person may renounce a Suit already instituted.*
4 *Who may be Plaintiffs and Defendants, and who not.*
5. *No Minors;*
6. *Nor Children against their Parents;*
7. *Nor married Women;*
8. *Nor Persons under Banishment;*
9. *Nor any improper or unpermitted Colleges.*
10. *Whether they are also excused from Criminal Suits, and from Cases subject to corporal Punishment.*
11. *Joint Debtors; whether and when they are responsible for the whole, or for their several Shares.*
12. *Whether and when any one is responsible for another's Engagement.*
13. *Husband and Wife, whether and when responsible for each other.*
14. *A Father for his Son.*
15. *Reprisal, what; and when it has Effect.*
16. *No one is legally responsible without a Demand, or before the Time is expired.*
17. *Of the Duty of the Plaintiff.*

THE persons occupied in and about proceedings at law, are of two sorts, viz. some, who are themselves concerned in the suit, and others who officiate therein for them, as advocates, proctors, door-keepers, messengers, &c. (1) The persons pleading themselves, who are actually concerned in the suit, are plaintiffs and defendants, who are denominated the *parties*, because they reciprocally plead against each other.

Plaintiff, who.

§ 1. A plaintiff is a person who summons another before the judge, to plead judicially against him. (2)

Defendant, who.

§ 2. A defendant is one who, being summoned, opposes the plaintiff judicially. (3)

Whether and when any one can be compelled

§ 3. No one is compelled to be a plaintiff against his own will or pleasure (4); but, when he has once instituted his cause before

(1) Cap. Quoniam, 11. extr. de probat.

(2) l. 13. Ff. de judic. l. 10. Ff. fin. regundor. l. 14. in fin. Ff. de in jus vocando.

(3) § 3. Instit. de perpet. et temp. act. l. 3. Ff. de probat. l. 5. & seq. Cod. de edendo.

(4) Tot. tit. Cod. ut nemo invitus ag. vel accus. l. fin. Cod. de usur. pupil. l. 1. Cod. de in litem jur. l. 20. Cod. de pign. et hypothek.

the judge, he is obliged to prosecute the same, otherwise he incurs the costs of the suit (1). This is to be understood in case they pleaded mutually, which is usually termed *litis-contestation*, namely, when claim is made, and an answer filed thereto, by which the case becomes depending before the court. But otherwise the plaintiff may, before litis-contestation, renounce the suit commenced by him before any judge, and again institute the same before another judge, provided he pays the costs incurred in the mean time by the defendant (2). But guardians of pupils, agents, receivers, attornies, and other similar persons, are also against their choice and will obliged, on account of their offices, to cause the suits of their pupils, minors, and others intrusted to their management, to be decided by the judge, on account of the danger of responsibility, if they be negligent. (3)

to be Plaintiff or Defendant; and whether a Person may renounce a Suit already instituted.

§ 4. All such persons as are not prohibited from appearing, may appear before the judge, either to institute or to defend a demand; and those who lie under prohibition of that nature (4), are the following:

Who may be Plaintiffs or Defendants, and who not.

§ 5. I. All minors, who are not permitted to appear in judgment without the consent and assistance of their guardians. (5)

No Minors;

§ 6. II. All children are prohibited from suing their parents, unless it be with the previous consent and knowledge of the judge. (6)

Nor Children against their Parents;

§ 7. III. All married women, who, according to our daily practice, are under the power, care, and protection of their husbands (7), without whose permission they cannot appear in civil cases before the judge, unless the husband be absent and abroad, in which case it is sometimes permitted (8). But women who carry on public trade are not included in such prohibition; who,

Nor married Women;

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(1) Instruct. van den Hove, art. 111. 209.

(2) DD. ad l. 4. Cod. de pact. Vide Damhouder, Prax. Civ. c. 202. Johan à Sande, lib. 1. tit. 7. defen. 1. Wieland, Prax. Civ. tit. 1. c. 12. Christin. vol. 2. decis. 91. n. 4. Pecc. van besetten en hand opplegen. c. 48.

(3) l. 8. in pr. Ff. de negot. gest. l. 11. Ff. mandat. l. 2. Cod. arbitr. tutel. l. 18. l. 24. Cod. de administrat. tut. See further, Andr. Gail. lib. 1. obs. 9. Merul. Prax. Civ. lib. 1. tit. 8. c. 1. n. 9. Damhouder, Prax. Civ. c 10. n. 2.

(4) Tot. tit. Cod. de his qui legit. person. stand. in judic. habent.

(5) l. 1, 2. Cod. qui legitim. person. stand. in jud.

(6) l. 4. § 1. Ff. de in jus vocando. l. 3. Cod. eod. § fin. Instit. de pœna temere litigant. See Merula, Prax. Civ. lib. 4. tit. 24. c 12. n. 3. Gudelin. de jure noviss. lib. 4. c. 5. in pr. Zyp. Notit. Jur. Belg. Perez. eod. n. 3. Christin. vol. 2. decis. 154. n. 8, 9. Rebuff. ad constit. in proem. gloss. 5. n. 47. Fachin. lib. 10. c. 17. Vinn. ad § pœnales, 12. Instit. de actionibus, n. 5. Papegay, p. (mihi) 17.

(7) Vide Grotius, Inleyd. lib. 1. c. 4. n. 4. Herbai. lib. sing. c. 13. § 1. et seq. Boër. ad consuetud. Biturig. tit. 1. § 4. gloss. 2. Argentr. ad consuet. Britt. art. 424. Gudelin. de jure noviss. lib. 1. c. 7. vers. certe.

(8) Arg. l. 18. § 1. Ff. de judic.

so far as their trade is concerned, may judicially institute a demand and defend themselves (1).

Nor Persons under Banishment;

§ 8. IV. All persons banished (2), among whom are included those who are with our public enemy, unless they are allowed to remain with them by the states general, or those in whose province the case is to be pleaded (3); excepting also in cases relating to trade. (4)

Nor any improper or unpermitted Colleges.

§ 9. V. And likewise all improper and unpermitted communities and meetings; of which, although some are tolerated among us, yet all judicial proceedings are refused to them. (5)

Whether they are also excused from criminal suits, and from cases subject to corporal punishment.

§ 10. All the above exceptions are observed in civil and unpunishable cases; but, in criminal and punishable cases, the defendant must appear personally to answer for himself; so that neither the assistance of guardians in the case of minors, nor of husbands in the case of their wives, are applicable therein; but the presence of the offender himself is not only permitted, but even necessary (6). The preceding observations are to be understood of litigating persons especially, that is, of a plaintiff and a defendant; but it sometimes happens, that several persons together or jointly carry on a law suit against others. (7)

Joint Debtors, whether and when they are responsible for the whole, or for their several Shares.

§ 11. Formerly, if one alone of the joint litigating parties sued any one else at law, the objection against him was, that he alone was not fully empowered; and on the other hand, if any one in such case was sued alone, at law, as defendant, it was deemed sufficient if he objected that there were several joint debtors with him (8); but at present, notwithstanding any one has joint partners in one and the same cause, he may sue any one at law for his share alone, or be sued by another (9): and he may also execute the matter entirely, if he, being a plaintiff, secures himself with respect to the approbation of his partners, and if a defendant gives security for the decision. (10)

But where several debtors are not jointly subject to one and the same judge or jurisdiction, if they reside under several jurisdictions, they may in such case be sued before a higher judge; conse-

(1) Vide supra, book i. ch. vi. § 7. p. 31. and also Wassenaar, Pract. Judic. d. 1. n. 23. et seq.

(2) Christin. vol. 2. decis. 123. n. 1.

(3) Vide Resolut. van de Staten Generaal, Oct. 2, 1590; March 4, 1591.

(4) Vide Cons. & Adv. part 1. consult. 289.

(5) Vide Jacob Coren, obs. 9.

(6) c. 5. extr. de except. l. 27. Ff. de pœn. See Cost. Antwerp. tit. 43. art. 75. Rebuff. ad const. reg. in proem. glos. 5. n. 72. Imbert. Enchirid. Jur. Gall. in verb. Authoritas curatoris. Boss. Pract. cum tit. de confess. n. 69. Clar. § fin. quæst. 50. n. 2. Papon. lib. 6. tit. 1. art 22. et Argentr. ad consuetud. Brittan. art. 208.

(7) Tit. Cod. de consort. ejusd. litis.

(8) Vide Cujac. et Gothofred. ad l. 1. Cod. eod.

(9) d. l. 4. Cod. eod. l. 85. § 4. Ff. de verb. oblig.

(10) l. 2. Cod. eod.

quently before the court of Holland in the first instance, in order that the case be not divided or transacted (1) by separate parts, as will be treated of more fully hereafter.

Whether and when any one is responsible for another's Engagement.

§ 12. Otherwise, no one can be sued for the engagement of another (2); so that, even in the inseparable community of husband and wife, the one does not remain bound for the transaction of the other, according to the Roman law. (3)

Husband and Wife, whether and when responsible for each other.

§ 13. To this rule, however, there is an exception, in cases wherein public use and customs have introduced another practice; and so the wife and her heirs may, among us, be called upon to pay half the husband's debts, on account of the community of property (4). But a widow, after the death of her husband, is not bound for the debts contracted by her husband *before* the time of her marriage, as is said more fully in the former part of this work (5), nor for any fines or penalties imposed upon the husband for any offence committed by him (6); and likewise, when the husband is punished in his property for adultery or other causes, that loss must be born out of the property of the husband only (7); and likewise, when all the property of the husband is confiscated, half of the property acquired remains free for the wife (8). Further, at many places, a wife has the privilege of renouncing the estate before the sheriff and two aldermen, before her deceased husband is committed to the earth; and if she walks out in her daily clothes, she is not bound for the debts afterwards, which is vulgarly called *laying the keys upon the coffin, or walking before the bier* (9). The statutes of Rotterdam also expressly enact, that all widows of citizens of that city, wishing to be released from debts contracted by their husbands during the marriage, or previously thereto, are obliged to lay the keys of their houses upon the coffin, and to cause the same to be publicly carried to the church; and further, to go out of the house in their daily clothes to the church, with the corpse, with ten stivers in cash, and afterwards to remain out of it (10). On the other hand,

(1) l. 10. cod. de jud. et tot. tit. Ff. de quib. reb. ad eund. jud. eat.

(2) l. 3. Cod. ne uxor. pro marito. l. unic. Cod. ut actio ab hærede.

(3) l. 1. Cod. ne uxor. pro maritc.

(4) Vide Neostad. de pact. antenupt. obs. 9. in notis. Grotius, Inleyd. lib. 1. c. 5. n. 54. Gomez. ad leg. 53 tauri, n. 73. vers. ex quibus infero. Consult. & Adv. part 1. cons. 47. vers. van gelyken. Pecc. de testam. conjug. lib. 2. c. 6. in fin.

(5) Vide supra, Book iv. c. 23. p. 412.

(6) Vide Papon. l. 15. tit. 2. art. 3. Goris. advers. tr. de societ. conjug. c. 4. n. 12.

(7) Vide Sande, l. 2. tit. 5. def. 8. Goris, dict. c. 4. n. 8. et seq. Herbai, lib. sing. c. 13. § 15. Grotius, Inleyd. lib. 1. c. 5. n. 35. Handvesten in Zuid-Holland, p. 531. art. 7. edit. 1654.

(8) Vide Cost. Antwerp. tit. 16. art. 1. Christin. ad Leges Mechlin, tit. 9. art 2. n. 12. Gomez, ad l. 77. tauri. n. 1. Gail. lib. 2. obs. 86. n. 14.

(9) Keuren tot. Leyden, art. 203.

(10) Keuren tot. Rotterdam.

the husband, (since, according to the custom of our country between husband and wife, community of all property is introduced between them), may also be called upon during the marriage to pay the debts of his wife, contracted *before* the marriage (1); but, for debts contracted during the marriage, he cannot be otherwise called upon to pay, excepting for so much as was contracted with his consent: as when the wife, with the previous knowledge and consent of her husband, carries on public trade, unless he be called upon for debts which concern the household in general. (2)

A Father for his Son.

§ 14. For the same reason, a son cannot be molested for debts of his father (3), nor a father for debts of his son; but it is questioned by some jurists, whether a father is obliged, in the name and on behalf of his son, to maintain and educate his son's illegitimate child, or to make amends for the honour of a girl whom his son had dishonoured. Christin (4) is of opinion in the negative. Faber (5) maintains the contrary opinion; but it cannot be extended further than to the education of the child, according to the opinion of Tulden (6); to which a grandfather is also obliged for his grandson, as is shewn more fully in Book i. c. xiii. § 7. p. 63, 64, supra.

Reprisal, what; and when it has effect.

§ 15. In like manner, according to the practice and custom of our country, for whatever a whole corporation of citizens is indebted, all the property of those who belong to that community is tacitly bound; so that if justice be refused to a stranger against his defendant in any of the provinces; or if a decision be forced upon him which is evidently unjust and unreasonable; or if the community or the heads thereof will not pay what they are indebted; in such case any citizen of the said corporation or province, whoever he may be, or any ships, goods, or merchandize, &c. coming from that place, may be seized, with the knowledge and consent of the government of his country or province, and thus the defendants may be compelled to pay, or make good the arrears. This is commonly denominated reprisals (7); but as such measures are rather too harsh, and tend to involve neighbouring countries in war, it is therefore argued by many doctors, whether in a free province they should be consi-

(1) Vide Chassan. ad consuetud. Burg. rub. 4. § 9. ad verb. de tuos debites, n. 8.

(2) Arg. l. final. Instit. quib. alienare licet. l. 33. Ff. de jure dot. l. 78. § 2. Ff. eod.

(3) l. 1. & tot. tit. C. Ne filius pro patre, junct. l. 26. Ff. de pœnis et ibi DD.

(4) Vol. 3. decis. 17. in fin.

(5) Cod. lib. 4. tit. 9. def. 3.

(6) Ad Cod. d. tit.

(7) See the subject of reprisals fully discussed in Christin. vol. 5. decis. 183. n. 7. Bart. tract. de repres. Gail. de pignorat. obs. 2. et seq. Mynsing. cent. 6. obs. 1. Georg. Tholosa. in Syntagm. Juris. lib. 38. c. 8. Menoch. de Arbitr. Jud. cas. 527.

dered good or bad, and permitted or unpermitted. It is therefore advisable between neighbours and allies, in order to prevent wars, that they should follow the rule laid down by a treaty made between this state and that of England, on the 15th April 1654, by which all imaginable causes of such or similar occurrences are prevented and cut off; and in the 24th article of the said treaty, it is expressly directed, that if any injustice or injury be committed by the one against the other, or by the people or inhabitants thereof, no letters of reprisals, marque, or counter-marque shall be granted by either of the nations, before justice be applied for according to the proper course of law; and should it be refused or delayed too long, that then the supreme power on the side of the people or inhabitants who suffered the injury, shall exhort and apply, in writing, to the other, who refuses or delays justice too long, to have all such differences settled and decided amicably, or by a common course of law; but should it then also be still postponed, and no justice be done, or satisfaction given, during the space of three months after such application has been made, that then only letters of reprisals, marque, or counter-marque, should be granted, &c.

This rule is supported also with respect to the heirs of a deceased person, who in every thing assumes his person, and must satisfy his debts whatsoever they may be, even the pecuniary fines and penalties which may arise from crimes committed by the deceased, without distinction. (1)

No one is legally responsible without a Demand, or before the Time is expired.

§ 16. As no one need be plaintiff against his will, so no one may be sued at law against his will, if he be ready to satisfy whatever is demanded of him; and therefore a plaintiff should sue no one at law before he has amicably spoken to and admonished him; for if the defendant, on appearing before the judge, alleges that he never was unwilling, and is still willing, to satisfy what is demanded from him, the plaintiff would in such case be subject to pay the costs incurred on both sides (2); but this is to be understood of debts which are to be demanded (3), and for which the creditor must go to the debtor's house to receive them, no certain day or place of payment being stipulated; in which case, the proper demand puts the debtor in default; but not with respect to debts for which a certain day of payment is limited, and which ought to be brought to the creditor's house, and paid into his hands (4); such

(1) Tot. tit. Cod. ex delict. defunct. in quantum hæred.

(2) Cap. novit. extr. de judic. Arg. l. 73. Ff. de procuratorib. l. 13. de serv. urban. prad. l. 40. Ff. de pign. act. l. 122.

(3) d. l. 1, 2. § 3. Ff. de oblig. l. 24. Ff. quando dies legitor.

(4) l. 12. Cod. de contr. et commit. stipulat. l. 2. Cod. de jure emphyteut.

as quit-rents, annual redeemable rents, and the like, in which the day, when payment falls due, serves as a proper demand and admonition, and places the debtor *in mora* (1). In like manner, no one may be sued at law before the day of payment is expired (2), unless the debtor is suspicious, or the creditor for some other cause has any reason to demand security for payment from his debtor: in which case he may also, before the expiration of the time, demand payment or security. (3)

Of the Duty of a Plaintiff.

§ 17. Before the creditor summons the defendant, he has it in his option to take into deliberation first, whether, and in what manner he will prove his demand (4); otherwise the defendant will be released from the case, as will be more fully shewn in a subsequent page. He ought also to consider whether the defendant will not be able to allege some exception either against the case itself, or against the manner of proceeding at law, of which also there are many sorts.

CHAP. IV.

Of Law Intercessors and Interpreters;—that is, of Advocates and Proctors, and their Offices.

§ 1. *Of Advocates or Law Intercessors, and their Dignity.*
2. *The Nature of their Offices.*
3. *Of Proctors or Interpreters, and their Dignity.*
4. *Their Office in civil Cases.*
5. *And in criminal Cases.*
6. *Whether and how far they are Master of the Case.*
§ 7. *Whether and in what Manner it is necessary to exhibit their Power of Attorney.*
8. *When their Charge and Power, and their Service cease.*
9. *Whether by pronouncing the Sentence.*
10. *Whether and when to be resumed if it ceased in consequence of Death.*

AS many persons, on account of their inexperience in matters of law, or on account of their necessary absence, either cannot or may not maintain and defend their own causes; so

(1) With respect to the question, whether, and the cases in which, the debtor himself ought to bring what he owes, and when the creditor himself ought to come and fetch it, see Ca par. Rederic. de Ann. et Menst. reditib. lib. 2. quæst. 6. Pyrrh. Maur. tract. de solut. c. 29. Anton. Fabr. ad Cod. lib. 4. tit. 43. defin. 15. et lib. 8. tit. 30. defin. 4. Pecc. van beseten ende hand-oplegg. n, c. 9. n. 2.

(2) l. 213. de verb. signif. l. unic. cod. ut act. ab hæred. l. 7 Ff. de compens.

(3) l. 41. Ff. de judic. l. 14. Ff. de pignor. Vide Pecc. van Besetten, c. 4. n. 6.

(4) l. 23. Cod. de probat. l. 21. Ff. eod.

necessity introduced the performance of them through the assistance of others, legally empowered thereto, upon enquiry made concerning their ability.

The persons thus empowered are the *Law-Intercessors* and *Interpreters*; otherwise denominated *advocates* and *proctors*.

Of Advocates or Law-Intercessors, and their Dignity.

§ 1. Advocates or intercessors of law are those who plead and maintain the lawsuits of another, either verbally, in writing, or otherwise with their good advice in and according to law, both in common causes (1), and also in cases subject to corporal punishment (2); and therefore their office is considered of great esteem, as well as necessary, because, by defending to the utmost of their skill and eloquence the property and blood of the innocent, ignorant, and guiltless, they do not promote the welfare of mankind less than those who defend themselves and their country, by arms, in the field of battle. (3)

To these offices, among us, all persons are admitted without distinction, who have been acknowledged to be doctors of both laws in any of the universities.

At present, the number of advocates is uncertain; and to that order belong all those who, having exhibited their diploma to the president or other person empowered by the court to receive the same, have taken the usual oath (4). Which oath ought to be renewed every year on the first law day after The *Three Kings* (5) day upon the public roll, after the same is read and the instruction of the court is renewed (so far as the same in anywise bears any relation to them), in the presence of two commissioners (6).

Those who remain away are still admitted to renew their oath two days after their return, and they are also admitted thereupon in the cities. (7)

The Nature of their Office.

§ 2. In what manner an advocate ought to behave himself in the execution of his office, is particularly stated in the authorities referred to below. (8)

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(1) l. 6. § 5. Cod. de postuland. l. 3. Cod. de advocat. divers. judicior. l. 1. § 4. Ff. de extraord. cognit.

(2) l. 5. Cod. de postul. l. 12. Ff. de publ. jud. l. 2. in fin. Cod. de exhib. reis.

(3) l. 14. Cod. de advocat. divers. judicior.

(4) Arg. l. 11. Cod. de advoc. divers. judicior. Inst. art. 71. Merula, Prac. Civil. lib. 4. tit. 16 & 17. c. 1 & 2. n. 7. & c. 3. Instruct. van. den Hoog. Rade. art. 121. Zypæ Notit. Jur. Belg. de colleg. artific. in pr.

(5) Or the Feast of the Epiphany, commemorated by the Western Church on the 6th of January. EDITOR.

(6) Vide Instruct. art. 71.

(7) See the Manier van procederen voor den Geregte den stad Amsterdam (Manner of proceeding before the Court of the City of Amsterdam), c. 3. art. 1.

(8) Vide Gudelin. de Jure Novias. lib. 4. c. 4. Merul. lib. 4. tit. 17. c. 4, 5, 6, 7, 8, 9, 10. Instruct. van den Hove van Holland, art. 71. & seq.; van den Hogen Raad, art. 123. & seq.; Ordonn. & Instruct. van de Hove van Utrecht, rubr. van de Advocaten; and Manier van procederen binnen Amsteldam, c. 3.; and the notes of N. Duysent Daalders thereon.

Among other points of which the duty of an advocate consists, we may notice the following, viz.

I. He is to take no causes which he knows to be unjust. (1)

II. He is to make no condition to have any share in the cause. (2)

III. He is to do only what the cause requires; and, excepting so far as may be necessary for promotion of the cause, is not to burst out into improper words or calumny. (3)

IV. He is to make no improper or unnecessary delays, in order to vex the people thereby. (4)

V. He is to make no repetitions in his pleadings in writing, of what was said before, in order to vex the people; neither may he repeat in the same the whole tenor of the documents, when he can proceed in the case in a short manner, and prove it with the contents of the documents themselves, as was directed by the ordinance of the court of Holland on the first of March 1583, and renewed by the new ordinance and regulation made to promote the expedition of justice before the high court, on the 7th June 1658 (art. 33).

VI. To the preceding regulations, it should be added, that in the allegation of his cause, he ought not to neglect any facts and proofs; or otherwise, if he forgets or neglects to adduce any point of law, through unskilfulness or imprudence, it may and ought to be supplied by the judge, and considered as if the same was alleged; but this does not take place in matters of evidence; for one must judge according to such evidence or proofs only in cases which consist of proofs. (5)

Advocates have at their service an interpreter, otherwise called a procurator or proctor, who is so denominated because he holds the pleadings, and must watch the progress of the suit in every part of the pleadings, and is in every respect at the service of the advocate; who, when the case is completed by his advice and the service of the proctor, further pleads and defends the cause alone, at law, either verbally or in writing.

Of Proctors or Interpreters, and their Dignity.

§ 3. Although the office of *interpreter* or *proctor* was anciently held in little estimation (6), yet, at present, those who execute this office are highly esteemed, and are so necessary, that no one

(1) l. 14. § 1. vers. non autem. & ibi Bald. Cod. de Judicior. Instruct. art. 71.

(2) l. 6. § 2. Cod. de postul. & Instruct. d. art. 71.

(3) d. l. 6. § 1. Cod. de postulat. & d. art. 71.

(4) d. l. 6. § 4.

(5) l. 6. § 1. ff. de offic. Præsid. c. judicantem. 30. quæst. 5. & c. 1. Vide Ant. Fab. ad tit. Cod. ut quæ des. advoc. part. def. 1. Christin. vol. 2. decis. 105. n. 1, 2.

(6) Vide Gloss. Bart. Angel. ad l. 54. Cod. de decurion.

may appear in judgment before the high tribunals without the protection of an advocate and the precaution of a proctor (1); excepting that, in inferior cases (in the first instance, of one hundred gilders and less; and in appeal from the cities, of two hundred; and from the villages, of one hundred gilders and less), either of them may defend; i. e. either an advocate or a proctor alone. (2)

Before inferior judges, the proctors alone plead and defend suits; unless, for the sake of better security, in cases of great importance and consisting of matters of law, an advocate is taken by them for their assistance, which they are at liberty to do.

In order that the people may be served by able and skilful persons, a certain number of persons are admitted in every tribunal upon oath and enquiry, who only may execute that office. (3)

Their Office, in Civil Cases,

§ 4. They may take and execute for another at law, all civil and unpunishable cases, in such a manner that the persons themselves need not appear before the judge, if the matter be only executed or exhibited by the proctor as his proxy before the secretary, or before a notary and two witnesses. (4)

and in Criminal Cases.

§ 5. But in criminal cases, and such as are subject to corporal punishment, although at present they are likewise pleaded by a proctor, so far as the same (excepting the confession of the defendant) can be admitted to an ordinary suit, that is, a common lawsuit (as according to practice no one is allowed to plead *his own* cause); yet the defendant is not excused from personal appearance, unless upon the information of the case, and preceding permission, under promise that he will appear again in judgment at any time. (5)

Whether and how far they are Masters of the Case.

§ 6. According to the written Roman laws, the proctors were masters of the case, and the execution of the decree was likewise carried into effect against them (6): but, at present, their office is merely regarded, and the execution of the decree is not carried into effect against themselves, but against their

(1) Vide Merula, Prax. Civil. lib. 4. tit. 36. c. 1. n. 5.

(2) Vide Instruct. van de Justitie in Kleine Saken, art. 23. Amplistie van de Instructie, art. 24.

(3) Gail. lib. 1. obs. 43. Merula, Prax. Civ. lib. 4. tit. 18. c. 1. n. 7. Gudelin. de Jure Noviss. lib. 4. c. 4. in fin. Christin. vol. 2. decis. 107. & seq.

(4) l. 46. § 2. l. 56. § 2. l. 53. Ff. de procurator. l. 110. § 1. Ff. de R. J. et simul. Marant. de procur. n. 1 .Merula, Prax. Civ. l. 4. tit. 18. c. 2.

(5) Vide Merula, Prax. Civ .lib. 4. tit. 36. c. 1. n. 4, 5, 6.

(6) l. 22. Cod. de procurat.

clients (1), and therefore they cannot be admitted without exhibiting their proxies. (2)

Whether and in what Manner it is necessary to exhibit their Power of Attorney.

§ 7. For which purpose, the adverse party may allege his exceptions at any stage of the suit, in order to make them exhibit their proxies, and the case must on that account be postponed. (3)

But, according to the daily practice and manner of litigation, if a proctor has a case in his hands, and is provided with the necessary documents belonging thereto, but who has not till then received the proxy, or if the proxy received by him is defective, time may be allowed to him to apply for and produce the same, upon promise of procuring whatever he might have done in the case approved of and confirmed (4); or, in failure thereof, the execution of the decree is carried into effect against him, and he remains responsible for all loss and interest (5). And, independently thereof, the proctors of the court are further subject to punishment, according to the exigency of the case. (6)

And, among us, the power of the proctor must be measured out of the text and sense of the charge and full power.—I say out of the *sense*, for it sometimes happens that the charge extends further than the words infer; and so it is generally understood, that where any one is charged to do something by a general power, he has likewise the charge and power to do every thing without which the promotion of the said case cannot exist. (7)

This power ceases in the following cases, viz.

When their Charge and Power, and their Service, cease.

§ 8. *First*, if it be revoked; which, the case being still whole, may be done at any time. (8)

Secondly, when the proctor himself renounces his case and causes himself to be excused; which may be done in the same way. (9)

When by pronouncing Sentence.

§ 9. *Thirdly*, by a decision of the case: so that unless the proctors have a special charge, they may not carry into effect the further

(1) Arg. l. 4. Ff. de re jud. l. 61. Ff. de procurat. Merul. Prax. Civ. lib. 4. tit. 88. n. 7. Christin. vol. 4. decis. 91. n. 16. Gail. lib. 1. obs. 111. n. 2. Sande, lib. 3. tit. 7. def. 1.

(2) l. 2. § 3. Ff. ex quib. caus. in poss. eat. l. 65. de except.

(3) Arg. l. 24. Cod. de procurat. vide Zanger de except. part 2. c. 8. n. 36. Merula, Prax. Civ. lib. 4. tit. 18. c. 3, 4.

(4) DD. ad l. 1. Cod. de procurat. Vide Imbert. pract. lib. 1. c. 17. n. 38. Christin. vol. 2. decis. 108. et 109.

(5) DD. ad l. 61. Ff. de procur. & l. 4. Ff. de re jud.

(6) Instruct. van den Hove, art. 52.

(7) Arg. l. 2. Ff. de jurisdict. Vide Pec. van besetten en hand-oplegger, c. 3. n. 4.

(8) l. 16. Ff. de procurator. Gail. lib. 1. obs. 47. Merula, Prax. Civ. lib. 4. tit. 18. c. 6. n. 3.

(9) Merula, dict. loco. n. 4.

execution of the decree; nor may any payment be made to them without such special charge. (1)

Fourthly, by the death of either of the parties. (2)

Whether and when to be resumed, if it ceased in consequence of Death.

§ 10. But in order that the case should not thereby be impeded, according to the practice of the court, in case of a proctor's death; while the case is pending the defendant is summoned to appoint another in his room, which is commonly termed placing a proctor who accepts the case (3). And in case of the death of any of the litigating parties, the heirs of the deceased are cited to accept the case in its actual state, and further to proceed therein with the adverse party according to the last pleadings held therein, or to renounce the same, and to consent to the demand of the adverse party, so as they may deem it advisable, which is commonly termed proceeding in the case and admitting the lawsuit. (4)

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(1) L. 13. Ff. de pact. d. l. 86. de solut. Pecc. van besetten en hand-opleggen, c. 3. n. 4. 10.

(2) DD. ad l. 15. Ff. eod. l. 26. in pr. Ff. eod. et l. 6. Ff. de jurisdict.

(3) Vide Merula, Prax. Civ. lib. 4. tit. 83. c. 6. et lib. 4. tit. 18. c. 7.

(4) Merula, lib. 4. tit. 83. c. 4.

CHAP. V.

Of Door-keepers and Judicial Messengers, and their Office.

§ 1, 12. *Of Door-keepers and judicial Messengers, and their Office.*
2. *Of the first or head Door-keeper.*
3. *Of others.*
4. *Of travelling Messengers.*
5. *Door-keepers and Messengers carrying the Box, by what Badges distinguished.*
6. *Of judicial Messengers, and their Badges.*
7. *What Credit is given to Door-keepers and judicial Messengers personally, and how in real Causes.*
§ 8. *Particularly to the Door-keepers of the public Revenues.*
9. *How far a Door keeper, who affirms that he has been beaten or ill treated is to be credited.*
10. *Whether and how far a Person is punishable who opposes a Door-keeper in the Execution of his Office.*
11. *Whether and when he may be opposed without incurring any Penalty.*
13. *Whether and when a Decree can be executed out of the Jurisdiction of the Judge.*

Of Door-keepers and Judicial Messengers, and their Office.

§ 1. THE servants of judges and tribunals are, door-keepers or judicial messengers: the door-keepers are in the service of the high courts, and the judicial messengers in that of the courts of justice of cities and in the country; each within his jurisdiction, for summoning the litigating parties, and for carrying into execution their decrees. (1)

Of the first or head Door-keeper.

§ 2. Among the door-keepers of the high courts, who are so denominated because they, as it were, open the door of the court of justice and superintend the same; if there be two, the *first*, as he is called, personally attends on the law days, and serves the citations alone, and performs any peculiar business of the court at the place where the same is held by turns (2); and the other performs all the business outside: besides whom there also are some travelling messengers, whose duty it is to carry every where the closed letters of the court. (3)

§ 3. Of others.

§ 4. Of travelling Messengers.

Door-keepers and Messengers carrying the Box,

§ 5. The door-keepers have a small stick, mounted at the end with an impression of the arms of the court, which they are

(1) l. 33. § 5. Cod. de episcop. & cleric. l. 1. Cod. de execut. & exact. l. 13. § 2. Cod. de re judic.

(2) Instruct. van den Hove, art. 102.
(3) Ibid. art. 103 et 104.

to exhibit to the people while executing their office (1); but the messengers have a box with a transparent cover, where the arms of the said court appear inclosed, which is suspended to their neck with a silken string. by what Badges distinguished.

§ 6. In the cities and in the country, the judicial messengers have a small stick or branch of thorns as a badge, which they exhibit to people in the execution of whatever relates to their office, on which account also they are called *messengers with the rod.* Of judicial Messengers and their Badges.

§ 7. These have full credit in all affairs relative to their personal summoning and information, and in whatever relates further to the execution of their office, by virtue of the oath taken (2); But, in executions against property, they ought to take two persons belonging to the court where the property lies, to be present as witnesses (3). And on the 7th of January 1577, it was ordered that the apparitors should not place under sequestration, or sell any property, but in the presence of two aldermen, sworn persons, or neighbours (4): which is also observed by the judicial messengers in the cities and villages in the country, as well as by the apparitors or door-keepers of the public revenue of the country (*Deurwaaders van Gemeenlands middlen*), in cases concerning the farming and execution thereof. What Credit is given to Door-keepers and judicial Messengers personally, and how in Real Causes.

§ 8. But it is to be principally confined to whatever relates to the immediate execution of their office: for, otherwise, it would be a dangerous precedent, if they were to be credited without distinction in all occurrences upon their mere statement; especially the door-keepers of the public revenue of the country, many of whom are of the meaner sort, and but of an indifferent character, whose fraud and extortions often cause great inconvenience to the people, and would cause still greater if they were to be too much credited; as, besides the common service of citation, and whatever relates to the immediate execution of judicial process, they allow themselves to be employed in detecting smuggling in concealing and defrauding the duties due to the renters and the imposed taxes of the country, wherein they have no more credit than other common people; which matters are, and remain, out of the mode of judicial proceedings; and which therefore are not to be proved less circumstantial, and by no inferior degree of conviction, than in all other common matters. Particularly to Door-keepers of the Public Revenues.

(1) Instruct. van den Hove, art. 99.
(2) l. 5. Cod. de exact. tribut. l. 1. § 12. Ff. de præf. Urb. l. 5. § 13. Ff. de reb. eor. qui sub. tutel. Andr. Gail. lib. 1. obs. c. 54. n. 4, 5.
(3) Instruct. van den Hove, art. 176.
(4) Vide Merula, Prax. Civ. lib. 4. tit. 95. c. 3. n. 11.

And it does not appear to be the meaning of the States General from the example and careful circumstances desired to be observed in gauging commodities subject to be gauged, and which can be ascertained by gauging (1). Yet, notwithstanding, their credit is often misused, to the prejudice of many innocent and ignorant people.

How far a Door-keeper, who affirms that he has been beaten or ill-treated, is to be credited.

§ 9. So narrowly indeed ought their conduct to be observed, that if an apparitor or judicial messenger were to say, that, in going or returning to execute his judicial orders, he had been beaten, thrown down, or otherwise ill-treated by those against whom he had executed the same, he would not be credited therein; as it would be an occurrence which took place independently of the immediate execution itself of his office; unless he could declare such assault was committed against him in the *immediate* execution of his office, and without any interval: in which case, as in all others, the degree of credit that may be given to him is much trusted to the discretion of the judge, according to the circumstances of the cases and persons. (2)

Whether and how far a Person is punishable, who opposes a Door-keeper in the Execution of his Office.

§ 10. Otherwise, as the apparitors and judicial messengers, when actually executing their orders, represent the person of the judges themselves, any opposition to them, or any personal assault or injury of them, when engaged in the execution of their office, is punished with great severity (3). The consideration of which offences, on account of the variable circumstances of the cases, is mostly left to the discretion of the judge: and it will be of no avail to the offender if it be afterwards found that he was not liable to undergo what had been effected against him, or that the apparitor had exceeded his orders, or the proper manner of judicial proceeding; in which case he can obtain redress against the latter by opposition of the judge to the execution of the sentence pronounced after the hearing of his prayer, or otherwise by a command of cessation upon penalty, until the case be finally determined on hearing the adverse party and the apparitor. (4)

Whether and when he may be opposed without incurring any Penalty.

§ 11. For a discussion of the cases and circumstances under which an apparitor, upon his simple statement that he is such an officer, without exhibiting however his staff, or producing any

(1) General ordonantie op den opheve van des Gemeenlands midlen, art. 12.

(2) Arg. l. 5. Cod. de exact. trib. junct. l. 37. § apparitor. Cod. de episc. & cleric. Vide Menoch. de arbitrar. judic. lib. 2. centur. 2. cas. 122. & centur. 1. cas. 95. Anton. Faber, ad cod. lib. 4. tit. 15. de testib. def. 26. and Pecc. van Besetten en hand opleggen, c. 22.

(3) l. 4. § 1. & tot. Ff. ne quis eum qui ne jus vocat.

(4) Arg. l. 2. Ff. si quis in jus vocat. junct. l. 5. l. quorum appell. non rec.

proof of the legal order received by him, may be opposed, the reader is referred to the authorities cited below. (1)

§ 12. The office of an apparitor or judicial messenger consists in the strictest observance of the judicial practice in use in the tribunal where he is, and of the commands given to him; upon penalty of redressing the same at his expence, and of making indemnification for the loss caused by his transgression (2); on which account, the apparitors of the court ought, before admission to their office, to give security to the amount of fifty Flemish pounds, each amounting to six gilders. (3)

Whether and when a Decree can be executed out of the Jurisdiction of the Judge.

§ 13. Lastly, they cannot execute their office out of the jurisdiction of the judge to which they belong (4); except when they are ordered to arrest property, or when by any other legal judicial proceeding a decree is issued against any one who resides under another jurisdiction: in which case, the said decree is sent inclosed to the judge of his place of abode, requesting him to have the same executed against such person by his judicial messenger, which application in writing is usually denominated *Requisitorial Letters.* (5)

CHAPTER VI.

Of the Daily or Competent Judge.

§ 1. *Of the Jurisdiction of the Judge as it respects the Place of Abode, Dignity and Prerogative of the Person suing.*
2. *Officers of the Court, who they are; and where they are to appear in Judgment.*
§ 3. *Before whom Professors and Students of the University of Leyden are to appear in Judgment.*
4. *Military Persons.*
5. *Of the Privilege of Minors, Widows, and* miserable *Persons.*

PREVIOUSLY to commencing a suit against any person a plaintiff ought maturely to consider before which judge he ought to appear in judgement, and conduct himself accordingly: other-

(1) Vide Pecc. van besetten en hand opleggen, c. 25. n. 3, 4. and also Anton. Faber, lib. 3. tit. 18. def. 1. & lib. 7. tit. 10. def. 15.

(2) Arg. l. 8. § 1. Ff. ad leg. Aq. l. 9. § 5. Ff. locat.

(3) Vide Instruct. art. 109.

(4) Novell. 82. c. 7. § 1. l. 2. C. de execut. & exact. l. ult. Ff. de jurisdict.

(5) Arg. l. 15. § 1. Ff. de re judic. Ordonnant. op 't stuk van de justitie in de Steden en Platten Lande, art. 27. Vide Pecc. van Besetten, c. 21. and the subsequent part of this work, in which the execution of decrees is treated at large.

wise he must expect that the defendant will refuse the judge, plead jurisdiction, and pray to be referred to his daily and competent judge; in which case the plaintiff ought, according to the common rule, to follow the tribunal of the defendant (1). The nature and extent of a judge's jurisdiction are therefore to be considered, and also the circumstances under which he may bind any one to appear before him, which circumstances are many and various: for the jurisdiction of any one is grounded upon the proper person or his dignity, office and prerogative, or upon the mere presence of the person, or situation of the property, or upon any engagement or mutual condition, or the propriety of the case irrespective of the person, or upon a higher prerogative of the judge.

Of the Jurisdiction of the Judge, as it respects the Place of Abode, Dignity, and Prerogative of the Person suing.

§ 1. Where any one is *personally* concerned, he is obliged to appear in judgment before the judge under whose jurisdiction he resides: and here is to be considered not only the place of abode which the defendant had at the time of the law proceedings, but also that where he resided at the time the transaction took place for which he is sued; but at present the judge has no jurisdiction unless the defendant be found at the place where the transaction took place (2). That is considered to be a person's fixed place of abode where he has his household and the greatest part of his furniture, and where he himself resides the greatest part of the year (3); or otherwise, if any person had his household at two places, so that one cannot judge where he has the greatest part of his property, or had a fixed intention to reside, in such case it is understood that he is obliged to appear at one of the two places where he is first found with his household (4), which place of abode every one may change as often as he wishes, and to the place which he prefers, unless he be under prohibition from doing so, upon any penalty of residing any where in consequence of any crime. (5)

Officers of the Court, who they are; and where they are to appear in Judgment.

§ 2. With respect to the dignity, office, and prerogative of the person, all officers, that is, all members and inferiors, all noblemen and other domestics of the court, can only be sued before

(1) l. 2. Cod. de jurisdict. & l. 2. Cod. de ubi de crimin. ag.

(2) l. 2. C. de jurisdict. Arg. l. 19, 20. Pf. de judic. Vide Christin. vol. 2. dec. 164. n. 1. Nicol. Burgund. ad Consuet. Flandr. tract. 2. n. 5. Cod. Fab. lib. 3. tit. 15. def. 4. Winn. ad § 1. Instit. de action. n. 10.

(3) l. 7. Cod. de incolis. l. 27. § 2. Ff. ad municipalem.

(4) Arg. l. 4. l. 203. Ff. de verb. signif. See Peec. van Besetten, c. 39. n. 4.

(5) l. 31. Ff. ad municipalem. l. 5. Ff. de interdict. & relegat.

the court of Holland, either in civil or in criminal cases (1); nor may they be arrested, either in their person or in their property, in any cities or villages of Holland, in order thereby to be subjected to the jurisdiction there: on which account if any of such officers be arrested in their person or property any where in the cities of Holland or Zealand, upon complaint to the court, provisions were always made by that court, by granting orders containing penalty, by writing *closed letters* and other means, of which many examples may be given.

The following are considered as justices and officers of the court so far as regards jurisdiction, viz. the stadholder of Holland, two presidents, all the members of the council and of the supreme court, the registrars, advocate-fiscal, proctor-general, two ordinary secretaries, the two first serjeants of both court chambers, the first and second persons of the audit, the auditor, commissaries, ordinary and extraordinary clerks of the same audit, dyke-reeves, and inspectors of the dykes of the three colleges of Rhineland, Delftland, and Schie-land, the rentmaster bearing the title of counsellor and rentmaster in North Holland, South Holland, and Kenmerland, the three upper servants, the rentmaster and secretaries of the Wilderness, the rentmaster of the *exploicts and expirgnes*, the registrar of the loan court, and the constable of the court at the Hague: all of whom are considered as belonging to the family of the counts of Holland, under the denomination of *des escrois*, because anciently they wore crosses on their coats and cloaks, and from thence are derived the words *heim-raden* and *huis-raden*.

Among the officers of the same court are also considered all secretaries of the court and their deputies, registers, advocates, proctors, serjeants, and beadles, who have retaken their oath in court on the Monday after Three Kings Day (the Epiphany), and who keep their fixed abode there, to exercise in the practice and to act in court, as may be seen at large in the charters and acts above cited: but others, who exercise in their profession only before the inferior courts, and who have their habitation there, may also without objection be tried before their competent

(1) l. ult. Cod. ubi senator. vel clarissim. Octroy by Hertog Karel (Privilege of the Archduke Charles, afterwards the Emperor Charles V., granted to the persons belonging to the Court of Holland), March 21, 1516, and the subsequent interpretation thereof, Act of April 20, 1520. Placc. van de Wildernissen, art. 2. Provisioneel accoort van de Staten van Holland (Provisional Contract of the States between the Court and the Hague), Sept. 27, 1614. See also a decision on this subject in Noostad. Soprem. Cur. decis. 117. Ordonantie van de Justitie var den Hove van Holland in Kleyne Saken (Ordinance of Justice for the Court Holland in Inferior Cases), Dec. 21, 1579, art. 2.

judge, particularly if the transaction has taken place, or the goods in question are within the jurisdiction from whence the summons was issued (1).

Before whom Professors and Students of the University of Leyden are to appear in Judgment.

§ 3. In like manner, the professors and students of the university of Leyden are to be tried; the *students* before their master and rector, viz. the senate of the said university, consisting of the rector, four assessors (who are annually delegated amongst the professors to assist the judge), four burgomasters and two aldermen of the town, which compose the court, and meet together: but the *professors* themselves are to be tried before the court of Holland (2). The article of the statutes of the university of Leyden just referred to, is as follows: "All students and persons belonging to the university shall be tried before the rector and assessors, together with the burgomasters and two *aldermen* of the town of Leyden, either in civil or criminal cases, and whether they are plaintiffs or defendants, or have their disputes with students or burghers; with this reservation however, that the burghers or inhabitants of the town of Leyden, although their complaint is against a member of the university, or they themselves are accused of any charge by any one belonging to the university, in cases wherein any person is criminally to be prosecuted on behalf of the county and by their officers, shall be tried before the aldermen of the same town, and not before the judges of the university; and cases of neighbouring disputes respecting separation of limits, services, and other questions between burghers, citizens, inhabitants, professors, students, and members, as also cases between members and members, shall be examined and decided by the sheriff and aldermen of the said town."

A dispute having arisen concerning the construction of this statute, whether a member of the university may voluntarily submit himself to another judge; it was decided by a subsequent interpretation on the 25th March 1662, that such submission may take place, and the following clause was added thereto: "Provided that such person is of proper age, and has bound himself to that effect by a written and specific contract, and has in no case, or in no wise, evaded the jurisdiction of another judge of the province."

Military Persons.

§ 4. In consequence of personal privilege, the soldiers have also their own tribunal, consisting of the chief of their body, called

(1) Facit. l. 2. Cod. ubi senator. Inst. van den Hove, art. 8. Merula, Prax. Civil. l. 4. tit. 2. c. 5. & seq. Anton. Fab. ad Cod tit ubi senator. Christin. vol. 2. decis. 167. Leonin. consil. 80.

(2) Statut. Univ. Leyden, art. 29. and the interpretation thereof. Auth. habita Cod. ne filius pro patre.

a court-martial (1). But this only applies to *military* matters, because, in all other common cases, they are immediately subject to the jurisdiction of the court of Holland. (2)

Of the Privilege of Minors, Widows, and *miserable* Persons.

§ 5. Under the same privilege all minors, widows, and other *miserable* persons may, by preference, summon their adversaries before the court of Holland, if they are first complainers, and are not called to attend before another court in the same case (3). Young and unmarried daughters have the same privilege, though they have attained the age of majority (4). Although, according to the written law, clergymen had their own tribunal (5), and are subject to the court only in Friezland (6), yet they do not enjoy that privilege generally among us (7). The same privilege was also extended to unmarried women of property; but among us it is at present allowed only to poor persons, to maid-servants, and women of like inferior classes (8): but it is a question whether such persons may, in the first instance, call others who have the same privilege; because the privilege granted to one cannot be used against those who have a similar privilege, or in such cases the privileges of both are to be considered void (9). In the court of Friezland it is not considered void, by Joan. à Sande (10): but it is nevertheless allowed and admitted in the court of Holland, according to Groenewegen. (11)

It is to be observed, that the said privilege has no concern in cases wherein widows and orphans apply for cession (12). But in cases of inheritance, they may enjoy that privilege though they have inherited from persons who do not fall under the said privilege. (13)

(1) l. unic. Cod. in quib. caus. milit.
(2) Instruct. van den Hove, art. 19.
(3) Ibid. art. 8.
(4) Per. l. 242. § viduam. Ff. de verbor. significat. DD. ad. d. tit. quando imperator. Trentacinq. l. 2. resol. tit. de citat. resol. 3. num. 16. Jacobus Cancer. variar. resolut. part 2. c. 2. num. 5. See Groenew. ad. d. l. unic.
(5) l. 2. c. 23. C. de episc. & cleric.
(6) Sande, dec. 1. 1. 1.
(7) Groenew. ad. l. 1. C. de episc. & cleric. Bell. Juridicum, pag. 248.
(8) Merula, Prax. Civ. lib. 4. tit. 2. c. 9. num. 7. contra. Covarruv. practicab. quest. c. 7.
(9) l. 11. § fin. Ff. de minoribus. l. 8. in pr. Ff. de excusat. tutorum. Covarr. practicab. quæst. c. 6. num. 2. Trentacinq. d. resolut. 2. num. 11.
(10) l. 1. tit. 1. defin. 2.
(11) De legib. abrogat. ad l. unic. Cod. quando imperator inter pupill. num. 7.
(12) Arg. l. 2. Cod. fisc. usur. Gloss. & DD. ad l. 8. in fin. vers. etiamsi pupillus. Cod. de non numerat. pecunia. l. 4. Cod. de hereditar. action. Panormitan. in cap. 10. extra de in integrum restitut. Ampliatie van de Instructie, art. 1.
(13) Arg. l. 6. Ff. de jure fisci. See Groenew. de legib. abrogat. ad l. unic. Cod. quando imperator inter pupill. num. 8.

CHAP. VII.

Of the Judge and Jurisdiction, arising from mere Presence of the Person or Situation of the Property, that is, of Arrests of the Person and of Property.

§ 1. *Arrests, what, and of what Force.*
2. *Different Sorts of Arrests.*
3. *Who may arrest.*
4. *Whether special Power is required thereto.*
5. *Who may be arrested, and for what Debts.*
6. *Whether and when before the Day of Failure.*
7. *Who, for the Debts of another.*
8. *An Heir, for the Debts of the deceased.*
9. *The Debtor's Debtor, for what he is indebted.*
10. *Whether and when a Person may arrest Property in his own Hands.*
11. *In what Cases Attornies and Managers may be arrested for the Debts of their Constituents.*
12. *Whether Guardians may be arrested for the Debts of their Pupils.*
13. *What Persons may not be arrested.*
14. *Not those who are under the Jurisdiction of a superior Judge.*
15. *No Citizens or Inhabitants of a City may arrest each other out of the City.*
16. *The Inhabitants of large Cities may not be arrested in the Country.*
17. *What Property may be arrested.*
18. *No Books of Students;*
19. *Nor Soldiers' Pay, nor warlike Instruments;*
20. *Nor Tools of Husbandry;*
21. *Nor necessary Maintenance;*
22. *Nor yearly Allowance to Professors, Advocates, or Clergymen;*
23. *No dead Body.*
24. *The Property of another Person, whether and how far liable to Arrest.*
25. *At what Times and Places no Arrest may be made.*
26. *At no free Fairs.*
27. *Whether an Arrest may be made on a Sunday, or after Sun-set.*
28. *Necessary Arrest suffers no Delay or Exception.*
29. *In Cases subject to corporal Punishment, the Offenders may be arrested everywhere.*
30. *By whom and to whom Applications may be made for Arrests, and how they are to be prosecuted before the superior Judge.*
31. *How, in Cities.*

Arrests, what; and of what force.

§ 1. THE jurisdiction arising from the mere presence of the person, or situation of the property, takes effect when any person causes another to be arrested and detained at the place where he finds him, or arrests his property whereever he

finds it; whereby the person so arrested is compelled by the power of the judge not to depart from that place before he has satisfied the plaintiff; or, if his property be arrested, before the debt is recovered; or he must come and answer before the judge. These proceedings we term *arrests*, for according to the common rule, "*arrest grounds jurisdiction.*" (1)

Different Sorts of Arrest.

§ 2. Other arrests are those which take place out of necessity, in order to secure the debt; as, if my debtor begins to squander away or to conceal his property, or is suspected of an intention to abscond, in such case I am at liberty to prosecute against him or his property wherever I find him or it, and to claim my right of him or it; which arrest, in Friezland and throughout Germany, gives a preference to the person who causes it to be made (2); but, among us, it gives no preference, unless it be finally executed, according to the common proverb, "*arrest gives no preference.*"

Another arrest is that which takes place only for the convenience of pleading; as, when I find my debtor at the place where I reside, I can sue him better and with less expence than if I am obliged to prosecute him before the judge of his place of abode; which manner of proceeding was antiently unknown, but has been every where introduced among us by statutes and customs, according to the said rule, "*arrest grounds jurisdiction.*" (3)

Who may arrest.

§ 3. Arrest may be made by every one who may appear in judgment, either for himself or for another, as we have shewn pp. 522—528. supra.

§ 4. Whether a special Power is required thereto.

But with respect to the question whether a special power is required in order to arrest on behalf of another, it is understood, that such power is included in the *procuration ad lites*, that is, full power in judicial cases; because that power includes whatever belongs to the institution and execution of a suit. (4)

Who may be arrested, and for what Debts.

§ 5. And in like manner every one may be arrested from whom we have to claim any thing (5); not only for a debt which is ready to be paid, but also for a debt payable on a certain day, or under a condition, before the day expires, if the debtor begins to neglect his property, to conceal it, or is otherwise suspected. (6)

§ 6. Whether and when, before the Day of Failure.

(1) Pecc. van Bleetten en hand opleggen, c. 1. n. 4. & c. 55. n. 1. 4.
(2) Arg. l. 7. § 1. quib. ex caus. in poss. eat. l. 20. § 12. Ff. quæ in fraud. credit.
(3) See Pecc. van Bleetten, c. 2. n. 5.
(4) Ibid. c. 3. Arg. l. 2. Ff. de judicict. omn. jud. junct. l. 56. & l. 62. Ff. de procuratorib.
(5) Pecc. van Bleetten, c. 4.
(6) Ibid. c. 4. n. 6. l. 14. Ff. pignorib. l. 21. l. 41. Ff. de judic. l. 15. Ff. de privileg. credit.

Who, for the Debts of another.

§ 7. And a person may make an arrest, not only for his own debt, but for the debt of another; such as sureties, and those who have taken upon them the debt of another (1), even without the renunciation of privileges appertaining to sureties, if, before the time of payment arrives, or before the debtors themselves were sued, such persons suffer a diminution of property, or are suspected of inability to pay. (2)

An Heir, for the Debts of the Deceased.

§ 8. So also an heir may be arrested for the debts of the deceased, for which he is answerable. (3)

The Debtor's Debtor, for what he is indebted.

§ 9. And even the debtor's debtor may be arrested in his person or property (4); and also the property which my debtor has under another, in order to recover therefrom whatever is due to me by my debtor (5); in which case information is given to the debtor, to come and answer respecting his arrested debt or property, or that he should suffer the same to be declared to be bound and executable for the same. (6)

Whether and when a Person may arrest Property in his own Hands.

§ 10. Further, in order to ground the jurisdiction of my daily judge with respect to the person of my debtor, I may also cause to be arrested in my own hands the property which my debtor intends to claim, in order that he may be declared thereupon, or upon the cause imagined by him, to have no right nor action; because the right which another may exercise against me, he must allow me to use against himself. (7)

In what Cases Attornies or Managers may be arrested for the Debts of their Constituents.

§ 11. Attornies and administrators or managers may also be arrested for the debt of their constituents, in cases wherein they have bound themselves for the accounts of such constituents (8); unless the loan was made in their master's name, and they had traded on his account (9), in which case they are not further or otherwise obliged than to shew their power; because, in such dealings, it is always considered to whom the creditor had looked apparently in the dealing, and whose credit was followed. (10)

Whether Guardians may be arrested for the Debts of their Pupils.

§ 12. But guardians of pupils or wards may not be arrested, either in their person or their property, for the debt of their

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(1) l. 2. § 1. Ff. de pign. l. 5. Ff. de usur.
(2) Pecc. van Besetten, c. 4. n. 9. l. 91. § 4. Ff. de obligat. l. 49. § 6. Ff. de legat. l. 10. § 16. Ff. quæ in fraud. creditor.
(3) l. 44. Ff. ad Senat. Trebell. l. 24. Ff. de verb. signif. l. 8. Ff. de acq. hæred. l. 2. Cod. de hæredit. vel act. vend. Pecc. van besetten, c. 4. n. 10.
(4) l. 21. Ff. de Senat. Trebell.
(5) Ibid.
(6) Vide Pecc. van Besetten, c. 4. n. 11. Joan à Sande, lib. 1. tit. 17. def. 1.
(7) Arg. ad l. 32. Ff. ad leg. aquil. l. 108. Ff. de verb. oblig. et ibi DD.
(8) l. 61. Ff. de procurat. l. 4. Ff. de re judicat. l. 1. l. 7. Ff. de institut. act. l. 2. § 17. Ff. de exercitor. act.
(9) § 2. Instit. quod cum eo qui in alien. potestat.
(10) l. 6. § 1. Ff. de negot. gest. See Coren. obs. 28. n. 47. Pecc. de Jure Sistendi, c. 4. n. 12.

pupils (1); so that the pupils, who have likewise no person in law, may only be arrested in their property (2); which their guardians are obliged to answer. (3)

§ 13. These rules, that every one may be arrested in his person or property, are subject to the following exceptions; viz. What Persons may not be arrested.

I. From arrests, tending only to ground the jurisdiction of the judge, all those persons are free, and may not be arrested in their person and property on that account, who have the privilege in the first instance to be summoned before a superior judge. (4) § 14. Not those who are under the Jurisdiction of a superior Judge.

§ 15. II. Pursuant to the customs and peculiar privileges of different cities in Holland, no citizens or inhabitants, residing together in one city, may arrest each other out of that city, in order to deprive each other of their daily judge. This privilege was given generally to the cities of Holland by the great privilege of the Lady Maria Duchess of Burgundy, on the 14th March 1474, art. 9. "That no inhabitants of one and the same city should, in the first instance, be at liberty to arrest each other for any secular affairs whatsoever, but before the tribunal of the same city and not further; neither before any other tribunal, nor on any other spot of ground." And likewise by the instruction of the court of Holland, (art. 220.) it is clearly expressed, "That none of the subjects of these countries should be at liberty to arrest each other in the first instance, but before his daily and ordinary judge." (5) No Citizens or Inhabitants of a City may arrest each other out of the City.

§ 16. III. According to a particular privilege and custom, the inhabitants of the capital towns in the low countries of Holland, cannot be attached or disturbed, either in their persons or in their goods (6); which is also allowed to the people of Amsterdam, by statutes of Duke Albert, on the 20th June 1410, that "no citizen or freeman of Amsterdam, nor his goods, may be arrested in any village at the north side of the Maese, except in closed towns;" and to the people of Delft, by a statute of Maximilian and Mary, of the year 1477, that "the inhabitants of Delft shall not be liable to be tried in any village or seignorial manor (7), for any personal actions, in which cases they shall The Inhabitants of large Cities may not be arrested in the Country.

(1) l. 1. Cod. quando ex fact. tutor. l. 13. Si cert. petat. l. 13. Cod. de administrat. tutor. l. 63. Ff. de re judicat. See also Coren, obs. 3. n. 18. Recueil Cost. Amst. c. 19. Cost. Antwerp. c. 27. n. 13.

(2) Arg. l. 22. Ff. in jus vocando. l. 22. Ff. ex quib. caus. major. l. fin. Cod. qui legitimam petendi. stand.

(3) Pecc. van Bestetten, c. 4. n. 20.

(4) Concerning these persons see the preceding chapter, pp. 538, 539. and also Pecc. van Besetten. c. 5. n. 1. 6. 10. 13.

(5) Vide Keuren der Stad Leyden, art. 182. Cost. Utrecht, rubric. 19. art. 1. Cost. Rynland, art. 44. in Zuid-Holland, p. 490.

(6) See Papegay, p. 329 & 330. and the last edition p. 350.

(7) *Ambagts-heerlijk Heden*, in the original.

only be tried in the court of justice of our said town;" and to the inhabitants of Leyden, by a statute of Duke William the Third, on the 1st May 1306, "that the citizens of Leyden shall only submit to the decree of the aldermen." It is also allowed to the inhabitants of Rotterdam, by a statute of Duke William in the year 1340; "that the burghers of the Low Country shall not be attached for debts contracted without any bond or written voucher, but for debts made upon lawful bond before aldermen under special mortgage of immoveable goods, or subject to the judge, or for fines imposed on crimes, they shall be tried at the place where such debt was contracted or fine imposed;" as may be seen by the statute of the same Duke given in the year 1328 to the people of Rotterdam, which was then no town; viz. "that whatever contract of merchandize or promise is made within the precincts of Rotterdam, if it is done in writing before the judge and two or more sworn persons, the bailiff may redeem it in all our bailiffship of Schieland."

Some towns would not admit in law, that two strangers, belonging to one and the same jurisdiction, should disturb each other with attachment; but they refer them to the competent judge of them both (1); and Jan van Beverwyk relates (2), that the statutes of Dordrecht, containing similar customs, were formerly testified and transmitted to Mary Duchess of Burgundy.

What Property may be arrested.

§ 17. All goods may be disturbed by attachment, whether moveable or immoveable, or on claims and debts, without distinction, and of whatever description they may be; so that the debtor or possessor thereof may not alienate the same previous to the creditor being paid, or the goods being declared as a mortgage for the same. (3)

No Books of Students;

§ 18. But from this rule the following articles are to be excepted; viz. I. The books of students or scholars, which cannot be disurbed with any attachment (4); as also the pay and arms of soldiers (5); likewise tools used in agriculture (6); because no tacit hypothecation or decree is given on the same. (7)

§ 19. Nor Soldiers Pay, etc.

§ 20. Nor Tools of Husbandry.

Nor necessary Maintenance;

§ 21. II. Those articles also are excepted from attachment, which are absolutely necessary for a person's support; such as his

(1) Keuren & Cost. Amst. c. 19. art. 29.
(2) Beschryving van Dordregt, p. 298.
(3) l. 5. in pr. & § ult. Ff. de pet. heredit. l. 6. in fin. Ff. de pollicitat.
(4) Auth. habita Cod. ne filius pro patre.
(5) l. 4. C. de execut. rei judic. junct. l. 6. C. de jurisdict.
(6) l. 7. l. 8. junct. auth. agricultores. Cod. quæ res pign. obligari.
(7) l. 40. Ff. de re judicat. d. auth. habita. junct. d. l. 6. 8. auth. seq. C. quæ res pign. unless by default of all other goods. DD. ad l. 40. Ff. de re judicat. & l. 4. Cod. de execut. rei judicat. See Perc. van Bessetten, c. 5. n. 1. 6. 22.

daily apparel, and what is allotted to him for his maintenance. (1)

§ 22. In which is also included the pension or salary annually paid to professors, advocates, and preachers, who in such cases are considered as being included under the privilege enjoyed by the military (2); which in no decision is declared to be liable to seizure, unless there is some surplus, after deducting the sum which is considered necessary for their support (3); and particularly the salary of the clergymen or servants of the church, whose annual pay is scarcely considered sufficient to live upon according to their calling. (4)

Nor yearly Allowance to Professors, Advocates, or Clergymen.

§ 23. III. No dead body can be disturbed by attachment (5); but it ought to be buried without any impediment (6), unless the body is considered unworthy of burial, and punishable even after death for some public crimes committed by the individual while alive. (7)

No dead Body.

§ 24. IV. As the goods of one person cannot be mortgaged or pawned for another's debt by any other than by the owner of such goods (8); so also the property of one person cannot be disturbed or attached for the debt of another (9), unless the claimant's debtor has any claim against the owner, in which case the attachment is to go no farther than for the sole amount of that claim (10). The goods found in a house or on the land of a second tenant may likewise be attached to recover therefrom the rent due by the first tenant up to the amount due by the second tenant in continuation of the hire. (11)

The Property of another Person, whether and how far liable to Arrest.

§ 25. V. There are also certain places, and times, in which no attachment can take place, as was antiently observed in churches, church-yards, cloisters, and sacred places, where no one could be disturbed in his person; to which places (as already stated), as no holiness is attributed to them by us, no liberty of sanctuary or asylum is granted. They only exempt certain barons in their own local jurisdiction, and also certain bankrupts, from being attacked by their creditors. This privilege is chiefly allowed by us at Vianen and Cuylenburg, to persons who, with-

At what Times and Places no Arrest may be made.

(1) l. 6. & l. fin. Ff. de aliment. & cib. relict. l. 15. Ff. de re judicat. § in venditione.
(2) d. l. 4. Cod. de execut. rei judicat. junct. l. 14. Cod. advocat. divers. judicior.
(3) Arg. l. 173. Ff. de reg. jur.
(4) Vide Aantekening. en op. Pecc. van Besetten (Annotations on Pecc. on Arrests) c. 5. n. 13.
(5) l. 6. Cod. de sepulcro violato.
(6) l. 27. Ff. de condit. instit.
(7) On this subject, vide supra, book iv. ch. xxxiv. § 12. pp. 468, 469. and Pecc. van Besetten, c. 5. n. 23.
(8) l. 1. & tot. tit. Cod. si res aliena pignor. l. 41. Ff. de pignorat. act. l. 54. Ff. de reg. jur.
(9) Arg. l. 15. § 4. Ff. de re judicat. Pecc. van Besetten, c. 5. n. 19.
(10) Arg. l. 11. § 5. Ff. de pignor. act.
(11) d. l. 11. § 5. Ff. de pignor. act.

ont any fault of their own, are disabled by misfortune and loss at sea from satisfying their creditors; and also to those who secreted their goods for their creditors to the detriment of the common people. And we have shewn in the last chapter of the preceding book, that so far as regards Cuylenburg, this privilege was done away, in order to secure Hans Diderik de Montague, who was accused of the violent ravishment of the Lady Katrya d'Orleans, and was prosecuted thus far to his refuge.

At no free Fairs.

§ 26. In a free fair, which commences and closes with ringing a bell, no person is allowed to be arrested during the holding of such fair, though an attachment may be issued for the purpose of getting the case against a stranger entered of record of the same judge. (1)

Whether an Arrest may be made on a Sunday, or after Sun-set.

§ 27. It is also allowed by some, that on Sundays and common feast-days or festivals no attachment can take place (2); and also that no attachment is to be made after sun-set. But an exception lies against this regulation, among us, so far as respects feast-days; for the rest, all process in law may be made at all times, and on any day, without distinction, without any particular limitation in the matter of attachment; all persons having causes of complaint being allowed to apply for it; and it is accordingly granted at his peril, that is to say, to pay the expences if he is wrong. (3)

Necessary Arrest suffers no Delay or Exception.

§ 28. It is however to be observed, that all these exceptions take place only in an attachment which is issued merely to secure the jurisdiction; and that with respect to an attachment issued by necessity, on suspicion of a debtor's inability or intention to quit the place, no distinction is made as to the privileges of persons, places, or times. (4)

In Cases subject to Corporal Punishments, the Offenders may be arrested everywhere.

§ 29. In cases subject to corporal punishment, persons who have committed crimes may be apprehended everywhere, and may be tried at the place where they may be found, without any distinction. (5)

By whom and to whom Applications are to be made for Arrests; and how they are to

§ 30. Attachment is not allowed by the supreme judge, or by the court of Holland, which has jurisdiction throughout Holland, unless upon a previous application and demonstration of the apparent debt, and suspicion of the debtor's inability and

(1) Juxta l. 1. Cod. d. nundin. & mercationibus. See Pecc. van Bessetten, c.10. n. 3, 4.

(2) Arg. l. 11. Cod. de feriis.

(3) Arg. l. 2. § Ff. quis ordo in possessionib. servet. See Pecc. van Bessetten, c.10. n. 1, 2.

(4) l. 2. l. 7. Ff. ex quib. caus. in poss. eat. l. 10. § 16. Ff. de his quæ in fraud. credit.

(5) l. 1. Cod. ubi de crimine agit. Sand. lib. 1. tit. defin. 6.

intention to quit the place, or the knowledge that he has no certain place of abode whence he can be called; and such is only to take place in case of necessary attachment. (1) be prosecuted before the inferior Judge.

§ 31. But in towns and cities every person is allowed to have an attachment executed against strangers, without previous knowledge, (for the purpose of having their case entered before the competent judge), by the proper law-officer or officers, who, or each of them, on application being made to that effect, cannot refuse his or their service to comply with the application according to the tenor of the special statutes and customs (2). In cases between burghers and burghers, or inhabitants and inhabitants, if application is made on suspicion of inability, it ought to be allowed after having taken previous cognizance of the case. How, in Cities.

In order that the attached persons may not unnecessarily be detained, they ought to be released upon security to submit themselves for trial, and they may proceed with their cases in a summary way before other cases (3). Whoever frees himself from an attachment made on him otherwise, and without security, is subject to pay a large fine, to be imposed upon him as stipulated at every place (4). And again, if the person who made the attachment does not institute a suit against the person so attached on the first law-day, the latter will be released, and the case dismissed. (5)

No arrest is granted where an obligation or deed of rent is passed by the community on behalf of the country, by the placaat of the 16th March 1661. (6)

An arrest, taken off by security, and not prosecuted within a year and six weeks, is interrupted, and the security is discharged and free of further responsibility; and although the case may be resumed by means of relief against the principal debtor, yet it has been repeatedly decided that it cannot take place against the securities.

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(1) See Merul. Prax. Civil. lib. 4. tit. 2. c. 25. n. 2. Damhoud. Prax. Civil. c. 64. n. 18. Pecc. van Besetten, c. 3. n. 5. Andr. Gail. de arrest. imp. c. 1. n. 11.
(2) Pecc. van Besetten. c. 24. n. 4.
(3) Ibid. c. 45. n. 7.
(4) Ibid. c. 38.
(5) See this subject treated at large in Cost. Rynland, art. 42.; Cost. Leyden, art 181.; Recueil van de Cost. tot. Amsteldam, c. 19.; Cost. in Zuid-Holland, p. 489.; Cost. Utr. rubric. 19. art. 4.; Cost. Antwerp. tit. 27, 28. Statuyten van Vrieslnd, l. 3. tit. 9. Land-regt van Overyssel, tit. 5. art. 16. & 13.
(6) Vide Papegay, p. 356.

CHAP. VIII.

Of Jurisdiction arising from Obligation, and of Submission to Jurisdiction.

§ 1. *When Jurisdiction through Obligation takes place.*
2. *Submission to Jurisdiction, what; how to be effected, and to what Extent.*
3. *Whether it can be extended to Heirs, married Women, and Sureties.*
4. *When any one is tacitly made subject to the Jurisdiction of the Judge.*
§ 5. *How by Re-convention and Re-action.*
6. *When Re-convention must be made; before or after* Litis-contestation.
7. *It does not prevail after Judgement pronounced;*
8. *Neither in Cases of a different Nature and Property;*
9. *Nor against any one who litigates in the Name of another.*

When Jurisdiction through Obligation takes place.

§ 1. JURISDICTION through obligation takes place, when any one submits to another judge either *expressly* or *tacitly*, to whose jurisdiction he does not otherwise belong; *expressly*, when any one by express words submits himself to the constraint of the said judge, otherwise denominated *submission to jurisdiction* (1); which submission is now commonly introduced by notaries in obligations, and is seldom omitted; containing these words, "*subject to the constraint and execution of all judges and laws of government.*" But since the new amplification of the instruction of the court of the year 1644 (art. 6.), this clause of submission is not extended to the jurisdiction of the court of Holland, unless it be specially expressed and added to such obligations in the following words, viz. "*and specially the court of Holland.*" By that amplification it was also enacted, that the amount of the cause between persons residing in different cities ought to be more than one hundred, and in the villages to more than fifty gilders; and between persons residing in six large cities under one and the same jurisdiction, the cause ought to exceed the amount of three hundred, and in small cities the amount of one hundred and fifty gilders; as will be shewn more at large, infra, in chapter xxv. (2). The

§ 2. Submission to Jurisdiction, what; how to be effected, and to what Extent.

(1) *Prorogatie van Jurisdictie* in the original. l. 1. Ff. de judic. l. 18. Ff. de jurisdic. l. 1. & l. 3. Cod. eod. Vide Andr. Gail. lib. 1. obs. 1. n. 29. & obs. 6. in fine.

(2) Vide Ampliatie, art. 5, 6. Ordonnantie van de Kleine Saken, A.D. 1579, art. 2. Merula Pract. Civ. lib. 4. tit. 2. c. 14.

same regulations also prevail distinctly in Friezland, according to Sande. (1)

§ 3. Such submission is also extended to the heirs of those who entered into such obligation (2), and likewise to a woman who is bound thereto through the obligation of her husband (3); and likewise, when any one has submitted himself in any bond to the jurisdiction of the court of Holland, and when any persons had bound themselves as securities for a debt, without repeating again the said engagement or submission, the said sureties, as well as the debtor, may by virtue of the said obligation be summoned before the court; and if the securities make exception, and wish to be referred to their daily judge, such exception will be rejected; and so it was determined in the case of Jan Adriansz, tailor at the Hague, and Peter Vos of Rotterdam, defendants, against Jan Mareys, impetrator, on the 13th December 1613.

Whether it can be extended to Heirs, married Women, and Sureties.

Parate execution, that is, immediate execution without preceding law proceedings, may not be performed among us; because it is only a right of the state for the purpose of recovering its taxes and revenue, and the said right was therefore prohibited by resolution from being assumed by any one for any transaction or mere submission (4); but instead thereof the mode of voluntary condemnation prayed for has been introduced, which does not materially differ from it; the manner in which this is done is stated in a subsequent part of this work.

§ 4. Jurisdiction is acknowledged *tacitly* in the following cases; viz.

When any one is *tacitly* made subject to the Jurisdiction of a Judge.

First, When any one being summoned before a judge, to whose jurisdiction he does not belong, takes no exception for the purpose of being referred to his daily judge; but without contradiction pleads the case there, whereby he is understood to consent tacitly to the jurisdiction of that judge. (5)

§ 5. *Secondly*, Jurisdiction is also tacitly acknowledged by *re-convention*, that is, re-claim, as well on the side of those who make re-claim as those against whom it is made, although none of them be subject to the same judge; for, if any one on being summoned before a judge, to whose jurisdiction he does not belong, institutes a re-claim, and *claims in re-convention* before he answers, he is tacitly understood to acknowledge the judge;

How by Re-convention and Re-action.

(1) Vide Joan à Sande, lib. 1. tit. 1. def. 3.
(2) Arg. l. 44. Ff. ad Senat. Trebell. junct. l. 59. Ff. de reg. jur. See also Pecc. van Besetten, c. 4. n. 10. & c. 13.
(3) Vide Sande, lib. 1. tit. 1. defin. 3.
(4) Cons. & Adv. Amst. vol. iii. p. 16.
(5) l. pen. Ff. de jurisdict. l. 1. Cod. eod. l. 1. Cod. ubi de crimen. l. 30. Ff. de judic.

and therefore cannot object to the judge in the first case against him, whom he in the second case had acknowledged. And again, a plaintiff who summons another before the judge, to whom they are both subject, must appear in judgement before the same judge, if the adverse party claims any thing against him in re-convention; because the judge whom a person has chosen for himself, may not be objected to in a case against one's self. (1)

When Re-convention must be made; before or after *Litis-contestation.*

§ 6. This re-action or re-convention is commonly effected before the *litis-contestation*, that is, before or at the same time with the answer, which the plaintiff must admit, although he wishes to renounce the case, and which he may not be allowed to do after the suit in re-convention is commenced and the answer filed (2); but according to the opinion of some jurists, it may be instituted at any stage of the suit, though in such case it cannot delay the progress of the first instituted suit, or be put on the same footing with the same; which otherwise, if instituted before and with the answer, must be proceeded with and terminated alike. (3)

It does not prevail after Sentence pronounced.

§ 7. Such re-action does not prevail after judgement (4); yet, having been neglected in the first institution of the suit, it may be made in appeal, as is extensively treated of by Marant (5); and according to his opinion, it was determined by the court of Friesland. (6)

Neither in Cases of a different Nature and Property.

§ 8. *Thirdly*, The cause of *re-convention* ought to be also of the same right, and of the same sort and property, as the suit first instituted; because it is compared and adjusted alike with the other by compensation, which cannot be effected in cases wherein there is any difference (7); so that if a prayer be made in the suit first instituted, to have the amount put under sequestration, it cannot be suspended by the re-convention, unless a similar sequestration can be demanded and established (8); nor

(1) l. 11. § 2. Ff. de jurisdict. l. pen. & auth. seq. cod. de sentent. & interloc. omn. jud. Novell. 96. c. 2, 3. Merul. Prax. Civil. lib. 4. tit. 2. c. 14. n. 4. & seq. Andr. Gail. lib. 1. observ. 39.

(2) Vide supra, ch. iii. pp. 522, 523. and infra, ch. xviii. Christin. vol. iv. decis. 94. n. 5. in fin. Berlich. pract conclus. part. 1. conc. 22. n. 64. Cancer. Var. Resolut. part. 2. c. 13. n. 38.

(3) Vide Merul. Prax. Civ. lib. 4. tit. 43. c. 2. n. 3. Christin. vol. 1. decis. 180. n. 9. & ad Leg. Mechlin. tit. 1. art. 24. sub. n. 5. Jacob Cancer. Var. Resolut. part. 2. c. 13. n. 14. Wurmser, Prax. tit. 12. obs. 4.

(4) Vide Marant. Prax. part. 4. distinct. 6. n. 39. Joan à Sande, lib. 1. tit. 6. defin. 2.

(5) Part. 4. distinct. 6. n. 24. Guid. Pap. decis. 436. n. 102. Jacob Cancer. part 2. Var. Resolut. c. 13. n. 5.

(6) Vide Joan. van den Sande, lib. 1. tit. 6. defin. 1.

(7) l. ult. § 1. Cod. de compensat.

(8) Vide Math. Coler. de process. execut. part 1. c. 3. n. 30.

can the prayer to be immediately supported with the necessaries of body and life, be opposed or suspended. (1)

§ 9. *Fourthly*, Those who litigate by order and on account of another, cannot be opposed with what one owes in one's own name; viz. agents, attornies, guardians, and directors. (2) Nor against any one who litigates in the Name of another.

CHAP. IX.

Of Jurisdiction and Law-Constraint in consequence of Submission and mutually chosen Condition, composed of Judges placed, Judges elected, and good Men, otherwise delegated Judges, Arbiters, and Arbitrators.

§ 1. *Of delegated Judges.*
2. *Of Commissioners.*
3. *Of chosen Judges.*
4. *Of Arbiters, or elected Judges.*
5. *Of Arbitrators, or good Men.*
6. *How they are to be distinguished.*
7. *Whether an Appeal lies from a Decision of Arbitrators.*
8. *Whether and when the same may be carried into Execution notwithstanding an Appeal.*
9. *By and through whom a Decree must be executed.*
10. *Submission to Condemnation, whether voluntary or prayed for, how to be effected.*

BY submission, judges are constituted who were not judges of themselves, but merely obtained authority and direction to decide any case like judges. (3)

§ 1. These are of two sorts, some who obtain their authority and order from the supreme government over cases in which the state is concerned, and which cases cannot be referred to certain judges, unless those to whose cognizance the case belongs make difficulty, and object against taking cognizance of the case. These are denominated *delegated judges* (4); and others are those, who from among judges are placed to hear and take cognizance of some particular case; and therefore they are commonly denominated *commissioners*, or those who Of delegated Judges. § 2. Of Commissioners.

(1) Arg. l. 3. Cod. de compensat. Surd. tract. de aliment. tit. 8. privileg. 53. n. 5, 6.
(2) l. 2. § 3. Ff. de jud. l. 14. § ult. Cod. de Sentent. & Interlocut. Wurmseri Prax. lib. 3. tit. 12. observat. 7. num. 1. Andr. Gail. de pace publica, c. 12. num. 3.
(3) l. 1. § 1. & l. 3. Ff. de offic. ejus.
(4) l. 1. & tot. tit. Ff. de off. ejus cui mand. est jurisdict.

are vested with authority; on which account their power is narrowly confined to a limited order to do and execute some particular thing (1); on the other hand, the power of others is very extensive, and includes without limitation whatever belongs to a jurisdiction. (2)

Of chosen Judges.

§ 3. *Elected judges* are those to whom a case is referred with the will and full consent of the litigating parties, to be decided if they judge proper. These are again distinguished into elected judges or *good men*, otherwise denominated *arbiters* or *arbitrators*.

Of Arbiters or elected Judges.

§ 4. Arbiters, or judges so elected, are those who are obliged to decide the cases and differences of litigating parties, and to give their decree thereupon according to the laws and customs, and agreeable to the power given to them by the submission or arbitration-bond, without being at liberty to transgress or go beyond the same (3); two persons are commonly chosen, who, if they do not agree in their award, are empowered to take a third person as umpire. (4)

Of Arbitrators or good Men.

§ 5. *Arbitrators* or good men, who were antiently denominated *Christmas people*, are amicable mediators, who decide according to the best of their understanding and judgement, without any form of law-proceedings, and who separate the people from each other in an amicable manner without reference to the law. To ascertain whether any one is an arbiter or a constituted arbitrator (or good man), we must refer to the tenor and meaning of the arbitration-bond (5); so that from the strict acceptation of the words, "*according to the strictness of the law*," or "*according to the laws, reason, and equity*," no distinction is to be made, as if something was right which is not reasonable and just, or that something was reasonable and just which at the same time was not right; but the award or judgement is to be formed from the matter itself, and the tenor of the arbitration-bond, viz. when a case, which really consists of points of law, is referred to some persons as judges to decide what the law thereof is, with what words soever the reference be made, such case must always be decided according to what the law dictates relative thereto, whether or not it consists in a point of law of an extensive or narrow consideration, and such persons are then the elected

§ 6. How they are to be distinguished.

(1) l. 1. § 1. de offic. ejus. Novell. 82. c. 1, 2. l. final. Cod. ubi et apud quem tot. tit. Cod. de Pedan Judicib.

(2) Vide Jul. Clar. lib. 5. § final. quæst. 40. & seq. Marant. prax. part. 4. distinct. jud. 5. Andr. Gail. lib. 1. obs. 97.

(3) l. 13. § 2. de recept. qui arbitr. Vide Speculat. de Arbitratore, § 1. in fr.

(4) l. 17. § 6. Ff. eod.

(5) l. 1. l. 3. Ff. de recept. qui arbitr.

judges of the law; but if it be an unjust case to be amicably settled, the law is not so much taken into consideration; as, whatever without regard to the law was unequal between the regulators, or stood between them, as in the separation and division of goods and merchandizes, where two were too quarrelsome and harsh towards the other, and the wrong is referred to the award of certain persons; in such cases, the law or the just price is not so much regarded as the mediation itself of whatever remains unequal before those regulators, who in a strict sense are good men and amicable arbitrators, on which account their decision is called the "*saying of men* (1);" and therefore also a just distinction is made by Gail (2); so that in doubtful matters it must always be understood that the reference of the case was according to law, when it does not expressly appear otherwise; and the arbitratorship of unjust but amicably to be settled cases is mostly entered upon and decided verbally, either decisively or under a certain penalty to be incurred by those who deviate from the "*saying of men*;" and it is seldom that any submission (*compromissum*) is made in writing, except with such meaning that the case should be decided according to what is right, which consists either in cases of strict right or of equity, the one not less right than the other, and both distinctly according to the sort of right of each, unquestionably explained by the laws.

Whether an Appeal lies from the Decision of Arbitrators.

§ 7. Antiently, the distinction between an *elected judge* and a *good man* consisted in many points (3); the principal of which was, that no appeal lay from the decision of elected judges to a higher tribunal, but the same was to be complied with, whether it was right or wrong; from a decision of good men an appeal was permitted. (4)

But at present a person may appeal as well from a decision of elected judges as from that of good men; this is denominated *reduction* (5); and if it be commenced within ten days, it has the effect of an appeal; and also, if delayed till within a year of reformation, and mere appeal (6) without suspension: after the year, or if appeal or reduction was renounced under a certain penalty, it is not allowed, unless by relief and redress.

Whether and when the same

§ 8. Some are of opinion (7), that a reduction never has the

(1) l. 1. junct. l. pen. Cod. de recept. arbitr. l. ult. Cod. de contrah. empt. l. 24. Ff. locati 1. 76. & seq. Ff. pro socio.
(2) Lib. 1. obs. 150. n. 5.
(3) Vide Panormitan. in cap. quinta vallis, extr. de Jurejur. n. 8. & seq.
(4) Vide Sande, lib. 1. tit. 14. def. 1. Christin. vol. i. decis. 142. n. 2, 3.
(5) Sande, lib. 2. tit. 14. def. 1.
(6) Merul. Prax. Civ. lib. 4. tit. 5. c. 1. n. 34. Christin. vol. ii. dec. 142. in fin.
(7) Vide Salicetus, ad l. 1. Cod. quando provoc. non licet. Menoch. de arbitrar. Jud. lib. 1. quæst. 80. n. 20. Leoninus. consil. 76. n. 5.

may be carried into Execution notwithstanding an Appeal.

effect of appeal and suspension, so as to stay the execution of the decree of elected judges; but according to the opinion of Baldus and others (1), it is understood otherwise, viz. that reduction has also the effect of an appeal in staying the execution (2); and such also is the practice among us, unless upon a certain penalty appeal and reduction were renounced; in which case, if (although by redress) an appeal be granted, the decree pronounced has its progress towards execution, and ought to be satisfied, under security of restitution in case the decree be afterwards reversed. (3)

The penalty stipulated in the submission (*compromissum*) is not understood to be incurred before the decision in reduction has been confirmed by a later decision. (4)

By and through whom a Decree must be executed.

§ 9. And no decision may be carried into execution, unless a lawful decree be made thereupon; because elected judges have no legal jurisdiction or constraint of themselves, and therefore their decision by verdict ought to be confirmed by the daily judge, after which it may be carried into execution (5). In order therefore that the submission should have the greater force, the litigating parties among us reciprocally insert therein the name of a person vested with irrevocable judicial authority, with a voluntary submission to him, empowering him to have them condemned upon the decision to be made by the elected judges by the high court; whereupon the decision is transmitted closed to the court, and thereupon judgement is given, and then no appeal or reduction has effect, not even by way of revision; because he who is condemned upon his own submission, and with his own consent, cannot obtain redress concerning the same, as will be more fully stated infra, chap. xxv. § 28.

Submission to Condemnation, whether voluntary or prayed for, how to be effected.

§ 10. Such decisions are brought to the court closed, and previously to giving judgment, are kept as secret as possible; because, if any one, who has executed an engagement to abide the event of an award under a voluntary submission to the judgement of the high court, receives information that the decision may happen to be to his prejudice, he may nevertheless always address himself (before judgement is pronounced) to the high court, and represent to it, that he had perceived from some

(1) Vide Bald. ad l. 40. § 1. Ff. de pact. Panormitan. in capit. Quinta vall. col. 23. versic. sed hic annecto. extra. de jurejurando. Maranta tit. de appellationibus, n. 122.

(2) Vide Boër. decis. Burdigal. 284. n. 24. Anton. Faber. Cod. lib. 2. tit. de arbitr. def. 8. Christin. vol. ii. decis. 143. n. 8, 9. Sande, lib. 1. tit. 14. def. 4.

(3) Ampliatie van de Instructie van de jare 1644, art. 20.

(4) Vide Coren, obs. rer. jud. 13.

(5) l. 15. Ff. de re judicat. Vide Gail. lib. 1. obs. 1. n. 53.

words of the elected judges or otherwise, that the decision was made against him, and that he therefore prays for a mandate of relief, that is, redress against such engagement, and the authority given for the judgement, with submission to satisfy the decision, by depositing the amount in question upon proper security.

To what judge a person ought to apply in a case of reduction is somewhat doubtful; but the most certain and general opinion is (1), that one ought not to pass by the daily judge, that is, the judge who ought to have sat in that very case, if it had not been referred: but in order to cut off the multiplicity of lawsuits among us, the decisions of elected judges are instantly admitted in appeal by the court of Holland (2); and also in Friezland and in France. (3)

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(1) According to Christin. vol. ii. decis. 142. n. 4.

(2) Merul. Prax. Civ. lib. 4. tit. 5. c. 1. n. 2.

(3) Vide Sande, lib. 1. tit. 14. def. 2. Monarc. ad l. 32. § 5. Ff. de recept. qui arbitr.

CHAP. X.

Of Jurisdiction arising from the Property of the Thing irrespective of the Person.

§ 1. *Of Jurisdiction over Property, arrested by another at the Place where he finds it.*
2. *Whether a Person must appear in judgement before another Judge, when he is obliged to guarantee any thing.*
3. *Before what Judge a Person must appear in Judgement, on account of the Possession of an Inheritance, and in making a Statement and Inventory, &c.*
4. *Before whom Guardians and Trustees ought to appear in Judgement on Matters of Account and Proof.*
5. *Before what Judge joint Debtors, and those concerned in one and the same Transaction, ought to appear.*
6. *Where and before whom Revenue Cases are to be instituted.*
7. *Of the antient Mode of determining Ecclesiastical Cases.*
8. *Church Ordinance of the Year* 1591.
9. *Of Cases relative to Feudal Property.*

WITH respect to the *property*, concerning which there is any dispute, a person becomes subject to the legal jurisdiction and constraint of a judge in different manners: as,

Of Jurisdiction over Property arrested, &c.

§ 1. *First*, Every one may prosecute and claim his property every where and before the judge where he finds it. (1)

Whether a Person must appear before another Judge, when he is obliged to guarantee any thing.

§ 2. *Secondly*, The seller who promised, or is otherwise obliged to guarantee, to free, and to indemnify the property sold from the action which any one may institute thereupon against the seller, before the judge of the purchaser or elsewhere, is bound to appear where he is summoned, and to answer accordingly (2); as he also is if he is bound to indemnify, or will nor cannot contradict it. But if he wishes to contradict his being bound to indemnify, he will have his exception to be referred to his daily judge, to whom the cognizance belongs, whether he is bound to make such indemnification or not (3); which is admitted among us, but with this difference; viz. that the purchaser, being

(1) l. 3. 7. C. ubi in rem. act. Vide Merula. Prax. Civ. lib. 2. tit. 1. c. 2.
(2) l. 1. C. ubi in rem. act. Vide Gail. lib. 1. obs. 37. n. 1.
(3) Arg. l. ult. Cod. ubi in rem act. l. 2. Cod. de jurisdict. Vide Joan à Sande, lib. 1. tit. 1. def. 5.

summoned before the court of Holland (consequently before a superior court) on account of indemnification, ought, without any distinction to appear in judgement, without being at liberty to allege such exception, according to the 115th and 117th art. of the instruction of the court of Holland; but if he be summoned before an inferior judge, in any case, to guarantee or indemnify, if he wishes to deny his obligation, he may allege an exception of "*renvoi*," that is, reference to his daily judge, according to Groenewegen (1). In order, therefore, to avoid this, it will be best for the purchaser not to summon the seller, who is bound to warrant the property, to undertake it, but to cause him to be lawfully announced and informed, that such action is instituted against the property, requesting him to come and answer the same, and to undertake the case; or that, in failure thereof, if judgement be given against him, the plaintiff will recover the loss and charges from him; which loss and charges he is in such case bound to indemnify, and cannot avoid; if he, being bound to warrant, had failed to do it after notice given. (2)

Before what Judge a Person must appear in Judgement, on account of the Possession of an Inheritance, and in making a Statement and Inventory, etc.

§ 3. *Thirdly*, Cases concerning the possession of an inheritance, the making and delivering of inventories, that is, descriptions of the estate, must be decided at the place and before the judge where the house of demise occurred. (3)

Before whom Guardians and Trustees ought to appear in Judgement in Matters of Accounts and Proof.

§ 4. And all guardians and trustees may and ought to be summoned, concerning the accounts of their administration, before the judge of the place where the house of demise occurred, and under whose jurisdiction they have undertaken the guardianship and trust, for which they are bound to render such account, although the goods are situated or the trust had been entered upon elsewhere (4). And such guardians or trustees, being also summoned before their daily judge on account of such matters, may allege exception of *renvoi*, that is, of reference; and they are responsible before their daily judge, but cannot be further condemned by him than by the judge where the house of demise occurred, under whom they have undertaken the guardianship and trust, and to whom they are bound to produce their accounts. (5)

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(1) Ad. l. ult. Cod. ubi in rem. act.
(2) Tot. tit. Ff. & Cod. de evict. Vide Sande, lib. 1. tit. 1. def. 5. in fin.
(3) Tot. Cod. ubi de hæred. agatur.
(4) Tot. tit. Cod. ubi de ratiociniis, junct. l. 45. Ff. de judic. in fin. princip. l. 19. § 1. l. 36. § 1. Ff. eod. l. 54. § 1. Ff. de procurat. Vide Christin. vol. ii. decis. 166. n. 7. Zypæ Not. Jur. Belg. tit. de jurisdict. vers. sed et tutela.
(5) Arg. l. ult. Cod. ubi in rem. actio. l. 2. Cod. de jurisdict.

Before what Judge joint Debtors, and those who are concerned in the same Transaction, ought to appear.

§ 5. In like manner, many and several equal debtors to one and the same case, may be summoned before a general higher tribunal (in order that the matter may not be divided, and that one and the same case may not be judged by different judges, and in different ways); or otherwise before the judge of the place where the property is situated in which such debtors are equally concerned, or where the case from its own nature is depending; as, in inheritances, and in cases of division of inheritances, guardianship, and the like; who may in such case at once be either summoned there, or otherwise before a higher tribunal. (1)

Where and before whom Revenue Cases are to be instituted.

§ 6. As to the case itself, without regard to the person, all cases concerning the revenue of the general state, must in the first instance be decided before aldermen commissioners, who are placed as judges between the renters or farmers of the general revenue of the state and the common people, concerning all cases of smuggling; each in his city and over the villages belonging to the rent of the same. (2)

Of the antient Mode of determining Ecclesiastical Cases.

§ 7. Upon the same principle, all ecclesiastical cases belong to the church or spiritual tribunal; which were of different sorts, some consisting only of matters of religion and institution, and some concerning the election of church ministers and divine service. Some are denominated church and spiritual affairs; such as matters of church discipline and service, and disputes between ecclesiastical persons and goods; some consisting of mixed cases, partly belonging to the secular and partly to the spiritual jurisdiction, such as matrimonial cases, swearing, divorce, adultery, and the like. All which cases respectively belong to the spiritual tribunal; and in all places that are still subject to the spiritual power of the pope, they are decided by ecclesiastics, agreeably to the papal laws (3). But at the establishment of the reformed religion among us, the papal power was entirely overthrown; and no tribunal or cognizance of any judicial cases whatever, is allowed to our ministers and the rulers of our church; but they are all to be decided by the usual judge without any distinction; and no power is delegated to the superintendants of the church, excepting the care and management

(1) l. 1. l. 2. Ff. de quib. reb. ad eundem judicem. l. 10. C. de jud. l. 11. Ff. de jurisdict. Merula Prax. Civ. lib. 4. tit. 40. c. 3. n. 16. Andr. Gail. lib. 1. obs. 32.

(2) Generale Ordonn. des gemeinschaftlichen impositen, art. 17, 18.

(3) Concerning the nature and extent of the papal jurisdiction, see Gail. lib. 1. obs. 37. and Georg. Tilleman. Synag. jur. l. 47. c. 21. n. 26.

of church services; such as the election of church ministers, institution of church service, and whatever belongs to it, and they have further a right to refuse the privilege of church fellowship to those who lead notoriously profligate and dissolute lives.

Church Ordinance of the Year 1591.

§ 8. In order to carry into effect all the objects above enumerated, not only the brethren of the church, but also the government of the place, or their commissioner, are appointed. And for the better conducting of the election of church ministers, as well as continuing the meetings of the consistory, classis, and synod, excommunication, and the refusal of church privileges and other matters; as also for the unanimous continuation and furtherance of the reformed religion of these countries, a fixed rule was established in the year 1591, by some gentlemen of the supreme and provincial courts, together with others authorized thereto by the states of Holland, under the denomination of the *church ordinance*. But the same having been produced in the council of the lords, the states, and sent out to the nobility and common councils of the cities, and having often been revised in the council, it did not make much progress at first; the inhabitants of many cities being of opinion, that these ordinances granted too much power to the clergy; until in July and August of the year 1612, it was resolved by the said lords the states of Holland, that provisionally, and until further orders of the cities, manors, and villages of Holland and West Friezland, the said ordinance should be followed and observed, whenever the same is desired and approved of; and since that time it has almost everywhere been followed and observed, and is still referred to in doubtful cases, in which government and the consistory cannot come to a mutual understanding. The following are the principal points of the said ordinance concerning the ecclesiastical matters above mentioned:

1. *Of the Election of Church Ministers in the Cities.*

Art. 1. Whenever any ministers of the gospel shall be wanting in the cities, the burgomasters and rulers of the said cities shall commission four persons, whom they shall deem the most capable for that purpose; and the burgomasters and rulers aforesaid, shall desire the ministers of the gospel and elders of the churches of the said city also to commission four persons from among them; who, after joining in prayer, and having made the necessary enquiry, shall proceed to elect all such person or persons as they shall think proper, useful, and capable of the said service; and shall then recommend their said election to the college of

the said burgomasters and rulers; and if the election be agreeable to them, the person elected shall be examined in the following manner; and so far as he shall be found capable and sufficiently qualified by God, he shall be brought to the notice of the community and the church; and, if within fourteen days subsequently, no one comes forward to allege any reason why he should not be admitted, he shall then be admitted to the said service, having previously lifted up his hands, or complied with such other forms as shall be adopted by every church; and he shall be placed in the said office. But if the said burgomasters and rulers declare, that they are not pleased with the said election, the said deputies shall proceed to elect some other persons in the manner aforesaid.

2. *Of the Election of Ministers of Churches in the Country.*

ART. 2. Whenever any ministers of the gospel shall be wanting in the villages, the chief officer with the bailiff and the court of justice shall commission four persons out of the parish, whom they think most capable for that purpose, who with three ministers out of the classis of that quarter, together with an elder of the church (and where there are no elders, with a fourth person of the said classis) shall proceed jointly to the election of a fit minister for the church, and cause him to be duly examined, and afterwards publish such election to the community in the church, in order that the minister chosen may be admitted, and placed in the manner aforesaid, to the performance of the service. And with respect to parishes and churches, the patronage of which belongs to private gentlemen or lords of manors, and which are in immediate use; the said gentlemen, or lords of manors, shall from their manors, where the vacancy occurs, commission four persons whom they conceive most capable for that purpose, who with three persons belonging to the classis of that quarter and an elder of the church (and where there is no elder, with a fourth person of the said classis of that quarter) shall jointly proceed to the election of a fit minister for the church; and, having so done, he shall be recommended to the said gentlemen or lords of manors, and if they approve of the election, the said person shall be examined, and the community informed thereof, and he shall afterwards be placed to perform the service in the manner aforesaid. But should the patron declare himself to be dissatisfied with the election, the said commisisoners shall, in manner aforesaid, proceed to a new election of some other person; and every classis shall depute every year four church-servants under them;

who, whenever required, shall attend the said election, in order thatthe same be not delayed by the absence of any one of the said commissioners so required for that purpose; which requisition ought to be made by the chief officer or the lord of the manor within the space of two months from the time that the church servant should be wanting.

3. *Of holding the Meeting; the Consistory, Classis, and Provincial Synod.*

ART. 28. Henceforth in all the countries of Holland and West Friezland, three sorts of church meetings shall be observed; viz. the consistory of every place, the classical meeting of every quarter, and the provincial synod of the said countries. And in such meetings only ecclesiastical business shall be transacted, according to the forms of the church; provided that no other business shall be transacted in the superior consistories, but such as could not be done in the inferior consistories, or the affairs immediately belonging to the churches of the superior meetings in general.

4. *Of the Consistory.*

ART. 29. The aforesaid consistory shall be held every week by the minister of the gospel and the elders of each church; provided, that at places where the number of elders is small, the deacons be added thereto; and that the magistracy, or rulers of cities or villages respectively, shall be at liberty to add thereto any persons whom they think best capable for that purpose, in order to have the superintendance there of every thing, and to assist in giving advice when required; and they are to take care that all matters relative to the church be transacted with good order, and to the edification of the community, in order that all scandals that have already arisen, or such as may at any future time arise among the community, may be removed and prevented.

4. *Of the Classical Meetings.*

ART. 30. In every quarter, according to the present division, a classical meeting shall be held at the most convenient place, four times in the year; the magistracy of the cities, where the same is to be held, being also invited for the purposes aforesaid, who shall be at liberty to commission some persons whom they think best qualified to answer the said purposes: and the meeting shall consist, at least, of a minister of the gospel, with an elder of each church of the city, together with the ministers of the

gospel of the villages of that quarter; and they shall make a diligent enquiry respecting the conduct and instructions of every minister, whether he is using both to promote the services of the church; and good care is to be taken to avoid all scandal, abuses, and breaches in the church; and the necessary orders are to be given, to enquire whether the ministers of the gospel, especially in the country, do execute their offices well.

5. *Of the Provincial Synod.*

Art. 31. And moreover, in every year, on the second Wednesday after Pentecost, a provincial synod of all the churches of Holland and West Friezland shall be held at the Hague, wherein shall assemble and vote the doctors of theology of the university of Leyden, together with two ministers of the gospel and an elder, to be commissioned for that purpose by every classis; who are to meet on the aforesaid day and place, without any special notice being required for that purpose: and there shall be discussed whatever has any relation to an union in the church, the edification of the community, and the removal of any impediment to the instruction of the gospel, under the superintendence and presence of all such commissioners as shall be commissioned by us from the college, or from among other individuals, in order to assist and take care that every thing be transacted at such synod in proper order.

Art. 33. Should any one allege that he is aggrieved by the address of an inferior meeting, he may appeal to a superior one; and whatever shall be resolved by the said provincial synod concerning ecclesiastical affairs, shall be considered valid so long as the same be not altered in a similar or national assembly.

6. *Of the Censures of the Church.*

Art. 34. In order that the censures of the church may have a good effect in Holland and West Friezland (which censures however are not understood to release any one from the punishment of the political laws), it is enacted, that whenever any one has sinned against purity of doctrine or probity of conversation; and if the sin be secret, and no public scandal be occasioned, that then the rule prescribed by Christ in Matthew xviii. shall be observed; namely, that if the sinner, being admonished by one separately, or before two or three witnesses, does repent, the case shall not be brought before the consistory; but if he, being admonished by two or three, does not pay any

attention, or if he otherwise had committed a public sin or offence, it shall be communicated to the consistory; and so far as he obstinately rejects the admonition of the consistory, and will not make any declaration of repentance for it before the consistory, the Lord's supper shall be prohibited to him; and if he, being under prohibition, after several admonitions will make no declaration of repentance, those of the consistory shall give information thereof to the magistracy, that is, to the burgomasters and aldermen in the cities, or to the chief officer and his men, or to the judges in the country, and with their approbation proceed to the utmost remedy, namely, entire and public separation; but if any of the magistrates make any difficulty in consenting to the said public entire separation, and the members of the consistory however deem it necessary for the church that it should be proceeded with, in such case the matter shall be brought before the first provincial synod that shall be held, in which it shall be terminated and decided by votes by the members of the synod, and such a number of commissioners as it shall please us to add thereto for that purpose.

In the year 1660 there was great discord in the church of Utrecht between the government of the country and the ecclesiastics, who intended entirely to exclude the government of the country from the church councils; but they were obliged to admit the same or their deputies therein, according to the 87th article of the national synod of Dort, held in the year 1618 and 1619. (1)

Cases relative to Feudal Property.

§ 9. Lastly, the jurisdiction of the judge is established through the property of the thing in all feudal property; and those who hold fiefs from the country of Holland itself, in cases in anywise concerning the fee, ought in the first instance to appear in judgement especially before the stadholder, the president and counsellors of the court of Holland, (they all being vassals) (2); and with regard to the decisions concerning fee-farms, which are in the first instance to be made by the lord and his vassals, they may be brought in appeal before the said feudal court, and ought to be admitted there. (3)

I say, *in cases which in anywise concern the fee;* because all other common cases which do not concern the fee, such as house, ground, and field-services, and the like, which have nothing common with the feudal right, ought to be decided by

(1) See Aitzema's Verhaal van Staat en Oorlog, vol. ix. p. 1041. & seq.

(2) Instructie van den Leen-Hove van Holland, April 7, 1661.

(3) Ibid, art. 1, 2, 5.

the daily judge (1), according to the exception of the 3d article of the said instruction.

The preceding principles are also applicable to military cases, which are to be decided by a court-martial, as well as to cases occurring at sea, which are to be decided by the court of admiralty, who are judges concerning maritime cases; and likewise cases relative to the forest and hunting, which are to be decided by the forester and his mates; and of dykes, sluices, and waters, by the dyke-reeves and officers, whose special business it is to superintend the banks; each of which will hereafter be treated of in particular.

CHAP. XI.

Of Jurisdiction through Privilege of the Judge.

§ 1. *Of Jurisdiction through Privilege of the Judge.*
2. *Of the Feudal Court.*
3. *Of the Jurisdiction of the University of Leyden; and whether a Person may withdraw himself therefrom by Submission to another Judge, or otherwise.*
4. *Of the Jurisdiction of the Provincial Court.*
5. *Of the Jurisdiction of the High Court.*

Of Jurisdiction through Privilege of the Judge.

§ 1. JURISDICTION through privilege of the judge consists in the prerogative given to the judge, that certain persons may in certain cases appear in judgement before him, and before no other judge.

Of the Feudal Court.

§ 2. Some privileges belong to the feudal court, of which we have treated in the preceding chapter.

Of the Jurisdiction of the University of Leyden; and whether a Person may withdraw himself therefrom by Submission to another Judge, or otherwise.

§ 3. Some are of opinion that the judges of the academy or university of Leyden have a similar right, so that the students may not withdraw themselves from that tribunal (2): but the case being considered more fully, it was found that there is no other reason for that prerogative but the benefit itself of the students, who by law have their choice whether or no they will appear in judgement before their instructors; so that they may submit themselves to another judge, and renounce their privilege; and so it was likewise declared in the last interpretation of the 39th article of the statutes of the university by the states of

(1) Ibid. art. 3. See also Frederic Sand. de feud. Gelriæ. tract. 3. c. 1. § 2. Gudelin. de Jure feudali, part. 6. c. 1. Christin. vol. vi. decis. 81.

(2) Arg. l. 20. Ff. de offic. præsid. l. 5. Ff. de jur. l. 7. Ff. de postulando.

Holland on the 25th March 1662; in which, among other things, it was expressed, "that the said students, being of age, may by contract submit themselves to the jurisdiction of another judge in the province of Holland, and may renounce the said other or former jurisdiction."

§ 4. Other privileges, which were granted as well for the benefit of the litigating parties as for the benefit of the judges, are left to the choice of the litigating parties themselves, whether they will make use of them or not. These privileges mostly consist of prerogatives of the court and the high court in Holland; and the prerogatives concerning the jurisdiction of the court are as follow:

Of the Jurisdiction of the Provincial Court.

I. That to this court the cognizance belongs of all cases concerning the laws, precedence, liberty, manors, and revenue of the country (1), in which is also included whatever is committed by any one to the prejudice, or in contumacy or disobedience of the supreme government, such as high treason (*crimen læsæ majestatis*), coining of base money, public violence, improper meetings, and similar more. (2)

II. The cognizance of disputes or differences between cities and manors, and of the hostilities between noblemen and others, and likewise of cases concerning the services and offices of the country, belongs to this court; and all advocates, proctors, and other officers of the court are responsible to the said court in cases relating to their office, and ought to summon thither their constituents for whom they pleaded, concerning their fees and judicial charges. (3)

III. To this court belongs the cognizance of cases concerning all widows, orphans, and other miserable persons. (4)

IV. It also takes cognizance of cases touching the institution of churches. (5)

V. Concerning cases relative to the possession of prebends or parsonages. (6)

VI. Concerning cases relative to signatures and bonds of officers, and of those who specially submit themselves to the said court. (7)

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(1) Instruct. art. 1. § 1. Bald. ad l. 51. Cod. de Episcop. & Cleric.

(2) Vide Merul. Prax. Civil. lib. 4. tit. 2. c. 2. n. 5.

(3) Vide Merul. lib. 4. tit. 2. c. 5, 6, 7.

(4) l. unic. Cod. quando Imper. inter pupill. & ibi DD. l. 1. Cod. ubi pupill. educ. deb. Covarruv. lib. 1. Pract. quæst. c. 6, 7. Merul. d. l. 4. tit. 2. c. 9. See also ch. vi. p. 541. supra.

(5) Merula, lib. 4, tit. 2. c. 10.

(6) Instruct. art. 8. 14. & art. 39, 40, & seq. Andr. Gail. lib. 1. observ. 5.

(7) Instruct. art. 8. Merul. d. lib. 4. tit. 2. c. 6. & 14.

VII. Of all calumny or injury, and extortion, committed by officers in their office, and of all others who desire to prefer complaints against the importunities of noblemen or other powerful persons. (1)

VIII. Of complaints in cases of innovation or disusage. (2)

IX. In cases concerning privileges, customs, statutes, &c. (3)

X. Of all commands to those who do something to others against right, which is commonly termed *mandament pœnaal* (4); by which the court prohibits or commands something under a certain great penalty, in cases wherein any person suffers importunity, which he knows not how to prevent by any ordinary means; or which, if it had taken place, could not be well redressed, or may tend to cause a considerable loss; or otherwise, when the case will admit of no delay. The mode of proceeding in these cases, appears in the Papegay (5); which has also been introduced by the judges of cities in some cases, and especially in those which relate to the building of houses.

XI. Of all criminal cases and those which are subject to corporal punishment, and which are prescribed but remain unpunished (6), including vagabonds and wanderers (7); who, on account of the uncertainty of their habitation, may be prosecuted before all judges wherever they are found, both in civil and in criminal cases.

XII. Of cases relating to the carrying into effect of and enquiry upon letters granted, of pardon, remission, abolition, cession, and respite, &c.

XIII. In case any one has unjustly slandered another, and caused a division among the people, on account of any crime, debt, fraudulent possession, or similar case, the injured person may summon him before the provincial court, to shew cause why he should not institute his action against him, or on failure thereof, why perpetual silence should not be imposed upon him. (8)

XIV. In cases which are to have execution granted upon prescribed decrees. (9)

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(1) Vide Merula d. loco. c. 15, 16, 17.
(2) Vide Instruct. art. 39. & seq. Andr. Gail. lib. 1. observ. n. 30. & obs. 16. n. 9.
(3) Vide Merul. d. loco. c. 12. 20.
(4) Vide Gail. lib. 1. obs. 13. & seq. Merul. ibid. c. 24.
(5) p. 332.
(6) Instruct. art. 8. in fin.
(7) Vide Gail. lib. 1. obs. 1. n. 33. & 34.
(8) Ex l. diffamari Cod. in gen. mun-miss. Vide Gail. lib. 1. obs. 9, 10. n. 12. Myns. cent. 7. obs. 82. & cent. 6. obs. 30.
(9) Vide Instruct. art. 118. & Ampl. art. 30. and of the High Court, art. 273. Marant. de Execut. n. 54.

XV. Upon all arrests. (1)

XVI. In cases in which several debtors reside under several jurisdictions (2); unless some of them reside out of Holland, who in such case ought to be summoned before their daily judge. (3)

Lastly, In cases wherein the inferior judge refuses either to do justice, or does no justice, by delaying the case too long; by means of evocation, that is, upon complaint of refused right. (4)

§ 5. The cases, in which the jurisdiction of the High Court prevails in the first instance, besides cases of appeal, are the following; viz. Of the Jurisdiction the High Court.

I. In cases between two foreign merchants, who have no fixed domicile either in Holland or in Zealand. (5)

II. In all cases of possession, and in other cases in which, according to law or ordinance, no appeal is allowed. (6)

III. In cases concerning navigation (7); and independently thereof, the high court in Holland grants, in the name and on behalf of the supreme government, all reliefs or redresses, and all letters of the benefit of inventory, cession, and the like (8); provided, however, that the carrying of the same into effect should be tried by the daily judge, who upon information of the case taken, either rejects or allows the letters granted according to the circumstances of the case.

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(1) Merula, d. loco. c. 25. See also ch. vii. pp. 542-549. supra.

(2) l. 10. Cod. de jud. & tot. tit. Ff. de quibus reb. ad eundem jud. eatur. Vide Gail. lib. 1. observ. 32. Myns. cent. 1. observ. 4. Menoch. de arbitrar. jud. lib. 2. cas. 371. Afflict. decis. 227.

(3) Per l. ultim. Ff. de jurisdict. Zypæ Notit. Jur. Belgic. tit. de Judic. vers. quibus.

(4) Vide Gail.] lib. 1. observ. 1. usque ad 32. inclusivè, & obs. 41. Mynsing. cent. 5. 81. Imbert. Instit. Forens. c. 23. Covarruv. pract. quæst. c. 6. & 7.

(5) Instruct. van den Hogen Raad, art. 18.

(6) Ibid. art. 19.

(7) Ibid. art. 20.

(8) Ibid. art. 23.

CHAP. XII.

Of Actions, and the Institution thereof.

§ 1. *An Action defined.*
2. *Different Sorts of Actions.*
3. *Possessory or Petitory Action, what.*
4. *Of what Effect, and where to be decided.*
5. *Of Complaint and Maintenance.*
6. *Depositing the Amount &c, what, and when it has Effect.*
7. *How introduced.*
8. *Division of Actions into Rights, extensively or narrowly considered.*

An Action defined.

§ 1. AN action is the right which every one has, of bringing an action at law against another, for whatever is due to him (1); the nature and property of which demand our particular consideration; because, from thence also the distinctive jurisdiction and legal constraint of the judge are established, as well on account of the person, as on account of the debt and the property whereupon the debt is grounded, of which we have already treated. (2)

Different Sorts of Actions.

§ 2. There are several sorts of actions, some of which arise from the deed itself of him who performs them, and which incur corporal punishment; and others are such as are not subject to corporal punishment: the former proceeding from crime, and the latter from common debts, are severally denominated *criminal* or *civil* actions. The actions which arise from common debt are also of different sorts. Thus, some personally bind individuals, and others affect property in various ways, whence they are termed *personal* or *real* actions. (3)

Possessory or Petitory Action, what.

§ 3. Of real actions, that is, such as relate to things; some are concerning disputes simply relating to a *provisional* possession, that is mere and previous possession, either for the purpose of obtaining, detaining, or regaining what has been lost (4). By others, again, the full right to the property is desired or prayed for upon a *definitive*, that is, a *final decision* (5). These are otherwise denominated *possessory* or *petitory* actions; in which it is always advisable to commence the suit upon a possessory

(1) Pr. Inst. de Action.
(2) See also Rombout Hogerbeets, van het aan vangen der processen, (on the institution of lawsuits) in principio.
(3) § 1. Instit. de actionib.
(4) § 3. 4. 6. Inst. de interdict.
(5) Cap. pastorales 5. et tot. tit. ext. de caus. possess. & proprietat.

action, that is, for a previous decision of the possession; because the proof of the right to the full property is often difficult, and the plaintiff, by the previous decision of the possession, is much relieved with respect to the further proof (1), because he remains in possession so long as the adverse party does not fully prove, to the contrary, his right to the property. This sort of action may also be commenced without much risk, as he who cannot obtain the right of possession does not lose thereby such right, nor is he prevented from proceeding in the petitory mode definitively, that is, upon a full action for a final judgement. (2)

Of what Effect, and where to be decided.

§ 4. A *Possessory Action* must be instituted before the high court in Holland in the first instance. (3)

There are, further, special statutes in several cities with respect to inheritance, concerning being put into and out of, and being again put into possession of the house of demise; which statutes are to be carried into effect by two aldermen of the place. By virtue of these statutes also the previous question is decided concerning the possession, as already stated; which case of right of possession, and concerning being put into or out of it, must be decided previously, before one may proceed with the case to a final judgement (4). But when a suit is instituted before the high court, concerning other right of possession, the plaintiff is not prevented from proceeding before the daily judge for a final judgement (5), because the privilege of such jurisdiction cannot be further or otherwise extended beyond the limits expressly assigned to it. (6)

The mode of proceeding at law for a right of possession is, like that right, two-fold; viz. the one, in order to re-obtain the possession lost and impeded; the other, in order to be established and confirmed in the attempted right of possession. The former is denominated the *complaining*, and the other the *maintaining*.

Of Complaint and Maintenance.

§ 5. This sort of complaint may also be instituted before the provincial court in the first instance, by way of *innovation*: for the mode of proceeding in both these actions, the reader is referred to the authorities cited below, where it is treated at large. (7)

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(1) § 4. Inst. de interdict. l. 23. Cod. de probationib.

(2) l. 14. § final. Ff. de except. rei judicat.

(3) Instruct. van den Hogen Raad. art. 19.

(4) l. 3. C. de interdict.

(5) Contra d. l. 3. Cod. de interdict. et l. 10. Cod. de judic.

(6) § 6. Instit. de actionib. junct. & l. 2. Cod. de legib.

(7) Vide Papegay, pp. 111. 120. See also Wieland, Pract. Civ. tit. 1. c. 9. 13. & tit. 2. c. 7. Damhouder, Prax. Civ. c. 41, 42.

We may however remark, that the mode of proceeding in these two sorts of action is different; viz. In a *complaint* before the court, a preceding citation takes place, to see the letters of complaint, and to proceed further according to its form and tenor; which being opened, a *demonstration* of the right of possession is first made thereupon. But, when a *mandate of complaint* is taken out and granted before the same is opened, a *demonstration in loco* is made to the commissioner, without the knowledge of the parties, and information of the possession is taken by him; and then only the citation is issued to see the letters of complaint opened, and a time is appointed to bring in *contrary facts of possession* (*contrarie feiten possessoir*), and to prove the same if they think proper.

Depositing the Amount due, what; and when it has Effect.

§ 6. Next to the previous institution of the right of possession, comes the depositing of the amount (otherwise termed a *provision of sequestration* (1),) by which the plaintiff, by virtue of a public acknowledgement of debt, confirmed by the signature of the defendant, may demand that the signature be confessed or denied; and in case of admission, he may pray that the amount may, without any delay or exception, be deposited in his hands; whereupon the defendant is condemned previously to deposit the amount claimed into court, or to advance the same to the plaintiff upon good security of restitution, if it be decided otherwise by a final decision. If the defendant denies his signature and debt, the proceedings are carried on, according to the usual form, to a final decision. This mode of depositing the amount is also extended to all other public writings, and is taken in a large sense, because

§ 7. How introduced.

it was not introduced by *mere practice*, that is, in the form of law proceedings against the common law, as some are of opinion; for, by the written laws, no exception or delay is granted against debts of which we can form an immediate clear judgement, upon confession or otherwise. (2)

Sometimes, however, exceptions are made against this mode of depositing the amount prayed for: the plaintiff may not rely thereupon only, but, saving the same, must proceed with the case. (3)

Division of Actions into Rights, extensively or narrowly considered.

§ 8. Actions and demands at law are otherwise divided into *rights* extensively or narrowly considered: an *action of extended right* is whatever can be made applicable thereto in cases of that

(1) *Provisie van Namptissement*, in the original.

(2) l. 4. § 3. l. 31. Ff. de re jud. l. 10. Ff. de pignorat. act. l. 6. § 1. Ff. quib. mod. pign. vel hypoth.

(3) Vide Joan à Sande, lib. 1. tit. 8. def. 5. and infra, book v. ch. xix.

sort; and, as in transactions of purchases and sales, so in doubtful cases, whatever belongs thereto, from the nature of the transaction itself, is followed, although it was not expressly conditioned. And so likewise in other similar cases; viz. The placing into custody, granting power, division of community, division of inheritances, mortgaging, and the like; in which the judge has the liberty to judge according to right, reason, and equity, whether and what the one ought to do or to give to the other, according to the propriety of the case; and he has the power to equalize and compare the rights of both in different views, and to determine what and how much they are to indulge each other. (1)

An *action of right narrowly considered*, is that in which the judge is strictly limited to whatever the case expressly contains, without being at liberty to make any equalization therein, or allowing any explanation whatever; such as in all obligations by which any one acknowledges himself to owe something, rents agreed upon, security bonds, actions relative to the contents of last wills, and the like; in all which cases the words of the obligations and cessions are strictly to be followed. (2)

CHAP. XIII.

Of Summoning.

§ 1. *Summoning defined.*
2. *How to be effected before superior and inferior Judges.*
3. *Of summoning out of a Jurisdiction by Notice delivered, and requisitorial Letters.*
§ 4. *Of summoning by Edictal Citation, when out of the Province.*
5. *Whether and when a Person may alter his Claim.*

§ 1. THE commencement, or, properly speaking, the preparation of a case is the *summoning*; when any one, as plaintiff, calls the adverse party before the judge, to come and answer on a certain convenient day concerning his claim, and to hear a decision made thereupon, according to what is right. (3) Summoning defined.

(1) § 30. Instit. de actionib. l. 11. § 1. Ff. de act. empt.

(2) l. 1. Ff. de verb. obligat. l. 24. Ff. de præscript. verb.

(3) DD. ad l. 2. Ff. de in jus vocand.

How to be effected before superior and inferior Judges.

§ 2. In the supreme courts such summons cannot be effected otherwise than by a command (in writing) of the judge, to whom a petition must be presented for that purpose, which is seldom refused but for considerable reasons; because the plaintiff carries on the lawsuit at the expence of the party in the wrong, and the loser is condemned to pay costs (1). But, before the inferior judges, the plaintiffs may, by their own desire, either verbally or in writing, cause the summonings to be effected by a judicial messenger (2): and all persons without distinction, of what condition soever they may be, may be summoned judicially, though the mode of summoning is not alike to all.

All magistrates, officers, and public persons in the service of the country, in cases concerning their office, are not to be summoned before their daily judge, but before the court of Holland, in the first instance; and they may also appear in judgment as plaintiff. (3)

And so a child may not prosecute his parents at law, excepting upon a previous *petita venia*, and having special leave for that purpose from the judge. (4)

Before the provincial and high courts, the summoning is carried into effect by apparitors or door-keepers appointed for that purpose; who, in carrying it into effect, ought to behave themselves according to the instruction of the court, and further, according to the tenor of the mandates and orders. And the following is the manner in which the summons is served, viz. the apparitor serves a copy of the mandate or petition, with the order upon which the summons is to be carried into execution, upon the defendant; or, in his absence, gives, delivers, and leaves it at his place of abode, to or with any of his household or neighbours, having attained the age of discretion, together with a copy of the document upon which the plaintiff (who is desirous to pray on the appointed day that the amount claimed may be deposited) grounds his said prayer, and also a memorandum of the said summoning, and of the law-day announced to the defendant; which must be appointed, in Holland, at least within a fortnight, in Zealand, three weeks, and now, both in

(1) § 1. Inst. de pœna temere litigant. in fine. l. 79. in pr. Ff. de jud.

(2) Vide Gudelin, de jure noviss. lib. 4. c. 5.

(3) l. 2. Ff. de in jus voc. Instruct. art. 8. 12. 38. Merula, Prax. Civ. lib. 4. tit. 40. c. 3. n. 1. Burgund. ad consuet. Flandr. tract. 9. n. 15.

(4) l. 4. § 1. Ff. de in jus vocand. l. 3. Cod. eod. § fin. Inst. de pœna temere lig. Gudelin de jure noviss. lib. 4. c. 5. in prac. 3. n. 3. Zyp. Not. Jur. Belg. tit. de in jus vocand. vers. quamvis. Perez. ad Cod. eod. n. 3. Rebuff. ad constit. reg. in procem. Gloss. 5. n. 47. Fach. lib. 10. Controv. c. 87. Vinn. ad § penal. 18. instit. de act. n. 5.

Holland and in Zealand, within a month after such service (*exploict*). This is to be understood of full judicial summons. Other letters of demand and notices, in inferior cases, for preparation or any interval, such as the appearances before commissioners previous to the mandate being granted, are also limited to a shorter period, according to the urgency of the case. (1)

A summons before the inferior judges is effected by a judicial messenger; whose office chiefly consists also in the institution and custom of the place where it occurs: and such summons ought to be served at least three days previous to the law-day. (2)

Of summoning out of a Jurisdiction, by Notice delivered, and by *Requisitorial Letters.*

§ 3. All summonses ought to be served upon the person himself, if he can be found at the place where he resides; or otherwise, at his house upon some one belonging to his household; or if there be no one at home, upon any of his nearest neighbours; so that he may get information thereof, leaving a copy of the messenger's information and a brief statement, and also of the document, upon which, on the day appointed, any prayer is to be made that the amount claimed may be deposited (3). And if it be a case against any one residing out of the jurisdiction of the judge before whom he is summoned, then by *requisitorial letters* the judge of that place is requested to cause such summons to be served by his messenger or door-keeper; for which purpose, in the country, in tribunals where the case is instituted at the expence of the party who may be found in the wrong, an offer is publicly made to any one who is willing for a very trifling consideration to have the said letters delivered, to carry the consent of that judge into effect, and to cause the summons to be served by the messenger there; which is denominated *the service of an information.* But in *closed* cities, besides the door-keepers and judicial messengers, there are sworn *letter carriers,* who wear the arms of the city where they serve, suspended upon their breast, under a crystal or glass cover, and who deliver the said letters and perform the service.

Of summoning by *Edictal Citation,* when out of the Province.

§ 4. If the person resides out of the ordinary jurisdiction of this country, the summoning is effected by an *edictal citation,* that is, public calling at the extremity of the boundaries; the

(1) Instruct. Cur. Holland, art. 91. Ampliat. 8, 9. Concerning the further duties and office of Apparitors or Door-keepers, see pp. 534-537. supra. See Merul. lib. 4. tit. 24. c. 5, 6, 7, & seq.

(2) Ordonn. op 't stuk van de justit. binnen de Steden en ten platten lande (ordinance relative to the administration of justice within the cities and in the country), art. 1.

(3) Instruct. van den Hove van Holland, art. 91. 99. Ampliat. art. 8, 9.

bell being previously rung before the court by a door-keeper or apparitor belonging to it, and before the cities or villages, upon application previously made to the judge of the same place, by his court messenger; which being effected, the said citation is affixed there, and duplicate copies are sent to the defendant (1).

Lastly, it is to be observed, that, according to the modern practice before all tribunals, when a person causes the adverse party to be summoned, it is not necessary that he should specify in his claim, on which the summons is grounded, the sort of action which he intends to institute against him, but merely the fact and the amount due, precisely as it is; together with the clause requiring him to appear and answer against such a demand and conclusion as is intended to be made by the plaintiff on the appointed day in the said case. (2)

Whether and when a Person may alter his Claim.

§ 5. Therefore, on the appointed day, when a person makes his claim and pleads, he is not bound to such claim as he has made, but before the *litis-contestation*, or answer, he is always at liberty to alter his claim as he pleases. This mode of proceeding, however, is attended with this very great difficulty, viz. whether and in what manner a person may and shall alter his claim or the subsequent one, after the suit is completed? And it is a fixed rule, that no one may do it, excepting by the mode of redressing the same by *civil petition*; provided, however, that the costs incurred by the adverse party up to that time be repaid to him (3), unless it be altered on the same day while it stands on the roll. (4)

(1) On the subject of summonses, and by whom, how, and upon whom the same are to be served, see Wieland's Pract. Civ. tit. 2. c. 4. et seq. Dambouder, Pract. Civ. c. 54. et seq. Pecc. van beseetten, c. 39. Ordonnante op 't stuk van de justitie binnen de steden en ten platten lande, art. 1.

(2) Vide Gudelin. de jure novis. lib. 4. c. 5. vers. tertium. Christin. vol. 2. decis. 88. n. 2. & 7.

(3) Vide Merula, Prax. Civ. lib. 4. tit. 37. c. 6. n. 4. Christin. vol. 2. decis. 104. n. 13.

(4) Arg. l. pen. Ff. de integr. resit.

CHAP. XIV.

Of Defaults of Appearance in Judgment.

§ 1. *First Default, what; and of what Effect.*
2. *Second Default.*
3. *Third Default.*
4. *How to purge or redress it.*
5. *What sort of Cases is terminated at the first Default.*
6. *What Sort at the second.*
7. *Of Proof of a Demand, how to be produced, and of its Effect.*
8. *Dismission of the Suit in case of the Plaintiff's Non-appearance, and of the Defendant's Appearance.*
9. *Penalty of being deprived of one's Right; what it is, and when it has Effect.*

WHEN a person has been duly summoned, he is obliged to appear before the judge on the day appointed, or otherwise, in case of his non-appearance after the repetition of two summonses and upon a fourth citation issued (which is more than is requisite), justice is, notwithstanding, administered: for, although any one is summoned before a judge to whose jurisdiction he does not belong, he ought, nevertheless, to appear in judgment, and allege an exception to be referred to his daily judge, in order that there may be evidence thereof, and that the exception may be decided upon a knowledge of matters, namely, whether he belongs to the jurisdiction of that judge or not (1). The mode of proceeding in this case is as follows.

First Default, what; and of what Effect.

§ 1. If every requisite has been properly observed, and the defendant does not appear or send an attorney, the plaintiff prays that the *first default* may be granted; and for the benefit thereof the defendant is deprived of all declinatory exceptions, that is, the exception to evade the jurisdiction of the judge, and a second citation is granted to the plaintiff against him, with indemnification of costs.

Second Default.

§ 2. If the defendant fails to appear the second time also, the *second default* is prayed for and granted against him; and for the benefit thereof he is deprived of all *dilatory exceptions*, that is, of the right to the day of deliberation and delay, and a third citation is granted against him, with indemnification of costs as before.

Third Default.

§ 3. And if he does not appear for the third time, the right to the *third default* is granted against him; and for the benefit

(1) l. 2. Ff. si quis in jus vocat. non erit.

thereof the person in default is deprived of all *peremptory exceptions*, that is, the exception against the termination and pronunciation of judgment, and the plaintiff is allowed to verify his claim, that is, to deliver his claim to the judge and the proofs relative thereto; in order that justice may be done upon the same accordingly (1). But before the court, upon the third default or neglected right, a fourth citation is granted, *ex superabundanti*. (2)

How to purge or redress it.

§ 4. But in order that no person may be condemned, to whom it was impossible to appear, or who was necessarily prevented (3), the parties in default are allowed, after the first and second default or neglected right, to *purge the same*, that is, to justify themselves; provided the effect thereof (that is, the right which the plaintiff has obtained thereby) prevails, namely, that the defendant may allege no evading exception and delay, but answers immediately; and further, pays the costs incurred by the plaintiff on account of his neglect. But against the third default no purging or justification is allowed, except by relief; that is, *by redressing*, for certain reasons; unless any thing can be alleged, and which may be heard, against the wrong execution of the citations. (4)

What sort of Cases is terminated at the First Default.

§ 5. In some cases, the citations need not be repeated, but justice is done after the first and second default; as in cases where the debt appears on record or book, or by public bond, by virtue of which prayer is made that the amount due may be deposited, and then the case is further proceeded with definitively, that is, to a final judgment upon three neglected rights and citations repeated as aforesaid. (5)

But before the court of Holland, in cases where any one is summoned to confess or deny his signature or seal, for the benefit of the first neglect the writing is considered as acknowledged, and the person in default is condemned to deposit the amount due, and a second citation is granted, by which the defaulter is summoned against the plaintiff to see the amount deposited and adjudged, delivered to him upon bail, that is, to see it secured under security, should it be otherwise determined by final decision: and if such defaulter does not appear *then*, for

(1) Ordon. op 't stuk van de justitie, &c. art. 2, 3.

(2) Vide Instruct. van den Hove van Holland, art. 108.

(3) l. 53. § 2. Ff. de re judic. l. 10. Cod. quomodo et quando judex.

(4) Instruct. van den Hove van Holland, art. 122. Ordonn. op 't stuk van de justitie, &c. art. 5. Merul. Prax. Civ. l. 4. tit. 43. c. 3.

(5) Ordonnant. op 't stuk van de justitie, &c. art. 6.

§ 6. What at the Second.

the benefit of the second default the amount deposited is confirmed to the plaintiff upon his bail and surety. (1)

If the depositing of the amount is subject to any consideration, it is, notwithstanding, adjudged upon the first default or neglected right, but otherwise than *salvo purge* on the next law day, that is, reserving the right of justification and answering against the same, to be made on or before the next law-day, or otherwise in cities where law-days are holden every day in eight to fourteen days. And although the said condition be not previously expressed therein, the defendant is nevertheless often allowed to purge or vindicate himself on the next following law-day; and is heard in his defence if he thinks himself aggrieved thereby. (2)

When any one is summoned to see execution granted against him upon prescribed decrees, judicial acknowledgments, voluntary or prayed for condemnation, or submissions, upon decisions or agreements, upon matters relative to which there were judicial proceedings, and respecting which it appears by public instruments that judgment was obtained, then also for the benefit of the first default, judgment and execution are granted with indemnification of costs incurred on that account. (3)

And likewise, in cases where any one is subpœnaed to give evidence of the truth, if at the time he was subpœnaed he was present within the jurisdiction, he is condemned at the first default to give evidence of the truth, at *his own* expence, upon penalty of imprisonment. (4)

Moreover, in cases of taxation of costs, the defaulter is by the first default deprived of the right of diminution, that is, of deduction, and the taxation is proceeded with, without hearing him. (5)

In cases of appeal only two defaults exist; and likewise, when any one is summoned to admit the lawsuit and to proceed therein as heir to the deceased, according to the last documents and pleadings, that is, to accept the instituted suit of the deceased as good in the state in which it was left, and to proceed therein (6). And in cases in which a person is cited to warrant and indemnify something, only two defaults are allowed. (7)

(1) Instruct. van den Hove van Holland, art. 119.
(2) Vide Merula, Prax. Civ. lib. 4. tit. 43. c. 3.
(3) Ordonnant. op 't stuk van de justitie, &c. art. 7. Instruct. van den Hove, art. 118.
(4) Ordonnant. &c. art. 8.
(5) Vide Instruct. van den Hove, art. 118.
(6) Ibid. art. 112. et seq.
(7) Ibid. art. 115.

Proof of a Demand, how to be produced, and of what Effect.

§ 7. If the plaintiff, for the benefit of the obtained default or neglected right, fully verifies the claim contained in his allegation, the defendant in default is condemned by final judgment to satisfy such claim, with costs; but if he does not verify it fully, and the case admits of doubt, he is allowed to supply the defect by oath, at the discretion of the judge; and if he proves nothing whatsoever, the defendant is released from the demand, but is nevertheless condemned to pay the costs of the suit. (1)

Dismission of the suit, in case of the Plaintiff's Non-appearance and of the Defendant's Appearance.

§ 8. If the plaintiff himself does not appear on the day appointed, the defendant may pray that the suit may be dismissed: and, on account of the plaintiff's non-appearance, he is released from the instituted suit, with indemnification of costs (2). And in cases of appeal, the appeal is declared abandoned, that is, ineffectual; and the appellant is condemned to pay the costs. (3)

Penalty of being deprived of one's Right; what it is, and of what Effect.

§ 9. If, after the answer is filed and the suit is completed, either the plaintiff or the defendant fails to proceed in the suit, prayer is made that the party in default may be deprived of the benefit which he would have derived on that day (4). Which deprivation of right is also granted (saving to the defaulter his right of justification and answering for himself), and is to be redressed on the next law-day; or otherwise the party in default is excused for such reasons as he may allege, and he is still allowed to redress such neglect, provided he pays the costs (5)

(1) Instruct. van den Hoven, art. 108. Ordonnant op. 't stuk van de justitie, &c. art. 3. DD. ad l. 23. Cod. de judic. l. 68. et seq. Ff. eod. Andr. Gail. lib. 1. obs. c. 60.

(2) Instruct. van den Hove, art. 111. Ordonn. op 't stuk van de justitie, &c. art. 2.

(3) Instruct. van den Hogen Raad, art. 225.

(4) Instruct. van den Hove, art. 61. Instruct. van den Hogen Raad, art. 254. DD. ad l. 13. Cod. de judic.

(5) Vide Damhouder, Prax. Civ. c. 47. et seq. Wieland, Prax. Civ. tit. 3. c. 5. et seq. Andr. Gail. l. 1. obs. 59, 60. Merula, Prax. Civ. lib. 4. tit. 31 et 32. Ordonnant. op 't stuk van de justitie in de steden en ten platten lande, art. 1. to 10.

CHAPTER XV.

Of Demand and Conclusion.

§ 1. *Demand, how to be made.*
2. *How, before the Court of Holland.*
3. *How in the Cities and in the Country.*
4. *Of the Consequences of making a Demand.*
5. *How to demand that the amount may be provisionally deposited or secured.*
§ 6. *Demand of Fruits and Interest.*
7. *Demand of Costs, Loss, and Interest.*
8. Salutary Clause, *what*; *and its Effect.*
9. *Accumulation of actions.*
10. *Whether and when a Demand and Conclusion may be altered.*

IF the defendant appears on the day appointed, the plaintiff ought to make a judicial demand against him of whatever he claims from him. This demand is twofold, verbally, or in writing, at the option of the litigating parties, or otherwise according to the judge's desire.

Demand, how to be made.

§ 1. All cases are commenced verbally, and short notes kept thereof; otherwise the pleas, if too long, are reduced into writing, with references by short notes; with this clause, "making claim, *pront in scriptis*;" whereupon the defendant answers verbally, and the suit is further completed. This being done, the litigating parties cause the case to be pleaded verbally, if the same can be decided in a summary way, and without further investigation; or otherwise, if it be a case requiring any further legal consideration or facts, the litigating parties agree together; or if the case involves any points of law, they are desired by the judge to describe the same by memoirs, that is, short writings of the merits of the case, and *additions* or *advertisements*, which are, means of laws alleged, or otherwise, if the case consists of facts, by a demand, answer, replication, and rejoinder, of which we shall distinctly treat hereafter.

How before the Court of Holland.

§ 2. There are several modes of instituting a demand and conclusion, according to the nature of the demand; which modes are also twofold before the court of Holland and the high court, viz. verbal institution, which merely consists in a brief conclusion of the means of the plaintiff's information, as is contained in his mandate in the manner following, viz. "concludes upon the "means contained in the impetrator's mandate, and upon such "others as may be subsequently deduced if necessary; that the

" defendant should be condemned to satisfy to the impetrator," &c. But if any subsequent means be necessary, the demand is made in writing containing such subsequent means, and thereupon a brief conclusion is made in the following manner; viz. " making " demand, caused to be said, that, &c. and concludes upon the " same and other means if necessary to be subsequently deduced, " that the defendant should be condemned," &c.

How in the Cities and in the Country.

§ 3. But in cities and in the country, where no petitions or mandates with means precede, but the citations are executed either verbally or in writing without means, it is usual to propose the facts of the case, whether verbally or in writing, summarily and clearly; and cause is to be concluded upon whatever is demanded by the plaintiff from the defendant, in the following manner; viz. " the plaintiff says, and the truth is so, " that, &c. and he concludes therefore that the defendant should " be condemned to satisfy the plaintiff," &c.

Of the Consequences of making a Demand.

§ 4. In these proceedings, the tenor of the conclusion is particularly to be observed; namely, that the same be in every point applicable to the means of the claim; for, if by the means of the demand something more be desired which was not in the tenor of the conclusion, no regard will be paid thereto in the decision of the case; for the decision ought to stand upon, and cannot go beyond the conclusion of the claim. (1)

How to demand that the Amount may be provisionally deposited or secured.

§ 5. Therefore the plaintiff ought to pay good attention, whether by a provisional decision he can obtain any right, which he then ought to add to his conclusion, with the clause, " that the amount claimed should be provisionally deposited." (2)

Demand of Fruits and Interest.

§ 6. And likewise, in claiming any immoveable property, unjustly possessed by another, the conclusion of the demand ought to be, that the defendant should be condemned to deliver up to the plaintiff, &c. " with the fruits and interest " thereof derived since the termination of the case," or otherwise from such time as the defendant was bound to deliver up such property. (3)

Demand of Costs, Loss, and Interest.

§ 7. And in common cases attention ought always to be paid to the clause of costs, loss, and interest; whether they arise from

(1) Aut. offeratur. Cod. de litis contestat. Innocent. in cap. super literis extr. de rescript. Bart. ad l. Aurelius 28. § Stichum, 7. Ff. de liberat. legat. Wieland, Prax. Civ. tit. 4. c. 3. Damhouder, Prax. Civ. c. 102. n. 2, 3. Andr. Gail. lib. 1. 61. n. 2.

(2) In what case such demand has effect, see Wieland, Pract. Civ. tit. 4. c. 4. & Damhouder, Prax. Civ. c. 103. et infra, ch. xix.

(3) l. 22. Cod. de rei vind. l. 2. Cod. de fruct. & lit. expens. § 2. Inst. de offic. judic. Vide Wieland, Prax. Civ. tit. 4. c. 5. Damhoud. Prax. Civ. c. 104.

obligation, or from the matter itself through default of payment. (1)

§ 8. To all the preceding pleadings, it is usual to add the *salutary clause*, that is, the *aiding conclusion*, viz. "or to such other "purposes as the Lords *ex-officio vel juris via* shall judge to "suit the plaintiff best." Which clause is of such effect, that all the right to which the plaintiff may in anywise be entitled, upon the means contained in his demand, is understood thereby to be stipulated in the conclusion. (2) Salutary Clause, what; and its Effect.

§ 9. Many and several actions of one and the same nature against one and the same person may be added to one and the same demand, viz. when in several cases, several amounts are due to me by one and the same person, I may add all of them to one, and institute an accumulated demand (3); and so, for one and the same crime a criminal and civil prosecution may be commenced, to punish and fine, and for more than one fine on account of the same offence: Thus, it is usual among us, in cases of smuggling and transgression against the revenue laws, to add together in the prosecution, and to inflict different punishments and fines on account of one and the same cause (4); and likewise in *alternative cases*, in which something is left to the choice of the adverse party, or to the judge's discretion, several cases may be added together, which, however, is no accumulation of actions, but an alternative conclusion, and a suit at option; or otherwise, if the choice consists of cases of different kinds, in which one annuls another, he is to be confined to the one or to the other. (5) Accumulation of Actions.

§ 10. When a demand has been once made, it may be altered at any time before filing the answer and litis-contestation; but, after it has been made, and an answer has been filed, the demand may not be increased or altered in any part to the prejudice of the party (6); unless it takes place under civil petition, that is, by way of redress obtained from government, and upon the payment of costs; but the demand may be always Whether and when a Demand and Conclusion may be altered.

(1) Vide Wieland, d. tit. 4. c. 6 and 9. Damhouder, Prax. Civ. c. 105. 108.

(2) Arg. l. 66. Ff. de judic. l. 83. § 1. Ff. de verb. oblig. l. unic. Cod. ut qui desunt advocatorum partibus judex suppleat. Vide Andr. Gail. lib. 1. obs. 61. n. 11. Damhouder, Prax. Civ. c. 109. Sande, l. 1. t. 4. d. 12. Neostad. Cur. Holl. decis. 14.

(3) l. 11. Ff. de jurisdictione. Bart. & DD. ad l. 3. Cod. de edendo.

(4) d. l. 11. Ff. de jurisdict. Vide Andr. Gail. lib. 1. obs. 63. n. 3. 9. et van de Arresten, c. 5. n. 16. Anton. Tessaur. decis. 18. Hartmann. Observ. tit. 49. obs. 3. n. 6.

(5) § 33. Instit. de action. l. 1. Cod. de furtis.

(6) l. 23. Ff. de judic.

decreased, even after the answer is filed and before judgment is given. (1)

To the practice and mode of making demands and of pleadings certain forms belong, which are usually followed; and concerning which we shall treat infra, ch. xix.

CHAP. XVI.

Of Delay and Day of Consideration.

§ 1. *Day of Consideration and Delay, what; and how to be granted.*
2, 7. *Of how many Sorts.*
3, 4. *What is allowed before the Suit is completed.*
5. *Whether and when unnecessary, upon the Defendant's Answer, and the Plaintiff's Replication.*
§ 6. *Whether and when after the Suit is completed.*
8. *Whether and when against the Amount of the Demand being secured or deposited, and other Provisions.*
9. *Day and Delay after the Decision, whether and which prevails.*

§ 1. IF the defendant appear either personally or by his attorney before the judge, in proper time, in order that he may not be surprised by any thing new being offered, and so be put out of the means of necessary defence, he has in every respect his time and day of consideration, which is granted by one judge for a shorter time and by another for a longer time, according to their respective instructions and ordinances, and also according to the exigency of the case: so that the space of time allowed to a defendant at his request for consideration, depends principally on the judgment and discretion of the judge. (2)

Of how many Sorts.

§ 2. *Day and delay* are sometimes granted before the suit is completed, sometimes after its completion, and sometimes after judgment is given, in order to postpone execution; of which we shall treat in a subsequent part of this work.

(1) Jason in § omnium, 1. Instit. de act. Bert. in l: edita. Cod. de edend. l. quidam existimaverunt. 21. Ff. de reb. cred. See Andr. Gail. lib. 1. obs. 74. n. 5. & seq. Wieland, Pract. Civ. tit. 4. c. 11. Damhouder, Prax. Civ. c. 110.

(2) Cap. quoad. 15 in fin. Extr. de re sentent. & de re judic. Vide Instruct. van den Hove van Holland, art. 69. 75. 131. Ampliat. van de Instruct. art. 18. And. Gail. lib. 1. obs. 53. n. 20. obs. 91. n. 13. Merula, Pract. Civ. lib. 4. tit. 30. c. 1, 2.

§ 3. The time allowed for day and delay before the completion of the suit, is that time which is necessary to enable a party to a suit to appear properly before the judge: before the court of justice this time is usually taken, at least fourteen days previously against persons residing in Holland, and against those in Zealand three weeks, and in the country by the first ensuing law-day, if the summoning takes place at least three days before, otherwise it would be extended to the next law-day but one. (1)

What is allowed before the Suit is completed.

§ 4. According to the ordinance of justice in the cities and country, no day of consideration or delay is granted in and until the completion of the suit, in *closed* cities in cases amounting to one hundred gilders, and in villages fifty gilders and less; which are to be completed verbally, and settled in a summary way without any delay, unless for important reasons, on the application of either of the litigating parties, the judge thinks any delay necessary (2). But in cases exceeding the aforesaid sum in value, or in other real or personal actions, eight days will be granted to the defendant against the claim in the cities, and before the bailiff and men or judges of villages fourteen days, to answer against the same, which time is likewise granted to produce replication and rejoinder. (3)

§ 5. Provided, however, that for such replication or rejoinder no time be granted, if nothing new be alleged or produced by the defendant's answer or the plaintiff's replication subject to any consideration, because such time or delay was not limited otherwise but in cases where it is required, and ought always to be restricted and refused where it is not highly necessary (4); so that if the defendant either immediately, or after taking time for consideration, makes no other opposition but a contrary conclusion, that is, a mere defence, the plaintiff, who on his part ought always to be ready, ought to proceed without any delay. And likewise the defendant (in case the plaintiff alleges by his replication nothing new upon the answer, but persists in his demand or instituted action), may have no new delay for consideration, but ought also directly to complete the suit, especially in the country; where the advocates, according to the tenor of the above-cited ordinance, contrary to its sense and to the

Whether and when it is unnecessary upon the Defendant's Answer, and the Plaintiff's Replication.

(1) Ordonnant. op 't stuk van de justitie, &c. art. 1. Ampliat. van de Instruct. art. 1. Papegay, page 18. Merula, Pract. Civ. lib. 4. tit. 24. c. 14.

(2) Ordonnant. op 't stuk van de justitie, &c. art. 11.

(3) Ibid. art. 12.

(4) DD. ad l. 1. Cod. de dilationib. et l. 2. in pr. Cod. de temp. appellat. Merula, Prax. Civ. lib. 4. tit. 80. c. 1. n. 3.

design of its institution, in every pleading apply for time, merely to delay each other and to render the cases perpetual. (1)

Whether and when, after the Suit is completed.

§ 6. Day or delay, *after* the completion of the suit, is that time which is granted to any one for producing his proofs, having the witnesses heard, refuting the witnesses, and saving the evidence by assertions and confirmations against the refutation, which delay is usually granted from one law-day to another, or otherwise from fourteen to fourteen days.

§ 7. Of these days of delay some consist of mere orders; after which a party is allowed for particular reasons to make a subsequent application for delay. Others again are peremptory, that is, under the penalty of deprivation of one's right, by virtue of which justice is done upon whatever is produced by either of the litigating parties; which delay in the cities and in the country is usually granted on pain of the said deprivation, in order thereby to prevent any further or subsequent application for delay; but before the court of Holland it is unnecessary to be added, where every day and terms are peremptory; that is to say, are safe, after which no more delays are granted. (2)

Whether and when against the Amount of the Demand being secured or deposited, and other Provisions.

§ 8. Against prayer to have the amount claimed deposited or secured, and other benefits and applications for provisional decision, such as in cases of right of possession and the like, no day for consideration is allowable; but the defendant ought, on the day appointed, to answer peremptorily provided that, in cases wherein prayer is made to have the amount claimed deposited, proper copies be delivered to him, together with the citation of the documents upon which the said prayer is grounded. But if the delivery of such copies be neglected, the defendant may apply for it on the day appointed, as well as for the day of consideration (3): which mode of proceeding is followed both in the cities and in the country.

Day or delay *after* the decision is that time which is granted to any one for consideration, whether or no he wishes to appeal from the decision. For this purpose, ten days are allowed among us, and twenty days more expire after the appeal has been entered, to prosecute the same; within which time the judgment may not be carried into execution (4). In this delay may be in-

(1) Vide Aantekenning op het 12 art. van de ordonn. op het stuk van de justitie, (memorandum upon the 12th article of the ordinance concerning administration of justice.)

(2) Instruct. van den Hove, art. 69. 75. 124. Ampliat. van de Instruct. art. 18.

(3) Vide Papegay, p. 19. Ampliat. art. 9.

(4) Instruct. van den Hove, art. 198. Ordonnant op 't stuk van de justitie, &c. art. 23.

cluded the time and suspension of the satisfaction of the judgment, which is granted by the judge according to the circumstances of cases, concerning which we shall hereafter treat more extensively. (1)

CHAP. XVII.

Of Exceptions, that is, of the Defendant's Objections to the Plaintiff's Suit.

§ 1. *An Exception defined, and its different Sorts.*
2. *Of the declinatory Exception.*
3. *Of Exception against the Person of the Judge.*
4. *Of Dilatory Exceptions.*
5. *The Appointment of the Day being too short.*
6. *When any one has been summoned to appear on a Feast Day.*
7. *What Exceptions are to be taken against those who carry on a Lawsuit in the Name of another, and not on their own Account.*
8. *How far it is usual to apply for a Copy of the Procuration.*
9. *How far it is the Practice to demand Security for the Costs and* Domicilium citandi.
10. *Juratory Caution, whether and when sufficient.*
11. *Application for Time to warrant and make Indemnification, whether or when to be made.*
12. *Of the Oath* de Calumnia.
13. *Of Peremptory Exceptions.*
14. *Of Errors in Calculation.*
15. *How the Exceptions are to be made before or after Litis-contestation.*
16. *By what Exceptions one may or may not persist.*

BEFORE the defendant answers, he ought to consider well whether he cannot evade the plaintiff's suit by any exceptions, especially such as may serve to evade the jurisdiction of the judge; for he is not allowed to do it after the answer has been filed, by which he is understood to have submitted himself to the jurisdiction of the judge. (2)

§ 1. An exception is an objection of the defendant against the suit of the plaintiff, as well to evade the judge as for the purpose of delaying or annulling the case; whence it is to be understood

An Exception defined, and its different Sorts.

(1) On this subject, also, the reader may consult Damhouder, Pract. Civ. c. 114. & seq. Wieland, Pract. Civ. tit. 4. c. 15. & seq. who have discussed it very fully.

(2) l. pen. Ff. de jurisdict. l. 30. Ff. de judiciis.

that these exceptions are of three sorts, viz. declinatory, dilatory, and peremptory.

Of the declinatory Exception.

§ 2. A *declinatory exception* is that, by which a person takes exception against the subordination to the judge (1), in order to evade or reject his jurisdiction (if summoned before him unlawfully), and that he may be referred by the judge to his daily judge. This sort of exceptions prevails in all cases in which a person is summoned before a judge to whose jurisdiction he is not subject, of which we have already treated.

Of Exception against the Person of the Judge.

§ 3. To this head of declinatory exceptions also belongs the exception against the person of the judge, in order to evade his jurisdiction (2); but since tribunals have been established amongst us, consisting of a certain number of judges, it is allowed to reject any one of them on account of enmity, relationship, or other causes, but not to reject the whole tribunal, or to evade the same entirely. (3)

Of dilatory Exception.

§ 4. A *dilatory exception* is an application for a day and time, by which the cause is prolonged and delayed. It may be allowed for several causes, at the discretion of the judge, as already stated.

The Appointment of the Day being too short.

§ 5. To this class of exceptions also belongs the exception against the shortness of the time, or feast or leave days, when any one has been summoned to appear in judgment by that time (4): for if in the cities or villages any person be not summoned three days before, and if in court at least fourteen days be not granted (5), he may take exception against such time, because he was summoned too short a time before the law-day, and then time is granted to him until the following law-day. (6)

When any one has been summoned to appear on a *Feast* or *Leave-Day*.

§ 6. But as to the *feast* or *leave days*, when any one has been summoned to appear on a leave or feast day, on which days the courts do not sit, the summoning will not be rendered void by it, but will be prolonged by the occurrence itself till the next following law-day. (7)

What Exceptions are to be taken against those who

§ 7. Against those who do not sue any one in their own name, but who proceed at law for and on behalf of another, previously

(1) l. ult. Ff. de jurisdict. l. 2. Ff. si quis in jus vocat. non ierit.

(2) l. 16. et auth. seq. Cod. de jud.

(3) Vide Merula, Prax. Civil. lib. 4. tit. 40. c. 4. Damhouder, Prax. Civ. c. 125. Wieland, Pract. Civ. tit. 5. c. 6. Andr. Gail. lib. 1. obs. 33. n. 1, 2, 3.

(4) c. 1. in judic. in element. l. 2. Ff. si quis ex jus vocat. non ievit. l. fin. Cod. de feriis.

(5) Ampliat. van de instruct. art. 9. Ordonnant. op 't stuk van de justitie, &c. art. 1.

(6) Vide Merula, Prax. Civ. lib. 4. tit. 40. c. 12. n. 2.

(7) DD. ad l. 1. Cod. de offic. civ. jud. Vide Instruct. van den Hove, art. 50. Damhouder, Prax. Civ. c. 60. n. 7. Wieland, Prax. Civ. tit. 2. c. 8. n. 5, 6, 7. Merula, Prax. Civ. lib. 4. tit. 24. c. 14. n. 12. Pract. van Benthem, c. 10. n. 1, 2. Christin. vol. 2. decis. 251. n. 22.

to answering, a person may require evidence of their authority, and of the right upon which they wish to establish their power in claiming justice (1). Against those who institute a claim on account of a purchased action, a party may, previous to answering, require a declaration of the sum given for it, in order that he may consider whether or not he would wish to appropriate to himself the right of such purchase.

carry on a Lawsuit in the Name of another, and not on their own account.

§ 8. Some have wished also to introduce this practice, viz. that before they answer, they should be desired to produce the power of attorney and copy thereof, by virtue of which the proctor acts judicially in the case of his constituent (2); but in consequence thereof, especially in the cities and in the country, the case is not detained or delayed, provided that the proctor promises to produce the same by the first opportunity, and takes the case at his peril and for his own. (3)

How far it is usual to apply for a Copy of the Procuration.

§ 9. But if the plaintiff be a stranger, having no property under the jurisdiction of the judge before whom the suit is instituted, the defendant may apply that he should give security for the costs, and for whatever the defendant may, on the contrary, have to claim from him in re-convention, in order to recover from such plaintiff whatever he may be condemned to pay; and moreover, that he (the plaintiff) should point out *domicilium citandi*, that is, a fixed place, under the same jurisdiction where all citations and judicial demands can be executed against him. (4)

How far it is the Practice to demand Security for the Costs, and domicilium citandi.

§ 10. But if he be not able to get security, he ought to be admitted under juratory caution, (*cautie juratoir*) that is, upon his oath that he will satisfy the same. (5)

Juratory Caution, whether and when sufficient.

§ 11. If any one be called to answer in a matter, in which another is also under obligation of doing so to him, as in cases where one is obliged to warrant and free something, the defendant may likewise, before he answers, apply for time to seek for redress against the other, and then the first case must be postponed until such time as the case so to be redressed or warranted be settled. But a mere release or indemnification cannot detain the first suit, which ought to proceed notwithstanding. (6)

Application for Time to warrant, whether and when to be made.

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(1) Vide Damhouder, Prax. Civ. c. 97. & c. 132. & 133. Merula, Prax. Civ. lib. 4. tit. 40. c. 7, 8.

(2) Arg. l. 24. Cod. de probat.

(3) Vide supra, ch. iv. § 7. p. 532.

(4) Auth. generaliter. Cod. de episc. & cler. junct. Nom. 112. c. 3. Cod. de his qui accus. non poss. Christin. ad leg. Mechlin. tit. 7. art. 19. Marant. Prax. Aur. part. 6. de satisdat. octave membr. judicii, n. 16. Horat. Carpan. ad statut. Mediolan. part. 1. c. 44. n. 11.

(5) d. auth. generaliter Cod. de episc. & cler. Pyrrh. Maur. tract. de fide jussoribus 2. part. princ. 3. sect. præliud. c. 25. alias 34. n. 21. Gail. lib. 2. obs. 47. n. 8.

(6) Vide Papegay, pag. (mihi) 89. Damhouder, Prax. Civ. c. 134.

Of the Oath *de calumnia.*

§ 12. Formerly, it was customary for the plaintiff, previously to filing an answer and the completion of the suit, to be obliged to swear, that he instituted his suit *bonâ fide*, relying upon his good right, without any wish of vexing the adverse party by it (1); but at present this is seldom observed. (2)

Of peremptory Exceptions.

§ 13. *Peremptory exceptions* are such objections of the defendant as set aside the whole lawsuit, whether they consist of points of law or facts; such as the exceptions against deceit, fraud, craftiness, or that the money has not been counted, that the payment was not made, renovation of debt, forgiveness of debt, and the like. (3)

Of Errors in Calculation.

§ 14. To this class of exceptions also belongs the exception against errors in calculation, which a person may always plead, according to the rule "upon a wrong calculation no payment can be enforced;" which is to be understood of accounts consisting in form, and in which the calculations can be made again, and the subsequent calculation thereof has not been renounced by agreement. (4)

How the Exceptions are to be made before or after the litis-contestation.

§ 15. The peremptory exception ought to be made with the answer, and at the time the answer is filed with this clause, viz., that "he should not be admissible finally and ordinarily;" but declinatory and dilatory exceptions ought to be alleged before the answer, and before the completion of the suit (5): and the one ought to be made before the other; for if the defendant alleges only dilatory exceptions, and applies only for a day without further protest, that is, without a reservation of his further right, (which is usually added thereto in these words, viz. "before the answering, I reserve the right to take exception, or to make any subsequent prayer"); as otherwise, if a person answers to the suit, it would be understood that he thereby submitted to the judge, and then he is thereby deprived of his right of taking declinatory and dilatory exceptions. (6)

By what Exceptions one may or may not persist.

§ 16. In this sort of exceptions are likewise included three sorts by which one may persist, that is, by which a judgment may be delayed before one need proceed with the instituted suit viz. *renvoi*, that is, a declinatory exception to evade the jurisdic-

(1) l. 2. & tot. tit. Cod. de jurejurand. propter calumniam dando.

(2) Vide Merula, Prax. Civ. lib. 4. tit. 44. c. 1. et seq.

(3) Vide Merula, Prax. Civ. lib. 4. tit. 40. c. 13, 14.

(4) l. unic. Cod. de errore calculi. junct. l. 2. Cod. de re judic. Vide Mascard. de probat. vol. 1. conclus. 253. n. 24. & seq.

(5) l. 16. Cod. de judic. DD. ad l. 57. Ff. de re judic. l. 12. Cod. de except. l. 19. Cod. de probat. Marant. de exceptionib. part. 6. n. 7, 8, 9.

(6) Vide Merula, Prax. Civ. lib. 4. tit. 40. c. 1. n. 1. Damhouder, Prax. Civ. c. 120. n. 4. Wieland, tit. 5. c. 1. Masuerii, Prax. tit. de except. 9. n. 3.

tion, and to be referred to the daily judge; exception *litis pendentis*, that is, that the case is already pending before another judge; and exception *litis finitæ*, that the case has already been decided by a preceding decree. In these exceptions are also included exceptions of transaction, that is, of agreement and decision of arbitrators at law, appearing by public instruments, or under the party's own hand, for which purpose one takes usually one's conclusion, namely, "that the party should be "declared inadmissible, and that absolution should be granted "upon that instance;" and likewise an exception of having acquiesced to and approved of the decree in question, which is proposed against those who wish to appeal from a judgment pronounced by an inferior court, and yet by evident signs and acts have approved of the same, and therefore are supposed to be deprived of their right of appealing.

An exception litis pendentis, by which the suit with respect to the defendant is made pending before the court, is understood to prevail as soon as the citation has been properly served and the claim produced, to which, before the court, the service of the mandate would be sufficient; by which it is understood that the defendant had notice in sufficient time, and that the suit in respect to him was made pending before the court (1). And in some cities there are statutes, by which the case is made pending by a mere summoning before peace-makers (2), which is to be understood with respect to the defendant, as the suit respecting him is made pending before the court thereby, but not with respect to the plaintiff, who may always renounce his instituted suit before the answer of the defendant, and deviate therefrom, or institute his suit again before another competent judge, as already stated (3). All other exceptions, whether dilatory or peremptory, may be well proposed, and a previous decision be prayed for thereupon; but, notwithstanding the same, an answer ought to be filed upon the case itself. (4)

(1) cap. 2. Ut lite pendente nihil innovetur. In Clementin. & cap. præposuisti. 19. extr. de foro compet. Joan. Papon. lib. 7. tit. 8. arrest. 1. Cons. & Adv. Rotterdam, vol. 3. cons. 326.

(2) Ampliat. van de 176 Burgerlyke Keur. der stad Leyden, art. 1. Merul. Prax. Civ. lib. 4. tit. 24. c. 11.

(3) Vide ch. xi. § 3. p. 566, supra.

(4) Ordonnant. op 't stuk van de justitie, &c. art. 13. Instruct. van den Hove van Holland. art. 88. Ampliat. art. 2. Damhouder, Prax. Civ. c. 23. et seq. Merula, Prax. Civ. lib. 4. tit. 40. c. 1, 2. et seq. Wieland, Prax. Civ. tit. 4. c. 5. et seq.

CHAP. XVIII.

Of Re-convention.

§ 1. *Re-convention defined.*
2. *Within what Time it must be brought in.*
3. *In what respect it differs from Compensation*
§ 4. *In what cases it takes Effect or not.*
5. *How to be instituted.*
6. *How it terminates.*

Re-convention defined.

§ 1. RE-CONVENTION is likewise a sort of exception against the claim of the plaintiff, whereby the claim is (as it were) rendered ineffectual, or is compared with what the defendant has again to claim from the plaintiff (1); so that if any one claims from me twenty, and I again had a claim against him of fifteen, or a similar twenty of the same sort, I may in such case, previously to answering, make a counter-claim against him, in order that our mutual claims may be judged at one and the same time.

Within what Time it must be brought in.

§ 2. On which account it must be brought in *before* the answer; for, if it has been brought in *after* the answer, the plaintiff in the case of re-convention makes it pending before the same judge, but cannot delay the first instituted suit, the proceedings of which are in an advanced state, as already shewn. (2)

In what Respects it differs from Compensation.

§ 3. Re-convention differs from compensation or right of set-off so much, that what is set off by way of compensation, ought to appear so clear as to make it of the same sort, propriety, and substance, as that which is compared therewith; so that there is not the least difference in it, and can actually annul the debt; namely, not only in every stage of the suit, but even after judgment, and during the execution of such judgment (3). But re-convention also has effect in cases which are unlike, and in which it cannot appear immediately, that compensation might have place therein, but for this purpose a judgment is required; yet in such sort that the re-convention, with respect to the manner of suing at law, must be of the same sort in order that it may have its progress with the case commenced (4). Further, re-convention can have no effect to oppose a prayer to have the

§ 4. In what Cases it takes Effect, or not.

(1) Novell. 96. c. 2. § Sancimus, et Novell. 123. c. 25.

(2) Vide ch. viii. § 6. p. 552. supra. See also Damhouder, Prax. Civ. c. 141. n. 1, 2. And. Gail. de pace public. c. 12. Wurmser, Pract. l. 1. tit. 12. obs. 4.

(3) l. 1. l. 2. l. 4. l. 8. Cod. de compensat. See Grotius, Inleyd. lib. 3. c. 40. And. Gail. lib. 2. obs. 17.

(4) Vide ch. viii. pp. 551, 552, supra.

amount sequestrated, unless such re-convention be likewise of the same sort, that the like provision of sequestration can be claimed (1). For the same reason re-convention also does not take place in cases of possession, and in cases which are litigated on account of the right of possession by a preceding keeping off, because in them a claim is made in a summary way (2); unless the defendant on his side brings in the same right. This is called doubling the interdiction, which is almost one and the same thing as re-convention. (3)

§ 5. According to our practice, no special summons is required to institute a claim in re-convention, but it may actually be laid in supposition, according to some writers (4), though others are of a different opinion. (5) How to be instituted.

§ 6. The manner of terminating a case in re-convention is as follows: the plaintiff having instituted his claim, the defendant likewise institutes his claim in re-convention, and at the same time answers to the first claim in these words; viz. "making re-convention concludes, &c." Whereupon the person who first instituted his claim must answer with his replication, or the defendant is detained from saying any thing upon his first claim, which in the meanwhile must stand still until an answer is also given upon the claim of re-convention; which being done, both cases are reciprocally terminated at one and the same time, and the plaintiff in convention has the last word in re-convention; and so in pronouncing the decree both cases are distinctly decided namely, "doing justice first in convention condemns, &c. and in re-convention, &c." (6) How it terminates.

(1) Arg. l. 3. Cod. de compensat.
(2) Damhouder, Prax. Civ. c. 141. n. 9. 11. & 16.
(3) See Willam de Groot, Inleyd. tot. de Hollandse. Practik. l. 1. c. 9. n. 23., Papegay, p. 116.
(4) Vide Papegay, p. 28.
(5) See Damhouder, d. c. 141. Faber, ad auth. et consequenter. Cod. de sentent. et interlocut.
(6) On this subject see further, Damhouder, Prax. Civ. c. 141. Merula, Prac. Civ. l. 4. tit. 43. Wurmser, Prac. lib. 1. tit. 12. per tot. Durandi Speculum. tit. de reconventione.

CHAP. XIX.

Of completing the Suit both verbally and in writing.

§ 1. *Completion defined.*
2. *Conclusion of Demand at the first Commencement of the Suit, how to be taken.*
3. *How provisionally against the Debtor himself.*
4. *How against the Heirs.*
5. *How upon an Hypothecation, or in case of Arrest.*
6. *In* rei vindicatio.
7. *In Complaint, where Possession is molested.*
8. *In Maintenance.*
9. *In Cases of Arrest.*
10. *By Penalty, in case of Innovation.*
11. *In Inheritances from Division of Estates.*
12. *In Cases of Possession before the High Court.*
14. *In Action of Purchase; and also to have Delivery of Merchandize.*
15. *In Appropriations.*
16. *In Cases of Warranty.*
17. *In Cases of Indemnification.*
18. *In Cases of Injury and Calumny.*
19. *What Right belongs to the Fiscal and Bailiff in those Cases.*
20. *To institute an Action* ex lege diffamari, *affirmatory, and negatory.*
21. *In Cases of Purging.*
22. *In Cases of Preference.*
23. *Answers, of how many Sorts.*
24. *In* Renvoi, *or declinatory Exceptions.*
§ 25. *In* lis pendens *or* lis finita, *how.*
26. *Answer by contrary Conclusion.*
27. *How to answer upon a Provision.*
28. *To complete the Case at once with the principal Case, without dividing the Pleadings.*
29. *Whether and in what Case the depositing of the Amount can be stopped.*
30. *Answer in Cases regarding Possession.*
31. *In Complaint.*
32. *In Maintenance.*
33. *Answer, in case of being dispossessed of an Inheritance.*
34. *In Cases of* Spolium, *or Destruction.*
35. *In Cases of Arrest and Penalty.*
36. *In Cases of Injury.*
37. *In Cases of Preference.*
38. *In Cases to have Action instituted* ex lege diffamari.
39. *In Cases of purging.*
40. *Of Answer in Cases where a Tender is made.*
41. *Replication and Rejoinder, how to be made.*
42. *Conclusion at Law, what.*
43. *Mode of proceeding in judicial Cases, by Memorials, and Advertisements of Law.*
44. *In Cases of Facts.*
45. *The making and producing of Acts.*

Completion defined.

§ 1. WHEN the defendant comes ready to answer upon the principal points of the plaintiff's application, the lawsuit takes a real commencement (and not before) for the comple-

tion and conclusion of the case (1), consisting of the demand and replication of the plaintiff, and the answer and rejoinder of the defendant, otherwise denominated *litis-contestation*: after which the conclusions and pleadings cannot be altered but with the consent of the litigating parties (2). In order to have redress and relief of error and neglect committed, a prayer is to be made to the supreme government, by petition, or by a petition *in judicio*, that is, a prayer to the same judge before whom the case is pending, if the neglect be trifling; which being prayed for and obtained, the party has a right (at least it is granted on such condition) to do the same if he wishes. The conclusions of demand are various, but they may, for the most part, be reduced to the following forms, viz.

Conclusion of Demand at the First Commencement of the Suit, how to be taken.

§ 2. In *raw-action*, that is, at the first commencement of the case, if it be to have payment of a certain amount, the demand is made as follows: "That the defendant should be condemned "to pay to the plaintiff the amount of . . . ., &c. more fully "inserted in the mandate, together with costs." But in the cities, and in the country where no written applications for summoning are necessary, the suit is instituted thus: "A. as attor-"ney of B. plaintiff, against C. the defendant, to have the pay-"ment of the sum of, &c. resulting from, &c. and concludes "to have condemnation thereupon, with costs," or otherwise, &c.

How provisionally against the Debtor himself.

§ 3. If the debt appears from such instrument, upon which a decree can be grounded previously, to have the amount claimed deposited, we usually add the following clause: "and provisionally "that the amount claimed should be deposited:" or if the debt appears from the defendant's own signature, it is then concluded and pleaded, "that the defendant should confess or deny the "bond; and moreover that he be condemned to pay with costs, "and to deposit the amount of the claim provisionally."

How against the Heir.

§ 4. And if the person be the heir to him who signed the bond, one concludes that the signature should be confessed or denied at least, *bonam fidem agnoscendo*, or that he should admit or deny the effects of the bond and the consequence thereof (3). I say, *with costs*, because it is not adjudged otherwise where here is no prayer, and it is understood of judicial costs; as, otherwise, if the case had suffered any damage or hinderance, or is

(1) l. 15. rem ratam haberi. Arg. l. nic. Cod. de litis-contestat. Gail. lib. 1. n. 74.

(2) Vide Hartm. Pist. lib. 4. quæst. 22. Joan à Sande, lib. 1. tit. 4. def. 2.

(3) Vide Joan à Sande, lib. 1. tit. 8. def. 1. in fin.

likely to suffer any in consequence of nonpayment, we ought to add thereto, " with costs, loss, and interest, already suffered or " which may hereafter be suffered;" and also if the principal be claimed without making any mention of interest, the latter will not be adjudged, although the judge, in consequence of following the *salutary clause*, may be induced to add it thereto; because it is not considered as a great neglect (1); the practice of the *salutary clause*, by virtue whereof the judge has the power to add whatever belongs to the case and is not inserted in the demand, is detailed in the authorities cited below. (2)

How upon an Hypothecation, or in case of Arrest.

§ 5. If any immoveable property be mortgaged for debt, or if any property be arrested or taken into custody for the same, we add " that the mortgage contained in the bond," or otherwise, " the property arrested, should be declared to be bound and sale- " able by execution."

In *rei vindicatio.*

§ 6. In cases of *rei vindicatio*, that is, to have the property of some goods unjustly possessed of by another, it is concluded by the plaintiff, " that the defendant should be condemned to cede " and to withdraw his hands from, &c. and to allow the plain- " tiff to have possession thereof, as his own free property, and " likewise to make restitution to the plaintiff of all the fruits and " profits which he, the defendant, has enjoyed, or might have " enjoyed thereof, during his unlawful possession until the ef- " fectual cession thereof, making further claim of costs, loss, " and interest."

And, if there be any *provision*, that is, any interlocutory decree, either to obtain, detain, or re-obtain the possession of something, in the possession of which a person is hindered, or if another be protected against him, or in a case of *spolium*, or destruction, the following conclusion is taken.

In Complaint, where Possession is molested.

§ 7. In a complaint where the possession is molested, viz " that by the sentence of the court, the service (*exploict*) of the " commissioners ordered in the case, should be approved of " as good and legal, and to be rectified and declared " effectual, and that in consequence thereof the plaintiff " should be maintained, confirmed, and strengthened, in " his lawful possession *vel quasi*; and that the defendant " should be condemned to make indemnification of all charges " and loss occasioned through the molestation, turbulence, and " hinderance done and caused to the contrary; and that the de- " fendant be interdicted from committing similar acts any more:

(1) Arg. l. 42. Ff. de re judicat. junct. § 32. Inst. de actionib.

(2) Vide Andr. Gail. lib. 1. obs. 61. n. 11. et Dambouder, Prax. Civil. c. 109. Merula, Prax. lib. 4. tit. 37. c. 2. n. 8.

" and that the trust thereof should be again adjudicated to the " plaintiff upon security, &c."

§ 8. In a case where the possession is maintained: " That " the plaintiff should be confirmed and strengthened by sentence " of the court in his lawful possession *vel quasi*." And the like in the case where the possession is hindered. In cases of *spolium* or destruction, the conclusion is as follows: " That the defendant " should be condemned to make restitution, and deliver up to the " plaintiff the possession of, &c. together with whatever was upon " and in the property at the time the defendant deprived the " plaintiff of the claim; and moreover, all loss and interest " sustained by the plaintiff, and which has arisen on account " thereof, as shall be calculated by him upon oath; and that " provisional restitution of the possession of the said property " should be made to the plaintiff." In Maintenance.

§ 9. In cases of arrest upon the goods. " To have approbation " of the arrest effected, and that the defendant should be con- " demned to pay to the plaintiff, &c.; and that the goods " arrested should be declared to be bound and saleable by exe- " cution for the same." In Cases of Arrest.

§ 10. In cases which are proceeded in, on account of innovation; " under penalty and prohibition to obey and make repa- " ration for attempts against the penalty, if any thing had been " committed against the same;" concluding further by the means, &c.; " and that the commands, containing penalty, should " be declared to be well and rightly done; and that the same " are to take full effect; and that the defendant, in consequence " thereof, should be condemned to withdraw his hands from, " &c.; and to demolish his commenced buildings, and put " matters in such condition as they stood before the date of the " said building; and pay all the costs, loss, and interest incurred " and sustained by the plaintiff on that account, according to " the taxation to be made by the court, &c." For which purpose a short time is usually fixed; which, if taken too long, may be shortened by the defendant upon a prayer for a mandate of anticipation; and if any thing has been done in the mean time against the penalty granted, it is then also concluded " that " the defendant should be condemned to make restitution " thereof, *ante omnia*." By Penalty in Cases of Innovation.

§ 11. In cases of inheritance and division of estates, thus; " That the defendant should be condemned to deliver to the " plaintiff a proper statement and inventory, confirmed by oath, " of the goods left behind by A., and to give him therefrom, &c. In Inheritances from Division of Estates.

" with the fruits, profits, and interest thereof, since the death of " the said A. until full payment."

In Cases of Possession before the High Court.

§ 12. And when any one is entitled by virtue of a last will, or if by other information it can appear without difficulty that he is entitled to an inheritance, he proceeds also, to have possession thereof, before the high court, " praying to be maintained and " put in possession of the goods, and to be confirmed and " strengthened, and if necessary to be put in possession of the " said goods *vel quasi*, &c.; and that the defendant should be " condemned to settle all hinderance and turbulence done con- " trary thereto, under prohibition of committing any further " similar acts; and, moreover, that he should *bonâ fide* admit " or deny the testamentary disposition of C., and that the trust " thereof should be provisionally adjudged to the plaintiff."

§ 13. And likewise in the cities where the proceeding is that the party may be introduced into the house of demise, and for the person praying to be introduced, the conclusion and pleadings are the same as in the preceding case, *mutatis mutandis*.

In Action of Purchase;

§ 14. In action of purchase: " That the defendant should " admit or deny the bill of sale, and that he should further be " condemned; and that the amount of the purchase money " should be provisionally deposited where he promised."

and also to have Delivery of Merchandize.

To have delivery of merchandizes: " To admit or deny the " letters or contract of purchase, and further that the defendant " should be condemned to deliver to the plaintiff the, &c. and " to pay the costs, loss, and interest already incurred and sus- " tained, or which may still be sustained in consequence of the " non-delivery; making further claim of costs, &c."

In Cases of Appropriation.

§ 15. In cases of appropriation: " That the plaintiff should " be declared to be more nearly related to the seller than the " purchaser, and therefore to be entitled to appropriate all such " lands, &c. and whatever is included therein in anywise; and " that the defendant, in consequence thereof, should be con- " demned to withdraw his hands from all of them, and to deliver " them up to the plaintiff, with the fruits, profits, and interest " thereof, derived therefrom since the appropriation; provided " that the plaintiff be satisfied to act in every point according " to the conditions of sale, and to fulfil the contents thereof, " and discharge the defendant therefrom, and independently " thereof to indemnify the defendant without failure, whatever " he, on account of the said purchase, might have disbursed " or laid out, and likewise to pay him double ration and wine " purchase, and generally to do further whatever he, according

" to the laws and customs of appropriation, is bound and obliged " to do ; making further, &c."

§ 16. In cases of warranty: " First to admit or deny, &c. " and that the defendant should be condemned to warrant the " plaintiff, and to keep him free of charges and damages on " account of the suit, demand, and conclusion made and taken " against him by A. on the said account ; and that he should " properly defend him, that he may peaceably possess and use " the said goods, and shall further warrant and defend the said " property, according to the tenor of the said contract, and so " forth." In Cases of Warranty.

§ 17. In cases of indemnification and discharge: " That the " defendant should be condemned to indemnify the plaintiff, and " to keep him free of charges and loss upon the demand and " conclusion, made and taken against him by A., &c." In Cases of Indemnification.

§ 18. In cases of injury and calumny: " That the plaintiff " should be declared to be injured by the defendant; and that " therefore he, the defendant, should be condemned to make " honourable and profitable amends for the said injury ; at first " by appearing before the court, or otherwise before the tribu- " nal where the case is pending, in the presence of the plaintiff, " and there, in the presence and hearing of every one, " bare-headed, to ask forgiveness of the justice and the plaintiff " (if they wish to be present), declaring that all the words of " injury, spoken by the defendant at such time and place, were " expressed without consideration and unjustly, and that he " retracts the same, and is very sorry on that account; adding " thereto, that he knows or imagines nothing against the plain- " tiff but whatever is becoming a man of honour : and the pro- " fitable amends is, that he should pay into the hands of the " plaintiff, to the poor, or otherwise, to serve where it shall " please him, an amount of, &c., he undertaking to declare " upon oath, that for a similar or larger amount he would not " suffer a similar injury ; claiming further the costs." In Cases of Injury and Calumny.

§ 19. In which cases, if the fiscal attends the court, it is concluded that the defendant "should be arbitrarily corrected by the court;" which may likewise be followed in the cities (1). But in Rhineland no higher penalty than ten gilders is imposed. (2) What Right belongs to the Fiscal and Bailiff in those Cases.

(1) Vide Marant. Prax. part 6. Judici de inquisit. n. 59. et seq. Boss. Prax. Criminal. tit. 5.

(2) Keuren van Rynland, art. 14. Vide Gail. lib. 1. obs. 64, 65.

To institute an Action *ex lege diffamari, affirmatorie et negatorie.*

§ 20. Next follows the case to have action instituted on pain of silence (1) *ex lege diffamari*, in the manner following: "That "the defendant should be condemned within six weeks to insti- "tute his action and complaint before the court, which he "means in anywise to have against the impetrator or plaintiff; "on pain of being ordered, on failure thereof at the expiration "of the said time, to observe a perpetual silence on that account "&c." In which case one may also conclude in a negatory way: "That the defendant should be declared to have no right "or action on account of such reports against the impetrator."(2)

In Cases of purging.

§ 21. In criminal cases, when any one is accused and the person accused wishes to purge himself, he may by *prevention*, that is, before he is summoned judicially any where, place himself before the court for the purpose of purging himself, as follows, viz. "That he should be declared to be pure, clear, and innocent "of the crimes alleged against him; and that upon the bailiff of "N. and all others, a perpetual silence should be imposed; and "that the impetrator should be provisionally released from the "obligation of personal appearance, under liability and upon "promise of appearing again at any time, *sub pœna confessi et "convicti*, and be allowed to employ a procurator, &c."

In Cases of Preference.

§ 22. In cases of preference between several creditors, it is concluded as follows: "That the plaintiff should be declared "to have the preference, for the arrears due to him, before all "other creditors of N., having no better right to the proceeds "of the sale of, &c. And, in case he be not preferred to them, "he trusts, praying for justice thereupon previously, that he, "the plaintiff, at least for his said arrears, should be declared "to be entitled in concurrence equally with all other creditors "of the estate."

The defendant's answer does not consist of so many points, but principally of *exceptions* and *contrary conclusion*, that is, *full objection*, and *presentation*, that is, tender.

Answers, of how many Sorts.

§ 23. Answer of exceptions which may be sufficient, or whereby one may persist, consists of the following, viz. reference, litis-pendence, or litis finite; whereof is said distinctly heretofore; and it is made in the manner following:

In *Renvoi*, or declinatory Exception.

§ 24. In *renvoi* (reference), or declinatory exception, of which we have already treated (3), upon the ground of *surreption* and

(1) l. 5. Cod. de ingen. manumiss. & l. 6. Cod. de remiss. pignor.

(2) Vide Censura Forensis, part 2. tit. 1. c. 19. n. 14.

(3) Vide ch. xvii. p. 388 supra.

obreption, "That the plaintiff is not admissible; and that the "case, together with the parties (saving the reverence due to "this court), should be referred to the court of N., the same "being the defendant's daily and competent judge, *cum ex-* "*pensis.*"

In *lis pendens* or *lis finita.*

§ 25. Otherwise, it is only concluded, "That he should be "declared to be inadmissable, and that absolution of the instance "should be granted, as the plaintiff is opposed with respect to "the *lis pendens*, or *lis finitâ*, &c. or regarding the submission "and decision followed thereupon, &c."

Whereupon it is concluded by the plaintiff, "That the pro- "posed exception should be rejected, and that the defendant "should be condemned peremptorily to answer:" and both parties having persisted therein, and the suit being completed, justice is done thereupon, before one proceeds further in the case: and the exception is either admitted, and the defendant absolved from the *instance*, that is, from the institution of the suit; or the defendant's exception is rejected, and he is condemned peremptorily to answer, notwithstanding the same.

Answer by contrary Conclusion.

§ 26. Full defence, or *contrary conclusion*, is made as follows, viz. "That the proceedings of the plaintiff should be declared "to be *surreptitious* and *obreptitious* proceedings, and therefore "inadmissible; and that the plaintiff's demand and conclusion, "made against the defendant, should be rejected with costs."

How to answer upon a Provision.

§ 27. And if the plaintiff had prayed that any provision should be made, an addition is to be made therein, namely, "*That the defendant supposes that no provision is applicable to* "*the case.*" (1)

To complete the Case at once, with the principal Case, without dividing the Proceedings.

§ 28. And, according to the practice of all courts, the suit is completed at once, as well upon the provision as upon the principal case itself, by replication of the plaintiff and rejoinder of the defendant; which practice is generally pursued; but in some cities and in the country, a practice has crept in through inexperience of the procurators, viz. that the plaintiff only insists upon the provision, without completing the suit upon the principal points; thereby dividing the pleadings and the one point from the other, to oblige the judge by that means, as it were, to do justice upon the provision only, to the great expence and trouble of the litigating parties; who, in one and the same case, are under the obligation of litigating twice, where the suit may be often decided finally at once. And it belongs only to the

(1) On the subject of provisions, see Van Leuwen, Manier van Procederen, pp. 36. et seq.

discretion of the judge, the suit being fully instituted, to judge whether and when the same can be finally decided; and to pronounce, after further investigation, whether the provision is necessary or not, which has only been introduced in case of necessary delay and further investigation of the case: so that if the case consists only of points of law (as frequently happens), the defendant can avail himself of no facts, by which the suit can be delayed: and the plaintiff, who ought always to be ready, cannot legally refuse to proceed in the suit, and can be compelled thereto, notwithstanding the provision prayed for. And, before the defendant files his rejoinder upon the provision prayed for, he ought on his side to reply to the defendant's answer, made merely upon a contrary conclusion, especially as there may be several points of the principal case which can oppose the provision, namely,

Whether and in what Case the depositing of the Amount can be stopped.

§ 29. I. All exceptions of payment, comparison, or compensation, novation or division of debt, and similar points, which would entirely remove the suit, so far as it can appear immediately without further investigation, either by a public instrument, or by the plaintiff's own hand, or otherwise, or that the case consists of points of law, and so forth. (1)

II. *Provision* does not prevail when the case consists of a transaction containing a reciprocal obligation, upon which no provision can be demanded against the one, so long as the said transaction is denied, or alleged to be fraudulent on the other side, or that it has not been fulfilled, in order that the parties on both sides may avail themselves of one and the same instrument (2): against penalty, it admits of no exception, but an answer ought to be filed on the principal points, because penalty is a foundation of jurisdiction.

III. No provision prevails if the handwriting or instrument be denied, or if fraud be alleged against it, or if the case contained therein is denied, or the cause is referred to the oath of the plaintiff, or if the defendant undertakes to prove his *alibi*, that is, that he was at a different place at the time the instrument was executed. (3)

(1) Vide Rebuff. ad Constit. Reg. n. 122. in fine. Math. Coler. de process. executiv. part. 4. c. 1. n. 194. et seq. & c. 2. n. 23. & seq. Imbert. Instit. Forens. lib. 1. c. 35. See also, Joan à Sande, lib. 1. tit 8. def. 3. who testifies that this practice is observed every where.

(2) Vide Math. Coler. de process. execut. part. 4. c. 1. n. 92. Andr. Gail. lib. 2. obs. 17. n. 12. Sande, dict. loco.

(3) l. 14. Cod. de contr. et commit. stipul. Monarc. ad auth. sed novo jure. Cod. si cert. petat. et ad l. 18. Cod. de contr. pactum. Christin. vol. 2. decis. 5. n. 9. On the subject of these exceptions and objections which may impede a provision, see Gerard van Wassenaar's Judic. Pract. c. 6. n. 17. & seq. Joan à Sande, lib. 1. tit. 8. defin. & Censura Forensis, 4. 18. 4.

§ 30. In cases concerning possession, that is, when a person litigates on account of the right of possession, to have provision made by interlocutory decree, viz. in case of complaint against, or maintenance or destruction of possession, the answer is made in the following form: Answer in Cases regarding Possession.

§ 31. *In complaint*, there are employed and made use of contrary facts regarding possession and destruction, by means in writing, by which the defendant maintains a similar lawful possession, and therein it is concluded against the admission; "and that the trust of the property should be adjudged to the "defendant" (1) In Complaint.

§ 32. *In maintenance*, the interdiction is usually redoubled by way of re-convention, and the defendant concludes thus: "redoubling the interdiction that he himself should be main- "tained, strengthened, and confirmed in the possession, *vel* "*quasi*, &c.;" and then answered as well upon the *convention* as upon the *re-convention*, "for the purpose of not being admis- "sible, and to have absolution of the demand and conclusion." In Maintenance.

Otherwise, only for the purpose of not being admissible "upon the plea of *surreption* and *obreption*, and that the plain- "tiff's demand and conclusion, and also the provision prayed "for, should be rejected."

§ 33. In the cities, where the litigation is concerning cases of inheritance devolved, to be introduced into the house of demise, they follow the same form as is observed in cases wherein a person is put out of possession; and therein it is concluded by the defendant, "that he should be declared to have put out of pos- "session well and justly, and therefore that he should be con- "firmed in the possession, *vel quasi*, &c." Answer in case of being dispossessed of an Inheritance.

§ 34. *In cases of destruction*, "for the purpose of not being "admissible, and that no provision is applicable therein." In Cases of *Spolium* or Destruction.

§ 35. *In cases of arrest and penalty*, also "for the purpose of "not being admissible upon the plea of surreption and obreption, "and in an ordinary way to have absolution of the demand, "and conclusion made and taken against him; and that the "arrest should be removed without any costs and loss, as being "wrongly effected; and that the commands containing penalty, "should provisionally be altered into simple commands, &c." In Cases of Arrest and Penalty.

Otherwise, also "for the purpose of not being admissible, "upon a plea of *surreption* and *obreption*, &c."

§ 36. *In cases of injury*, re-convention is mostly introduced, viz. "that the plaintiff's demand against him should be retorted; In Cases of Injury.

(1) Vide the New Papegay, p. 190. & seq.

" and therefore that he, conformably to the said demand made " against the defendant, should be condemned; and further for " the purpose of not being admissible, and in an ordinary way " to have absolution of the demand, &c."

Otherwise, the fact is denied or justified, that the words were not spoken *animo injurandi*, or with an intent to throw suspicion in anywise against the plaintiff; and it is only concluded, " that " he should *not be admissible*, &c."

In Cases of Preference.

§ 37. A like conclusion is taken in *cases of preference*, by every one of the creditors; who mean to have right of preference against the other; and it is further concluded against the other " in full defence, that the other should not be admissible, &c."

In Cases to have Action instituted, *ex lege diffamari.*

§ 38. In cases where it is demanded that an action should be instituted *ex lege diffamari*, it is also concluded " that the other " should not be admissible, and in an ordinary way, &c."

Otherwise, " the defendant is willing to institute his action, " within the stipulated time, before the competent judge of the " plaintiff, or before the court at his option;" or, " he denies that " he uttered any defamatory words against the plaintiff; and on " that account declares that he has no intention of instituting " any action; and therefore that he, the defendant, has no " objection that silence should be imposed on him, with com- " pensation of costs."

In Cases of purging.

§ 39. *In cases of purging*, the defendant concludes also, " that " the party should not be admissible; and, if he be not admis- " sible, that then his demand and conclusion should be " rejected."

Otherwise, " that the plaintiff, on account of the crime com- " mitted, which is contained in the mandate, should be punished " criminally or civilly, &c."

" Or, that he should be provisionally put into close confine- " ment, in order to proceed afterwards in the case in such " manner as shall be deemed expedient, &c."

Otherwise, merely " that the party should not be admissible; " consenting to excuse him from personal appearance, pro- " vided he gives security, or he is referred on that account to " the discretion of the court, &c."

Of Answer in Cases where a Tender is made.

§ 40. If the defendant does not extend his defence to the full demand, or does not deny that he is indebted to the full amount of the demand, but admits it in part, or will offer something else instead thereof, which he thinks would be sufficient, it is concluded as follows, viz. " Making tender he is satisfied, &c. and " supposes that it would be deemed sufficient: and in case of

" refusal thereof, it is concluded further or otherwise, or that " that the party should not be admissible, and in an ordinary " way, &c."

And it is commonly answered on the other hand by the plaintiff, that the party's prayer should be rejected, viz. " Rejecting " the tender as an insufficient one, and persisting by replica- " tion;" or otherwise, the tender is accepted, and thereupon condemnation is prayed for with costs.

Replication and Rejoinder, how to be made.

§ 41. The demand and answer being made in this manner, if by the answer any tender be made, or something else be alleged as a mere defence, the plaintiff resumes his demand and alleges against the defendant what he thinks proper; or otherwise he persists by the pleadings and means of his demand. This is termed a *reply*; against which the defendant, if any thing new be alleged, may file his *rejoinder*; or otherwise he may persist in his preceding answer. Further pleas are not allowed among us, but the case is now considered as completed; and thereupon the copies of the documents are reciprocally taken; and in the cities and country it is usually added thereto, that they reciprocally reserve their right of refuting the evidence, and of strengthening that evidence, by removing that refutation, and of making conclusion at law, that is, completing the suit, and praying for judgment thereupon.

§ 42. Conclusion at Law, what.

Mode of Proceeding in Judicial Cases, by Memorials and Advertisements of Law.

§ 43. After these proceedings, the case is further pleaded verbally, or it is written (if it consist of points of law) in memorials and law advertisements, with the addition of all such letters and documents as the litigating parties think necessary to support their right; which being produced in a list, copies of such memorials and documents produced on both sides are allowed to each party, in order that they make their remarks upon them if they think proper: and it is likewise concluded at law, that is, the whole suit is completed, and, with a proper index, is brought into the secretary's office, and judgment thereupon is prayed for. (1)

In Cases of Facts.

§ 44. But if the case consists of facts, then the parties describe the same by libel, answer, replication and rejoinder, with the addition of such documents as are of use to defend the said case (2). After which the parties may still produce some allegations, and as many law advertisements as they please, without giving notice thereof to the adverse parties; but not any thing

(1) Vide Merula, lib. 4. tit. 57. per tot. Papegay, page 612.

(2) Ordonnant op 't stuk van de justitie in de Steden en ten platten lande, art. 15.

consisting of facts (1). The common practice in lawsuits consisting of points of law as well as of facts, is as follows:

First, in a suit where the parties appear upon notice on the appointed day, the demand is made and time is granted to the defendant to answer thereupon; such time being expired, the answer is given; and, according to the replication or rejoinder, the parties are directed to describe by memorials and law advertisements, and to add thereto such letters as they think will be of use and belong to their right, and to produce the same in the office of the secretary to the court from fourteen to fourteen days.

In consequence of this direction the memorials, and all such documents as are contained in the index given by each party, are respectively produced. And when either party, whether defendant or plaintiff, has produced his memorials, and the other has failed to do it, time is granted to him on pain of deprivation of his right; which time is usually extended to one month, unless the parties appear before a commissary of the court, and bring with them the memorial, and produce the same. When the parties remain further in default, notice is given to them, to produce their memorials within a certain time, or to deliver them to the commissioner. And if they still remain in default, a petition is presented to the court; praying that the parties should be directed to produce a description of their case within a certain time.

If they continue to remain in default, an insertion is in such case made on the list of the notice, and command is given, and the parties proceed to the sentence.

When the parties produce their memorials, each of them may take copies from the secretary's office of such memorials, and of the documents produced by the adverse party, and write their remarks thereupon if they please; but no term is granted for this purpose, nor is there a law-day held: and as soon as the memorials are in the bag, the suit is at issue, and the parties may proceed to the sentence. (2)

The making and producing of Acts.

§ 46. In cases where the parties are directed to make acts of their pleas, and to produce them, without hearing witnesses, a demand is also made, and time is given to the defendant to answer, from eight to fourteen days.

(1) Vide Merula, Prax. Civ. lib. 4. tit. 64. c. 3. n. 9. Mincing. cent. 3. obs. 27.

(2) Vide Merula, Prax. Civil. lib. 4. tit. 75. c. 1. n. 3. 5.

If it be in the high court, time is granted to the defendant, on pain of deprivation of right; and also before the court of Brabant. But, before the court of Holland, the said terms are in no wise granted; and when the case comes on again, the defendant ought to answer, unless he has considerable reasons for delay.

And then the defendant answers verbally or in writing; and if he does it in writing, he ought to deliver in his conclusion immediately, or otherwise the secretary will sign no notes; and then time is granted to the plaintiff to reply thereupon, if he desires it. On the day appointed, the plaintiff replies, and time is granted to the defendant to file his rejoinder; and if the plaintiff replies in writing, he ought also to deliver it in immediately, as aforesaid.

And again, on the appointed day, the defendant files his rejoinder, and the parties are ordered to make and deliver in acts. But, according to the practice of the court, it is usual, after the plaintiff has instituted his demand, to grant time to the defendant to answer thereupon; and, on the day of the answer, the suit is completed on the roll verbally, and then direction is given to make and deliver in acts as aforesaid; which is positive, and is always taken according to the institution of the case, when the case consists of facts, and when it is not necessary to hear witnesses: and then the parties write their claim, answer, replication, and rejoinder, from fourteen to fourteen days; and the same are produced, together with the documents belonging thereto. This process is denominated "*the making and producing of acts*:" but sometimes, by interlocutory sentence of the court, the one or the other party, or both, are directed to hear witnesses upon the facts contained in the documents; which is denominated "*opening the points of office.*"

When both parties have produced the acts and documents, the case is then also at issue.

The making of acts and hearing of witnesses is when the parties, being heard, are found to have contradictory evidence, and when it is necessary to hear the witnesses; in which case the court appoints, on contradictory facts, that acts be made and witnesses be heard.

And then the case is also described by libel, answer, replication, and rejoinder; which being effected, the witnesses are heard upon the fact or facts therein contained. (1)

(1) Instructie, art. 59.

Such witnesses ought to be heard within ten weeks if beyond sea, and within eight weeks if in the country; but the time is easily prolonged.

That time being expired, and the witnesses on both sides having been heard, both parties renounce the hearing of further witnesses, and take time to refute and to save the evidence: and, upon the production of every thing, it is also concluded at law, and the suit is put at issue. (1)

This mode of proceeding is also followed in the cities and in the country, in cases where it is necessary. The forms and institution of memorials, additions, claim, answer, replication, rejoinder, &c. appear in the new Papegay. (2)

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(1) Vide Merula, Prax. Civil. lib. 4. tit. 58, 59, 60. & seq.

(2) p. 612. & seq.

CHAP. XX.

Of Evidence by Writing, or by Witnesses.

§ 1. *Proof of Cases how to be made.*
2. *Of Public Writings, and what Force they have.*
3. *Of Private Writings, and what Force they have.*
4. *Public Writings, how to be confirmed.*
5. *Of Notaries, and their Office.*
6. *What Credit their Copies have.*
7. *What Credit is given to Writings made before the Court.*
8. Vidimus, *what.*
9. *Old Ledgers and Journals, of what Credit.*
10. *A signed Hand-writing, of what Credit.*
11. *What Credit is given to Merchants Books.*
12. *Of the Credit given to Sworn Brokers.*
13. *Of a Tally, and Writings on Walls.*
14, 22. *Of Proof by Witnesses.*
15. *Dishonest Persons, &c. may not give Evidence.*
16. *Nor any inveterate Enemy, Relation by Blood, nor Domestics.*
17. *Advocates, &c. in what Cases inadmissible; and Persons interested.*
18. *No mad or foolish Persons, or Minors.*
19. *Of Reproaches and Salvos in Law.*
21. *Whether and when Evidence of the Truth may be refused.*
23. *Of full or half Proof.*
24. *Whether and when* Hearsay *makes full Proof.*
25. *Swearing and hearing of Witnesses, how and by whom to be done.*
26. *Whether it ought to take place also in the Presence of the Parties.*
27. *Of* Reproaches *and Cross Interrogatories.*
28. *Of Requisitory Letters to hear Witnesses residing out of the Jurisdiction.*
29. *Of Inquest valetudinary.*
30. *Of hearing and swearing Witnesses in Cities and in the Country.*

THE case being completed, if it consists of facts, it must be proved by the plaintiff, or otherwise the defendant is released for default thereof, who is not bound to prove his negative (1); and although the proofs are lost, the contract still remains in existence, whereto it seems it can be brought (2); unless he does not merely deny, but adds such circumstances to his denial, upon which the truth of his denial rests, and would like-

(1) l. 2. l. 21. & l. 23. Cod. de probat. 29. Cod. de obligat. l. 3. Cod. de non numer. pecun. l. 4. Cod. de edendo.

(2) l. 1. 7. 8. 9. de fide instr. auth. si quis de edendo. and see Brunnemsn thereon.

wise refute the plaintiff's proof; as if he denies that he has done this or that against an instrument or other proof, because he was at another place at that time; which is called proving his alibi. (1)

Proof of Cases how to be made.

§ 1. The evidence and proof of the truth of cases, consisting of facts, are made by writings or by witnesses. Writings are either *public* or merely *private*.

Of Public Writings, and what Force they have.

§ 2. Public writings are those, which are lawfully made either by the court of the place, by seal and letters, or by a lawful writer, with the signature of two witnesses, which prove fully. (2)

Of Private Writings, and what Force they have.

§ 3. But writings under hand, or *private writings*, have no credit except against the writer himself. (3)

Public Writings, how to be confirmed.

§ 4. In last wills and testaments, seven witnesses were antiently required to prove them; and, in other public writings, five, and in private writings three witnesses; and in order that public writings should have the greater credit, they were mostly executed before the court under the seal of the place. But at present a notary and two witnesses, above fourteen years of age, being men of character, are sufficient to confirm all sorts of instruments and testimonial writings, of whatever description. (4)

Of Notaries and their Office.

§ 5. A *notary* is a person, who is admitted and authorized by the government of the country, upon previous examination of the court with respect to his capacity, and upon the nomination, that is to say, recommendation of the cities or courts of justice where he wishes to exercise that office (5); out of which place he may not officiate in that capacity, on pain of being subject to punishment and fine; yet, notwithstanding, whatever he happens to execute out of that place, is not on that account of no value. (6)

In order to execute their office well, and in an able manner, they ought to keep a good *register* and *protocol* of all instruments, acts, and transactions executed before them; and diligently to keep and take good care of the drafts signed by the parties executing them, and of the witnesses, in order that they may be able to give proper transcripts thereof at any time, to persons who may require them. (7)

In composing their instruments, they ought to mind, that besides the good sense thereof, they insert the names, offices,

(1) l. 14. Cod. de contrah. & commit. stipulat.

(2) l. 2. C. de edend. l. 10. Ff. & C. de prob. Nov. 6.

(3) l. 3. Cod. de divers. rescript. l. 2. Ff. de fid. instit. l. 5, 6. 7. Cod. de probat. Nov. 48. c. 1. 2. Coren. obs. 38. n. 17.

(4) Arg. l. 12. Ff. de testib. l. 6. Cod. de re judic. Novell. 73. c. 2. et ibi DD.

(5) Placaat, March. 20, 1514.

(6) l. 1. Cod. de testam. et l. 3. Ff. de offic. prætorum. Coren, obs. 37.

(7) Placaat, Oct. 4, 1540, art. 9.

profession, and place of abode, of the persons concerned, who ought to be known to them, or at least to the witnesses; and further, to mention the year, month, day, and hour, when the execution of the instruments take place, making the persons who executed them, together with the witnesses, sign such instruments. (1)

What Credit their Copies have.

§ 6. But whether copies of such public writings have full credit is a question that requires a distinct consideration. With respect to which, some jurists are of opinion, that the first and original subscribed writings themselves ought to be produced if necessary (2). But it is to be understood of writings, confirmed by the signature of the debtor himself, which are themselves to be actually produced; in order that the signature may be judged of if there be any dispute, or if they be denied by the debtor. For this purpose, the notaries are obliged to preserve the first and originally subscribed writings, and to produce them at any time at the requisition of those who may demand them; respecting which, good orders have been introduced in many cities, that in case of the death of one of them, the instruments executed before him should be delivered to another notary, and so from the one to the other, in order that they may always be preserved in existence. (3)

What Credit is given to Writings made before the Court.

§ 7. But with respect to other writings, *apud acta*, that is, confirmed before the court, with the seal or signature of the court, or of their authorized writer himself, since their testimonial writings are likewise sufficient according to our practice without the signature of the debtor, the first transcript of them is considered as full evidence. (4)

Vidimus, what.

§ 8. And likewise full credit is given to further mere copies of such first exemplications; of which, on account of their being old and perishable, after public exhibition, *apud acta*, that is, before the court, copies are made for the sake of security (which is denominated a *vidimus*), if the first perishes through age, or is missing or lost.

Old Ledgers and Journals, of what Credit.

§ 9. Moreover, mere ledgers and old journals of churches, hospitals, communities, and other congregations, have full credit; and justice is done upon what they prove to have existed of old, and from time out of memory; although the letters and first writings belonging thereto are not to be found. (5)

(1) Placaat, art 9. Oct. 4, 1540.
(2) Arg. l. 5. l. ult. Cod. de edendo.
(3) Arg. l. ult. C. de re judic. & l. 60. Ff. de judic. Keuren der Stad Leyden, art. 14.
(4) Arg. l. 11. Cod. qui pot. in pign.
(5) Arg. l. 10. Ff. de testib. l. 29. § sed. ne aliqua Cod. de testam. See Berlich. pract. conclus. part. 1. conclus. 44.

A signed Hand-writing, of what Credit.

§ 10. The mere hand-writing of my debtor, although it contains ever so large a debt, if he cannot deny his hand-writing, is considered as legally and sufficiently proving my debt. (1)

What Credit is given to Merchants Books.

§ 11. So, full credit is in like manner given to merchants books, especially if they be strengthened by oath, or confirmed by the death of the writers, in all matters whereby the dealing and delivery of the article is acknowledged; provided that such books be kept with good distinction of persons, things, year, month, and day. (2)

Of the Credit given to sworn Brokers.

§ 12. And likewise sworn brokers on their memorandums respecting dealing between merchants, have full credit. (3)

Of a Tally, and Writings on Walls.

§ 13. In many places it is also the practice, that all trading persons, who deliver their merchandize for daily consumption, may confirm their tally by oath, provided the name of the debtor be written thereupon, with an explanation what, and how much each tally costs; and likewise all chandlers, tapsters, bakers, builders, and others, with respect to what they write on the post of the door or wall, concerning deliveries made by them, have full credit upon trifling amounts; and, such writings being shewn to two aldermen, they may confirm the same by oath. (4)

Of Proof by Witnesses.

§ 14. Two or more credible witnesses are competent to prove by declaration whatever, from their certain knowledge and science, can appear in the occurring case.

Dishonest Persons, &c. may not give Evidence.

§ 15. Dishonest persons and perjurers have no credit in law, and among them are included those who are convicted of having been bribed to give evidence of the truth (5); also women who have dishonoured themselves and lain with a man previously to their being married. (6)

Nor any inveterate Enemy, Relations, or Domestics.

§ 16. Neither may evidence be given by those who are inveterate enemies of the persons against whom they give evidence, nor by near relations by blood, or domestics of the persons for whom they give evidence, nor in cases which concern themselves. (7)

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(1) Vide Gudelin. de jur. noviss. lib. 4. c. 11. in fin. Christin. vol. iii. dec. 5. n. 8.

(2) Vide Joan. de Passerib. de privat. script. lib. 4. c. 21. de lib. mercat. n. 11. 30. 82. Mascard. de probat. conclus. 976. n. 28. & conclus. 977. n. 33. Christin. vol. iii. decis. 25. n. 1. Gail. lib. 2. obs. 20. Cons. & Adv. part. 1. cons. 284, 285. Neerl. Adv. 1. c. 17. & seq.

(3) Stracch. de proxenetic. part 4. quæst. liber. prox. an credat. Joan de Passer. de privat. script. lib. 4. cap. de lib. proxenet. n. 10. Cons. & Adv. vol. cons. 248. Van Leeuwen Man. van proc. n. 28.

(4) Keuren tot. Leyden, art. 191. 1st. Oudewater, art. 145.

(5) l. 3. § 5. l. 15. l. 18. l. 21. Ff de testib.

(6) Vide Mascard. de probat. concl. 951. n. 7. and book iii. ch. iv. § 9. p. 232, supra.

(7) l. 3. in pr. Ff. eod. l. 6. l. 23. l. 24. Ff. & l. 3. Cod. eod. l. 10. Ff. et l. 20. Cod. de testibus.

§ 17. Likewise, no advocates or proctors, in cases in which they have pleaded (1). The relationship by blood, on which account the evidence may be refuted, is reckoned up to the fifth degree. (2)

Advocates, &c. in what Cases inadmissible; and Persons interested.

§ 18. Mad and foolish persons, and minors who are under fourteen years of age, are not admitted to give evidence, because their understanding is wanting, and they are imperfect in the knowledge of things. (3)

No mad or foolish Persons, or Minors.

§ 19. Therefore, no assertions and proofs are admitted of persons or matters, which can be refuted and are refutable (according to proclamation of the year 1556); and since that time it has been the practice, that the litigating parties mutually must have copies of each other's proof; upon which, after the exchange of documents, time is granted to refute what has been produced by the adverse party, who again has time to maintain his statement against those of his adversary (which are commonly termed *reproaches* and *salvos*) (4); which is to be understood of matters of fact, written in libel, answer, replication and rejoinder. But in other cases, consisting of points of law, or of facts of such a nature that they can be terminated upon one pleading (like those which mostly occur in cities and countries) reproaches and salvos are mutually produced, but no new time is granted thereupon, nor are any new documents produced, but the case is verbally defended on both sides, and they are denominated *reproaches* and *salvos* of laws, as pointed out in the preceding chapter.

Of Reproaches and Salvos in Law.

§ 20.

§ 21. No person, who is called to give evidence of the truth, may refuse to do so; but he may be compelled thereto by imprisonment, upon a decree made previously; because the common cause is therein concerned, namely, that the truth should become known and public (5); excepting only in cases where a witness or any of his relations by blood are interested, in or against whom no one may be compelled to give evidence of the truth. (6)

Whether and when Evidence of the Truth may be refused.

§ 22. By evidence, is proved whatever can appear by the declaration of two or more credible witnesses from their certain

(1) l. ult. Ff. eod. vide tamen Gotofred. Sichard. et Costal. ad d. l. ult. Sande, 1. 10. 4.

(2) Arg. l. 4. Ff. de testib. e contrario. See Cons. & Adv. vol. v. cons. 245.

(3) d. l. 4. § 5. de testib. § 8. Instit. de inutilib. stip. l. 5. Ff. de reg. jur.

(4) In the original, *Reprocken en Salvatien.*

(5) l. 16. Cod. de testibus. Vide Gail. lib. 1. obs. 100.

(6) d. l. 16. & l. 4. Ff. de test. Jul. Clar. § fin. quæst. 24. n. 21. Tessaur. dec. 42. Merula Prax. Civ. lib. 4. tit. 65. c. 4. Sande, 1. 10. 3.

§ 23. Of full or half Proof.

knowledge and science. This is termed a *full proof* (1); so that it rests upon the number of witnesses and the cause of knowledge; for, if any thing be proved by one witness only, it cannot be admitted without other assisting means (2); and again, if the case be asserted by two or more witnesses, without their being able to give evidence from their own full or entire knowledge, it would likewise make out no full proof; as if they depose only hearsay evidence of something consisting of matters independent of such hearsay, and of which a person can ascertain the real certainty (3). This sort of evidence is denominated *half proof*; but if it related to something which *merely* consists of hearsay; as when some one had heard another give directions on his death-bed to have something done after his death, such evidence would be full (4); or if it related to matters beyond recollection of men, as that some one is of such generation or offspring, and that such persons were his parents and ancestors, and the like; which often cannot be otherwise proved, but by witnesses who always heard their parents say so as a truth. (5)

§ 24. Whether and when *Hearsay* makes full Proof.

§ 25. It is not sufficient to the evidence and credit of witnesses, that they declare in writing before notary and two witnesses, or otherwise confirm with their signatures, such matters to be the truth; but they ought to confirm it by oath (6); which ought to be taken before the judge where the case is pending, who hears and examines the witnesses upon certain interrogatories, and administers the oath, as some are of opinion, in the presence of parties called thereto (7). But these authorities seem to separate the taking of the oath and the examination from each other, as two peculiar matters; namely, as if the one ought to take place in the presence of the adverse party, and the other in his absence; which, however, according to the better opinion of others (8), is in no wise observed; and conformably to this opinion, the witnesses are each heard separately and secretly, in the absence of the adverse party; with this exception, that the same is committed into writing from point to point.

Swearing and hearing of Witnesses, how and by whom to be done.

§ 26. Whether it ought to take place also in the Presence of the Parties.

(1) l. 5. l. 6. Cod. de probat.
(2) l. 9. § 1. Cod. de testib.
(3) Boër. decis. 23. Bart. Cyn. & DD. ad l. testium. 17. Cod. de testibus.
(4) l. 8. Ff. de offic. præsid. junct. l. 13. Ff. de re militari.
(5) Cap. licet. ex quadam extr. de testibus. Vide Mascard. de probat. conclus. 104. n. 1, 2, 3. & seq. Merula. Prax. Civil. lib. 4. tit. 78. c. 1.
(6) l. 9. Cod. de testib.
(7) Arg. Novel. 90. c. 9. See And. Gail. lib. 1. obs. 102. Merula. Prax. Cr. lib. 4. tit. 65. c. 9. n. 1. & c. 10. n. 1.
(8) Secundum l. 14. junct. l. 19. in fa. Cod. de testibus.

§ 27. And the party adverse may desire a copy thereof, in order to refute and *reproach* the evidence given, and if he finds it expedient, to have other witnesses examined contrary thereto, or otherwise to have those witnesses themselves examined upon cross interrogatories. (1)

Of *Reproaches* and cross Interrogatories.

§ 28. If the witnesses reside out of the jurisdiction of the judge, before whom the case is pending, the court of that place is requested by *requisitory letters* to hear the witnesses; and such evidence is heard and confirmed there, and sent closed. (2)

Of *requisitory* Letters, to hear Witnesses residing out of the Jurisdiction.

§ 29. If the witnesses be old, weak, and sick persons, who, it is apprehended, may die before this case is brought to this stage, the commissioners of the court (if the case be pending there) may be requested to proceed to the place where such witnesses reside, in order to hear them previously (which is called an *inquest valetudinary*) (3); otherwise such evidence is previously obtained by the litigating parties themselves, upon oath, before the court of the place where such witnesses reside.

Of Inquest valetudinary.

§ 30. The hearing and swearing of witnesses are seldom observed in full order in cities and in the country, as the litigating parties mostly dispense with it mutually: but when a case rests upon the evidence, skilful judges (before they finally decide the case) direct that the witnesses should be heard upon oath. (4)

Of hearing and swearing Witnesses, in Cities, and in the Country.

(1) Instruct. van den Hove, art. 129. Merula Prax. Civil. lib. 4. tit. 65. c. 10. Gail. lib. 1. obs. 95. n. 6. in fin.

(2) Arg. L. 18. Cod. de fide instrum. cap. si qui testium. extr. de testibus. Gail. lib. 1. obs. 96. See the Practice in this case, in Merula, Prax. Civ. lib. 4. tit. 65. c. 2. n. 2. & seq.

(3) Ampliat. van de Instruc. art. 19. Gail. lib. 1. obs. 102. n. 4. & seq.

(4) See further what every person demanding justice, after the production of documents, is to observe, in Merula, Prax. Civil. lib. 4. tit. 78. and 79. Damhouder, Prax. Civil. c. 183. & seq. Wieland, Prax. Civil. tit. 7. c. 3. & seq.

CHAP. XXI.

Of Proofs without Witnesses, by Confession and ocular Inspection, that is, by Acknowledgement and clear Demonstrations.

§ 1. *Confession or Acknowledgement, what; and of what Efficacy.*
2. Judicial, *or according to Law, what.*
3. Extra-judicial, *whether of any and what Efficacy.*
4. *Whether and when it may be retracted.*
5. *Whether and when a circumstantial Confession may be divided, and partly accepted and partly rejected.*
6. *Confession and Affidavit, made by one on his Death-bed, whether of any and what Efficacy.*
7. *Of ocular Inspection; when and in what Case necessary, and of its Power.*

Confession or Acknowledgement, what; and of what Efficacy.

§ 1. WITHOUT witnesses, a case is fully proved by *confession*; that is, an acknowledgement of the persons themselves, which is considered to be the most effectual proof in law. (1)

Such confession is either *judicial*, that is, given at law and by pleadings; or extra-judicial, that is, done out of law, and without being judicially required.

Judicial, or according to Law, what.

§ 2. To a *judicial confession* it is required that the same be made at law, in the presence of the adverse party, with free will and with proper and true knowledge, without errors (2); this being so done, the plaintiff may proceed to move for a decision, in order by that means to come to execution without farther pleadings, which may not be refused him; for if any one confesses at law, he pronounces his own sentence, and is considered to be cast or defeated. (3)

Extra-judicial, whether of any and what Efficacy.

§ 3. An *extra judicial confession*, or one made out of law, requires to be fully proved that it *is* done, and *how* it is done, whether in writing or with witnesses; which, if proved to be *full*, that is to say, that it is done expressing therein and adding thereto special reasons and causes, and in the presence of the adverse party and of witnesses, it excludes all other proofs;

(1) l. unic. Cod. de confess. l. 1. l. 6. Ff. eod.

(2) l. unic. verb. in jure Cod. de confess. l. 6. § 3. Ff. eod. l. 22. Ff. quod met. caus. l. 2. Ff. de confess.

(3) l. 1. l. 3. in fine. l. 6. in pr. Ff. de confess. l. unic. Cod. l. 12. in fin. Ff. de interrogat. in jure faciend.

and it has the force of a transaction and contract, and thereupon likewise sentence is given. (1)

§ 4. But if such extra-judicial evidence was given in the absence of the adverse party; or if it was not confirmed with proper reason and causes, it cannot serve as proof (2); and it may at all times be rejected and retracted on account of thoughtlessness and mis-sayings. (3)

Whether and when it may be retracted.

§ 5. So, if any one confesses any thing with the addition of certain circumstances, by which the case may be ambiguously understood or explained, the confession ought to be taken as it lies, without separating one part from the other; for the action or sayings of any one cannot be explained farther or otherwise than according to his meaning, and every one is the fittest person to explain his own words (4); unless the circumstance thereof consists of such detached or separate parts as have no coincidence with each other. (5)

Whether and when a circumstantial Confession may be desired, and partly accepted and partly rejected.

§ 6. A confession or an affidavit made by any one at his death-bed, does well prove to his disadvantage, as it is considered that no one will speak a falsehood in the last moments of his life (6); but it cannot be taken to the advantage of himself or his heirs farther than as a probable presumption and as half proof. (7)

A Confession or Affidavit, made by any one on his Death-bed, whether of any and what Efficacy.

§ 7. *Ocular inspection*, (that is, representations and remonstrance of or about the pending law-suit), is a full proof in the partitions of lands and premises, or in the tenure of land (8); which is either requested for or directed by the judge, at the cost of the loser. (9)

Of ocular Inspection; when and in what case necessary; and of its Power.

This sort of proof is also necessary on many occasions; as, to judge of the wound of a person wounded, whether the same is mortal or not; and also in the case of a dissolution of marriage

(1) l. 26. § fin. Ff. deposit. et l. 25. § fin. Ff. de probat. DD. ad l. 1. et l. 11. § 6. Ff. de interrogat. in jure faciend. et ad l. 40. Ff. de pact. l. 13. Cod. de non num. pecun. ad l. 25. in fin. Ff. de probat. Hartmann. observ. tit. 11. obs. 1. num. 1. Nic. Everhard. consil. 186. num. 11. Speculi. tit. de confess. § nunc vidend. num. 5. Surd. decis. 12. num. 1. Mascard de probat. conclus. 345. num. 1. 5.

(2) l. 6. § 3. Ff. de confess. l. 47. Ff. de re judic.

(3) Arg. l. 8. Ff. de juris et facti ignorantia. See Mascard. de probat. conclus. 347. Gabriel. Commun. conclus. tit. de confessis. conclus. 1. & conclus. 5. Nicol. Everhard, consil. 72. num. 5. et consil. 164. num. 2. Marant. prax. part. 6. tit. de confess. num. 2. Marc. decis. 705. num. 2. 3. Böer. decis. 89. num. 4.

(4) Arg. l. 39. Ff. de oper. lib. cap. cum. dilecti. extr. de accusat.

(5) See Althus. dicæolog. lib. 3. c. 38. num. 23. Card. Tusc. practicab. conclus. litt. C. conclus. 673. & seq. Boër. decis. 263. & 339. Surd. decis. 258. Ant. Fab. ad Cod. lib. 7. tit. 24. defin. 1. Andr. Gail. lib. 2. obs. 106. n. 7. de pace publ. lib. 1. c. 17. n. 1, 2. & seq.

(6) l. 1. § 24. Ff. de quæst.

(7) See Hyppolit. de Marsil. ad d. l. 1. § 24. Ff. de quæstion.

(8) l. 8. in fin. Ff. finium regund.

(9) l. 8. § 1. finium regund. et l. 44. Ff. de arbitris. Bald. ad l. unic. col. 4. Cod. ut quæ des. advocat. part. Bart. Cæpoll. cautel. 115.

for the sake of incapacity; and to judge whether a woman is pregnant, and the like; experienced physicians and midwives are directed to make inquiries, and by them, after inspection and clear demonstration, it is judged what the cause may be. (1)

CHAP. XXII.

Of Half Proof and Presumptive Evidence;—that is, *probable Means and Swearing.*

§ 1. *Half Proof defined.*
2. *Presumption defined; and of what Force.*
3. *It is always in Favour of Innocence, so long as it is not otherwise proved.*
4. *Whether, when, and to whom an Oath may be administered, for Want of full Proof.*
5. *In case of Want of Proof and Presumption, the Plaintiff is directed further to prove his Claim.*
6. *An Oath defined.*
7. *In what Cases it is to be administered.*
8. *May be admitted.*
9. *Whether and when it may be refused by the Defendant.*
§ 10. *When by the Plaintiff.*
11. *It may be imposed by the Judge.*
12. *Effect of a Refusal of it.*
13. *Must be done in the Presence of the adverse Party.*
14. *Whether Sentence is pronounced before, or whether it follows upon the Oath.*
15. *In what Case an Oath is administered.*
16. *Whether in criminal Cases.*
17. *Whether and how with respect to Fines.*
18. *In Cases of Renters.*
19. *In Cases of Marriage and Promise of Marriage.*
20. *In Cases of Injury.*

Half Proof defined.

§ 1. *HALF PROOF* is such an assertion by which the judge obtains some knowledge of the case, but not a perfect knowledge, nor such that, in consequence thereof, judgment may be given in the case, or that it may be decided as just.

Presumption defined.

§ 2. This sort of proof is an assertion with *one* witness; whose evidence, although a man of reputation and worthy of credit, cannot serve as proof. (2)

(1) l. 1. Ff. de ventr. inspic. cap. nec aliqua et cap. proposuisti. extra. de probat. cap. laudabilem in pr. extra. de frigid. et malef. See also Chassan. ad consuetud. Burgund. rubric 1. des justices et droicts, § 6. Messieurs et Sergens, in verb. par leurs sermens, num. 8, 9.

(2) l. 9. § 1. Cod. de testib. l. 14. Ff. de dote prælegata. l. 1. § 1. § fin. Ff. quemadmod. test. aper. l. 13. Ff. de jurejur.

Common report also has no more weight than half proof; because reports are mostly false, and many additions are made to reports that widely deviate from the truth. (1)

Which proof is likewise made by *presumption*, that is *circumstantial probability* (2); and it is of such force, that the adverse party is obliged to purge himself against it, and to prove the contrary (3); and so we conclude that a fugitive is guilty of the crime whereof he is accused. (4)

§ 3. Otherwise, if a person accused has probable circumstances in his favour, he is not guilty so long as the contrary be not proved so much the stronger, and with full proof. (5)

It is always in favour of Innocence, so long as it is not otherwise proved.

Other loose conjectures, which introduce no circumstantial probability, cannot constitute half proof, but are entirely rejected: whether any and what degree of importance is to be attached to them, is for the most part left to the judge's discretion to determine.

The cases being proved by one witness, or otherwise by such circumstantial probability, so that they are sufficiently probable and proved by halves, but not strengthened with any other means which would make out full proof, then the principal recourse and strength to decide the case is the imposing of an oath on the one or other side, either to supply the defective proof of the plaintiff, or for purging the probable presumption introduced against the defendant (6); whether and when the said oath is to be imposed on the plaintiff or the defendant, depends entirely on the judge's discretion.

§ 4. It is imposed upon the plaintiff, if he be an honest man, and had proved his claim by halves or more than half; and if there be on the side of the defendant no counter-proofs, nor probable circumstances in his defence; but if the defendant has any proof for his exception, or has any legal presumption in his favour, or otherwise if the case stood equal on both sides, the oath of the defendant to release himself would be preferred to that of the plaintiff. (7)

Whether, when, and to whom an Oath may be administered, for want of full Proof.

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(1) Gloss. & DD. in l. 3. Cod. de rob. cred. c. 2. in fin. extr. de probat.

(2) l. 9. Ff. de probat. & præsumpt.

(3) l. 5. Cod. de Codicill.

(4) Cap. nullis extr. de præsumpt. & cap. determinamus. 3. quæst. 9.

(5) l. ult. Ff. quod. met. caus. l. 57. in fin. Ff. de Jure dot. l. 16. Cod. de probat. See Andr. Gail. lib. 2. obs. 128. n. 12. Nicol. Everhard. cons. 3. n. 14. Berlich. pract. conclus. part 1. conclus. 37. n. 15. Coren, cons. 16.

(6) DD. ad l. admonendi. 31. Ff. de Jurejurando in verb. solent. cap. final. vers. presumptione. extr. de Jurejur.

(7) Merula. Prax. Civil. lib. 4. tit. 71. c. 1. arg. l. 125. Ff. de reg. jur. See DD. ad l. admonendi 13. Ff. de Jurejurando. & l. in bonæ fidei. 3. Cod. de reb. credit. Specul. tit. de Jur. delat. § 1. n. 6. Carpzov. defin. forens. part. 1. const. 23. defin. 9.

In case of want of Proof and Presumption, the Plaintiff is directed further to prove his Claim.

§ 5. Otherwise, if the plaintiff had proved his claim or proposition less than half, or otherwise, if it be questionable whether it can be declared upon oath, we do not usually reject his oath entirely, or his having recourse to it; but the case is *held in advice*, or suspended, and the plaintiff is directed further to prove his claim or proposed case: as thus, "The aldermen "(*schepenen*) not finding the case sufficiently proved to be ter- "minated entirely, do hold the same in advice; and, before "they decide, they order the plaintiff further to prove his "claim; so that, upon seeing it, the case may be decided as "shall be found requisite."

An Oath defined.

§ 6. An oath is a true affirmation of what a person speaks, by calling God to witness to the sincere truth, as the righteous revenger of falsehood, with fingers lifted up and these words, "*So truly help me God Almighty.*"

In what Cases it is to be administered.

§ 7. When the litigating parties, perceiving that their full proofs are defective, they may themselves have recourse to an oath, and may offer to take the same in lieu of proof, or refer to the adverse party to take it in contradiction thereof. (1)

May be admitted.

§ 8. This proceeding is denominated *placing the case upon distribution of oath*: — which oath, being offered to him by the adverse party, may be accepted to be taken, or else allowed to be taken, and justice is done thereupon, and sentence is pronounced (2); but it may be rejected; so that the rule "*swear, or I will swear*," (3) does not always take place, but is left entirely to the judgment of the judge, even whether it need be accepted or not. (4)

Whether and when it may be refused by the Defendant.

§ 9. So, an oath offered by the plaintiff may be rejected and refused by the defendant, if he does not prove his claim or allegation by means, or proves less than half (5); in which case the defendant may insist upon the plaintiff's claim and conclusion being dismissed, notwithstanding the oath offered. (6)

When by the Plaintiff.

§ 10. And again, if the plaintiff is put upon his oath by the defendant, he may refuse and reject taking the same, and may engage to prove the case to the satisfaction of justice. (7)

It may be imposed by a Judge.

§ 11. When the oath in supplement of full proof is imposed on one of the litigating parties by the judge, either *ex officio* or

(1) l. 3. Ff. de Jurejurando.
(2) l. 1. verb. ex pactione. Ff. de Jurejur.
(3) l. 38. Ff. de Jurejur.
(4) l. 12. in pr. & § 2. Cod. de reb. cred. cap. fin. in pr. extr. de Jurejurando.
(5) l. 4. in fin. Cod. de edendo. c. fin. in pr. extr. de jurejurando.
(6) l. 4. in fin. Cod. de edendo. cap. fin. in prin. extr. de Jurejurando. & d. l. 4. in fin. Cod. de edendo.
(7) Cap. 2. extr. de probat. Bert. & DD. ad d. l. admonendi. 31. Ff. de Jurejur.

after delation (*delatie*), and offering the same, must be accepted; or, in case of refusal, the case is considered as admitted (1), and sentence is pronounced thereupon, and in the said sentence is inserted the following formula; viz. "The "aldermen, having heard previously N. N., who refused to "take the oath imposed on him, do condemn, &c.;" because he may not be heard against such refusal in appeal, having been condemned upon his own admission (2), except when he wishes to prove that the said oath was imposed on him unjustly and without necessity. (3)

§ 12. Effect of a Refusal of it.

§ 13. The oath having been accepted or agreed upon, or otherwise imposed upon one of the parties, it ought to be taken in the presence of the adverse party, who is to be summoned for that purpose, or be deprived of the right of being present after having been summoned, or otherwise it is void. (4)

Must be taken in the Presence of the adverse Party.

§ 14. The oath having been taken, sentence immediately follows; it being of such force that the result of the case is concerned therein (5). But according to our mode of proceeding, the sentence containing condemnation usually precedes the oath, with this proviso, namely, that the plaintiff or defendant should declare upon oath, &c.; in order that when the oath has been taken, it may not be easily suspected to be false; and the taking of such oath is usually postponed so long as the time of appeal is open, unless the adverse party suffers the said oath to be taken without opposition by appeal, and is satisfied.

Whether Sentence is pronounced before, or follows upon the Oath.

§ 15. An oath is administered in all suits which are pending (6); but the oath taken or offered extra-judicially binds no one. (7)

In what Case an Oath is administered.

§ 16. In criminal cases and cases subject to corporal punishment, an oath is not admitted, although the case was *half* proved; because no one will mind avoiding corporal punishment by means of an oath which he is compelled to take, especially if it be severe and capital (8); so that the *juramentum purgatorium*, or oath of purging, in cases subject to corporal punishment, is not allowed (9). Instead of such oath, torture (of

Whether in criminal Cases.

(1) l. manifeste 38. Ff. de Jurejurando.
(2) d. l. 12. § 1. & seq. Cod. de reb. credit.
(3) d. l. 12. § 2. Cod. de reb. cred. & Jurejur. cap. fin. in pr. extr. de Jurejurand.
(4) l. 19. Cod. de testib. Novell. 90. c. 9. Wurmser. Prax. tit. 18. obs. 19. Hartmann. obs. tit. 18. obs. 6.
(5) l. 1. in. fin. Ff. de Jurejur. l. 31. vers. Solent. Ff. eod.
(6) l. 3. Cod. de reb. cred.
(7) l. 3. Ff. de Jurejurand.
(8) Arg. l. 1. Ff. de bon. eor. l. 1. § 3. Ff. de calumniatorib. See Jul. Clar. lib. 5. § fin. quæst. 63. Böer. decis. 86. Berlich. conclus. pract. part. 1. conclus. 54. n. 5. & 8. Ant. Fab. ad Cod. tit. de reb. cred. & Jurejur. def. 43.
(9) See Boss. Prax. Criminal. tit. de Sentent. n. 75. in fin. Jul. Clar. d. quæst. 63. n. 6.

which we shall subsequently treat) was introduced in important cases, in which the proof is almost full; and in inferior cases, and those in which the proof is not so great, the hearing upon interrogatories is customary with us.

Whether and how with respect to Fines.

§ 17. From these some jurists except such criminal cases as are not subject to corporal punishment, but merely to fines (1); but since many fines are consequences of infamy, that is, of disgrace and suspicion of vice, it is left to the discretion of the judge.

In Cases of Renters.

§ 18. This proceeding is especially applicable in cases of smuggling, in rents and revenues of the country, in which the smugglers upon conviction immediately fall into infamy and disgrace, and the fine is often so heavy, that, to avoid it, people would act against their conscience, and declare against the same, for the purpose of vindicating themselves entirely; therefore many are of opinion (and not without reason), that in similar cases, the swearing of an oath is not necessary to be released, nor ought to be allowed. (2)

In Cases of Marriage and Promise of Marriage.

§ 19. In cases of matrimony and promise of marriage, the imposing of an oath does not take place; but as it often takes place between four eyes, whatever is therein concerned, and is often very difficult and impossible to be fully proved, the offering of an oath in such cases, according to probable circumstances, between people of the same condition and blameless life (with exception of what had taken place between them) is mostly accepted and allowed. (3)

In Cases of Injury.

§ 20. For the benefit of the necessary education of innocent children, in doubtful cases it is understood, that he who, upon the mother's statement, dare not fully declare upon oath, that he never, nor at any time, had known her, is declared to be the father, and is obliged to take the education upon him. (4)

With regard to the question, whether swearing an oath, likewise takes place in cases of injury and calumny, wherein the vehemence of the mind carries people out of themselves, it

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(1) According to the opinion of Ant. Fab. d. tit. definit. 43. Berlich. pract. conclus. part. 4. conclus. 54. n. 5. & 8. and other authors quoted by him. Carpzov. defin. forens. part. 1. constit. 23. def. 11.

(2) Arg. l. 27. § 3. Ff. de pact. l. 5. Ff. de pact. dotal. See Berlich. pract. conclus. part. 1. conclus. 21. & conclus. 29. n. 34, 35. Carpzov. defin. forens. part. 1. constit. 6. defin. 10. n. 4. & constit. 12. defin. 31.

(3) See And. Gail. lib. 2. observ. 94. n. 12. Ant. Fab. ad Cod. lib. 4. tit. 1. defin. 44. n. 6. Carpzov. defin. forens. part. 1. constit. 23. def. 10.

(4) Vide supra, book i. ch. xiii. § 7. pp. 63, 64.

is likewise (at the discretion of the judge) understood, that such oath is to be administered in such cases, especially to discharge the person accused; namely, that he who swears did not mean to slander the other by the words uttered by him. (1)

CHAP. XXIII.

Of Agreement.

§ 1. *What Cases may be decided by Agreement.*
2. *No Disputes concerning any Thing given in Trust, unless, &c.*
§ 3. *No Disputes concerning last Wills, which have not yet been opened or perused.*
4. *No Crimes, in what Cases.*

§ 1. BEFORE the cases, made litigious, are completed and brought into a state of decision, and are finally decided, every one is at liberty to compromise and settle the affair which he has with another (2); for which purpose sometimes good men are appointed by the judge, before whom the parties ought to appear on a certain day, for the purpose of compromising. What Cases may be decided by Agreement.

All contested cases and disputes may be compromised, with the exception;

§ 2. *First*, Of those in which any thing has been bequeathed for the maintenance of any person, which may not be compromised without the knowledge or approbation of the court (3). I say, *without the knowledge or approbation of the court*; because it is not at present material whether the knowledge and the approbation of the judge precedes, or is subsequent thereto. (4) No Disputes concerning any thing given in Trust, etc.

§ 3. *Secondly*, No one may come to an agreement in disputes arising out of any last wills, which are not yet opened or perused. (5) No Disputes concerning Last Wills which have not yet been opened or perused.

(1) l. 5. § 8. Ff. de injuriis. junct. l. 3. Cod. de reb. credit. & l. 3. l. 13. § 2. & l. 30. § 3. Ff. de Jurej. See Papon. lib. 9. tit. 6. arrest. 10. Boër. decis. 86. n. 4, 5. Christin. ad Leg. Mechlin. tit. 1. art. 26. ad num. 4.

(2) l. 1. Ff. de transact. junct. l. 38. Cod. eod.

(3) l. 8. in pr. & § 6. Ff. de transact. Mantic. de ambig. convent. lib. 26. tit. 3.

(4) Contra d. l. 8. junct. l. 5. Cod. de legib. Vide Groenew. de legib. abrogat. ad l. 8. Cod. de trans. § 1. Inst. de auth. tutor.

(5) l. 6. Ff. de transact. l. 1. Ff. testam. quemadm. aper. Vide Christin. vol. i. decis. 84. Sande, lib. 4. tit. 5. def. 15. Faber. Cod. lib. 2. tit. 4. def. 1. Mantic. de ambig. conv. lib. 26. tit. 2.

No Crimes, in what Cases.

§ 4. With respect to crimes and offences, the Roman law allowed every one in particular to compromise respecting murder, and other crimes by which the neck and life were forfeited, but no compromising was permitted in other and inferior crimes. (1)

But at present the prosecution for punishment, on account of murder and other crimes, belongs to the government; and in the name and on behalf of the same, their fiscal and all other officers, bailiffs, and sheriffs of the county, carry on the prosecution (2); who may not compromise or remit any crimes, unless in the presence and with the knowledge of the supreme government, who, in this respect, is represented by the chamber of accounts. (3)

But notwithstanding the same, those who have been injured through crime, may for their peculiar interest freely compromise and remit amongst themselves all crimes without distinction (4). It is even so far necessary, that the granting of remission cannot take place, unless the relations of the persons slain are reconciled to the offender. (5)

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(1) l. 18. Cod. de trans.

(2) Vide ch. xxvii. infra, where this subject is treated more fully.

(3) Edict & Ordonnant. op 't stuk van de Crisminele Justitie, van Koninck Philippus (Edict and Ordinance concerning the administration of Criminal Justice of King Philip) July 5, 1570, art. 13. Merula. Prax. Civ. lib. 4. tit. 14. c. 1. n. 5. & c. 6.

(4) Vide Grotius, Inleyd. lib. 3. c. 4. n. 10. Christin. vol. i. decis. 152. Zypæ Notit. Jur. Belg. tit. ne transact. vers. accusare.

(5) Instruct. van den Hove, art. 213. Zyp. Notit. Jur. Belg. de abolit. et remiss. vers. ante grat. Grotius, Inleyd. lib. 3. c. 33. vers. cum. seq. For the proceedings in such cases, vide Papegay, p. (mihi) 475. & seq.; in Flanders, see Damhoud. prax. criminal. c. 145.; and in Brabant, see Cost. Antwerp, tit. 22.

CHAP. XXIV.

Of Sentences and Decisions.

§ 1. *Sentence how to be pronounced, and how to be understood when the Votes are equal.*
2. *Of interlocutory and definitive Sentences.*
3. *Orders, what, and how to be granted, and their different Sorts.*
4. *Interlocutory Decrees.*
5. *Remistible Exceptions.*
6. *Provisional Decrees, what, and how to be granted and composed.*
7. *Whether a Party can proceed in the principal Point, before Satisfaction is made upon the Provision.*
8. *Of a definitive Judgment.*
9. *How to proceed in cases of Default.*
10. *How Decrees are to be made in common Cases, and what is to be observed therein.*
11. *A Decision, how and when considered as confirmed.*
12. *Within what Time to be carried into Execution.*
13. *Postponement of Executions, how to be granted.*

§ 1. THE suit being thus brought to a state of decision, the sentence or judgement of the judge follows thereupon (1); which is finally pronounced upon the case according to the majority of the votes collected, from the oldest to the youngest, by the bailiff, who makes out the sentence from the votes of the major part who adhere to one and the same opinion (2); and if the votes are equal on both sides (as it happens at some places where they decide with eight aldermen, or otherwise in case of the absence of one where the number of judges is unequal, on which account the tribunals are every where composed of seven judges), the collecting of the votes is repeated for the second time; and every one is asked whether he will alter his vote, or will adhere to the opinion of the one or other side? If they do not wish to alter it, then in cases wherein the litigation is carried on on account of right of possession, marriage, and promise of marriage, necessaries of life, and the like, the sentence is given in favour of the plaintiff. (3)

Sentence, how to be pronounced, and how to be understood when the Votes are equal.

In other common cases, wherein such an occurrence takes place, the judgment is given in favour of the defendant, where it tends to release and find him not guilty, especially in cases

(1) L. 1. Ff. de re judic.
(2) Arg. ad l. 19. Ff. ad munic. l. 160.
§ 1. Ff. de reg. jur. l. 46. Cod. de decurion.
(3) l. 38, 39. Ff. de reg. judic.

subject to corporal punishment; because in all cases the probable right is for him (1). But in some cities there are statutes, which expressly provide for such cases; viz. "That in all meetings "consisting of an equal number of persons, and where the votes "are equal and in opposition to each other, and when on a subsequent enquiry about the votes no one wishes to deviate from "his vote, the vote of the person who presides in such board, "whether a burgomaster or alderman, shall have the effect of "two votes." So it was enacted by the great council of the city of Leyden, on the 28th November 1592; and this law is still observed.

§ 2. Of interlocutory and definitive Sentences.

Such collective opinion, if of a high tribunal, is denominated a *sentence*; and of any inferior tribunals, a *decree*; and it is either *interlocutory*, when it contains any intervening or preceding order, or *definitive*, that is, which brings the whole suit to a *final* termination, otherwise denominated a *final judgment*. (2)

And as in the pronunciation of the decisions many errors may be committed, in the pronunciation of such decisions, the nature, right, propriety, and institution thereof, are to be especially observed. They are divided into orders, interlocutory, provisional, or definitive decrees.

Orders, what; how to be granted, and their different Sorts.

§ 3. An *order* is upon a mere petition or an incident, made verbally, either previous or subsequent to the pleadings, and sometimes also in writing, to remove and prevent further disputes, which is granted, stipulated, or rejected by the judge; and further, notwithstanding the same, the parties are ordered to proceed in the case in this or that manner, all according to the discretion of the judge.

Upon which it is to be observed, that the one party be not urged too much, because in many cases a person cannot be ready immediately to defend himself (3); and on the other side, that the defective party be not indulged too much, to vex his adverse party with unnecessary or useless evasions; and for that purpose either party is always to be at liberty to make a verbal defence, if the minutes contain an insertion of the matter, or by an answer in writing, if it be treated of by petition, according to the proverb, *audi et alteram partem*. And, without a petition, the parties are sometimes ordered by the judge, ex-officio, to appear before good men to be chosen by the parties themselves,

(1) l. 125. Ff. de reg. jur. l. 5. Ff. de pœn. junct. l. 47. Ff. de obligat. et act.
(2) l. 3. Cod. et l. 1. Ff. de re jud.
(3) DD. ad l. 1. Ff. & l. 2. Cod. de edendo.

or before certain persons specially nominated for that purpos e by the judge, to be reconciled by them if possible; if not, after after hearing the parties, the judges are to do in the case whatever they shall deem requisite.

Some of these preparatory and preceding prayers and orders are such, as will necessarily stop the course and progress of the principal case, and therefore are to be considered as decided and pronounced.

Others are such as do not necessarily impede the course and progress of the final judgement. And, upon petitions of that nature, notwithstanding the same, such orders may be given to hold such pleadings as the state of the suit requires: for example, if any one claims a right upon a purchased action, and if a prayer be made against him for a statement of the price which he gave for it, in order by that means to effect the appropriation; and likewise upon a prayer for copy of the document whereupon the plaintiff institutes his claim or right; and moreover upon the petition in a case wherein guaranteeing necessarily prevails, and wherein the defendant, if he gives no information of the law-suit to his guarantee, would lose his right of action against him, and therefore prays to be maintained for some time, and in other similar cases; such incidents and intervening matters ought to be first and previously decided.

But if, in a case wherein no provision is desired, copies be prayed for previously to the *litis-contestation* of whatever will be produced in defence of the principal case (which may be done only in the term in which the witnesses are produced); or if in a case of penalty, before the claim, a prayer be made for reparation of attempts; or in a case of appeal from the bailiff and men, when a prayer is provisionally made to carry that decree into into execution, and before the court, to have the termination of the clause of inhibition, which tends to the same purpose; or in case of spoliation when restitution, *ante omnia*, is prayed for, or other similar prayer is made; in all these cases it is left to the discretion of the judge to decide upon the provision according to circumstances, and to postpone until the termination of the principal case, and, notwithstanding the same, to order that the demand be instituted, answer be made, and the suit completed in every respect, in order to decide then upon the principal point, or upon the provision, according to requisition. The judge may also make a similar discretional order if the action be not merely concerning possession, and if the saving or redressing of whatever was hostilely broken off, or demolished by any one, be

provisionally demanded, and in which payment is provisionally demanded, or that the amount claimed may be secured, and when the case is not found by the judge entirely completed.

This mode of carrying on the litigation is sometimes necessary from the propriety and consequence of the case itself, or it is sometimes used as the best and most proper to give the parties who are inclined to delay, by an entire rejection, no cause to appeal.

And the judges may be induced by the same reason to do justice immediately upon a clear and equitable provision, if only an answer be made upon the provision.

Interlocutory Decrees.

§ 4. *Interlocutory Decrees* are such as are made upon the revisal of and enquiry into the case when completed, if it be declared by the judge, "that the case is not found in a state to be "decided, and therefore the plaintiff or the defendant is directed "to prove this or that fact more to the satisfaction of the judge, "in order that the decision may thereupon be made according "to requisition;" or when an order is made that declarations which come into consideration should, according to the 17th art. of the ordonnance for the administration of justice in the cities, be confirmed, that is, that the witnesses should be again heard upon oath, &c.

Remissible Exceptions.

§ 5. Those are also called interlocutory decrees by which the exceptions taken by defendants are rejected; and they are condemned to answer in the case on the principal point.

The exceptions, on which alone a person may insist and pray for justice without answering further upon the case itself, are of three sorts; viz. *declinatory* exceptions, exceptions on the ground of the *incompetency* of the tribunal (otherwise denominated *renvoi* or reference), exceptions *litis pendentis* and *litis finitæ*, of which we have already treated more extensively, in ch. xvii. pp. 590, 591, supra.

But besides these there are several others, which would entirely render void the instance and action, and which are commonly termed *peremptory exceptions*; or which otherwise may induce the judge not to reject the same loosely, but to add them to the principal case; and, notwithstanding the same, to order the defendant to answer. But the defendant may not stand upon such exceptions without answering also upon the principal point: for example, if a minor appears in judgment without his guardian, or a married woman without her husband; and likewise when the plaintiff institutes a suit before the birth of his right of claim; and moreover, when an appeal has been made from a provisional

decree of the judges of cities to the court, and the defendant (by virtue of the 3d article of the ampliation of the instruction) will take his exception against such appeal; thus, "That on the "ground of surreption and obreption the party should be de- "clared inadmissible," praying previously justice thereupon, and farther in an ordinary way; and then, although the suit was brought to a state of completion on the different points at one and the same time, justice may always be done at any stage thereof upon the exception, and the defendant may be absolved and released from the *instance*, that is, from the suit instituted.

Provisional Decrees, what; and how to be granted, and composed.

§ 6. A provisional decree is that by which, on account of the great advantage that the plaintiff can point out in his favour, the defendant is provisionally condemned before the principal point of the case is enquired into; with this proviso, that the said decree may and will be liable to alteration with respect to the principal point, if it be found requisite upon further enquiry; for which, if it be found expedient, the plaintiff is directed to give security before he is allowed to have the benefit thereof.

Such provisions are daily made in cases wherein the plaintiff grounds his claim upon bonds, notes of hand, and other public instruments; whereupon the defendant, being summoned to confess or deny the same at least, "*bonam fidem agnoscendo*," that is, *bonâ fide* to acknowledge his signature; and if he cannot deny the execution thereof, the provision is made as follows; "The defendant is condemned to deposit in the plaintiff's hands "provisionally the amount claimed, &c. upon security to make "restitution thereof if it be subsequently found requisite." (1)

The procurators or proctors who practise before the inferior courts, often plead upon the provision before conclusion has at all been taken, and mostly upon the point of depositing the amount of the claim, thereby *splitting* the pleadings in order to avoid the peril of justice being done upon the principal point of the suit, and as no appeal from a provisional decree is granted which will prevent the execution, to make the right of appeal fruitless: this practice has already been objected to as erroneous.

If, on such provision being pleaded, the adverse party does not insist that the suit be at the same time completed with respect to the principal point also; or if he himself is not ready to answer, the judges may (if the right to provision lies ready, and the suit has only been completed thereupon), administer justice by a full adjudication or rejection of the provision prayed

(1) Vide supra, ch. xix. pp. 595, et seq.

for; or if the case is not so clear, the provision may so far be rejected; and, notwithstanding the same, the parties may be ordered to complete the suit; further declaring, that the judges are of opinion that that point requires further investigation. And the judge has also the power, at any stage of the suit, to do justice upon the provision prayed for; provided that in the principal case always something remains to be determined: for it would be strange when a suit is fully completed, and at issue, to grant provision without declaring at the same time, "that the "judge does not find the suit as yet in a state of decision; and "therefore orders the parties to do this or that more, &c.;" and "doing further justice upon the provision prayed for, to con- "demn the defendant provisionally, &c."

It is consequently necessary that the litigating parties, in their conclusion, should leave something of the principal point to be decided by the judge by final judgment.

In a provisional decree a distinction is necessary that the same is not final; namely, "that the point concerning the costs be "reserved until the final decision be made; and," according to circumstances, "it is ordered that they proceed on the prin- "cipal part of the case according to practice;" or otherwise.

Whether a Party can proceed in the principal Point, before Satisfaction is made upon the Provision.

§ 7. According to the opinion of some, the party who has obtained any provision is not bound to proceed on the principal point of the case before the provision is satisfied (1); this takes place in a case of possession, or in cases of redress upon new facts, wherein the order of the judge ought first to be satisfied before a party can be further heard (2); but it cannot be extended to other common provision, to have the amount claimed deposited, which has no relation to the command and authority of the judge, but to the probable right of the suitor, who is at liberty to carry such right immediately into execution; and he of course can proceed therein, before the case can have a termination: but it does not prevent the person condemned from being admitted to proceed in the case, which the judge cannot refuse him; and it produces no alteration in consequence of the provision being carried into execution.

Of a definitive Judgment.

§ 8. A definitive, that is, a safe or *final judgment* is, when the case is decided on the principal point, and finally pronounced; as thus, "The aldermen, having heard the parties,

(1) Of this opinion, among others, is William van Alphen, in the New Papegay, p. 267.

(2) Arg. l. 26. § 6. Ff. ex quib. caus. maj. Rebuff. ad constit. reg. tract. de sentent. provis. art. 1. Glos. 4. n. 12. Boërdecis. Burdegal. 326.

" seen the documents produced, and paid attention to whatever " could induce them, do justice, and condemn or dismiss, &c." And by the court also a distinction is made; thus, " In the case " pending between N. N., &c. the court, doing justice in the " name of the supreme government and the county of Holland, " &c. do condemn, &c."

Here it is to be observed, that nothing whatsoever should be wanting in the pleadings of claim, answer, replication, and rejoinder, as well in convention as in re-convention, and in the production of witnesses, the renunciation of the production of further evidence, the refutation of witnesses, the assertion against the said refutation, the conclusion at law, and the prayer for judgment (1); the least omission will render the judgment subject to nullity. And likewise, that the convention and re-convention go always *pari passu* together, and be pronounced at one and the same time; thus, " The aldermen having seen and " heard, &c. and observed every thing which can induce them, " do justice; first, in convention they do condemn the defendant " to pay the plaintiff, &c. and in re-convention they do reject " the claim and conclusion of the plaintiff made and taken " against the defendant in the said case, &c.;" or thus, "Doing " justice, first, in convention they do reject the claim and con- " clusion of the plaintiff; and in re-convention do condemn the " defendant to pay the plaintiff in the same case, &c."

And in order to avoid falling into greater error or nullity, it is to be observed that all decrees, both provisional and definitive, be not extended beyond the conclusion and pleadings, but the adjudication may be less (2); and in case of diminution, the following clause is added thereto; viz. " Do reject the plaintiff's " further claim and conclusion, made and taken against the " defendant;" or if his further right be good, but ought to have been instituted in another manner, thus, " Do reserve his further " action to be made there, and so as he shall think it advisable, " and do compensate the costs on account of, &c.;" or when the case is beyond all doubt on the one or other side, " Do con- " demn the person who is evidently in the wrong to pay the " costs, to be taxed and moderated on their behalf;" which is entirely left to the discretion of the judge. (3)

(1) See these subjects discussed, supra, ch. xix. pp. 595, et seq.

(2) DD. ad l. 18. commun. divid. Vide Merula. Prax. Civ. lib. 4. tit. 37. c. 2. n. 21.

(3) Vide Instruct. van den Hogen Raad, art. 49. Damhouder, Prax. Civ. c. 222. Wieland, Pract. Civ. tit. 9. c. 7.

How to proceed in Cases of Default.

§ 9. In case of the defendant's default in not appearing (1), full entries are to be made, and also of the document of claim produced; and, where provision is made to have the amount of the claim deposited, the judgment is to be composed thus: "The "aldermen do grant the plaintiff, against the defendant, the "first default; and for the benefit thereof, having seen the "bond mentioned in the claim, do consider the same as ac- "knowledged;" or thus, "Having seen the protocol to which "this has reference, and having heard the affirmation of the "plaintiff, do condemn the defendant provisionally, &c. and do "grant the plaintiff a second citation." And in case of contumacy, thus, "It having appeared to the aldermen, that the de- "fendant, having been lawfully cited three several times, had "not appeared nor sent an attorney on his behalf, and that he "was in contumacy, and had deprived himself of his right; "and having seen the document of the claim and verification "thereof, and observed whatever could induce them, do jus- "tice, and condemn, &c."

How Decrees are to be made in common Cases, and what is to be observed therein.

§ 10. In common decrees the head is inserted thus: "The "aldermen, having heard and seen whatever was produced, and "having paid attention to whatever could induce them, doing "justice, do condemn or reject, &c." as is partly pointed out heretofore, namely, in such a manner that it should contain, that the defendant is condemned to pay the whole or part of the claim, or that he is absolved therefrom; and it should further contain the condemnation or compensation of costs: but the clause of rejection of the claim may not be inserted in the decree in these words, "so as the same was made and taken," or with similar words; but the amount, and the estimate of the amount condemned, ought to be clearly expressed. (2)

In cases of disputes amongst neighbours, the decree runs thus: "The aldermen, having been at the place in question, "and having taken ocular inspection thereof, heard the parties, "and paid attention to whatever required attention, do justice, "&c." If the decree does not contain the condemnation of an amount which is indisputable and just, and if something is contained therein which ought afterwards to be liquidated and settled, the parties are directed (in order to prevent them from

(1) In what manner the defendants in case of non-appearance are to be condemned by judgment, see Ordonnant. op 't stuk van Justitie, art. 3. and ch. xv. pp. 577—580, supra.

(2) Ordonn. op 't stuk van de Justitie in de Steden, art. 19.

vexing each other afterwards with any new suits concerning the same) to "appear on a certain day, or to send attornies "before two or more commissioners of the court, to proceed in "the suit summarily, to have a subsequent explanation and "liquidation of the decree pronounced;" which form is daily observed before the high court.

Particular care ought further to be taken, lest any thing be done or directed at any stage or interval of the suit, without hearing the parties; and, in deciding the suit, every point ought to be considered; and for that purpose, a prudent, ingenious, and impartial judgment ought to be exercised; and if in any point a person cannot trust his own judgment (especially when the case is of importance) he should not be ashamed to take the advice of skilful lawyers, and then the head of the decree should be thus: "The aldermen, having seen the advice of practising "lawyers, taken for that purpose by their order, and con-"forming themselves thereto, and having heard the parties, seen "whatever was produced by them, &c." And further, all definitive sentences should contain condemnation or compensation of costs (1), according to the rule, "that those who are found to be in the wrong ought to be condemned to pay the costs (2);" thus, "and condemn him to pay the costs of the suit, the "same being taxed and moderated." But it is understood of such persons as are evidently in the wrong, and who have instituted or opposed the suit merely to vex the other party; or otherwise, if the case be doubtful, and both parties had reason therein, in such case the costs are compensated, and each party ought to bear his own; thus, "And do compensate the costs for such "reasons as induced them thereto." And when the plaintiff is most evidently in the wrong, he may also, independently thereof, be condemned to pay a fine, which is left to the discretion of the court (3). And in the cities before the bailiff and men, such fine is limited to three gilders in real cases, and in civil cases the thirtieth penny (4) of the claim, as far as six gilders; and in villages, as far as thirty stivers in real cases, and the fiftieth penny upon the claim (5), provided it does not exceed three gilders, all for the officer. (6)

§ 11. The decree of the judge becomes absolute after the expiration of ten days, (within which it may be appealed against); A Decision, how and when considered as confirmed.

(1) Vide Ordonn. op 't stuk van de Justitie, art. 19.
(2) l. 19. ff. de judic. § 2. Instit. de pœna temere litigant. Vide Novell. 82. c. 10. auth. post jusjurand. Cod. de judic.
(3) Instruct. art. 215.
(4) Three and one third per cent.
(5) Two per cent
(6) Ordonn. op 't stuk van de justitie, art. 22.

and in that case is to be considered as really true (1), and may not be repealed under pretence of new proofs or muniments (2); but it is sufficient that the case was pronounced according to the evidence seen by the judge, because one ought to judge exactly according to the proof and evidence produced. (3)

We said, "*in that case is to be considered as really true*;" because it ought to be confined to the condition of that case, and may not be extended to other cases; for whatever has been transacted between two different persons, cannot prejudice a third; and one ought to live according to certain laws, but not according to examples of mere cases. (4)

Within what Time to be carried into Execution.

§ 12. The right which a person has obtained by a decision of the judge was antiently perpetual (5); but it is not observed among us, because the decision of the judge, even in his jurisdiction, may be directly carried into execution (6); or, if the person against whom judgment was granted be abroad, or has no property there, an application may be made to the judge where he is by requisitorial letters (7); which execution, if not carried into effect within one year, ought to be every time renewed before the provincial court within five, and before the high court within ten years. (8)

Postponement of Execution how to be granted.

§ 13. All decrees may be carried into execution directly, unless an appeal be entered against them to a superior judge, for which ten days consideration is granted to the person against whom judgment was given; within which time any proceedings in that case must cease, and he ought in the mean time to declare himself. (9)

With respect to the question whether any delay of payment is granted by the decree to the person condemned, on account of his inability, it is customary with us, that when persons who are unable to pay are sued at law, and do confess the debt, and

(1) l. 25. Ff. de statu hom.

(2) Vide Coren, obs. 26.

(3) l. 30. Ff. de testam. tutel. l. 6. § 1. in verb. ex fide eorum quæ probabuntur. Ff. de offic. præsid. l. 2. 4. Cod. de re judicat. Coras. 4. Miscel. 20. Hottoman. Illustr. quæst. 17. Costal. ad d. l. 6. § 1. Ff. de offic. præsid. Vinnium ad pr. Instit. de offic. Jud. reclamante. Couvarruv. 1. resolut. 1. Clar. lib. 5. § fin. pract. criminal. quæst. 66. n. 2. and Christin. vol. ii. decis. 148. n. 11. & vol. i. decis. 4.

(4) l. 63. Ff. de re judicat. l. 13. Cod. de sentent. & interlocut. Vide Coren, obs. 30. n. 2, 3, 4. and Christin. vol. i. decis. 1. & vol. ii. decis. 51. n. 5. & seq. & decis. 63. n. 3. & seq. & decis. 65.

(5) l. 8. Cod. de reb. cred. & l. ult. cod. de usur. rei jud.

(6) l. 56. Ff. de re judicat.

(7) Vide Instruct. van de Justitie in de Steden, art. 17. Merul. Prax. Civ. lib. 4. tit. 97. c. 1. Argent. ad consuetud. Brixm. art. 17.

(8) Instructie van den Hove, art. 118. Ampliat. art. 30. Instructie van den Hoge Raad, art. 273.

(9) On the proceedings in case of appeal see the following chapter.

prays that they may pay the same by two instalments and intervals in three months, or three in two months, or three in three months, and lastly four in three months, or three in four months; that thereupon, in pronouncing the sentence, it is considered with discretion, and it is either refused or allowed; provided that in the meantime security and pledge be given for the payment thereof; in the manner following, viz. " The aldermen having " heard the admission of the debt of the defendant, do condemn " him, &c. postponing nevertheless the execution thereupon for " the time of, &c. provided security be given, &c. (1)

(1) See this subject fully treated by Gabriel Alvarez Velasc. de privileg. paup. & miserabil. lib. 1. quæst. 44. Papegay, p. 33. Keuren der Stad Leyden, art. 176. n. 5. Cons. & Advys. vol. i. cons. 278. Pecc. van Beset. en hand op-leggen, c. 4. n. 6. in not.

CHAP. XXV.

Of Appeal

§ 1. *Appeal, how and when at Time to be made.*
2. *When it is necessary to appeal, and when to pray for Reformation; and wherein the Difference consists.*
3. *Inhibition and Suspension of Execution, whether and how to be granted.*
4. *Reduction, what; and of what Force.*
5. *Of Relief against the Inhibition, Interjection, or Prosecution of Appeal or Reformation.*
6. *To what Judge an Appeal is to be made.*
7. *When Revision takes place; and what is to be observed therein.*
8. *Whether it takes place against a voluntary Condemnation.*
9. *Whether it can stop Execution.*
10. *From what Sentences an Appeal lies, and from what not.*
13. *Whether and when from provisional and interlocutory Decrees.*
14. *Whether and when from Criminal Decrees.*
15. *Whether and when against Decrees in Matters of Correction, Refusal of Consent of Marriage, Cases of Renters and others concerning Dykes, Correction by the political Government, Default, and voluntary Condemnation.*
16. *Up to what Amount Causes may be decided in the Cities and in Villages by Arrest, and without Appeal.*
17. *Up to what Amount no Inhibition may be granted.*
18. *Fine for ungrounded Appeal.*
19. *What Pleas to be alleged in Appeal.*
20. *What, in Relief of Appeal.*
21. *What in Reformation.*
22. *How to be admitted as Appellant.*
23. *Upon an Inhibition till certain Day, whether that Day is included.*
24. *Of the Force of such Inhibitions.*
25. *What Pleas are to be alleged in Reduction.*
26. *Grievances à minimâ, when and how to be proposed.*
27. *In Appeal, to make no Reconvention.*
28. *What Pleas are to be alleged in Revision.*

THE differences and cases, in which two or more persons do not agree after investigation and decision by the judge, become absolute and are actually confirmed as true (1), unless

(1) l. 207. Ff. de reg. jur.

within proper time appeal be made thereupon to a higher judge, by way of appeal or reformation.

Appeal; how and within what Time to be made.

§ 1. If any person feels himself charged and aggrieved by any judge, and will appeal, he must have it entered within ten days computing from the day that the sentence was pronounced (1); or at least from the day that he obtained knowledge thereof (2); and within twenty days he must prosecute the same before the court, and within forty days, before the high court (3), which time is understood to run *de momento in momentum*, that is, from the hour or moment of the pronunciation of the sentence, or from the time that the party condemned obtained information thereof, until the same hour, ten or thirty days thereafter (4); unless, so far as concerns the ten days of entering the appeal, the same be prolonged according to the words of the 198th article of the instruction; so that the whole of the tenth day must be reckoned therein, which may also be interpreted as applicable upon the day that the sentence was pronounced. (5)

When it is necessary to appeal, and when to pray for Reformation; and wherein the Difference consists.

§ 2. With this commonly is granted and applied the *clause of inhibition*, that is, of prohibition and suspension of execution of the said decree; by which the judge who pronounced sentence is prohibited from carrying his sentence into execution in the mean time, which then is denominated an *appeal* (6); or otherwise, if suspension of execution be not necessary, or if the person condemned on account of the smallness of the amount, above which the sentences of inferior judges, notwithstanding appeal, are provisionally carried into execution, under security for restoring the same (as will be shewn in a subsequent page); or otherwise, if he be satisfied with having the sentence carried into execution upon security to make again restitution, if it be found expedient; in that case prayer is made merely for *reformation*, that is, revision of the decree without suspension, which is always allowed within the year (7). But sentences of the provincial court, notwithstanding reformation to the high court, are carried into execution without such security, because the instruction of the high court does not infer it, and those of the high court can assume no more right against the provincial court than was given to them, as was judged by a full court, on the 22d

(1) Instruct. van den Hove, art. 198.
(2) Ibid. in fin. Gloss. & Barth. in l. 1. § 7. Ff. quando appell. Marant. de appellat. n. 203, 204.
(3) DD. apud Andr. Gail. lib. 1. obs. 111. Instruct. art. 206. and art. 216.
(4) See Gail. lib. 1. obs. 139. Sande, lib. 1. tit. 13. def. 1.
(5) Ante kenning op het xi. art. van de Ordon. op 't stuk van de justitie en de Steden. (Notes on the 11th article of the Ordinance concerning Justice in the Cities.)
(6) See Gail. lib. 1. obs. 144.
(7) Instruct. van den Hove, art. 212.

April 1651, in the caseof Johan van Leeuwen, and Dirk Jansz van Vesanevelt, against Petrus Stepsius, defendant.

It is further to be also remarked, that reformation does not suspend the execution for costs, although a mandate of reformation was formerly granted by the court, with the clause of inhibition and suspension of costs; as it is now no longer in use, and by a resolution of the court on the 13th March 1698, was condemned as an illegal corruption crept in; and the secretaries of the court were desired to leave out, in future, the said clause of inhibition in the mandate.

Inhibition, and Suspension of Execution; whether and how to be granted.

§ 3. An appeal, with the clause of inhibition and suspension of execution, is not always fully granted upon application, but often only till a certain day; which day is again taken in two ways, either as merely granted, which is tacitly continued and prolonged until the case be heard and the plaintiff has made claim, by which he may again pray for a prolongation of the said inhibition and suspension; or with this additional clause, "*precisely and on that day;*" upon which the plaintiff must exactly have the case heard, or the suspension and inhibition falls away of itself; and sometimes only a mandate to be admitted as appellant is granted, which contains no inhibition, nor can it suspend execution.

Reduction, what; and of what force.

§ 4. If, in a case referred to and decided by arbitrators or good men, any one finds himself aggrieved thereby, he may come against the same in *reduction*, which has the force of appeal; if applied for within ten days, or else within a year, it has the force of *reformation*: and inhibition and suspension are also granted, unless upon certain fine of appeal and reduction renunciation was made, as is commonly expressed among us in references. (1)

Of Relief against the Inhibition, Interjection, or Prosecution of Appeal, or Reformation.

§ 5. The time for limited appeal and reformation being a little past, relief is easily granted to the person condemned upon civil petition; which, as not concerning the case itself, is likewise granted by the provincial court, and is commonly inserted in the mandate under the denomination of relief against the inhibition, interjection, or prosecution of appeal or reformation, and is denominated *relief of appeal.* (2)

To what Judge an Appeal is to be made.

§ 6. Appeals are always made by degrees from inferior to superior judges, to the high court inclusive, without passing by

(1) Ampliat. van d'Instructie van den Hove, art. 10. & book v. ch. ix. § 7, 8. p. 555, supra.

(2) See the Octroy en Ordonnantie (Grant and Ordinance) of the 27th Aug. 1562, art. 5. Merula, Prax. Civ. Bk. 4 tit. 82. c. 3.

the judge between them (1), unless he refuses to admit the appeal; in which case, the defendant may appeal to a higher judge, and apply to him to act in the case, as if appeal had been regularly made from the one to the other (2). And the court of Holland is entitled (3) to admit in appeal, and an appeal may be made to it, from all decrees made by aldermen in villages, passing by the higher tribunal of well-born men under which they belong, to which a person may appeal if he chuses; or otherwise passing by it, he may appeal directly to the highest, according to resolution of the states of Holland, of the 9th October 1577. (4)

When Revision takes place, and what is to be observed therein.

§ 7. Above or beyond the high court no appeal lies (5), except by way of revision, to point out errors and mistakes, for which it may always be made within two years after the pronunciation of the sentence (6). Whereupon mandate being granted, within three months after the decision of the case, additional judges may be granted upon application to the supreme government, to revise the suit; and in consequence of such application the states of Holland appoint seven other lawyers, together with the gentlemen of the high court, who are called *revisers* (7). For this office the pensionaries of the cities, with two of the provincial court of Holland, are commonly selected, if the case comes in appeal to the high court.

In cases of revision the following particulars are to be observed; viz.

I. That in cases relating to possession or interlocutory decrees, which are reparable by definitive decrees, there is no revision; but such cases must be prosecuted by demand and principally. (8)

Whether it takes place against a voluntary Condemnation.

§ 8. II. Upon and against a voluntary condemnation of the high court, no revision is allowed; because any one, who is desirous to come in revision, must point out errors in the decision, which he who has been condemned upon his own application and submission cannot do; and besides, in revision, no

(1) l. 1. Ff. de appellat. et l. 32. Cod. eod. Seculat. tit. de Appellat. § nunc tractemus. Marant. tit. eod. n. 357 et seq. Gail. lib. 1. obs. 119. n. 2.

(2) Groeneweg. de leg. abrog. ad l. 19. vers. quod si victus. Cod. de Appel. Arg. l. 4. C. de juris ordin. jud. et ib. Cast. Guid. Pap. decis. 426.

(3) Instruct. art. 205.

(4) See Merula, Prax. Civil. lib. 4. tit. 3. c. 1. n. 3.

(5) l. 1. § 1. Ff. de quibus appellare non licet.

(6) Auth. quæ suppl. Cod. de precib. Imp. Off. Instruct. van den Hoog Raad, art. 279, 280.

(7) Arg. l. 35. Cod. de appellat. Instruct. van den Hogen Raad, art. 282.

(8) Instruct. van den Hogen Raad, art. 258. et seq. Ordonnant. op 't stuk van de Revisie, Jan. 16, 1578. registered in 7 Memorial Boek. Bart. Ernst. fol. 206. verso. Rebuff. tract. de supplic. quæst. 9. cas. 8. & ad constitut. reg. alibi.

new facts may be alleged, nor can any new documents be produced; but, *ex iisdem actis*, upon the same documents, the case must be decided, whether the sentence be just or erroneous: and in such case the submission to voluntary condemnation would again be in the way (1), against which no relief is granted by the high court for any grievances or prejudices whatsoever; unless any person can point out that he, *ex justo metu*, (i. e. by mere deception) was compelled and misled to such submission and promise to abide by the voluntary condemnation, against his will. (2)

Whether it can stop Execution.

§ 9. III. Revision prevents or suspends no execution except only in such cases in which such execution could not be redressed after such revision, as in cases of marriages or the like; and because such revision should not tend to detain the person in whose favour the decision was, or to protract the case training, on his application a certain short time is granted by the states to the party condemned, within which he is obliged to prosecute his revision on pain of forfeiting his right, as otherwise it need only be prosecuted within the year; and so, in the year 1623, three months time was granted by an answer of the states to Abraham Symons of Hamburgh (the person condemned) against Mrs. Constantine Koymans: and in 1621, six weeks time was granted to one Peter Francis Maalson of Enkhuysen (the person condemned) against Diewertge Maartens, also of that place. (3)

IV. In revision no relief or civil petition is allowed on the expiration of the time of application and prosecution of revision.

But in the case of Miss Alida Koninks against Mr. Cornelis Bikker, sheriff at Muyden, in a matrimonial case in 1655, such relief was granted by the court to the said Miss Alida Koninks, notwithstanding she had allowed two years to elapse after the sentence of the high court: because he made new prayer after the expiration of two years, for an interpretation of the said sentence; and failing therein, came in revision; in consequence whereof, as it would otherwise have relation to the preceding sentence, revision was granted to her likewise. (4)

In Holland, no revision is granted *pro deo* in civil cases, according to the resolution of the 19th July 1675; but it was allowed in a criminal case in 1725, after it was refused in the year

(1) Vide Joan Bender, tract. de Revision. conclus. i. c. 16. p. (mihi) 230.

(2) Several such instances appear in the Papegay, p. (mihi) 395.

(3) See Cons. et Adv. Rotterdam, vol. 3. cons. 103.

(4) See a full Report of this Case, pp. 430—435. supra.

1718 to Frederic Muller alias *Jaco*, a notorious villain of that time. (1)

From what Sentences an Appeal lies, and from what not.

§ 10. Further, in all cases of appeal or reformation it is observed, that the judge who pronounced sentence, is called and requested to appear also together with the parties, and to answer in the case if he wishes to make himself a party, (vulgo *inchimatie*): which being neglected, the inpetrator is declared not admissible in appeal. (2)

§ 11. In cases of appeal no new facts or allegations may be alleged, unless it takes place under the benefit of civil petition (3) which was granted; on which account, in cases that come from the provincial to the high court, if they had been recorded, the whole suit is brought over closed and sealed according to the register, to be decided upon the same documents, whether well or wrongly decided (4). But in appeals that come from the villages and cities to the provincial court, it is at present not so strictly observed.

§ 12. An appeal may be made to a higher judge from all decrees and decisions of inferior judges, by which a party conceives himself to be prejudiced: for it is a privilege granted to those who are prejudiced and aggrieved by the judge of the court below; and as he, who uses his right, injures no one; so he injures not the judge who appeals to a higher judge against the decree given by him. (5)

Whether and when from Interlocutory Decrees.

§ 13. An exception, however, is made in favour of provisions and interlocutory decrees, which are reparable by definitive sentences, and which may be redressed by final decision, and are not followed by infamy (6). One may likewise appeal against a decision respecting the competency or incompetency of a judge; although this seems to be an interlocutory decree, it is not reparable by a definitive one (7). Under this class of decisions are likewise reckoned all decisions of cases of possession; therefore, if it be questionable whether a provision decided can not be redressed definitively, in such case a mandate to be admitted as appellant is granted instead of an appeal, which

(1) See Zurk's Codex Bat. voce Appel. § 81. p. 70. in notis.

(2) See Instruct. van den Hove, art. 206; van de Justitie van de Steden, art. 21.

(3) Contra. l 4. Cod. de temp. appel. Zypæ, notit. jur. Belg. tit. de appel. vers. ob expensar.

(4) See Instruct. van den Hogen Raad, art. 222.

(5) l. 1. Ff. de appell. l. 5. § 1. & l. pen. de his quæ ut indign. l. 20. Cod. de appel. l. 55. Ff. de reg. jur.

(6) See Ampliat. van de Iustruct. art. 3. Nader Ampliat. Resolut. van de Staten van Holland, March 19, 1622, art. 1. in the new Papegay, 282.

(7) Gail. 1. obs. 130. n. 9. Zutphen, Pract. p. 34. § 14.

does not suspend execution, and does not prevent the gainer from proceeding with the case. (1)

Whether and when from Criminal Decrees.

§ 14. II. From criminal sentences, pronounced upon the confession of the guilty person, in which they proceed extraordinarily and summarily at law, no appeal is granted to the person condemned (2). But, according to practice, the officer and prosecutor, who finds himself aggrieved by an inferior judge, may always appeal to a superior. (3)

In which case some are of opinion that the person condemned, (the case having come in appeal through that means) ought to be admitted in a subsequent appeal by a superior judge; and so in the case of Charles Payelle, who committed a rape upon a young woman on the road, and having attempted to commit another rape upon another young woman, was sentenced to the gallies for twenty-five years by the men of Watering, the procurator general appealed from that sentence; and thereupon the sentence having been annulled by the court on the 4th July 1606, and he being condemned to be beheaded, it was judged by the members of his court, that as the procurator general had appealed, he was also at liberty to appeal further in consequence thereof. But the members of the high court having seen the prisoner's confession, his prayer was rejected on the 19th July following. Accordingly the sentence was executed, and he was put to death.

From other criminal sentences, in which they proceed slightly and usually at law, a person should by right be admitted in appeal (4). The way of appeal was always open for those who were admitted into an ordinary suit; but in the year 1718, on account of the misuse made thereof, it was enacted by their high mightinesses, that all thieves, vagabonds, and highwaymen, having been once corporally punished for their offences, and being again accused thereof, should not be admitted in appeal or revision against the sentence of punishment for the second time. (5)

In France (6) a person may appeal from all criminal sentences to a higher judge without distinction; but in Flanders no appeal

(1) See the new Papegay, p. 297. 299.

(2) l. 1. Ff. de confess. l. 2. Cod. quorum appellat. non recip. et ibi Bald. Plac. Sept. 10. 1591. Neostad. dec. 47. Merula, Prax. Civ. lib. 4. tit. 93. c. 7. n. 4.

(3) Ita tenent Grammat. decis. Neapolitan. 14. n. 1. post Innocent. Abb. Bart. Bald. Angel. et Parid. de Puto locis ibi citatis. Jacob. Cancer. Var. Resolut. num. 1. c. 17. n. 15.

(4) l. 6. Ff. de appellat. junct. l. 2. in fine. Cod. quor. appellat. non recip.

(5) Plac. July 17th, 1718. Zuris Cod. Bat. appel. § 20. p. 55.

(6) Autum. ad d. l. 2. Cod. quor. appellat. non recip. Bugnon. de legibus abrogat. lib. 2. sect. 148. Imbert. Instit. Forens. lib. 4.

is allowed in criminal cases (1); because no one may be condemned to death, unless he confesses the crime with his own mouth, either there (2), or in Germany (3), or in Spain (4), or in Italy. (5)

In Holland, Brabant, and other adjacent places, it is not so certain: the general practice, however, is, that although the crime be proved by witnesses and clear proofs, and is otherwise notoriously known, yet the confession of the offender himself is extorted by means of torture, if he be obstinate; and without it no one is condemned to death (6). And in the statutes of Rynland (art. 2.) it is expressly mentioned; and Peter Christiaansz Bor attests the existence of such a custom at Leyden (7): by which all appeals and provocations proceeding from criminal cases are undoubtedly much prevented; whereas, according to law, any person receiving justice upon his own confession, is not admissible in appeal (8): so that, according to Grotius (9), it was maintained by the States from antient times, as appears in the suit against Brabant, whereupon sentence was pronounced in the year 1549; and formerly also by the court of Holland, as appears in a letter of the year 1545, written to the great council of Mechlin, which is also mentioned in the grant obtained by the States of Holland from King Philip, in the year 1564; concerning which the court of Holland, writing again in the year 1564 to the great council of Mechlin, certifies the above customs to be thus, viz. "That in criminal cases decided by inferior tribunals, as well as by them, relative to body "or limbs, no appeal was permitted of old in Holland;" and subsequently, by a resolution of the States of Holland, passed on September 10, 1591, it was enacted, that no provision should be granted by the provincial court in Holland at the application of any person, in which they shall have proceeded extraordinarily in criminal cases, and upon confession of the offender himself;

(1) Wieland, Pract. Civ. tit. 9. c. 21. n. 17. Damhouder, Prax. Civ. c. 234. n. 17. et Prax. Crim. c. 151. n. 3.

(2) Damhoud. dict. c. 234. n. 17. contra, l. 16. Cod. de pœn. et l. ult. Cod. de probat. Quod an de jure procedat. vide apud Boss. Prax. Crim. de convict. n. 2. et seq. Christin. vol. 4. decis. 109. Gomez, Resolut. tom. 3. c. 13. n. 3.

(3) See Mynsinger, centur. 2. observat. 98. n. 2. et centur. 4. obs. 41. Gail. lib. 1. obs. 1. n. 28. et de pace publica, c. ult. in fine, n. 36. Wesemb. consil. 43. n. 80. Nicol. Rausner, numer. 2. decis. 23. lib. 2.

(4) Zigismund, Zcacch. lib. 1. c. 97. n. 62, 63. 87. 93. et 95. Cawarr. Pract. Quæst. c. 23.

(5) Clar. § fin. quæst. 99. n. 3. Vincent. de Franch. decis. 637. n. 2. part. 4.

(6) Gudelin, de jure novias. lib. 5. c. 14. vers. utrum. Zypæ, not. jur. Bel. de appell. vers. in criminib. Neostad. Cur. Holl. dec. 47.

(7) Nederlandse Historien, lib. 5. fol. 192. verso.

(8) per l. 2. Cod. quor. appellat. non recip.

(9) Apologie, c. 12.

but that sentences, pronounced in the said cases against the person condemned, should be executed without any appeal, reformation, or provocation being allowed against the same. (1)

With regard to Zealand, it is also inserted in the eighth and following articles of the treaty between Holland and Zealand, of the 20th September 1596;—that, as the cities in Zealand have from antient times decided criminal cases by arrest, without allowing any appeal; therefore, no provision of appeal, reformation, or any other, shall be granted by the high court in such cases; but that all sentences, either interlocutory or definitive (nothing whatsoever excepted), which shall be pronounced in extraordinary suits upon the confession of the delinquent or preparatory information of the officer, shall be and remain fully executed, and no appeal shall be allowed against them; and likewise that no appeal shall be allowed from sentences pronounced in suits conducted by the ordinary officer, when they carry with them any capital or corporal punishment, &c.; unless in banishment, or any honourable or other amends.

The same regulation is in use throughout the Netherlands (2), as well as in the villages and manors, where the right of the supreme government is exercised without any appeal being allowed against the same. (3)

III. All sentences or decrees pronounced by the provincial court respecting the police of the country, correction of inferiors, civil amends, or pecuniary fines, pronounced for the benefit of the fiscal, are executed without security, notwithstanding appeal, and without prejudice thereof. (4)

Whether and when, against Decrees in Matter of Correction, Refusal of Consent of Marriage, Cases of Renters and others concerning Dikes, Correc-

§ 15. IV. In all cases pronounced by way of correction by the political government over their burghers, either publicly to prohibit them the city, or privately respecting certain fines, no appeal or reformation is granted. (5)

Neither is any appeal allowed in matrimonial cases respecting consent between the parents and their children, against the refusal of parents, confirmed with the like declaration and refusal of the magistrate, according to the resolution of the States of

(1) See this resolution, in Cous. et Adv. Rotterd. vol. 3. p. (mihi) 353. See also Christin. ad leg. Mechlin, tit. 2. art. 43. n. 15. Bald. ad l. 1. in fin. Cod. de jure jurand. propt. calumn. Covarruv. Practicab. Quæst. c. 23. n. 5. et Less. de justit. et jure, lib. 2. c. 29. n. 152.

(2) According to Christin. ad leg. Mechlin, tit. 1. art. 1. n. 12.

(3) l. unic. Ff. de offic. præfect. prætor. l. 1. Ff. a quibus appellare non licet. For a further discussion of the cases above treated of, the reader is referred to Mr. Peter Bort's Tractaat van Appel in Criminele Saken (Treatise respecting the use of appeal in criminal cases.)

(4) Instruct. van 't Hof. art. 218.

(5) Vide supra, book i. ch. ii. § 19. p. 12.

Holland in the case of Maritge Dirksz, widow of Johan van Graswinkel, against Hubert Jacobsz Grinain and Geertjen van Graswinkel her daughter, pronounced at Delft on the 23d December 1598, and by an edict of the states of Holland renewed on the 27th September 1663. tion by the Political Government, Default, and Voluntary Condemnation.

Against decrees made in cases of renters respecting the revenue of the country, a person may only have a reformation; and no appeal, or inhibition or suspension, is granted against the same; but they ought to be satisfied without diminution or delay, as is shewn in a subsequent page.

It is also observed in cases respecting *excise* and *income* of the cities, which also are provisionally executed, notwithstanding appeal or reformation, according to the resolution of the 22d January 1590. And likewise all sentences or decrees of inferior judges, respecting matters of dykes, watercourses, sluices, police, fines of officers, correction, and others of similar nature, are executed upon security, notwithstanding appeal, without prejudice thereof. (1)

V. All cases pronounced upon default or contumacy (2), and all voluntary condemnations, cannot be admitted in appeal; because negligence and free submission are considered as a confession and surrender, against which there is no appeal (3); in so far, that if any one had been admitted to appeal by the higher judge and permission of the parties, the sentences which followed thereupon would of themselves be null and void (4). But Groenewegen (5) is of opinion, that application for relief against the same may be made to and granted by the supreme government, for certain reasons.

VI. In order that the authority of, and respect due to, the judge, may not be despised, and also to prevent litigious and malicious persons from vexing their adverse parties with appeals for trifling causes, or from endeavouring to benefit themselves by the delay and suspension of a little time, various excellent regulations have been made respecting these cases, according to which every one must behave himself in appeal and provocations.—Thus,

§ 16. (1.)—The inclosed cities of Holland, including the Hague, may likewise decide by arrest, up to the amount of fifty Up to what Amount Causes may be decided

(1) Vide Instruct. van den Hove, art. 213. et 218.
(2) l. 13. § 2. 4. Cod. de jud.
(3) l. 23. § 3. Ff. de appellat. junct. l. 73. § 3. Ff. de judic. et l. 8. Cod. quorum appellat. non recip.
(4) Per ea quæ tradit. Jul. Cæsar Rugellinus tract. de appellat. § 2. c. 3. n. 225. See also Damhouder, Prax. Civ. c. 78. n. 30. et c. 230. n. 2.
(5) Ad d. l. Cod. quorum appell. non recip.

in the Cities, and in Villages, by Arrest and without Appeal.

gilders; and the bailiff and men, and magistrates of villages, up to the amount of twenty gilders, without being subject to any appeal or provocation (1); unless their decrees were followed by infamy.

(2.)—Nc inhibition is granted by the high court against sentences of the provincial court, if the amount does not exceed 800 gilders (2); and provisional or interlocutory sentences of the said provincial court have execution upon bail up to the amount of 1500 gilders (3). Decrees of the forester and his companions, imposing pecuniary fines under and not exceeding 100 gilders, are executed without security, pursuant to the proclamation of the 25th June 1621.

§ 17. Up to what Amount no Inhibition may be granted.

(3)—The definitive and final sentences of large cities, viz. Dordrecht, Haarlem, Delft, Leyden, Amsterdam, Gouda, and Rotterdam, are put in execution if they do not exceed the amount of 300 gilders; the other inclosed cities, including the Hague, not exceeding 150 gilders; of the bailiff and men, 60 gilders; of the magistrates of villages 40 gilders; all under caution or security *de restituendo* if otherwise found proper, notwithstanding the appeal (4). But, by a proclamation issued May 8 1674, the preceding amounts were increased; viz. the inclosed cities, including the Hague, may, by arrest, without being subject to appeal, decide, instead of 50, to the amount of 100, and the villages, instead of 20, as far as 40 gilders; and that the definitive sentences, notwithstanding appeal, should have execution in the said large cities, instead of 100, to the amount of 600 gilders; and the other inclosed cities, including the Hague, instead of 60, up to the amount of 120; and the villages, instead of 40, up to 80 gilders; each gilder containing 20 stivers of Holland currency.

But, if any one be condemned from several causes, altogether exceeding the above amount, though each of them separately does not exceed the same, a distinction ought to be made, viz. that if they be of one and the same case, and so that they follow from each other, or if they cannot be separated from the others, then such accumulated condemnations are computed for one amount (5); and so it has been decided in several cases by the court of Friesland. (6).

Fine for ungrounded Appeal.

§ 18. Lastly, those who are understood to have appealed wrongly and unjustly, are fined before the court, in appeal, in

(1) See Nader Ampliat. van d'Instruct. (subsequent ampliation of the instruction) art. 1.
(2) Ibid. art. 22.
(3) Ibid. art. 19.
(4) Ibid. art. 2, 3, 4.
(5) l. 11. Ff. de jurisdict. l. 10. § 1. Ff. de appellat. Andr. Gail. lib. 1. obs. 123. n. 3.
(6) See Sande, lib. 1. tit. 13. def. 4.

40 gilders, in reformation 20; before the high court, in appeal, 75, and in reformation 36 gilders; and in revision, in a fine of 200 gilders, being the fines of wrong appeal; all which fines are to be deposited with the treasurer of exploits (*Rentmeester van d'Exploicten*) before a party is admitted in appeal, reformation, or revision. (1)

What Pleas to be alleged in Appeal.

§ 19. In appeal before a higher judge the claim is made in the following manner, for one who had the decree against him: "To annul or correct the decree in question, and to do what "the judge in the first instance ought to have done, that the "defendant's claim and conclusion, made and taken against "the impetrator there, should be dismissed, making claim of "costs, &c." For a plaintiff who has the decree in his prejudice, "to annul and correct, &c. and doing so, &c. that the "impetrator's (plaintiff's) claim and conclusion, made and taken "in the first instance against the defendant, should be ad-"judicated."

On the other hand, the defendant, in case of appeal, answers thus: "On account of subreption and oppression, that the "plaintiff is finally not admissible, and ordinarily for approba-"tion of the decree in question;" and when a person may insist upon the termination of the inhibition; and if the case is situated so that it ought to have execution provisionally, then it is added thereto. "For approbation of the decree in ques-"tion *ilico*, at least that the clause of inhibition should be provi-"sionally terminated, *cum expensis*."

What in Relief of Appeal.

§ 20. In relief of appeal, thus, "That the impetrator do sup-"port the clause of relief, inserted in his mandate or civil peti-"tion; and further in appeal to annul and correct, &c." By the defendant, "For final rejection, not being admissible, and "ordinarily for approbation, &c."

What in Reformation.

§ 21. In reformation, when no suspension of appeal is required, the proceedings are held in the same way *mutatis mutandis*. If appeal has been rejected with the clause of inhibition, and mandate only is granted to be received as appellant, the proceedings run thus:

How to be admitted as Appellant.

§ 22. "That the impetrator shall be admitted as appellant "of the decree, &c., and therefore in appeal to annul, &c., and "doing, &c., and that provisionally the clause of inhibition "should be granted to the impetrator."

(1) Nader Ampliat. (subsequent ampliation) art. 9, 10, 11, 12, & 13.

On behalf of the defendant, " That the plaintiff is not finally " admissible, and ordinarily for approbation of the decree in " question *ilico*, at least that the provision prayed for by the im- " petrator should be dismissed *cum expensis*."

Upon an Inhibition till a certain Day, whether that Day is included.

§ 23. If the clause of inhibition is not granted fully, but is only to take effect till a certain day, the impetrator must add thereto, " That provisionally, the clause of inhibition, granted " to the impetrator until a certain day, shall be continued until " the termination of the case." On the other hand, the defendant only prays " That no provision may be granted to the im- " petrator," without praying for further termination of inhibition, which by rejecting the provision is also sufficiently rejected to him.

Of the force of such Inhibition.

§ 24. The clause of inhibition until a certain day is of such effect, that the defendant may avail himself of that day, and compel the impetrator to make claim on the same day, or that he be discharged from the suit, the benefit whereof is, that the inhibition and suspension ceases, and the defendant may proceed according to the decree.

But if the inhibition was granted until a certain day, with this additional clause, " precisely and exactly on that day," then the impetrator is bound to cause the case to come on even on that very day, or else the inhibition and suspension granted become void, and the decree may be carried into execution.

What Pleas are to be read in reduction.

§ 25. In reduction, that is, revision of a decision of good men, the proceedings run thus: " In reduction to annul or correct the " decision of the arbitrators in question, and ordinarily that the " same should be reduced *ad arbitrium boni veri*; and therefore " that the claim and conclusion of the impetrator, made and taken " before the same, shall be adjudicated, or otherwise the decision " be against the defendant, that the claim and conclusion of the " defendant, made and taken before the same, should be dis- " missed."

For and on behalf of the defendant, it is prayed, " For ap- " probation, &c." in the same manner as in appeal or reformation.

Grievances *à minimâ*, when and how to be proposed.

§ 26. If the case had been partly decided and partly rejected, and the one or other appeals from it, the defendant may likewise contradict it, and say he did not gain his whole case, which is denominated a grievance *à minimâ*, thus: " By the defendant " proposing provisionally a *grievance à minimâ* so far as his whole " claim was not adjudged to him;" or " for as much as the plain-

" tiff's whole case is not dismissed, concluding therefore likewise " in appeal to be annulled, and doing, &c. and answers upon the " claim of the impetrator, that he is not finally admissible, and " prays ordinarily for approbation, &c." whereupon the impetrator then answers again, " With respect to the grievance " *à minimâ* concludes finally, that the defendant is not admis- " sible, and ordinarily that the defendant should be declared, " by the decree in question, not to have been aggrieved con- " cerning the same persisting for reply, &c."

In Appeal to make no Reconvention.

§ 27. In appeal no reconvention may be made, if it had been neglected in the first instance; because, in appeal, no new facts may be introduced, as already shewn: and so it was determined by sentence of the court, in the case of Guiljame Barteleti against the West India company, on the 11th March 1650.

What Pleas are to be alleged in Revision.

§ 28. In revision, the proceedings run thus: " Concluding " upon the reasons and means mentioned at large in the man- " date, and on behalf of the impetrator deduced at large in the " suit, in revision, that by the sentence of the high court, as " well as by the lords adjuncts or revisors, it shall be declared " to be erroneous, and that therefore the said sentence and " arrest (under correction) shall be annulled, and that the said " error found therein shall be corrected, &c." That on the " other hand the party shall answer, " That it is not finally ad- " missible, and prays ordinarily for the approbation of the arrest " or sentence in question, and that it should be declared, that " no error had been committed therein; making claim of costs, " &c."

CHAP. XXVI.

Of Execution, and Opposition against the same.

§ 1. *When and by whom the Execution of a Sentence must be effected.*
2. *How, when the Person or Property is under another Jurisdiction, and out of the Compulsion, by Law, of him who pronounced the Sentence, and how by requisitorial Letters.*
3. *Nature of Executions, and when they are to be applied for and renewed; and how the Execution before the Court is conducted.*
4. *How in Cities and in the Country.*
5. *How any one is put into Possession in Sentences affecting Real Estate and Possession.*
6. *Of Execution in cases merely personal, against the Person of him who was condemned; by summoning and renovation.*
7. First, *upon the moveable Goods, and in what manner.*
8. *Of pointing out the principal Debtor's Property by the Security.*
9. Secondly, *how and when upon immoveable Property.*
10. *How by Execution of the Court.*
§ 11. *How upon special Hypothecation and Goods declared to be liable to Execution.*
12. *Whether and when by Arrest against the Person, and by Imprisonment.*
13. *Proclamations on Sundays and Market Days, of what Effect.*
14. *Whether and when Opposition agtinst Execution has Effect with regard to the Person himself against whom Execution was carried into Effect, and before what Judge.*
15. *Within what Time a Sentence becomes void and prescribed.*
16. *New Letters of Execution, whether and when to be applied for.*
17. *Whether Payment and Compensation or Set-off may be opposed to Execution.*
18. *Opposition of a third Person how to be made, and when admissible.*
19. *Penalty, whether and when necessary.*
20. *In a Matter consisting of Acts, how the Execution is to be effected by Imprisonment.*
21. *Of the Proceedings when a Decree is not clear.*

When and by whom the Execution of a Sentence must be effected.

§ 1. ALL sentences, against which no appeal, or of which no reformation or revision is applied for to higher tribunals, may, after the time fixed for commencing and prosecuting the same, and after the sentence becomes absolute, (which we term *being admitted* or *approved of*,) be carried into execution upon the prayer of the party who gained the cause, by order of

the judge who pronounced such sentence (1), so far as the person or the property, on which the execution must be effected, is under his jurisdiction. (2)

How, when the Person or Property is under another Jurisdiction, and out of the Compulsion, by Law, of him who pronounced the Sentence, and how by Requisitorial Letters.

§ 2. If the person or property is out of the jurisdiction and compulsion by law of him who pronounced the sentence, application is made for *requisitorial letters*, which are recommendatory letters whereby one judge transmits the same sentence to another; and requests, as the person or property against whom or which the sentence was pronounced, resides or is situated within his jurisdiction, that it may please him, for the purpose of doing justice, to cause the said sentence to be carried into execution against him, or it: this, being requested, may not be refused. (3)

Nature of Executions, and when they are to be applied for and renewed; and how the Execution before the Court is conducted.

§ 3. For the execution of a sentence, prayer is to be made to the court, and an execution must be taken out of the registry, by which the door-keeper or judicial messenger is directed to carry the judgment into execution (4). This remains good for one year; but as it is prescribed if it be not executed, new letters of execution must be again applied for and taken; which *executorium*, together with the judgment, is delivered into the hands of a judicial messenger, who, according to its form and tenor, carries it into execution.

How, in Cities and in the Country.

§ 4. In cities and in the country the judgment is only written down by the secretary or registrar, and is issued under his signature, and delivered into the hands of the judicial messenger, in order that he may proceed with the same according to its form and tenor, and to the usual manner of carrying executions into effect.

How any one is put into Possession in Sentences affecting Real Estate and Possession.

§ 5. Upon all sentences concerning *real* estates and possession, by which any immoveable property, or possession thereof, is adjudged to any one, the parties who have gained the cause are established in the property, and actually put into possession, and the losers are put out of possession, and the former are kept therein, and countenanced and strengthened (5): but according to the opinion of some, before such institution of facts takes place respecting the goods adjudged, the loser ought to be previously ordered and informed to withdraw his hands from the said goods, and to leave the same within a certain short time, and allow

(1) l. 2. Cod. de execut. rei jud.
(2) Arg. l. 4. Ff. de jurisdict. junct. l. penult. & ult. Ff. eod.
(3) Arg. l. 15. § 1. Ff. de re judic. Ordonn. op 't stuk van de Justitie binnen de Steden en platten lande, art. 27. Christin. ad leg. Mechlin, tit. 1. art. 30. n. 4.
(4) See a precedent of this instrument in the New Papegay, p. 404.
(5) Instruct. van den Hove, art. 172. facit. l. 68. Ff. de rei vind.

the gainer the possession thereof(1); which agrees with the practice in the cities and in the country, where the sentence is read to the gainer and the possessor of the goods adjudged, by the messenger of the place, and notice is given to him to withdraw his hands from the goods so adjudged within three days, and to allow the possession thereof to the gainer; and in case they do not do it within the said three days, then, in the presence of two members of the court, the person condemned, or the possessor of the said goods, is actually put out of possession, and the gainer is placed therein. (2)

In personal actions, in which a sum of money is adjudged to any one, a distinction ought to be made, whether it is *single* and merely personal; or whether for the same, any immoveable goods were hypothecated, which by the sentence have been declared bound and executable for the same.

Of Execution, in Cases merely Personal, against the Person of him who was condemned, by summoning and Renovation.

§ 6. In matters merely personal, the sentence is carried into effect in the following manner; viz. the door-keeper of the court with the sentence and execution, or in the cities and in the country the messenger with the sentence, proceeds to the person of the party condemned; and, having read the same to him (shewing at the same time his door-keeper's or messenger's staff), announces to him, that he is to pay into his hands within twenty-four hours the amount therein contained; or otherwise that, in default thereof, he will proceed with the execution begun by him. This is denominated *summoning*.

On the expiration of the said twenty-four hours, if no payment has been made, he requests and orders him again to make satisfaction, within twenty-four hours, of the amount contained in the judgment, or to point out some goods in order that such officer may carry the execution into effect, and recover the said amount thereupon. This is denominated a *renovation*.

On the expiration of the time so fixed without payment, or without pointing out the goods from which the amount adjudged may be recovered, the said officer proceeds, in the presence of two aldermen, men, or sworn persons, to arrest and take into custody the moveable goods and chattels which he finds; and causes the same to be either kept by the servants of the officer of the place (if unmanageable), or else he brings them to the court-house; where he is obliged to detain them for the period of six days, within which time the person condemned may cause

§ 7. *First*, upon moveable Goods, and in what manner.

(1) Bart. & DD. all. a Divo Pivo. § 2. Ff. de re jud.

(2) Ordonn. op 't stuk van de Justit. &c. art. 29, 30.

them to be released, on paying the charges incurred thereby (1). After which, the door-keeper or messenger (having affixed public advertisements and caused publication to be made on a Sunday as well as a law-day), causes them to be sold on the next market day, in the cities, and on the next law-day in the villages, to the highest bidder, in the presence of some persons of the court, as he finds it expedient; and from the proceeds thereof he pays the amount adjudged to the creditors; and after deducting the law expences incurred by the party against whom the execution was effected, he delivers the residue to him, with a proper account of the transaction. (2)

Of pointing out the principal Debtor's Property by the Security.

§ 8. It is to be remarked, that a security, by virtue of his bail executed under renunciation, may point out the goods of the principal debtor, if there be any. (3)

Secondly, how and when upon immoveable Property.

§ 9. If the moveable goods are not sufficient to recover therefrom the amount adjudged; in that case, besides the same, and in the presence of the persons aforesaid, the said door-keeper or messenger proceeds to arrest first the *immoveable* property of the person condemned himself, and then the tributary goods and quit-rents and the fruits of feudal tenures, and after the same the feudal tenures themselves; of which arrest he gives notice to the debtor condemned, with judicial prohibition from disposing of or alienating the same, as he ought to carry his writ into execution upon them in due form. After which, they are publicly sold in like manner for ready money, after proclamation duly made on four preceding Sundays and market days in the cities, and on four Sundays and law-days in the country, and after affixing adververtisements in the nearest adjacent cities or villages where the execution is to take place: and the money arising from such sale is paid in the manner above described (4); but with this distinction, that the sale by execution of judgments of cities and villages is held at once in a common way of selling by bidding and bidding up, by abatement, and crying *mine*; and the highest bidder crying *mine*, becomes the purchaser.

How by Execution of the Court.

§ 10. But the sale of immoveable property by virtue of a sentence of the court, is held by the extinction of a burning candle; and such property is sold to him who offers the highest price at

(1) Arg. l. 19. Cod. de usur.

(2) Instruct. van den Hove, art. 173—176. Ordonn. op het stuk van de justitie in de Steden en den platten lande, art. 24. facit. l. 15. § 2. in verb. primo quidem res mobiles Ff. de re judicat. l. 31. Ff. de re judicat.

(3) l. 1. & l. 4. Cod. quando fiscus vel privat. debitoris sui debitores convenire possit vel debeat. See also Cost. & Handvesten tot Amsteldam, A.D. 1663. pp. 178. 193.

(4) Instruct. van den Hove, art. 179—181, 193. Ordonn. op 't stuk van de Justitie, &c. art. 25.

the extinction of the said candle: but the said sale is afterwards confirmed by a decree of the court; in which (previously to such confirmation) the property is again put up, in order to ascertain whether any one will bid more, and it is given to him who offers the highest price before the seal is withdrawn from the wax with which the said decree and confirmation is sealed; if not, the first sale is confirmed and approved of: if sold for the second time to the highest bidder, the earnest money given by him at the sale is returned to him, with double ransom. (1)

How upon special Hypothecations, and Goods declared to be liable to Execution.

§ 11. If, by virtue of any obligation or hypothecation, proceedings be had against immoveable property, or else if by sentence any property mortgaged for the amount is declared subject to execution, notice is given thereof to the person condemned so possessing that property, and he is warned to satisfy the contents of the said sentence, or that in default thereof the said property (having been declared hypothecated for the same) will be publicly sold by execution, after which such property is sold in manner above described, after proclamation made on four Sundays and market-days or law-days. And likewise, if any moveable property be declared bound by arrest, it is sold in the same manner as immoveable property is. And in arrest against the person, or against any property, effected only to ground the jurisdiction of the judge, the decree against the person, and in case the arrested property be deficient, for the said deficiency, is transmitted by requisitorial letters and by recommendatory letters to the judge where the person resides, or the other property is situated, and is there carried into execution against the person and further property by their messenger, in the mode already described. (2)

If neither the moveable nor the immoveable property be sufficient, then the actions and outstanding debts are arrested; and the execution is effected in the manner already described with respect to the moveable goods. (3)

Whether and when by Arrest against the Person, and by Imprisonment.

§ 12. If there be any reason to suspect that neither the moveable and immoveable goods, nor the actions and debts, are sufficient to recover therefrom the amount contained in the judgment, then, together with the arrest against the property, there is likewise granted an arrest against the person, who (if he is to be found) is kept until the execution against the goods is effected; or if he knows of no more goods which he can point out, or if

(1) Instruct. art. 190. See the mode of proceeding above noticed fully described in the New Pupegay, p. 404. & seq.

(2) Ordonn. van de justitie in de Steden art. 27.

(3) Ibid. art. 26.

they be evidently not sufficient, he is then at the prayer of the creditor instantly, or otherwise after the execution is effected, imprisoned and detained (1), at the rate of three stivers per day, until he has paid the deficiency; but in case time changes, at six stivers at least, according to circumstances. (2)

Proclamations on Sundays and Market-days, of what Effect.

§ 13. The proclamations or publications made on Sundays, market-days, or law-days, require specially that all persons, who wish to oppose the said sale, or to appear as joint creditors, should in the mean time make themselves known to the secretary, registrar, door-keeper, or messenger; who will admit them as opponents, commit to writing the reason of their opposition, observe a proper preference in the payment of the money arising from such sale, and make good report upon every matter; under the penalty that, in case such persons fail to come forward, they will be deprived of the arrears due to them.

Whether and when Opposition against Execution has effect with regard to the Person himself against whom Execution was carried into Effect; and before what Judge.

§ 14. Opposition against the execution takes place only with regard to a *third* person, but not with regard to the person himself against whom execution is effected, who is *not* admitted in opposition (3). But if he intends to offer any reason, as that the execution is effected erroneously and contrary to the order, or is extended and explained further or otherwise than the decree contains (4), or that the judgment whereupon such execution is effected is prescribed, and the like, he ought in such case to appeal thereupon, and conclude that the proceedings of the execution should cease, together with the consequences thereof. But, in cities and in the country, he is also admitted in opposition; and his reason of opposition is heard on the law-day first following; and thereupon he is declared to be a good or a bad opponent. If it be contended who ought to be judge in respect to the opposition against a judgment which by requisitorial letters is carried into execution before another judge, and not before him who pronounced sentence; it is understood, that if the opposition occurs only respecting the *manner of carrying* the execution into effect, the judge, who causes the execution to be effected, may decide thereupon; but if the opposition concerns the *matter* itself, that it ought to be referred to the judge who gave judgment. (5)

(1) Ordonn. van de justitie in de Steden, art. 28.

(2) Instruct. van den Hove, art. 164. With respect to the points when and how far any one may be imprisoned for debt, see Peer. van Bessetten en hand opleggen, c. 4. n. 2.

(3) Instruct. van den Hove, art. 177.

(4) l. 4. Ff. de appellat. l. 5. Cod. Quorum. appellat. non recip. l. 21. Cod. de appellat. et ibid. DD.

(5) Per text. l. 75. de judic. ibi Bus. et Cospl. See also Ant. Faber. ad Cod. l. 7. tit. 20. def. 1. 25. 29. Rebuff. ad Constitut. Reg. tract. de sentent. execut. art. 7. Gloss. 12. n. 29. And. Gail. l. 1. obs. 113. n. 8. Argentr. ad Consuetud. Brit. art. 17. n. 2. & seq. Sande, lib. 1. tit. 12. def. 5.

Within what Time a Sentence becomes void, and prescribed.

§ 15. A judgment pronounced is not prescribed in thirty years; but it may not be carried into execution, viz. judgment of cities and villages, after a year,—of the court, after five years,—and of the high court after the expiration of ten years,—unless a new execution be granted. (1)

New Letters of Execution, whether and when to be applied for.

§ 16. And, in like manner, no execution may be effected upon writs of execution of the court which are prescribed; but they ought to be renewed again every year (2). When a sentence has been prescribed for some years, in order that the defendant may not be under a perpetual apprehension of being vexed with an execution, against which he may have his exception, he may summon the adverse party to see the case declared deserted and dropped; in the same mode as we proceed against an appeal commenced, which is prescribed and not prosecuted (3). And likewise, according to practice, new letters of execution ought to be applied for, against the heirs of the persons condemned who died before the execution (4). But when a woman is condemned to pay any thing, and she re-marries before the execution, the execution is granted against her husband, without its being necessary to summon *him* to see new execution granted; which practice was also established in court on the 29th May 1599.

Whether Payment and Compensation or Set-off may be opposed to Execution.

§ 17. Payment and compensation, or set-off of a debt, may also be opposed to or against execution, provided there be a clear proof of it. (5)

Opposition of a Third Person, how to be made; and when admissible.

§ 18. If a third person says that the goods exposed for sale by execution, or any of them, belong to him, or are mortgaged to him, or that he, as a joint creditor of the person condemned, ought to be admitted together with him who caused the execution to be carried into effect, he must make himself known in time, or otherwise he will lose his right. (6)

In which case, preference and a judicial adjudication of the said money is observed, and the same is adjudged to him who has the best and oldest right; or among those having the same or an equal right, it is divided equally, to each according to his share, and he, who first obtained judgment and took out exe-

(1) Vide Instruct. art. 118. Ampliat. art. 30. Instruct. van den Hogen Raad, art. 263. New Papegay, pp. 81, 82. Marant. Prax. de execut. sentent. n. 54.

(2) Vide New Papegay, p. 405.

(3) See Merula, Prax. Civ. lib. 4. tit. 3. c. 13. New Papegay, pp. 102, 103.

(4) See Gail. l. 1. obs. 113. n. 17. Ant. Fab. l. 4. tit. 29. def. 10. n. 8. Christin. ad leg. Mechlin. tit. 1. art. 30. n. 10.

(5) l. 1. § ult. Cod. de compens. Joan. Papon. lib. 19. tit. 8. art. 12. Ant. Faber ad Cod. lib. 4. tit. 23. def. 4. n. 2. New Papegay, p. 406.

(6) Instruct. van den Hove, art. 87. vers. Maar indien.

cution upon it, does not acquire more right in consequence thereof than another, so long as the proceeds of the execution be not legally given to him, and a proper account is made thereof: and so it was determined by the high court in Holland on the 27th February 1652, in the case of Albert Erasmus Heerman against the superintendants of the drained lakes in Aalsmeer. For which purpose it is customary, in several cities, that the proceeds of the execution (not only of immoveable but also of all moveable goods) are not delivered to him who caused the execution to be carried into effect, but are kept in the registry; where a proper account is taken of them, and where, if there be no opposition on behalf of a third person, he may receive the same (1). With this practice coincides the opinion of Faber (2), who says, that a case decided gives no right of preference, and that the goods seized in execution can neither be taken by him who causes the judgment to be executed, nor be understood to belong to him, before it has been so declared by the judge, after the execution.

If any one, after the previous affixing of advertisements, makes himself known as an opponent, he is admitted in opposition; the further proclamations in the church are nevertheless proceeded with until the last; which having been performed, a certain day is appointed for him and the person condemned; if he had appealed or otherwise was admitted in opposition during such publications in church, or otherwise if the publications in church contain an appointment of a certain day, the reason of opposition against the fixed sale and the preceding proceedings must be brought in, and then the one is heard against the other; and thereupon the court decrees and decides in a summary way. (3)

If such third persons will not declare themselves against the sale and execution, but will only prosecute their right as joint creditors upon the proceeds of the sale, or if they mean to have a better right, the said sale is allowed by them to be effected, reserving their right of preference to the said proceeds; in which case preference is observed in the payment of the said proceeds. (4)

§ 19. If the apparitor will not admit the opponent in opposition, but nevertheless will proceed further with the execution, Penalty, whether and when necessary.

(1) Keuren der stad Leyden, art. 197. Cost. Utrecht. rubric. 16. art. 1.

(2) Vide Ant. Faber ad Cod. l. 7. tit. 20. de exec. rei jud. def. 5.

(3) Instruct. van den Hove, art. 187, 188, 189.

(4) See the manner of proceeding in the above case, fully treated in the New Papegay, pp. 423. & seq.

in such case a penalty and prohibition are granted against him by the court, which decides thereon in a summary way on the day appointed, and such opposition is declared to be good or bad. (1)

Lastly, it is to be observed, that the said proclamations in church, by which every one is called, are not sufficient to deprive the known creditors of their right to the goods disposed of by execution, such as those having any known rents, mortgage, or hypothecation upon the same, who ought to be called specially, as is already pointed out respecting voluntary decrees (2); which mode of proceeding was enacted for better security by the new statutes of the city of Leyden. (3)

In a Matter consisting of Acts, how the Execution is to be effected.

§ 20. If the sentence contains any *act*, which the person condemned is directed to perform, such as to produce an account or any thing else depending on his performance, notice is likewise given to him, by way of summoning, to comply with the sentence within twenty-four hours; when it has been renewed and prolonged for twenty-four hours more by renovation, he is personally arrested in a certain inn (*Herberg*), where he is to be found, the charges incurred thereby being previously settled, and security given for the same, and then default is allowed him with a second arrest, and he is brought up to the nearest city or court under arrest (4). If he continues under arrest, and does not prove his performance and duty within fourteen days, or that he will comply with the sentence, or does not pray to be heard as to the propriety or impropriety of the arrest (which he is at liberty to plead if he can); in that case, prayer for imprisonment and apprehension is made against him, and granted upon investigation into the case. (5)

If he remains in prison for one month, and does not comply with the sentence, the plaintiff may pray that the performance of the act or work contained in the sentence, upon a previous declaration and estimation of the loss and deficiency suffered thereby, may be computed into a sum of money; against which estimation a certain time is then allowed him to diminish and contradict the same, if he wishes, or otherwise he is deprived thereof, and the estimation is made thereupon, which is reco-

(1) See Merula, Pract. Civ. lib. 4. tit. 95. c. 4. n. 8, 9. and the New Papegay, p. 406.

(2) Vide book iv. ch. xviii. § 5. pp. 385, 386. See also Arg. l. 6. Cod. de remiss. pignor. junct. l. 27. § 7. Ff. de fidei-commiss. libert. & 46. Ff. de re judicat.

(3) Nieuwe Keuren der stad Leyden, art. 117.

(4) Ordonn. op 't stuk van de justice, &c. art. 31. Amplist. art. 14.

(5) Ordonnant. op 't stuk van de justitie, &c. art. 31. in fine. Amplist. art. 15.

vered from him by execution against his property in the manner above described, and he remains in prison until the same is fully satisfied. (1)

Of the Proceedings, when a Decree is not clear.

§ 21. If the sentence is not clear, and does not contain a certain sum or matter, but comprehends something which is still to be estimated and reckoned, as when any one is condemned to make restitution of fruits, indemnification of loss and interest, and similar points, the said sentence may likewise not be carried into execution, but the person condemned must be first called to liquidate the same, and to see the contents thereof estimated.

For which purpose commissioners are prayed for in court, before whom verbal pleadings are had respecting the said estimation, and thereupon declaration and decision is made, which may then be carried into execution in the manner aforesaid; and in order that the pleaders should not delay each other therein, the commissioners are often desired in the sentence, and the parties are ordered, to proceed before them on a certain day for the liquidation of the said sentence.

(1) Ordonnant. op 't stuk van de justitie, &c, art. 32. Ampliat. art. 15, 16. and the New Papegay, pp. 430. & seq. where the proceedings relative to imprisonment are fully described.

CHAP. XXVII.

Of Proceedings in Criminal Cases.

§ 1. *Who may, and who may not judge in Criminal Cases.*
2. *By whom the Accusation and Complaint are to be made.*
3. *Whether and when a Criminal and a Civil Suit may be instituted for one and the same cause.*
4. *Of the Office of the Fiscal.*
5. *Of all other Officers.*
6. *Their Duty before a Criminal Suit is instituted.*
7. *How to proceed in Criminal Cases, ordinarily or extraordinarily.*
8. *Of the Duty of the Officer in Criminal Cases.*
9. *How, when the Person accused does not come.*
§ 10. *How, when he appears or is present.*
11. *The Requisites to an extraordinary Suit.*
12, 13. *When and in what Cases they are to proceed ordinarily or extraordinarily, and see* § 16, 18.
14. *In what Cases the Person accused is admitted to an ordinary Suit.*
16. *Whether and when Confession is necessary.*
17—19. *Of Appeals in Criminal Cases.*
20. *Abuses in the Tribunal of the University of Leyden, in refusing Copies and Communication of Documents.*

Who may and who may not judge in criminal Cases.

§ 1. THE cognizance of criminal cases, and of cases subject to corporal punishment, is not confined to the supreme court (as in Friezland), but also belongs to inferior courts, each within its [circuit and jurisdiction (1); and therefore all magistrates and chiefs of cities and villages, besides a jurisdiction in common cases, also have the cognizance of criminal cases, with the exception of a few villages, where the aldermen have only a single jurisdiction, and the criminal cases of which places are disposed of by well born men, under whose jurisdiction the said villages are. (2)

The accusation and the prosecution of crimes were effected, according to the written laws, by the people in particular, and by them every one was allowed to do it, who would carry the same into execution; on condition, that if the accusation should prove to be false, that such punishment would be inflicted on

(1) DD. ad l. 1. ff. de officio ejus cui.
(2) Vide Gudelin. de Jure Novissimo, lib. 4. c. 2. & lib. 5. c. 13. in fin. Arnold Vinn. de jurisdict. c. 1. n. 8.

him as he intended to cause by false accusation (1). But, for the purpose of avoiding all the uncertainty, hatred, danger, and confusion which arose in consequence thereof between the people, and in good governments, the prosecution was from time to time allowed to governments of countries, who would demand the punishments of crimes, not out of any hatred and design, but in consequence of the equity of the laws.

By whom the Accusation and Complaint are to be made.

§ 2. And therefore the right to punish, and to fine for crimes, at present belongs to the county; and on its behalf this right is executed and prosecuted judicially by the fiscal or procurator general, and all officers, sheriffs, and bailiffs of cities and villages; saving only that the person prejudiced may demand indemnification for molestation, injury suffered, or loss caused to him, and may judicially prosecute for the same. (2)

Whether and when a criminal and a civil Suit may be instituted for one and the same Cause.

§ 3. According to which distinction a judgment is to be formed, whether and when for one and the same cause a criminal or civil action is to be instituted; a criminal one by the fiscal or officer, and a civil action by any individual, to have indemnification for loss sustained. (3)

Of the Office of the Fiscal.

§ 4. The fiscal or procurator general, who institutes his action before the court of Holland, has (according to the doctors) by preference a right to institute such action upon all criminal cases and forfeitures that are prescribed against, and which have remained with impunity under other judges (4); and he has further a right of preference or precedence before all other officers, to apprehend and detain those whom he surprises in the very commission of the act, and finds to have incurred the penalty. (5)

Of all other Officers.

§ 5. Moreover the complaint may be made, and the offender may be judicially prosecuted, by the officer, sheriff, and bailiff, in whose jurisdiction he is found; unless at the place where the act was committed, or the offender has his domicile, a preceding information has been taken and previously acted upon; that is, unless the case was made depending by calling in or summoning

(1) l. 1. de accus. & tot. tit. Cod. de his qui accus. poss.

(2) Vide Grotius, Inleyd, lib. 3. c. 32. n. 12. & c. 33. n. 7. Cost. Antwerp, tit. 23. art. 4. Christ. vol. iv. decis. 294. n. 4. Gudelin. de Jure Noviss. lib. 5. c. 24. vers. quod dixi. Zypæ Notit. Jur. Belg. de his qui accus. poss. Ant. Matth. de crimin. lib. 48. tit. 2. c. 2. n. 1, 2. Rebuff. ad constit. reg. in præm. gloss. 5. n. 92. & 105.

(3) Vide Clarus, § fin. quæst. 1. n. 1. Ferrar. in sua praxi. tit. 64. gloss. 1. n. 4. Bonacoss in syntagm. comm. opinion. lib. 8. tit. 30. de pœn. n. 18. See Mart. Digest. Noviss. n. 1. tit. index. ad quem. c. 1. Carpzov. Def. Forens. part. 4. constit. 42. def. 2. n. 6, 7, 8, 9. & def. 3. n. 6.

(4) Instruct. van den Hove, art. 8.

(5) Ibid. art. 19.

the offender; in which case the offender ought to be sent and delivered up to the officer who took the preceding information and previously acted upon it. (1)

Their Duty before a criminal Suit is instituted.

§ 6. Before the officer or bailiff accepts any criminal cases, or meddles with any one's person, he ought previously to take the advice of the magistrate in the same, as the procurator general does, who may take no information without the advice and approbation of the court, or of the chamber of accounts (2); excepting when he takes the offender in the very commission of the act, and in cases where he was present when the offence was committed; and likewise against vagrants, or in cases wherein delay would be productive of considerable danger, and when the offence is found of importance and notorious; in all which cases it is sufficient if the officer gives information to the judges within twenty-four hours after the apprehension and detention of the offender. (3)

How to proceed in criminal Cases, ordinarily or extraordinarily.

§ 7. And it requires further attention, that the ordinance (cited in the preceding note) concerning the form of proceeding in criminal cases, having been instituted as an eternal edict and a perpetual law, to be observed by the public upon a full knowledge of matters, was not expressly altered by the lords the states in any points or articles, nor repealed by any contrary usage; and therefore it ought still to serve as an instruction and necessary observation; there being as many reasons for such observance as there are for the observation of the instruction of the court of Holland, made by the Emperor Charles for civil cases, on the 20th of August 1531, consequently thirty-nine years before.

The judicial proceeding against offenders is commenced in two manners, and by two means; viz. 1. By personal apprehension and confinement; and 2. By summoning the offender to appear before the judge, personally.

If the offence be doubtful, whether and by whom it was committed or not; and if there be no evidence, or if the fact be denied, or the nature of the offence be uncertain; for example, (as whether homicide was committed through necessary defence or not) that we may not proceed to apply the pains of torture, or

(1) Vide Damhouder Prax. Crim. c. 33. n. 5. Sande, lib. 1. tit. 1. def. ult. Clarus § fin. quæst. 38. n. 20, 21. Wesemb. Parat. de accus. n. 8. Rebuff. de constit. reg. in prœm. gloss. 5. n. 53. Gail. de pace publ. c. 16. n. 30. Vinn. in add. ad Pecc. in l. 7. ne quid in fin. Ff. de incend. ruin. & naufr.

(2) Instruct. art. 1. junct. l. ult. Cod. de exhib. & transmitt. reis.

(3) Instruct. art. 19. Ordonnat. op't stuk van de criminele saken van Koning Philippus (Ordinance of King Philip concerning criminal cases) July 5, 1570, art. 30. Manier van procederen in criminele zaken (Form of proceeding in criminal cases) ibidem art. 2.

that the trifling nature thereof does not make it liable to corporal punishment, the action is in all these cases to be instituted by summoning the person, and according to the common way (1); and then the offender is admitted to an ordinary suit, and in that case copies are to be delivered, and the documents are to be made public; and against these he causes his defence to be made in the same manner as in a common suit. But if the name of the offence only be sufficient to establish the nature of the punishment, so that the offence being known, the punishment from the laws follows it notoriously; and if the offence is notorious, or is proved by preceding evidence; we proceed in an extraordinary mode and summary way, by an immediate apprehension and confinement, and the offender is heard further, and upon his confession justice is prayed for. (2)

Of the Duty of the Officer in criminal Cases.

§ 8. If there be any doubt respecting corporal punishment, or if the person be otherwise suspected, the officer ought, with the advice and knowledge of the magistrate, immediately to apprehend and secure him, if he is to be laid hold of. (3)

§ 9. How, when the Person accused does not come.

If he is not to be had, he is summoned, by affixing advertisements and ringing the bells, to appear and defend himself *sub poena confessi et convicti*; that is, that in default of his appearing, he will be considered guilty; whereupon, if the offender allows four successive defaults to pass by, he will be considered guilty; and, upon information and evidence, be banished, and his property will be declared forfeited, or otherwise be condemned, according to the exigency of the case (4); as was often understood by the court of Holland; and lastly, at the end of July 1640, and 7th February 1648. But a person may still be allowed to appear against these proceedings within one year, and to purge himself *beneficio restitutionis in integrum*, and upon admission to vindicate himself properly (5). But such restitution would not be well made before the same judge, but better before a superior judge, by *provocation under benefit of relief*, if the person accused remains somewhere, but however trusts there are no proofs against him, and on the contrary that he will prove his innocence by witnesses; for which purpose he requires time,

(1) Vide Damhouder, Prax. Crim. c. 3. n. 3.

(2) l. 2. quorum appel. non recip.

(3) l. 1. Ff. de custod. & exhib. reor. Vide Menoch. de arbitr. jud. cas. 305. n. 1. Gomes. Var Resolut. tom. 3. c. 9. n. 6.

(4) Instruct. van den Hove van Holland. art. 120. See Damhouder, Prax. Crim. c. 28. n. 5, 6. Anth. Math. de Criminib. lib. 48. tit. 20. c. 2. n. 23. Gudelin. de Jure Noviss. lib. 5. c. 14. vers. pen. Zypæ Notit. Jur. Belg. tit. de dolo & contumac. Clar. § fin. quæst. 44. n. 3, 4. Gomes. ad l. 76. tauri, n. 1.

(5) Arg. l. 44. Ff. de requirend. reis. Vide Christin. vol. iv. decis. 203. § fin. quæst. 94. n. 12.

or is able to give other reasons of excuse for his non-appearance; when, on the day appointed, vindication of his absence may be made on his behalf, and prolongation of time may be prayed for him to appear and vindicate himself. (1)

When any one is accused of a crime committed in his office, he ought during the accusation to be suspended from the execution of such office; which suspension produces no infamy. (2)

How, when he appears, or is present.

§ 10. The offender having appeared, or being otherwise in good custody, the officer may proceed either in an *ordinary* and communicative way, that is, to try him by making the proofs public, or in an *extraordinary* or summary way, merely upon his confession legally taken from him by examination and verbal enquiry of the officer, in the presence of two aldermen (3), and likewise by inflicting the pains of torture in great and important cases, when the offender will not in conscience confess the truth (4); and then without further legal proceedings justice is administered, unless the offender be admitted into an ordinary suit upon his own application, grounded on reason; in which case, his vindication and innocence against the accusation of the officer is made and proved according to the common form; and then copies of documents are to be delivered to the person accused, which the judge ought to be easily induced to grant, unless the importance and circumstances of the case require it otherwise; because justice greatly favours the vindication of innocence (5). And every one ought to be allowed to prove the innocence of a person accused, even in his absence, and without his knowledge (6); and the judge himself ought to trace out his innocence, although the same be not defended by any one else. (7)

Of the Requisites to an extraordinary Suit.

§ 11. But in order to prevent officers from vexing people with confinement or other inconvenience beyond what is requisite, under cover of extraordinary proceedings, three necessary points are required by the second, fourth, and following articles of the ordinance upon the form of proceeding in criminal cases of the year 1570; viz.

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(1) Vide Rebuff. ad constit. reg. de excusat. & exoner. aba. tom. 3. tract. 8. Menoch. de arbitr. Jud. lib. 1. art. 79. & seq.

(2) Vide Neerl. Adv. 1. 3.

(3) Auth. apud eloquentissimum Cod. de fide Instrum. Novell. 90. c. 5. Gail. lib. 1. observ. 96. n. 10. junct. l. 8, 9. Ff. de quæst.

(4) l. 15. § 1. l. 18. § 2. l. ult. Ff. de quæst.

(5) Vide Hypolyt. de Marsyl ad l. 1. § si quis ultro Ff. de quæst.

(6) Idem Hypolyt. Pract. Crimin. § opportune, n. 16, 17.

(7) Vide Boër. decis. 165. n. 1.

I. That the offender be detected *in flagranti delicto*, in the actual perpetration of the deed itself.

II. Or, where the offender is not detected in the actual perpetration of the deed itself, that the judge himself, upon cognizance and inspection of evidence, should direct and allow provision of *prinse de corps*, that is, to have his person seized, or should grant personal adjournment, that is, to appear in person.

III. Or, by *accusation* and *formed party*, according to the disposition (*arbitragie*) of the written laws, and at the arbitration of the judge, &c. that is, to proceed according to the course of the common law-proceedings, excepting when they are vagrants under considerable suspicion of flight, where the offence is very grievous and horrible, and where the case is found very clear by the officer.

In all these cases the officer ought, within twenty-four hours after apprehension and confinement of the offender, to give information to the judges, and also of the cause thereof, and how it appeared to him, in order that the judges may form an opinion whether the confinement is right or not; and so in the cities, with the exception of the circumstance of the crimes and the quality of the persons, communication thereof is previously made to the magistrate, who, however, in consenting either to the apprehension or personal summoning, is understood to do it only at the peril of the officer.

This mode of proceeding in some points agrees with the order concerning the procurator-general or fiscal, contained in the 19th article of the instruction of the court, "that the procu- "rator-general may take no cases of officers or others, unless "there be cause thereto; and by the ordinance of the court, so "far as it touches justice, or of those of our chamber of "accounts, so far as it concerns our finances, that he should "not sue another, excepting upon preceding information against "the person whom he wishes to sue; and that our attorney- "general shall henceforth take no preceding information, unless "it be by order of the court, or in cases which occur acci- "dentally at the place where he shall be present when the "offence was committed."

And it is also notorious in law, that incarceration does not prevail, excepting in crimes which are evident, and wherein proper evidence precedes. (1)

(1) Gloss. & DD. ad l. si quis alicui 3. Cod. ad leg. Jul. majestat.

In the city of Amsterdam, where the chief officer is appointed by the magistracy, the sheriff, and also his deputy by his order, may take up and carry to prison all persons, whether strangers or inhabitants, against whom considerable suspicion exists, at any time and at any places; and he may examine all houses and places, as well in civil as in criminal cases, without the special order of burgomaster and aldermen; but he may not imprison, apprehend, molest, or hinder any citizen in his person or property, so far as he can give sufficient security, at the discretion of the aldermen, that he will await justice upon the demand to be made by the officer against him; namely, for all offences which a citizen of Amsterdam might have committed, with the exception of murder, arson or setting on fire, rape, opposition against government with arms; or if a citizen misbehaves within the navigable ditches of Reygerbrouk at Overamstel and Oude Konynen in Goyland. The above is enjoyed by virtue of a certain privilege granted by Duke Albert on Sunday after St. George's day in 1387.

And if it happens that a citizen of Amsterdam is apprehended and confined for any other crimes not included in the aforesaid exclusion, the sheriff will notwithstanding be obliged to set him free, if any known and sufficient person will become security for him.

But if it does not take place, and the citizen is instantly carried to prison, he may on the day appointed take his exception, and declare that he is not obliged to answer upon the case, before he, by virtue of the said privilege, is released upon bail, to await justice; which exception is there admitted in such a case; and the prisoner is released under promise and security that he will appear again in judgment at any time, for such an amount as shall be fixed by the aldermen according to circumstances. (1)

And it is observed as a rule, that when the officer proceeds to confinement on a personal summoning, upon application to have the person brought in close confinement, in order by means of examination and conviction to have confession of the fact; the prisoner being heard, justice is done upon his confession, and so forth.

Whether and in what Cases they are to proceed ordinarily or extraordinarily.

§ 12. Criminal proceedings are denominated and considered to be extraordinary; which the officer has always at his option in cases wherein it is allowed, either to proceed *extraordinarily*

(1) See a more extensive account of this subject in Gerard Rosenboom's Recueil van Keuren, Costuymen, en manieren procederen binnen Amsteldam (Collection of statutes, customs, and manner of proceeding at Amsterdam) p. 46. & seq. edit. 1644

that is, by confinement and apprehension, and only upon the confession of the offender, or ordinarily and publicly; but having once deviated from the extraordinary mode of proceeding, he may not again avail himself of it.

But it will not be a hindrance to him therein that he hears the defendant on the day of personal appearance before he makes his demand upon articles and interrogatories, which are at his option, to try whether they will be productive of any light; and he may, notwithstanding the same, insist upon *provisional* incarceration and *instant* imprisonment, in order then to cause the person accused to be heard further, to find out whether on his confession alone he can bring him to his trial. This will sometimes take effect on ignorant persons, who will betray themselves; but those who know that no one need accuse himself, and that every one may avail himself of a mere denial, they will not easily be frightened by such imprisonment.

§ 13. Extraordinary proceedings may not be instituted in any other case, but in crimes liable to corporal punishment, since personal summoning, apprehension, and adjudication of provisional incarceration, (which are the beginning of all extraordinary suits), prevail only in crimes, the punishment of which is death or bodily pains, because otherwise imprisonment, which is a sort of bodily compulsion, would, on account of the additional disgrace, be heavier than the punishment required for the offence; so that, for all offences liable to corporal punishment, it is always sufficient to give security. (1)

In what Cases the Person accused is admitted to an extraordinary Suit.

§ 14. There are two ways in which prayer may be made in the name of a prisoner or person summoned to be admitted to an ordinary suit; viz.

First, In the name of the prisoner, when he is tried, a prayer is made for "*Copies of the demand, and of the appointment of the* "*principal day, and that he should be released from personal* "*appearance, or from the imprisonment in which he is, upon* "*bail, and promise to appear personally at any time when* "*required; and that he may further be allowed to employ a* "*procurator* sub pœna confessi et convicti, *or bail, if required,* "*according to the opinion of the aldermen.*"

Secondly, By contrary conclusion; as thus, "Denying the "facts of which he stands accused in the document of demand, "concluding by reasons and means to be subsequently adduced

(1) l. 1. & l. 2. Ff. de custod. & exhibit. reor. l. 2. Cod. & transmitt. reis. & ibi DD. Vide Jul. Clar. lib. 5. sent. § ultim. quæst. 28. n. 1.

" in the suit. in order that the demand should be declared " inadmissible, and for the rejection and absolution of the " demand made, and of the conclusion taken, with costs; and " that the gentleman, the plaintiff, should be condemned to " settle the detention, with the consequence thereof, as wrongly " and unjustly done, free of costs and loss; and that he should " be provisionally released, &c."

A custom prevails in these countries, that no one is punished with death, but upon his own confession of the crime. This custom was especially introduced, in order to prevent the person condemned from appealing from the sentence pronounced against him; because whoever receives justice upon his own confession, is not admissible in appeal (1); with respect to which, the use of torture is clearly prohibited for the purpose of obtaining a confession, by article 61. of the ordinance concerning the administration of criminal justice, issued by king Philip, where the proof is certain and beyond all doubt, &c.; yet it is still observed among us, for the reasons stated in the following chapter.

§ 15. And hence it proceeds that, notwithstanding the proofs are sufficient, the means of sharp examination and torture are still practised. It is true, that, on the one side, the confession tends to put the judge more at ease, and to make him more certain; but on the other side, as to the justice itself, more delay and difficulty is to be expected thence, if the prisoner under torture continues obstinate in his denial; whereby he is in some degree purged, and the evidence against him is weakened; and according to the opinion of some jurists, he ought provisionally to be released, under promise and bail to appear at any time. But as the court of Holland determined, with respect to this point, in the year 1583, that an offender who obstinately endures the torture, or withdraws his confession when once made (if the evidence be of itself clear and sufficient), ought notwithstanding to be condemned and executed (2); so torture is only applicable in case the proofs are of themselves not very clear and sufficient. The explication, however, if the presumptions and symptoms of the offender's guilt are so strong that it cannot be otherwise, will appear more fully hereafter.

But as, in law, the offender may be condemned, when the proofs are clear and sufficient, as well without as upon his con-

(1) l. 2. Cod. quor. appell. non recip. Vide Plac. Sept. 10, 1591.

(2) Vide Neostad. Cur. Holland. decis. 47. and ch. xxviii. § 4. p. 674 infra.

fession (1), so the officers of justice ought to consider with great circumspection, whether justice (according to the constitution of some strong, wicked, and obstinate offenders), would not be delayed by resisting the torture; and when the fact can be clearly proved, whether it would not be better to keep to it, and to condemn the offender even without his confession; but it is again to be considered, with respect to this point, whether in such case a person would be obliged to enter upon an ordinary suit.

As to the former point, it is not attended with great difficulty; and therein this distinction is to be made, viz. that there is great difference between one, who by decree of the judge is provisionally released from imprisonment or personal appearance, and who is allowed to have a proctor to plead, and is likewise admitted into an ordinary suit; and between one who is not released, but remains in prison for some heavy charge liable to corporal punishment, or to arbitrary correction at the discretion of the judge. And in such cases, notwithstanding there is no confession, if it is nevertheless found advisable, proceedings may take place against the offender, upon the proofs alone, which then, in its strict sense, is still no ordinary suit, but a proceeding upon such short terms, and in such order, without the common form, as is found good and directed by the aldermen. And in the collection of the statutes of Amsterdam, (art. 33.) the persons who are released from imprisonment are nevertheless not admitted into an ordinary suit; but in a similar case they are obliged upon such short days and terms, as are found good and ordered by aldermen, to conclude in law and to await the sentence, all under penalties, summarily or verbally, without putting the case upon any other list but upon that of the bailiff, as was subsequently established by the ordinance concerning the mode of proceeding at Amsterdam, of the year 1655.

§ 16. Whether and when Confession is necessary.

To what has been stated, we may add, that in some of our cities, the offender is at liberty (if he desires it) to vindicate himself, either against his confession or other proofs, summarily and verbally, in full court, before the decision; or to cause his vindication to be made, without however having any connection with an ordinary suit.

(1) Arg. l. 8. Ff. de quæstionib. & ibi DD. Farinac. Prax. Crim. vol. ii. quæst. 40. n. 19, 20. Vide Gomes. Resolut. tom. 3. c. 13. n. 20. Clar. Pract. Criminal. quæst. 74. versic. illata reo. 38. Anton. Fab. ad Cod. lib. 9. tit. 21. defin. 9. & def. 12. n. 3.

And so it was decreed by their high mightinesses the States of Holland and West Friezland, that the preservation of the mother country depends generally upon proceeding against smugglers and opposers of the common revenue of the country, and even against those who are liable on that account to an arbitrary corporal punishment in a summary way, and *de plano*, that is, without the form of proceedings; in which cases it is however observed to give communication of the documents, and verbally to refute the witnesses and evidences, but in a summary way and *de plano*, without following the common form of proceedings. (1)

The principal point to be observed in criminal cases is this; viz. That a prisoner be not improperly abridged in his vindication, or *blind-folded* with respect to the evidence. On account of which he cannot complain with any reason when such information is given to him, as is observed relative to the common revenue of the country; and when, according to the form thereof, the proceedings are carried on against him in a summary way, which is entirely left to the discretion of the judge, he being unlimited therein; namely, on the one hand to act, taking cognizance how much the general welfare depends thereon, that the crimes be punished, and the country be cleared of them by short but efficacious means; and on the other hand to prevent, that no such errors be committed by too great haste as would oppress the innocent: with respect to which, the following enactment is contained in several articles of King Philip's ordinance of the year 1570, relative to the form of proceeding in criminal cases: and especially in the thirty-second and thirty-fifth articles: namely, that all criminal suits should be commenced and proceeded upon in an extraordinary way; unless, on account of difficulty and obscurity, it be specially ordered, that the prisoner should be admitted into an ordinary suit; and moreover, that the delays found necessary to proceed or to make the documents, should be upon short terms and intervals, from day to day, or from the third to the third day, and all under penalties; and that the same should not be prolonged by the judge without important and legal reasons.

Of Appeals. § 17. But whether the decree, not being made upon the confession, but upon the evidence, would be subject to appeal on the side of the prisoner, is a question attended with difficulty, as already pointed out more particularly in ch. xxv. of this book.

(1) Generale Ordonnantie, art. 13.

But the prisoner notwithstanding, would be obliged to remain in prison; and a mandate of appeal is not easily granted by the court, without previously seeing the information, which being found perfect, the prayer for appeal is easily rejected.

§ 18. In order to distinguish criminal suits according to their proper nature, we may divide them into three sorts; viz.

I. *Extraordinary* criminal suits, in which justice alone is demanded, either on account of imprisonment, and further upon the confession.

II. Suits instituted *summarily* and *de plano*, in which we proceed upon the information and evidence, against any person remaining in prison, or who is provisionally released therefrom, or otherwise from personal appearance upon bail.

III. Criminal suits instituted *ordinarily*, in which any one is fully released from imprisonment or from personal appearance, or in which any one is summoned by the officer simply, that is, without personal necessity.

§ 19. Although sentences in criminal cases can scarcely be appealed against by the person condemned, and in the strictest sense is admissible to appeal only in such cases where the offender has been condemned without his confession; it is nevertheless observed as a common rule, that if the officer who prosecutes for and on behalf of the right of government, is of opinion that the sentence was pronounced too mildly, he may always appeal from it to a superior judge, even if the sentence was merely pronounced, that the prisoner should be provisionally released from imprisonment, which imprisonment the prisoner is in such case to endure, until the case is decided before the superior judge.

But here the following distinction is to be made; viz. That, if the person condemned was not in prison, but had appeared in judgment while at large; and if it was pleaded in such a manner upon the provision of releasing or confining him, and if the aldermen in such a case had provisionally released the defendant from the obligation of personal appearance, the officer will not then be at liberty to confine the defendant against the said provisional sentence, but the defendant ought to remain in such a state as he was previously to the litis-contestation; and he may again go as free as he was when he came.

It is likewise considered to be a bad practice, when the officer, having summoned some one in person to come and vindicate himself against the demand, conclusion, and application for imprisonment, wishes, when the defendant appears in judg-

ment for that purpose, to imprison him without instituting a demand, or having a decree of the judge for that purpose.

Abuse in the Tribunal of the University of Leyden, in refusing Copies and Communication of Copies.

§ 20. In the tribunal of the university of Leyden, a practice was introduced contrary to the general rule; viz. that in all criminal cases without distinction, whether a person pleads extraordinarily upon the confession of the person accused, or demands justice in an ordinary way upon the evidence, no communication of documents and proofs is made; and the person accused is condemned without being able to vindicate himself properly, and (as it were) without being heard; against which practice complaints were often preferred without any effect: but it has since been understood, that upon their decisions also, against which there was otherwise no appeal, an application may be made to the States of Holland for revision, and if required, it is granted: and so revision was prayed for lately, but it was left by the officer unprosecuted, as he mistrusted the said misuse; and the case, which was otherwise of consequence and importance, was discontinued.

CHAP. XXVIII.

Of Torture.

§ 1. *What Proofs are sufficient to apply the Torture to any one.*
2. *In what Manner the Offender may defend himself against the Torture.*
§ 3. *In what Manner Torture is to be applied.*
4. *What is to be done, if the Person tortured endures the Pains.*

What Proofs are sufficient to apply the Torture to any one.

§ 1. VARIOUS opinions are entertained by the doctors concerning the proofs, which are sufficient in order to apply the torture to any one: but the general opinion is, that it cannot be effected upon any presumption or small *indicia*, that is, mere symptoms of guilt, but only upon such proofs as would be almost sufficient to maintain the certainty; and in that case nothing is considered to be wanting but the confession of the offender, so that he may be, with sufficient certainty, convicted of the offence by the words of his own mouth. (1)

(1) Vide Boër. decis. 163. n. 1. 3. Christ. ad Leges Mechlin. art. 7. n. 4. Hyppol. de Marsil. ad l. 1. Ff. de quæst. n. 3. vers. secundo debent. cautelæ. criminal. dubio. 32. respons. 3. p. 146. Farin. Prax. Crim. quæst. 37. n. 1.

It is left to the discretion of the judge to decide who is to moderate the torture, so as to be always inclined to the mildest means and least prejudice of the person accused; and although the judgment of the *indicia*, or symptoms of guilt of the crime committed, which are required for the application of torture, is discretionary, the lawfulness and justness thereof are nevertheless subject to consideration (1): and they ought to be such that they are almost sufficient to condemn any one (2); but not such as are grounded upon common reports, or upon the evidence of one witness, or the preceding bad life of the person accused. And they ought to be so probable, that nothing but the confession of the person accused himself is wanting thereto (3): and several, who are inclined to think well of their fellow creatures, are likewise of opinion, that although, on account of lawful and just symptoms, one *may* proceed to apply the torture, still it is only applicable to persons of whom an ill report is circulated; and that to a man, of whom no ill is spoken, no pains of torture may be applied on account of *mere* symptoms of guilt, how strong soever they may be. (4)

Concerning the question what sort of *indicia* or symptoms of guilt are subject to the torture, see the authors referred to below. (5)

§ 2. How and in what manner the offender ought to defend and vindicate himself against the symptoms of guilt subject to torture, is treated at large by the authors cited below. (6)

In what Manner the Offender may defend himself against the Torture.

But, among us, such defence is not always allowed to the offender, especially when a case is to be tried extraordinarily; in which event it would be strange, according to our practice,

(1) Vide Damhouder, Prax. Crimin. 36. n. 3.
(2) l. 8. § 2. C. de quæst.
(3) l. 1. § 1. Ff. de quæst. l. 18. § 2. f. eod. Alber. Gentil. ad tit. Cod. de g. Jul. Majest. disputat. 3. and Farinac. rax. Crim. quæst. 37. n. 3.
(4) Ut tradit. post Andream de Isernia homas Grammatic. consil. 15. n. 4. quis accedit Hyppolit. de Marsil. Prax. rim. § diligenter. n. 196. & 97. arg. l. n omnes 5. § a barbaris. 6. Ff. de re ilitari.
(5) Vide Christ. ad consuetud. Mech. art. 7. n. 4. in fin. & n. 5. in pr. ressive. Gomes. Resol. lib. 3. c. 13. n. 7. seq. Ant. Fab. in suo Cod. lib. 9. 21. defin. 10. in not. Tholosan. in ntagm. Jur. Civ. lib. 48. tit. 12. n. 10, & late apud Hippolit. de Marsil. Pract. Criminal. lib. 2. § diligenter et latius apud Farinac. Prax. Crim. quæst. 43. & seq. See also relative to this point a good opinion in the Consult. & Adv. vol. ii. cons. 76. and seq. and see also Johan van Heemskerk, in his *Batavise Arcadia*, p. (mihi) 452. & seq.
(6) Vide Hyppolit. de Marsiliis ad l. 1. Ff. de quæst. n. 5. & DD. ibi allegati. Bossius. tit. de indiciis n. 74. & Farinac. Prax. Crim. quæst. 38. n. 3. Gomes. Resol. tom. 3. c. 13. n. 21. Christ. ad Leg. Mechlin. art. 7. n. 5. & seq. et qualiter indicia elidantur per contraria, Boër. dec. 165. n. 2. & seq. Hyppolit. de Marsil. in sua praxi, diligenter. n. 190. & seq. Tholosan. in Syntagm. Jur. lib. 48. c. 12. n. 7. Anton. Math. tit. de quæst. c. 3. n. 20. Farinac. Prax. Crimin. quæst. 38. n. 110, 111, 112.

should the communication and opening of documents and evidence be made upon an incident and interval, which we refuse even in the principal case, and which we are not bound to do. But this, however, is entirely entrusted to the discretion of the judge.

In what Manner Torture is to be applied.

§ 3. How and in what manner the torture is to be effected is also (according to the circumstances of the case and the person) left to the discretion of the judge (1); who is always to take care that the pains be not inflicted so strongly as to injure the joints or body of the person on whom the pains are inflicted (2)

What is to be done, if the Person tortured endures the Pains.

§ 4. If the person accused bears the pains without making any confession, it is by no means certain whether or in what manner he is to be punished in that event; and on this subject the same practice is by no means unanimously observed.

Thus, some doctors are of opinion that he ought to be entirely set free and released from the instance (3); and their opinion is followed by the court of Utrecht (4). And the statutes of Rhineland (art. 1.) enact, that no one shall be condemned to death, unless he confesses the crime, notwithstanding it be notorious and evident, through witnesses and other *indicia* or symptoms of guilt.

Other doctors, however, condemn him (5); whose opinion is followed by the parliament of Paris. (6)

Others, again, are of opinion, that he is neither to be set free nor condemned, but merely released upon bail, to appear in judgment at any future time (7); which is reasonable and just, if the torture was applied to the offender only upon strong presumption and symptoms of guilt.

But upon the whole, and in general, that opinion of the doctors seems to be the most reasonable, which pronounces him to be entirely free, or condemns him to an inferior and extra-

(1) l. 7. l. 10. § 3. Ff. de quæst. Vide Vigel. c. 4. quæst. 4. reg. 1. Constit. Corolin. 58.

(2) Vide Jul. Clar. Prax Crim. quæst. 64. Hyppolit. de Marsel. ad d. l. 7. Ff. de quæstion. n. 72. Damhouder. Prax. Crim. c. 37. n. 5. Christin. ad consuetud. Mechlin. art. 7. n. 11. Cost. Utrecht. rubr. 37. art. 5.

(3) Of this opinion are, Hyppolit. de Marsel. sing. 262. Papon. lib. 24. tit. 9. arrest. 1. Argentr. ad consuetud. Britann. art. 41. n. 4.

(4) Tit. de process. crim. art. 20. Cost. Utrecht. rubr. 37. art. 9.

(5) Such as Gomes. Reselut. tom. 3. c. 13. n. 20. Farinac. in Prax. Crim. quæst. 40. n. 7.

(6) According to Papon. lib. 24. tit. 9. arrest. 1. in fin. Faber. in Cod. tit. lib. 9. def. 9. & ibid. in notis. n. 2. definit. 12. n. 3. in not. Chassan. consuetud. Burgund. rubr. 1. § 5. n. 5. & Argentr. ad consuetud. Brit. tit. art. 41. n. 4.

(7) Vide Gomes. tom. 3. c. 13. n. 21. & Faber. in suo codice, lib. 9. tit. 2. def. 9. & ibi not. n. 1. & def. 15.

ordinary punishment, according to the circumstances of the case and sufficiency of proofs. (1)

It was decreed by the court of Friezland, that a person, on whom the torture was inflicted, in a case which (independently thereof) was fully proved, ought to be punished with an ordinary and common punishment (2). And by the court of Holland, in the year 1521, it was determined, that if the fact, confessed by the offender under torture, be afterwards denied by him while he is not under torture, declaring that the confession was merely made to avoid the torture, he should not be again tortured; but if the evidence be of itself clear and sufficient, the person guilty should, notwithstanding, be condemned in the said case (3). And it was afterwards enacted in the year 1583, that an offender who endures the torture out of obstinacy, when the evidence is of itself clear and sufficient, ought, notwithstanding, to be condemned. (4)

Otherwise, the confession made during the torture is not considered full, unless the person tortured, some time afterwards (at least twenty-four hours), being free from torture and iron bands, persists voluntarily in his confession. (5)

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(1) Of this opinion is Ludovic. Rom. in l. 1. § si quis in villa. Ff. ad St. Syllanian. Fachin. Controv. lib. 9. c. 6. Anthon. Matth. tit. de quæstion. c. 3. n. 22. Clar. § fin. quæst. 64. vers. illata reo. n. 38. Grammat. cons. 12. n. ult. in fin. Anton. Faber, Cod. lib. 9. tit. 21. def. 25. Rasinac. Prax. Crim. quæst. 40. n. 11, 12, 13. & seq.

(2) Vide Joan. à Sande, lib. 5. tit. 9. def. 14.

(3) Arg. l. 16. Cod. de pœn. & l. ult. Cod. de probat. Vide Neostad. decis. cur. Holland. 47.

(4) Vide Boss. Prax. Crim. de convict. n. 2. & seq. Gomes. Resolut. tom. 3. c. 13. n. 20. Faber, Cod. lib. 9. tit. 21. def. 15. Christin. vol. iv. decis. 109. n. 6. Joan. à Sande, d. lib. 5. tit. 9. def. 14.

(5) Vide Damhouder Prax. Crim. c. 39. n. 7. Gomes. Resolut. tom. 3. c. 13. n. 14. Hyppolit. de Marsil. ad l. 1. § devios severus 17. Ff. de quæst. n. 4, 5. Cost. Antwerp. tit. 14. art. ult.

CHAP. XXIX.

Of Punishments and Fines.

§ 1. *Fine, Nature of.*
2. *Punishment defined.*
3. *In what cases Confiscation of Property takes place.*
4. *What Cities are allowed by Charter to sell confiscated Property.*

SENTENCES of corporal punishment impose fines or punishments.

Fine, Nature of.

§ 1. A *fine* is a pecuniary punishment.

Punishment, defined.

§ 2. *Punishment* is bodily pain, to be inflicted on the offender for the satisfaction, and in compensation, of the crime committed by him.

This is either *mortal* (1), as when the sentence contains the clause "*until death follows*," or *not* mortal (2), as when it consists of perpetual imprisonment, banishment, whipping, branding, &c. according to the circumstances of the case, time, place, and persons. (3)

In what cases Confiscation of Property takes place.

§ 3. According to the written laws (4), corporal *mortal* punishment is commonly followed by forfeiture of property; but among us, and also in the neighbouring countries, confiscation does not take place, unless it be specially inserted in the sentence; but such forfeiture, even though it should be inserted in the sentence, may be bought off by the greatest part of the inhabitants of the cities of Holland for a certain small and trifling amount; in some, of one hundred, in others of eighty, of sixty, of fifty, of twenty gilders, and even less; all according to the privileges successively granted by the counts of Holland to various cities and villages in particular, and to the whole country in general.

This sort of buying off prevails in all crimes without distinction, even in high treason; excepting at those places, in the charters of which it is otherwise expressed (5). And in some places, those persons are particularly excluded from this privilege of buying off, who, being themselves convinced of having committed some crime, wilfully deprive themselves of their lives,

(1) l. 2. Ff. de pœnis.
(2) l. 28. Ff. eod.
(3) Vide Zypæ Notit. Jur. Belg. tit. de pœnis. Gudelin. de Jure Novissimo, lib 5. c. 15. vers. illud circa. Damhouder, Prax. Crim. c. 55. n. 4, 5.
(4) l. 1. et tot. tit. Ff. et Cod. de bon. damnat.
(5) Vide Cons. & Adv. Amstelodam. vol. iii. cons. 187. vol. ii. cons. 1c.

as appears in the following charters and privileges carefully inserted by Johan van Heemskerk in his Batavian Arcadia (1), which I mostly relate, adding to them such additional particulars as I have been able to collect.

What Cities are allowed by Charter to sell confiscated Property.

§ 4. The citizens of Dordrecht could never exhibit under their own seal any evidence that they were entitled to this privilege; but they avail themselves of this benefit, viz. that, according to the privileges granted on this subject to the villages of the southern part of Holland, (which they conceive themselves to be at full liberty to follow in every respect), in case of a mere homicide committed by a citizen of that city without design, treason, or previous assaulting, within the city of Dordrecht, or the court of the southern part of Holland, (so far as the said citizen was not apprehended, and the relations of the person slain were reconciled), the bailiff of the county is declared to be bound to grant him permission to leave the country; provided he pay fifteen pounds for the homicide, and sixteen pounds for the permission to leave the country. (2)

By a charter granted by Duke Albert of Beyeren, June 16th 1394, the inhabitants of Haarlem obtained that none of their citizens may in anywise forfeit to the lord more than his body and sixty pounds out of his property, excepting in case of homicide committed within the said city; for which he will forfeit his body, and eighty pounds out of his property, and no more: but if he be convicted according to law, and banished for the homicide, all his property beyond the said eighty pounds will be free, and follow him wherever he goes.

Liberties, similar to those granted to Haarlem, were also granted to the citizens of Delft by a charter of Duke Albert, July 6, 1398, excepting that the charter of Delft speaks of homicide committed within the said city or the manor thereof.

Leyden obtained by a charter of Duke John of Brabant, on the 20th April 1418, that no citizen, on account of any forfeiture, howsoever it may be incurred, may forfeit to the count and his manor more than his body and sixty pounds, — such pounds as the count would at that time take on account of his fines in Rhineland.

To the city of Amsterdam various privileges were granted in his respect at different times; viz.

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(1) Batavise Arcadia, p. 388. & seq.

(2) Vide Octroy (Grant) of the Emperor Charles V. to the inhabitants of Dordrecht, Sept. 4, 1520, art. 4. See also the Handvesten in Zuid Holland, p. 243. and p. 122. of the new edition, printed in the year 1654.

First, By a charter of Count William of Henegouwen, on the 19th December 1340, that whosoever of the citizens shall kill a man, and be apprehended on that account, he shall forfeit his life, if he be condemned according to law; and from his property he shall forfeit to the lord no more than twenty Dutch pounds; and, if he leaves the country, and is banished, the lord shall likewise have no more from his property than twenty Dutch pounds.

Secondly, The charter of the Empress Margaret, given on Monday after Ascension-day in 1346, contains, that whosoever of the citizens commits homicide out of that city, when he is reconciled to the relations of the person slain, he shall be indebted to the lord only in a penalty of ten pounds, and ten pounds for permission to leave the country.

Thirdly, The charter of Duke William of Beyeren, granted on the 13th May 1355, contains, that whosoever of the citizens loses his life by due course of law, he may forfeit to the count no more than half of his real property, and that the other half should go to his wife, his lawful children, or his legal heirs.

Lastly, the charters of Duke William of Beyeren, the son of William, given on the 20th March 1404, contains, that none of the citizens may forfeit to the lord in any matters or penalties more than his life and one hundred pounds from his property. (1)

Gouda has obtained, by a charter of Duke William of Burgundy, dated Sept. 28, 1451, that whosoever of the citizens, by accident or in the heat of passion, kills any person, he shall forfeit to the lord his life, and a fine of sixty pounds from his property, and no more.

By a charter of Duke William of Beyeren, on the 13th May 1355, Rotterdam obtained, that whosoever of the citizens forfeits his life by due of course of law, may forfeit no more to the lord than the half of his real property, and that the other half should go to his wife, or his lawful children or heirs; and further it was granted by the States of Holland, in the name of King Philip, on the 13th February 1580, (then being at Utrecht), that the citizens of Rotterdam, committing any homicide, should forfeit no more from their property than eighty pounds, of forty groten each, Flemish money.

(1) Concerning the different opinions entertained by the lawyers relative to the explanation of the above privilege with respect to the words "*life*" and "*one hundred pounds*," see the Amsterdam's Poorter Regt (or Citizen-right of Amsterdam) of Mr. Tobias Boel de Jonge, esq. of law, in which every thing is treated which can be thought of and said for or against that privilege.

To Schiedam was granted, first by the Empress Margaret, in the year 1340, that whosoever of the citizens commits a homicide, shall forfeit no more than his life and half of his real property; and that the other half of his property should be kept by his wife and his lawful children, or by his legal heirs; and if he be reconciled to the relations of the dead person, he shall be indebted to the lord only in a fine of ten pounds, and ten pounds for permission to leave the country; but a minor child of a citizen of the said city may forfeit no more than his life, and ten pounds out of his father's and mother's property, if they themselves be alive. And afterwards, by a charter of Duke William of Beyeren, given on the 27th August 1412, it was granted that whosoever of the citizens commits a homicide within the territories of Holland, shall forfeit his life and eighty pounds of his property.

To Schoonhoven, by a charter of the lord Jan van Bloys, lord of Schoonhoven and Gouda, granted on St. Barbara's day in the year 1536, no citizen there, being lawfully married, may forfeit more to the lord than the one half of his property, the other half remaining for his wife; and further, that no citizen's children, while they are maintained by their father and mother, may forfeit more than ten Dutch pounds to the lord out of their parents' property.

Briel obtained, by a charter of Duke Jan of Beyeren, Lord of Voorn, on the 28th November 1407, that no citizen of the said city may forfeit more to the lord in anywise, but his life, and fifty Dutch pounds from his property.

Alkmar obtained, by a charter of Duke William of Beyeren, May 1st, 1315, that whosoever of the citizens forfeits his life by due course of law, may forfeit no more to the lord than half of his real property; and that the other half should remain for his wife or his lawful children or heirs.

Hoorn and Enkhuysen obtained, by a charter of the said Duke William of Beyeren, on St. Martin's day in the summer of 1356, and Edam, on St. Elizabeth's day in 1357; Monikendam, on St. Clement's day in 1356; and Medenblik, on the 4th September 1355, one and the same freedom as Alkmar. And to the inhabitants of Hoorn, it was granted by a charter of Philip Duke of Austria, on the 2d of August 1504, in addition to the preceding privilege, that if any of the citizens, being a good and peaceable man, in defence of his life, upon a great injury, commits homicide, that the property of such citizen in such a case shall be free, and not be forfeited to the lord; provided he pays

for it one portable load of sixty pounds, of forty groten each, Flemish money.

Woerden obtained a charter from Duke Albert of Beyren, on St. Pontian's Day 1401, that a citizen, who commits homicide there, shall forfeit his life to the count, and not his property.

Woudreghem and the territory of Altena obtained, by a charter of Jacob Count of Hoorn, Lord of Altena and Woudreghem, on the 18th December 1476, that in case any man or woman forfeit their lives or property, if they live in a lawful state of matrimony, or if any of them has lawful children, that then, in such a case, no more shall be forfeited to the lord than half the property; and that the other half should go to the husband or wife, who forfeited nothing, or to the children; provided that all lawful debts be first paid out of the general estate.

Heusden has obtained, by a charter of Albert of Beyeren, granted at the Hague on the 27th May 1430, that no man, residing in the cities or country of Heusden, having a married wife or married child, or several married children, may on account of any penalties or fines (in what measure soever they may be incurred) forfeit more to the lord than his life, and the half of such property as he and his wife or his married children possessed together; but, in case he possesses no property in community with them, that then he shall forfeit to the count all his property.

Naarden, Weesop, and Muyden, have the same liberties in this respect as the citizens of Goyland and Amstelland, which are stated infra, p. 683.

Vlaardinge obtained by a charter of the Empress Margaret, on Monday before Pentecost, in 1346, that whosoever of their citizens commits a homicide, shall forfeit his life, and only one half of his real property, and the other half of his real property shall be kept by his wife and his lawful children or heirs; but that whosoever of the citizens commits a homicide, and is reconciled with the relations of the dead person, he shall be indebted to the count no more than a fine of ten pounds, and ten pounds for permission to leave the country.

The inhabitants of Zirxzee obtained a privilege from Duke William of Beyeren, on St. John's day in the summer of 1312 (which was renewed by the Emperor Charles V. on the 4th July 1515), that their citizens may lose no more from their property than sixty pounds *parasiis* for the lord, and ten pounds for the

city, what offences soever they may commit in any criminal or civil cases, and whether they forfeit their lives or not.

Hardinxvelt, a village in the southern part of Holland, has obtained by charter of the Lord Arend van Gent, in the year 1412, that in what manner soever a man commits a homicide, or any other offence, he may forfeit no more than his life and seven English nobles. (1)

Papendregt, Vinkenland, and Matena, also villages in the southern part of Holland, have obtained by a charter of the Lord Reynout van Brederode, in the year 1387, that none of the good people there may forfeit more to the lord than his life and ten pounds, whatever crime he may have committed; and that whenever any one forfeits his life and quits the country, he shall nevertheless forfeit no more than the said ten pounds, and shall be at liberty freely to enjoy the remainder of his property.

The villages of Vroon, Koedyk, Ouddorp, and Otterleek, have the same right of citizenship and liberties as the city of Alkmar, which have been stated in p. 679, *supra*.

The countries, which were favoured with such privileges on behalf of all their inhabitants in general, are the southern part of Holland, the northern part of Holland, Kenmerland, Voorn, Amstelland, Goyland, and Waterland.

The southern part of Holland consists of those countries which are under the jurisdiction of the court and high tribunal of the same; viz. the countries and villages belonging to the cities of Dordrecht, Gorcum, Worcum, Schoonhoven, Heusden, and Geervlied (in the country of Putten), which obtained by a charter of Count Jan van Henegouwen, in the year 1303, that whosoever commits a homicide within the jurisdiction of the court of the southern part of Holland, should have permission from the lord to quit the country for ten Dutch pounds, and should forfeit no more than that sum for the homicide; and upon paying the said twenty pounds, the offender shall be at liberty to enter upon and possess again all his premises and property, belonging to him at the time he committed the homicide; which was confirmed by the Empress Margaret, on the 10th May 1346; and it was added thereto, that those of the southern part of Holland, as well noble as common men, who resided out of the free cities and free manors, either man or woman, having lawful children, may forfeit no more to the lord than their lives and the half of their own property, and that the other half should remain for

(1) £2. 6s. 8d. sterling.

granted to themselves, besides which there are very few if any other places that have obtained like privileges.

But with respect to the Hague, to which place no special privilege was granted, it is to be remarked, that the charter of the Empress Margaret given in the year 1346 (by which the privileges above stated were granted to all the territories of the northern part of Holland) contains the following clause; viz. "To all good people residing upon the territories "of the northern part of Holland, without distinction, except- "ing only those who in the said territories have free dominion "over their rights within their said dominions;" whence it may be justly concluded, that the inhabitants of the Hague (as that place is situated upon the said territories, and as the treasurer of the northern part of Holland keeps his domicile there) cannot be excluded from the said freedom.

The noblemen in Holland obtained a grant on the 9th January 1598, that in no matters or forfeitures they should be liable to forfeit more than their lives, and eighty pounds, excepting in case of high treason.

By the ordinance of the court of Utrecht (1) it is also declared, that until further interpretation of this clause, expressed in several of the above-cited charters, whosoever forfeits his life, shall forfeit no more than the half of his property, and that the other half shall remain for his wife and children, &c. It is to be remarked, that the county has not only considered in that point the community of property between husband and wife, to remove thereby the doubt and consideration, that in such cases also, from the half belonging to the husband by virtue of the community, something could be forfeited by him through crime, as master of the estate, as it is understood that such favour would be very trifling, and productive of no benefit whatsoever; especially as nothing else or more would be then given to the person favoured, but what the county, according to the common law, cannot detain (2). Which intention was subsequently confirmed by some, and introduced without any doubt whatsoever, with this additional clause; to wit, "his wife and children, or "his lawful heirs," unless from the words of the charter it could appear to be otherwise meant, as in the aforesaid charters of

(1) Ordonnantie van den Hove van Utrecht, rubr. van process. crimineel, art. 3.

(2) l. 9. Cod. de bon. proscript. Vide Handvesten in Zuid Holland, p. 403. art. 7. & p. 531. of the new edition of the year 1654. Cost. Antwerp. c. 16. art. 4. Sanis, lib. 2. tit. 5. def. 8. Goris. de Societ. Conjugal. c. 4. Grotius, Inleyd. lib. 1. c. 5. vers. uit krachte, in fin.

Woudreghem and Altena, and in the subsequent one of Heusden, which followed it; whereby it seems that no more liberty was granted, than the general local right, which belongs to every one; and the doubt was therein removed, namely, whether the goods of the wife, brought into the common estate, may be forfeited by the husband as master of the estate.

And likewise, that although in almost all the aforesaid privileges and charters no other words are used but the "forfeiture of life "and property," they are nevertheless understood to take effect, not only when, the offender being put to death, his property is declared forfeited independently thereof, as those words infer; but also when he is banished or imprisoned for life, with the forfeiture of his property (1). And so it was often understood and judged, and a good precedent thereof is given by Rombut Hogerbeets, who in his lifetime was counsellor and pensionary of the city of Leyden. (2)

This contribution is paid by the citizens and inhabitants of the said places in the manner above described, according to the tenor of their charters and privileges; or otherwise, the forfeitures or confiscations not being clearly expressed, the remaining and other property of the person condemned devolve upon his heirs as well by last will as *ab intestato*; i. e. as well collateral as ascending and descending relations, not only to the third degree as formerly, but even to the tenth and further degrees, according to the law of succession recognized in these countries (3).

(1) l. 2. Ff. de pœnis, & ibi DD. l. 1. Cod. de hered. inst. l. 14. § 1. Ff. de bon. libert. Vide Hypolit. de Marsil. in Pract. Crim. § opportune, n. 36. Menoch. de arbitr. Jud. lib. 1. c. 89. n. 3. Damhoud. Prax. Crim. c. 16. n. 2.

(2) Vide Cons. & Adv. het Amsteldamse, vol. iii. n. 1. cons. 187.

(3) Vide Clar. § fin. quæst. 78. n. 1. Christin. vol. v. decis. 49. n. 6. Perez ad tit. Cod. de bonis proscriptor. seu damnator. num. 22. vers. in Germania, in verb. quocunque gradu. Carer. practical. criminal. § homicid. 7. num. 34. Farinac. d. loco. num. 1. & DD. ibi allegati.

CHAP. XXX.

Of Proceedings at Law concerning the ordinary Revenue of the Country, and Recovery of all Taxes upon Towns and Country, and of the Contributions thereof, and also of inspecting and keeping in Repair the public Roads, Dykes, small Banks, Ditches, and Dams.

§ 1. *Smuggling to defraud the common Revenue of the Country, how to be punished.*
2. *Contravention and mere Transgression how to be considered.*
3. *By whom to be judged.*
4. *Precise answering for the Fine specified Articles.*
5. *Parata Executio upon the Imposts of the Country.*
§ 6. *Excises of Cities how to be demanded, and in what manner Smugglers are to be punished.*
7. *In Poundages and Tons.*
8. *Distraining according to the Dyke-law.*
9. *Inspection of Roads, Dykes, small Banks, Ditches, Dams, drained Lands, &c. how to be made.*
10. *Seven Witnesses.*

FOR the common revenue of the country, (in which are included all poundages, tolls, taxes, imposts, rents, excises, contributions, and voluntary contributions imposed for the support of the common cause), there is altogether a special law-proceeding appointed.

Smuggling to defraud the common Revenue of the Country, how to be punished.

§ 1. All imposts or rents and excises, levied for the support of the common cause, and imposed upon victuals and commodities in the cities and in the country, ought to be punctually paid and brought in; or else the negligent, and those who have dealt in any goods or merchandizes, owing imposts or toll, or who have carried away, carried in, and consumed the same, without paying the full and entire dues upon the said contributions, are condemned; *first*, to pay a fine of two hundred gilders, under prohibition of carrying on their trade, dealings, &c. for one year for the first time; for the second time for two years, and to forfeit four hundred gilders; and for the third time six hundred gilders, under a perpetual banishment and liability to be declared useless for the country, and an enemy of the republic, according to the general proclamation upon the levying of the general revenue (1); all saving and excepting the fines which were

(1) Generale Placaat op het stuk van den opheve van de generale en Gemene Middel

imposed by the particular ordinances concerning every impost and excise, especially against smugglers and transgressors of the said ordinances, as well on account of the common country as of the cities and places to which special power was allowed.

§ 2. With this exception, however, that transgressions against the said special ordinance, so far as the frauds do not concern the common revenue and imposts, ought only to be considered as a contravention and mere transgression; and the penalties in the said general proclamation are not understood to be applicable to them. Contravention and mere Transgression, how to be considered.

§ 3. In order to take cognizance and to have jurisdiction of and over the fines, penalties, or other disputes concerning the said imposts and duties, the aldermen or some of them are authorized and constituted in every city to decide the said differences, as well in the city as in the adjoining villages; who are bound to meet for that purpose on certain days in the week, and administer justice to the litigating parties summarily and *de plano*, that is, without delay. By whom to be judged.

If any one finds himself aggrieved by their decision, he may appeal to the lords, the commissioned counsellors of their high mightinesses the States of Holland, within two months; provided that if judgment be given against renters, the execution be in the meantime suspended and postponed; and if against others, it is notwithstanding to be carried into effect provisionally. (1)

The law concerning the common revenue ought to be pointed out by special ordinances in every case in particular, which is strictly observed in every part thereof; and from time to time it is revised, and additions and alterations are frequently made to it, which are too extensive to admit of their being here particularly considered.

§ 4. Excepting only that, as an information therein, this is to be remarked, namely, that the ordinance relative to the duty upon the consumption of wine, beer, salt, soap, and woollen cloth, imposed in the year 1633, (and still often renewed), so far as the rendering of an exact account of the said five articles was thereby introduced, has not been accepted of and put in practice until this day by the cities, so that with respect to them we ought still to act according to the ordinance of the year 1632. Precise answering for the Five specified Articles.

§ 5. The imposts and duties upon victuals and articles of consumption, and likewise the poundage upon lands, houses, and *Parate Execution* upon the Imposts of the Country.

(1) Generale Ordonnantie, art. 17.

other taxes and contributions (excepting only the fines and penalties against peculiar transgressors, for which a previous decree of the judge is necessary), are recovered by *parate execution* from those who are unwilling to pay them, or who do not pay their arrears at the appointed time and place; and, after a demand of twenty-four hours, they are really and actually recovered by seizure and detention of person and property, by imprisonment and arrest of all those who may be found in arrear on that account of something due to the common revenue, as well the cities, villages, meetings, as others who are to pay the imposts and rents on account of hire or farm, or otherwise to answer for the same; for which every citizen, inhabitant, and member may be called upon in particular for his city, village, or meeting; and their property may be inventoried and detained, whether moveable or immoveable, in order to be sold, six days after the demand, for want of payment, according to the order made and published for that purpose at the end of March 1588.

Whosoever finds himself aggrieved by such execution may appear and oppose the same before the commissioned counsellors of the States of Holland, for which he is to pray by petition, and which is allowed if he remains in prison, or otherwise, being previously released upon bail (if he be able to give the same, and if the case be of great importance), a certain day is allowed to him for that purpose; on which day he may not only oppose the mode of execution, if any thing wrong had been done therein (as in other common imprisonments), but he may also independently thereof (no judgment having preceded in the said case) defend the legality or illegality of the whole case with respect to the debt itself.

Excises of Cities, how to be demanded; and in what manner Smugglers are to be punished.

§ 6. Almost all the cities have a right to levy excises on their behalf, on wine, beer, the grinding of corn, on cattle, &c. in order to defray the expences of necessary repairs, and other charges, out of such excises; and an account of what is paid upon them, is annually rendered by the treasurer to some of the presiding members of government, appointed for that purpose, and who are denominated *rojermeester* (surveyors of buildings).

Some of these excises, together with the common revenue of the country, are publicly farmed out; and some are recovered by collection and collectors; and negligent transgressors, who take into their cellars articles subject to the payment of excises, without paying the same, and those who without seeing a proper certificate thereof deliver out the same, are fined in a summary way by the court, consisting of the bailiff, burgomaster, and

aldermen, and are punished arbitrarily according to the exigency of the case.

Of these offenders, formerly, those who *intentionally* transgressed, were publicly exposed upon the pillory, with a wooden cloak, or were led along all the streets with a tun without a bottom suspended to their body, and they were to undergo further similar public disgrace; but such punishments have not been inflicted for a long time; and offences of this description are at present punished mostly by pecuniary fines, prohibition from trading, and (if the offence be very great) by a prohibition from remaining in the town. From such sentences, as they are included in arbitrary corrections, no appeal may be made.

In Poundages and Taxes.

§ 7. The poundage and taxes of lands are collected and accounted for in a similar manner by the receivers and collectors thereof; but houses in the cities are taxed by the magistrates up to a certain amount; who also recover their poundage and other taxes imposed immediately, without form of law, from those who are negligent. Some they recover by seizure, that is, when the bailiff seizes the furniture of the house and sells it for his arrears; some, by imposing upon them the burden of supporting soldiers, messengers, or servants, who on account of their daily wages are maintained out of the property until satisfaction be made. By some the doors and windows are taken away. (1)

With regard to the poundage of lands, it is however specially to be remarked, that the execution upon them is carried into effect against the renters, as was determined by a resolution of the lords, the States of Holland, on the 6th of June 1605, enacting, that no bailiffs and justices of villages, nor those who undertake the collection of the poundage, should, after the expiration of three months in every year, have any right to claim from the proprietors or their lands any part of the poundage of the preceding year; unless within the said period they had duly and properly taken out execution against them, without any collusion; and, in case they had properly done their duty and taken out execution, that they should demand from the proprietors no more than the eighth penny: but on the first of August 1658, the said resolution against carrying to the account of the proprietors the poundage of lands farmed out, three months after the expiration of every year, was prolonged to a whole year.

(1) Vide Keuren van Leyden, art. 201.

And with respect to proprietors cultivating their own lands, both the proprietor and the land themselves remain under obligation and subject to execution.

Distraining according to the Dyke-Laws.

§ 8. In Rhineland, the money which by consent of the dyke-reeves, and superior lords superintending the dykes or banks, is contributed for making and repairing sluices, plateworks (*Plaat-werk*), mills, dykes, bridges, small banks, and similar other works, is recovered by distress, taken from those who do not pay on the day appointed; which distress being levied, the dyke-reeve lays out the money, together with the distress money, provided he may recover the same again from the property of the person in default by rating, and execute two ratings in money, and four ratings in pawn, according to the dyke law; in the following manner, viz. Those, who are desirous of having distress taken, and who are entitled to it, do deliver in a certificate to the messenger of the superintendant of dykes, signed by him, containing an exact statement of the money for which distress is to be levied, and the cause thereof; whereupon the messenger levies distress against the persons contained therein, and gives them notice to pay within twenty-four hours the amount therein contained, with the distress money: but if distress be taken against any one unjustly, too high, or for a debt which is disputable, the said messenger may within twenty-four hours make restitution of the distress; provided the amount, together with the distress-money for which distress was levied, be deposited; and the messenger shall appoint a law-day to bring in the distress as well as him who returns it.

The twenty-four hours being expired, and no payment or restitution having followed, the messenger delivers in a report and evidence thereof into the hands of the dyke-reeve, who is bound to lay out the money, together with the distress money, which he will be at liberty to recover again, by rating, from the goods which are nearest at hand of the person produced, whereof he causes notice to be given to him, that the amount was laid out by him, and that therefore the person against whom distress was taken, should return the same double within twenty-four hours, or that he shall proceed otherwise by rating; against which he may again (provided he deposits the amount) return within twenty-four hours the amount rated. But if no payment nor return of the amount rated take place, the rating and pointing out of property may be proceeded with by the messenger and two aldermen or neighbours, sufficient for the amount claimed, as well as for the fines and costs; which rating being made, the

messenger may take the rated property for the benefit of those who caused the rating to be made, or leave the same to the raters for the amount rated. (1)

The same manner of collecting the rates and levying distress prevails also in Kenmerland, according to the charters of Duke Jan of Beyeren, of the year 1412. (2)

Inspection of Roads, Dykes, Small Banks, Ditches, Dams, Drained Lakes, etc. how to be made.

§ 9. Common villages, manors, dykes, small banks, dams, and sluices, have also a mode of proceeding peculiar to them in Rhineland; viz. In order that all common roads, small banks, dams, dykes, and sluices, may be constantly kept in good repair, the bailiffs, each in his division, with five superintendants, once or twice a year, upon a preceding notice and publication of fourteen days (at least of eight days), are bound to go and inspect all the roads, small banks, dykes, dams, sluices, and other common works; on which appointed day, all farriers (3) are bound to shew the progress and decline of their works; and the two which are situated next to the same, of which the works are not shewn, are bound to nominate the farriers, or to purify themselves by oath that they do not know them; whereupon the bailiff and superintendants of dykes at once take an inspection; and upon the works which are then inspected, those who are to pay fines, forfeit twelve stivers for the benefit of the bailiff; who shall give notice to the proprietor or the person using the same, that the inspection was made at their expence, in order that the fine and the charges for the notice may be paid by him, and the works be made according to their requisition; and if, at the expiration of eight days, the bailiff and superintendents of the dykes come a second time to the works which had remained unfinished, to see whether they have been completed or not, and if they still remain unfinished, the person to whom the works belong shall forfeit a double fine, and the bailiff is to give him notice again; and, on the eighth day after such second inspection, if the bailiff and the said superintendents come for the third time upon the works left unfinished, and find them still in the same state, the person whose works were so inspected, shall forfeit two double fines, and the bailiff shall cause the said works to be completed at the expence of the said person, at as cheap a rate as possible: and in order to recover the said charges and

(1) Vide Keuren in 't Heimraadschap van Rynland (Statutes for the Dykereeves in Rhineland), art. 195. 215. 219. 222; and also Keuren van Heimraadschap van Delfland (Statutes for the Dykereeves of Delfland), art. 301. & seq. Schieland, art. 231. & seq.

(2) Vide Handvest van Kenmerland, p. 198. where the mode of taking distress is treated at length.

(3) *Gehoef Slaagden* in the original.

fines, the bailiff proceeds by levying distress in the manner already described. (1)

Seven Witnesses. § 10. But with respect to unappropriated and unmade works, the proprietor of which is not to be found, or is uncertain, or concerning which there is a dispute among two or more, the same having been inspected thrice, and the making thereof agreed upon, the practice is to proceed therein upon the evidence and pleadings of seven possessors, in the manner following; viz. The bailiff causes to be summoned upon the work, on a certain day, seven persons the nearest to the unappropriated works, four from the sea side, and three from the country or land side; who are bound to appear on the day appointed, on pain of forfeiting forty-two shillings for the bailiff for the first time, a third part of ten pounds for the second, half for the dyke-reeve, and half for the bailiff; and for the third time, upon a penalty of ten pounds, two third parts for the bailiff; and in case of further unwillingness, on pain of arbitrary correction and banishment.

On the said day the bailiff comes with the superintendents of dykes, and holds his court there, making a report of the inspection and the money laid out, and takes a conclusion before the said superintendents against the said seven nearest persons; viz. that they should inform the right lord of the works, or that they should provisionally advance the amount of the fines and costs, and further make the said works with others, until information be given to the said right lord of the works, in order that the said works may be commenced, and all preceding fines and charges be again repaid. Whereupon the said superintendents, having fully heard the said seven nearest persons, in the absence of the bailiff, cause their declaration to be reduced into writing; and immediately, or at furthest within eight days afterwards, pronounce their decision upon the work, and in consequence thereof upon all the fines and costs; and those who are found to be bound upon their oath (against whom the bailiff produces his declaration, and the calculation of costs before the said superintendents) pray thereupon for valuation; and, according to the said dyke-law, proceed in recovering the same by levying distress. (2)

The charter granted by Philip Duke of Burgundy to the cities of Holland, granted on the 9th August 1446, contains

(1) See Keuren van 't Heimraadschap van Rynland (Statutes for the Superintendents of Dykes in Rhineland), art. 190, 191; of Delfland, art. 173. & seq.

(2) Vide Keuren van Rynland, art. 193; Delfland, art. 182; Schieland, art. 202; Handvest van Kennerland, p. 53. See also Handvesten van Zuid Holland, pp. 327. 344. 496. edit. 1654.

a clause to the following effect: "Whereas, at some places in "our countries, many subtilties and evasions are used in law "proceedings by our subjects against each other in their claims "of lands, which they institute against seven possessors, which is "an antient practice at law, of which they make a bad use: so by "the advice and approbation of the knights, cities, notables, and "able persons of our said country, it is ordained and resolved, "that the mode which shall in future be pursued respecting the "right upon seven possessors shall be, that the nearest seven "fields which will acquire an additional one, lose still what is "situated on both sides, according to older customs, and shall "have the eighth field without banishment or penalty, i. e. that "from every piece of land between two back ditches, there shall "be but one possessor, and that pieces of lands shall be at least "of an extent of one morgen or six hundred rods; and if the "property thereof belongs to more than one person, then he "who owns the largest proportion of lands thereon shall be "deemed the possessor thereof; and if there be more pieces "than every one possesses, they shall then draw lots to know "who shall be possessor thereof; and whoever loses, he shall "pay the expences of those seven gentlemen; to wit, of each of "the seven for his charges of every law-day, two good grooten, "and again to one of the seven living at a distance of one mile, "they shall give for every mile two good grooten. So the "bailiff shall appoint for no one a law-day concerning seven "possessors, without previously taking security for the expences "of the seven, and also of the defendant. And, moreover, no "one shall be possessor of seven upon any lands, unless he was "in possession of the land a year and day before he acquires "the above possession. And of lands where there are no "ditches, it is also to be understood, that every piece of land "of which one shall become possessor, shall be of an extent of "at least one morgen, as aforesaid."

With respect to the inspection of small banks, dams, ditches, and waters in drained lakes (which are numerous in Rhineland), every drained lake is subject to special order of the following tenor; viz. In order to keep such drained lake thoroughly dry, to avoid the danger of being broken in or overflowed, attention ought from time to time to be paid to the highest waters in winter, which come from outside, and which ought to be prevented by proper small banks; and for that purpose, in mills, sluices, or waters, a mark of the height of the water is made, according to which the height of the small banks and dams

above the said mark and measure is taken, and a certain measure is made, by some five, six, more or less inches above the said mark, of such breadth as is deemed sufficient according to the circumstances of each, to prevent the overflowing of the said outside water.

In order that all the lands may be well served, the waters are deepened once a year up to a certain mark, and the sluices are cleaned and repaired every year, once on the south side, and the other year on the north side of the country.

The inspection is made once or twice a year by the bailiff of the manor within which the drained lake is situated, and two or more superintendents for the same are annually chosen by the inhabitants, one of whom goes out of office, and the other continues as old superintendant of drained lakes, which also are subject to fines on the first, second, and third inspection, and lastly to be worked, as already stated concerning public roads.

The works are made for the most part by each person on his own land, where the extremities border upon the waters or small banks; but where the small banks or waters run along any person's land, or into large drained lakes, where there are many interior lands, an iron partition (*hoefslag*) is made; and upon the small banks and waters, by dividing the whole length, each work is separated with poles, according to the extent of the lands.

Accounts of the common charges of grinding are annually produced by the superintendents of mills, in the presence of the bailiff and inhabitants summoned for that purpose, by affixing public advertisements; and in order to secure persons from improper charges, the said accounts are to be examined by the dyke-reeve and superintendents of dykes in Rhineland, under certain penalties; and a calculation is made and given upon the drained lakes, each according to its share, before the same may be collected and received by the superintendents of such drained lakes. But on account of the difficulty in collecting the money, a special privilege was granted in favour of some drained lakes at the time they were made, that the inhabitants, together with the production of the account and calculation, should pay their shares in advance; upon which production and calculation the approbation of the dyke-reeve and superior superintendents of the dykes is solicited (1). From this regulation are excluded

(1) Vide 187. Keur. van het Heimraadschap van Rynland, & ampliat. & interpretat. ejusdem, Nov. 12. 1639, July 6. 1651, and Feb. 3, 1652.

drained lakes, which are less than one hundred morgen (1) in size, and which, on account of their small size, are managed by the superintendents of mills alone, without the knowledge of the bailiff, or approbation of the said superintendents. (2)

CHAP. XXXI.

Of the Mode of Proceeding, either in Writing or by Verbal Pleadings.

§ 1. *Of the Mode of transacting a Case.*
2. *By Memorials and Advertisements of Law, and how the same are to be made use of.*
3. *Additions, what, and how to be made.*
4, 7. *Law Advertisements what, and when to be used.*
5. *New Facts how to be introduced.*
6. *In what Manner the Claim, Answer, Replication, and Rejoinder are to be written.*
8. *Of Refutation.*
9. *Of Confirmation against a Refutation, by Debating, Counter-Debating, Solutions, and Super-Solutions.*
10. *How verbally.*
11. *By Demand.*
12. *Answer.*
13. *Replication.*
14. *Rejoinder.*

THUS far we have treated of law proceedings in general, and of the institution of them: it will now be necessary to treat particularly of the manner in which a case ought to be conducted and terminated as well before the court as in the cities and country. For this purpose, the instruction of the court of Holland is a guide to the daily practice, to which are added the forms of petitions, mandates, the taking of conclusions, and forms of documents in writing, as appears by Mr. Secretary Van Alphen's book of forms, published under the title of *Papegay*, (or the parrot): and with respect to the cities and country, recourse may be had to the ordinance concerning the administration of justice, as well within the cities as in the country, of the year 1580, in civil cases; and the edict and ordinance of king Philip concerning criminal justice, as well before the court as before the

(1) or two hundred acres.
(2) See the above-cited Statute of the 12th November 1612, and the subsequent ampliation and interpretation thereof.

other judges, issued in the year 1570, and confirmed by me, by citing all the laws, lawyers, proclamations, ordinances, charters, statutes, customs, and decisions, and likewise the customs in Rhineland concerning the mode of proceeding before the high tribunal of Rhineland, antiently in use in criminal cases, and subsequently confirmed by me, in which is sufficiently discussed whatever relates to the said cases in particular.

Of the Mode of transacting a Case.

§ 1. It is however to be observed, that the authorities above referred to do not treat how and in what manner a case ought to be further terminated after its full institution, and (as it is termed) after its full conclusion at law, preparatory to a final judgment. The mode of transacting or stating a case is twofold, viz. by *writing* or by *verbal pleadings*, according to the nature of the suits.

By writing, cases are again instituted in two ways, upon points of law, or upon facts.

By Memorials and Advertisements of Law; and how the same are to be made use of.

§ 2. Cases consisting of law points are admitted or ordered to be written by memorials and advertisements of law, (*memorien en advertissementen van regten*).

Memorials are short writings, in which the cases and the state of the question are related, and the conclusion is taken thereupon, as well on the part of the plaintiff and impetrator as on the part of the defendant; on the part of the plaintiff and impetrator, by a short statement of his case and good right, and on the side of the defendant by a short statement and assertion in contradiction to the plaintiff's claim, with a brief resolution and statement, in conclusion, of the demand and answer made in the case: so that thereby no opening of the means of law is made; but it contains merely the state of the question, together with the plaintiff's proposal and the defendant's contradiction by denial or otherwise, without any further assertion, which is reserved for the second document, and which is termed the *addition*.

And in cases described by memoirs, or memorials, there is produced from fourteen to fourteen days without further delay, (on pain of being deprived of that right), and by delivering and exchanging, an inventory of documents in evidence of the facts alleged by the memorials contained in the articles of the said memorials, and the other articles are only alleged in a narrative way; that they are *juris*, *illative* or *negative*, that is, that they consist of law-points, or are clear evidences in support or contradiction, without requiring any further proof.

§ 3. The memoirs having been produced, additions are next written in refutation of the memoirs of each party; concerning which no further information is given to the opposing parties, except in case of appeal to a higher tribunal.

Additions, what; and how to be made.

The additional writings are, the subsequent assertion of the proposition of the plaintiff and impetrator, and refutation of the defendant's memoirs on the part of the plaintiff, and a refutation of the memoirs of the plaintiff and impetrator on the part of the defendant: and, on the other hand, they write on both sides from article to article, with the addition of such means of law as each on his side knows how to allege, in assertion, as well as in refutation of the documents produced on each side.

§ 4. Upon which additional writing on each side there is sometimes produced, in further confirmation, a document which we denominate an *advertisement of law;* by which the case is subsequently proved, if found necessary, especially in the first instance, if it be apprehended that the party will appeal from the decision; because, in the first instance, the additions are the last documents, of which parties get no knowledge, which must only be seen from the memoirs and inventories of the documents that are to be produced, contained in the articles of the said memoirs, namely, upon what ground the parties establish their case, and by what means they they will prove the same by their additional documents. But when an appeal has been made to a higher tribunal, a copy may be taken of the additions of each, to see upon what the suit and the decision may be grounded.

Law Advertisements, what; and when to be used.

When, therefore, a party has reason to think that the case will be appealed from, then some of the practitioners know how to give as little opening of the grounds of the case as is possible, and to conduct the case so, that by the additional documents the case may be defended as soberly and nearly to the same extent as was done by the memoirs, adding thereto a *law-advertisement*, by which they make the full and subsequent defence; which law-advertisement is and remains a secret writing, as well in the second and further as in the first stage of the suit. Other practitioners, however, who are accustomed to go round, do not pay much attention to this advertisement, understanding the grounds and merits of the case from the memoirs; and that the means of law which each can allege in his paper ought to be so notorious that one need not look for the same in the writing of the party, and that therefore it must be of little consequence, whether the party can have information thereof or not in the

second instance; and that each ought not to deprive the other of an opportunity of obtaining information thereof, but ought to have the justice of the case itself in view, without using any concealing means, which is not considered a correct practice in pleading, and the judge is not bound to look into such advertisements; so that the advertisement, to be joined with the additional documents, is only of use in the second instance, for the purpose of refuting the additions of the party, on which account copies of it are given; and likewise, when the case is decided by the court, he who loses it may require a copy of the additional documents of his party, to consider whether he will appeal or not.

When an appeal is lodged from a case which was stated in writing before an inferior judge, by memoirs and advertisements to the court, the case is then written anew by the production of memoirs and advertisements of law, without being obliged to make use of the preceding documents.

But when from a case, which was stated in writing before the court by memoirs and advertisements of law, an appeal is lodged to the high court, an index is made of all the documents belonging to the suit, and is transmitted in order that it may be terminated *ex iisdem actis, an bene vel male*; and only copies of the additions are given on both sides, in order to write against them by law-advertisements. (1)

New Facts, how to be introduced.

§ 5. If, after the case has been written by memoirs, any new matters be found applicable to it, a party may, by a petition to government or by a petition *in judicio*, pray to allege new facts; which in such case are produced by an ampliation or enlargement of the memoirs, and production under an inventory. Cases consisting of facts are differently written; in common cases by a claim, answer, replication and rejoinder, which are accepted by the parties themselves after taking their short conclusion, or otherwise the court itself orders them to make and produce them with the clause of "*an act to make and serve.*"

In what Manner the Claim, Answer, Rejoinder, and Replication, are to be written.

§ 6. The claim is produced nearly in the same manner as the memoirs, by relating the actual facts of the case, against which the defendant answers under a similar inventory of documents, serving to refute the claim; whereupon a replication and rejoinder in writing are further produced, against which, on both sides, the parties persist by their claim and answer, or refute whatever has been otherwise alleged, also from fourteen to fourteen days. These writings having been produced, the documents of each party are delivered again to them, that they may add

(1) Vide Instruct. van den Hogen Raad, art. 225.

thereto, under an inventory, such documents as serve to defend and prove the contents or articles of the writings.

§ 7. These being exchanged on both sides, each party prays for such copies as he thinks it necessary for a subsequent defence and refutation of the allegation, to be made in writing by law-advertisements.

If the proof is to be made by witnesses, they are heard subsequently, and their evidence is confirmed by oath; which is termed a *recollection*, or *second hearing of witnesses*; and they are heard upon such articles and interrogatories, as each party will allege and pray against or for the witnesses produced; and against them it is again written, in order to refute or confirm evidence of the witnesses.

§ 8. Refutation is a document by which the evidence of witnesses is refuted, both with respect to the credibility of the witnesses itself, and also in refutation of the evidence given by them. Of a Refutation.

§ 9. Confirmation is a document by which the witnesses and evidence are confirmed and maintained against the refutation. Of Confirmation against a Refutation,

In matters of accounts, we write by debating, counter-debating, solutions and super-solutions, in the same way as by claim, answer, replication and rejoinder. by Debating, Counter-Debating, Solutions, and Super-Solutions.

A debate is a document containing objections to an account; and the errors and unjust charges are pointed out; whereupon they write from the one item to another by way of an answer, viz. whether the same is admitted or rejected, and what either party has to allege against the same.

A counter-debate is a refutation of the above debate, against which the parties also write by articles, from one article to another.

Solution is a document by which the debate is defended subsequently, and the counter-debate is contradicted, and as it were rejected.

Super-solution is a subsequent defence of the counter-debate and refutation of the solutions produced by the debater. (1)

§ 10. The pleadings are verbal in all cases which are so clear, that a judgment may be formed of them without further investigation, or which are such as do not admit of delay, or upon which provision is prayed; consisting of such matters as may be defended by public instruments, acknowledgments, the handwriting of the defendant, or by similar clear and irrefutable How verbally.

(1) Precedents of all the above-named documents are contained in the *Papegay*, or Book of Forms, of Mr. Secretary Willem van Alphen, lately augmented and published by him.

proofs; and in which the pleadings are likewise verbal in all intervening prayers and incidents.

In the cities and in the country, the cases are seldom if ever written; but the pleadings are verbal in almost all cases, to the great prejudice of many cases, which are not well comprehended, and which might with more certainty be defended and produced in writing. But before the court, it is most distinctly observed, and it is at the option of the plaintiff to plead the case, on his account, verbally; but he must expect (if upon a subsequent investigation it be found necessary) to receive an order, that the case should be written even after the pleading.

By Demand. § 11. In pleading verbally, the plaintiff pleads first by a short introduction and statement of the circumstances of the case, and the claim and conclusion, and then follows the assertion, with the reasons upon which the same is grounded, and the further appropriation by the claim and conclusion. I say, *a short assertion*; because the more extensive assertion is reserved to be made by the replication.

Answer. § 12. Whereupon follows the answer of the defendant, also with a short statement of the state of the question and the circumstances of the case, so as he thinks best for the assertion of his conclusion in the answer, with a short refutation of what has been alleged by the plaintiff, and further appropriation by his conclusion of answer.

Replication. § 13. Against which the plaintiff replies with a short pleading upon his claim, alleging extensively further reasons, confirmed by laws and lawyers, for which the precedents and decisions of similar cases are of great use, although the judge does not consider himself bound by them (1), as already stated, in Book i. ch. iii. s. 12. p. 23. supra. After which assertion follows a further objection to the plaintiff's allegation, making repeatedly applicable whatever was pleaded by him as a foundation of his claim, and concluding that therefore his claim should be adjudged to him.

Rejoinder. § 14. Upon the plaintiff's replication follows the defendant's rejoinder, in which he shortly repeats the state of the question and means alleged in his answer, with a refutation (as far as he is able to refute them) of the arguments and reasons alleged by the plaintiff, contradicting the reasons, laws, and lawyers alleged, and refuting the precedents and decisions, as not being applicable on account of the difference existing in the cases, if there be

(1) Quamvis enim rerum sæpius judicatarum non vilis sit authoritas, l. 36. Ff. de leg. Attamen non usque adeo sui valitura est momento ut rationem vincat aut legem. l. 2. Cod. quæ sit longa consuetudo.

any, *quam minima circumstantia variet causam, et sic ipsum jus:* and moreover, that decisions make no laws, &c. with a short repetition of his allegation, making further every thing applicable to his contrary conclusion.

In pleading the case, attention ought to be paid to the statement of the same, that nothing else, neither more nor less, be alleged, but what agrees with the ground of the case, and the truth; to which ought to be made applicable such means of law as one knows how to allege, together with a refutation of whatever the party thinks will be alleged against the same, in order to have a ready answer; yet so that the principal refutation and urgent conclusion be reserved to be made at last.

CHAP. XXXII.

Concerning the Judges, Jurisdiction of the Court, and Mode of Proceedings; the Regulations of the Chace, and Matters regarding Forests.

§ 1. *The legal Authority of the Foresters, and their Chief Bailiffs.*
2. *Of the Chief Servants; what Proceedings are to be held before them, and in what Manner; and how often they are to hold their Sessions in each Year.*
3. *What Causes are to be decided by them.*
4. *Of the Office of the Vagrant-Bailiff, and Keeper of the Downs.*
§ 5. *Of making out Summons and legal Executions.*
6. *In what manner Proceedings are to be made before the Forester and his Chief Bailiff.*
7. *Of speedy Justice in particular Cases.*
8. *In what Courts no Appeal is allowed from the Sentence.*
9. *To whom such Appeals are to be made.*
10. *No provisional Possession to be granted by the Court of Supreme Council.*

HAVING incidentally mentioned, in the former part of this work, the especial courts appointed for matters relative to the chace and forests, it is requisite that we notice this subject more particularly before we conclude the present work.

The legal Authority of the Foresters, and their Chief Bailiffs.

§ 1. All business concerning the chace and forests is to be brought before no other judge, for decision, besides the forester and his chief bailiff. In cases where the foresters are the plaintiffs, and the chief bailiffs are judges, the court must be selected for the purpose, from among the nobility of the province of Holland.

Of the Chief Servants; what Proceedings are to be held before them, and in what Manner; and how often they are to hold their Sessions in each Year.

§ 2. These are to be three in number, who are to do justice and give sentence, on complaints brought before them at the request of the forester or his deputy, without entering into figurative descriptions, or a long train of proceedings: and who, in conformity with the ordonnance of the 26th December 1517, are to hold their public sessions four times in the year, namely in the beginning of January, April, July, and October; which however, by the later directions dated the 26th of March 1678, were reduced to twice in every year, that is to say, on the second Monday in the month of May, and the first Monday in the month of October; then to take cognizance of all matters

breaches, and trespasses, which may be found to have occurred and happened in the said forests, contrary to the law concerning the forests, and to punish the same either criminally, by corporal inflictions, or according to civil justice, by mulcts and fines in money, proportionably to the nature and extent of the offence, as may be perceived by the rescripts and ordonnances thereon existing, and wherein the same are more particularly described, but which are of too great length to be here repeated: and whereas it is possible that some extraordinary cases might occur, in which the crimes might be of such magnitude, that the forester or his deputy could not apprehend the criminals, or at least, not venture to give sentence thereon; they are empowered to transfer the same, and leave it to the decision of the fiscal, president, and council of Holland.

§ 3. What Causes are to be decided by them.

§ 4. For the prevention of all which crimes, and in support of the regulations and ordonnances issued with regard to the forests, *vagrant-bailiffs* and *keepers of the downs* are to be employed; who are to pay strict attention to every thing which may occur, and have full power to punish the criminals, either by imprisonment or fines.

Of the Office of the Vagrant-Bailiff, and Keeper of the Downs.

§ 5. The summonses and execution of the sentences passed shall be entrusted to the apparitors of the court, who are thereunto empowered by antient custom, and finally by an act bearing date the 2d of April 1598.

Of making out Summonses and legal Executions.

§ 6. The law-proceedings are to be carried on by previous notices, given by the vagrant-bailiffs and keepers of the downs, who are directed to pay strict attention to all occurrences; and, within six days after the facts have taken place, are to notify the same to the forester, who thereupon, and within the space of fourteen days at the farthest, shall enter proceedings against certain persons unknown, concerning the facts laid to their charge, with a particular description of the alleged crime, the place, day, and hour in which it was committed, and in what manner it was done; and compel them, by imprisonment and summonses, to appear before the forester and his deputy, towards the sessions-day next approaching.

In what manner Proceedings are to be made before the Forester and his Chief Bailiff.

§ 7. In all petty causes under one hundred caroluses of twenty stivers each, (as such clauses mostly are,) the proceedings shall be brief and plain, without allowing any delays or train of proceedings. (See the proclamation of the emperor Charles V., dated the last day of July 1545, which mentions cases only amounting to one hundred philippus gilders.) Hence it is apparent that in all cases above that amount, or in other

Of speedy Justice in particular Cases.

criminal matters, which arise to corporal or degrading punishments, or in which an extraordinary and irreparable crime demands a more severe visitation; the usual manner of proceeding by three defaults, and legal terms of complaint, reply, answer, and duplicate, may be allowed.

In what Courts no Appeal is allowed from the Sentence.

§ 8. No appeal will be allowed against any sentences given by the forester or his deputy, not amounting to more than one hundred carolus gilders, or to that sum itself, by any clause of inhibition; but the said sentence shall be carried provisionally into execution, and no alteration shall be therein made. (1)

To whom such Appeals are to be made.

§ 9. It is likewise to be observed, that no appeal or amendment will be allowed from the decisions of the foresters or their deputies, to the court of Holland: but such appeal or amendment may be made to the feudal court, and from thence to the high court of judicature.

No provisional Possession to be granted by the Court or Supreme Council.

§ 10. And also, in case of possession, if any one should assert his title to the right of enjoying the chace, under the pretext of such possession having been granted him by the court or supreme council, by some mandate of right of complaint and maintenance, or other provisional possession, but that the same is claimed under the prohibition and penalty of imprisonment, the business must be defended by legal proceedings before the forester and his deputy, with reservation of appeal or amendment to the feudal court, and from thence to the supreme court of judicature, in case of his deeming himself to be injured by such decision. (2)

(1) Vide Plac. June 25, 1621.

(2) Vide Resolutie nopende de Judicatuyre, van de Jagt van den November 22, 1670 (Resolution concerning the Judicature of the Chace, dated the 22d November 1670).

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INTRODUCTION.

In order to render the present volume more useful as a manual of the actual law of Ceylon, it has been deemed expedient to annex—

1. A description of the established customs, usages, and institutions, according to which civil cases are decided among the Malabar or Tamul inhabitants of the province of Jaffna, on the island of Ceylon, particularly respecting inheritances, adoptions, grants, appropriations, sales, purchases, mortgages and redemptions of lands and gardens; and,

2. Certain special laws concerning the Moors or Mohammedans, who inhabit parts of the province of Jaffna, as well as parts of all the adjacent provinces of Ceylon, relating to matters of succession, right of inheritances, and other incidents occasioned by death, and also concerning matrimonial affairs.

In preparing these Collections of Customs and Laws for the press, no other liberty has been taken, than to correct the rude English of the Ceylonese (Dutch) translator, to render the sections more distinct, and to supply marginal notes for the greater convenience of reference.

The following account of these two Collections of Customs and Laws is taken from the report which Sir Alexander Johnston, Chief Justice and First Member of his Majesty's Council on Ceylon, made to his Majesty's government, of the circuit which he performed through the northern provinces of that island, in May 1814.

" No people can be more attached to their antient institutions than the native inhabitants of the province of Jaffna: and nothing is more calculated to secure their respect for the administration of justice, than a strict adherence on the part of the courts (whenever circumstances will permit) to those customs, which the

experience of ages has shewn to be applicable to their situation, and which have, therefore, obtained among them all the force and authority of law.

" The native inhabitants of that province consist of two descriptions of people, differing from each other in their origin, religion, and laws. The one are the Tamul or Malabar inhabitants, whose names, features, manners, and language, as well as the historical fragments and popular traditions met with at Jaffna and at Madura, distinctly prove them to be descended from that antient people, who inhabited all the southern provinces of India before they were subject to the Tellinga empire of Vijeyanugger. The other are the Lubbes, or Mohammedan inhabitants, who are descended from the Arabs of the house of Hashem, who were driven from Arabia in the early part of the eighth century, by the tyranny of the caliph Abu 'Al Melek ben Merivan; and who, proceeding from the Euphrates southward, settled along the coasts of Ceylon, as well as along those of the peninsula of India.

"The Tamuls,—some of whom are Christians, but most of whom are worshippers either of Vishnu or of Sheva,—(independently of the Dhermaa Shastra, the source of all Hindoo law, the Viguyan Ishuar, a law tract of great authority in the south of India, and Videyavanga's commentary on the text of Parasara, a work of equal authority in the Mysore country) have a customary code of their own called the *Thasavalema*; which, although it provides for many cases, leaves others to be decided according to the general principles of Hindoo law, as evidenced in the three works to which I have just alluded.

" The Lubbes, all of whom are Mohammedans, independently of the Koran and the innumerable commentaries upon its text (of which the ones most in repute on Ceylon are those written by the professors of Mohammedan law at Caylpatnam) have also a customary code of their own, on the subject of marriages and inheritances; which, though founded in a great measure on the

Koran, contains some modifications arising out of their local circumstances, and differing in a slight degree from the general law upon the same subjects.

" We are much indebted to the late Dutch government for having collected and reduced into writing the various customs, of which the above two customary codes are composed. With respect to the first, the late Dutch governor Simons, very early in the last century, finding that such customs existed in the province of Jaffna, and that great injustice was experienced by the people in consequence of no written collection of them ever having been made, ordered such a collection to be immediately prepared. This was accordingly done in the year 1707, from the reports of those natives in the province of Jaffna who were known to be most conversant on the subject; and who, by affixing their names to the compilation, as a proof that they would vouch for its authority, gave it all possible weight with the inhabitants of the country.

" This Collection supplied the rules, according to which the several Dutch courts framed their decisions, from the year 1707 to the period when Jaffna was surrendered to the British arms. From the latter period to the year 1806, although it was sometimes referred to, yet from its being in Dutch, its contents were by no means so well known as they ought to have been; and in the year 1806, while I was on my first circuit through the province of Jaffna, aware of the great veneration which the people entertained for this Collection, I, with the approbation of government, caused the whole of it to be translated into English, and printed. As, however, I had not an opportunity at that time of comparing that translation with the original, and as I have since thought that it may be much improved in point of arrangement, I took the opportunity of my late circuit to consult with many individuals in the province as to the alterations which it would be advisable to adopt; and shall at an early period take the liberty of submitting to government what I have to suggest on the occasion.

"With respect to the second collection, the Dutch governor, Falck, during the period of his government, caused a collection to be made by the Mohammedan priests of Batavia, of what they conceived to be the Mohammedan law concerning the rights of inheritance and of marriage, and sent it to Jaffna, in order that the Lubbes or Mohammedan inhabitants of that province might point out in what respects it differed from the local customs that prevailed among them. They accordingly did so; and the governor ordered the original Collection, as modified by those customs, to be observed among the Lubbes at Jaffna. At my suggestion, an English translation was made of this Collection, and printed at the same time that the Thasavalema was printed."

Subsequently to the above report, Sir Alexander Johnston, having obtained the opinions of the best informed Tamul and Mohammedan natives, concerning their respective codes, caused copies of each, drawn up according to their unanimous opinion, to be printed on *paper*, in Tamul and English, and sent to all the courts and magistrates on the island; and, in order to make the people themselves thoroughly acquainted with their own laws and usages, he further caused numerous copies of them, in the Tamul language, to be made on *palmyra leaves*, and circulated among the native heads of villages, with a direction to them, to explain them to the people of their respective villages.

How far each of these codes is applicable to the Malabars and Mohammedans, who inhabit the different provinces on Ceylon, may be seen at full length in the report made by Sir Alexander Johnston to his Majesty's government, in November 1807; when he submitted for their consideration, a general statement of the Dutch and native laws, whether general or local, which prevailed on Ceylon, and a plan for framing from them a short and simple code in English, Tamul, and Cingalese, applicable to the state of the country.

APPENDIX.

A DESCRIPTION of the Established Customs, Usages, and Institutions, according to which Civil Cases are decided among the Malabar or Tamul Inhabitants of the Province of Jaffna on the Island of Ceylon, and particularly those respecting Inheritances, Adoptions, Grants, Appropriations, Sales, Purchases, Mortgages, and Redemptions of Lands and Gardens pursuant to the Order contained in a Letter bearing date the 14th August 1704, written here by the Honourable Governor of Ceylon, Dr. Cornelis Joan Simons, and Council at Columbo, and collected together by me the undersigned, after an experience of Thirty-five Years, having been for the most part of that time amongst the Natives.

SECTION I.

Of Inheritances and Succession to Property.

§ 1. *Different kinds of property.*
2. *Of dowry.*
3—6. *Of the marriage of daughters, and the dowry given with them.*
7. *Of the marriage of sons, and their portions.*
8. *Of resignation of property.*
9. *Of succession to property where children and their mother are left.*
10. *Property how to be divided, where the mother marries again.*
11. *Of succession to property, where children and their father are left.*
12. *Of the division of property, where* orphan *children are left.*
13. *Division of property, where there are half brothers and sisters.*
14. *Division of property, where there is issue of both marriages.*
15. *Division of property, where two persons, each being the sole child of their respective parents, die without issue.*
16. *Property, how to be divided where it has been improved.*
17. *How, where a Pagan marries a Christian woman.*
18. *How, where two Pagans intermarry.*

I WILL commence by stating that a man and woman being married, the descending heirs proceed from them, and by those, the ascending heirs are ascertained, so as to point out their shares of inheritances.

Different kinds of Property.

§ 1. From antient times, it has been an established custom or law, that the goods brought in marriage, or acquired by such husband and wife, have from the beginning been distinguished by the denomination of *moedesiom*, or hereditary property, when brought by the husband; and when brought by the wife, it was denominated in the Malabar language *chidenam*, which in our language signifies *dowry:* and such property, as is acquired during marriage, is denominated *tedijeteutom*, or in our language, *acquisition*. On the death of the father, all the goods brought in marriage by him were inherited by the son or sons; and, when a daughter or daughters married, they received dowry or *chidenam* from their mother's property; so that the husband's property always remained with the male heirs, and the wife's property with the female heirs, but the *acquisition* or *tedijeteutom* was divided among the sons and daughters; the sons however were always obliged to allow the daughters to get a larger share.

§ 2. But in process of time, and in consequence of several changes of government, particularly those in the times of the Portuguese (when the government was placed by order of the King of Portugal in the hands of Don Philip Mascarenha), several alterations were gradually made in those customs and usages, according to the testimony of the oldest Moodeliars; so that, at present, whenever a husband and wife give a daughter or

Of Dowry.

daughters in marriage, the dowry is taken indifferently, either from the husband's or wife's property, or from the *acquisition*, in such manner as they think proper; that is to say, by parts and pieces, for there is scarcely any person who can say that he possesses the sole property of entire pieces of grounds, gardens, slaves, &c., for it will generally be found that he is only entitled to the half or to one sixteenth part of the property.

Of the Marriage of Daughters, and the Dowry given with them.

§ 3. The nearest relations, either on the father's or mother's side, from a particular regard to the bride, often enlarge the dowry, by adding some of their own property to it: and such a present should be particularly described in the *doty*, *marriage act* or *ola*, which must specify by whom the present or gift is made, and the donor must also sign the act or ola; but such a donation or gift is voluntary. When the act of doty is executed, it is presumed that it is done without fraud; but the donor does not point out therein what his share is of the pieces of ground, gardens, or slaves, which he gives by pieces to his daughter or daughters, but says merely "such and such part of such a piece of ground;" so that, frequently, the receiver or bridegroom

finds himself deceived in his expectations: which always causes differences and disputes, for many often expect to get a sixth part, when they do not get more than one sixteenth. For instance, a husband and wife having five children, viz. two sons and three daughters, and possessing a quarter or fourth part of a ground called *Worlancooly;* of which they give as a dowry to each of their daughters, when they marry, a fourth part of their (the husband's and wife's) share in the said ground, which together is three fourths, and retain the other one fourth for themselves as long as they live: but, after their death, the two sons come and take each the half, consequently the daughters have no more than one sixteenth part each of the said ground, and the two sons each but one thirty-second part; and it is the same with the donations of gardens, slaves, &c., from which often disputes also arise. The daughters must content themselves with the dowry given them by the act or *doty ola,* and are not at liberty to make any further claim on the estate after the death of their parents, unless there be no more children, in which case the daughters succeed to the whole estate. And in case the new married couple, to whom one or more pieces of the said gardens, slaves, &c. have been given in marriage, do not take possession thereof within ten years, they forfeit their claim thereto: for there has been of old since the Pagan times, a proverb, *Ottioem chidanaoem pattyaal,* that is, immediate possession must be taken of dowry and pawns. If this be not done, the lands, gardens, slaves, &c. again become a part of the common estate, in the same manner as if they had never been given to the young married couple; unless they can produce an act of their parents concerning their delay in taking such possession.

§ 4. If a father or mother gives as a dowry to their daughter or daughters, a piece of land or garden which is mortgaged for a certain sum of money, and say in the *doty ola* "*a piece of land called Kalloenanpuende, which is mortgaged to Kandaapoedam for sixty fanams, but which the bridegroom and his bride must redeem for that money;*" and if they are unable to do it, and the mortgagee does not wish to retain any longer the mortgage for the money lent by him, the parents themselves are obliged to redeem it; and notwithstanding, (although it be fifty years afterwards) the said mortgaged land or garden devolves again to the child to whom it was originally donated by the doty ola, provided the money for which it had been mortgaged is paid by such a child.

§ 5. If one or more pieces of land, garden, or slaves, &c. are given as a marriage gift, respecting which at the expiration of

some years a law suit arises; and the young couple lose the same by the suit, the parents who gave the same (and after their decease the sons) are obliged to make good the loss of the land, garden, or slaves, &c., for a well drawn up and executed doty ola must take effect; because it is by this means that most of the girls obtain husbands, as it is not for the girls but for the property that most of the men marry; therefore the dowry they lose in the manner above stated must be made good to them either in kind or with the value thereof in money. Should it happen, that after the marriage of the daughter or daughters the parents prosper considerably, the daughters are at liberty to induce their parents to increase the doty, which the parents have an undoubted right to do.

If all the daughters are married in the manner above stated, and each has received the dowry then given by their parents, and if one or more of them dies without issue, in such case the property indisputably devolves to the other sisters, their daughters, and grand-daughters; but if there should be none of them in existence, the property, in such case, falls in succession to the brothers, their sons, and grandsons, if any; if not, the property reverts to the parents, if alive; and if not, the husband's *modesiom*, or hereditary property, and the half of the *tedijeteutom*, or acquired property, (after deducting therefrom the half of the debts) devolves first to his brother or brothers, then to their sons and grandsons; and the wife's *chidenam*, or dowry, with the other half of the acquired property, after deducting therefrom also the remaining half of the debts, devolves to her sister or sisters, their daughters or grand-daughters, *ad infinitum*.

§ 6. Although it has been stated, that, where a sister dies without issue, the dowry, obtained by her from her parents, devolves to her other sister or sisters, yet it sometimes happens that her mother, having in the mean time become a widow and poor, requests the sister or sisters of the deceased to allow her to take possession of the property of her deceased daughter and to keep the same as long she lives, to which they sometimes agree, but are by no means bound to do it; but, in order that they may not subject themselves to any loss, they ought to have the property described and registered, otherwise, on the mother's death, the son or sons will come and take possession of all that she has left.

Of the Marriage of Sons, and their Portions.

§ 7. Having pointed out the manner in which the daughters are given in marriage, and what becomes of their property when they die, I will now proceed to state what relates to the sons. So long as the parents live, the sons may not claim any thing what-

soever: on the contrary, they are bound to bring in to the common estate (and there to let remain) all that they have gained or earned during the whole time of their bachelorship, excepting wrought gold and silver ornaments for their bodies which have been worn by them, and which have either been acquired by themselves or given to them by their parents, and that until the parents die, even if the sons have married and quitted the paternal roof. So that, when the parents die, the sons then *first* inherit the property left by their parents, which is called *moedesiom* or hereditary property. And if any of the sons die without leaving children or grandchildren, their property devolves in the like manner as is said with respect to the daughters' property, which devolves to the women as long as there are any. The property of the sons, therefore, devolves to the men, and, in failure of them, to the women: and although the parents do not leave any thing, the sons are nevertheless bound to pay the debts contracted by their parents, and although the sons have not at the time the means of paying such debts, they nevertheless remain at all times accountable for the same; which usage of the hard measure, though according to the laws and indeed is a country.

Of Resignation of Property.

§ 8. Should it happen that age renders the parents incapable of administering their own acquired property, the sons divide the same, in order that they may maintain their parents with it: and it will be often found that sons know how to induce their parents to such a division or resignation of their property, with a promise of supporting them during the rest of their life; but, should the sons not fulfil their promise, the parents are at liberty to resume the property which has been so divided among the sons, which is not done without a great deal of trouble and dispute. And the experience of many years has taught us, that such parents, (in order to revenge themselves on their sons,) endeavour, by unfair means, to mortgage their property for the benefit of their married daughters or their children: and for this reason it has been provided by the *commandeur*, that such parents may not dispose of their property either by sale or mortgage, without the special consent of the *commandeur*, which is now become a law.

Of Succession to Property, where Children and their Mother are left.

§ 9. If the father dies first, leaving one or more infant children, the whole of the property remains with the mother, provided she takes the child or children she has procreated by the deceased, until such child or children (as far as relates to the daughters) marry; when the mother, on giving them in mar-

riage, is obliged to give them a dowry, but the son or sons may not demand any thing so long as the mother lives, in like manner, as is above stated with respect to parents.

Property, how to be divided where the mother marries again.

§ 10. Should, however, the mother marry again, and have children by her second marriage, then she does with the daughters as is above stated with respect to parents. But it is to be understood, that, if she has daughters by her first husband, she is obliged to give them, as well as the daughters by her second husband, their dowries from her own *doty* property; and if the son or sons marry or wish to quit her, she is obliged to give them the hereditary property brought in marriage by their father, and the half of the acquired property obtained by the first marriage, after deducting therefrom the dowry which may have been given to the daughters.

If the mother, of whom we have just spoken, also dies, the sons, both of the first and second marriage, succeed to the remaining property which the mother acquired by marriage; besides which such son or sons are entitled to the half of the gain acquired during the mother's marriage with his or their father, and which remained with the mother when he or she married, and provided that therefrom are also to be paid the debts contracted by her or their father when alive.

But if any part of that property is diminished or lessened during the second or last marriage, then the second husband, if he still be alive, or if he be dead, his son or sons are obliged to make good the deficiency either in kind or in money, in such manner as may be agreed upon.

On the other hand, the son or sons of the second marriage are entitled to the hereditary property, brought in marriage by his or their father, and also to the property acquired during marriage, after all the debts contracted by him shall have been paid from the same.

Of Succession to Property, where Children and their Father are left.

§ 11. If the mother dies first, leaving a child or children, the father remains in the full possession of the estate so long as he does not marry again, and does with his child or children and with his estate in the like manner as is above stated with respect to the mother.

If a father wishes to marry a second time, the mother-in-law or nearest relation generally takes the child or children (if they be still young) in order to bring them up: and, in such case, the father is obliged to give at the same time with his child or children the half of the property brought in marriage by his deceased wife, and the half of the property acquired during his first mar-

riage. When those children are grown up and able to marry, that is to say, the daughters (if any there be), the father must go to the grandfather or grandmother with whom the children are, in order to marry them and to give them a dowry both from their deceased mother's marriage portion and from the acquired property, which, as before stated, had been given to the relations with the children, and from his own hereditary property.

This being done, and if any thing remains of what had been given to the relations with the children as above stated, and if the son or sons have acquired a competent age to administer what remains, they then take and possess the same without dividing it until they marry, when they divide it equally among themselves, together with the profits acquired thereon; but if they make a division immediately on taking possession of what remains, so that each possesses his share separately, then they are not obliged to share with each other what each has acquired.

But should there remain nothing of the mother's property, and of the half of the acquired property during marriage, the sons, whether young men or married, must do as well as they can, until their father dies; for these sons by the former marriage cannot claim any thing from this their father.

If such a father has, by his second wife, a child or children, and among them a son or sons (for it is unnecessary to say any thing further concerning daughters), and dies, his property which exists is divided into two equal shares, one of which the son or sons by the first wife take, and the other the son or sons by the second wife, although there should be but one son of the first and five or six of the second. And what remains of the half of the acquired property during the first marriage, must also devolve to the son or sons of that marriage; but, if any part thereof has been diminished during the second marriage, then the sons of this marriage are obliged to make good the deficiency to the sons of the first marriage, in the manner above stated, and the son or sons of the second marriage divide the property acquired during that marriage, and also the remaining part of that which has not been given as a dowry to the sisters, (but not before their mother is dead); in which case the sons are obliged to pay all the debts contracted by the father during his marriage with their mother.

§ 12. If the father and mother die without being married more than once, and their surviving children are infants under age, then the relations of both sides assemble to consult to whose

Of the Division of Property, where orphan children are left.

care the children are to be entrusted; and, a person being chosen, the children are delivered to him together with the whole of the property left by the parents, which remains with such person until they attain a competent age to marry; and, when they are grown up, it is to be supposed that it will be the turn of the eldest first to marry, when the friends must again assemble to consult what part of his or her parents' property shall be given to him or her as a dowry, with which he or she must be content. In order to understand the following observations better, we will limit the number of brothers and sisters remaining unmarried to *three*, that is to say, two brothers and one sister, which last on account of some misfortune or other remains unmarried. If the brothers (having attained in the mean time a competent age) marry, and if she desires that the remaining property of her parents shall be divided, the relations and possessors thereof may not refuse it: but the brothers must, in such case, allow their sister who remains unmarried to have a larger share. This, however, the brothers often oppose, particularly when there is but little, because, when the unmarried sister dies, the married one succeeds to all that the unmarried one was possessed of.

But should it happen that both the brothers, after they have grown up and are married, possess the before-mentioned property without having divided it, and that the unmarried sister receives nothing else besides what is necessary to provide herself with subsistence and clothing until her death; in such a case the whole of the property remains with the brothers, and the married sister has no right or claim thereto: and should it happen that the unmarried sister had allowed herself to be deflowered and thereby had a child, she (in order to bring it up decently) ought to agree with the brothers and sisters to divide the estate of their parents, in order to enable her to allot her child a certain portion thereof.

Division of Property, where there are half-brothers and sisters.

§ 13. With respect to the succession of half brothers and sisters, if a woman, who has been married twice, and, by the first husband, has had a son, and by the second a son and daughter, and these all survive their parents, and act with their parents' estate as is above mentioned, and if the son of the second marriage dies without leaving a child or children, and the question is, who shall inherit the deceased's estate? respecting which the principal moedeliars and inhabitants have not agreed,—many are of opinion, that the full sister must be preferred above the half brother, but this would be quite contrary to the old established laws. Therefore I agree in opinion with the greater

part of the inhabitants who have been consulted on the subject, that the half brother, from the side he is brother, that is to say, from the mother's side, must succeed to the inheritance; and the sister, because there cannot be brothers from the father's side, must succeed to all that is come from the father's side, and the acquired property must be divided, half and half, between the half brother and full sister, provided that it has been acquired by means of the mutual property.

Division of Property, where there is Issue of both Marriages.

§ 14. If the husband has been married twice, and has, by his first wife, had a son and daughter, and only one daughter by his second wife, and if the daughters have been married and receive a dowry, and the father dies, it would be supposed from what has been stated, that the son must succeed to the estate of the deceased; but in this case it may not take place: for the daughter of the second marriage, must inherit equally with her brother, there being no full brother to inherit. If a man has a child or children, and his brother and sister die before or after him, without children, then this man's son succeeds both to his brother's and sister's property, as well as to that of his deceased father.

It is the same with a woman who has a child or children, and whose brother or sister dies afterwards without leaving children; for this woman's daughter or daughters inherit both from the brother and sister of her or their deceased mother; but if the said brother and sister die first, and if the mother of the beforementioned daughter is still alive, then the mother inherits from the brother and sister, whereby the daughters remain deprived of that inheritance; for, when the mother afterwards dies, her son or sons are justly entitled to all that their mother leaves at her death.

Division of Property, where Two Persons, each being the sole Child of their respective Parents, die without Issue.

§ 15. In the case of two married persons, each in particular being the sole child of their respective parents, all that the mutual parents possessed must be brought together: and if the husband dies without leaving a child or children, then the property which proceeded from the father returns to the father's nearest relations, and to his mother's nearest relations all her dowry which he inherited, and of the acquired property and debts, each a fourth part. The same usage obtains, as it respects her, for all that she inherited from the father returns to the father's nearest relations, and her mother's dowry to the mother's nearest relations, and of the acquired property and debts to each a fourth part: excepting that the gold and silver, made for the husband's use, goes reciprocally to his own father and to his

mother's relations, and all that was made for the wife's use, and worn by her, goes to her relations, although there should be, on the one side, the value only of ten rixdollars, and on the other the value of one hundred rixdollars.

Having thus stated what is to be done with the property, when a husband and wife dies, one after the other, without leaving a child or children, it is now necessary that we shew, in case one of them dies, what the heirs ought to do, to prevent all difficulties and losses. They must cause the survivor to return what was brought in marriage by the deceased, and also the half of the acquired property, they being justly entitled thereto: but if, from motives of affection or otherwise, the heirs wish to leave the survivor in the possession of any part of the inheritance, they must do it in writing. If they neglect to do this, they must, when the survivor marries again, take back the property left in his or her possession. But if they do not do this also, and if he or she, having children by the second marriage, dies, in such case the heirs, who have suffered so many years to elapse without claiming the property as are established by the laws of the country, remain deprived thereof. With respect to the crops that have been gathered, when one of them has died, disputes have often arisen, one pretending that so much was produced from the hereditary lands, while the other pretends that so much was produced from the hereditary lands; but no attention is paid to such claims, for all kinds of grain collected are considered as acquired property, which they really are, and as such are divided equally.

Should any of the man's hereditary property or woman's dowry be diminished during marriage; when one of them dies, and the property is divided, the same must be made good from the acquired property, if it be sufficient; if not, he or she who suffers the loss, must put up with it patiently.

roperty how to e divided, where has been proved.

§ 16. Should husband and wife during marriage considerably improve a piece of ground, whether it be husband's hereditary property or wife's dowry,—for instance, by building houses, digging wells, and planting all sorts of fruit-bearing trees thereon,—the heirs of the wife, should she die first, and should the improved ground be the husband's hereditary property, shall not be at liberty to claim any remuneration for the expences made. In the like manner also, the husband's heirs cannot claim any remuneration should the wife's dowry-ground have been improved.

where a marries a ian n.

§ 17. If a Pagan comes from the coast, or elsewhere, and settles himself here, and being afterwards inclined to marry a

Christian woman, procures himself to be instructed in the Christian doctrine, and being sufficiently instructed, is at last baptised and married, and by his industry acquires property by means of what his wife has brought in marriage, his heirs (should he die afterwards without leaving a child or children) shall not be entitled to any thing: for, not having brought any thing in marriage, they consequently shall not carry any thing out, and being moreover Pagans. But should the wife die first, without leaving any child or children, the husband is lawfully entitled to the half of the acquired property, it having been gained by his industry.

How, where Two Pagans intermarry.

§ 18. If a Pagan comes here as just stated and marries a Pagan woman, and such Pagan dies without leaving a child or children, his relations inherit the half of the property acquired during marriage; because, should he have left any child or children and should they or his relations claim the inheritance, they certainly would get it without his having brought any thing in marriage, they being Pagans; but having once embraced the Christian religion, the Pagan relations are not entitled to any thing. Pagans consider as their lawful wife or wives those round whose neck they have bound the taly with the usual Pagan ceremonies: and should they have more women, they consider them as concubines. If the wives, although they should be three or four in number, should all and each of them have a child or children, such children inherit, share and share alike, the father's property; but the child or children by the concubines do not inherit any thing.

SECTION II.

Of Adoption.

§ 1. *Ceremonies of adoption.*
2. *Of the succession to, and division of, property, in the case of adoption, where the parties adopting leave other children.*
3. *Where the adopted person dies without issue.*
4. *Where two children, not related, are adopted.*
§ 5. *Of the division of property among adopted children, to the adoption of whom some of the relatives of the person adopting consent, while others refuse their consent.*
6. *Where one of three brothers adopts a child.*
7. *Of the adoption of a person of a higher or lower cast.*

Ceremonies of Adoption.

§ 1. IF a man and woman take another person's child to bring up, and both or one of them be inclined to make such child their heir, they must first ask the consent of their brothers and sisters if there be any; if not, that of their nearest relations, who otherwise would succeed to the inheritance: and if they consent thereto, saffron-water must be given to the woman, or to the person who wishes to institute such a child their heir, to drink, in the presence of the said brothers or sisters or nearest relations, and also in the presence of witnesses after the brothers and sisters, or nearest relations, and also the parents of the child, shall previously have dipped their fingers in the water as a mark of consent. Although there be other witnesses, it is nevertheless the duty of the barbers and washermen to be present on such occasions.

If the brothers and sisters refuse to give their child, such a man and woman may take the child of another person, although a stranger, but they are not at liberty to drink saffron-water without the consent of their brothers and sisters, or of those who conceive themselves to be heirs; although this litigious people, from mere motives of hatred, often endeavour to prevent a man and woman, who have brought up a child with the same love and tenderness as their own, from adopting such child. Nevertheless, according to the testimony of all the Moedeliars, such a man and woman may, in spite of the opposition, adopt such a child, and bequeath it one tenth part of the husband's hereditary, or wife's dowry property: out of the acquired property they may bequeath more than one tenth, provided they have not many debts. But such an adoption may not be made

without the consent of the magistrate, in order to keep them within the bounds of discretion, and also in order to prevent them from adopting children, from motives of hatred towards their relations.

Of the Succession to, and Division of, Property, in the case of Adoption, where the Parties adopting leave other Children.

§ 2. But when the said man and woman have both together drunk saffron-water, such or such a child shall inherit all that they leave when they die: and if, after such adoption, they have a child or children of their own, then such adopted child inherits together with the lawful child or children. And it is to be observed, that such an adopted child, being thus brought up and instituted an heir, loses all claim to the inheritance of his own parents, as he is no longer considered to belong to that family, so that he may not inherit from them. If the adopting father alone drinks saffron-water, then such a child shall succeed to the inheritance of his or her own mother; and, if the adopting mother has alone drunk saffron-water without her husband, then such a child inherits also from his or her own father.

Where the adopted Person dies without Issue.

§ 3. If such an adopted person dies without leaving a child or children, then all that he or she might have inherited returns to the person or persons from whom it came, or to their heirs.

Where two Children, not related, are adopted.

§ 4. If a husband and wife adopt two children, a boy and a girl, who are not related to one another by blood, so that they can marry together, and if both husband and wife together drink saffron-water in the manner above stated, and if both the said adopted persons be married together after they arrive to the age of maturity, and at the expiration of time one of them dies without leaving a child or children, then the survivor inherits the whole on account of the adoption, which binds them as brothers and sisters, and not in the blood. It goes in the same manner, if husband and wife, after having adopted a boy, have a daughter of their own: such a boy is allowed to marry with the daughter, provided they are not nearer related by blood than brothers' and sisters' children, and they inherit from one another as before mentioned.

Division of Property among adopted Children, to the Adoption of whom some of the Relations of the Person adopting consent, while others refuse their Consent.

§ 5. If a husband and wife wish to adopt another person's child, to which adoption some of his or her brothers and sisters or nearest relations consent, and others do not consent; in such case, the husband and wife are at liberty to adopt such a child, and to make him the heir to so much as the share amounts to, of those who have consented to the adoption; and who, as a token thereof, must have dipped their fingers in the saffron-water

drunk by the husband and wife leaving the inheritance, to which the non-consenting party is entitled, at their disposal, until such a time as husband and wife, or one of them, dies; when the child and each of them take the shares to which they are entitled. But if the said heirs, either through negligence or otherwise, permit or allow the adopted person to remain for several years in the peaceable possession of the property, the heirs, by their silence, forfeit their claim and title thereto.

Where one of three Brothers adopts a Child.

§ 6. If there are three brothers, one of whom has two children and the other two have none, and if one of these wishes, from pure motives of affection, to adopt one of his brother's children, which the other brother, who has also no children, wishes to approve, the two brothers may carry their design into execution, leaving to the third brother the action which he pretends to have on the inheritance. On the death of such adopting brother, all his property is divided between the adopted child and the non-consenting brother, share and share alike. If the non-consenting brother who has no children wishes to give some of his property to the child, who has remained with the father unadopted, the question is, whether the adopted child can prevent it? The general opinion now is, that, on account of the right which he had thereto (as nephew and heir of his uncle) being lost by the adoption, he must allow the giver to do with his property what he pleases, as long as he lives.

Of the Adoption of a Person of a higher or lower Cast.

§ 7. If a man adopts, in the manner above stated, a youth of a higher or lower cast than his own, such child not only inherits his property, but immediately goes over into his adopted father's cast, whether it be higher or lower than his own. But if a woman adopts a child, such child cannot go over into her cast, but remains in the cast of his own father, and will only inherit the woman's property after death.

If a man adopts a girl of another cast, in the manner above stated, *she* (it is true) goes over into the cast of her adopted father, but *not* her children or descendants: for if she marries, and has a child or children, they follow their father; except among slaves, in which case it has another tendency, for there the fruit follows the womb.

SECTION III.

Of the Possession of Grounds, Gardens, &c.

§ 1. *Of joint possession, or tenancy in common.*
2. *Of the renting of ground.*
§ 3. *Division of produce where fruit-trees overhang the ground of another.*
§ 3. *To whom the possession of palmyra trees belongs.*

Of joint Possession, or Tenancy in common.

§ 1. IF two or more persons possess together a piece of ground without having divided it, and one of them incloses with a fence as much as he thinks he would be entitled to on a division, and plants thereon cocoa-nut and other fruit-bearing trees, and the other shareholders do not expend, or do any thing to their share of the ground, until the industrious one begins to reap the fruits of his labour, when the others, either from covetousness or to plague and disturb, come (which is frequently the case among the Malabars) and want to have a share in the profits, without ever considering that their laws and customs clearly adjudge such fruits to the person who has acquired them by his labour and industry,—when, in such a case (not being able to obtain the fruits), they generally request to divide the ground, to know what belongs to each person, such division may not be refused. But care must be taken in making it, that the part, which has been so planted, falls to the share of the brother who planted the same, and that the unplanted part falls to the share of the other joint proprietors: unless they wish to put off the repartition of the ground, and give one another time to plant an equal number of trees, and by proper attention to get them to bear fruit; in which case the repartition must be general, without considering who has planted the ground.

Of the renting of Ground.

§ 2. If a person has not a proper piece of ground of his own on which to plant cocoa-nut trees, and is allowed to do it on another man's ground, he gets wo thirds of the fruits which the trees planted by him produce, provided that he himself furnished the plants; and the owner of the ground receives the other third. But if the owner of the ground supplies the plants, the planter gets but one third, and the owner of the ground the other two thirds. If, however, they have *both* been at an equal expence for the plants, then they are each entitled to an equal share of the fruits and trees. This division mostly takes place in the province of Timmoraatje: for, in the other pro-

vinces, they know better how to employ their grounds than to let strangers plant cocoa-nut trees thereon. If a labourer squeezes out his *pannegays* and sows the kernels, in order to obtain plants, and on digging them out forgets some of them, which afterwards become full grown trees, bearing fruit, the fruit which they produce remains the property of the owner of the ground, the trees having grown of themselves, without any trouble (such as watering them, &c.) having been taken.

Division of Produce where Fruit Trees overhang the Ground of another.

§ 3. If any one plants on his own ground, near the boundaries thereof, any fruit-bearing trees, which must be cultivated with a great deal of trouble, and if by a crooked growth the tree or any of the branches grow on or over the neighbour's grounds, the fruits of such tree nevertheless remain the entire property of the planter, without his neighbour having any right to claim the fruit of the branches which hang over his ground: but, if any trees, such as tamarinds, illipe, and margosy, grow of themselves, without having been planted or any trouble having been taken, in such case the fruits belong to the person whose ground they overshadow.

It seems, that many customs have been invented here for the sole purpose of plaguing one another: for it is sufficient to say, that the trees which stand on a person's own ground have grown up of themselves, without trouble or labour, and that he is not to be the owner of the branches and fruits, which grow over his neighbour's ground, the fruits of such branches being indisputably his; and he is even at liberty to cut the branches if they hinder him, and sell the same for his own profit, without the consent of the owner of the ground on which the trees stand. And the owner of the branches cannot also prevent the owner of the tree from cutting it down, but in such a case he must give the branches to the person over whose ground they hang. But, on account of the margosy oil, it has been ordered, since the company has had possession of the country, that the trees are not to be cut down without the special consent of the persons in power; and it is the same with all other fruit-bearing trees.

To whom the Possession of Palmyra Trees belongs.

§ 4. Although a piece of ground belongs to one person and the old palmyra trees standing thereon belong to another person, the owner of such trees cannot claim the young trees, as they must remain to the possessor of the ground; excepting in the village of Araly where it is an antient custom that the owner of the old trees takes possession of the young trees; which is the reason why only a few young trees are found in that village.

For although a few ripe pannegays fall occasionally from the trees upon the ground, from which young plants proceed, the owner of the ground, when he wants to cultivate it, has a right to extirpate such plants, in order to get rid of other persons' trees on his ground.

In the provinces of Timmooraatje and Patdupalle, in so far as the trees and not the grounds stand mentioned in the company's thomboos, the owners of the old trees take the young ones; but, where the grounds are mentioned and also the young trees, and for which rent is paid, then the young palmyra trees belong to the owners of the ground.

SECTION IV.

Of a Gift or Donation.

§ 1. *In what cases a gift may, or may not, be made, where husband and wife live separately.*
2. *How far they may make donations to their nephews and nieces.*
§ 3. *When they receive a gift of land from another person.*
4. *How far gifts to one of two sons are good.*
5. *Presents to sons being bachelors, by relations, remain to them on their marriage, but no other presents.*

§ 1. WHEN husband and wife live separately, on account of some difference, it is generally seen that the children take the part of the mother, and remain with her: in such a case the husband is not at liberty to give any part whatsoever of the wife's dowry away; but, if they live peaceably, he may give some part of the wife's dowry away. And if the husband, on his side, wishes to give away any part of his hereditary property which he has brought in marriage, he may then give away one tenth of it without the consent of the wife and children, and no more: but, the wife being subject to the will of her husband, may not give any thing away without the consent of her husband.

In what cases a Gift may, or may not be made, where Husband and Wife live separately.

§ 2. If a husband and wife have no children, and are therefore desirous to give away some of their goods to their nephews and nieces, or others, it cannot be done without the consent of the mutual relations; and if they will not consent to it, they may

How far they may make Donations to their Nephews and Nieces.

not give away any more of their hereditary property and dowry; and, if their debts be not many, they may also give something from the property acquired during marriage. If those nephews and nieces, who have received such donation, die without issue, then the brothers inherit from brothers, and sisters from sisters; and the children and grandchildren succeed also, if there be any: if not, it devolves to the parents of those who obtained the donation, that is to say, to their father's side, and to his brother and his children; and in like manner, on the mother's side, to her sister and her daughters, and on failure of them, to the brothers and their children, and in default of heirs on his or her side, the gift returns to the donor and his nearest heirs.

When they receive a Gift of Land from another Person.

§ 3. If a husband or his wife receives a present or gift of a garden from another person, so much of such gift or present as is in existence on the death of one of them when the property is divided, remains to the side of the husband or wife, to whom the present was made, without any compensation being claimable for any part of the gift that may have been alienated: but the proceeds thereof, acquired during marriage, must be added to the acquired property. But, if any one has a present of a slave, cow, sheep, or any thing else that may be increased by procreation, such present, together with what has been procreated, remains to the side where it was given, without any compensation being claimable for what might have been sold or alienated thereof.

How far Gifts to one of two Sons are good.

§ 4. If a husband and wife have two sons and no daughters, and the husband, from a greater affection which he bears the eldest son more than the youngest, wishes to give him a part of his hereditary property, he may do it by executing a regular deed: and if, after the expiration of some time, the youngest son dies without issue, and afterwards the parents die one after the other, then it will be as if the gift never had been made; for every thing devolves to him who received the gift; and if he dies also without issue, his property is inherited in the manner above stated. The father's hereditary property and the half of the acquired property, after deducting therefrom the debts, go to his brother or brothers, and the mother's dowry property and the other half of the acquired property (after deducting also therefrom the half of the debts) go to his sister or sisters, without the latter being at liberty to claim any thing on account of what the father gave to his son, as above stated. The same also obtains, if the grant or gift had been made on the mother's side: but, if the gift has been obtained from any other person besides

the father and mother, then it is divided both on the father's and on the mother's side.

If husband and wife have two, three, or more sons, and have given and delivered to them a piece of ground or garden; and if, after having possessed it for several years, the father and mother die, which causes a division of the estate, and if the abovementioned son who has obtained the grant or gift demands that it shall be first delivered him from the estate, it may not be refused to him, if he can prove it by a written document; if not, the gift is considered of no value, and is equally divided.

Presents to Sons, being Bachelors, by Relations, remain to them on their Marriage, but no other Presents.

§ 5. We have stated above that all the property, acquired by the son or sons while they are bachelors, must be left by them to the common estate when they marry: but this is by no means understood to include the presents that have been made them by relations or others, which must remain to the person to whom they have been given.

Should a husband and wife, who have no children, have acquired during their marriage any property; and should the husband, without the knowledge of his wife, give a part thereof to his heirs, and both afterwards die; in such case, on the division of the estate, the relations of the wife must receive beforehand a part equal to that which was given away by the husband to his relations when he was alive.

SECTION V.

Of Mortgages and Pawns.

§ 1. *Of mortgages of lands, on condition that the mortgagee should possess the same, and take the profits thereof, in lieu of money.*
2. *Mortgagee so in possession, to be liable to all land taxes or duties.*
3. *Of redemption of a mortgage, where due notice has not been given by the mortgagor.*
4. *Of mortgages for certain terms of years.*
5. *Of mortgages of fruit trees.*
6. *Of mortgages of slaves.*
7. *Of loans of money for the use of beasts.*
8. *Of pawns of jewels, &c.*

Of Mortgages of Lands, on condition that the Mortgagee should possess the same, and take the Profits thereof in lieu of Money.

§ 1. WHEN any person has mortgaged his lands or gardens to another for a certain sum of money, upon condition that such lands or gardens should be possessed by the mortgagee, and that the profits thereof should be enjoyed by him instead of the interest of his money; then the mortgagor of such lands or gardens cannot redeem the same whenever he pleases, but, after the crop has been reaped, he must give information of his intention to the mortgagee, so as to prevent any further trouble, labour, and expence to the latter. In such case the mortgagor must, without failure, pay to the mortgagee the sum of money for which the said property has been mortgaged, namely, for the *warrego lands* in the months of July and August, and for the *paddy* lands in the months of August and September: but, should the mortgagee have left the ground for the space of one year without sowing, for the purpose of having a better crop, in that case the mortgagor will be obliged to pay the money for which the grounds have been mortgaged in the month of November in the same year; and in the month of November also must be redeemed the *palmyra*, *betel*, and *tobacco gardens*. Yet, should the mortgagee conceive a dislike to the land or garden mortgaged to him on account of the same not yielding so much profit as the interest of the money for which the lands have been mortgaged, and should he therefore wish to get rid of the same and to recover his money, he shall be obliged, in that case, to wait for his money one year after the lands or gardens have been delivered to the proprietor or the mortgagor: and if the mortgagor is and remains unable to

redeem such land or garden, in that case the same must be offered for sale to his heirs; who then may purchase such lands or gardens, in case the same are worth more than the amount for which they were mortgaged; but should they *not* be worth so much, the mortgagee must then accept and keep the same for the sum advanced by him, provided he is confirmed in the full possession thereof, by a title deed drawn up in proper form.

Mortgagee so in Possession, to be liable to all Land Taxes or Duties.

§ 2. The mortagee is to pay all such taxes and land duties to which the mortgaged land is subject, so long as he remains in the possession of the same, even for that year in which the mortgaged land is redeemed; for the payment of which taxes and duties the mortgagee must take a receipt from some person belong to the cutcherry, except in the province of Waddemoruatchie, where the custom differs; because there, the proprietor receives a tenth part of the fruits produced by the ground mortgaged by him, and he therefore pays the land duties and takes a receipt for the same in his own name; and for the palmyra trees, he receives the duties upon the trees from the mortgagee or possessor, which duties he, the mortgagor, then pays to the majorals, and takes a receipt for the payment thereof in his own name.

Of Redemption of a Mortgage, where due Notice has not been given by the Mortgagor.

§ 3. In case the mortgagor wishes to redeem his mortgaged ground, but out of ignorance, informs the mortgagee too late of his intention, namely, after the ground has been dug or other labour has been bestowed on it; in that case, the redeemer must give to the mortgagee his proper share from the fruits, which the land has produced in that year, for the labour and expences which he has bestowed upon such lands: in which case, the redeemer must observe the customs prevailing in the province and village.

Yet, when the mortgagee receives the money advanced by him, but cannot agree with the proprietor with respect to the profits expected by him according to the custom of the country, the proprietor in that case must permit the mortgagee himself to sow that piece of land; provided that he gives to the proprietor of the land, according to the custom of the country, the *terre-wakom*, that is, the ground duty.

Of Mortgages for certain Terms of Years.

§ 4. At present it is the prevailing custom here, that many persons mortgage their lands for a fixed term of three, five, eight or ten years; yet, in case the mortgagor, before the expiration of the stipulated time, shall be compelled to sell a piece of mortgaged land, either for the purpose of discharging his debts, or for some other reasons, the mortgagee cannot prohibit such a

sale, but must consent to it, and receive or accept the sum of money advanced by him according to the custom of the country.

Of Mortgages of Fruit Trees.

§ 5. If any person has mortgaged to another, in the manner above-mentioned, any fruit-bearing trees, viz. cocoa-nut, mango, jack or areca trees, and is able to redeem the same, he must do so in the months of December and January; and the mortgagee may pluck such ripe fruits as are eatable from the said trees, before he delivers over the same to the proprietor.

Of Mortgages of Slaves.

§ 6. If any male or female slaves have been mortgaged upon the before-mentioned condition, and if they have fallen sick after some time; it is the duty of the mortgagee to give information thereof to the proprietor, in order that he may cause his male or female slaves to be cured of such disease as they labour under. But, should the mortgagee cause such male or female slaves to be cured at his own expence, without giving notice thereof to the proprietor; all such expences, as were incurred by him for that purpose, are to be defrayed by himself, and he cannot demand the same from the proprietor. Yet, should such male or female slaves happen to die, the proprietor must then return to the mortgagee the sum, for which such slaves had been mortgaged.

Of Loans of Money for the Use of Beasts.

§ 7. Should any person lend a sum of money to another, upon condition that the debtor, instead of paying the interest, should furnish the lender with one or more beasts for the purpose of having his land ploughed, without mentioning however what buffaloes or bullocks are to be delivered by him during the period that he keeps the borrowed money under him, and should a beast or beasts, so delivered to be used in ploughing the land, happen to die during the said period, the debtor or the proprietor of such beast or beasts is obliged to furnish the lender of the money with one or more beasts instead of those which are dead, in order to be kept by the lender of such sums of money until his land has been ploughed, after which the borrower of the money may acquit himself from the said obligation by returning such sums of money as were borrowed by him.

Of Pawns of Jewels, &c.

§ 8. Should any person take in pawn any jewels or wrought gold or silver for a certain sum of money, in order to receive a monthly interest upon the same, and should the proprietor of the pawned goods be able to prove that the pawnee has either worn them himself, or has lent out the same to be worn by others, the pawnee in such case will forfeit the interest of the sum of money lent by him; and such pawnee will be obliged, in such case, to return the pawn for such an amount as was lent by him to the pawner.

SECTION VI.

Of Hire.

§ 1. *Of the hire of beasts.*

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§ 1. WHEN any person has hired one or more beasts, in order to plough his land, the proprietor of such beasts is not obliged to furnish the person who has hired the same with fresh beasts, in case such as were hired become sick or happen to die during the time that they were used to plough the land. In case any person borrows from another any beasts for his use, with the free consent of the proprietor, such proprietor, according to the custom of the country, may not demand from the borrower any indemnification for such of the beasts as are hurt or have broken their legs, but must consider the loss as accidental, and consequently bear the same. Of the Hire of Beasts.

SECTION VII.

Of Purchases and Sales.

§ 1. *Of sales of land.*
2. *Of sales of cattle.*
§ 3. *Of the sale of children.*

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§ 1. FORMERLY, when any person had sold a piece of land, garden, or slave, &c. to a stranger without having given previous notice thereof to his heirs or partners, and to such of his neighbours whose grounds are adjacent to his land, and who might have the same in pawn, should they have been mortgaged, such heirs, partners and neighbours were at liberty to claim or demand the preference of becoming the proprietors of such lands. The previous notice, which was to be given to persons of the above description, was to be observed in the following manner, viz.: to such as resided at the village, one month; to persons residing in the same province but out of the village, three months; to those residing in another province, six months; and to those who reside abroad, one year. Of Sales of Land.

The above periods having expired without such persons having taken any steps upon the information given to them, the sale was

considered valid; yet this mode of selling lands underwent an alteration afterwards, in consequence of the good orders given on that subject during the time of the old Commandeur BLOM (of blessed memory): as, since those orders, no sale of lands whatever has taken place until the intentions of such as wish to sell the same have been published on three successive Sundays at the church to which they belong; during which period such persons as mean to have the preference to the lands for sale, according to the antient customs of the country, are to come forward, and to state the nature of their preference; in consequence whereof they then become the purchasers of the same.

It is customary, under this nation, that a piece of land which has been mortaged to one person is sold to another, for which sale, according to the above cited order, proper title deeds are granted, although the new purchaser is unable to discharge the amount of the purchase money, and in consequence thereof pays immediately to the seller only that part of the purchase money which exceeds the sum for which the land has been mortgaged, and afterwards leaves the same in possession of the former mortgagee for the amount for which it was mortgaged by the former proprietor, until the new purchaser has the means to pay the amount for which the said land has been mortgaged. This manner of dealing creates many disputes, as it occurs very often that such sums of money are not discharged before the expiration of eight, nine, or ten and more years; on which account I am of opinion, (yet submitting mine to wiser judgment), that the passing of title deeds without the purchase amount being fully discharged should be prohibited, or at least that orders should be given, that in cases of the above described nature, the mortgage deeds made previously in the name of the seller should be repealed, and that a new one should be passed in the name of the purchaser instead of that which has been repealed.

Of Sales of Cattle.

§ 2. If any person wishes to sell his cattle, viz. bullocks, cows, buffaloes, sheep, &c. &c. the sales thereof are to take place without any publication or acts in writing, which sales are considered valid when the dry dung or excrement of such animals as were sold has been delivered by the seller to the purchaser: and in case the animals so sold happen to die or to get young ones before they are delivered up, the purchaser being able to prove by witnesses that the seller has sold them to him for a sum of money, and that the dry dung or excrement of those animals has been received in token of their having been sold, obtains the right of a proprietor of such animals as were pur-

chased by him as well as of their young ones, without any claim whatever being made to them by any other person whomsoever.

Should any person sell any of his bullocks or buffaloes, &c. &c. upon a statement that they are fit to be employed in ploughing lands, and should the contrary appear to be the case after the price has been agreed upon and paid for them, the purchaser may, in such case within the period of fifteen days, deliver back to the seller such of the above described animals, and may demand from him the price paid for the same, who in that case is also obliged to restore it to the purchaser.

Should any person sell a cow to another, stating that the animal sold has once or several times had young ones, and should it appear afterwards that the animal sold upon the above statement, instead of having had young ones once or several times, is a cow which never bears a calf, and consequently unfit for generation, the purchaser may in that case deliver back to the seller the cow or such other animals as were purchased by him, and he may demand from the seller the restoration of the purchase money. But should any person, on the contrary, purchase a calf a year and a half or two years old, and should it appear afterwards that the calf so purchased grows up a cow which never bears a calf, or is unfit for generation, the purchaser is then obliged to keep the same, as no fraud whatever could have taken place in the sale thereof.

Of the Sale of Children.

§ 3. Where parents of this country neither are nor never were slaves, yet sell their children when they are in needy circumstances, notwithstanding they are free people, such parents have a right to redeem their children when they are in better circumstances, for such prices as may be fixed upon by arbitrators; in which case the proprietor of slaves of the above description may not hinder or object to their being redeemed.

This is an antient custom, which, according to my opinion, is grounded on reason; and I am also of opinion, that, in case slaves of the above description can prove that they became slaves in the manner heretofore stated, they ought not in such case to be deprived of the above mentioned privilege, as the sale of free-born natives has been positively prohibited in this country.

SECTION VIII.

Of Male and Female Slaves.

§ 1. *Different classes of slaves.*
2. *Marriages of slaves.*
3. *Division of the property of slaves, dying without issue.*
4. *Division of property where there are children.*
§ 5. *Duties of married slaves.*
6. *Sale of slaves having lands, &c.*
7. *Mode of emancipating slaves.*
8. *Of succession to the property of an emancipated slave.*

Different classes of slaves.

§ 1. THE slaves of this country are divided into four casts, viz. *Cowias*, *Chiandos*, *Pallas*, and *Nalluas*. It would be a matter of great difficulty to find out that the two former casts were slaves from their origin, as it is supposed that some of them were sold in antient times by their parents or friends to others; this supposition is entertained especially with respect to the Cowia cast, the greatest part of whom are slaves at present, and such as were not slaves caused themselves by some intrigue or other to be registered in antient times in the church rolls and thombes, under the denomination of other casts; so that none of that denomination are free at present.

The slaves of the second cast, viz. the Chiandos, are but few in number, and such of this cast as were in slavery were not registered in the thombo as Chiandos, but under the denomination of Cowias; so that the remaining part of them are free, and perform government-services in the same manner as the Bellales; and these Chiandos perform their ordinary *Oliam* or government-services during one day in every month, besides which they are obliged to provide the elephants of government in the stables of the province with food, together with the Pallas and Nalluas, and also to assist in carrying the palankeens and the baggage of the company's civil servants of rank. The two other casts are slaves from their origin, and remain so till the present time, unless any of their masters out of compassion happen to emancipate them, which very seldom takes place.

Marrriages of Slaves.

§ 2. When people of this description intend to enter into matrimony, during the time that they continue in slavery, they are obliged to inform their masters of their intentions and obtain their consent thereto; for which purpose they must state to their masters with whom they intend to marry, and when they have

obtained the consent of their masters, they get a certificate from them to be produced to the schoolmaster of the church to which they belong; which certificate being produced, the marriage ceremony is performed.

The proprietors never give their consent to such marriages, except when their male slaves wish to marry with their own female slaves: yet, if circumstances do not permit it, they then allow their slaves to enter into matrimony with female slaves of other persons; but government male slaves are prohibited from marrying with any other female slaves, and if they wish to marry, they must do so with the female slaves of government.

Division of the Property of Slaves dying without Issue.

§ 3. In case any of these slaves happen to depart this life without issue, then the deceased's master (should the deceased's brothers and sisters be slaves of other persons) appropriates to himself such inheritances and dowries as were brought by the deceased into the marriage, and also half of the property acquired during the deceased's marriage; yet in case the deceased's brothers and sisters are also the slaves of the deceased's master, they are then permitted to possess such property; unless the proprietor of the slaves himself is in an indigent situation, and has nothing to subsist upon.

Division of Property where there are Children.

§ 4. If it happens that such slaves procreate children together, the child may not inherit from his father at his death, when the father is a slave of another person; but should the mother happen to die, her master has the choice either to appropriate to himself half of the property which the deceased had brought into the marriage, and also a quarter part of the whole property acquired during her marriage, or to deliver to the female slave's children all the goods left behind by their mother at her death, because the children of slaves of different masters appertain to the proprietor of the female slaves. Formerly, the masters of such male slaves as married with female slaves of other proprietors, had the right, when his slaves had procreated five or six children to appropriate to himself one of the boys; yet he had no right to take any when they were girls; but this right is enjoyed at present by no person whatever except government; that is to say, when the male slaves of government were married with female slaves of the inhabitants before the publication of the aforesaid order.

Duties of Married Slaves.

§ 5. The male and female slaves of the above description live separately from their masters, and are obliged to earn their own livelihood in such manner as they think proper, the Pallas and Nalluas male slaves giving yearly to their masters four fanams

in cash, as a token of their gratitude. And they are all obliged to perform for their masters government-services when they require the same, on which occasion the masters are obliged to maintain the slaves so employed; but should the slaves fail therein, and the *chiko* money be demanded from their masters on behalf of government, the slaves are then obliged to pay the chiko money for their masters, as such neglect is not to be attributed to the masters but to the slaves, because they have received maintenance for the time that they were to be employed, and have deceived their masters.

They must also be ready, when required by their masters, to repair the fences of their master's lands, provided that they receive maintenance during the time they are at work for their masters. When the boys, among the children of the slaves, are able to be employed as herdsmen, the master then chooses such of them as he likes for that purpose, provided that he gives them food and raiment so long as he employs them.

When the female slaves of the above description happen to be delivered of a child, their masters are obliged to provide such female slaves with such articles as are required by women in child-bed, to the amount of six fanams, viz. when their female slaves are Nalluas and Pallas. The masters being unable to contribute the said six fanams, and the Nalluas and Rallas themselves having no means to defray the expence, are permitted to pawn either the child of which the female slave was delivered, or another of her children, for the amount of six fanams, until such female slave is able to redeem the child so pawned; the proprietors of the Cowias slaves usually give them something more, but the slaves of the Cowias and Chiandos casts are not permitted to pawn their children in any manner whatsoever, as that custom prevails only among the slaves of the Nalluas and Pallas casts.

Sale of Slaves having Lands, &c.

§ 6. When any person intends to sell a male or female slave who possesses a piece of land, garden, or other thing, and wishes not to be deprived of the right which he has to the property of his male or female slaves, he is obliged to take possession of the property of such slaves before he sells them, and to deal therewith as he may think it expedient. But should the seller, through negligence or otherwise, allow the slave so sold to possess his goods unmolested, the seller cannot in that case have the least claim to such property.

It sometimes occurs, that wealthy inhabitants, who have many slaves, make a present of one of their slave girls to a poor

widow, in order that she may get a husband for her daughter, by giving the slave girl to her daughter either as a gift or dowry; and as the person who makes a present to another of such a slave girl, loses the right which he had to her, so the parents of such a slave girl, should she happen to continue residing at their house, may give to their daughter nothing whatever from their goods as a dowry at her marriage; whereas all the property of such parents when they are slaves appertains to their master, and their child having been made a present of, as above stated, to another, becomes the slave of another person, and, in consequence thereof, has no share in her parent's goods, unless her former mastsr consents thereto.

Mode of emancipating Slaves.

§ 7. When a man, whether married or not, has no child or children, and intends to emancipate a male or female slave inherited by him, he is obliged to announce his intention to the schoolmaster of the church to which such female or male slave belongs, and to request that he will publish in the church his intention on three successive Sundays, in order that his community, but especially those wishing to oppose such intention, may get notice thereof in due time, and be able to institute such claims as they think they have to such slave: and, should any person come forward during the time that such publications take place, both they, as well as the person wishing to emancipate the slave, must submit to the decision of such arbitrators as they choose to appoint thereto; yet if a married man, having no child or children, wishes to emancipate a male or female slave appertaining to his wife's dowry, he must do so with his wife's consent, and such emancipation must further take place in the manner heretofore stated with respect to a single man; but husband and wife, having children, may emancipate one or more slaves according to their pleasure.

When a person has a child by his own female slave, he may emancipate such child without consent of his heirs, and may also make a donation, (though of no great consequence), to such child out of his hereditary property.

Of Succession to the Property of an emancipated Slave.

§ 8. In case an emancipated male or female slave happens to die childless, leaving behind him brothers and sisters by his or her mother's side, and if among the deceased's brothers or sisters, only one should have been emancipated, the emancipated brother or sister of the deceased only inherits from the deceased: yet should *none* of the deceased's brothers or sisters by the mother's side have been emancipated, in that case the legitimate children of the deceased's father are the heirs, should there be any;

but, in the contrary case, the goods left behind by a deceased person of the above description, devolve again upon the persons from whom such property was received by the deceased, and afterwards to their heirs.

It was an old custom during the time of the heathens, which still subsists among them on the coast of Coromandel, and also at some other places, that when the proprietor of a slave, on account of such slave's faithful services, or from any other motives, emancipates one or more of his slaves, and such emancipated slaves after the lapse of some time behave themselves improperly to their former masters or to their children, in that case, the emancipated slaves were reduced again into slavery. When I was occupied in composing and writing these country laws and customs, a great many of the principal inhabitants and moedeliars expressed their sorrow to me, that the above cited antient customs, not having been observed for a long time, had lost their force in that country; as no emancipated slaves (so as far as they could recollect) were reduced into slavery for their improper behaviour to their masters, either under the Portuguese or under the Dutch government, the consequence whereof, they said, was, that emancipated slaves have been very impertinent to their masters and benefactors, on which account the aforesaid principal inhabitants and moedeliars urgently requested me, that I should propose the said antient customs being again made a positive law, in order to restrain the impertinencies of any emancipated slaves; in compliance with their request I propose that the said customs be made a positive law*. (1)

(1) This proposal was not acceded to by the Dutch government. See p. 777. *infra*. EDITOR.

SECTION IX.

Of Loans of Money upon Interest.

§ 1. *Of loans for fixed terms.*
2. *Securities, how far liable for debt.*
3. *Wife or children, how far liable for husband's debts.*
4. *Interest not to exceed the principal.*
5. *Of loans of paddy.*
§ 6. *Of exchanges of paddy, &c.*
7. *What proportion of profits is to be paid, where any person sows the grounds of another, without stipulating any fixed portion of the produce.*

Of Loans for fixed Terms.

§ 1. WHEN any person lends a sum of money upon interest to another, upon condition that the borrowed sum should be restored within the time fixed by the lender, with such interest as was usually paid to others at the time that the money was lent by him; should such conditions not be fulfilled by the debtor, the creditor in that case must cause the pawn to be sold, if he has had the prudence to take any lands or any other goods whatever in pawn; and in case the debtor does not consent to the said pawns being sold, the lender of such sums of money must prefer his complaint to government, and request from the same that such mortgaged goods be sold for his benefit.

Securities, how far liable for Debt.

§ 2. Should there be securities, and should the debtor or borrower abscond, or be in reduced circumstances and unable to discharge the debt contracted by him, the creditor may then demand the payment of such debts from the securities; who, in such case, are obliged to discharge the debts for which they became securities, and such securities reserve the right of instituting an action against the debtor, should the latter be improved in circumstances. If two persons jointly borrow a sum of money from another, and bind themselves generally for the amount borrowed, the lender in that case may demand the payment o the amount so lent from such a debtor as he may happen to see first, provided that the following expressions are inserted in the *olay* or bond, viz. *moonendaan moon eurooca*, which signifies, he who is present or before me must pay the debt; the consequence whereof then is, that the debtor who comes first before the creditor, when he intends to demand the money, must pay the

whole debt; but such a debtor, who pays the whole debt, has a right to demand the payment of half the amount paid by him from his fellow debtor wherever he may find him.

Wife or Children, how far liable for Husband's Debts.

§ 3. When a man has contracted debts in his life time without the knowledge either of his wife, child, or children, and happens to depart this life before he has discharged the same; his wife, child, or children, are obliged to pay such debts, provided the same be duly proved.

When husband and wife jointly cause a piece of land or a garden to be registered, as a pawn for a sum of money borrowed by them, and do not deliver over such land or garden to the creditor but keep the same in their own possession, and in consequence thereof give them afterwards to any of their daughters, as a dowry, without specifying in the deed of gift that such a piece of land or garden has been mortgaged to another; if the debtors in the supposed case happen to depart this life without discharging a debt of the above nature, yet leaving behind some other goods, their creditors of the above description, who have neglected to prevent such mortgaged lands or garden from being given as a dowry, have a right to seize such other goods as might have been left behind by the debtors; and the son or sons of such debtors are responsible for such debts, provided that the creditors (if such son or sons are unable to discharge the debt), do wait until they are in better circumstances.

Interest not to exceed the Principal.

§ 4. When a person lends money upon interest, and suffers the interest to exceed the principal, the debtor is not obliged to pay the interest exceeding such principal.

Of Loans of Paddy.

§ 5. When any person lends money on condition to receive paddy on account of interest, he loses the interest when the harvest fails; and in the event of a bad harvest, the interest is to be calculated and paid according to the profits of that harvest.

When any person is in want of paddy, either as seed corn or for any other purpose, and borrows paddy to pay interest in kind; the borrower must stipulate the quantity which he agrees to pay, because it is not known what quantity is customary to be paid in such occasions; on which account the creditors take from two to five parrahs upon a quantity of ten parrahs of paddy; and the mode to be observed in paying paddy on account of interest, is that just stated in the event of a bad harvest, or of no harvest having taken place.—In case the debtor has had a good harvest every year during the time that he keeps the borrowed money, and the creditor has neglected to come and demand his interest upon the harvest, the debtor is not obliged, in that case, to pay any thing

on account of interest exceeding the principal, but it is sufficient if he pays double the principal sum borrowed by him.

Of Exchanges of Paddy, &c.

§ 6. In case any person wishes to exchange grain, the paddy, *seamie krackan*, *cooloe rice* and *cadjang* are exchanged for an equal quantity, because they bear the same price: but any person wishing to exchange paddy for warago, must give one and a half parrahs of warago for one parrah of paddy.

What Proportion of Profits is to be paid, where any Person sows the Grounds of another, without stipulating any fixed Portion of the Produce.

§ 7. When any person sows the fields of another, without a previous agreement what quantity the sower shall give from the harvest to the proprietor of the fields; it is deemed sufficient if if the sower pays to the proprietor the *terrewaram*; which signifies the ground duty, and is calculated to be one-third part of the profits, except the tenth part which is to be given to the proprietor previously. And when the sower has agreed to give a fixed quantity to the proprietor, and the crop happens to fail in the year for which the contract has been made, the sower need not pay to the proprietor the quantity agreed upon; but in case the other inhabitants of the village (in which such a sower resides) have all had a good harvest, then the sower of the above description is obliged to pay such a quantity to the proprietor as was agreed upon by him; because, in such an event, the failure of the crop of the field sown by him is attributed to his laziness and negligence; yet, should it happen that he has had a tolerably good harvest, and the other inhabitants of his village a bad one, then the proprietor of the ground must be satisfied with the quantity produced by the field, and may not claim *any* thing more from the sower.

The above laws and customs of Jaffnapatam were composed by me, in consequence of my experience, obtained by my long residence and intercourse at that place. I have written the above laws and customs after a strict enquiry into the same by order of his excellency, the governor and doctor of laws, Cornelis Joan Simons; and I hope my endeavours will satisfy his excellency the governor's intention; in the expectation whereof, I have the honour to be,

Honourable Sir,

Your Excellency's most obedient humble servant,

(Signed) CLAAS ISAAKSZ.

Jaffnapatam.
30th January, 1707.

To the honourable the Commandeur
Adam van der Duyn.

Sir,

You are not ignorant that I have composed the Malabar laws and customs by order of his excellency the governor, which I have done so far as my knowledge of the same permitted me; yet, to prevent any future disputes concerning the same, I request that you will have the goodness to cause them to be translated into Malabar by the translator Jan Pirus, who is known to have a thorough knowledge of that language. And I also request that you will cause the Malabar translation to be attentively perused by twelve sensible Malabar moedeliars, in order that they may state their objections in writing to my composition, should they have any, in which case, I request that you will appoint such persons as would be able to point out to you such mistakes, as might have been committed either by me or by the said twelve moedeliars; and, should such persons as are appointed by you decide in my favour, I request that you will desire them to sign the Malabar translation. I insist upon this mode of giving their assent to my composition, because I know that the Malabars are deceitful and variable; and therefore, when they have subscribed their names to the composition of their law and customs, they will have no opportunity whatever to retract their assent given to the same. In the expectation that you will not refuse me this favour in your capacity of commandeur of this place, I remain,

Honourable Sir,
Your most obedient humble servant,
(Signed.) CLAAS ISAAKSZ.

Jaffnapatam,
5th April, 1707.

Sir,

Pursuant to the application made to me by Mr. the Dessave Claas Izaaksz, I have caused the composition of the Malabar laws and customs in use at this place to be translated; and I afterwards delivered the translation thereof to twelve sensible Moedeliars, whose names are hereunder specified, in order to peruse and revise the same. They have been employed in that work a great length of time, and have now returned the same to me with the following observations, viz.

" We, the undersigned twelve Moedeliars, have received from the commandeur the Malabar laws and customs composed by the Dessave Mr. Claas Isaaksz in order to be perused and revised by

us, and afterwards to state our opinion whether or not the same agrees with such laws and customs as are in use at this place.

" We were also desired to confirm the translation of the Malabar laws and customs with our signatures, should we agree to the correctness of the same.

" We declare by these presents, that the composition of the said Malabar laws and customs perfectly agrees with the usual customs prevailing at this place, and we therefore fully confirm the same. But we deem it our duty to state hereby, that, according to the antient customs which prevailed under the Portuguese government, and also at the commencement of the Dutch government, in case slaves happened to behave themselves disrespectfully to their masters and disobey any of their orders, such masters had a right to give them correction, and by that means to make them mind their duties. But within the last eight or ten years, it very often happens that, as soon as masters punish their slaves for any faults, such slaves maliciously tear their own ears and anoint their body, in order that they may have a pretence to complain of their masters' ill treatment: the consequence whereof is, that such slaves obtain some lascoreens from the magistrate in order to bring their masters before the same. Such occurrences cannot but injure the characters of the masters and at the same time render the slaves audacious.

" We must also observe, that, when any slaves are conveyed to the fort to be put in chains for their misbehaviour, the proprietors are obliged to pay great expences, and are unable to defray the same when they are in indigent circumstances, on which account the slaves very often disobey and vex their indigent masters: We, the conjunct moedeliars, therefore request that it may please his excellency the governor to order that the payment of twenty-four stivers which is at present received on such occasions from the masters may be diminished. (1)

" We Don Philip Willewaraja Moedeliar, Don Anthony Naraynen, Don Francisko Arcelambela Moedeliar, Don Joen Chanderasegra Mana Moedeliar, Don Martinho Manapoelie Moedeliar, Don Francisko Wanniaraaya Moedeliar, Don Joan Chiamboenadem Moedeliar, Don Joan Choodoogayela Chenaderaya Moedeliar, Don Louwys Poeder, and Don Francisco Rayaretna Moedeliar, are the persons who have perused and revised the translator of the Malabar laws and customs, in consequence whereof we *confirm* the same with our signatures."

(1) This request was not granted by the Dutch government. See p. 777. *infra*.—EDITOR.

In consequence of the above declaration I conceive that your excellency may rely upon the correctness of the Malabar laws and customs written by the Dessave, and I therefore hope that your excellency will either entirely approve of the same, or make such alterations therein as you may deem necessary for the welfare of the inhabitants. In the mean time I remain with the highest respect;

Honorable Sir,

Your excellency's most obedient humble servant,

(Signed) A. V. VER DUYN.

A true copy.

Jaffnapatam. (Signed) J. HUYSMAN.

9th May 1707. Secretary.

Extract of a Letter dated 4th of June 1707 written from Colombo by his excellency the governor and doctor of laws Cornelis Joan Simons in council, to the commandeur in council of Jaffnapatam, Adam van der Duyn.

The Malabar laws and customs composed by the Dessave Claas Isaacksz are approved of by us: and, in consequence thereof, we desire that authenticated copies of the same should be sent to the court of justice and the civil landraad for their guidance. And we also desire, that the said laws and customs should be entered in the records at the office of the secretary to government; and as we have read, in the composition of the Malabar laws and customs, an application to us for the necessary orders relative to the purchase and sales of lands, gardens, and slaves, &c. &c., so we desire by these presents that no title deeds whatever should be passed before the amount of purchase money has been duly discharged; and that, in case the property disposed of might have been mortgaged previously to any other person, we desire that the seller of such property should redeem the pawn; and that the purchaser, if he wishes to leave such property with the pawnee for the amount for which it has been mortgaged by the former proprietor, should grant a new bond to the pawnee in his own name in order to avoid any future disputes.

As to the application made to us to have the emancipated male and female slaves reduced again into slavery, according to the heathen customs, in case they behave themselves disrespectfully to their former masters, we think that a compliance with that application would be productive of very bad consequences; yet, in order to bridle any impertinences of emancipated slaves, we are of opinion that the punishment, directed for slaves in the twentieth article of the statutes of Batavia, may be madeuse of to correct the impertinencies of such emancipated slaves.

We cannot also comply with the application made to us by the Moedeliars, respecting the orders for diminishing the expence of half a rix-dollar which is usually incurred by such masters as are desirous to put their slaves in chains, because the masters would in that case have recourse too often to that punishment on account of the cheapness of iron.

A true copy.
(Signed) J. HUYSMAN,
Secretary.

Compared with the original at Jaffnapatam
the 16th December 1707.
(Signed) J. HUYSMAN,
Secretary.

SPECIAL LAWS CONCERNING THE MOORS OR MOHAMMEDANS.

TITLE I.

Relating to Matters of Succession, Right of Inheritances, and other Incidents occasioned by Death.

§ 1. WHEN either husband or wife dies, either leaving or not having children, the survivor shall in the first place separate, and take away from the estate, the dowry brought in marriage by him or her, the same not being in common.

§ 2. If a husband dies, leaving a wife but no children or relations, the estate shall, after deducting the funeral charges and other legacies, be divided into four shares, viz:

One-fourth to the wife, and the other three-fourths to the poor.

§ 3. If the husband dies, leaving a wife and one or more sons, then the estate is divided asfollows, viz.

One eighth part to the wife, and to the son or sons seven eighth parts.

§ 4. If the husband dies, leaving a wife and a daughter,

The wife is entitled to one eighth part.

The daughter to the just half, and the poor to the remaining three eighth parts.

§ 5. If the husband dies, leaving his wife and two daughters, then there are due

To the wife one eighth part;

Two-thirds to both the daughters, and five twenty-fourth parts to the poor.

§ 6. When the husband dies, leaving his wife and three daughters,

One-eighth part goes to the wife; three-fourths go to the three daughters, and one-eighth part to the poor: and should there even be more daughters, they shall not inherit more than three-fourth parts.

§ 7. If the husband dies, leaving his wife and a son and one daughter,

The wife is entitled to one eighth part;

The son to seven twelfths; and the daughter to seven twenty-fourth parts.

§ 8. Should there be more than one son and one daughter, then the division is fixed as follows:

One eighth part to the wife, and to

The son or sons twice as much as the daughters receive.

§ 9. If the wife dies, leaving only her husband, he is entitled to the half, and the poor to the other half.

§ 10. If the wife dies, leaving the husband and one son, the estate is divided as follows:

One-fourth part to the husband, and three-fourth parts to the son: should there be even more sons, they will get no more than three-fourth parts.

§ 11. If the wife dies, leaving a husband and one daughter,

The husband is entitled to one-fourth part of the estate,

The daughter to the just half, and the poor to one-fourth part.

§ 12. If the wife dies, leaving a husband and two daughters,

The husband is entitled to one-fourth part; the two daughters to two-thirds; and the poor to one-twelfth.

§ 13. If the wife dies, leaving a husband and three daughters, the estate must be divided into thirty-three parts, viz:

Three sixteenth parts to the husband; three-fourth parts to the three daughters, and one sixteenth part to the poor. And in this manner the estate shall be divided, even if there are more daughters.

§ 14. If the wife dies, leaving a husband, one son, and one daughter, the estate shall be divided as follows, viz.—

To the husband one-fourth part, to the son the just half, and to the daughter one-fourth part.

§ 15. If the wife dies, leaving her husband, one son, and two daughters, the following is allotted, viz.—

One-fourth part to the husband, three-eighth parts to the son, and three-eighth parts to the daughters.

This manner of dividing the estate shall take place, even if there be more sons and daughters.

§ 16. Should the husband or wife die, leaving a father and mother,

The father gets two-thirds, and the mother one-third.

§ 17. If any one dies, leaving a father, a mother, and one son,

The father is entitled to one-sixth part; the mother, to one-sixth; and the son, to two-thirds.

§ 18. If any person dies, leaving a father and mother, and one son, and one daughter,

The father is entitled to one-sixth; the mother to one-sixth; the son to four-ninths; and the daughter to two-ninth parts.

§ 19. If a person dies, leaving a father and mother, and one daughter,

The father is entitled to one-third; the mother to one-sixth; and the daughter to the just half.

§ 20. If a person dies, leaving a father and mother, and two daughters,

The father gets one-sixth; the mother, one-sixth; and the two daughters, two-thirds: and, although there be more daughters, they shall have no more than two-thirds.

§ 21. If a man dies, leaving a daughter, and a son's daughter, or grand-daughter, they are entitled to the following, viz.—

The daughter to one-half of the estate; the grand-daughter, to one-sixth; and the poor to one-third.

§ 22. Should the husband also leave, beside his aforesaid daughter, two or more grand-daughters, their share shall, however, not surpass what is stated here above.

§ 23. If a grandfather or grandmother, and father or mother dies, and a grand-daughter survives them, the one-half of the estate shall go to the grand-daughter, and the other half to the poor.

§ 24. But in case two grand-daughters have been left; then

Two thirds go to the two grand-daughters, and one-third to the poor.

§ 25. If a person has only a grandson, he succeeds to the whole property.

§ 26. If a person dies, leaving a grandson and a grand-daughter, the estate is divided as follows:—

To the grandson, two-thirds, and to the grand-daughter, one-third; and although there be more grandsons and grand-daughters, the division shall take place in the same manner.

§ 27. Should any person die, leaving a daughter, and a son's son, or grandson, one-third of the estate devolves to the daughter and two-thirds to the grandson.

§ 28. But in case two daughters and one grandson are left, each of them is entitled to an equal share of the estate.

§ 29. But should there be a daughter, a grandson, and a grand-daughter, the estate is then divided as follows:—

The half to the daughter, one-third to the grandson, and one-sixth to the grand-daughter.

§ 30. Should there, however, be two daughters, one grandson, and one grand-daughter, the estate shall be divided as follows:—

To the two daughters, two-thirds;

To the grandson, two-ninths; and to the grand-daughter, one-ninth.

§ 31. Should there be one daughter, two grand-daughters, and one daughters' son, the estate is to be divided as follows, viz.:—

To the daughter, one-half; to the two grand-daughters, one-fourth; and to the grandson, one-fourth.

§ 32. Should there be two daughters, two grand-daughters, and one daughter's son, or grandson.

The two daughters are to have two-thirds; the two grand-daughters, three-eighteenths; and the grandson, one eighteenth.

§ 33. Should any person die, leaving one daughter and a sister, although he and the sister be of two mothers and the same father, the half of the estate shall go to the daughter, and the other half to the sister.

§ 34. Should the deceased leave one daughter and two sisters; the daughter must have one-half, and the two sisters the other half.

§ 35. Should he have left two daughters and two sisters,

The two daughters shall have two-thirds and the two sisters, one-third; the same division shall take place, even if there be more daughters and sisters.

§ 36. The husband dying, leaving his wife with one daughter and a son's daughter, and leaving also a mother and one sister, the estate shall be divided as follows, viz.

The wife shall have one-eighth;

The daughter, one-half;

The grand-daughter, one-sixth;

The mother, one-sixth; and

The sister, one twenty-fourth part.

§ 37. But should the husband (as in the above case) survive his wife, and remain with the above persons, then the estate is divided as follows:

To the husband, three thirteenths; and

To the daughter, six thirteenths.

To the grand-daughters, two thirteenths; and to the mother, two thirteenths; and the brothers and sisters, in this case, are not to share in the inheritance.

§ 38. If the deceased leaves one brother and one step-brother from the side of another father or mother; the full brother is entitled to five-sixths, and the step-brother to one-sixth.

§ 39. If a person dies, leaving two brothers or sisters of one mother and two fathers,

The two brothers or sisters are to have one-third, and the poor two-thirds.

§ 40. If the deceased leaves two half brothers or sisters of one mother and another father and one full brother and one full sister, the estate is divided in the following manner, viz.:

One-third goes to the two half-brothers or sisters, four-ninths to the full brother, and two-ninths to the full sister.

§ 41. If the wife dies, leaving her husband and her grandfather, each of them are entitled to one-half of the estate.

§ 42. If the husband dies, leaving his wife and his grandfather, one-fourth of the estate devolves to the wife, and three-fourths to the grandfather.

§ 43. Should the deceased leave a daughter and grandfather, each of them shall be entitled to an equal share of the estate.

§ 44. Should the deceased leave two daughters and a grandfather, each of them shall be entitled to one-third of the estate.

§ 45. Should there be a grandfather, of the father or mother's side, and a son and a daughter,

The grandfather shall be entitled to one-sixth; the son to five-ninths; and the daughter to five-eighteenth parts.

§ 46. Should the wife die, leaving her husband, a grandfather or grandmother, and a son,

The husband shall be entitled to one-fourth; the grandfather or grandmother to one-sixth; the son to seven-twelfth parts.

§ 47. Should there be two sons, then the husband is entitled to one-fourth,

The grandfather or grandmother to one-sixth; and the two sons to seven-twelfth parts.

§ 48. Should there be also a son and a daughter,

The husband is entitled to one-fourth; the son to seven-eighteenths; the grandfather or grandmother to one-sixth; and the daughter to seven-thirty-sixth parts.

§ 49. Should the deceased leave a grandfather and grandmother of the fathers side,

The grandfather is entitled to five-sixths, and the grandmother to one-sixth part.

§ 50. Should the deceased have left a grandfather and grandmother of the father's side, and a grandmother of the mother's side, then the grandfather of the father's side is entitled to two-thirds; the grandmother of the father's side, to one sixth; and the grand mother of the mother's side, to one-sixth.

§ 51. If a wife dies, leaving her husband, father and a son, then

The husband is to have one-fourth;

The father one-sixth; and the son seven-twelfths.

§ 52. If a husband dies, leaving his wife's mother and a daughter,

The wife is to have one-eighth;

The mother, one-sixth;

The daughter one half of the estate; and the poor five-twenty-fourths.

§ 53. If the husband dies leaving two wives and a son, then

The two wives are to have one-eighth; and the son seven-eighths; and should there be more wives the division shall take place in the same manner.

§ 54. If a grandfather or grandmother dies leaving a sons' daughter or grand-daughter;

The grand-daughter is to have one-half of the estate, and the poor the other half.

§ 55. If a person dies leaving two grand-daughters of his son's side, and a brother, each of them are entitled to one-third.

§ 56. If the deceased has left a sister, she is entitled to the half, and the poor to the other half.

§ 57. If the wife dies, leaving her husband and two sisters,

The husband is entitled to three-sevenths; and the two sisters, to four-sevenths.

§ 58. If the wife has left two full sisters and an uncle of her father's side, then each of these persons shall be entitled to one-third part.

§ 59. If an emancipated female slave dies, leaving her husband and one daughter, together with her late master or mistress, then

The husband is entitled to one-fourth;

The daughter to one-half; and the master or mistress to the other one-fourth.

§ 60. If an emancipated male slave dies, leaving his wife, daughter, and his master or mistress, then

The wife is entitled to one eighth;

The daughter to one-half; and the master or mistress to three-eighths.

§ 61. If an emancipated female slave dies, leaving her husband and two daughters, together with her late master or mistress, then the property is divided as follows, viz.

One-fourth to the husband; two-thirds to the two daughters; and one twelfth to the late master or mistress.

§ 62. If such an emancipated male slave dies,

The wife will be entitled to one-eighth;

The two daughters to two-thirds; and the master or mistress to five twenty-fourth parts.

§ 63. Lastly, agreeably to the same rule, all descendants are entitled to their respective shares of inheritances, according to the persons they represent in the same manner, as follows, viz.

A wife or her descendants, a full brother or his descendants, paternal uncle and full uncles and aunts and their children, and their descendants, if there be no nearer kin; fathers', brothers' and mothers' sisters' children are entitled to the same shares as sons and daughters.

TITLE II.

Concerning Matrimonial Affairs.

§ 64. IF a person wishes to marry, application must be made to the bride's father and mother, for their consent.

§ 65. Should the parents of such bride be dead, the man must make his intention known to the relations of the bride, and endeavour to obtain their consent.

§ 66. And, after consent has been obtained, it is customary that the bride and bridegroom interchange some presents, which, however, are reciprocally restored if the marriage does not take place.

§ 67. The parents, or nearest relations of the bride, shall then, with the knowledge of the bride, enter upon an agreement with the bridegroom concerning the marriage gift, called *maskawien.*

§ 68. The matter being settled, the bridegroom is obliged to pay to the bride immediately what has been agreed upon.

§ 69. But should the bridegroom not be able to pay such marriage gift immmediately, it is with special consent of the bride, however, carried to a separate account.

§ 70. The bridegroom is obliged to inform the commandant, or the headman under whose orders he stands, of his intended marriage.

§ 71. The commandant will then by means of the native commissioners apply to his excellency the governor for his consent.

§ 72. The *maskawien* or *magger* being paid, or remaining due, the priest or lebbe shall be informed thereof.

§ 73. The priest and commandant are then obliged to record all such transactions, and to permit the marriage ceremonies to be performed.

§ 74. Should it, however, be discovered, before the consummation of the marriage, that the bridegroom laboured under any bad complaints, such as leprosy, insanity, or any other disorder, so that he is unable to perform the matrimonial duties, in such case a divorce is permitted.

§ 75. If the bride wishes to be divorced, she is obliged to inform the priest thereof; who, after having deliberated with the commandants on both sides, in the presence of the native commissioners, accedes to the divorce, which they are obliged to record. Should the parties, however, not wish to abide by the decision, they shall be at liberty according to custom to lay their case before the competent judge.

§ 76. In such case the bride is obliged to restore to the bridegroom the *maskawien* or *magger*.

§ 77. But should the disorder be discovered after the cohabitation, a divorce may take place, and the wife may in that case keep the *maskawien* or *magger*.

§ 78. And although such complaint should be discovered by the bride either before or after the consummation of the marriage, the husband is entitled to the *maskawien* or *magger*, if discovered *before* the cohabitation; but the wife is entitled to the same, if discovered *after* such cohabitation.

§ 79. Married persons (whether they can alledge any reasons or not) being with mutual consent divorced, the husband is obliged to allow his wife the *moettelaak*, or ready money proportioned to the marriage gift, for the support of the house.

§. 80. Should the husband and wife disagree, and live in continued dissensions with one another, and wish to be divorced,

§ 81. In that case the priest and the commandants on both sides are obliged to inquire into the matter, and endeavour if possible to reconcile the parties.

§ 82. But should the wife oppose a reconciliation, and the husband be inclined to a divorce, in that case they shall be separately kept by their own relations.

§ 83. After which, a meeting of the priests and the officers of the company shall be appointed.

§ 84. And the matter in dispute shall be investigated a second time, and endeavours made to bring the parties (if possible) to a reconciliation.

§ 85. And if the parties cannot come to a reconciliation before the said assembly, the matter in question must be brought before the sitting magistrate.

§ 86. And if the wife should oppose the reconciliation, she shall be held to restore to the husband twice the value of the *maskawien*.

§ 87. If the husband be desirous to divorce his wife, he shall be obliged to give her the *tollok* or letters of divorce, which is repeated a second time at the expiration of fourteen days; and, at the end of one month, she receives the third tollok, during which time the husband is obliged to maintain the wife and to furnish her with all necessaries.

§ 88. Before the third tollok is issued, a reconciliation between the parties may take place, and it is not necessary that they should disclose to any body the causes of their differences.

§ 89. But should the third tollok have been issued, they must be divorced: and should the husband be determined to divorce his wife without any further consideration, it is the practice to issue three tolloks or letters of divorce at once. But in that case he is obliged to furnish the wife with a dwelling place for the space of three months, and she shall not be allowed to marry before she has three times had her menses.

§ 90. The husband is held to give notice to the commandants, on both sides, of such divorce, which shall be recorded by them, and no other person shall intermeddle therewith.

§ 91. No wife is obliged to receive from the husband any interest money for her maintenance; but such maintenance must, according to the Mohammedan law, be the product of some trade or manual work of the husband.

§ 92. If a married man fall into poverty, so as to be unable to maintain his wife, such wife if she should be possessed of any wealth, (which she is unwilling to share with her husband) may

obtain a divorce, should she wish it, under the same provision as stated in section 76.

§ 93. If the husband leave his wife, in order to repair to some place or other on business, he must, without giving occasion to divorce, provide for the maintenance of his wife in the presence of his relations.

§ 94. A married woman disobeying her husband, shall suffer herself to be reprimanded by him, for the first time, with kindness, in order to bring her back to her duty.

§ 95. Should the wife, however, fail in her due obedience for the second time, the husband is then permitted to inflict on her some gentle correction, but by no means to treat her in a rough manner, so as to occasion any marks either in her face or other parts of her body; much less is he permitted to beat her on any dangerous place of the body, so that blood appears.

§ 96. A divorced wife, being pregnant, is entitled to be maintained, till she is delivered, by her husband; who is also obliged to pay the expence of her lying-in.

§ 97. The wife, in the above case, is obliged to nourish her child during three days without being at liberty to ask or receive any thing.

§ 98. But, after the expiration of that time, the husband is obliged to fix a certain amount for the maintenance of the child, if the wife requires it.

§ 99. Should the wife be unwilling to keep the child longer than three days, the husband is obliged to receive it.

§ 100. According to the law of Mohammed, a man is permitted to marry four wives, that is to say, only such men as are uncommonly addicted to the fair sex, who have ability enough to acquit themselves of their duty, and who are possessed of wealth sufficient to maintain the same properly.

§ 101. Such men are also permitted to keep under their protection, besides their lawful wives, as many concubines as they are able to maintain.

§ 102. The husband and wife being divorced, (the third tollok having been issued), they are not permitted to become reconciled and live as husband and wife, unless the wife has been married to another husband, and has also obtained from him letters of divorce.

The shares, allotted to the poor by several of the foregoing articles, are not for the poor, but must go to the *asewatoekares*, *aroegamoedeweigel*, and persons on the father's and mother's side, who are entitled to the same.

Heirs, who claim such inheritances, make the same known to the headman of the Moors, the arbitrators, and the priests; who then, at the entrance of the gate of the temple, inquire into and decide the case, and cause the shares to which each is entitled to be given to them. And as, according to the Mohammedan custom, the women may not go out, it is therefore the custom to inquire into and settle their cases in an amicable manner; but if they are not contented therewith, both such cases and the criminal ones, are brought before the governor.

In this manner we the marikair, arbitrators, priests and inhabitants, according to our knowledge, and having consulted with the learned high priests, have stated the foregoing articles as being agreeable to the laws and customs to be observed; and have confirmed the same with our signatures, at Colombo, the 1st of August 1806.

(Signed) Mamoenyna Poele Slyma Lebbe Marikair
Segoe Ismael Lebbe Nyna Marikair
Oedoema Lebbe Meestriar Sekadie Marikair
Magellem Moegydien Lebbe
Segoe Mira Lebbe Oedoema Lebbe Marikair
Ibrahim Poelle Sinne Lebbe
Lebbe Marikair Saraay Lebbe Marikair
Agamadoe Lebbe Segoe Abdul Kader Interpreter
Omeroenayna Poelle
Segoe Lebbe
Kasie Lebbe Mamoenyna Poella
Asen Miera Lebbe Moegammadoe Lebbe
Andekana Poelle Ossena Lebbe
Kasi Lebbe Segoe Mira Lebbe
Aydroes Lebbe Sultan Kandoe
Lebbe Marikair Oemeroe Lebbe Markan
Lebbe Markair Samsoe Lebbe Markair
Segoe Mira Poelle Awoewekker Lebbe Alvers
Mira Lebbe Meestiriar Sekadie Markair
Siyma Lebbe Jesboe Nayna.

FINIS.

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