AN INTRODUCTION TO ROMAN-DUTCH LAW

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TO

THE HON. J. G. KOTZÉ

ONE OF HIS MAJESTY'S JUDGES

OF THE

SUPREME COURT OF SOUTH AFRICA

LATE CHIEF JUSTICE OF THE TRANSVAAL

PREFACE

THIS book, as its title indicates, is an Introduction to Roman-Dutch Law. It has grown out of a course of lectures delivered in the University of London at intervals in the years 1906–14. During this time I was frequently asked by students to recommend a text-book which would help them in their reading and perhaps enable them to satisfy the requirements of the University or of the Council of Legal Education. The book was not to be found. The classical *Introduction to the Jurisprudence of the Province of Holland* of Grotius, published in the year 1631, inevitably leaves the reader in a state of bewilderment as to the nature and content of the Roman-Dutch Law administered at the present day by the Courts of South Africa, Ceylon, and British Guiana. The same must be said of the treatise of Simon van Leeuwen entitled *The Roman-Dutch Law*, published in 1664, and of the elementary *Handbook* of Joannes van der Linden, published in 1806.

Of more modern works the excellent volume of Mr. G. T. Morice entitled *English and Roman-Dutch Law* scarcely meets the needs of the mere beginner, while the *Institutes of Cape Law* of Chief Justice Sir A. F. S. Maasdorp, the weighty work of Dr. Manfred Nathan on *The Common Law of South Africa*, and the *Laws of Ceylon* of Mr. Justice Pereira, besides being not especially fitted for the use of students, deal only with the laws of the several

jurisdictions to which they relate. What was needed was a book of modest compass, published at a reasonable price, which would put a student, whether from South Africa, Ceylon, or British Guiana, in the way of acquiring a knowledge of the general principles of the Roman-Dutch Law as it exists at the present day in Africa, Asia, or America. Such a work would supply an historical background; would refer the reader to the original sources and teach him to distinguish in them what is obsolete from what is of living interest. These, therefore, are the objects which I have set before me. I have aimed at producing not a treatise on the Law of South Africa, or of Ceylon, or of British Guiana in particular, but rather an exposition of the principles of the Roman-Dutch Common Law, which forms the historical basis of all those systems, and which, however much abrogated, limited, or transformed by legislation, by judicial decision, or by custom, is still in greater or less measure the substance of which they consist. It is for the student, principally, that the book is intended and for any other person who may care to have before him a general picture of the Roman-Dutch Law at the present day. The practitioner, should he happen to glance at my pages, may find that I have here or there supplied a reference or suggested a point of view.

Though the book is not bulky, I may perhaps be permitted to say that its composition has involved considerable labour. Research in Latin and Dutch folios and quartos of bygone centuries takes time and the results are not always immediately apparent.

Amongst well-known text-writers my references are principally to Voet, Van Leeuwen, Van der Keessel and Van der Linden. The citations of Van der Keessel's *Dictata* are from manuscript copies in my possession, which I have reason to believe conform substantially to the Leyden exemplar. For the rest, my studies have been partly conditioned by the contents of my own library. It will probably be thought that my citations are on the whole sufficiently numerous. Circumstances have prevented me from referring as often as I should have wished to many valuable articles in the *South African Law Journal*. I must be content with a general mention of that excellent review.

In the spelling of Dutch words I have as a rule followed the vagaries of my original. In citing Grotius I have usually quoted the first or second edition of the *Inleiding*. This accounts for such strange forms as ' muirbezwaring ', ' inbalcking ', &c.

For the law of South Africa and Ceylon I have made use of the works mentioned above as well as of Messrs. Bisset & Smith's *Digest of South African Case Law*. For the law of British Guiana I have received valuable help from Mr. W. J. Gilchrist, Barrister-at-Law of Gray's Inn, who holds an important position in the Civil Service of the Colony. The notes from his hand have in many cases been indicated by the letter ' G ' between square brackets ; but my indebtedness goes beyond what is thus formally acknowledged. My thanks are due also to my former pupil Mr. E. Draper, of the Inner Temple, for many useful references to South African cases.

I have to express my gratitude to the Delegates of

the Clarendon Press for acting upon the maxim 'Business as usual', and persevering with the publication of this work notwithstanding the outbreak of the European War.

With regard to the proposed abolition of the Roman-Dutch Common Law in British Guiana, my latest information is that a Committee has been appointed by the Governor to advise as to the necessary legislation.

My recent removal to Montreal, where I have not access to South African Law Reports and other necessary books of reference, has hampered me a little in seeing the work through the press. I trust, however, that any errors which may arise from this cause will be neither numerous nor important.

My friends Dr. W. R. Bisschop, Barrister-at-Law of Lincoln's Inn and the Middle Temple, and Mr. J. C. V. Behan, Barrister-at-Law of the Middle Temple and Fellow of University College, Oxford, have given me kind assistance in correcting the proofs.

I am permitted to dedicate my book to the honoured name of Mr. Justice Kotzé.

R. W. LEE.

MONTREAL,
June 18, 1915.

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GENERAL INTRODUCTION

The Roman-Dutch Law:

THE phrase 'Roman-Dutch Law' was invented by Simon van Leeuwen,[1] who employed it as the subtitle of his work entitled *Paratitula Juris Novissimi*, published at Leyden in 1652 and republished in 1656. Subsequently his larger and better known treatise on the 'Roman-Dutch Law' was issued under that name in the year 1664.

The system of law thus described is that which obtained in the province of Holland during the existence of the Republic of the United Netherlands. Its main principles were carried by the Dutch into their settlements in the East and West Indies; and when some of these, namely the Cape of Good Hope, Ceylon, and part of Guiana, at the end of the eighteenth and the beginning of the nineteenth century, passed under the dominion of the Crown of Great Britain, the old law was retained as the common law of the territories which now became British colonies. With the expansion of the British Empire in South Africa, the sphere of the Roman-Dutch Law has extended its boundaries, until the whole of the area comprised within the Union of South Africa, representing the four former colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River, as well as the country administered by the British South Africa Company under the name of Southern Rhodesia, has adopted this system as its common law. This is the more remarkable since in Holland itself and in the Dutch colonies of the present day, the old law has been replaced by modern codes; so that the statutes and text-books, which are still consulted and followed in the above-mentioned British dominions, in the land of their origin are no longer of practical interest.[2]

[1] See *Journ. Comp. Leg.*, N.S., vol. xii (1911), p. 548.

[2] On codification in Holland, see a note by Dr. W. R. Bisschop in *Journ. Comp. Leg.*, N.S., vol. iii (1901), p. 109.

Though to indicate in general terms the nature of the Roman-Dutch Law is a matter of no great difficulty, precisely to define its extent in time or space is not so easy.

Its origin, Derived from the two sources of Germanic Custom and Roman Law, the Roman-Dutch Law may be said to have existed, so soon as the former of these incorporated elements derived from the latter. Undoubtedly such a process was at work from very early times. Long before the Corpus Juris of Justinian had been 'received' in Germany, the Codex Theodosianus (A. D. 438) had left its mark upon the tribal customs of the country now comprised within the limits of the kingdoms of Holland and Belgium.[1]

and development. Later, the various influences of the Frankish Monarchy and of the Church and Canon Law[2] forged fresh links between Rome and Germany. The general reception of the Roman Law into Germany and Holland in the fifteenth and sixteenth centuries completed a process, which in various ways and through various channels had been at work for upwards of a thousand years.[3]

For many centuries after the dissolution of the Frankish Empire there was no general legislation. Under the rule

[1] Van de Spiegel, *Verhandeling over den Oorsprong en de Historie der Vaderlandsche Rechten*, pp. 73–4.

[2] Ibid. p. 110. For some remarks on the part played by the Canon Law in the formation of the mature system of R.-D. L. see Kotzé, *S. A. L. J.*, vol. xxvi, pp. 510 ff.

[3] Mr. Justice Kotzé says (*S. A. L. J.*, vol. xxvi, p. 492): 'There is, no doubt, a good deal of what is true in this speculation of Van de Spiegel that Germanic and Frankish laws and customs formed the basis or component parts of the law under the early Dutch Counts; but there is a lack of historical evidence to show that the Roman Law ever had any influence in the Northern Netherlands during the Frankish régime, or that, in the period from the eleventh to the fifteenth century, it was adopted and relied on by the ordinary tribunals throughout the country. The opposite view to this is the more correct.' This very learned writer accepts Bynkershoek's view: Ego vix putem aliquam in Hollandia Juris Romani fuisse auctoritatem ante Carolum Audacem (*Observationes Juris Romani, in praefat.*). And again (p. 497): 'Although the Roman Law was known in various ways before the time of Charles the Bold, it is clear that Bynkershoek is correct when he says that it first received authoritative and legislative recognition in 1462 (*Instructie voor den Stadthouder ende Luyden van de Kamer van den Rade*, Art. 42, 3 G. P. B. 635) from that Prince' (*S. A. L. J.*, vol. xxvi, p. 497). On the other hand, Mr. Justice Wessels (*History of the Roman-Dutch Law*) supports the view expressed in the text.

of the Counts of Holland the law of that province consisted principally in general and local customs supplemented to an uncertain degree by Roman Law. The numerous privileges (*handvesten*) wrung from the Counts by the growing power of the towns only tended to complicate the law by a multiplication of local anomalies.[1] In such a state of things it is not surprising that men should have resorted to the Roman Law as to a system logical, coherent, and complete.[2] Later, under Spanish rule, came an era of constructive legislation; but by that time the victory of the Roman Law was already assured.

The reception of the Roman Law in the Netherlands;

Prominent amongst the causes which stimulated the reception of the Roman Law in this its latest phase was the establishment of the Great Council at Mechlin[3] in the year 1473 with jurisdiction over all the provinces of the Netherlands then subject to the Duke of Burgundy. This Court, which continued to exist until the War of Independence,[4] did much to assimilate the law in the various provinces, and thus exercised a jurisdiction comparable to that of the Judicial Committee of the Privy Council or (in a narrower field) of the Appellate Division of the Supreme Court of South Africa at the present day. Nicholaus Everardus,[5] one of our earliest authorities for the Roman-Dutch Law, was President of this Court in 1528.[6] Perhaps we shall not be wrong, then, if we select

[1] This was particularly the case when, as usually happened, the towns enjoyed the privilege of making local regulations (*keuren*). Wessels, p. 210.

[2] Mr. Justice Kotzé in *S. A. L. J.*, vol. xxvi, pp. 407–8.

[3] The Great Council (*De Groote Raad*) was instituted in the year 1446 by Philip the Good, Duke of Burgundy and Count of Holland. It was fixed at Mechlin by Charles the Bold in 1473, and again by Philip the Fair in 1503 (Fruin, *Geschiedenis der Staatsinstellingen in Nederland*, pp. 136–7). The Provincial Court of Holland (*Hof van Holland*) also exercised an important influence in the same direction. See Professor Fockema Andreae's edition of Grotius, *Inleidinge tot de Hollandsche Recht-geleerdheid*, vol. ii, p. 8. For a short history of these Courts, see Kotzé, *S. A. L. J.*, vol. xxvi, pp. 39 ff.

[4] Fruin, p. 255. Its place was taken, as regards Holland and Zeeland only, by the *Hooge Raad van Holland* (*en Zeeland*), established in the Hague in 1581. Zeeland submitted to its jurisdiction in 1587.

[5] Kotzé, *S. A. L. J.*, vol. xxvii, p. 29.

[6] He had previously been President of the Court of Holland from 1509.

the year of the institution of this tribunal as the starting-point of the system which we know by the name of the Roman-Dutch Law.[1]

unequal in the various provinces.

The reception of the Roman Law was by no means equally complete in all the provinces of the Dutch Netherlands.[2] It was most far-reaching in Friesland, least so in Overijssel and Drenthe. The other provinces lay at various points between these extremes. It follows that the laws of no two provinces were precisely the same. There is no reason why we should not, if we please, include all these systems under the name of 'Roman-Dutch Law'. In practice, however, the phrase is usually applied more particularly to the law of the province of Holland. This is accounted for partly by the hegemony, constantly tending to domination, which Holland exercised over the other provinces during the whole continuance of the Republic, partly by the fact that the principal writers upon the romanized law of the Dutch Netherlands belonged to this province.

The extent of the reception matter of controversy.

If we ask to what extent the Roman Law was received in the Netherlands in general and in the province of Holland in particular, we incur the risk of taking sides in a controversy of rival schools.[3] There are those who regard Grotius, Van Leeuwen, Voet, and the other romanists as traitors to the law of their country, which, it is inferred, they enslaved to an alien system. So far as the issue is purely historical the present writer does not offer an opinion. For the lawyer, he submits, the question is not what the law was when these jurists wrote, but what it was when they had written. In the history of institutions it is sometimes more important to know what was thought to be true than to know what was true in fact. At all events, no one disputes the fact of the reception of the

[1] If we adopt Mr. Justice Kotzé's view (*supra*, p. 2, n. 3), we shall date it from 1462.

[2] Kotzé, *S. A. L. J.*, vol. xxvi, pp. 503 ff.

[3] See, on the whole subject, the valuable tract of the late Professor Modderman, *De Receptie van het Romeinsche Recht* (Groningen, 1874).

Roman Law. What is questioned is the degree to which the reception went. For our part, we shall be content to accept the *dictum* of Van der Linden: 'In order to answer the question what is the law in such and such a case we must first inquire whether any general law of the land or local ordinance (*plaatselijke keur*) having the force of law or any well-established custom can be found affecting it. The Roman Law as a model of wisdom and equity is, in default of such a law, accepted by us through custom in order to supply this want.' [1] The limits of this acceptance are defined by Van der Keessel in a series of theses [2] which Professor Fockema Andreae recognizes to be substantially correct.[3]

Legislation under Spanish rule.

During the period of Spanish rule legislation became active. Many useful measures were promulgated by Charles V, such as the Placaat of May 10, 1529,[4] relating to the transfer and hypothecation of immovable property, and, above all, the Perpetual Edict of October 4, 1540.[5] In 1570 his son Philip II issued a Code of Criminal Procedure,[6] which regulated the practice of the Dutch Colonies until superseded by the humaner provisions of the English Law.[7] The Political Ordinance of April 1, 1580,[8] though enacted by the States of Holland and West Friesland, not by the States-General, must also be mentioned as one of the formative elements of the modern

[1] Van der Linden, *Rechtsgeleerd, Practicaal, en Koopmans Handboek* (translated by Sir Henry Juta, under the name of *Institutes of Holland*), lib. I, cap. i, sec. 4. See also Gr. 1. 2. 22; Van Leeuwen, 1. 1. 11.

[2] V. d. K. *Th.* 6–23.

[3] *Inleidinge tot de Hollandsche Rechts geleerdheid, beschreven bij Hugo de Groot, met aanteekeningen van Mr. S. J. Fockema Andreæ, Hoogleeraar te Leiden* (tweede uitgave), Arnhem, 1910, vol. ii, p. 9; Kotzé, *ubi sup.* at p. 508.

[4] 1 G. P. B. 374.

[5] 1 G. P. B. 311. Wessels (p. 218) summarizes its contents.

[6] 2 G. P. B. 1007; Wessels, p. 373: 'The statute of 1570 regulated the procedure in the lower Courts. The same procedure was followed in the Supreme Court of Holland except in so far as it was modified by the rules of that Court.'

[7] It remained part of the Law of British Guiana until 1829, when it was superseded by Rules of Criminal Procedure made under the authority of an Order in Council of December 15, 1828.

[8] 1 G. P. B. 330. Wessels (p. 222) summarizes its contents.

law. The Civil Procedure of all the Courts was regulated by another Ordinance of the same year and day.[1]

The Roman-Dutch Law in Holland.

The history of the Roman-Dutch Law during the existence of the Dutch Republic is for our present purpose the history of the authorities from whom we derive our knowledge of it. To these we shall presently refer. In the home of its origin the Roman-Dutch Law as a separate system survived by a few years the dissolution of the Republic of the United Netherlands. In 1809 it was superseded by the Napoleonic Codes, which in turn gave place in 1838 to the existing codes in force in the kingdom of the Netherlands. Van der Linden, the latest writer on the old law, was also the earliest writer on the new. When the old system crumbled beneath his hands he left unfinished his projected Supplement to Voet's Commentary upon the Pandects;[2] applying his tireless industry in a new field, he became to his countrymen the interpreter of the laws of their conqueror.[3] The existing Dutch Civil Code, however, in many respects reverts from the rules of the French law to the earlier law of Holland.

Having said thus much of the Roman-Dutch Law in general, we shall proceed next to speak more particularly of its history in the Roman-Dutch Colonies,[4] for by that name we may conveniently indicate the British possessions in which this system obtains. After that we shall go on to speak of the sources from which our knowledge of the Roman-Dutch Law is derived.

The Roman-Dutch

The two great trading companies of East and West, the Dutch East India Company incorporated in 1602,

[1] 2 G. P. B. 695. See Wessels, *Hist. R.-D. L.*, p. 186. An annotated edition of this Ordinance by Willem van Aller was published at Middelburg in 1664.

[2] Johannis Voet, *Commentarii ad Pandectas, tomus tertius: ejusdem commentarii continens supplementum, auctore Joanne van der Linden.* Sectio prima, a libro I usque ad XII Pandectarum, Trajecti ad Rhenum, 1793.

[3] In his *Beredeneerd register op het wetboek Napoleon ingericht voor het Koningrijk Holland* (Amsterdam, 1809), and other works.

[4] See an article by the present writer on 'The Fate of the Roman-Dutch Law in the British Colonies,' *Journ. Comp. Leg.*, N.S. vol. vii (1906), p. 356, which, by kind permission, is partly reproduced in the text.

Law in the Dutch Colonies.

and the Dutch West India Company incorporated in 1621, carried the Roman-Dutch Law into their settlements. The Cape was occupied by Van Riebeek in 1652. The maritime districts of Ceylon were won from the Portuguese in 1656. The Dutch settlements upon the 'Wild Coast' of South America, which came to be known as Guiana, date from the early years of the seventeenth century.

How far the Dutch Statute Law was in force in the Colonies.

How far the statutes of the mother country were in force in these Colonies the evidence hardly allows us to say. On principle they would not apply unless expressly declared to be applicable, or at least unless locally promulgated;[1] but some may have been accepted by custom as part of the common law.[2] As regards laws of the *patria* passed subsequently to the date of settlement it may be thought that the burden of proof lies on him who alleges their application. The fact is that the States-General legislated but seldom for the Colonies, having delegated their functions in this regard to the two Chartered Companies of East and West. These acted through their Committees, the Councils of XVII and the Council of X respectively; and the East India Company also, through its Governor-General in Batavia, issued rules for the government of the various stations, which, if locally promulgated, had binding force until superseded or forgotten.[3] In addition to these there were the enactments of the local governors. Failing all the above and any colonial custom having the force of law, recourse was had to 'the laws statutes and customs of the United Netherlands' and, where these were silent, in the last

[1] As to the necessity of promulgation see Gr. 1. 2. 1, and Groenewegen and Schorer, ad loc.; Van Leeuwen, 1. 3. 14; V. d. K. *Th.* 1.

[2] See Appendix to this Chapter (*infra*, p. 24).

[3] The collected edition of the Statutes of Batavia of 1642 seems to have been promulgated at the Cape in 1715. Burge, *Colonial and Foreign Laws* (New Edition), vol. i, p. 115. Governor van der Parra's New Statutes of Batavia of 1766 were never recognized by the States-General and had not strictly the force of law. The law in force in the West Indies was defined by the *Ordre van Regeeringe* of October 13, 1629 (2 G. P. B. 1235; Burge, vol. i, p. 119), and later by the resolutions of the States-General of October 4, 1774 (*Laws of Brit. Gui.*, ed. 1905, vol. i, p. 1; Burge, vol. i, pp. 121 ff.).

resort to the Law of Rome.[1] It may be supposed, since the Dutch Colonies stood in no peculiar relation to the province of Holland more than to any other provinces of the Union, that even general customs of this province had no preferential claim to acceptance in the Colonies. In theory this is true. In practice, perhaps, the predominant partner carried the day. In South Africa at all events there seems to be some presumption in favour of the admission of a general custom of Holland rather than that of any other province as part of the common law of the Colony.[2]

The Roman-Dutch Law in the Colonies under British Rule: (a) At the Cape;

The Dutch settlements of the Cape of Good Hope, Ceylon, and Guiana, passed into the hands of the British at the end of the eighteenth and the beginning of the nineteenth century. The Cape was taken from the Dutch in 1795, given back in 1803, and retaken in 1806, since when it has remained part of the British Dominions. It does not appear that any express stipulation was made upon the occasion of either the first or the second cession for the retention of the Roman-Dutch law. Its continuance is the expression of the settled principle of English law and policy that colonies acquired by cession or by conquest

[1] Burge, vol. i, p. 116.

[2] Per Kotzé J.P., in *Fitzgerald* v. *Green* [1911] E.D.L. at p. 493: 'There is no rule which makes it incumbent upon us, under the circumstances, to adopt the law of North Holland in preference to that of South Holland, although in a conflict between the law of the different provinces of the Netherlands the Courts in South Africa, we are told, have generally followed that of the province of Holland.' Dr. Bisschop (Burge, *Colonial and Foreign Laws* (2nd. ed.), vol. i, p. 91) directs attention to the preponderating influence in the affairs of the Company of the Chambers of Amsterdam and Middelburg, which accounts for the fact that the Company was held to be domiciled within the jurisdiction of the Court of Holland. The same writer has observed elsewhere that the Colonial Courts in most cases got their law, so far as it was not comprised in local statutes and customs, from text-books rather than from the original sources, with the result that 'the local law of the Netherlands—so far as it was not referred to by writers on the Roman-Dutch Law—would be ignored'. 'In the Dutch East and West Indies the same method of legal application and interpretation would be followed as in the Low Countries, viz., to apply first the local statutes and customs and subsidiarily the Roman law as explained by the learned jurists at home.' *Law Quarterly Review*, vol. xxiv (1908), p. 169.

retain their old law, so long and so far as it remains unrepealed. In a system derived from the Civil Law repeal may be effected tacito consensu as well as alia postea lege lata; so that as regards the Cape Province we may state the presumption to be that, except so far as they have been abrogated by legislation or by the growth of a custom inconsistent therewith, the laws which obtained under the Dutch Government remain in force at the present day.[1] Custom, however, seems to have made short work with the pre-British statute law of the Colony. The earliest collected edition of the local statutes (1862) contains only nine enactments prior to 1795, and the latest edition (1895) only five. The remainder of the Dutch *placaaten, reglementen, advertissementen*, &c. (whether emanating from the home country or from Batavia, or locally enacted) seems to have been abrogated by disuse. We are speaking, of course, of the statute law subsequent to 1652, the date of the Dutch occupation of the Cape. The home legislation prior to that date may, unless inapplicable or abrogated by disuse, be regarded as forming part of the common law of the Colony. An exception, too, must be admitted in favour of the *Octrooi* to the East India Company of January 10, 1661, which, together with the Political Ordinance of 1580 and the Interpretation thereof of 1594, defines the law of intestate succession for the whole of Roman-Dutch South Africa.

[1] Per de Villiers C.J. in *Seaville* v. *Colley* (1891) 9 S. C. at p. 44: 'The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this Colony at the date of the British occupation in 1806 may be briefly stated. The presumption is that every one of these laws, if not repealed by the local legislature, is still in force. This presumption will not however prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usage is furnished by un-overruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well-established but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distinctly recognized and acted upon by the Supreme Court may fairly be held to have been abrogated by disuse.' This principle applies alike to the statute law and to the common law of Holland. See also *Parker* v. *Reed* (1904) 21 S. C. 496; *McHattie* v. *Filmer* (1894) 1 O. R. 305; *Natal Bank* v. *Kuranda* [1907] T. H. 155.

(b) In Ceylon;

In Ceylon the continuance of the Roman-Dutch Law was guaranteed by the Proclamation of Governor the Honourable Francis North of September 23, 1799, which declared that the administration of justice and police should 'henceforth and during His Majesty's pleasure be exercised in all Courts of Judicature, Civil and Criminal, according to the laws and institutions that subsisted under the ancient government of the United Provinces subject to such deviations and alterations as have been or shall be by lawful authority ordained and published '.[1] The central portion of the island did not pass under British rule until 1815, but the Dutch Law was applied to this region also by Ord. No. 5 of 1852.[2] In Guiana the existing laws and usages were expressly retained in the articles of capitulation of Essequibo and Demerara dated September 18, 1803. A similar provision is contained in the Letters Patent of March 4, 1831, by which the three settlements were constituted a single colony under the name of British Guiana[3].

(c) In British Guiana.

General result.

It results from what has been said that the foundation of the law of Cape Colony is the Dutch Law as it existed in that settlement in the year 1806; that the law of Ceylon is based upon the Roman-Dutch system administered in the island in 1796;[4] and that the law of British Guiana rests upon a substructure of Dutch laws and usages

[1] It has been doubted whether the Dutch ever applied their law to the native races of the low country. But since the British occupation the low-country, Sinhalese have had no distinctive law of their own, and have always been treated as subject to the Roman-Dutch law.

[2] This Ordinance extends to the Kandyan provinces certain specified branches of the law of the Maritime Provinces, and further enacts that if the Kandyan Law is silent on any matter the law of the Maritime Provinces is to be applied. It says nothing as to the general law applicable to Europeans or low-country Sinhalese residing in the Kandyan provinces. The extension to them of the Roman-Dutch Law in general seems to be the work of judicial decisions (see *Williams* v. *Robertson* (1886) 8 S. C. C. 36).

[3] For the history of the Roman-Dutch Law in British Guiana see *Report of the Common Law Commission* (Georgetown, Demerara, 1914) and 'Roman-Dutch Law in British Guiana' (*Journ. Comp. Leg.*, N.S., vol. xiv (1914), p. 11), by the present writer.

[4] The capitulation of Colombo to the British is dated February 15 of that year.

having authority in the settlements of Essequibo, Demerara, and Berbice in the year 1803.

It remains to speak of the geographical extension of the Roman-Dutch Law in South Africa.

Geographical extension of the Roman-Dutch Law in South Africa.

So long as the boundaries of Cape Colony enlarged themselves by gradual and inevitable advance, so long the Dutch civil law extended its sphere by the same natural process of expansion without express enactment. But before the middle of the last century the era of annexation had begun.

Natal.

Natal was annexed to the Cape by Letters Patent of May 31, 1844, and this was followed by Cape Ordinance No. 12 of 1845, confirming the Roman-Dutch Law in and for the district of Natal. This remains the common law of the Colony, which was called into existence as a separate entity by Royal Charter of July 15, 1856; and now the Natal Act No. 39 of 1896 provides that: 'The system, code, or body of laws commonly called the Roman-Dutch law as accepted and administered by the legal tribunals of the Colony of the Cape of Good Hope up to August 27, 1845, and as modified by the Ordinances, Laws, and Acts now in force, heretofore made or passed in this Colony by the Governor or Legislature thereof, is the law for the time being of the Colony of Natal, and of His Majesty's subjects and all others within the said Colony'.

Zululand.

The law of Natal, with some reservations, obtains also in Zululand, which became part of Natal on December 30, 1897.

Basutoland.

In Basutoland, by proclamation dated May 29, 1884, the law to be administered (save between natives) is, as nearly as the circumstances of the country permit, the same as the law for the time being in force in the Colony of the Cape of Good Hope; but Acts of the Cape Legislature passed after the date of the Proclamation do not apply.

Bechuanaland Protectorate.

By Proclamation No. 36 of 1909, the law of Cape Colony is to be administered, as far as practicable, in the Bechuanaland Protectorate to the exclusion, however, of subsequent Cape statutes.

Southern Rhodesia.

By the Southern Rhodesia Order in Council of October 20, 1898, s. 49 (2), the law of Cape Colony as it stood on June 10, 1891, applies in Southern Rhodesia, except so far as that law has been modified by any Order in Council, Proclamation, Regulation or Ordinance in force at the date of the commencement of the Order.

Transvaal and Orange Free State.

In the Republics the Roman-Dutch Law remained in force almost unaltered up to the date of annexation.[1] It is continued in the Orange River Colony (now, once more, the Free State) by Proclamation No. 3 of 1902, s. 1, and in the Transvaal by Proclamation No. 14 of 1902, s. 17. But in each of the new Colonies extensive alterations have been made so as to bring the law into closer harmony with the system obtaining in the adjoining territories.

Swaziland.

By Proclamation of February 22, 1907, the Roman-Dutch common law, save in so far as the same has been modified by statute, is law in Swaziland.

The Union of South Africa.

By the South Africa Act, 1909 (9 Edw. 7, ch. 9), which took effect on May 31, 1910, the four Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony[2] were united in a Legislative Union under one Government under the name of the Union of South Africa (s. 4), and became original provinces of the Union under the names of Cape of Good Hope, Natal, Transvaal, and Orange Free State respectively. Subject to the provisions of the Act, all laws[3] in force in the several Colonies at the establishment of the Union are continued in force in the respective provinces until repealed or amended by the Parliament of the Union, or by the provincial

[1] A resolution of the Volksraad of the South African Republic of September 19, 1859, gave statutory authority to the legal treatise of Van der Linden, which, failing the commentaries of Simon van Leeuwen and the *Introduction* of Hugo de Groot, were to be binding. This quaint enactment was repealed by Tr. Procl. No.34 of 1901.

[2] On annexation to the British Crown (May 31, 1902), the Orange Free State became the Orange River Colony.

[3] 'By the word Laws in that section the Legislature meant Statutes, and never intended that the section should apply to Judge-made Law.' *Webster* v. *Ellison* [1911] A. D. at p. 99, per Solomon J.

Councils in matters in respect of which the power to make ordinances is reserved or delegated to them (s. 135).

The last portion of this Introduction relates to the authentic sources of the Roman-Dutch Law, which are also the primary sources of our knowledge of that system. These are: The sources of the Roman-Dutch Law.

1. Treatises.
2. Statute Law.
3. Decisions of the Courts.
4. Opinions of Jurists.
5. Custom.

I. *Treatises.*[1] The numerous works of the Dutch jurists, written in Dutch and Latin at various dates from the sixteenth to the nineteenth centuries, are cited to-day as authoritative statements of the law with which they deal. A modern text-book has no such authority. The rules therein expressed are merely opinions which Counsel in addressing the Court may, if he pleases, incorporate in his argument, but which have no independent claim to attention, however eminent their author. The works of the older writers, on the contrary, have a weight comparable to that of the decisions of the Courts, or of the limited number of 'books of authority' in English Law. They are authentic statements of the law itself, and, as such, hold their ground until shown to be wrong. Of course the opinions of these writers are very often at variance amongst themselves or bear an archaic stamp. In such event the Courts will adopt the view which is supported by authority or most consonant with reason; or will decline to follow any, if all of the competing doctrines seem to be out of harmony with the conditions of modern life; or, again, will take a rule of the old law, and explain or modify it in the sense demanded by convenience. i. Treatises.

[1] For a bibliography of Roman-Dutch law books see *The Commercial Laws of the World*, vol. xv—South Africa—pp. 14 ff.

Writers of the seventeenth century.

The principal writers on the old law and their principal works are the following :

SEVENTEENTH CENTURY

H. DE GROOT. *Inleiding tot de Hollandsche Rechtsgeleertheyd* ('s Gravenhage, 1631); the same with notes by Groenewegen (1644); the same with added and more extensive notes by W. Schorer (1767).[1] This is the best old edition. The best modern edition is that with historical notes by Professor Fockema Andreae. There is a translation by Sir A. F. S. Maasdorp.

ARNOLDUS VINNIUS.[2] *Commentarius in IV libros Institutionum Imperialium* (1642). This well-known work contains copious references to the *jus hodiernum*. The best edition is that with notes by the Prussian jurist Heineccius.

S. VAN GROENEWEGEN VAN DER MADE edited the *Inleiding* of Grotius in 1644. In 1649 he produced his well-known *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus*, in which he goes through the whole of the Corpus Juris by book and title and considers how far it has been received or disused in the modern law.

SIMON VAN LEEUWEN published his *Censura Forensis* in 1662, and his *Roomsch Hollandsch Recht* in 1664.[3] The

[1] In the early editions of Grotius the paragraphs are not numbered. Van Leeuwen cites Grotius by book, chapter, and the initial words of the paragraphs, e.g. *Grot., Introd., lib.* 1, *cap.* 5, *vers. Alle Mondigen.* Voet makes the numeration of Groenewegen's notes do duty for paragraphs. Thus : *Hugo Grotius manuduct. ad Jurisprud. Holl. Libr.* I, *cap.* 5, *num.* 13 (=Gr. I. 5. 9). The division of the chapters into paragraphs was first employed in an edition of the 'Inleydinge' published at Amsterdam by Ian Boom in 1727. I am indebted for this information to Mr. Justice Kotzé.

[2] Wessels, *Hist. R.-D. L.*, p. 294.

[3] The title-page of this work and of its precursor, the *Paratitula*, affords an interesting indication of the uncertainty of seventeenth-century spelling. The first edition of the *Paratitula* has for its subtitle *Een kort begrip van het Rooms-Hollandts-Reght.* In the second edition this becomes *Een kort begrip van het Rooms-Hollands-Recht.* The first edition of the later work is described as *Het Rooms-Hollands-Regt.* Lastly, in Decker's edition (1780) we have *Roomsch Hollandsch Recht*, and this I have followed.

last-named work was an amplification of a slighter treatise called *Paratitula Juris Novissimi* published in 1652 and again in 1656. The best edition of the *Roomsch Hollandsch Recht* is that with notes by W. Decker issued in 1780. This last-named edition has been translated with additional notes by Mr. Justice Kotzé.

Ulrik Huber issued the first volume of his *Praelectiones Juris Civilis*, containing his commentary on the Institutes of Justinian, in the year 1678. This was followed after a considerable interval by his commentary on the Digest in two additional volumes. The best edition is that of J. Le Plat of Louvain issued in 1766. The same author published in 1686 his treatise entitled *Heedensdaegse Rechtsgeleertheyt, soo elders, als in Frieslandt gebruikelyk.* The last-named work, though principally concerned with the law of Friesland, not of Holland, is a valuable contribution to the study of the Roman-Dutch Law. It was edited after the author's death by his son Zacharias Huber, who, like his father, was a Judge of the Frisian High Court.

Johannes Voet. *Commentarius ad Pandectas.* This work was published simultaneously at the Hague and at Leyden in 1698 and 1704 in two volumes folio. It has gone through innumerable editions. The best is the Paris edition of A. Maurice of 1829, which is free from most of the misprints which disfigure the folio editions. The whole of Voet has not been systematically translated into English,[1] but translations varying in merit are procurable of many of the separate titles. In 1793 Van der Linden published, in folio, a Supplement to Voet's Commentary. It extends only to Book xi of the Pandects. Amongst the lesser works of Voet may be mentioned his Compendium of the Pandects, which, though originally issued before the larger work, serves the purpose of an analysis of it. A little book in Dutch published in the eighteenth century under the name of *De beginselen des rechts volgens*

[1] I am told that there is an Italian translation, which I have not seen.

Justinianus is a translation from the Latin of Voet's analysis of the Institutes (*Elementa Juris*), supplemented with a translation of those passages in Vinnius' Commentary in which reference is made to the modern law.

Eighteenth Century

Writers of the eighteenth century.

Cornelis van Bijnkershoek is beyond controversy the most eminent Dutch jurist of the eighteenth century. He was President of the Supreme Court of Holland, Zeeland, and West Friesland from 1724 to 1743. For our present purpose the most useful of his works is the *Quaestiones Juris Privati*, published in Latin in 1744, and in a Dutch translation in 1747.

Mention has already been made of Schorer's edition of Grotius (1767) and of Decker's edition of Van Leeuwen (1780). A Dutch translation of Schorer's notes on Grotius, which contains also additional matter supplied to the translator by the author, appeared from the hand of J. E. Austen in 1784–6. This is the edition referred to in the margin of Professor Fockema Andreae's edition of Grotius

A useful work was published by Van der Linden and other jurists in 1776 under the name of *Rechtsgeleerde Observatien, dienende tot opheldering van verscheide duistere, en tot nog toe voor het grootste gedeelte onbewezene passagien uyt de Inleidinge tot de Hollandsche Rechtsgeleertheid van wylen Mr. H. de Groot.*

D. G. Van der Keessel, a Professor at Leyden, issued in the year 1800 his *Theses Selectae juris Hollandici et Zelandici ad supplendam Hugonis Grotii Introductionem ad Jurisprudentiam Hollandicam.* The work was reprinted in 1860. There is a translation by C. A. Lorenz. The *Dictata* in which the author of the Theses expanded and supported them still circulate in manuscript, but have never been printed. There is a fine MS. copy in the University Library at Leyden corrected in Van der Keessel's own hand. I am told that the author's own manuscript

is in the Bar Library at Colombo. A typewritten copy of the Leyden MS. was presented to the Supreme Court Library at Capetown by the late Dr. C. H. van Zyl.

JOANNES VAN DER LINDEN is the last of the old text-writers. In 1794 he published his *Verhandeling over de judicieele practijcq*, which is still consulted. But his best-known work is his Introduction to Roman-Dutch Law, issued in 1806 under the name of *Regtsgeleerd, Practicaal, en Koopmans Handboek*. The book is very elementary, but has enjoyed great favour amongst students, particularly in Sir H. Juta's translation entitled *Institutes of Holland*. Another work by the same author which may be mentioned (besides his Supplement to Voet referred to above) is his Dutch translation of POTHIER on *Obligations* with short notes from his own hand (1804–8).

If the student wishes to supplement the above-mentioned list of books with a handy law dictionary he will find BOEY'S *Woorden-tolk* easily procurable and sometimes useful. KERSTEMAN'S larger work (1768) and the supplementary volumes by Lucas Willem Kramp[1] enjoy a reputation which is scarcely merited. The collection of pleadings by WILLEM VAN ALPHEN known by the quaint name of *Papegay* (originally published in 1642) is deservedly famous. If Van der Linden's work on Procedure proves inadequate, reference may be made to PAUL MERULA'S *Manier van Procederen*, the last and best edition of which, under the names of Didericus Lulius and Joannes van der Linden, was issued in the years 1781–3.

ii. Statute Law.

II. *Statute Law*. The enactments of the States-General and of the States of Holland and West Friesland are to be found in the ten folio volumes of the *Groot Placaat Boek*. The statutes of Batavia are printed in VAN DER CHIJS, *Nederlandsch-Indisch Plakaat Boek*. The pre-British statutes of the Cape exist but have not been printed.

iii. Decisions of the Courts.

III. *Decisions of the Courts*. Many published volumes

[1] As to the authorship of the Aanhangsel to Kersteman's *Woordenboek* see *Journ. Comp. Leg.*, N.S., vol. xii (1911), p. 549.

of Decisions have come down to us and are a valuable source of law. Particular mention may be made of the *Sententien en gewezen Zaken van den Hoogen en Provincialen Raad in Holland, Zeeland en West-Friesland*, published by JOANNES NAERANUS at Rotterdam in 1662; of the *Utriusque Hollandiae, Zelandiae, Frisiaeque Curiae Decisiones* of CORNELIUS NEOSTADIUS, printed at the Hague in 1667; and of the *Decisiones Frisicae sive rerum in Suprema Frisiorum Curia judicatarum libri V* of JOHANNES À SANDE, himself a Judge of the Court whose decisions he reports. The Latin original of this work is dated 1634. There is also a Dutch translation. These three volumes of Reports are often cited by Voet. Van der Keessel frequently refers to a volume entitled *Decisien en Resolutien van den Hove van Holland*, published at the Hague in 1751; but this and Van der Linden's *Verzameling van merkwaardige Gewijsden der Gerechtshoven in Holland*,[1] published at Leyden in 1803, are rarely obtainable.

iv. Opinions of Jurists.

IV. *Opinions of Jurists.* The numerous volumes of *Consultatien, Advysen*, &c., are a very interesting and characteristic feature of the Roman-Dutch system of jurisprudence. It is enough here to refer more particularly to the well-known collection entitled *Consultatien, Advysen en Advertissementen gegeven ende geschreven by verscheijden Treffelijke Rechtsgeleerden in Hollant en elders* (commonly known as the *Hollandsche Consultatien*), originally published by Naeranus in 1645,[2] containing the opinions of Grotius and other eminent lawyers. The opinions of Grotius, in particular, have been translated and edited by the late Mr. D. P. de Bruyn (1894). Other collections designed to supplement the above-named work were issued at various dates during the eighteenth century. The latest work of the kind, containing opinions by the eminent jurist J. D. Meijer, was published at Amsterdam in 1842.

[1] The Introduction to this volume contains some valuable observations by the compiler on the authority of decided cases.

[2] Wessels, p. 243.

V. *Custom.* This is in every country a source of law. We mention it here more particularly because, as observed above, it is through custom that the Roman Law found its way into Holland, and it is as custom that it continues to exist in the Roman-Dutch Colonies. Without attempting a bibliography of the jus civile we may perhaps be allowed to recommend the student to supply himself with the Mommsen-Krüger edition of the Corpus Juris. For a law lexicon he will consult the older works of Calvin [1] or Vicat [2] or Heumann's *Hand-Lexicon*,[3] or the exhaustive *Vocabularium jurisprudentiae* in course of publication under the auspices of the Savigny Foundation. v. Custom.

Such, then, are the sources of the Roman-Dutch Law, or such were its sources while it still flowed in an undivided stream. They remain to-day the sources of law for the several Roman-Dutch Colonies, supplemented by enactments of the local legislatures, decisions of the local tribunals, and local authoritative custom. The treatises and opinions of modern lawyers do not make law, though they often help the inquirer to find out what the law is. Sources of the Modern Law.

The principal works on the modern law of South Africa are : *The Common Law of South Africa*, in 4 vols., by Dr. MANFRED NATHAN ; *The Institutes of Cape Law*, by Chief Justice Sir A. F. S. MAASDORP ; *English and Roman-Dutch Law*, by Mr. GEORGE T. MORICE. Works on Colonial Law.

For the Law of Ceylon the student may refer to *The Laws of Ceylon*, by Mr. Justice PEREIRA (2nd ed., Colombo, 1913) ; to *A Digest of the Civil Law of Ceylon*, by Sir P. ARUNACHALAM (vol. i, ' Persons Natural and Juristic ', London, 1910) ; and to the earlier work entitled *Institutes of the Laws of Ceylon*, by HENRY BYERLEY THOMSON, a Puisne Judge of the Supreme Court of Ceylon, published in 1846. Sir CHARLES MARSHALL'S *Judgments, &c., of*

[1] Calvinus J., *Lexicon juridicum juris Caesarei simul et Canonici*, Geneva, 1670.
[2] B. Philip Vicat, *Vocabularium Juris utriusque*, Lausanne, 1759.
[3] Heumanns *Handlexicon zu den Quellen des römischen Rechts* (9th ed.), Jena, 1907.

the Supreme Court of the Island of Ceylon, published at Paris in 1839, furnishes a conspectus of the Law of the Colony as it existed in the first half of the last century.

For British Guiana no text-book exists.

Reception of the English Law in the Roman-Dutch Colonies;

The reader who may use this book, or one of the older text-books mentioned in the preceding pages, as an introduction to his study of the modern law in one or other of the Roman-Dutch Colonies must bear in mind that just as the Roman-Dutch law of Holland was a complex system drawn from different sources, so the law of every one of these Colonies, Roman-Dutch in origin, has been affected in almost every department by the encroaching influences of English Law. This has been the result partly of express enactment, partly of judicial decisions, partly of tacit acceptance.

the result of (a) express enactment,

As examples of statutory introduction of the law of England, mention may be made of the Ceylon Ordinance No. 5 of 1852, which enacts that the law of England is to be observed in maritime matters and in respect of all contracts and questions relating to bills of exchange, promissory notes, and cheques; and of the Ceylon Ordinance No. 22 of 1866, which makes similar provisions with respect to the law of partnerships, joint-stock companies, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance.

In British Guiana by Ordinance No. 6 of 1864, s. 3, 'all questions relating to the following matters, namely ships, and the property therein, and the owners thereof, and the behaviour of the master and mariners and their respective rights, duties, and liabilities as regards the carriage of passengers and goods by ships; stoppage *in transitu*; freight; demurrage; insurance; salvage; average; collision between ships; bills of lading; and all rights, liabilities, claims, contracts, and matters arising in respect of any ship, or any such question as aforesaid, shall be adjudged, determined, construed, and enforced according to the Law of England applicable to such or the like case.' By Ordinance No. 3 of 1909 the law of England for the time being was made the law of the Colony in relation to life and fire insurance.

At the Cape the General Law Amendment Act No. 8 of 1879, introduced the English law: (s. 1) in all questions relating to shipping; and (s. 2) in all questions of fire, life, and marine insurance, stoppage *in transitu*, and bills of lading. But (s. 3) English statutes passed subsequently to the date of the Act do not apply.

(a) or imitation of English statute law;

It would occupy too much space to speak of the numerous Colonial Statutes which follow more or less closely the language of English Acts of Parliament and through this channel admit into their own system the rules and principles of the law of England. As examples may be cited the Ceylon Sale of Goods Ordinance No. 11 of 1896, and the British Guiana Sale of Goods Ordinance No. 26 of 1913. The numerous changes produced by the statutory abolition of institutions of the Roman-Dutch common law will be illustrated in the course of this book.

(b) judicial decisions;

We have not space to speak of the modification of the Roman-Dutch common law in the several Colonies by the jurisprudence whether of the Colonial Courts or of the Judicial Committee of the Privy Council. Fuller information on these matters must be sought elsewhere. It is enough to have warned the student that much of the learning of the old books is obsolete or superseded. To the extent of the topics included in this book, the points of contact between the Roman-Dutch and English systems will, it is hoped, be sufficiently indicated in the following pages.

(c) tacit acceptance.

Lastly, much of the English law has found its way in by a process of silent and often unnoticed acceptance. It would be easy to accumulate instances in every branch of the law. But the student may better be left to draw his own conclusions from the pages of the law reports and, in course of time, from the practice of his profession.

The present condition of the Roman-Dutch system:

In conclusion, a few words will be permitted with regard to the present condition and future prospects of the Roman-Dutch system within the British Empire. In South Africa, in Ceylon, and in British Guiana its fortunes have been widely different. Writing some years ago in the *Journal of Comparative Legislation*, I said:

in South Africa,

in Ceylon,

in British Guiana.

'In South Africa its tradition is continuous, its pre-eminence unchallenged. Bench and Bar have been trained to it. The best legal talent of the country has applied it in judgments or explained it in text-books. Far other has been its fate in Ceylon. Here it has been mangled by the Legislature, and administered by judges sometimes frankly contemptuous of its principles. And yet it lives! The local Bar is vigilant and active. The Bench has been adorned by at least one profound civilian. There are text-books. There are law reports almost continuous since 1821. In British Guiana these signs of activity have been absent. There are no text-books. There are no written records of judgments of earlier date than 1856. There are no reports, the series initiated in 1890 having been discontinued after four years' life.[1] Upon a general view of the state of the Roman-Dutch Law in this Colony it may be said that except in the sphere of property and intestate succession not very much of it remains. What of it the Courts had spared the Legislature has quite lately set itself to destroy.'[2]

The future of the Roman-Dutch system:

in South Africa,

Since these words were written events have tended to confirm them. The institution of the Union of South Africa and with it of the Appellate Division of the Supreme Court, which hears appeals also from the Supreme Court of Southern Rhodesia, will before long lead to the production of a body of statutory and judge-made law, in which the principles of the Roman-Dutch Law will be expounded and developed. It may be anticipated that under such auspices the Roman-Dutch Law will assume a completeness and a symmetry which it has failed to attain in previous ages. It will be a system in which the best elements of the Roman and the English Law will be welded together in an harmonious and indissoluble union. As the *corpus* of South African Law grows to maturity the old folios and quartos, which some of us have learnt to handle with a feeling almost of affection, will be less and less consulted.

[1] Since September 1, 1900, all Supreme Court judgments have been published in the *Gazette*, previously only judgments in Appeal.

[2] *Journ. Comp. Leg.*, N. S., vol. vii (1906), p. 369.

Having served their turn they will yield to the fate of all things mortal. But the spirit of justice which inspires them and the rules of law which they express will live embodied in new forms. The reproach levied against the Roman-Dutch Law by a learned writer lately deceased, that its text-books are antiquated and its weapons rusty, if it is true to-day, will be true no longer.

in British Guiana,

In British Guiana the doom of the Roman-Dutch Law has been pronounced. The 'Common Law Commission' appointed by the Governor of the Colony has recently reported in favour of its replacement by the Common Law of England, to the exclusion, however, of the English Law of Real Property. Whether this scheme will be carried out in its entirety remains to be seen.

Meanwhile the Commissioners append to their Report the draft of 'An Ordinance to codify certain portions of the Roman-Dutch Law of the Colony and to substitute the English Common Law and principles of Equity for the Roman-Dutch common law', and propose that it should come into operation by January 1, 1915.[1] The justification for a change of so uncompromising a character is found in the circumstances of the Colony.

'While much has gone from the Roman-Dutch domain much remains. Roman-Dutch Law may be seldom quoted in the Courts and even then with little hope of the quotation seriously affecting the issue. English authorities and precedents may tend more and more to have weight with judges and lawyers to its exclusion. But it remains as an element of uncertainty. We have all the disadvantage of a mixed system without the elasticity of the Roman-Dutch jurisprudence.'

'It increases the work of both judge and counsel. It wastes time and is a source of expense. In this country it is not a living system. We have no resident Dutch population and few even of the Dutch names survive. The colonists have no sentimental affection for any legal legacy of the Batavian Republic of 1803 or the Kingdom of the Netherlands of 1814. Our population is a small one, very mixed in race. East Indians and Portuguese make

[1] This design has not been realized. See Preface.

up some fifty per cent. ; and natives of the West Indian Islands form no small proportion of the balance. Mixed as it is, it is overwhelmingly British in its attachments, traditions, and sympathies.'

in Ceylon. In Ceylon, if the Roman-Dutch Law is not so firmly established as it is in South Africa, yet it is not, as in British Guiana, in danger of immediate extinction. It seems more likely that in this Colony it will die slowly of asphyxia, smothered beneath legislation which may, however, continue in a greater or less degree to reflect its principles.

APPENDIX

How far the Statute Law of Holland obtains in the Colonies

In *In re Insolvent Estate of Loudon, Discount Bank* v. *Dawes* (1829) 1 Menz. at p. 388, the Court observed : ' When this Colony was settled by the Dutch the general principles and rules of the law of Holland were introduced here, but by such introduction of the law of Holland it did not follow that special and local regulations should also be introduced ; accordingly the provisions of the Placaat of 5th February, 1665, as to the payment of the 40th penny (3 G. P. B. 1005) have never been part of the law of this Colony, because this tax has never been imposed on the inhabitants of this Colony by any law promulgated by the legislative authorities within this Colony. In like manner until a law had been passed here creating a public register the provisions of the Placaat of 1st February 1580 (? 1st April—1 G. P. B. 330), were not in force or observance here.'

In *Herbert* v. *Anderson* (1839) 2 Menz. 166, the following Placaats were said to be merely fiscal and revenue laws of Holland, which had never become or been made law in Cape Colony, viz. Placaats, &c., of June 11, 1452 (3 G. P. B. 18), January 22, 1515 (1 G. P. B. 363), April 1, 1580 (Art. 31, 1 G. P. B. 337), March 29, 1677 (3 G. P. B. 672), April 3, 1677 (3 G. P. B. 1037). This decision was quoted with approval by Kotzé C. J. in *Eckhardt* v. *Nolte* (1885) 2 S. A. R. 48, who

added (at p. 52): 'From this it follows that the Placaats of [September 26] 1658 (2 G. P. B. 2515) and [February 24] 1696 (4 G. P. B. 465) and others *in pari materia*, merely renewing the earlier *Placaats* are likewise of no application at the present day.' On the other hand, in *De Vries* v. *Alexander* (1880) Foord at p. 47, de Villiers C. J., referring to *Herbert* v. *Anderson* said: 'The Court could only have intended to confine their decision to those portions of the Edicts (of 1515 and 1580) which are of a fiscal or of a purely local nature. So far as they had been incorporated in the general law of Holland, and were not inapplicable here, they were equally incorporated in the law of this Colony.' Applying this principle, the learned Judge held that the 9th Art. of the Placaat of September 26, 1658, formed part of the law of Cape Colony.

In British Guiana the question arose in 1905 as to the validity of a gift by will to a Roman Catholic bishop: (*a*) for offering masses for the soul of testatrix; (*b*) for the benefit of Roman Catholic churches. The full Court (Bovell C. J., Lucie Smith, and Hewick JJ.) held that the Acts of: (1) October 28, 1446; (2) July 6, 1515; (3) March 20, 1524; (4) October 16, 1531; (5) May 4, 1655; (6) October 14, 1655; have never been part of the law of these Colonies (*De Freitas* v. *Exor. of Jardim* (1905) *Brit. Gui. Off. Gaz.*, vol. xxii, p. 1193). [For Cape law herein see Act No. 11, 1868.] On the other hand, the Placaat of September 26, 1658, has been held to be in force in British Guiana (*Liquidator of the Brit. Gui. Ice Co.* v. *Birch* (1909) *Brit. Gui. Off. Gaz.*, vol. xx, p. 3). 'There was nothing in the original circumstances of this Colony which would show that this part of the Roman-Dutch Law was unnecessary, unsuitable, or inapplicable, or that cases could not reasonably be expected to arise in which the Placaat or any rules founded thereon would be appropriate. . . . It is obvious that the mere non-existence of any concrete case to which the law could be applied at the date of the Colony's foundation would not be a sufficient reason for holding that the Placaat and rules based thereon were not introduced here, as similar reasoning would prove the non-introduction of some of the most elementary laws for the preservation of life and property' (Bovell C. J., Hewick, and Earnshaw JJ.).

For Ceylon Law see *Karonchihamy* v. *Angohamy* (1904)

8 N. L. R. 1, in which Middleton J. and Sampayo A. J. (Moncreiff A. C. J. dissenting) held that the Placaat of July 18, 1674, prohibiting marriage between an adulterer and his adulteress, was not in force in Ceylon, and that it is for those who assert and rely upon the operation of a law enacted since the date of the Dutch occupation of the island in 1656 to show beyond all question that it operates and applies. See also authorities cited in argument in *Rabot* v. *de Silva* [1909] A. C. 376, and Pereira, *Laws of Ceylon*, p. 12.

BOOK I

THE LAW OF PERSONS

The Law of Persons: what it includes.

THE law relating to persons occupies the first book of the Institutes of Gaius and Justinian. The scope and meaning of the phrase have been much discussed, with little result save to show that the distribution of topics made in these treatises between the law of persons and the law of things is not logically defensible, or, at least, is not readily understood by modern writers. In this volume we shall include under the law of persons the allied topics of: (1) the law of status; (2) the law of the consequences of status; and (3) family law. No attempt will be made to keep these topics rigidly distinct. The method adopted will be to trace the legal life-history of human beings from conception to the grave, and to see how their rights and duties are affected by certain conditions or accidents of human life, such as birth, minority, marriage, mental disease. To this will be added some remarks on artificial or juristic persons. For convenience the subject will be treated in chapters dealing with:

1. Birth, Sex, Legitimacy.
2. Parentage.
3. Minority.
4. Guardian and Ward.
5. Marriage.
6. Unsoundness of mind.
7. Corporations and other juristic persons.

CHAPTER I

BIRTH, SEX, LEGITIMACY

Section 1.—Birth

Birth.

Legal capacity begins with the completion of birth,[1] subject however to the qualification that a child in the womb is deemed already born whenever such a fiction is for its advantage. Thus an unborn child may inherit *ab intestato*.[2]

Section 2.—Sex

Sex.

Sex, as such, is not a factor of importance in the sphere of private law. There is a difference, however, in the age of puberty, which for males is fixed at fourteen years, for females at twelve.[3] Further, there is a special rule of law by which a woman cannot bind herself as surety unless she expressly renounces the benefits which the law allows her.[4]

Section 3.—Legitimacy

Legitimacy.

By the law of all civilized countries a distinction is made between legitimate and illegitimate issue. Legitimate children are those born from parents united in wedlock.[5] In the case of issue born from the beginning of the seventh[6] month after marriage to the beginning of the eleventh month[7] after its termination by death

[1] *German Civil Code*, sec. 1; *Ontwerp van het Burgerlijk Wetboek*, Art. 76.

[2] Dig., 1. 5. 7 and 26; Gr. 1. 3. 4; Voet, 1. 5. 5; V. d. K. *Th.* 45.

[3] Inst. 1, 22. pr.; Van Leeuwen, 1. 6. 1; Voet, 4. 4. 1.

[4] Senatus-Consultum Velleianum; Authentica si qua mulier. 3 Maasdorp, p. 347; *infra*, p. 264. Abrogated in Brit. Gui. by Ord. No. 12 of 1904, sec. 25.

[5] Gr. 1. 12. 2; V. d. K. *Th.* 169.

[6] Gr. 1. 12. 3; Voet, 1. 6. 4. Van Leeuwen (1. 7. 2) says: 'We consider as legitimate those persons who are born during the seventh month, or even on the hundred and eighty-second day after the consummation of the marriage.'

[7] V. d. K. *Th.* 170: Post solutum matrimonium intra decimum mensem id est 300^{um} diem partum editum esse oportet ut regulariter pro legitimo possit haberi. The period has even been extended to the

or divorce the presumption of legitimacy is only rebuttable by proof of impotence or non-access.[1] Indeed legitimacy is presumed whenever a child is born during the subsistence of marriage, even though it be born on the very day on which the marriage is celebrated.[2] This is in accordance with the maxim 'pater is est quem nuptiae demonstrant'.[3] But if the husband can prove sexual relations before marriage unknown to him followed by pregnancy and not condoned by cohabitation subsequent to his discovery of them, he is entitled to have the marriage declared null and void.[4] The uncorroborated evidence of a married woman is not permitted to bastardize her own child.[5] To prevent difficult questions as to paternity, the Dutch Law, following the Civil Law,[6] prohibited re-marriage within a certain time after a first husband's death.[7] This was called the widow's 'annus luctus'; but in Holland the period of mourning (*treur-tijd*) varied in different places, with a preference for a term of six months.[8] In the Roman Law re-marriage within the year of mourning entailed penal consequences.[9] This was not the case in the Dutch Law,[10] and in the Colonies

Pater is est quem nuptiae demonstrant.

Annus luctus.

twelfth month inclusive in a case where the lady's character was thought to be beyond reproach. Voet, loc. cit.; Sande, *Decis. Fris.* 4. 8. 10. In Ceylon the limit of time is two hundred and eighty days after the dissolution of marriage, the mother remaining unmarried. Evidence Ordinance, No. 14 of 1895, sec. 112.

[1] The presumption in favour of legitimacy may be rebutted by 'clear and satisfactory evidence'. *Fitzgerald* v. *Green* [1911] E. D. L. at p. 462.

[2] Gr. 1. 12. 3; Van Leeuwen, 1. 7. 2; *Cens. For.* 1. 1. 3. 5; Voet, 1. 6. 5 and 7; V. d. K. *Th.* 169.

[3] (Paulus) Dig. 2. 4. 5; Voet, 1. 6. 6; *Richter* v. *Wagenaar* (1829), 1 Menz. 262.

[4] Voet, 24. 2. 15; *Horak* v. *Horak* (1860) 3 Searle 389. It is not so in English law. *Moss* v. *Moss* [1897] P. 263.

[5] Schorer *ad* Gr. 1. 12. 3; Voet, 1. 6. 7.

[6] Cod. 5. 9. 2 (Gratian, Valentinian, and Theodosius, A.D. 381).

[7] Gr. 1. 5. 3, and Schorer's note. Van Leeuwen (1. 14. 14) says that a widow must wait six months after the death of her former husband, unless in the interval she has been delivered of a child.

[8] Fockema Andreae, *Bijdragen*, vol. i, p. 167; V. d. K. *Th.* 67.

[9] Cod. 5. 9. 2.

[10] *Cens. For.* 1. 1. 13. 27; Groenewegen, *de leg. abr.* Cod. ad loc.; Bynkershoek, *Quaestiones Juris Privati*, lib. II, cap. iv; V. d. K. *Th.* 68.

the institution itself has passed out of use.[1] If a widow so far forgets herself as to remarry within the period of mourning and issue is born which may be attributed to either father, it is presumed to be the child of the second husband.[2]

Eene moeder maakt geen bastaard.

A bastard has no lawful father and therefore no rights of succession *ex parte paterna*. But with the mother it is different; for 'eene moeder maakt geen bastaard', and therefore her illegitimate issue succeeds to her and to her blood relations.[3] Such was the opinion of Grotius, though, as regards these last, Van der Linden inclines to a contrary view.[4]

Legitimation.

Illegitimate issue may be legitimated: (1) by subsequent marriage; (2) by an act of grace on the part of the Sovereign.[5] The first of these modes alone obtains at the present day.[6] Children born in adultery or incest (which extends to all the prohibited degrees) are incapable of legitimation by subsequent marriage.[7]

[1] By the Transvaal Marriage Ordinance (No. 3 of 1871), s. 9, no widower might marry within three months after the decease of his wife, and no widow within three hundred days after the decease of her husband; but this is no longer law, having been repealed by Procl. No. 34 of 1901. For the Orange Free State see Law No. 26 of 1899, sec. 13. The *annus luctus* is unknown in Cape Colony (1 Maasd., p. 19; Nathan, *Common Law of South Africa*, vol. i, p. 100 (2nd ed., p. 108)), Ceylon and British Guiana, though in the last-named colony there is a clause abolishing it in the Draft Ordinance of the Common Law Commission of 1914.

[2] Voet, 1. 6. 9; who gives amongst other reasons because 'ipse incertitudinis auctor et causa est'.

[3] Gr. 2. 27. 28; Van Leeuwen 1. 7. 4; Anton. Matthaeus, *Paroemiae*, No. 1; V. d. L. 1. 4. 2. No distinction is made between adulterine, incestuous, and other bastards. Anton. Matth., *ubi sup.*, secs. 7 and 8; *Fitzgerald* v. *Green*, *ubi sup.* pp. 474 ff.

[4] V. d. L. 1. 10. 3. The question was much debated. See *against* Grotius, Bynkershoek, *Quaest. Jur. Priv.* lib. III, cap. ii.; *for* Grotius, Van der Vorm (*Versterfrecht*, ed. Blondeel, pp. 212 ff.), and V. d. K. *Th.* 342–5. See also *Mogamat Jassiem* v. *The Master* (1891) 8 S. C. 259. As to succession *to* bastards see Van der Vorm, *ubi sup.* p. 237.

[5] Gr. 1. 12. 9; Van Leeuwen, 1. 7. 5; Voet, 25. 7. 6 and 13; V. d. K. *Th.* 171–2; V. d. L. 1. 4. 2.

[6] (Cape Province) 1 Maasd., p. 9.

[7] Van Leeuwen, 1. 7. 7; Voet, 25. 7. 8; V. d. L. 1. 4. 2. Grotius (1. 12. 9) merely says that legitimation is not readily accorded to them. This refers only to legitimation by act of grace, for as pointed out by Kotzé J., in *Fitzgerald* v. *Green*, *ubi sup.* at p. 472, legitimation

CHAPTER II

PARENTAGE

Parentage.

BIRTH implies parentage and the reciprocal duties of parent and children. These may be considered under two heads: (A) the reciprocal duty of support; (B) the parental power and its consequences.

A. *The reciprocal duty of support.*

The reciprocal duty of support between parents and children.

A father must support his children,[1] i.e. he must supply them with necessary food, clothing, shelter, medicine, and elementary instruction.[2] The duty extends to emancipated children [3] (i.e. to such as have reached or are deemed to have reached full age), if they have not sufficient means for their own support;[4] and it includes illegitimate [5] as well as legitimate children or further descendants.[6] The obligation is personal and ends with the father's death.[7] The father does not escape liability

by subsequent marriage presupposes that marriage could have taken place between the parents at the time of the birth of the child. But Voet allows legitimation if marriage within prohibited degrees is afterwards contracted with the necessary dispensation in cases where dispensation is permitted by law. In Ceylon illegitimate children are legitimated by subsequent marriage unless procreated in adultery. Ord. No. 2 of 1895, s. 22.

[1] Gr. 1. 9. 9; Van Leeuwen, 1. 13. 7; Voet, 25. 3. 5; and grandchildren too if their parents are dead or indigent. Ibid. sec. 7. According to Van Leeuwen (*ubi sup.*), a man is obliged to support and educate his brother, sister, or brother-in-law, whether of the whole or of the half blood, in case they have become reduced to poverty, and also his natural brother. For Brit. Gui. see Ords. Nos. 13 and 14 of 1903, supplementing the common law [G.].

[2] Van Leeuwen, 1. 13. 8 (*ad fin.*); Voet, 25. 3. 4.

[3] Dig. 25. 3. 5. 1; Voet, 25. 3. 5.

[4] Dig. 25. 3. 5. 7; Voet, 25. 3. 14–15.

[5] Voet, 25. 3. 5; including incestuous and adulterine issue. *Secus*, jure civili. Nov. 89, cap. xv.

[6] Voet, 25. 3. 7.

[7] Voet, 25. 3. 18; so says Voet here and elsewhere (e. g. 23. 2. 82); *contra*, Groen., *de leg. abr. ad* Dig. 34. 1. 15. 'Upon the question whether the obligation of a father to support his children passes to his heirs, the authorities are by no means agreed.' Sir Henry de Villiers C.J., in *Carelse* v. *Estate De Vries* (1906) 23 S. C. at p. 536. In this case it was held that deceased's estate being more than sufficient to pay

by the fact that he has made other provision for a son, which the son has lost or squandered.[1]

The mother likewise is liable, together with the father during his lifetime, and solely after his death. The mother of illegitimate children is liable for their support.[2] In case of divorce, both parents may be required to maintain the children according to their means.[3] The obligation of support ceases if the children are able by their industry or from their own means to support themselves.[4] The duty is reciprocal. Children must maintain their parents,[5] and if they are minors or lunatic the Court may charge the cost of maintenance upon their estate.[6] In every case the proper process to enforce this duty is not an action but petition to the Court.[7]

B. *The parental power and its consequences.*

The parental power and its consequences.

Parental power, or, as it is also called, natural guardianship, has little in common with the *patria potestas* of the Civil Law.[8] Van der Linden writes:

'The power of parents over their children differs very much among us from the extensive paternal power among the Romans. It belongs not only to the father, but also to the mother, and after the death of the father to the mother alone. It consists in a general supervision of the maintenance and education of their children and in the administration of their property. It gives the parents the right of demanding from their children due reverence

for the support and maintenance, according to their condition in life, of his legitimate children, it was competent for the Court to award to the mother of his illegitimate children as their natural guardian, such sum as would enable her to supply them with the means of subsistence, until they were old enough to earn it for themselves. Ibid. at p. 537.

[1] Voet, 25. 3. 5.

[2] So is the father if he is known. Gr. 3. 35. 8; Van Leeuwen, *ubi sup.*

[3] Van Leeuwen, 1. 15. 6; Voet, 25. 3. 6; and 48. 5. 6.

[4] Voet, 25. 3. 14–15. The child's whole capital must be exhausted before he becomes chargeable on his parent. *Holl. Cons.*, vol. ii, no. 280.

[5] Voet, 25. 3. 8; *Holl. Cons.*, vol. ii, no. 279.

[6] *In re Knoop* (1893) 10 S. C., 198.

[7] Voet, 25. 3. 13.

[8] Gr. 1. 6. 3; Van Leeuwen, 1. 13. 1.

and obedience to their orders, and also in case of improper behaviour to inflict such moderate chastisement as may tend to improvement. Parents may not be sued by their children without leave of the Court, termed venia agendi.[1] No marriage can be contracted by children without the consent of their parents. The parents are entitled on their decease to provide for the guardianship of their children.'[2]

Whatever is here said of children must be understood to refer to minor children, for in the Roman-Dutch law parental power ceases when the child attains full age.[3]

The incidents of the parental power described by Van der Linden may be developed as follows :

1. *Custody and Control.* The custody, control, and education of children belong to the father, and after his death to the person named in his will.[4] Failing any such disposition the Court will appoint a fit person to act in this behalf, and in the absence of good cause to the contrary the mother will be preferred to remoter relatives or strangers. Remarriage is not in itself a ground of exclusion.[5] 1. Custody and control;

2. *Administration.* During the lifetime of both parents, and in the modern law until the father's death,[6] the management of a minor child's property belongs to the father, except so far as the person from whom such property is 2. Administration;

[1] In the Cape Province *venia agendi* is abrogated by disuse. *Mare* v. *Mare* (1910) C. P. D. 437.

[2] V. d. L. 1. 4. 1 (Juta's translation).

[3] V. d. L. 1. 4. 3. Full age is now fixed by law at the twenty-first birthday. *Infra*, p. 37.

[4] Voet, 27. 2. 1 ; *Van Rooyen* v. *Werner* (1892) 9 S. C. 425, where de Villiers C. J. reviews the whole subject of paternal and maternal rights. *Semble*, a surviving mother is now absolutely entitled to the custody unless the Court sees fit to direct otherwise.

[5] Voet, *ubi sup.*

[6] In the old law the father's natural guardianship did not survive the death of the mother. It was necessary for him to apply to the Court to be appointed guardian along with the guardian, if any, named in the will of his deceased spouse. Except in this capacity the surviving father had no competence either to represent his minor son in Court, or to administer his estate. Gr. 1. 7. 8–9; Voet, 26. 4. 4. Van der Keessel is to the same effect. *Dictat. ad* Gr. 1. 7. 8 (*in fine*). This can no longer be regarded as representing the law in South Africa. See *Van Rooyen* v. *Werner*, *ubi sup.* at p. 428, where de Villiers C.J. said: 'As to the father, he is the natural guardian of his legitimate children until they attain majority.'

derived may have excluded the father from the administration and appointed a curator nominate in his stead.[1] In the event, however, of property coming to the child by inheritance the parents must give notice to the proper authority, who will inquire whether the administration of such inheritance requires a special guardian or not.[2] The father may apply the income of property belonging to the child for his maintenance, education, and other like purposes.[3] He may invest his child's money,[4] and (within limits) contract on his behalf.[5] But an executory contract entered upon by the father in the name of his minor son, if prejudicial to him, will not be enforceable against the son unless expressly ratified by him after majority.[6]

A minor child, being unemancipated, is unable to contract without the consent of his father.[7] Any contract entered upon by him without such consent is *ipso jure* void, and will not bind either the child or the father [8] except in so far as either of them has been enriched thereby, and if any payment has been made by the minor under such contract, it is recoverable by the condictio indebiti. If, however, the minor's contract is authorized or ratified by the father, the father will be liable. So far and so far only may a minor son bind his father by his contracts.[9]

A father may represent his son in Court [10] and sue and defend in his name, but if he does so without leave from

[1] Gr. 1. 6. 1, and Schorer, ad loc.

[2] Gr. *ubi sup.*; V. d. K. *Th.* 103. The rule in the text has never been observed in Brit. Gui. [G.].

[3] Van Leeuwen, 1. 13. 2.

[4] *Van der Byl* v. *Solomon* (1877) Buch. at p. 27.

[5] Gr. 3. 1. 28; e.g., he may bind him by a contract of service. V. d. K. *Dictat.* ad loc.

[6] *Van der Byl* v. *Solomon, ubi sup.*

[7] V. d. L. 1. 4. 1.

[8] Gr. 3. 1. 34. Nor is a father liable for his son's delicts unless expressly made so by statute, as is sometimes the case. V. d. K. *Dictat.* ad loc

[9] Voet, 15. 1. 11. Conversely the advantage of the minor child's contract accrues to the father. Gr. 3. 1. 38, and V. d. K. *Dictat.* ad loc.

[10] Gr. 1. 6. 1. 'The right of a father to bring actions on behalf of his minor children has been repeatedly recognized by this Court.' *Van Rooyen* v. *Werner, ubi sup.* at p. 430, per de Villiers C. J.

the Court he will be personally answerable for costs, if the suit proves unsuccessful.[1]

3. *Consent to marriage of minor children.* The consent of parents is necessary to the marriage of minor children,[2] and without it the marriage is null and void.[3] Consent may be either express or implied. It is implied if the father knows that the marriage of the minor is about to take place and does not forbid it.[4] Strictly, the mother's consent is also necessary, but in case of disagreement the father's will prevails.[5] In the absence of fraud, publication of banns is, in the Cape Province, presumptive evidence of consent, and a marriage celebrated after publication of banns without objection by the father is neither void nor voidable.[6] But a marriage celebrated after special licence without the father's consent may be set aside at his instance. The consent of grandparents or remoter ascendants is in no case necessary,[7] nor is consent necessary to a second marriage of widows or widowers who are under the ordinary age of majority.[8]

3. Consent to marriage of minor children;

4. *Right to provide testamentary guardians.* This has been mentioned above,[9] and will be further considered under the head of Guardianship.

4. Right to appoint guardians by will;

5. *Rights in respect of minor children's property.* The Dutch Law, following the Roman Law, distinguishes between peculium profecticium and peculium adventicium. *Jure civili* the first of these belonged wholly to the father;[10] of the second, which belonged to the son, the

5. Rights in respect of minor children's property.

[1] *Van der Walt* v. *Hudson* (1886) 4 S. C. 327.
[2] Gr. 1. 5. 15, and Schorer, ad loc.
[3] Voet, 23. 2. 11; V. d. K. *Th.* 75; V. d. L. 1. 3. 6. *Infra*, p. 72.
[4] Voet, 23. 2. 8.
[5] Voet, 23. 2. 13; Schorer, *ubi sup.* At the Cape 'He alone can consent to their marriage'. *Van Rooyen* v. *Werner, ubi sup.* at p. 429.
[6] *Johnson* v. *McIntyre* (1893) 10 S .C. 318. *Semble*, the marriage cannot in any case be impeached by the minor spouses themselves. *Willenburg* v. *Willenburg* (1909) 3 Buch. A. C. 409, per de Villiers C. J.
[7] Voet, 23. 2. 15; V. d. L. 1. 3. 6.
[8] Voet, 1. 7. 14; V. d. L. 1. 4. 3.
[9] *Supra*, p. 33.
[10] From which it follows that a father cannot make a valid gift to a son in power. Gr. 3. 2. 8; Voet, 39. 5. 6; but Schorer, following

father had the usufruct. Peculium profecticium, according to Voet, comprises (1) gifts made by sponsors at baptism, which are deemed to be made to the father, not to the child ;[1] (2) anything acquired by children residing at home and supported by their parents, whether acquired suis operis or ex re patris. Schorer is to the same effect. 'What children acquire by their own labour and industry, while supported by their parents, is acquired for their parents,' being set off against the cost of maintenance.[2] Adventitious property, however, i.e. property coming to the child from sources other than the above, belongs to the child in full ownership, and the father has no usufruct therein, unless this has been expressly conferred upon him by the person from whom the property is derived, or unless it is necessary for him to use the property and apply its proceeds about the maintenance and upbringing of the minor child.[3]

Thus far of the incidents of the parental power. It remains to see how it is acquired and lost.

How the parental power is acquired : how lost.

The parental power is acquired [4] by : (1) birth in lawful wedlock ; and (2) legitimation by subsequent marriage ;[5] but not, as amongst the Romans, by adoption.[6] It is determined by : (1) the death of parent or child ;[7] (2) emancipation, which is either (*a*) judicial, i.e. by order

Groenewegen in *notis ad* Grot. loc. cit. and *de leg. abr. ad* Inst. 3. 20 (19). 6, says that this no longer obtains. See also V. d. K. *Th.* 485.

[1] Voet, 15. 1. 4; but see Van Leeuwen, 3. 16. 7; and V. d. K. *Th.* 104.

[2] Gr. 1. 6. 1; and Schorer ad loc.; Van Leeuwen, 2. 7. 7; Voet, 15. 1. 4 and 25. 3. 14. For Brit. Gui. see *Rego* v. *Cappell* (1901) *Brit. Gui. Off. Gaz.*, vol. xiii, p. 704, where it was held that the property acquired by a minor by his labour belongs to himself, and not to his parents, and consequently is not executable for their debts [G.].

[3] Van Leeuwen, 1. 13. 2, and Decker ad loc.; Voet, 14. 1. 6; Schorer, *ubi sup.*; V. d. K. *Th.* 105.

[4] Voet, 1. 6. 4.

[5] Gr. 1. 12. 9; and Schorer ad loc.; Voet, 25. 7. 6; V. d. L. 1. 4. 3. Legitimation by act of the Sovereign is disused in Cape Colony (1 Maasd. p. 9), and probably elsewhere.

[6] Gr. 1. 6. 1; Van Leeuwen, 1. 13. 3; Voet, 1. 7. 7; V. d. L. 1. 4. 2; *Robb* v. *Mealey's Exor.* (1899) 16 S. C. 133. But see V. d. K. *Th.* 102.

[7] Voet, 1. 7. 9.

of Court made at the father's instance,[1] or (*b*) tacit, as when a son is permitted to live and carry on business by himself ;[2] (3) marriage ;[3] (4) majority ;[4] to which Voet adds (5) public office or priesthood ;[5] and Grotius (6) the placing of the father under curatorship.[6]

CHAPTER III

MINORITY

Minority.

A MINOR by Roman-Dutch Law is a person of either sex who has not completed the twenty-fifth year.[7] For this the twenty-first year has been substituted by statute in all the Roman-Dutch Colonies.[8] As to the precise moment at which minority ends Voet makes the following distinction. The last day of minority is regarded as completed at the moment of its inception, where it is to the minor's advantage that it should be so considered ;[9] but where the advantage lies the other way, so as, e.g., to prolong the benefit of restitutio in integrum, then, majority is not deemed to be attained until the very minute arrives at which birth took place.[10]

[1] Gr. 1. 6. 4 ; Voet, 1. 7. 11. But see Decker *ad* Van Leeuwen, 1. 13. 5 ; V. d. L. 1. 4. 3 (note 4) ; V. d. K. *Th.* 107 and 110.

[2] The two conditions need not always co-exist. A separate establishment is enough, a separate business only if the parents have not expressed a contrary intention. V. d. K. *Dictat. ad* Gr. 1. 6. 4. According to Voet (1. 7. 12), the separate establishment must have continued for a year and a day.

[3] Gr. 1. 6. 4 ; Van Leeuwen, 1. 13. 4 ; Voet, 1. 7. 13.

[4] Van Leeuwen, 1. 13. 6 ; Voet, 1. 7. 15.

[5] Voet, 1. 7. 10. But see Van Leeuwen, 1. 13. 6.

[6] Gr., 1. 6. 5. But the child, of course, remains a minor. Van Leeuwen, *ubi sup.* A sentence of banishment (and in the modern law, no doubt, a long term of imprisonment) has the same effect. V. d. K. *Th.* 109.

[7] Gr. 1. 7. 3 ; Van Leeuwen, 1. 12. 3 ; Voet, 4. 4. 1.

[8] Cape, Ord. 62, 1829, sec. 1 ; Natal, Ord. No. 4 of 1846, sec. 1 ; Transvaal, Volksraad Resolution of December, 1853, Art. 123 ; O. F. S. Law Book of 1901, chap. 89, sec. 14 ; Ceylon, Ord. No. 7 of 1865, sec. 1 ; British Guiana, Ord. No. 1 of 1832.

[9] Voet, 4. 4. 1.

[10] Gr. 3. 48. 9 ; Voet, *ubi sup.* and 44. 3. 1 ; *Cens. For.* 1. 4. 43. 11, cf. Dig. 4. 4. 3. 3. In English law full age is reached at the beginning

Majority may be accelerated by: (a) Venia aetatis;

Majority may be accelerated by: (1) venia aetatis; (2) marriage. Venia aetatis, Grotius says, is obtained when the minor is for special reasons declared of age, before attaining the prescribed years of majority, either by the Sovereign or by the Court.[1] Voet,[2] however, and Van der Linden [3] give the prerogative of conceding it to the Sovereign alone. After some difference of opinion the law has been settled in this sense by the Courts of South Africa.[4] The effect of venia aetatis (which is not given to males under twenty or to females under eighteen years of age) [5] is to put an end to all the incapacities and benefits of minority except as regards the alienation or hypothecation of immovables, which, unless expressly granted along with venia aetatis, can only be effected after leave obtained from the Court. In this respect alone, persons who have obtained venia aetatis remain on the same footing as other minors.[6]

(b) Marriage.

The effect of marriage is different. In the case of a male this puts an end to minority absolutely;[7] accordingly the latter does not revive in the event of the death of the wife while the husband is within the ordinary limits of minority.[8] But in this case, as also in the case of natural

of the day before the twenty-first birthday (1 Blackst. *Comm.* 463, and Christian's note). Is the rule the same in R.-D. L.? See Dig. 50. 16. 134 and 28. 1. 5, with Gothofredus' note. As to leap year see Voet, *ubi sup.*

[1] Gr. 1. 10. 3. The language of Grotius limits this privilege to an orphan (*wees*). The institution of venia aetatis is taken from the Civil Law, Cod. 2, tit. 44 (45). [2] Voet, 4. 4. 4.

[3] V. d. L. 1. 4. 3. See also V. d. K. *Th.* 161.

[4] See cases in Nathan, *Common Law of South Africa*, vol. i, p. 116 (2nd ed. p. 126), and Bisset and Smith, *Dig. S. A. Case Law*, vol. ii, col. 1837. Maasdorp (vol. i, p. 237) says that venia aetatis is obsolete in the Cape Province. For a form of venia aetatis still in use in Ceylon see Appendix A to this Book (*infra*, p. 107).

[5] Cod. 2. 44 (45). 2; V. d. L., *ubi sup.*; *O. F. S. Law Book* of 1901, chap. xcii, sec. 7. But see Van Leeuwen, 1. 16. 11.

[6] Voet, 4. 4. 5; minoribus caeteris hac in parte manentes exaequati.

[7] Voet, 4. 4. 6.

[8] Schorer *ad* Gr. 1. 6. 4; V. d. K. *Th.* 879; V. d. L. 1. 4. 3. The position of a female widow not yet twenty-one years old is somewhat anomalous. She has been a minor during marriage *jure maritali*. The death of the husband leaves her still under age. But, on the other hand, she does not revert to the paternal power or require a guardian. V. d. K. says (*Th.* 879) that she cannot be relieved from her contracts on the

majority, the Orphan Chamber might for good cause prolong the period of guardianship beyond its usual legal term.[1]

The legal status and capacity of a minor.

The next matter for consideration is the legal status and capacity of a minor. The subject is inadequately treated in the text-books, but the following rules may be extracted from them.

1. If the child is so young that he does not know what he is about, he is absolutely incapable of contracting at all with or without assistance, for, as Van Leeuwen says: 'All obligations must arise out of a free and full exercise of the will. It cannot therefore take place where there is a hindrance to the exercise of the will as in the case of lunatics and madmen and young children, who are bound neither by a promise nor acceptance.'[2]

2. If the child is old enough to understand the nature of the transaction, he has *intellectus* but is still wanting in *judicium*, and therefore cannot, with some exceptions, contract a valid obligation without his parents'[3] or guardians'[4] consent. 'Municipal law,' says Grotius,[5] 'considers all obligations incurred by minors[6] as invalid, unless incurred through delict or in so far as they have been benefited.'

Such obligations are said to be *ipso jure* void, and therefore minors are *ipso jure* secure from any claims in respect of them without the need of invoking the extraordinary remedy of restitutio in integrum.[7] The phrase

ground of minority. Voet, however (4. 9. 9), whom he calls in aid, expresses the opposite view.

[1] Voet, *ubi sup.*; V. d. K. *Th.* 160.

[2] Van Leeuwen, 4. 2. 2 (Kotzé's Transl., vol. ii, p. 11); Voet, 26. 8. 9.

[3] V. d. L. 1. 4. 1.

[4] Gr. [illegible]8. 5.

[5] Gr. 3. 1. 26.

[6] I. e. unassisted. V. d. K. *Th.* 128 and 474; Dig. 4. 4. 16 pr. No distinction can reasonably be drawn between a minor whose parents are alive and one whose parents are dead. As regards contractual capacity, they are in exactly the same position. V. d. K. *Th.* 474; *Dictat. ad* Gr. 3. 1. 26; *Holl. Cons.*, vol. vi, pt. 2, no. 30. Van der Keessel rightly dissents from the view of Groenewegen (*de leg. abr. ad* Cod. 4. 26. 2) and Voet (14. 5. 4) that minors above the age of puberty whose parents are alive are bound by their contracts until relieved by restitutio in integrum.

[7] *Cens. For.* 1. 4. 43. 2. For the *Senatus-Consultum Macedonianum* forbidding loans of money to filii familias see below, p. 263, n. 7.

'*ipso jure* void' must not, however, be taken too literally, for, as will be seen, such obligations are not so much void as voidable at the minor's option.[1]

Exceptions to the rule of non-liability: (a) When the minor has been benefited;

3. The first exception to the rule of non-liability is mentioned by Grotius in the passage above cited, viz. so far as the minor has been benefited.[2] This means that when a contract has been executed in a minor's favour he cannot evade the corresponding liability, or set up his minority as a defence, provided that in view of all the circumstances of the case the contract was for his benefit.[3] To this head may be referred a minor's liability for necessaries, or for money borrowed and expended on necessaries.[4] The liability is, indeed, rather quasi-contractual than contractual,[5] and rests upon the principle stated by Pomponius: 'Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem.'[6]

(b) Trade and professional contracts;

4. The next exception is when a minor carries on a profession, trade, or business. He may contract in relation thereto, and cannot obtain relief by restitutio in integrum in respect of consequent loss or damage.[7] A female minor is in this regard in the same case as a male.[8]

Are the contracts of an unassisted minor void or merely voidable?

5. It has been said above that the phrase '*ipso jure* void' must not be taken too literally. This appears from the fact that the other party to the contract is bound, if the minor through his tutor, or the late minor after majority, on his own motion takes steps to enforce the contract.[9] In other words, a contract entered into by a minor, unassisted, may be ratified either during his minority or after its determination.[10] Voet adds that if a minor seeks to enforce a contract made by him without his tutor's

[1] For Ceylon law herein see Pereira, *The Laws of Ceylon*, pp. 185 ff.
[2] Gr. 3. 1. 26.
[3] Gr. 1. 8. 5; 3. 6. 9; 3. 30. 3; Van Leeuwen, 1. 16. 8; Voet, 26. 8. 2; *Nel* v. *Divine, Hall & Co.* (1890) 8 S. C. 16.
[4] Van Leeuwen, *ubi sup.* [5] Gr. 3. 30. 3.
[6] Dig. 12. 6. 14, and 50. 17. 206.
[7] *Cens. For.* 1. 4. 43. 5; *Gericke* v. *Keyter* (1879) Buch. 147; *Riesle* v. *McMullin* (1907) 10 H. C. G. 381.
[8] Voet, 4. 4. 51. [9] Gr. 3. 6. 9; Voet, 26. 8. 3.
[10] Voet, 26. 8. 4 (*ad fin.*), and 4. 4. 44. But see *Riesle* v. *McMullin*, *ubi sup.*

authority, he may do so only on condition that he himself performs his part.[1] He further points out that an unassisted contract of a minor always creates a natural obligation, and therefore supports the collateral undertaking of a surety, provided that the minor be upwards of seven years of age. But, contrary to the rule usually applicable to such obligations, the natural obligation of a minor does not preclude the condictio indebiti. Accordingly, if the minor has made a payment in pursuance of an unauthorized contract he can get the money back. But, if he ratifies after full age, his obligation is no longer merely natural, but civil.[2]

Unilateral contracts.

6. A contract entered upon by a minor is good without the tutor's consent,[3] if the advantage is all on his side, and there is no corresponding disadvantage or burden. Other contracts, entered into with the tutor's consent, bind the minor[4] unless and until he obtains a decree of restitutio in integrum.[5] Further, a father and guardian, as we have seen or shall see hereafter, may in due course of administration contract in the name of the minor and bind him by such contract, subject however to the same relief.[6]

Liability for delicts and crimes.

7. A minor above the age of seven years is liable for his delicts and of course for his crimes.[7] With regard to delicts Voet says that if there is wrongful intention the minor is always liable. If, on the other hand, he has done injury through slight or very slight fault (*levi vel levissima culpa*), without wrongful purpose, he should be excused, or at least relieved from punishment by restitutio in integrum.[8]

Property.

8. In the sphere of property-law there is nothing to

[1] Voet, 26. 8. 3; V. d. K. *Th.* 529. But, says Van der Keessel, 'a minor, who has become a party to a bilateral contract which has been executed, may recover property alienated by him in terms of the contract, but on his side is only bound *quatenus locupletior factus est.*'

[2] Voet, 26. 8. 4.

[3] Gr. 1. 8. 5; Voet, 26. 8. 2.

[4] Voet, 26. 8. 3.

[5] Gr. 3. 48. 10; Voet, 4. 4. 52.

[6] Gr. *ubi sup.* and 1. 8. 8; V. d. K. *Th.* 133.

[7] Gr. 1. 4. 1; 3. 1. 26; 3. 48. 11.

[8] Voet, 4. 4. 45; but not, I think, in the modern law.

prevent a minor from acquiring ownership,[1] but he cannot alienate or charge his property[2] without his parent's or tutor's authority;[3] which, as we have seen, in the case of the alienation or hypothecation of immovables is not sufficient without an order of Court.[4]

Minors under the age of puberty are incompetent to make[5] or to witness a will.[6]

Restitutio in integrum.

9. Restitutio in integrum, which has been already mentioned, is an extraordinary remedy, by which the Court relieves a person from the consequences of a transaction into which he has entered and so far as possible restores the *status quo ante*. It is granted to minors when it

[1] Dig. 41. 1. 11.

[2] Gr. 1. 8. 5; 2. 48. 4; Van Leeuwen, 2. 7. 8; nor make a gift *mortis causa* (Gr. 3. 2. 23—from whom Schorer, ad loc., dissents); nor discharge a debt by release (Gr. 3. 41. 8); or by novation (Voet, 46. 2. 8); nor make a valid payment of a debt (Gr. 3. 39. 11); i.e. he may recover the money if still intact; if this is impossible the payment holds good (Ibid.).

[3] It is not clear that he can do so even with such authority. By the earlier Civil Law he could (Inst. 2. 8. 2; Dig. 26. 8. 9. 1 and 41. 1. 11); but the restrictions imposed by the Oratio Severi and later enactments on alienation by the tutor in the course of administration applied equally to alienation by the pupil with the tutor's authority. Property included within the scope of these laws was inalienable either by tutor or by pupil without an order of Court. Vinnius *ad* Inst. 2. 8. 2. *ad init.*; Girard, p. 216. After Constantine the statutory restriction extended to all immovables and to valuable movables. Cod. 5. 37. 22. Grotius (1. 8. 5) says, without qualification, that a minor cannot alienate; and Van der Keessel (*Th.* 129) requires the consent of the pupillary magistrates for the alienation even of movables. But this opinion seems to be inferred from local *keuren* (*Dictat.* ad loc.), and does not make common law. Gifts by a minor were prohibited by Roman Law (Girard, *ubi sup.*); but in Roman-Dutch Law donations by minors do not seem to be distinguished from their other contracts. *Cens. For.* 1. 4. 12. 3; Voet, 39. 5. 7 (*ad fin.*). Van der Linden (1. 15. 1) says that a minor cannot make a donation to his guardian, but lays down no rule that donations by minors made with the authority of their tutors are otherwise invalid. The conclusion to be drawn from the authorities seems to be that in the modern law a minor is not incapable of alienating his movable property with the consent of his guardian even by way of gift.

[4] Voet, 26. 8. 5; 27. 9. 1 and 4. [5] Gr. 1. 6. 3; V. d. L. 1. 4. 1.

[6] Gr. 2. 17. 21; V. d. L. 1. 9. 1. By the Roman Law (Inst. 2. 10. 6), and Roman-Dutch Law, the witnesses to a will must be *males* above the age of puberty. By Cape Law, Act No. 22 of 1876, sec. 2: 'Every person, except as hereinafter excepted, above the age of fourteen years, who is or may be competent to give evidence in any Court of Law shall be competent and qualified to attest the execution of a will or other instrument.'

appears that they have suffered by reason of the weakness of youth.[1] This remedy is given in respect not only of contracts, but also of alienation of property by donation or otherwise; of compromises; and even of judicial proceedings (e.g. when he has failed to put in his pleadings in time).[2] The benefit of restitution accorded to a minor devolves on death,[3] but is not generally available to persons who have bound themselves as sureties for a minor, therein differing from other cases of restitution.[4] Restitution is refused when a minor has fraudulently misrepresented his age.[5] It is waived by ratification after full age, which may be express or implied.[6] It seems that acquiescence with knowledge or means of knowledge of the true circumstances for four years after full age amounts in law to ratification and excludes restitution, which in other cases is only barred after thirty years.[7] A minor cannot obtain restitution against marriage on the ground of minority alone,[8] nor against his liability for crime or serious delicts.[9] By the Civil Law a minor [10] might exclude the benefit of restitution by oath. This was not allowed in the United Provinces.[11]

[1] Gr. 1. 8. 8; 3. 48. 9–13; Voet, 4. 4. 12 ff. In Ceylon it is a question whether the remedy of restitutio in integrum has not been impliedly abrogated by the provisions of the Civil Procedure Code. Pereira, p. 811.

[2] Voet, 4. 4. 14 ff.

[3] Voet, 4. 4. 38.

[4] *Cens. For.* 1. 4. 43. 10; Voet, 4. 4. 39.

[5] Voet, 4. 4. 43. See *Johnston* v. *Keiser* (1879) K. 166; *Vogel & Co.* v. *Greentley* (1903) 24 Natal Law Reports, 252; and for Ceylon —*Wijesooria* v. *Ibrahimsa* (1910) 13 New Law Reports, 195. In this case the Court upheld a sale of immovable property, though made without sanction of the Court.

[6] Voet, 4. 4. 44; *Van der Byl* v. *Solomon* (1877) Buch. 25.

[7] Gr. 1. 8. 8; 3. 48. 13; *Cens. For.* 1. 4. 42. 5, and 1. 4. 43. 8–9. Voet speaks on this subject with uncertain voice. See *Compendium* 4. 1. 5, and *Comment. ad Pandect.* 4. 1. 16 and 20. The prescription itself may in turn be annulled by restitution. Schorer, *ad* Gr. 3. 48. 13. Time does not begin to run after full age unless the late minor knew or might have known of the *laesio* which entitles him to relief. *Cens. For. loc. cit.*

[8] Voet, 4. 4. 45; *Haupt* v. *Haupt* (1897) 14 S. C. 39.

[9] Voet, ibid.

[10] Above puberty. Voet, 4. 4. 46.

[11] *Cens. For.* 1. 4. 43. 13–15; Groen. *de leg. abr. ad* Cod. 2. 27. 1. The enactment in the Code is attributed to the Emperor Alexander, and there is an authentica of the Emperor Frederick I (2 Lib. Feud. 53. 3) in the same sense. The commentators hesitate to treat such an oath as

CHAPTER IV

GUARDIANSHIP

Guardianship.

In the Institutes of Justinian under the titles of tutela and cura are considered two several institutions designed by the law for the protection of persons who, though not subject to parental control, are nevertheless on account of immaturity of years or for other like cause incompetent to be in all respects their own masters. The first of these, tutela, related to young persons alone, and ended with puberty. The second, in the case of young persons, extended from the fourteenth to the twenty-fifth birthday, and was also applicable to the case of lunatics and prodigals.

In Roman-Dutch Law there is one kind of minority only; which, as we have seen, now ends by statute at twenty-one. The distinction between tutela and cura has therefore largely disappeared.[1] But the terms tutor and curator are still retained to denote various cases of control.

In this chapter we shall consider: (1) the different kinds of guardianship and how guardians are appointed; (2) who may be guardians; (3) the powers, rights, and duties of guardians; (4) actions arising out of guardianship; (5) how guardianship ends.

SECTION 1. THE KINDS OF GUARDIANS AND THE APPOINTMENT OF GUARDIANS

The kinds of guardians:

In Roman Law three principal kinds of guardians were recognized: (1) Tutores testamentarii, i.e. guardians appointed to minors in his power by the father or other

devoid of effect. See Groenewegen, loc. cit., and the same author's note *ad* Gr. 1. 8. 5, and Voet, 4. 4. 46–8. There is a decision in Neostadius (*Supr. Cur. Decis.*, Dec. 80) to the effect that a sale by a minor confirmed by oath holds good. But Van Leeuwen concludes: facilior est responsio nullum jusjurandum ejus efficaciae esse, ut negotium actumve de jure invalidum confirmare queat. In the modern law the question does not arise.

[1] Gr. 1. 7. 3 and Schorer ad loc.; Voet, 26. 1. 7; 27. 10. 1; V. d. K. *Th.* 111.

male ascendant; (2) Tutores legitimi, i.e. the nearest agnatic (afterwards cognatic[1]) relatives of the minor, who acted in default of testamentary appointment; (3) Tutores dativi, i.e. guardians appointed by the magistrate in default of either of the first two classes.

(a) Tutors testamentary.

In early Germanic Law testamentary guardians were unknown, but fathers sometimes, before their death, committed the care of their minor children to persons in whom they confided;[2] failing these, some near relative or relatives were considered to be entitled to the guardianship; failing these, again, an appointment was made by the King and in later times by the Count or other feudal lord, who also claimed the prerogative of confirming guardians belonging to either of the first-named classes. This prerogative right was the source of the upper guardianship (*opper-voogdij*) of minors, which in later Dutch Law and also at the present day is vested in the Court.

The Roman-Dutch Law here, as elsewhere, has worked the principles of the Civil Law into the original Germanic fabric. When in later times testaments came into use, testamentary guardians began to be appointed, and the phrase was taken to include guardians appointed, whether in an ante-nuptial settlement or by other judicial or notarial act *inter vivos*,[3] and that by the mother no less than by the father of the minor children.[4]

(b) Tutors assumed.

A special variety of testamentary guardian was the assumed or substituted guardian, i.e. a guardian named by a testamentary guardian, by virtue of a special authority

[1] Nov. 118, capp. 4–5 (A. D. 543).

[2] Hoola van Nooten, *Vaderlandsche Rechten*, vol. i, pp. 544–6; and see on the whole subject *Rechtsg. Obs.* pt. 4, no. 9.

[3] Hoola van Nooten, vol. i, p. 558; V. d. L. 1. 5. 2.

[4] Gr. 1. 7. 9; Van Leeuwen, 1. 16. 3; Voet, 26. 2. 5. But in South Africa, by the Administration of Estates Act, 1913, sec. 71 (re-enacting and amending Cape Ord. No. 105, 1833, sec. 1): 'It shall not be lawful for any person except—(a) the father of a minor; or (b) the mother of a minor whose father is dead or has abandoned the minor; or (c) the mother of a minor to whom the custody of such minor has been given by a competent Court; by any will or other deed to nominate any tutor or tutors to administer and manage the estate or to take care of the person of such minor.' This is without prejudice to the right to appoint a curator nominate.

conferred upon him in that behalf, to act either together[1] with such testamentary guardian, or in substitution for him, particularly in the event of his death.[2]

The guardianship of blood relations.

Failing testamentary guardians, the guardianship or the appointment of guardians devolved upon the nearest relatives of the minor and, in particular, as Grotius[3] tells us, went to the 'four quarters' (*vier vieren-deelen*), i.e. to the nearest of kin on the side of each of the four grandparents. 'Afterwards, however,' he continues, 'it was thought better that guardians should be appointed by the authorities, that is, by the Court of Holland, by the town and country Courts, or by the Orphan Chambers,[4] which are in several places charged with that duty, the upper guardianship of orphans remaining, however, in the Court. These authorities are accustomed and bound in appointing guardians to take the advice of the nearest relatives, and to choose the guardian from amongst them so far as this can be done with advantage to the wards.'

unknown in the modern law.

The consequence of the change described by Grotius was to extinguish the last survivals of the old Germanic guardianship of blood-relations as a separate institution, so that Grotius and Voet are able to speak of 'born' or 'lawful' guardians as no longer recognized by the common law of Holland.[5] All guardians thenceforward were either: (1) testamentary; or (2) appointed;[6] and the intermediate class of 'legitimi tutores' disappears.[7] Over both of these classes, it is important to remember, subsists the upper guardianship of the Sovereign exercised through the Courts of Justice.

(c) Tutors dative.

Orphan Chambers.

At this point something may conveniently be said with regard to the Orphan Chambers. These were official

[1] Voet, 26. 2. 5 (*magt van assumptie*). *Infra*, p. 49, n. 8.
[2] Hoola van Nooten, op. cit., p. 593 (*magt van surrogatie of substitutie*). *Vide* Boey, *Woorden-tolk, sub voce* Voogdye; V. d. L. 1. 5. 7.
[3] Gr. 1. 7. 10; Van Leeuwen, 1. 16. 4.
[4] Voet, 26. 5. 5.
[5] Gr. 1. 7. 7–8; Voet, 26. 4. 4; V. d. K. *Th.* 117.
[6] Gr. 1. 7. 10; Voet, 26. 5. 5; V. d. L. 1. 5. 2.
[7] Hoola van Nooten, vol. i, p. 560.

boards charged with the supervision of orphan children,[1] which so early as the middle of the fifteenth century were already in existence in most of the towns of Holland.[2] Their functions were variously defined by the *keuren* of the various towns. Strictly speaking, their authority was co-ordinate merely with that of the testamentary guardian,[3] but they constantly tended to supervise [4] and sometimes to encroach upon [5] his functions. Thus in the town of Alkmaar, testamentary guardians must be confirmed by the Orphan Chamber, though as a rule such guardians did not require confirmation.[6] Consequently it was the common practice of testators when appointing guardians by will to express in clear terms their wish to exclude the Orphan Chamber from interference with the estate.[7] Even this did not always produce the desired result.[8]

Is a surviving parent ipso jure guardian?

The word 'guardianship' is not free from ambiguity, for it implies sometimes guardianship of the person, sometimes administration of the property, sometimes both. Where property alone is concerned the term 'curatorship' may be employed. But it is not always easy to distinguish the two functions, for the person who controls the property tends also to control the person.

[1] i. e. of minor children who had lost one or both parents (Gr. 1. 7. 2); sometimes also of *onbestorven kinderen* (Gr. 1. 6. 1).

[2] Hoola van Nooten, vol. i, p. 550.

[3] Ibid. pp. 564 ff. [4] Gr. 1. 9. 2. [5] Van Leeuwen, 1. 16. 3.

[6] This is implied by Van Leeuwen, who mentions the case of Alkmaar as exceptional; but in *Cens. For.* 1. 1. 17. 3 he says: hodie omnes omnino tutores ex inquisitione dantur aut confirmantur. See Voet, 26. 3. 1 and 26. 7. 2 (*ad fin.*). It appears from Van der Keessel (*Th.* 116) that the practice varied. In South Africa confirmation is always necessary (Administration of Estates Act, 1913, sec. 73), provided that a father or mother does not require letters of confirmation (Ibid.).

[7] Hoola van Nooten, vol. i, p. 567; V. d. L. 1. 5. 2–3.

[8] Van Leeuwen, *ubi sup.* The Orphan Chamber was abolished in Cape Colony by Ord. 103, 1833, which vested its functions in the Master of the Supreme Court. In South Africa Orphan Chambers exist at the present day and the administration of estates is often left to them, but they are not official and no longer appoint guardians. They are in fact merely Trust Companies. In Brit. Gui. the Orphan Chamber was abolished by Ords. Nos. 17 and 18 of 1844, which created in its place the office of Administrator-General.

This is seen when we consider the relation of guardians testamentary or dative to a surviving spouse. Guardianship certainly does not exclude the parental power,[1] but neither is it excluded by it. A surviving parent, it must be remembered, was not, as such, guardian of the property of his or her minor children,[2] however much parental power might imply control of the person. Accordingly such parent, unless appointed by the deceased spouse[3] or by the Orphan Chamber or Court,[4] could not lawfully intermeddle with the estate.[5] This seems somewhat extreme in the case of the father, who having been sole administrator of the minor's property during the subsistence of the marriage, might reasonably expect to continue to exercise the same functions after his wife's death, at all events as regards property not coming to the child *ex parte materna*. The reasonableness of this claim is recognized by the law of South Africa, which gives the father the exclusive control of the person and also of the property of his minor children, during the whole of his life, and even permits him to bestow equally extended powers upon guardians appointed by his will to act after his death.[6] This would seem to exclude the mother altogether from the control of the persons of her own minor children,[7] which in the Dutch Law she exercised concurrently with the testamentary guardians.[8]

On the other hand, when no testamentary guardians have been appointed she is solely entitled to the control

[1] Gr. 1. 7. 8; Hoola van Nooten, vol. i, p. 569.

[2] Gr. *ubi sup.*; Voet, 26. 4. 4. But the parents had a prior claim to be appointed, and usually were appointed, to act concurrently with one or two other tutors dative. Gr. 1. 7. 11–12.

[3] Van Leeuwen, 1. 16. 3.

[4] Gr. 1. 7. 10.

[5] Gr. 1. 7. 8; Voet, 26. 4. 4. In Brit. Gui. a father has never been required to apply to the Court to be appointed guardian of his minor children along with another person named as guardian in the will of a deceased mother [G.].

[6] *Van Rooyen v. Werner* (1892) 9 S. C. 425.

[7] Ibid., per de Villiers C. J. at p. 431. But a deceased father cannot exclude the mother except by appointing a testamentary guardian in her place. Voet, 27. 4. 2.

[8] V. d. K. *Th.* 118.

of the person to the exclusion of guardians dative.[1] After the death of both parents the guardians, whether testamentary or dative, exercise personal control and also administer the property conjointly.[2]

In South Africa the appointment of tutors dative is vested in the Master of the Supreme Court, subject to review by the Court.[3] The same official confirms testamentary tutors,[4] and supplies casual vacancies in case of death, incapacity, or removal.[5]

(d) Curators nominate.

A testamentary tutor, as we have seen, is appointed by parents only. But it is permitted to any person whomsoever who gives or bequeaths property to a minor or insane person to direct at the same time that some specified person shall administer it.[6] A person so appointed is termed a curator nominate,[7] and if a curator nominate is expressly empowered to appoint another to act as co-guardian, such other becomes (after confirmation) a curator assumed.[8]

(e) Curators assumed.

[1] (Cape) *Van Rooyen* v. *Werner, ubi sup.*; (Natal) *In re Dolphin's Intestacy* (1894) 15 N. L. R. 343. She does not lose her right to the custody of the children upon remarriage except in special circumstances. Voet, 27. 2. 1.

[2] V. d. K. *ubi sup.*

[3] Administration of Estates Act, 1913, secs. 76 and 107. In Brit. Gui. tutors dative are appointed by the Supreme Court, which may require security and impose conditions [G.].

[4] Administration of Estates Act, 1913, sec. 73.

[5] Ibid., sec. 78. By the Civil Law the mother, and by the R.-D. L. the surviving parent, was required within a short time of the death of the predeceasing spouse to notify the Court or the Orphan Chamber, and to apply for the appointment of guardians. Gr. 1. 7. 13; *Cens. For.* 1. 1. 16. 9. In the Civil Law the mother who failed to do so lost all right of succession to the minor children. Cod. 6. 58. 10. This penalty was disused in the R.-D. L. Groen. *de leg. abr. ad* Cod. *ubi sup.*; Voet, 26. 6. 4 (*ad fin.*); V. d. K. *Th.* 123; but the local statutes usually imposed a small pecuniary penalty. The same duty attached in the R.-D. L. in respect of an inheritance coming to a minor child during the lifetime of both parents. Gr. 1. 6. 1; V. d. K. *Th.* 103. *Supra*, p. 34.

[6] Voet, 26. 2. 5; V. d. K. *Th.* 118; V. d. L. 1. 5. 2.

[7] Administration of Estates Act, 1913, sec. 71.

[8] Ibid., sec. 77: (1) Nothing in this Chapter contained shall prevent any tutor testamentary of any minor or curator nominate of any estate from assuming any other person as tutor of that minor or curator of that estate (as the case may be), by virtue of any power for that purpose committed to him by the will of, or any other deed duly executed by, the person by whom the tutor testamentary or

(f) Curators dative.

Curators dative are appointed by the Court (in South Africa upon the application of the Master or of some person interested) to insane persons or prodigals[1], either for the care of the person, or the administration of the property, or both.[2] In case of minor disqualifications such as deafness, dumbness, or the like,[3] curators bonis may be appointed whose functions will be limited by the requirements of the particular case.[4]

(g) Curators bonis.

(h) Curators ad litem.

Curators ad litem are appointed to a minor or insane person or prodigal, for the purpose of bringing or defending an action, when such minor has no other guardian or curator, or where the guardian or curator is a party to the litigation.[5]

The various kinds of guardian, then, are: (1) tutors testamentary; (2) tutors assumed; (3) tutors dative; (4) curators nominate; (5) curators assumed; (6) curators dative; (7) curators bonis; (8) curators ad litem; and they are appointed in the ways above described.

Section 2. Who may be Guardians

Some persons are disqualified from being guardians.

Van der Linden says that some persons are prohibited from being guardians; others may excuse themselves.[6] To the first class he assigns: (1) persons who are themselves subject to tutela or cura,[7] with whom must be included all persons less than twenty-five years of age, although

curator nominate was appointed: Provided that no person shall be entitled or qualified to act as assumed tutor or curator unless, during the lifetime of the tutor testamentary or curator nominate, letters of confirmation have been granted to the assumed tutor or curator as such by the Master.

[1] Also to administer the property of persons who are absent from the Colony and not otherwise represented. Administration of Estates Act, 1913, sec. 80.

[2] Such persons were known as *bejaerde wezen* (Gr. 1. 11. 3–4; Van Leeuwen, 1. 16. 13; Voet, 27. 10. 3 and 6; V. d. K. *Th.* 164–5) or as *Hofs-* or *Stads-Kinderen* (V. d. L. 1. 5. 8).

[3] Gr. 1. 11. 2. An insane or prodigal wife is placed under the guardianship of her husband; an insane husband is not placed under the custody of his wife, but his property may be. Gr. 1. 11. 7; V. d. K. *Th.* 168.

[4] Voet, 27. 10. 13.

[5] Van der Linden, *Judic. Prac.* 1. 8. 3.

[6] V. d. L. 1. 5. 1.

[7] Gr. 1. 7. 6.

majority may have been anticipated by marriage or venia aetatis;[1] (2) women, except a mother and grandmother, and they only so long as they have not contracted a second marriage;[2] (3) creditors and debtors of the minor, if the debt is considerable and the Court sees fit to exclude them.[3]

To these the laws of the Cape and of the Transvaal add: (4) any person who as witness has attested the execution of any will which appoints such person guardian, and the wife or husband of such person.[4]

The second class includes: (1) soldiers;[5] (2) persons already burdened with three guardianships; (3) persons upwards of seventy years of age; (4) persons disqualified by sickness or infirmity. This list is not exhaustive; nor by the common law can any one claim exemption as of right. In fact, no rigid rule can be laid down; for in the modern law the whole matter lies in the discretion of the Court.[6] In South Africa, however, excuses are unneces-

Others may excuse themselves;

but in South

[1] Voet, 26. 1. 5; V. d. K. *Th.* 112; Schorer *ad* Gr. 1. 7. 11; Hoola van Nooten, vol. i, p. 572. Cf. Voet, 26. 4. 2. But a surviving spouse, though under age, may, it seems, be guardian to his or her children.

[2] Gr. 1. 7. 6 and 11; Voet, 26. 1. 2; V. d. K. *Th.* 114. But see Maasdorp, vol. i, p. 267, and Schorer *ad* Gr. 1. 7. 11. A married woman may not be appointed curator over her husband if insane or prodigal. V. d. K. *Th.* 168. In South Africa, by the Administration of Estates Act, 1913, sec. 83: (1) The provisions of this Act in regard to the election and appointment of tutors and curators shall apply to males and females; (2) Letters of confirmation shall not, without the consent in writing of her husband, be granted to a woman married in community of property or to a woman married out of community of property when the marital power of the husband is not excluded.

[3] Grotius is silent on this point. Voet (26. 1. 4), Groenewegen (*ad* Cod. 5. 34. 8), and van Leeuwen (*Cens. For.* 1. 1. 16. 19) agree that there is no absolute disqualification. See also Sande, *Decis. Fris.* 2. 9. 1.

[4] Cape, Act No. 22 of 1876, sec. 4; Transvaal, Ord. No. 14 of 1903, sec. 4; O. F. S. Ord. No. 11 of 1904, sec. 4. Brit. Gui., Ord. No. 12 of 1906, sec. 8, contains a provision to the same effect. In Natal there is no such disqualification (see Law 2 of 1868, sec. 7). In Ceylon there is no statutory provision. Voet adds to the disqualifications mentioned in the text: (5) a person not subject to the jurisdiction cannot be tutor dative (26. 5. 3); (6) persons expressly prohibited by the will of either parent (26. 1. 4).

[5] Grotius (1. 7. 6) says that soldiers cannot be guardians; so also Voet (26. 1. 4). Van der Keessel (*Th.* 113) agrees with Van der Linden.

[6] Gr. 1. 7. 14; Voet, 27. 1. 12; V. d. K. *Th.* 124.

Africa guardianship is voluntary.

sary, for guardianship is at the present day a purely voluntary office, which no one can be compelled to undertake against his will.[1] This marks a departure from the Roman-Dutch common law, according to which every one who was named guardian was bound to accept the office, and in the case of unwillingness could be compelled to undertake it by civil imprisonment.[2]

Section 3. The Powers, Rights, and Duties of Guardians

The duties and functions of guardians:

Without seeking to distinguish too exactly between the duties and the powers or rights of guardians, we may classify their functions of whatever kind under the following heads.

(1) To find security;

1. *The duty to find security.* In Holland practice varied in different localities. Van der Linden says[3]: 'The practice of guardians finding security is in our law fairly out of use, though where there are weighty reasons for doing so the Court may demand it.' But in South Africa, by the Administration of Estates Act, 1913, s. 82, every tutor and every curator now gives security, except only a testamentary tutor or a curator nominate when: (*a*) he is the parent of the minor; or (*b*) has been nominated by will executed before the commencement of the Act (October 1, 1913), and has not been directed by the will to find security; or (*c*) has been nominated by will executed after the commencement of the Act and the testator has directed the Master to dispense with security; or (*d*) the Court otherwise directs.

(2) to make an inventory;

2. *Inventory.* Guardians must make a full inventory of the estate which they are to administer, or demand an

[1] 1 Maasdorp, p. 244; Administration of Estates Act, 1913, sec. 73 (2). In Brit. Gui. a beneficiary under the will, or the parent, child, grandparent, grandchild, brother, sister, uncle, or aunt of the testator, must obtain the permission of the Court to enable him or her to refuse the guardianship. A non-relative is not compelled to act, but must file with the Registrar an affidavit that he does not desire to act. Ord. No. 12 of 1906, sec. 16 [G.].

[2] Gr. 1. 7. 15; Van Leeuwen, 1. 16. 5; V. d. L. 1. 5. 1.

[3] V. d. L. 1. 5. 3. Cf. Gr. 1. 9. 1; Voet, 26. 7. 2; V. d. K. *Th.* 134.

inventory from a surviving parent.[1] In South Africa every tutor and every curator must make such inventory within thirty days [2] of the date of his entering on office. If a guardian fails herein, he is liable (besides other penalties) [3] to removal; as he is, also, if he wilfully omits items of credit or inserts false items of debit.[4] A surviving parent who, in preparing the inventory, fraudulently conceals any property forfeits his or her interest therein.[5] A similar inventory must be made by parent or guardian in the event of any property coming to a minor from any source whatever, e. g. by testament, either during the lifetime of both parents or after the death of one or both of them.[6] The inventory when complete must be delivered to the Orphan Chamber,[7] or in Cape Colony to the Master of the Supreme Court.

3. *Distribution of the estate.* The next duty of the guardian (and this is the object of the inventory), is, subject to the control of the proper authority, to see that each child has assigned to him his proper share in the property in question.[8] This done, the guardian proceeds

(3) to distribute the estate;

[1] Gr. 1. 9. 3 and 8; Van Leeuwen, 1. 16. 6; Voet, 26. 7. 4; V. d. K. *Th.* 135–6 and 146; V. d. L. *ubi sup.* The first-dying parent may not dispense the survivor from the duty of preparing an inventory. V. d. K. *Th.* 137.

[2] Administration of Estates Act, 1913, sec. 85.

[3] Ibid., secs. 108–9.

[4] Voet, 26. 7. 5.

[5] Gr. 1. 9. 4, and Schorer's note ad loc.; V. d. K. *Th.* 139, dissenting from Voet (26. 7. 5), who questions whether forfeiture obtains. *Semble,* in any event an action lies for damages.

[6] Gr. 1. 6. 1; and 1. 9. 5. If a curator nominate has been appointed to the property in question, the duty of making an inventory falls on him and not on the parent. V. d. K. *Th.* 140–1.

[7] Gr. 1. 9. 3 and 8; Van Leeuwen, 1. 16. 6; V. d. K. *Th.* 135 ff. A testator might by his will: (1) exclude the Orphan Chamber; (2) remit the duty of accounting; but such directions were not always effectual. Gr. 1. 9. 3; Van Leeuwen, 1. 16. 3 and 6; Voet, 26. 7. 4; V. d. K. *Th.* 135–8. In the latter case it was sometimes permitted to furnish an inventory closed and sealed; and Cape Law allowed this course: (a) when the testator had so directed; (b) in the case of a surviving spouse whom the deceased spouse had appointed tutor and boedelhouder. Ord. 105, 1833, sec. 18. This is now repealed. There is no corresponding provision in the Administration of Estates Act, 1913. For Boedelhouder see below, p. 100.

[8] Gr. 1. 9. 6 and 8; V. d. K. *Th.* 142.

to deal with the estate of the minors in his charge, retaining it under his own control as administrator, or placing it in the hands of the proper authority, according to the requirements of the local law.[1] A surviving parent may not under any circumstances proceed to a second marriage, without first assigning to the minor children of the first marriage their proper shares in the joint estate[2], or at all events giving security for their future payment. In South Africa this security takes the form of a notarial general mortgage-bond passed by the surviving spouse. It is known as a deed of *Kinderbewys*.[3]

(4) to maintain and educate the minors;

4. *Maintenance and education.* All preliminaries being properly settled, it is next the duty of the guardian to provide for the maintenance and education[4] of the ward according to the directions of the father, if he has left any, and, failing such, to see that the child is educated by the mother or other near relations.[5]

The guardian must take care that his expenditure in

[1] V. d. K. *Th.* 143 and 153. By Cape Ord. 105 of 1833, secs. 25 ff., tutors dative, curators dative, and curators bonis must pay their wards' moneys to the Master of the Supreme Court, except in so far as it may be required for the immediate payment of debts, or for the maintenance of their wards. 1 Maasdorp, p. 255. This clause is re-enacted by the Administration of Estates Act, 1913, sec. 88, which extends the above provision to a tutor testamentary and curator nominate 'subject to the terms of the will or deed by which he was appointed'. Securities must be deposited. Gr. 1. 9. 9.

[2] Gr. 1. 9. 6; Voet, 23. 2. 100; V. d. K. *Th.* 142; V. d. L. 1. 5. 4; *Regtsg. Obs.*, pt. 1, no. 15; Boey, *Woordentolk*, *sub voce* Vertigting; *Ontwerp*, sec. 411; Cape Act 12 of 1856, secs. 1 and 2, re-enacted by the Administration of Estates Act, 1913, sec. 56, which, however, does not require such payment or security, if the estate is of less value than one hundred pounds.

[3] 1 Maasdorp, p. 19; 2 Maasdorp, p. 247; and see the judgment of Hopley J. in *Maxwell & Earp* v. *Dreyer's Estate* (1908) 25 S. C. 723. In Brit. Gui. the instrument in use was called an Act of *Verweezing*. By the Married Persons Property Ordinance (No. 12 of 1904), sec. 26, no Act of *Verweezing* shall be necessary before or upon the marriage of any widower or widow.

[4] Gr. 1. 9. 9; Voet, 26. 7. 1 and 6. Generally speaking a surviving mother is entitled to the custody (V. d. K. *Th.* 141), notwithstanding a remarriage (Voet, 27. 2. 1). A surviving parent must provide for the children, males until their eighteenth, females until their fifteenth year, out of the proceeds of the minor's estate. Gr. *ubi sup.* Van der Keessel, however (*Th.* 152), says until full age.

[5] Gr. *ubi sup.*; Voet, 27. 2. 1.

this regard keeps well within the limits of the annual income of the estate, unless in very special circumstances, which should be made the subject of an application to the Court.[1]

(5) to administer the property;

5. *Administration of the ward's property.*[2] This includes the general supervision and management of the minor's estate, in which task the guardian must display the diligence which a *bonus paterfamilias* applies to his own affairs.[3] His expenditure must be such as is demanded by the interest and credit of the minor, regard being had to the value of the estate and the minor's position in life.[4] He must preserve and secure the property,[5] call in and enforce debts,[6] invest in good securities,[7] and meet the minor's liabilities as they fall due. When the guardianship comes to an end, the guardian must properly wind up the business of his office, and is deemed to remain guardian for the purpose.[8] Where there are more guardians than one, it is not necessary that they should all act; but, whether he acts or not, each is responsible for the acts of every other.[9]

(6) not to alienate immovables without leave of Court;

6. *Alienation of property.* A guardian may, in due course of administration, sell[10] or mortgage any movable property under his charge. But the alienation or hypothecation of immovable property, except by leave of the Court,[11] is entirely void. Such leave is only given after full inquiry,

[1] Voet, 27. 2. 2.

[2] Gr. 1. 9. 11; Van Leeuwen, 1. 16. 8; V. d. L. 1. 5. 3.

[3] Dig. 26. 7. 33 pr. (but see Dig. 27. 3. 1 pr.); Voet, *Compendium*, 26. 7. 3.

[4] Voet, 26. 7. 6; 27. 2. 2.

[5] Voet, 26. 7. 8.

[6] Voet, 26. 7. 7.

[7] Gr. 1. 9. 10; Van Leeuwen, 1. 16. 8; Voet, 26. 7. 10; V. d. K. *Th.* 153–5; *Van der Byl & Co.* v. *Solomon* (1877) Buch. at p. 27 per de Villiers C.J.

[8] Voet, 26. 7. 15. If the guardianship is determined by the minor's death, the guardian must render accounts and make over the property to his heir. V. d. K. *Th.* 159.

[9] Gr. 1. 9. 11; Voet, 26. 7. 1; V. d. L. 1. 5. 3 (*ad fin.*). Remuneration of guardians—*vide infra*, p. 61, n. 3.

[10] Gr. 1. 8. 5; Voet, 27. 9. 4. Grotius adds: 'doch met kennisse van de weeskamer daer de zelve niet en is uitgesloten'.

[11] Gr. 1. 8. 6. Van Leeuwen (1. 16. 9) says, 'otherwise than with the consent of the Court or local tribunal'.

and it is, besides, usual to consult the nearest relatives.[1] The measures proposed must be necessary for payment of debts, maintenance, or marriage, of the ward, or otherwise to his manifest advantage.[2] The word 'immovables' extends to such incorporeal rights as are commonly included under the term immovable property, and to the cession of rights of action relating to such property.[3] Alienation includes any act of the guardian whereby a real right of the ward is in any way diminished, lost, or abandoned.[4] Failing a judicial decree (where such is necessary) everything that takes place in the course of or incidentally to such alienation is *ipso jure* null and void.[5] The same applies if the decree is shown to have been obtained from the Court by fraud.[6]

The prohibition of the sale of immovables is stated by Grotius to extend to money put out at interest and rents.[7] Van der Keessel says that the same rule ought to be laid down in respect of public Dutch or foreign securities.[8] Voet goes still further and adds to the list all movables which are not perishable in their nature (*quae servando servari possunt*),[9] as gold, silver, and jewellery, whereas perishable movables the guardian not only may sell, but must.[10] It appears that by the law of Holland even movables could not be sold without previous notice to the Orphan Chamber (unless this were expressly excluded), and by public auction.[11] In the case of immovables also the sale must be by public auction. Otherwise (which is not the case with movables) the sale will be void. In both cases the guardian is answerable in damages.[12]

[1] Voet, 27. 9. 7; and the Weeskamer. V. d. K. *Th.* 131.
[2] Voet, 27. 9. 7–8.
[3] Voet, 27. 9. 2.
[4] Voet, 27. 9. 3. But short leases are permitted and bind the ward even after majority. Voet, 19. 2. 17.
[5] Gr. 1. 8. 6.
[6] Voet, 27. 9. 9.
[7] Renten ende pachten. Gr. 1. 8. 6.
[8] V. d. K. *Th.* 130.
[9] Cf. Cod. 5. 37. 22. 6.
[10] Voet, 27. 9. 1. But see V. d. K. *Th.* 130.
[11] Gr. 1. 8. 5; Van Leeuwen, 1. 16. 8; V. d. K. *Th.* 129.
[12] Gr. 1. 8. 5–6; Van Leeuwen, 1. 16. 9.

South African alienation of immovables.

In South Africa by the Administration of Estates Act, 1913, sec. 87, no tutor and no curator (other than a tutor testamentary or a curator nominate duly authorized thereto by the will or deed under which he has been appointed) shall alienate or mortgage any immovable property belonging to a minor unless the Court or, when the Master is satisfied that the immovable property does not exceed three hundred pounds in value, unless the Master authorize the alienation or mortgage of such property. But the Master may authorize the mortgage of immovable property belonging to a minor to an extent not exceeding three hundred pounds, if satisfied that the mortgage is necessary for the preservation or improvement of the property, or for the payment of expenses necessarily incurred in connexion therewith, or for the maintenance or education of the minor. The same Act by sec. 86 saves the common law as regards the powers and duties of tutors except so far as they are affected by that Act. But it is submitted that in regard to the sale of the ward's property the principle 'Expressio unius est exclusio alterius' holds, and therefore all that is required of the guardian in alienating his ward's movable property is that he should exercise a wise discretion and in matters of difficulty seek the guidance of the Court.[1]

Remedies in case of unauthorized alienation.

The ward's remedies in respect of unauthorized alienation are two: against the tutor and against the alienee. Against the first he has the actio tutelae directa. From the second he may vindicate the property (together with all fruits, if the defendant's possession is mala fide; but if it is bona fide together with fruits existing at the date of action brought). If, however, the purchase-money has been received and applied to the minor's use, it must be refunded with interest as a condition precedent of the return of the property.[2] A sale of immovable property made by a minor without judicial decree and without his guardian's authority cannot be impeached on behalf of

[1] In Brit. Gui. a guardian may dispose of valuable movables without leave of the Court [G.].

[2] Voet, 27. 9. 10.

such minor, where the minor has falsely represented himself as of full age.[1]

Ratification of void alienations.

An alienation void *ab initio* may be ratified on full age. Ratification is express or tacit. An example of tacit ratification is when the ward, having reached full age, claims the purchase-money from the guardian in an actio tutelae; or when the ward after majority allows a certain time, which varies with the circumstances, to elapse without asserting his right.[2] When ratification has taken place the transaction may, in Roman-Dutch Law, still be rescinded on the ground of laesio enormis,[3] but in the Cape Province and in the Orange Free State this is no longer law.[4]

(7) to render accounts;

7. *Accounts.* The guardian must render annual or other periodic accounts as required by law to the proper authority.[5] If the testator has remitted this duty, the Court or other authority may none the less in its discretion insist upon it.[6]

(8) to represent the minor in Court;

8. *Representing the minor in Court.* A minor has no persona standi in judicio.[7] He must therefore be represented or assisted by his guardian in any proceedings to which he is a party, whether as plaintiff or defendant.[8] If the guardian is himself a party to the proceedings the ward obtains a curator ad litem.[9] No doubtful action may be brought by a guardian in the name of the ward

[1] Voet, 27. 9. 13 (*ad fin.*).

[2] Voet, 27. 9. 14. If the alienation was made for value the period is five years; if *donationis titulo*, ten years *inter praesentes*, twenty *inter absentes*. Cod. 5. 74. 3.

[3] Voet, ibid. (*ad fin.*); Cod. 4. 44. 2 and 8.

[4] Cape, General Law Amendment Act, No. 8, 1879, sec. 8; O. F. S. Ord. No. 5 of 1902, sec. 6. The doctrine of *laesio enormis* is still in force in the Transvaal, Natal, and Brit. Gui. See below, p. 203, n. 3.

[5] Gr. 1. 9. 12; Hoola van Nooten, vol. 1, p. 583; V. d. K. *Th.* 120 and 157; 1 Maasdorp, p. 256.

[6] Van Leeuwen, 1. 16. 6.

[7] Gr. 1. 7. 8; V. d. K. *Th.* 127; V. d. L. 1. 5. 5. In Brit. Gui., by Ord. No. 11 of 1893, sec. 6, a minor may bring an action in his own name for a sum of money not exceeding one hundred dollars, which may be due to him for wages or piece-work, or for work as a servant. If the action fails, he is liable for costs [G.].

[8] Gr. 1. 8. 4; Voet, 26. 7. 12.

[9] Gr. *ubi sup.*

without previous sanction of the Court ;[1] otherwise, if the ward fails in the suit, the guardian will be liable to pay the costs himself.[2] In all other matters of importance too, says Van der Linden,[3] the Court should be consulted.

(9) to contract in the name of the minor ;

9. *Contracting in the name of the minor.* Guardians have the right to contract on behalf of their wards, but must proceed with particular caution, otherwise they will be liable in damages.[4] By such contracts the wards acquire rights and incur liabilities. They may sue and be sued on the contracts entered into by their guardians,[5] saving, however, their right to restitutio in integrum, if they have been prejudiced thereby ; which right they must prosecute within four years after attaining majority.[6] It seems that a guardian who has contracted *nomine pupilli* is himself alternatively liable to the other contracting party ;[7] though if the contract was a proper one, he will be entitled to an indemnity from the estate. A ward is not bound by a donation made by his guardian or by a release of a manifest right.[8]

(10) to authorize the minor's acts.

10. *Authorizing the minor's acts.* Finally, it is the duty of the guardian (and the law gives him power) to 'interpose his authority', that is, to assist and represent the minor in all transactions ; and in particular, as has been seen, to represent him in Court. 'Authority' in Roman Law

[1] Or subsequent allowance by the Court ?

[2] Voet, *ubi sup.* [3] V. d. L. 1. 5. 3. Cf. Gr. 1. 9. 2.

[4] Gr. 1. 8. 7 ; 3. 1. 30 ; Voet, 26. 9. 1–2.

[5] Gr. 1. 8. 8 ; V. d. K. *Th.* 133 ; and see Cod. 5. 39. *Semble,* if a guardian contracting on behalf of his ward, has acted fraudulently, the ward is not liable, except : (1) to the extent of his enrichment ; (2) in the absence of enrichment only if the guardian is solvent, so that the ward can have recourse against the guardian's estate ; and the ward can always free himself by ceding his actions against the guardian. Gr. 3. 1. 30 ; Voet, 26. 9. 4.

[6] Cod. 2. 52 (53) 7. pr. ; Voet, 44. 3. 6–7.

[7] Voet, 26. 9. 3 ; but generally only during the continuance of the guardianship. Cf. Cod. 5. 39. 1.

[8] Gr. 3. 1. 30 and 3. 2. 7 ; unless it be a remuneratory donation. Gr. 3. 2. 3. Guardians may make a novation in the name of their wards, if for the wards' benefit. Voet, 46. 2. 8. Guardians may compromise on behalf of their wards provided they do not thereby effect an alienation of the ward's property. V. d. K. *Th.* 517.

meant a present consent to and approval of what is done by the ward, but in the modern law a subsequent ratification will have the same effect as a contemporaneous authority.[1] Where there are several co-tutors the authority of one alone is generally sufficient.[2] If the guardian withholds his authority the Court will in a fit case compel it.[3] A male or female minor upwards of fourteen or twelve years of age requires no authority to make a will,[4] nor is a marriage contracted without authority of the guardian invalid.[5]

Thus far of the powers, rights, and duties of the guardians of minors. Since the functions of the curators of lunatics and interdicted prodigals are generally similar,[6] it is unnecessary in an elementary treatise to make them the subject of special discussion.

Section 4. Actions arising out of Guardianship

The actio tutelae directa and contraria.

Two actions arise out of guardianship, the one by the ward against the guardian (*actio tutelae directa*), the other by the guardian against the ward (*actio tutelae contraria*). The first is available to the ward and his heirs[7] against the guardian and his heirs,[8] and against each guardian *in solidum* (saving that on satisfaction by one the others are released), to render an account of his administration,[9] to transfer everything which by virtue of the guardianship has come under his control;[10] and also to make good all losses caused to the minor by his bad management.

The contrary action lies for the guardian and his

[1] Voet, 26. 8. 1. [2] Voet, 26. 8. 7.

[3] Voet, 26. 8. 8, i. e. *moribus*. It was otherwise *jure civili*. Dig. 26. 8. 17.

[4] Gr. 1. 8. 2. [5] Gr. 1. 8. 3.

[6] Gr. 1. 11. 5; Voet, 27. 10. 5 ff.

[7] Voet, 27. 3. 4; also to the husband of a minor against her former guardians and in some cases to creditors.

[8] Voet, 27. 3. 5; or other successors.

[9] Voet, 27. 3. 7.

[10] Voet, 27. 3. 8; including claims arising *ex contractu*. Gr. 3. 1. 38. The emancipated ward may sue in respect of such claims without cession of the right of action. V. d. K. *Dictat.* ad loc.; Dig. 26. 9. 2.

heirs [1] against the ward and his heirs to be indemnified for expenses [2] and to recover a reasonable recompense for his time and trouble.[3]

In the Civil Law these actions only lay after the termination of the guardianship,[4] but in the modern law they may be brought, when necessary, also during its continuance.[5]

Extent of guardians' liability.

The statement made above that each tutor is liable *in solidum* must be understood subject to the law as to the benefit of excussion and the benefit of division. Where one tutor alone has acted he must be sued before the rest, who otherwise can plead the beneficium excussionis. Where more than one tutor have acted, any one of the acting tutors may be sued, but by pleading the beneficium divisionis he can divide his liability with the other tutors who were solvent at the earliest time at which the pupil could properly have sued. Where different duties of administration have been assigned by the testator, or the judicial authority, between various tutors, each is, generally speaking, liable only for his own particular sphere of duty.[6]

Other actions in Roman Law.

In addition to the above actions the Civil Law gave various other remedies or securities to the minor, more particularly: (1) the action 'rationibus distrahendis';[7] (2) an action against the magistrate by whom the guardian has been appointed;[8] (3) the crimen suspecti[9] for the

[1] Voet, 27. 4. 2.

[2] Voet, 27. 4. 3–6.

[3] V. d. L. 1. 5. 6. In the Civil Law the office of tutor was unpaid. Dig. 26. 7. 33. 3. In R.-D. L. a reasonable remuneration was allowed except to parents. Gr. 1. 9. 11; Voet, 27. 4. 12. The amount was usually fixed by local statutes. V. d. K. *Th.* 156.

[4] Dig. 27. 3. 4, pr. and 27. 4. 1. 3.

[5] Groen. *de leg. abr. ad* Dig. 27. 3. 4.

[6] Van Leeuwen, 1. 16. 12; Voet, 27. 8. 6. 'With regard to losses occasioned by omissions, all the guardians are liable *in solidum*, and though they may claim the benefit of division as between themselves, are not entitled to the benefit of excussion. 1 Maasdorp, p. 259; *Niekerk* v. *Niekerk* (1830) 1 Menz. 452.

[7] Dig. 27. 3. 1. 9; 27. 3. 2.

[8] Dig. 27. 8. 1. This action was given by a S. C. of the time of Trajan. Cod. 5. 75. 5.

[9] Inst. lib. 1, tit. 26: Sciendum est suspecti crimen e lege duodecim tabularum descendere.

removal of guardians on the ground of misconduct actual or anticipated; (4) a tacit hypothec or legal mortgage upon the whole of the guardian's estate.[1]

The action rationibus distrahendis, 'for separation of accounts', which was as old as the Twelve Tables,[2] applied only to those who during their administration had carried off something from the ward's estate.[3] It lay for twice the value of the thing taken. Voet seems to treat this remedy as still existing, but Groenewegen says that the penalty of double was disused.[4]

In the Civil Law a subsidiary action lay in certain cases against the magistrates, when the ward had failed to obtain satisfaction from the guardian appointed by them.[5] Whether this action subsisted in the Roman-Dutch Law was much debated. Voet and others [6] allowed it in case of fraud or gross negligence. But the Orphan Chamber, at all events, was answerable for the moneys of minors committed to its keeping.[7]

Removal of guardians.

With regard to the removal of guardians the Court, as the upper guardian, has a wide judicial discretion,[8] exercised usually on the complaint of a co-guardian or near relatives of the ward.[9] Incapacity, dishonesty, or insolvency are the most frequent grounds of removal. In South Africa the final order for sequestration or assignment of the guardian's estate *ipso facto* determines the office of tutor or curator.[10]

The ward's tacit hypothec.

Lastly, wards have a legal or tacit hypothec over the property of their tutors or curators in respect of debts

[1] Cod. 5. 37. 20 (Constantine, A.D. 314).
[2] Dig. 26. 7. 55. 1.
[3] Dig. 27. 3. 2.
[4] Groen. *de leg. abr. ad* Dig. 27. 3. 2. 2, and Cod. 9. 47 (*rubric*).
[5] Inst. 1. 24. 2.
[6] Van Leeuwen, 1. 16. 4, and Decker's note; *Cens. For.* 1. 1. 17. 4; Voet, 27. 8. 5; Groen. *de leg. abr. ad* Inst. 1. 24. 4; Vinnius, ibid.
[7] Decker *ad* Van Leeuwen, 1. 16. 4.
[8] Voet, 26. 10. 2.
[9] Gr. 1. 10. 4.
[10] Administration of Estates Act, 1913, sec. 84; and see secs. 32 and 73. But *semble*, it was not so by the common law. See *De Villiers* v. *Stuckeris* (1829) 1 Menz. 377.

due to them arising out of the administration and to the extent of loss attributable to the guardian's misconduct.[1] By the Roman-Dutch Law this extends to the property of all tutors (natural, testamentary, or appointed) and curators, as well as of protutors,[2] i. e. persons who have acted as tutors without appointment or confirmation, and of agents and others who have concerned themselves in the administration of the minor's estate. Further, the liability attaches to a step-father who has married a mother-tutor before she has wound up the tutorship and settled her accounts; also (*semble*) to the wife, married in community, whose husband has, during the marriage, undertaken the duties of guardianship.[3] By statute this legal hypothec has been abolished in the Transvaal and materially restricted at the Cape.[4]

Section 5. How Guardianship ends

How guardianship ends.

Guardianship is determined by the following events: viz. (1) the death of the minor; (2) the death of the guardian,[5] in which case a surrogated tutor (if any) or tutor dative replaces him; (3) majority, unless the Court decides that the ward is to remain under guardianship for some time longer;[6] (4) marriage, unless the Court for weighty reasons orders that the guardianship is to continue either absolutely or with respect to the immovable property of the ward;[7] (5) venia aetatis;[8] (6) arrival of time or cessation of purpose, when the guardianship was created for a limited time or purpose;[9] (7) removal[10] or release of the guardian by the Court;

[1] Gr. 2. 48. 16, and Schorer's note; Voet, 20. 2. 11 ff.; 27. 3. 1; V. d. L. 1. 12. 2.

[2] Voet, 20. 2. 12.

[3] Voet, 20. 2. 11.

[4] 1 Maasdorp, p. 257; 2 Maasdorp, p. 247; Cape Act 5 of 1861, sec. 8; Transvaal Procl. No. 28 of 1902, sec. 130.

[5] Gr. 1. 10. 1.

[6] Gr. *ubi sup.* The age of majority was sometimes anticipated by order of Court, but this practice was replaced by grant of venia aetatis. V. d. K. *Th.* 110.

[7] Gr. 1. 10. 2.

[8] Gr. 1. 10. 3. But this does not carry the right to alienate immovables except by leave of the Court. *Supra*, p. 38.

[9] Gr. 1. 10. 6.

[10] Gr. 1. 10. 4; Voet, 26. 10. 1–4; V. d. K. *Th.* 162.

(8) absence of the ward [1] for a prolonged period, such as furnishes a presumption of his death, in which case his property is divided amongst his testamentary or intestate heirs, security being given for its return in the event of the ward's reappearance; (9) (in South Africa) the insolvency of the guardian [2] and, so far as concerns the property, of the ward.[3]

CHAPTER V

MARRIAGE

THE union of man and wife in marriage produces important consequences in the Law of Persons. In this chapter we shall consider: (1) the contract to marry; (2) the legal requisites of marriage; (3) the consequences of marriage; (4) antenuptial contracts; (5) the dissolution of marriage; (6) some miscellaneous matters relating to marriage.

SECTION 1. THE CONTRACT TO MARRY

The promise to marry.

Marriage is commonly preceded by espousals,[4] which constitute a binding contract between the parties.[5] No form is prescribed for the contract.[6] Any persons competent to intermarry may validly engage themselves.[7] This excludes boys and girls below fourteen and twelve years of age respectively.[8] By the Dutch Law young persons who have passed this limit but not reached the age of twenty-five[9] (if males), of twenty (if females), cannot contract a valid engagement without the consent of father

[1] Gr. 1. 10. 5, and Schorer's note; V. d. K. *Th.* 163.
[2] *Supra*, p. 62. In Brit. Gui. guardianship is not *ipso jure* determined by the guardian's insolvency [G.].
[3] *In re Jones* (1885) 5 E. D. C. 34; 1 Maasdorp, p. 264.
[4] Van Leeuwen, lib. 4, cap. 25; V. d. L. 1. 3. 2.
[5] Voet, 23. 1. 12.
[6] *Cens. For.* 1. 1. 11. 3; Voet, 23. 1. 1. In Ceylon writing is required. Ord. No. 19 of 1907, sec. 21.
[7] V. d. L., *ubi sup.*
[8] *Cens. For.* 1. 1. 11. 12; V. d. K. *Th.* 52; but see Voet, 23. 1. 2.
[9] The age is now twenty-one for both sexes. *Duncan* v. *R. M. Mossel Bay* (1905) 22 S. C. 587. *Supra*, p. 37.

and mother, or of the survivor of them, and, failing these, of the majority of the friends and relatives,[1] which consent, however, may be given *ex post facto* at any time before marriage.[2] Failing such consent the engagement is invalid.[3] With it, the engagement is valid, subject however in this case, as in other contracts of minors, to restitutio in integrum on the ground of lesion;[4] from which it follows that the engagements of minors are in no case finally binding unless and until ratified after full age.[5] By the common law of Holland the consent of tutors was not required;[6] but the want of consent of tutors, no less than of parents, was a sufficient ground for the repudiation of the contract by either party.[7]

An engagement lawfully contracted with the necessary consents cannot be broken off without just cause.[8] If a person contracts more than one engagement[9] we must distinguish whether the first engagement is clandestine or lawful. If the second engagement alone is lawful, it takes precedence of a previous clandestine engagement, which, as we have seen, is ineffectual to bind the parties. If the first engagement is lawful, a subsequent engagement is null and void.[10] Under the Roman-Dutch Law the Courts used to decree specific performance of the marriage contract, and even declare a reluctant party married in

[1] Perpetual Edict of Charles V, 4 Oct. 1540, Art. 17 (1 G. P. B. 319); *Greef* v. *Verreaux* (1829) 1 Menz. 151.

[2] Hoola Van Nooten, vol. i, pp. 309 and 321; V. d. K. *Th.* 50.

[3] Voet, 23. 1. 20.

[4] Voet, 23. 1. 17; V. d. K. *Th.* 61.

[5] *Cens. For.* 1. 1. 11. 13.

[6] Hoola van Nooten, vol. i, p. 304.

[7] Hoola van Nooten, op. cit. p. 328; Loenius, *Decis.* 4 and 54; V. d. K. *Th.* 53. Bynkershoek (*Quaest. Jur. Priv.*, lib. II, cap. iii) argues that the engagements of minors who have tutors are governed by the same rules as any other contracts of minors; viz. (1) if made without consent of tutors they are absolutely void (but see above, p. 39); (2) If made with consent, the minor may nevertheless in a fit case obtain relief. This seems sound.

[8] Voet, 23. 1. 12; Hoola van Nooten, *ubi sup.*; V. d. K. *Th.* 60.

[9] Van Leeuwen, 1. 14. 11.

[10] Van Leeuwen, *ubi sup.* But the other party to the second engagement, if innocent, may maintain an action for damages. V. d. K. *Th.* 58.

absence.[1] This practice is disused in the modern law,[2] but an action lies for damages for breach of the contract to marry.

Section 2. The Legal Requisites of Marriage

Legal conditions of a valid marriage:

Assuming the consent of the parties as a necessary condition of marriage, as of other contracts, we may lay down the essentials of a valid marriage as being:

A. Capacity to marry and to intermarry.

B. Consent of parents.

C. Due observance of the necessary forms and ceremonies.

We shall deal with these in order.

A. Capacity of parties.

A. *Capacity to marry and to intermarry.* The following cannot contract a valid marriage:[3] viz. those who are (1) already married;[4] (2) under the age of puberty; (3) impotent; (4) insane; to whom the Roman-Dutch Law added (5) widows, so long as the question of their pregnancy remained undetermined.[5]

The following persons are precluded from intermarriage: viz. (*a*) persons within the prohibited degrees of relationship;[6] (*b*) persons who have previously committed adultery together.[7]

[1] *Cens. For.* 1. 1. 11. 26 and 1. 1. 14. 9; Voet, loc. cit.; V. d. K. *Th.* 57. This was called 'met de handschoen trouwen'. Hoola van Nooten, vol. i, p. 332; (Cape) *Richter* v. *Wagenaar* (1829) 1 Menz. 262; (Ceylon) *Dormeux* v. *Kriekenbeek* (1821) Ramanathan, 1820–33, p. 23.

[2] (Cape) Marriage Order-in-Council of 7 Sept. 1838, sec. 19, in force in the Colony from Feb. 1, 1839. The same enactment applied to British Guiana, but has now been repealed by Ord. No. 25 of 1901. See also Ord. No. 36 of 1903. In Ceylon the action to compel marriage was abolished by Ord. No. 6 of 1847, sec. 30 (re-enacted in sec. 21 of Ord. No. 19 of 1907).

[3] For Brit. Gui. see Ord. No. 25 of 1901, sec. 28.

[4] But, Van der Keessel says (*Th.* 64–5), if a second marriage has been contracted in good faith, the first spouse being thought to be dead, the children of the supposed second marriage will be deemed to be legitimate.

[5] Gr. 1. 5. 3; V. d. K. *Th.* 66–8; V. d. L. 1. 3. 6.

[6] Gr. 1. 5. 5 ff.; Van Leeuwen, 1. 14. 12 ff.; Voet, 23. 2. 29 ff.

[7] Dig. 34. 9. 13; Nov. 134, cap. 12. (A. D. 556); Schorer *ad* Gr. 1. 5. 18; Voet, 23. 2. 27; Echt-reglement van de Staten-Generaal, 18 March, 1656, art. 83 (2 G. P. B. 2444); Placaet van de Staten van Hollandt, July 18, 1674 (3 G. P. B. 507); V. d. K. *Th.* 70; V. d. L. 1. 3. 6; *Rechtsg. Obs.*, pt. 1, no. 11; Bynkershoek, *Quaest Jur. Priv.* lib. II, cap. x. Groenewegen, adopting a benignant interpretation

To these two grounds of disability the commentators add others which at the present day are either obsolete or of diminished importance. For instance, the Civil Law [1] prohibited marriage between a female ward and her tutor or curator, or his son; and this prohibition, though considered to be obsolete by Van Leeuwen,[2] Groenewegen,[2] Voet,[2] and others, was accepted as existing law by Bynkershoek,[3] Van der Keessel,[3] and Van der Linden.[3] In the Cape Province the marriage of a guardian with his female ward requires the sanction of the Court.[4] By the Roman and Roman-Dutch Law a ravisher might not marry the woman whom he had ravished.[5] The old disqualifications on the ground of differences of religion [6] are doubtless obsolete.

of Cod. 9. 9. 26 (27), thought such marriages permitted (*De leg. abr.* ad loc.). See also Zypaeus, *Notitia Juris Belgici*, p. 208. The matter is concluded for the modern law by the Placaats above cited, unless they are abrogated by disuse. For Cape Law see *Daniel* v. *Daniel* (1884) 2 S. C. 231. In Ceylon the rule has been declared to have no place. *Rabot* v. *de Silva* [1909] A. C. 376.

[1] Dig. 23. 2. 62 and 64; Cod. lib. 5, tit. 6 (de interdicto matrimonio inter pupillam et tutorem seu curatorem liberosque eorum). But a tutor might give his daughter in marriage to his ward. Dig. 23. 2. 64. 2.

[2] Van Leeuwen, 1. 14. 13 and *Cens. For.* 1. 1. 13. 25; Groen. *de leg. abr. ad* Cod. *ubi sup.*; Voet, 23. 2. 25.

[3] Bynkershoek, *Quaest Jur. Priv.* lib. II, cap. iii, p. 219; V. d. K. *Th.* 74; V. d. L. 1. 3. 6.

[4] 1 Maasdorp, p. 19. In Brit. Gui. if the mother is alive and consents it is unnecessary to apply to the Court for leave [G.].

[5] Cod. 9. 13. 1. 2; Voet, 23. 2. 26; Matthaeus, *De crimin. ad* Dig. 48, tit. 4, no. 16; Echt-reglement van de Staten-Generaal, March 18, 1656, art. 85 (2 G. P. B. 2444); Placaat van de Staaten van Holland, Feb. 25, 1751 (8 G. P. B. 535). Groenewegen, whose book first appeared in 1649, i. e. before the Placaats, says (*ad* Cod. 9. 13. 1): Jure Canonico raptae raptori nubere licet, et hoc jure utimur. See also Zypaeus, *Notitia Juris Belgici*, pp. 207–8. This opinion, however, cannot stand against the express language of the Placaat of 1751, which saves the punishments and penalties of 'the written law' in the matter of abductio violenta (geweldaadige vervoeringen). See V. d. K. *Th.* 71.

Van der Linden mentions further the case of persons of any age who have eloped together. 'There was a strong prohibition,' he says, 'in Holland, against marriages between persons who had eloped' (Placaat of Feb. 25, 1751, *ubi sup.*), 'which was afterwards considerably relaxed whenever the subsequent consent of parents was obtained.' Resolutie van de Staaten van Holland, June 26, 1783 (9 G. P. B. 375). The case of elopement is in fact covered by the language of the Placaat of 1751. But in this case marriage is not prohibited, only penalized, V. d. K. *Th.* 72.

[6] Voet, 23. 2. 26; Hoola van Nooten, vol. i, p. 393; V. d. K. *Th.* 73; V. d. L. 1. 3. 6.

Marriage not permitted within the prohibited degrees.

The law of prohibited degrees was defined for Holland by the Political Ordinance of April 1, 1580,[1] which forbids marriage between: (1) ascendants and descendants,[2] whether related by legitimate or illegitimate birth;[3] (2) collaterals of whom either is related to the common ancestor in the first degree of descent, e.g. brother and sister, uncle and niece, uncle and grand-niece, nephew and aunt.[4] In the latter class no distinction is made between the whole and the half blood, and in both classes the prohibition extends to relations by marriage as well as to relations by blood and within the same degrees;[5] that is to say, since a man may not marry his sister or sister's daughter, neither may he marry his sister-in-law or sister-in-law's daughter; and so with all the other prohibited degrees of relationship. It must be observed, however, that though relationship by marriage is a disqualification within the prohibited degrees, this rule has no application when more than one marriage intervenes

[1] G.P.B. 330.

[2] Pol. Ord., Art. 5; Gr. 1. 5. 6; Voet, 23. 2. 30.

[3] Groen. *de leg. abr. ad* Dig. 38. 10. 8; V. d. K. *Dictat. ad* Gr. 1. 5. 6.

[4] Pol. Ord., Arts. 6–7; Gr. 1. 5. 7–8; Voet, 23. 2. 31–2.

[5] This is expressly enacted by Pol. Ord., Art. 8, by which 'it is forbidden and interdicted for a man to marry blood relations of his deceased wife or for a woman to marry blood relations of her deceased husband'. But inasmuch as the Ordinance goes on to specify 'namely' the cases enumerated in Arts. 8 to 11 (Vide Gr. 1. 5. 10–12), it was doubted whether the prohibition of the Ord. extended in regard to collateral affinity beyond the cases specifically stated. With regard to the ascending and descending lines of affinity no such doubt arose, a man being by universal consent prohibited from marrying his stepmother or mother-in-law, step-daughter or daughter-in-law; just as a woman from marrying her step-father or father-in-law, step-son or son-in-law. (Pol. Ord., Arts. 5 and 8; Gr. 1. 5. 10; Voet, 23. 2. 30). Nor were any exceptions admitted in the second degree of affinity. In the third degree doubts arose, which were variously resolved. Thus the question of marriage with a deceased wife's brother's or sister's daughter remained open until definitely disallowed by the Publicatie van de Staten van Hollandt of May 21, 1664 (3 G.P.B. 506); Van Leeuwen, 1. 14. 13. Van Leeuwen gave an opinion in favour of marriage with a deceased wife's maternal aunt (*Cens. For.* 1. 1. 13. 21). Van der Linden, however (1. 3. 6), says that the same prohibitions apply to affinity as to blood relationship and, since dispensations are no longer accorded, the modern law may be taken to be settled in this sense, subject to statutory modifications, where they exist. See on the whole subject, Loenius, *Decis.*, Cas. 7, pp. 39–62; *Rechtsg. Obs.*, pt. 4, no. 3; Hoola van Nooten, vol. i, pp. 383 ff.

between the intending spouses.[1] Thus by the Dutch law a man might not marry his deceased wife's sister,[2] but there was no reason why he should not marry his deceased wife's brother's widow.[3] In the colonies the matter of prohibited degrees has in part or in whole been regulated by statute.[4]

[1] In other words, my wife's *affines* are not my *affines* so as to bring them within the prohibited degrees (Van Leeuwen, 1. 14. 13 and *Cens. For.* 1. 1. 13. 23), at all events in the collateral line. Voet, 23. 2. 33.

[2] Pol. Ord., Art. 10.

[3] *Cens. For.* 1. 1. 13. 24; Voet, 23. 2. 33; *Rechtsg. Obs. ubi sup.*, p. 20; Hoola van Nooten, vol. i, p. 387.

[4] For the Cape see Act No. 40 of 1892, which enacts (sec. 2) that: 'it shall be lawful for any widower to marry the sister of his deceased wife, provided such sister be not the widow of a deceased brother of such widower, or to marry any female related to him in any more remote degree of affinity than the sister of his deceased wife save and except any ancestor of or descendant from such deceased wife'. By sec. 4 nothing in the Act contained 'shall be deemed to legalise or render valid the marriage of a man with the sister of a wife from whom he has been divorced'. Sir A. F. S. Maasdorp has some remarks on this Act (1 Maasdorp, p. 17), which are stated by a writer in *S. A. L. J.*, vol. xxix, p. 130, to rest upon a misapprehension.

In the Transvaal Province by Law No. 3 of 1871, sec. 4, 'Under the prohibited degrees of blood relationship are included: (a) all persons in the ascending and descending line *ad infinitum*, and in the collateral line to the third degree inclusive, consequently uncle and niece, aunt and nephew, whether by blood or marriage; (b), first cousins when both the parents of the one are related to both the parents of the other, as own brothers and sisters. The law is silent as to the prohibited degrees of affinity, which therefore depend upon the common law. It follows that marriage with a deceased wife's sister is not allowed; and a man who has carnal intercourse with his wife's sister is guilty of incest. *R.* v. *Paterson* [1907] T. S. 619.

In the Orange Free State, by Ord. No. 31 of 1903, sec. 1, 'Marriage is prohibited between all persons related to one another in the following degrees of consanguinity or affinity: (1) In the ascending and descending lines between persons related to one another either by legitimate or illegitimate birth, or by marriage. (2) In the collateral degrees. (*a*) Between brother and sister by birth legitimate or illegitimate; (*b*) (As amended by Ord. No. 27 of 1906) between uncle or great-uncle and niece or great-niece by birth legitimate or illegitimate; (*c*) Between aunt or great-aunt and nephew or great-nephew by birth legitimate or illegitimate. (3) (*a*) Between cousins whose fathers are brothers and whose mothers at the same time are sisters by birth legitimate or illegitimate; (*b*) Between cousins of whom the father of the one is brother of the mother of the other and at the same time the mother of the one is sister of the father of the other by birth legitimate or illegitimate.

Sec. 2. No marriage shall be deemed unlawful by reason only that the persons contracting such marriage are related to one another in any

B. Consent of parents.

B. *Consent of parents.* In the oldest Germanic law the consent not alone of parents but also of other near relatives, was a necessary, or at all events usual, preliminary of marriage. 'Intersunt parentes et propinqui,' says Tacitus, 'ac munera probant.'[1] In Holland a case is cited as late as the year 1422 in which parents had incurred a penalty for having given their minor daughter in marriage without the consent of relatives and of the authorities of the town.[2] In the sixteenth century the matter was regulated by two statutory enactments: viz. the Perpetual Edict of Charles V of October 4, 1540, and the Political Ordinance of the States of Holland and West Friesland, of April 1, 1580.

The Perpetual Edict (Art. 17) runs as follows:[3]

The provisions of the Perpetual Edict of October 4, 1540, Art. 17.

'And whereas, daily, many inconveniences are caused in our realm in consequence of secret marriages, which are contracted between young persons without the advice counsel and consent of friends and relatives of both sides, we observing that according to the precepts of the written law such marriages are not in accordance with honour and due obedience, and generally come to a bitter end, Will, Ordain and Decree that in case any one shall take upon himself to solicit and induce any young girl not exceeding the age of twenty years by promise or otherwise, to contract marriage with him, or shall in fact contract marriage with her without the consent of the father or mother of the said girl, or of the majority of the friends and relatives, in case she had no father or mother, or of the judicial authorities of the place, such man shall at

other degree of consanguinity or affinity than those in section one mentioned.

In Natal the prohibited degrees are left to the common law, except that Act No. 45, 1898, legalizes the marriage of a man with his deceased wife's sister.

For Ceylon see Ord. No. 19 of 1907, sec. 17. It has been held that by the law of the Colony there is no objection to a man marrying his wife's sister (*Valliammai* v. *Annammai* (1900), 4 N. L. R. 8). But the Ordinance is silent on the subject and the Court does not appear to have investigated the common law.

In British Guiana Ord. No. 25 of 1901 (sec. 28) defines the prohibited degrees and permits marriage with a deceased wife's sister.

[1] Tacitus, *Agricola*, cap. 18.

[2] Hoola van Nooten, vol. i, p. 300.

[3] 1 G. P. B. 319; 1 Maasdorp, p. 287.

no time be entitled to take or receive any *douarie* or other benefit (whether by way of ante-nuptial contract, by the custom of the country, by testament, gift, transfer or otherwise in what manner soever) out of the goods which the said girl may leave behind, even though he may, after the marriage has been completed, have obtained the consent of the father and mother, of the aforesaid friends and relatives, or of the Court ; of which circumstance we will that no regard should be had in this matter. In like manner if any girl or woman take upon herself to contract marriage with a young man not exceeding the age of twenty-five years, without consent of father or mother, or of the nearest friends and relatives, or of the judicial authorities of the place, such woman shall never be entitled to take or acquire any *douarie* or other benefit out of the goods which such man may leave behind (whether by way of ante-nuptial contract, by the custom of the country, by testament, gift, transfer or cession, in what manner soever), even though she may, after the marriage has been consummated, have obtained the consent of father or mother, of the aforesaid friends and relatives, or of the judicial authorities ; of which circumstance we will that no regard should be had. Further, we forbid all our subjects to be present, to consent or agree to such marriages, contracted without the consent of the judicial authorities, or to receive, entertain, or lodge in their houses persons so married, under penalty of one hundred gold Caroli or other severe punishment in the discretion of the Court. We forbid also all Notaries to receive any ante-nuptial contract or other promise to effect such marriage under pain of deprivation of office and, moreover, of being punished at discretion. Commanding all our officers and fiscals to take good care to have this ordinance observed and maintained, and to punish the contraveners of the same without favour or dissimulation.'

The above enactment, it will be noticed, penalizes marriages contracted without the necessary consents, without, however, annulling them. This further step was taken by the Political Ordinance of April 1, 1580, which by Art. 3[1] provides that banns shall not be granted or proclaimed if those that apply for the same are beneath the proper age, viz. twenty-five for young

The Provisions of the Political Ordinance of April 1, 1580, Arts. 3 & 13.

[1] 1 G. P. B. 331 ; Gr. 1. 5. 14–15 ; Voet, 23. 2. 11.

men, and twenty for young women, unless they produce to the magistrate or minister of religion the consent of their parents or the survivor of them (if they have any); and by Art. 13 declares 'null and void and of no effect marriages not contracted and celebrated' as required by the Ordinance, and adds an express reservation of the provisions of the Perpetual Edict relating to the marriage of minors and the penalties therein contained.[1] With regard to the interpretation of these two enactments and their combined effect very divergent views have been entertained. As regards minors who have parents or parent yet living the law seems plain. Such young persons can neither engage themselves[2] nor contract a valid marriage,[3] without the consent of parents or parent.[4] If both parents are living the consent of both is required, but in case of difference of opinion between them the will of the father, as the head of the family, prevails over that of the mother.[5] If the father is dead the mother's consent is necessary, and sufficient,[6] even though she has contracted a second marriage.[7] Consent may be express or tacit, the latter when a parent knows of the intended marriage and does not forbid it. Such a case might arise if, through fraud or mistake, the publication of banns had taken place without previous proof of parental consent as required by the Political Ordinance, and the parents nevertheless acquiesced in the banns when they came to know of them.[8] Indeed, in the absence of fraud on the part of one or both of the spouses, publication of banns is deemed to be notice to the parents,[9] and a marriage thereafter concluded is valid, even though, through carelessness on the part of the marriage-officer or other person

The combined effect of these enactments:

(a) As regards consent of parents;

[1] 1 G. P. B. 334.
[2] Voet, 23. 1. 20; V. d. L. 1. 3. 2.
[3] Van Leeuwen, 1. 14. 6; *Willenburg* v. *Willenburg* (2) (1908) 25 S. C. at p. 910; 3 Buch. A. C. 409.
[4] Grandparents are not included. V. d. K. *Th.* 77.
[5] Voet, 23. 2. 13. [6] Ibid. [7] Voet, 23. 2. 14. [8] Voet, 23. 2. 18.
[9] Voet, loc. cit. (*ad fin.*); *Johnson* v. *McIntyre* (1893) 10 S. C. 318. But there is no presumption of notice in case of marriage by special licence under Cape Act No. 9 of 1882.

responsible, the parents may in fact not have consented to the marriage or even have known of it. In any event, ratification by the parents or parent after marriage, so far as concerns the validity of the marriage, and the legitimacy of the children, has the same effect as a previous consent; but no ratification after marriage can relieve from the penalties imposed by the Perpetual Edict, this being excluded by the express terms of the Edict itself.[1]

If parents frivolously and unreasonably withhold their consent, it would seem just that the Court should have power to override their veto. Such is the opinion of Voet,[2] which Van der Keessel accepts.[3] But only very peculiar circumstances would justify overriding the parental authority.[4] An insane parent, so far as concerns consent, is treated as non-existent, and the same consent, if any, is required and sufficient as would be sufficient if he or she were already dead.[5]

A minor who has married with consent, and who becomes widowed before reaching the usual limit of full age, may remarry without consent. Such at least was the law in the province of Holland, in regard to females and males alike.[6]

Thus far we have spoken of the consent of parents Or other relatives.

[1] Voet, 23. 2. 19; V. d. K. *Th.* 75. In the absence of consent or ratification the marriage will be declared void by the Court on the application of an aggrieved parent 'si rigido jure uti velit'. Voet, 23. 2. 11; Van Leeuwen, 1. 14. 6; *Johnson* v. *McIntyre, ubi sup.*; *Willenburg* v. *Willenburg* (1909) 3 Buch. A. C. at p. 423. It follows that marriages contracted without consent of parents are voidable, not void. Further, they are voidable by the parent only, not by the parties or either of them, i. e. not on the ground of minority merely apart from fraud (*S. A. L. J.*, vol. xxviii, p. 480); and by the parent (*semble*) only during the minority of the married child. Ibid.

[2] Voet, 23. 2. 22; Schorer *ad* Gr. 1. 5. 16. In Brit. Gui. the minor may appeal to the Court against the refusal of parents to consent. Ord. No. 25 of 1901, sec. 31; *Re petition of Victorina Chaves* (1912) *Brit. Gui. Off. Gaz.*, vol. xxxv, p. 1445.

[3] V. d. K. *Th.* 76.

[4] Voet, *ubi sup.*

[5] V. d. K. *Th.* 82. Cod. 5. 4. 25 is not followed in R.-D. L. At the Cape, any person desirous of marriage to whose marriage consent is necessary, but cannot be given or is withheld, may apply by petition to the Chief Justice. Marr. O. in C. 1838, sec. 17.

[6] *Cens. For.* 1. 1. 13. 11; Voet, 23. 2. 17. The Echt-Reglement of March 18, 1656 (2 G. P. B. 2439) contains an express provision to this effect for the Generaliteyts Landen.

or of a surviving parent. But what if both parents are dead? The Political Ordinance (Art. 3) does not require the consent of relatives.[1] Inasmuch, however, as Art. 17 saves the operation of the penal clauses of the Perpetual Edict, it has been thought that a marriage of minors whose parents are both dead, if contracted without the consent of friends and relations, or, if these disagree amongst themselves or unreasonably withhold their consent, of the Court, though not void, is nevertheless penalized. This is the view of Grotius,[2] whose opinion seems to have prevailed. Voet[3] and Bynkershoek,[4] however, agree in thinking that the penalty of the Edict is only preserved by Art. 13 of the Political Ordinance so far as the enacting clause of the Edict is also retained. Since, therefore, the Political Ordinance requires no consent of relatives, neither can it be supposed to retain the penalty attached by the Edict to marriages contracted without such consent. Grotius treats the consent of the nearest relatives as necessary, if the penalty is to be avoided, though he expressly says that the marriage of minors is not void by reason of its being prohibited by their guardians or relatives.[5]

(b) As regards consent of tutors;

The argument founded upon the language of the Perpetual Edict clearly fails in regard of the consent of tutors, for the Edict does not penalize marriages contracted without such consent. In view of this fact, it seems impossible to say that the common law of Holland made the consent of tutors a necessary condition of a valid marriage of a minor whose parents were dead,[6] nor, apart from general or local legislation, can the penalty of the Edict be extended to a case to which it does not in terms apply.[7] It is plain, however, from Van der Keessel[8] that

[1] Voet, 23. 2. 16. [2] Gr. 1. 8. 3. [3] Voet, *ubi sup.*
[4] Bynkershoek, *Quaest. Jur. Priv.*, lib. II, cap. iii.
[5] Gr. *ubi sup.*
[6] Gr. *ubi sup.* and Schorer ad loc.; Van Leeuwen, 1. 14. 9; Voet, 23. 2. 16; V. d. L. 1. 3. 6; Hoola van Nooten, vol. i, p. 307.
[7] Van Leeuwen (*ubi sup.*) applies it, but with hesitation. In any event consent of guardians will be easily inferred. Ibid.
[8] V. d. K. *Th.* 125.

the consent of guardians or relatives, and often of both, was very generally required by the local statutes, if not for the validity of the marriage, at all events for the avoidance of the penalty.[1] On the other hand the law of Zeeland, which penalized and also annulled marriages contracted without such consents, seems to be mentioned as exceptional.[2]

The statutory penalty does not attach to the spouse who is a minor.

With regard, more particularly, to the statutory penalty, it must be noticed that it attaches only to the person of full age of either sex who inveigles a minor of the other sex into marriage. Such person is not allowed to take any benefit from the property of the minor spouse, whether present or future, whether by gift, legacy, inheritance, or in what way soever. One effect of this is that the major spouse takes no advantage from the marriage by way of community of property, nor, where this exists, by ante-nuptial contract.[3] But the minor spouse is not penalized,[4] so that where both spouses are minors the penalty is not incurred.

Consent of parents when the spouses are of full age,

It remains to speak of the requirement of consent of parents when the parties to the marriage are of full age. This case is provided for by the Political Ordinance (Art. 3) in the following terms :[5]

'But if any young man or young woman being above the age of twenty-five and twenty respectively and having parents, applies for the aforesaid Sunday banns without

[1] This is (*semble*) the law in Cape Colony. *Mostert* v. *The Master* (1878) Buch. 83. Mr. Justice Kotzé, however, says (Van Leeuwen, vol. i, p. 107, note): 'At the Cape of Good Hope the consent of guardians to the minor's marriage is necessary. Marr. O. in C. 1839, secs. 10 and 17.' In Natal the consent of guardians has been held to be necessary to the valid marriage of a minor. *In re McDuling and Brown* (1885) 6 N. L. R. 88. In the Transvaal, by Law No. 3 of 1871, sec. 8, it is not lawful to solemnize the marriage of a minor, if he or she cannot produce the consent of father or guardian. In Ceylon, the consent of guardians is required. Ord. No. 19 of 1907, sec. 22. For Brit. Gui. see Ord. No. 25 of 1901, sec. 30.

[2] V. d. K. *Th.* 126.

[3] 'The husband, whether he knew at the time or did not know the lady to be a minor, can receive no benefit from such a marriage and can have no control over her property.' *Mostert* v. *The Master* (1878) Buch. at p. 85, per Sir Henry de Villiers C.J.,

[4] Voet, 23. 2. 20.

[5] 1 G. P. B. 331.

producing evidence of their parents' consent, the aforesaid Magistrates or Ministers of Religion shall, before the proclamation of such banns, be bound to summon the parents of the applicant before them, and in case the parents refuse or fail to appear within fourteen days after the service of the summons upon them, such refusal shall be held for consent, and the said Magistrate or Ministers of Religion may then forthwith proceed to the aforesaid proclamations and banns; but if the parents appear and allege any reasons why they will not consent to the desired marriage, and cannot be persuaded thereto by the Magistrate or Minister of Religion, the aforesaid Magistrate or Ministers may not marry such young people or join them in wedlock, before they are directed to do so by the College of Magistrates after enquiry into the circumstances.'

is easily presumed, and may not be withheld unreasonably.

From the above-cited passage it is plain that though the consent of parents was required in the case of the marriage of major children, such consent was easily presumed and might not be unreasonably withheld. If consent was withheld the Court determined whether the grounds of refusal were sufficient.[1] In the modern law the consent of parents is not necessary when the parties to the marriage are of full age.

C. The formal requirements of marriage.

C. *The formal requirements of marriage.* In early times, Grotius tells us, marriages were perfected with little or no ceremony.[2] The blessing of the Church was not always invoked. To provide against the scandals consequent upon such a state of things the Political Ordinance, by Art 3,[3] for the first time gave statutory authority to the canonical practice of publication of banns.

'Those who after the publication of these presents shall desire to enter upon marriage shall be bound to appear before the Magistrate or Ministers of Religion in the towns or places of their residence, and there apply for the granting to them of three Sunday or market banns, to be made in

[1] Van Leeuwen, 1. 14. 6; Hoola van Nooten, vol. i, p. 311; V. d. K. *Th.* 78–81; V. d. L. 1. 3. 6. Van Leeuwen (1. 14. 7) specifies the circumstances which the judge will usually take into consideration.

[2] Gr. 1. 5. 16; Van Leeuwen, 1. 14. 3.

[3] 1 G. P. B. 331.

the Churches or from the Council-House or other places where justice is administered, on three successive Sundays or Market Days : which banns shall be granted and made to the end that any one who wishes to advance any let or hindrance, whether of blood, affinity or pre-contract of marriage, by reason of which the marriage should not go forward, may do so.'

If no such let or hindrance was alleged, the marriage was shortly afterwards celebrated by a minister of religion or by the magistrate. In the latest Dutch Law the civil marriage was indispensable, a religious ceremony being left to the option of the parties.[1]

With regard to the solemnization of marriage at the present day the reader is referred to the statute law of the several colonies.[2]

Section 3. The Legal Consequences of Marriage

The legal consequences of marriage may be considered, first, in relation to the personal status and capacity of the wife ; secondly, in respect of the property of the spouses.

The legal consequences of marriage :

A. *Effect of marriage on the personal status and capacity of the wife.* This consists principally in the marital power of the husband over the wife,[3] with its consequences, which are as follows :

A. Effect of marriage as regards the personal status and capacity of the wife :

1. The wife acquires the rank or dignity of the husband, which after the husband's death she retains durante viduitate. She acquires also her husband's forum and domicil.[4]

(a) rank, forum, and domicil ;

2. Though she may have been of full age before marriage, on marriage she is deemed to be a minor under the guardianship of her husband, the paternal power ceasing.[5] Like a minor, she has no independent persona standi

(b) she becomes a minor on marriage ;

[1] V. d. K. *Th.* 84 ; V. d. L. 1. 3. 6 (*ad fin.*).

[2] (South Africa) 1 Maasdorp, chap. iv, and Nathan, *Common Law of S. A.*, vol. i (2nd ed.), p. 224 ; (Ceylon) Ord. No. 19 of 1907 ; (British Guiana) Ord. No. 25 of 1901.

[3] V. d. L. 1. 3. 7.

[4] Voet, 23. 2. 40.

[5] Gr. 1. 5. 19 ; Van Leeuwen, 1. 6. 7.

in judicio. She must sue or be sued assisted by her husband.[1]

(c) husband administers wife's property;

3. As administrator of his wife's property the husband may alienate and encumber it as he pleases without her consent.[2] This applies even to property which she has kept out of community. The wife, on the other hand, may not alienate or encumber her property without his consent,[3] unless in due course of trade.[4]

(d) does not render an account;

4. The husband is not compellable to render an account of his marital administration,[5] nor to indemnify the wife or her heirs for his negligence.[6]

(e) contracts in his wife's name;

5. The husband may contract in his wife's name, and render her liable[7] or entitled[8] under contracts so made. The wife cannot, without the consent of her husband, render herself civilly liable by her contracts[9] except in cases in which a minor would be liable.[10] But she does incur a natural obligation, which is a good foundation for a contract of suretyship, and will exclude the condictio indebiti in case she has paid money in pursuance of such obligation, after her husband's death.[11] Contracts made without her husband's authority being civilly void, neither wife nor husband can be sued upon them either during the marriage or after its determination.[12] Subsequent ratification by the husband, however, has the same effect as antecedent authority, and so also, it seems, has tacit acquiescence.[12]

[1] Gr. 1. 5. 22–23; Van Leeuwen, *ubi sup.*; Voet, 5. 1. 14 ff., and 23. 2. 41; V. d. K. *Th.* 95. But a woman married out of community who has the management of property is entitled to sue in her own name without the assistance of her husband. *Boyes* v. *Verzigman* (1879) Buch. 229.

[2] Gr. 1. 5. 22; Schorer *ad* Gr. 2. 48. 2; Van Leeuwen, *ubi sup.*; Voet, 23. 2. 58; 23. 4. 21; 23. 5. 7; V. d. K. *Th.* 92. This extends to donations to third parties unless fraudulent. Voet, 23. 2. 54.

[3] Gr. 1. 5. 23; Van Leeuwen, 2. 7. 8. [4] Gr. loc. cit.

[5] Sande, *Decis. Fris.* 2. 4. 1. [6] V. d. K. *Th.* 91.

[7] Gr. 1. 5. 22; 3. 1. 30; V. d. L. 1. 3. 7. [8] Gr. 3. 1. 38.

[9] Gr. 1. 5. 23; Voet, 23. 2. 42.

[10] Voet, 23. 2. 43.

[11] V. d. K. *Th.* 96. *Secus* if payment has been made during his lifetime without his authority. Voet, 12. 6. 19.

[12] Voet, 23. 2. 42.

6. Though a wife's contract cannot be enforced against her, she may, if she pleases, confirm it after her husband's death and enforce it against the other contracting party.[1] (f) wife's own contracts may be ratified after husband's death;

7. The contracts of a wife, as of a minor, are in certain cases legally operative. Thus: (*a*) She may enter into a unilateral contract which is solely to her advantage. Her husband reaps the benefit, and payment must be made to him, and not to the wife without his knowledge.[2] (g) and are in certain other cases operative; viz. (*a*) if unilateral and advantageous;

(*b*) Husband and wife are rendered liable by the wife's contracts, though made without the husband's authority or ratification, to the extent of their enrichment—that is, to the extent to which he or she has taken a benefit under the contract.[3] (*β*) if enrichment ensues;

(*c*) A wife who is authorized or permitted by her husband to carry on the business of a public trader binds herself and her husband by her trade contracts.[4] It makes no difference whether she is above or below the normal limit of full age.[5] The wife's authority to bind herself or her husband ceases if the husband has revoked his consent. Such revocation must be communicated to third parties and cannot be made to their prejudice in respect of transactions already begun.[6] (*γ*) if the wife is a trader;

(*d*) A wife may bind herself and her husband by contracts incidental to the household.[7] This authority results from the wife's position as domestic manager and cannot be taken from her except by judicial decree and public (*δ*) if incidental to the household.

[1] Voet, 23. 2. 43. Van Leeuwen (1. 6. 7), citing Stockmans, *Decis.* no. 52, says that the wife's contracts do not revive upon the dissolution of the marriage, but this must be understood to mean 'do not revive against her will'.

[2] Voet, 23. 2. 44.

[3] Gr. 1. 5. 23 (*ad fin.*); Voet, 23. 2. 43; V. d. L. 1. 3. 7.

[4] Gr. 1. 5. 23; Van Leeuwen, 1. 6. 8 and 2. 7. 8; Voet, 23, 2. 44; V. d. L. *ubi sup.*

[5] Voet, loc. cit.

[6] Voet, loc. cit.

[7] Gr. *ubi sup.*; Van Leeuwen, *ubi sup.*; Voet, 23. 2. 46; *Mason* v. *Bernstein* (1897) 14 S. C. 504. The wife is only liable to the extent of a half, and if community of property and of profits has been excluded may claim indemnity from her husband or his heirs. V. d. K. *Th.* 99. When a wife has been deserted by her husband, and buys necessaries for herself and her children, she is liable to the extent of one-half only, even though the tradesman when supplying the goods stated that he would not give credit to the husband. *Grassman v. Hoffman* (1885) 3 S. C. 282.

notification.[1] It is for the judge[2] to say whether a particular contract falls within the permitted class. Much depends upon the custom of the country, the husband's condition and resources, and the previous course of dealing. It is all one whether the wife has purchased goods for domestic use, or borrowed money for the purpose of doing so.[3]

(h) Extent of wife's liability for husband's contracts.

8. As above observed, the wife is entitled[4] and bound by the husband's post-nuptial contracts. She is liable for them to the fullest extent during the continuance of the marriage, and after its determination to the extent of one-half.[5]

B. Effect of marriage as regards the property of the spouses.

B. *Effect of marriage in respect of the property of the spouses.* By the common law of Holland, in the absence of ante-nuptial contract, marriage creates *ipso jure* a community of goods (*communio bonorum—gemeenschap van goederen*) between the parties.[6] This community is often spoken of as statutory, not that it was introduced by any specific statute, but because its existence is recognized by numerous ancient statutes and privileges,[7] as forming

Community of goods;

[1] Gr. *ubi sup.*: 't welck een man niet en kan beletten, ofte hy most sijn vrouw oock dat bewint rechtelick verbieden, ende 't selve doen afkondighen. The meaning of 'rechtelick' appears from Voet (23. 2. 46), who says: nisi hujuscemodi rei domesticae cura ac circa eam contrahendi licentia ad mariti desiderium uxori publica magistratus auctoritate justas ob causas interdictum sit. Does this hold good to-day?

[2] When the trial is by judge and jury it would be for the judge to say whether the contract in question could, in law, come within the permitted class; and this being decided affirmatively, for the jury to say whether in fact it did so.

[3] Voet, *ubi sup.*

[4] Gr. 2. 11. 17; 3. 1. 38; V. d. K. *Dictat.* ad loc.; i.e. she is entitled after the dissolution of the marriage to the extent of one-half.

[5] Gr. 1. 5. 22; Voet, 23. 2. 52; V. d. L. *ubi sup.*; unless community of goods and of profit and loss has been excluded. V. d. K. *Th.* 93. Even when community of profit and loss has been excluded, she is liable, after her husband's death, to the extent of one-half for goods applied to the maintenance of the family, retaining, however, a right of recourse against the husband's heirs. *Cens. For.* 2. 1. 11. 7.

[6] Gr. 2. 11. 8; Voet, 23. 4. 1; Hoola van Nooten, vol. i, p. 399; V. d. K. *Th.* 216. The historical origin of community of goods has been much discussed. See Voet, 23. 2. 66, and authors there cited. For the results of modern research see Fock. And., vol. ii, pp. 164 ff.

[7] Hoola van Nooten, vol. i, pp. 401 and 408. Many of these are collected in *Rechtsg. Obs.*, pt. 2, pp. 90 ff.

an integral part of the law of the country. As such it is a purely Germanic institution, and derives nothing from the law of Rome. The effect of community, where it exists (for in Ceylon[1] and British Guiana[2] it exists no longer) is to create a joint fund under the administration of the husband, consisting (with some exceptions) of all the property of both the spouses, as well existing at the time of the conclusion of the marriage as after-acquired.[3] It extends to all property of the spouses,[4] wherever situated,[5] immovable as well as movable, and to jura in personam, or rights arising from obligations, as well as to jura in rem. Conversely, the lawful liabilities of the spouses, whether ante-nuptial or post-nuptial, are also charged upon the community and go to diminish the joint estate.[6] Community begins when marriage begins, i.e. so soon as the necessary rites or ceremonies have

its effects.

Includes property,

and liabilities of both spouses;

[1] Ceylon, Matrimonial Rights and Inheritance Ordinance (No. 15 of 1876), sec. 8: 'There shall be no community of goods between husband and wife, married after the proclamation of this Ordinance, as a consequence of marriage.'

[2] Brit. Gui., Ord. No. 12 of 1904, sec. 6. In Natal by Law No. 22 of 1863, sec. 2, community of goods does not attach to any spouses married elsewhere than in South Africa, unless the spouses by agreement exempt themselves from this law.

[3] Voet, 23. 4. 30; V. d. K. *Th.* 91–92; V. d. L. 1. 3. 8; Hoola van Nooten, vol. i, p. 408. This is expressed in the proverb: Man ende wijf hebben geen verscheyden goet. Anton. Matthaeus, *Paroem.* no. 2.

[4] With some exceptions, however: viz. (1) Feuds (in the Dutch Law); (2) Property burdened with a fidei-commissum, except only as regards the profits until the f.-c. takes effect, Gr. 2. 11. 10; Voet, 23. 2. 71 ff.; V. d. K. *Th.* 220–1; (3) Jewels, &c., given by the bridegroom to the bride on marriage, Van Leeuwen, 4. 24. 13; (4) Clothes, Hoola van Nooten, vol. i, p. 411.

[5] Voet, 23. 2. 85 and 23. 4. 29; unless the law of the *lex situs* requires a more formal mode of transfer, in which case a personal action lies to compel transfer in due and solemn form. *Chiwell* v. *Carlyon* (1897) 14 S. C. at p. 66.

[6] 'Die den man of de vrouw trouwt, trouwt ook de schulden.' Gr. 2. 11. 12; V. d. K. *Th.* 222—so much so that an ante-nuptial stipulation to the contrary is void in law, unless community of goods is also excluded. Voet, 23. 2. 80. A married woman therefore may be utterly ruined by her husband's extravagance, but the remedy is in her own hands, viz. to apply to the Court for a separation of goods (boedelscheiding) and, if necessary, to have the husband interdicted as a prodigal. Gr. 1. 5. 24; Voet, 23. 2. 52; Hoola van Nooten, vol. i, p. 417; V. d. L. 1. 3. 7 (*in fin.*).

ends on dissolution of marriage;

been performed;[1] it persists during its continuance and ends upon its dissolution. Thereupon the common fund is divided *ipso jure* into two equal shares, one of which vests in the surviving spouse, without regard to the amount which such spouse may have contributed, the other of which vests in the testamentary or intestate successors of the deceased.[2] On the dissolution of the community post-nuptial liabilities attach to the extent of one-half to each moiety of the now divided estate.[3]

whereon ante-nuptial liabilities, still undischarged, burden the original debtor alone.

Ante-nuptial liabilities on the other hand, which have not been discharged during the marriage, revert exclusively to the side from which they originally came.[4] Community of goods being an institution of the Roman-Dutch common law, all marriages are, in the absence of proof to the contrary, presumed to have been contracted in community,[5] and the legal consequences of community follow, except so far as they are excluded expressly or by necessary implication. They attach not only to a first, but also to a second or subsequent marriage,[6] subject, however, to certain rules and restrictions to be presently mentioned. There are, nevertheless, certain cases to which the rule of community does not apply. These are: (1) when the parties are within the prohibited

[1] Gr. 1. 5. 17; 2. 12. 5; Neostad., *de pact. antenupt.* Obs. 15–17; Van Leeuwen, 4. 23. 3.

[2] Gr. 2. 11. 13. Children who have received advances must bring them into collation for the benefit of the joint estate before division. Ibid.; V. d. K. *Th.* 223.

[3] Gr. 1. 5. 22; V. d. K. *Th.* 93 and 223. Creditors may sue the husband or his heirs for the whole debt, the wife or her heirs only for half. The husband (or his heirs) has recourse against the wife (or her heirs) to the extent of one-half. Gr. 2. 11. 17; Voet, 23. 2. 52 and 80. If the husband is insolvent the creditors may proceed by right of surrogation against the wife for the recovery of half the debt. Voet, ibid.

[4] Gr. 2. 11. 15; Van Leeuwen, 4. 23. 6; Hoola van Nooten, vol. i, p. 415; V. d. K. *Th.* 224. According to Voet (23. 2. 80), if the husband (or his heirs) has discharged the whole of an ante-nuptial debt, he (or they) has (have) *regressus* against the wife or her heirs in respect of one-half. Schorer (*ad* Grot. *ubi sup.*) takes the same view. Van der Keessel (*ubi sup.*) dissents. See Loenius, *Decis.*, case 99, and Boel's Excursus.

[5] *Faure* v. *Tulbagh Divisional Council* (1890) 8 S. C. 72.

[6] Van Leeuwen, 4. 23. 5; V. d. K. *Th.* 219.

degrees (But community continues so long as they are innocently ignorant of their relationship. If one party comes to know of it and conceals it from the other, community continues so far only as it is advantageous to the innocent party—i.e. there is community of gains, but not of loss.) ; (2) when a minor has married without the necessary consents ;[1] (3) (most important of all) when community is excluded by ante-nuptial contract, of which we are next to speak.[2]

Cases in which community of goods is excluded.

Section 4. Ante-nuptial Contracts

No persons need marry in community of goods unless they wish to do so. It is always open to the spouses to exclude or modify the common law by ante-nuptial contract.[3] 'Ante-nuptial contracts, being of wide application,' says Van der Keessel, 'can scarcely be otherwise defined than as agreements between future spouses and other interested persons regarding the terms or conditions by which the marriage should be regulated.'[4] According to Van der Linden, to be valid such a contract must be in writing[5] and contained in a public instrument,

Ante-nuptial contracts:

Is writing necessary to their validity ?

[1] *Supra*, pp. 72 ff. Van der Linden (1. 3. 8) adds 'when the parties have eloped' (Placaat van de Staaten van Holland, Feb. 25, 1751 ; 8 G. P. B. 535). In all these cases one or both of the spouses are precluded by way of penalty from taking any benefit under the marriage, whether by community or by ante-nuptial pact. Hoola van Nooten, vol. i, pp. 419–20. The general opinion is that the Edict of 1540 operates to the disadvantage of the major spouse only. Groen. *ad* Gr. 2. 11. 8 ; Van Leeuwen, 4. 23. 3 ; Voet, 23. 2. 20. Van der Keessel (*Th.* 218) dissents.

[2] Community may also be put an end to by boedelscheiding, which may be decreed on the ground of prodigality (*supra*, p. 81, n. 6), or in the event of judicial separation (V. d. K. *Th.* 231. *Vide infra*, p. 99). The curious custom which allowed the wife to repudiate the community and by consequence the debts by 'going out before the bier', (Gr. 2. 11. 18–19 ; Hoola van Nooten, vol. i, p. 463), is said by V. d. K. (*Th.* 226), to be 'multis statutis concessum,' and, therefore, does not make common law.

[3] Gr. 2. 11. 8 ; V. d. K. *Th.* 227.

[4] V. d. K. *Th.* 228.

[5] V. d. L. 1. 3. 3. Writing was not necessary by the common law. Gr. 2. 12. 4 ; *Cens. For.* 1. 1. 12. 9 ; Voet, 23. 4. 2 ; V. d. K. *Th.* 229. Van der Linden's opinion that writing was necessary in his day is based upon certain Ordinances requiring ante-nuptial contracts to be sealed. But perhaps merely verbal agreements are not thereby forbidden. The authors of the *Rechtsg. Obs.* (pt. 2, no. 35) agree with Van der

although, he adds, 'registration in Court is not required, since the law on this point as enacted by the placaat of July 30, 1624, has never been observed in practice.'[1]

Registration of ante-nuptial contracts.

In the practice of Cape Colony writing was invariably employed, and by Act 21 of 1875, sec. 2, an ante-nuptial contract requires to be executed before a notary and two witnesses (underhand documents not being entitled to registration) and registered in the office of the Registrar of Deeds,[2] and a duplicate or notarial copy of the contract must be left in the office of the Registrar of Deeds for general information. It is to be noted, however, that the absence of registration only affects the validity of the contract as regards creditors. An unregistered contract cannot operate to their prejudice so as to deprive them of any rights which they would have in the absence of ante-nuptial contract by the common law. As regards the parties to the contract, however, and persons claiming through them, as well as others taking a benefit under it, the contract holds good in the absence of registration and even (*semble*) though not reduced to writing.[3]

Who may be parties.

In this connexion it should be observed that the parties to an ante-nuptial contract may be not only the spouses but also any relatives or others who may be disposed to exercise any liberality towards them.[4]

Such contracts serve two purposes.

In fact the contract often serves a double purpose: first, its obvious one,

Linden, as also de Haas in his note to *Cens. For.* (*ubi sup.*). Van der Keessel (*ubi sup.*) and Hoola van Nooten (vol. i, p. 442) do not consider writing indispensable. But satisfactory proof, and therefore the presence, at the least, of competent witnesses is necessary, if an ante-nuptial contract is to affect creditors. Voet, 23. 4. 3–4; V. d. K. *ubi sup.*; *Holl. Cons.*, vol. iv, no. 35.

[1] Groen. *de leg. abr. ad* Cod. 5. 12. *l. ult.*; Voet, 23. 4. 4 and 50. This statute did not, however, require registration in all cases, but only when the ante-nuptial contract created a f.c. or prohibition of alienation of immovable property. In Brit. Gui. an ante-nuptial contract need not be notarially executed [G.].

[2] At the Cape the combined effect of Act 21 of 1875, sec. 7, and of Ord. 27 of 1846, sec. 1, is that ante-nuptial contracts executed in the Cape Province must be registered within a certain specified time of execution, but not necessarily before marriage. See *S. A. L. J.* (1912), vol. xxix, p. 39.

[3] Voet, 23. 4. 2 and 4; 1 Maasdorp, p. 49.

[4] Voet, 23. 4. 10–11.

to exclude or modify the incidents of marriage at the common law; and secondly, if desired, to regulate the devolution of the property contributed to the marriage after the death of one or both of the spouses. In this latter event the contract plays the part of what in English Law is called a marriage-settlement.

What terms may be inserted in ante-nuptial contracts?

Generally speaking, any condition whatever may be introduced into a marriage contract provided that it is not contrary to law or good morals.[1] Some stipulations are disallowed as contrary to the legal nature of marriage. Such are conditions: (1) that the husband shall be under the guardianship of his wife;[2] (2) that a second wife shall take more than a child's portion under the first marriage;[3] (3) that donations shall be permitted or legacies not permitted between the spouses.[4] Provisions to the effect: (4) that the husband shall not change his domicil without his wife's consent;[5] and (5) that a husband shall not represent his wife in Court, but that she shall have a persona standi of her own,[6] though condemned by Voet, are allowed by Van der Keessel.[7] The last of these indeed is so far from being open to objection at the present day, that where there is exclusion of community and of the marital power, the wife has as full capacity to appear in Court, whether as plaintiff or defendant, as if no marriage had taken place.[8]

Certain stipulations are not permitted.

A stipulation that a wife should share in profits but not in losses, though condemned by Grotius[9] and Neostadius,[10] is in Van der Keessel's[11] opinion free from objection.

[1] Voet, 23. 4. 19; Hoola Van Nooten, vol. i, pp. 457–8; V. d. K. *Th.* 228, and 233 ff.; V. d. L. 1. 3. 4.
[2] Voet, 23. 4. 20. [3] Gr. 2. 12. 6. This only applies where the lex hac edictali is unrepealed. Cod. 5. 9. 6.
[4] Voet, *ubi sup.*; *Hall* v. *Hall's Trustee and Mitchell* (1887) 3 S. C. 3.
[5] Voet, *ubi sup.*; Hoola Van Nooten, *ubi sup.*
[6] Voet, *ubi sup.* and 5. 1. 14–15.
[7] V. d. K. *Th.* 228, and *Dictat.* ad loc.
[8] *Boyes* v. *Versigman* (1879) Buch. 229. [9] Gr. 2. 12. 9.
[10] Neostad. *de pact. antenupt.* Obs. 21 (*in notis*).
[11] V. d. K. *Th.* 249; for, as he says: creditoribus etiam nihil nocet, cum lucrum intelligi nequeat, nisi damno prius deducto.

Permitted stipulations fall into certain defined classes,

To undertake a detailed discussion of the various ante-nuptial stipulations which are or may be made is beyond our scope. We shall indicate, however, the principles which govern the interpretation of such agreements, and mention the objects usually aimed at and the effect produced. So far as they are directed to the modification or exclusion of the common law they fall into well-defined groups according as the exclusion is more or less complete; and in this connexion it must be remembered that ante-nuptial contracts are strictly construed, and that the presumption is in favour of the continuance of the common law in all cases where its exclusion is not clearly expressed or implied.[1]

The consequences of marriage in community have been seen to be mainly two: viz. community of goods (which extends not only to goods brought into the marriage, but also to subsequent acquisitions[2] and profits), and the marital power. Now, any or all of these consequences may be excluded by ante-nuptial contract. Thus the parties may:

of narrower or wider extent.

1. Exclude (*a*) community in respect of goods brought into the marriage, leaving it unimpaired as regards (*b*) post-nuptial acquisitions, (*c*) profits and losses, and (*d*) the marital power. Such is the effect of a stipulation which does not exclude community of goods in terms, but provides that 'the goods brought into the marriage shall return to the side whence they came'.[3]

2. Exclude community of goods, whether (*a*) brought into the marriage, or (*b*) after-acquired (other than 'profits'), leaving unimpaired (*c*) the community of profit and loss, and (*d*) the marital power.

3. Exclude community of goods whether (*a*) brought into the marriage, or (*b*) after-acquired (not being profits), and (*c*) community of profit and loss, leaving only (*d*) the marital power.

[1] Gr. 2. 12. 11; V. d. K. *Th.* 251.

[2] By 'subsequent acquisitions' is here meant 'subsequent acquisitions' not referable to the head of profits. This will be explained below.

[3] Voet, 23. 4. 46; Hoola van Nooten, vol. i, pp. 450–1.

4. Exclude all community (*a*), (*b*), and (*c*) and the marital power (*d*) as well.[1]

In ante-nuptial contracts 'community of goods' is contrasted with 'community of profit and loss'.

In speaking of the legal consequences of marriage (sec. 3, *supra*) we used the phrase 'community of goods' in the sense of the statutory community of the common law with all its consequences. This exists independently of any contract. But in ante-nuptial contracts the phrase acquires a narrower meaning, viz. community of goods whether (*a*) brought into the marriage, or (*b*) after-acquired (other than 'profits'), but not (*c*) community of profit and loss. Accordingly, where community of goods (alone) is expressly excluded, the phrase is understood in the narrower sense, and community of profit and loss is tacitly reserved;[2] and, conversely, where community of profit and loss is expressly reserved, community of goods (in the narrower sense) is tacitly excluded.[3] It is necessary, therefore, to determine with some precision the meaning of 'profits' or 'acquests', as they are also called. Briefly, the phrase includes all post-nuptial acquisitions, which the law does not attribute to one spouse alone. Thus it comprises: (1) the fruits[4] and other profits of all the goods belonging to the community or to either spouse severally, whether originally brought into the marriage or acquired subsequently; (2) all profits accruing from the work, labour, industry, or skill of either of the spouses;[5] (3) official and other salaries; (4) rights

The meaning of 'profit': what the term includes;

[1] A writer in the *S. A. L. J.* (1912), vol. xxix, p. 37, criticizes the phrase 'exclusion of the marital power', and says 'It is certain that the marital power . . . cannot be entirely excluded by an ante-nuptial contract'. The phrase, however, is now statutory (Administration of Estates Act, 1913, sec. 83 (2)), and means, I suppose, 'the marital power which the husband by law possesses over the property and the estate of his wife' (see Precedent of ante-nuptial contract, Appendix B to this book (*infra*, p. 109), clause 5). Hoola van Nooten (vol. i, p. 453) gives a clause of similar import, viz., 'dat gemeenschap van goederen en van winst en verlies uitgesloten zal zijn, en dat de man geen recht zal hebben om de goederen van zijne vrouw te alieneeren, of te bezwaaren'. [2] Gr. 2. 12. 11; Voet, 23. 4. 28. [3] Voet, ibid.

[4] Gr. 2. 12. 12; Voet, 23. 4. 32; Hoola van Nooten, vol. i, p. 427. The profits of goods subject to fidei-commissum are included under the term 'fruits' (Gr. 2. 11. 10); also the benefit of a usufruct. V. d. K. *Th.* 253.

[5] Voet, *ubi sup.*

under contracts concluded by the husband, or by the wife within the limits which the law allows ;[1] (5) property purchased *stante matrimonio* with common moneys,[2] and even with the money (or with the proceeds of the sale of the property) of one of the spouses ; except that in the last case the matter must be adjusted between the spouses on the dissolution of the marriage.[3]

what it does not include.

On the other hand, the term 'profits' does not include : (*a*) property which became due to one or other of the spouses before marriage ;[4] (*b*) accessions (e. g. by alluvion or increased value or otherwise) to the separate property of husband or wife ; (*c*) inheritances, legacies, or gifts accruing after the marriage to either spouse.[5] With regard to this last group considerable difference of opinion existed whether it fell within the definition of 'profits' or not. Most jurists answered the question in the negative.[6] Voet distinguishes according as such acquisitions are derived from strangers or from parents or relations, to whom there is a right of intestate succession. In his view, in the first case they are 'profits', in the second not so.[7] It is with regard, more especially, to such acquisitions as these that it becomes important to determine whether an ante-nuptial contract falls within the first or the second of the four classes mentioned above.

[1] Hoola van Nooten, *ubi sup.*

[2] Voet, 23. 4. 33.

[3] Voet, 23. 4. 35 ; i. e. the thing purchased remains common, but the spouse with whose money it was purchased is credited as against the other spouse with the money so expended. However, property purchased *stante matrimonio* will not become common if the husband intended to acquire it exclusively for himself or for his wife. V. d. K. (*Th.* 254) dissenting from Voet (23. 4. 34). Clothes are a case in point. Van Leeuwen, 4. 24. 14.

[4] Voet, 23. 4. 39 ; e. g. bought before marriage, delivered after marriage. V. d. K. *Th.* 254. The same rule applies to a *res litigiosa* adjudicated to one of the spouses after marriage, even though proceedings may have commenced after marriage. Voet, 23. 4. 40.

[5] Anton. Matthaeus, *Paroemiae*, no. 3 (Erfnis is geen winste) ; Van Leeuwen, 4. 24. 6 ; V. d. K. *Th.* 252.

[6] Gr. 2. 12. 11 (*ad fin.*), and Schorer ad loc.

[7] Voet, 23. 4. 43. Matthaeus (*ubi sup.*, secs. 4–7) is of the same opinion with regard to legacies, but holds that an inheritance never comes under the head of 'profit'.

Community of profit implies also community of loss, so that if either of these is named the other is taken to be implied.[1] As between themselves, indeed, the spouses may make any terms they please, e.g. to share the profits, but to throw all the losses on the husband's estate.[2] But such a clause will not avail against creditors who, where there is community of profits, are entitled, at all events, to enforce half the amount of their claim against the wife's estate.

What is included under the term 'losses'.

The word 'losses' is no less wide in its application than the word 'profits'. Without attempting a complete enumeration of possible cases of loss, it is enough here to say generally that it includes all post-nuptial donations, unless clearly in fraud of the wife, made by the husband of the common property or of the separate property of either spouse ;[3] all commercial losses which do not attach to the separate property of one of the spouses only ;[4] and all liabilities arising out of the post-nuptial contracts of the husband, and also of the wife so far as she is competent to bind her husband by her contracts.[5] But the term 'losses' does not cover the ante-nuptial debts or liabilities of either spouse,[6] nor (*semble*) liabilities arising ex delicto,[7] nor loss or deterioration of property belonging exclusively to one of the spouses ;[8] nor necessary expenses.[9]

[1] *Cens. For.* 1. 1. 12. 18 ; Voet, 23. 4. 48. [2] *Cens. For.* 1. 1. 12. 11.
[3] Voet, 23. 2. 54. [4] Voet, 23. 4. 49.
[5] Hoola van Nooten, vol. i, pp. 431 ff. [6] Voet, 23. 4. 50.
[7] In other words, the joint estate is not chargeable, as between the spouses, with pecuniary liabilities arising ex delicto. See Boel *ad* Loen., no. 99, p. 640 ; V. d. K. *Th.* 94 and 225, and Lorenz *ad* V. d. K. *Th.* 94 ; Nathan, *Common Law of S.A.*, vol. iii, pp. 1547–8. *Infra*, p. 279, n. 2.
[8] Voet, 23. 4. 49 ; V. d. K. *Th.* 257 ; unless the loss or deterioration in question is imputable to the fault of the other spouse. Voet, 24. 3. 21. Useful and voluptuary expenses incurred by one spouse in respect of the other's property must be made good so far as the property is found at the dissolution of the marriage to have been thereby increased in value. Voet, 25. 1. 3–4 ; V. d. K. *Th.* 257. Any excess of value over outlay is reckoned as profits and accrues to the joint account of the spouses, if community of profits is not excluded—otherwise to the husband. Voet, ibid.
[9] Voet, 25. 1. 2 ; V. d. K., *ubi sup.* Necessary expenses are such as are required to preserve property from depreciation. Useful expenses

Various terms in ante-nuptial contracts distinguished as regards their effects.

(a) Exclusion of 'community of goods' only;

The above explanation will enable the reader to distinguish the effect of a clause excluding community of goods only (class 2, *supra*), and of a clause excluding both community of goods and also community of profit and loss (class 3, *supra*). The effect of a clause excluding community of goods only is that the spouses are not liable to creditors for each other's ante-nuptial debts.[1] On dissolution of marriage each of them is credited as between themselves with what he or she brought into the marriage,[2] plus subsequent acquisitions not being 'profits', plus half the net balance, if any, of profits over losses. Each of them is debited with half the net balance, if any, of losses over profits,[3] and by consequence with half the outstanding post-nuptial debts. All this as between the spouses. The creditors may, if they please, recover the whole of their claim from the husband; in which case he has the right of recourse against his wife to the extent of half. They may also, if they choose, after the husband's death recover one-half,[4] but not more, directly from the wife.

If during the marriage the husband has applied his wife's property in paying his own ante-nuptial debts, the money so applied constitutes as between the spouses a first charge [5] upon the net balance, if any, of profits over losses; that is to say, the wife is first credited with

increase the value of the property, though their omission would not render it less valuable. Voluptuary expenses add to its amenity, but do not render it more profitable—speciem ornant non fructum augent. Voet, 25. 1. 1, 3–4.

[1] Voet, 23. 4. 50 (because post-nuptial debts count as 'damnum', ante-nuptial not); V. d. K. *Th.* 255.

[2] Gr. 2. 12. 14; Voet, 23. 4. 31; V. d. K. *Th.* 256.

[3] Voet, 23. 4. 48.

[4] Gr. 1. 5. 22. In an action against her for such half, the plaintiff must aver and prove that the claim had been duly lodged with the person vested with the administration and distribution of the common estate and had not been satisfied. *Faure* v. *Tulbagh Divisional Council* (1890) 8 S. C. 72; and see *Sichel* v. *De Wet* (1885) 5 E. D. C. 88.

[5] Voet, 23. 4. 50. Voet says that in the absence of provision to the contrary, the wife's property may *stante matrimonio* be taken in execution for the husband's ante-nuptial debts. Van der Keessel (*Th.* 255) dissents. But if done by the husband's direction, it seems to be a logical consequence of the marital power.

it, and the remainder of such balance is then divided between the spouses. The wife cannot claim repayment until all post-nuptial creditors have been fully satisfied.[1]

(b) exclusion of community of goods and of profit and loss;

The effect of a clause excluding community both of goods and of profit and loss[2] is that the spouses are not liable to creditors for each other's debts, ante- or post-nuptial.[3] On dissolution of the marriage each of them is credited with what he or she brought into the marriage, plus subsequent acquisitions from all sources whatever.

(c) exclusion of community of goods, and of profit and loss and also of the marital power of administration.

Lastly, by the exclusion of community of goods and of profit and loss and of the marital power (class 4, *supra*) a wife is, as regards her property, in the same position as if the marriage had not taken place.[4] She may contract, and, according to modern practice, sue and be sued in her own name. If the husband has alienated her property without her consent she may vindicate it from the alienee.[5] But if notwithstanding the ante-nuptial contract

[1] Voet, 24. 3. 21. But she may resume such of her property as exists *in specie* on the dissolution of the marriage, subject to the obligation of satisfying creditors *pro semisse*. Neostad. *de pact. antenupt.*, Obs. 9, note A; and the husband is not entitled to deduct expenses. Van Leeuwen, 4. 24. 13.

[2] Kersteman says (*Woordenboek*, sub voc. *Huwelyksche Voorwaarde*, p. 195) that an ante-nuptial pact of this character must be registered.

[3] Except that the wife is liable even *soluto matrimonio* to creditors *pro semisse* in respect of debts for household expenses (Voet, 23. 4. 52; Van Leeuwen, 4. 24. 3; Neostad. *de pact. antenupt.*, Obs. 9, note (d)) with a right of *regressus* against the husband. V. d. K. *Dictat. ad* Gr. 2. 11. 17.

[4] Sometimes this is expressed. So in *Ruperti's Trustees* v. *Ruperti* (1885) 4 S. C. 22, the wife reserved to herself free control over her property 'as fully and effectually as if no marriage had taken place'. *Held*, that she had no tacit hypothec upon her husband's insolvent estate for money lent by her to her husband before his insolvency.

[5] Voet, 23. 4. 21 and 23. 5. 7; Groen. *de leg. abr. ad* Inst. 2. 8. pr. The effect is the same if the power of alienation is expressly taken away, or if the husband has been judicially interdicted. Gr. 1. 5. 24. Van Leeuwen, however (4. 24. 4), says that except in the case mentioned by Grotius, the alienation of the wife's property by the husband, notwithstanding the stipulation to the contrary, will hold good as regards third parties, saving to the wife an action against the husband or his heirs. Van der Keessel (*Th.* 97–8) lays down the same rule as regards the alienation of movables or of bonds to bearer, but not as regards immovables. If Van Leeuwen is right, no ante-nuptial pact can exclude the husband's power of administration and of alienation, so far as concerns third

the wife has suffered her husband to alienate her property, she may sue him in respect of it, and prove against his estate in concurrence with, but not in preference to, other unsecured creditors.[1]

The wife, generally, is not preferred to the husband's creditors;

From what has been said it is evident that, ante-nuptial contracts notwithstanding, a wife, generally, stands in no position of advantage with regard to her husband's creditors, but rather the reverse. In this respect she is not so well situated as she was under the late Roman Law, which gave her a tacit hypothec over all the property of her husband in security of her dos, and a preference over all creditors, ante- and post-nuptial, secured and unsecured, alike.[2] In the Roman-Dutch Law the right of hypothec and preference is disused.[3] It is competent, however, by express stipulation to provide that the wife 'shall reserve to herself her right of dos, legal hypothec,[4] and preference', but only provided that she shares neither in community of goods nor of profit and loss.[5] The same result follows, without express agreement in that behalf, when, in addition to the exclusion of community, there is either: (*a*) exclusion of profit and loss together with a clause that the wife shall keep her own goods (*dat de vrouw haare goederen zal behouden; ut mulier dotem salvam habeat*);[6] or (*b*) an option left to the wife whether she will share in profit and loss, or have her own goods

but in certain cases she has right of preference and legal hypothec.

parties. *Ontwerp*, art. 349, is to the same effect. But in the modern law it is otherwise. *Mostert's Trustees* v. *Mostert* (1885) 4 S. C. 35.

[1] 1 Maasdorp, p. 54.

[2] Cod. 8. 17 (18) 12; Girard, p. 966.

[3] Voet, 20. 2. 20.

[4] V. d. L. 1. 3. 4. It seems that in R.-D. L., contrary to the Roman Law, the wife's legal hypothec was in every case postponed to prior tacit or special conventional mortgages. Gaill, *Pract. Observ.* 2. 25. 10; Van Leeuwen, 4. 13. 14; *Cens. For.* 1. 1. 12. 3; Voet, 20. 2. 20 and 23. 4. 52. According to Van Leeuwen (*ubi sup.*), she comes in concurrently with other special and legal hypothecs; by which he means, as the context shows, that she ranks with them in order of time. Qui prior est tempore potior est jure. But V. d. K. (*Th.* 263) insists that she is preferred to all creditors ante- and post-nuptial alike.

[5] Groen. *de leg. abr. ad* Cod. 5. 12. 30; *Cens. For.* 1. 1. 12. 2; V. d. L. 4. 13. 14.

[6] Voet, 23. 4. 52; V. d. K. *Th.* 247; Hoola van Nooten, vol. i, p. 452.

back,[1] which option she has exercised after her husband's death so as to exclude community; or (*c*) a clause prohibiting the husband from alienating property brought into the marriage by the wife, and the husband has nevertheless alienated the property, or part of it, without her knowledge and consent.[2] In the last case she will also, it seems, be able to vindicate her property in the hands of third parties to whom the husband has made it over.[3] But if the wife, having retained and reserved the possession and administration of her own property, knowingly allows her husband to deal with it, she will lose her hypothec and preference over creditors, just as if she had renounced these rights by a contrary stipulation.[4]

Ante-nuptial contracts sometimes serve the purpose of marriage settlements.

The ante-nuptial pacts above described have all been directed to the exclusion or modification of the common law consequences of marriage.[5] It remains to speak of stipulations of another kind, namely those which may be generically described as 'settlements'. Under this head may be included: (1) gifts made to one or other of the spouses, but more especially to the wife, either by the husband or by some third party, and taking effect immediately upon the conclusion of the marriage; (2) contracts whereby the wife or husband is to receive something by way of gift at some future date, usually upon the death of the other spouse; (3) provisions regulating the devolution

[1] Gr. 2. 12. 10; Voet, 23. 4. 53; Neostad. *de pact. antenupt.*, Obs. 9; Groen. *ubi sup.*; V. d. K. *Th.* 250.

[2] Van Leeuwen, 4. 13. 14; Neostad. op. cit., Obs. 21.

[3] Voet, 23. 4. 21 and 50. This consequence does not follow from a clause merely securing the wife's property to herself. De Haas *ad Cens. For.* 1. 1. 12. 5; Groen. *de leg. abr. ad* Cod. 5. 12. 30. But where there is exclusion of profit and loss such a clause gives her a tacit hypothec and preference over post-nuptial creditors. Groen. loc. cit.; V. d. K. *Dictat. ad* Gr. 2. 12. 9. According to Van Leeuwen (4. 24. 4), even a prohibition of alienation by the husband will not entitle the wife to recover the property from third parties unless the prohibition has been publicly proclaimed (openbaarlyk afgekondigt).

[4] Van Leeuwen, 4. 13. 14; *Mostert's Trustees* v. *Mostert* (1885) 4 S. C. 35.

[5] Before passing to another part of the subject it may be well to warn the reader that every ante-nuptial contract raises its own problem of construction. The rules stated in the text must not be supposed to be inflexible.

of the property brought into the marriage (or part of it) upon the dissolution of the marriage by death.

Morgengave.

To gifts of the first kind the old Dutch Law gave the name of 'morgengave', a term applied originally to a gift by the husband to the wife on the morning after marriage.[1] A provision which took effect only on the death of the husband or wife was known as 'douarie'.[2] *Prima facie* there is no legal objection to any such settlement. The ante-nuptial pact which creates it is, at all events, binding upon the spouses. If made by third parties to either spouse, or by the wife to the husband, or by the husband so as to confer rights on the issue of the marriage, it would by the Dutch common law be good against creditors. But when a husband made a gift or promised a douarie to his wife the law was otherwise; for by express statutory enactment her claim in this regard was only allowed to take effect when her husband's creditors had been fully satisfied. The law on this subject is contained in the Perpetual Edict of Charles V of October 4, 1540, Art. 6, which runs as follows:[3]

Provisions of the Perpetual Edict of October 4, 1540, Art. 6.

'*Item*, whereas many merchants take upon themselves to constitute in favour of their wives large dowers and excessive gifts and profit on their goods, as well in order to contract a marriage as to secure their goods with their aforesaid wives and children, and thereafter are found unable to pay and satisfy their creditors, and wish their wives and widows to be preferred before all creditors, to the great injury of the course of commerce: We will and ordain that the aforesaid wives, who henceforth shall contract marriage with merchants shall not pretend to, have, or receive any dowry (*douwarie*) or other profit on the goods of their husbands, or take part or portion in the profits made by the said husbands or during their marriage [*sic*], although they may have been inherited or given in

[1] Hoola van Nooten, vol. i, p. 446; Wessels, *Hist. R.-D. L.*, p. 463. Boey (*Woordentolk*) says: 'Morgengaav is een gift die de Bruidegom aan de Bruid gewoon is te doen des anderen daags naa 't voltrokke huwelyk als een belooning van haer Maagdom.' V. d. K. *Th.* 258.

[2] V. d. K. *Th.* 259; V. d. L. 1. 3. 4; Wessels, *ubi sup.*

[3] 1 G. P. B. 316.

feud,[1] until such time as all the creditors of their aforesaid husbands shall have been paid or satisfied; whom we will in this matter to be preferred before the aforesaid wives and widows, saving to the latter their right of preference, to which they are entitled by reason of their marriage portion, brought by them into the marriage or given to them or coming to them by succession from their friends and relatives.' [2]

Its effect.

The effect of the Placaat is: (1) that no ante-nuptial contract can secure to a wife any property of the husband in competition with creditors; but (2) that, if she is content, by ante-nuptial contract, to forgo all advantage from the husband's estate, she may keep her own property secure and unimpaired and further enjoy in respect of it a preference over creditors and a tacit hypothec over her husband's goods. But she cannot have it both ways. If she claims to benefit financially by the marriage, she must also take her full share in its burdens. In order to secure her property against creditors it is necessary that she should be content to keep her estate entirely distinct from that of her husband.

It must be observed that though the Placaat speaks expressly of 'merchants', it has never been held to be so limited in its application.[3]

If the practice before the passing of this measure operated in prejudice of creditors, the enactment has in modern times been thought to be unduly oppressive to married women.[4] Accordingly, the law has in many of the Colonies been altered by legislation in the direction of securing the validity of settlements. Thus in the Cape Province the sixth article of the Perpetual Edict has been repealed by Act 21 of 1875, which, in its place, enacts in effect: (1) That no ante-nuptial contract shall be valid against creditors unless registered (s. 2); (2) that a settlement made with intent to defraud creditors shall be of no force or effect against creditors whose debts existed at the

Legislation on marriage settlements in South Africa.

[1] Al waer 't soo dat sy ghe-erft oft beleent waren.
[2] See *In re Insolvent Estate Chiappini* (1869) Buch. 143.
[3] V. d. K. *Th.* 262. [4] Wessels, *Hist. R.-D. L.*, p. 464.

date of registration, if sequestration takes place within two years of the execution of the settlement (s. 3); (3) that where there is a covenant or agreement for a settlement any act done in pursuance thereof is, in like circumstances, invalid against creditors whose claim existed at the date of such act, for five years from the making thereof (s. 4); (4) that nothing in the Act contained shall protect any ante-nuptial contract or any provision in an ante-nuptial contract which apart from the act is void or voidable by reason of fraud (s. 11). The statute further enacts that if a life policy has been executed or ceded in pursuance of an antenuptial contract by one spouse in favour of the other, premiums paid by the settling spouse are not to be adversely affected by such spouse's insolvency (s. 6). Provisions similar to the above have been enacted also in the Transvaal [1] and in the Orange Free State.[2]

Stipulations with regard to rights of succession upon death.

Closely akin with, and sometimes indistinguishable from, the settlements described in the preceding paragraphs are pacts relating to future succession.[3] These, as pointed out by Voet, may relate either: (1) to the succession of the spouses to each other;[4] or (2) to the succession of a third party to the spouses;[5] or (3) to the succession to the children of the marriage, particularly in the event of their dying under age and therefore intestate;[6] or (4) to the succession to a third person who has become a party to the ante-nuptial contract.[7] Such agreements, though condemned by the policy of the Civil Law, were permitted by the law of Holland, if they formed part of an ante-nuptial settlement,[8] but not of any other act *inter vivos*.[9]

Can ante-nuptial contracts be revoked or

This brings us to another topic. How far, if at all, can ante-nuptial contracts be revoked or modified by the subsequent act of one or more of the parties? By act

[1] Insolvency Law, No. 13 of 1895, sec. 39. [2] Law, No. 23, 1899.
[3] Voet, 23. 4. 57 (sec. 58 in the Paris ed. In the folio ed. sec. 57 is duplicated).
[4] V. d. K. *Th.* 235–8. [5] V. d. K. *Th.* 239–40.
[6] V. d. K. *Th.* 241–3. [7] V. d. K. *Th.* 244–6.
[8] Voet, 2. 14. 16. [9] Voet, 23. 4. 59 (60).

inter vivos they cannot be altered at all ;[1] by testament, within limits, they may, provided such an intention is clearly expressed or implied by the will.[2] Of course, if property has been contributed to the marriage by a parent or other third party with an added provision that it is to revert to the giver or go over to another specified person, it cannot be affected by the testamentary dispositions of the spouses.[3] When the question relates to property brought into the marriage by the spouses, and the ante-nuptial contract has provided for mutual succession, or at all events for the succession of one to the other, alteration or revocation by will is permitted, but it must be a mutual will of the two spouses. Further, such a will is merely 'ambulatory' in effect, i. e. revocable at any time before death. Therefore, either spouse may by a subsequent will, without the concurrence or even knowledge of the other, revoke so much of the joint will as concerns himself or herself alone and revert to the dispositions contained in the original contract. Indeed, even after the death of the first spouse, the survivor has the same right of repudiating the joint testament, conditionally, however, upon declining all benefit under it.[4] When the spouses have by ante-nuptial contract provided that some third person or persons shall succeed to the several shares on the dissolution of the marriage, both spouses by mutual will or a surviving spouse by his or her separate will may freely depart from this agreement. A joint will is in fact merely two wills of two persons disposing of two estates.[5] But the law is otherwise if the intended successor was a party to the ante-nuptial contract and acquired a contractual right under it.[6] When the future succession to children is the subject of the ante-

modified by the parties ?

Only by mutual will.

Which, however, may in turn be revoked pro tanto by either of the spouses alone.

[1] Neostad. *de pact. antenupt.*, Obs. 4 (*in notis*); Voet, *ubi sup.*; V. d. K. *Th.* 264.
[2] Voet, 23. 4. 60 (61); V. d. K. *Th.* 265.
[3] Voet, 23. 4. 61 (62). *Secus* if it is merely to revert 'to the side whence it came'.
[4] Voet, 23. 4. 62 (63).
[5] Voet, 23. 4. 63 (64). *Infra*, pp. 324–5.
[6] Voet, 23. 4. 64 (65).

nuptial pact, in Holland not only might the spouses (or the survivor of them) alter the arrangement by testament, but the children, having reached the age of testamentary capacity, might do the like after their parents' death. They might also freely alienate the property by act *inter vivos*. This must be understood, of course, only where there was no fideicommissum in favour of ulterior successors.[1] When a third person has become a party to the contract and has undertaken to leave his own property in a particular way, such undertaking has the force of a contract, and can only be revoked with the consent of the other parties to the agreement.[2]

With this we leave the subject of ante-nuptial contracts, referring the reader for fuller information to Voet's title 23. 4 (*de pactis dotalibus*) and to the other works in which this topic is fully considered.[3]

Section 5. Dissolution of Marriage

Divorce a vinculo matrimonii.

Divorce a vinculo matrimonii is decreed by the Court at the suit of a plaintiff of either sex on the ground of: (1) adultery;[4] or (2) malicious desertion;[5] to which some authorities, by an extensive interpretation, add (3) sodomy;[6] and (4) perpetual imprisonment.[7] Relief may, in the discretion of the Court, be refused on the ground of: (*a*) adultery on the part of the plaintiff;[8] (*b*) condonation; (*c*) collusion or connivance.[9]

Divorced persons are free to marry again, except that persons who have committed adultery together are prohibited from intermarriage.[10]

[1] Gr. 2. 29. 3; Voet, 23. 4. 66 (67). [2] Voet, 23. 4. 67 (68).
[3] See particularly Neostadius, *Observationes rerum judicatarum de pactis antenuptialibus.*
[4] Gr. 1. 5. 18; Van Leeuwen, 1. 15. 1; Voet, 24. 2. 5.
[5] Voet, 24. 2. 9.
[6] Schorer *ad* Gr. *ubi sup.*; V. d. K. *Th.* 88; V. d. L. 1. 3. 9.
[7] V. d. K. *Th.* 89; V. d. L. loc. cit.; *Jooste* v. *Jooste* (1907) 24 S. C. 329; which discusses also the procedure to be followed in case of malicious desertion. [8] Voet, 24. 2. 5–6.
[9] 1 Maasdorp, p. 82; *Hasler* v. *Hasler* (1896) 13 S. C. 377.
[10] *Supra*, p. 66. As to custody of children see Van Leeuwen, 1. 15. 6.

The guilty party to a divorce is, after judicial sentence, penalized by loss of all the advantages of the marriage, whether arising from community of goods or from ante-nuptial contract.[1]

Separation a mensa et thoro.

Judicial separation a mensa et thoro is decreed by the Court on the ground of cruelty or for other sufficient cause.[2] The result is to relieve the parties from the personal consequences of marriage, but not to dissolve the marriage tie. As regards the effect of such a decree upon the proprietary rights of the spouses the Dutch authorities are by no means agreed.[3] In the modern practice the matter is very much in the discretion of the Court. An order is usually made, if asked for, directing a division of the common estate, or a rescission of an ante-nuptial contract which confers a benefit on the guilty spouse, conditionally, however, on the innocent spouse renouncing any corresponding advantage. The effect of such a decree is to dissolve the community, and to free each spouse from liability for the other's debts subsequently contracted.[4] Further, in the event of the husband's insolvency the wife ranks as a preferred creditor for half of the common estate.[5] A decree of alimony to the wife lies in the discretion of the Court.[6]

Decree of nullity of marriage.

A decree of nullity of marriage[7] is granted: (1) when the parties have married within the prohibited degrees; (2) at the suit of a parent when minors have married without the necessary consent; (3) in case of impotency

[1] Van Leeuwen, 4. 24. 10; V. d. K. *Th.* 88; *Celliers* v. *Celliers* [1904] T. S. 926. But the Court will not deprive the guilty party of the share of the joint estate which he or she may have contributed. Ibid.

[2] Gr. 1. 5. 20; Van Leeuwen, 1. 15. 3; Voet, 24. 2. 16.

[3] Schorer *ad* Gr. 1. 5. 20; Voet, 24. 2. 17; V. d. K. *Th.* 90. As to the effect, if any, of separation by mutual consent, see Schorer *ubi sup.*; Voet, 24. 2. 18; and for South African Law 1 Maasdorp, p. 76.

[4] 1 Maasdorp, p. 77.

[5] *Luzmoor v. Luzmoor* [1905] T. H. 74. 'To ascertain what this half share amounts to, the debts of the common estate up to the date of the order of the Court must, of course, be first deducted, and she will be entitled to half of what remains.' Per Smith J.

[6] Voet, 24. 4. 18.

[7] Voet, 24. 2. 15.

existing antecedently [1] to the marriage; (4) in case of ante-nuptial stuprum followed by pregnancy of the wife, unknown to the husband and not condoned by cohabitation with knowledge of the facts; [2] (5) in case of insanity.[3]

Section 6. Miscellaneous Matters relating to Marriage

Miscellaneous matters relating to marriage:

In this section we shall deal with various matters relating to marriage, but not specially connected with one another. These are: (A) Donations between the spouses; (B) Boedelhouderschap, and continuation of community after the death of one spouse; (C) Second marriages.

A. Donations between spouses.

(A) *Donations between the spouses.* In the Civil Law such gifts were prohibited by custom,[4] and were regulated by a Senatus Consultum passed on the proposition of Antoninus (Caracalla) in the year 206 A. D.[5] The rule passed into the Roman-Dutch Law.[6] It follows that a spouse donee has no dominium and cannot give a valid title to third parties. But such gifts, if validly executed, are confirmed by the death of the donor.[7] Once a donation is confirmed, the donee acquires the right to keep the gift, if it has been transferred, or to demand it, if it has not. The gift may be revoked, and is *ipso jure* void, if the donee predeceases the donor.

B. Boedelhouderschap.

(B) *Boedelhouderschap.* In certain cases the community which exists between the spouses (or would have existed if the common law had not been excluded) is continued

[1] Van Leeuwen, 1. 15. 5; Voet, 24. 2. 16. See *Jones & Ingram, Leading Cases in South African Law* (pt. 1, Persons), p. 64.

[2] Voet, 24. 2. 15; *Nel* v. *Nel* (1841) 1 Menz. 274; *Horak* v. *Horak* (1860) 3 Searle 389.

[3] *Prinsloo's Curators bonis* v. *Crafford and Prinsloo* [1905] T. S. 669.

[4] Dig. 24. 1. 1.

[5] Dig. 24. 1. 32. pr. As to the effect of this S. C. see Roby, *Roman Private Law*, vol. i, pp. 159 ff., and Girard, p. 945.

[6] Gr. 3. 2. 9; Van Leeuwen, 4. 24. 14; Voet, 24. 1. 17; V. d. K. *Th.* 486; *Van der Byl's Assignees* v. *Van der Byl* (1886) 5 S. C. at p. 176.

[7] Dig. 24. 1. 32. 2; Cod. 5. 16. 1; Voet, 24. 1. 4; provided that the estate of the donor is not then insolvent. Voet, 24. 1. 6. For exceptions to the rule prohibiting donations between spouses see 1 Maasdorp, pp. 32–3.

(or called into existence)[1] between a surviving spouse and the heirs of the deceased. This result may be effected: (1) by the ante-nuptial contract or mutual testament of the spouses;[2] (2) (under a local custom or statute) by the separate will of the deceased spouse,[3] in which the survivor is appointed executor of the will and administrator of the joint estate during the minority of the children in both cases there must be an express direction in the will that the community is to continue, or come into existence; (3) by operation of law. This takes place in one case only: viz. 'if the surviving father or mother, being at the same time guardian of the children, fails to draw up an inventory or make to them the "proof" or buy out their interest (noch aan dezelven bewijs, vertigting of uitkoop doet). The consequence is that the community of goods continues between the survivor and the children, and to the advantage of the latter, who enjoy the half of all the profits that accrue to the estate after the death of their deceased parent, but not to their prejudice, inasmuch as all losses are borne by the surviving parent.' So the law is stated by Van der Linden, who adds: 'At least this rule applies when local statutes have not provided differently on this point'. Van der Keessel, however, regards this penal and one-sided community as resting, in every case where it occurs, on local custom only, and, in accordance with a principle laid down by himself in an earlier Thesis, takes Grotius to task for inferring a rule of common or general law from a number of particular instances of merely local application.[5] However this may be, it appears from the above authors as well as from Grotius, Schorer, and Bynkershoek,[6]

[1] V. d. K. *Th.* 267 and 144.
[2] V. d. K. *Th.* 266–7.
[3] V. d. K. *Th.* 269.
[4] V. d. L. 1. 5. 4 (based on Juta's translation). See also Van Leeuwen (4. 23. 7), who says that the law 'has been introduced in favour of the innocence of young children, and as a punishment of wicked parents'.
[5] V. d. K. *Th.* 270–1.
[6] Gr. 2. 13. 2–3; and Schorer ad loc.; Bynkershoek, *Quaest. Jur. Priv.*, lib. III, cap. x; Voet, 24. 3. 36; *Natal Bank, Ltd.* v. *Rood* [1910] A. C. 570; in appeal from the Transvaal S. C. [1909] T. S. 243.

that when the community continues at the desire of the parties concerned, viz. by virtue of an ante-nuptial contract or mutual will, or, where permitted, by the will of the deceased, or by agreement between the parent and the children, being of full age, it continues for all purposes, or at all events for the purpose of profit and loss; and that the one-sided community above described, arises not by act of party, but *ipso jure*, i.e. only when the survivor, being under a duty to do so, neglects to make an inventory or to assign to the children their share of the joint estate. Finally, it is to be observed that, where Boedelhouderschap exists, it is not determined by the remarriage of the surviving spouse.[1] This gives rise to difficult questions as to the respective shares, when the community eventually determines, of the children of the first marriage, the remarrying parent, and the second wife (or husband). For the resolution of these problems the reader is referred to Van der Keessel, *Theses*, 273–6. In the Cape Province, however, such difficulties can scarcely arise, in consequence of the statutory provisions to be presently mentioned.

C. Second marriages.

(C) *Second marriages.* In the Civil Law second marriages entailed numerous penalties, which, says Van der Linden, have not been adopted by us.[2] He excepts from this statement lex 6 of the relevant title in the Code, which is called from its opening words the *Lex hac edictali*.[3] It is an enactment of Leo and Anthemius of the year A.D. 472, and provides that no man or woman who remarries, having children by a former marriage, may by gift *inter vivos* or by will settle on the second spouse more than the amount of the smallest portion bequeathed to any of the children of the former marriage.[4] A gift contrary to this law is void to the extent of the excess, and the excess must be equally divided amongst the children of the prior marriage or marriages alone.

[1] Van Leeuwen, 4. 23. 8.
[2] V. d. L. 1. 3. 10; and see Van Leeuwen, 1. 14. 14.
[3] Cod. 5. 9. 6 (*de secundis nuptiis*).
[4] Van Leeuwen, 4. 24. 8.

This well-known enactment need not detain us further, since in the Roman-Dutch Colonies it has either never been received or been repealed by statute.[1]

Another rule relating to remarriage is that which imposes upon the surviving parent, before contracting another marriage, the duty of paying or securing to the minor children of the first marriage the shares due to them out of the estate of the deceased.[2] By the Civil Law the penalty for remarrying in breach of this rule was the forfeiture by the defaulting spouse of any property accruing to him or her from the estate of the deceased.[3] In South Africa the defaulting spouse forfeits his or her share in the joint estate for the benefit of the minor children, besides incurring a statutory penalty of fine or imprisonment.[4]

CHAPTER VI

UNSOUNDNESS OF MIND. PRODIGALITY

Unsoundness of mind.

In an earlier chapter we saw that curators dative are appointed by the Court for insane persons, and (after interdiction) for prodigals. It is tempting to speak of unsoundness of mind as constituting a status; but it would not be correct to do so, for mental unsoundness is not necessarily permanent or constant, and the question which must be answered is not, 'Has the man been declared mad?' but, 'Was he, in fact, incapable of understanding

[1] Repealed in the Cape Province by Act 26 of 1873, sec. 2; in the Transvaal by Procl. 28 of 1902, sec. 127; in the Free State by the Law Book of 1901, chap. xcii, sec. 1; in Natal by Laws No. 22, 1863, sec. 3; No. 17, 1871, sec. 1; No. 7, 1885, sec. 3; in British Guiana by Ord. No. 12 of 1906, sec. 10. In Ceylon the lex hac edictali has, apparently, never been recognized.

[2] Gr. 1. 9. 6–7; Voet, 23. 2. 100–1; V. d. K. *Th.* 142 ff.; Administration of Estates Act, 1913, sec. 56.

[3] Voet, 23. 2. 101: Binubus aut binuba amittat proprietatem relictorum sibi a priore conjuge cessuram aequaliter liberis prioris thori . . . solumque retineat usumfructum, quamdiu superstes fuerit.

[4] Administration of Estates Act, 1913, sec. 56 (3).

the particular transaction which is brought in issue?'[1] If the answer is affirmative, then the transaction is wholly void[2] for 'furiosus nullum negotium gerere potest, quia non intelligit quid agit'.[3] The same principle applies to any other form of mental alienation.[4] It is immaterial that the other party to the transaction was unaware of the condition of the person with whom he was dealing.

Furiosus nullum negotium gerere potest.

Qualifications of the rule.

The rule, however, admits two qualifications: (1) The Roman-Dutch Law, while denying the capacity of an insane person to bind himself by contract, recognizes the equity of allowing a person who has in good faith expended money on behalf of a lunatic to have his expenses recouped.[5] (2) 'Where acts have been done on behalf of an insane person by virtue of a power of attorney (or other mandate) given by him before he was bereft of his reason, there are authorities, such as Digest 46. 3. 32, and Pothier on Obligations, sec. 81, from which it might be fairly inferred that want of knowledge regarding the principal's change of condition would protect persons dealing with the agent. The power is revoked by reason of the insanity; but if the power held out the agent as a person with whom third parties might contract as such until they receive notice of the revocation of the authority, their knowledge of the insanity would have an important bearing on their right to recover upon a contract thus made. That would, however, be a very different matter from saying that an agent appointed after the insanity of the principal could, under the Roman-Dutch Law, validly bind such principal.'[6]

Interdicted prodigals.

The condition of the prodigal after interdiction and public notification thereof may correctly be described as

[1] *Prinsloo's Curators bonis* v. *Crafford & Prinsloo* [1905] T. S. 669.
[2] Gr. 3. 1. 19.
[3] Inst. 3. 19. 8; Van Leeuwen, 2. 7. 8.
[4] Such as drunkenness. Gr. 3. 14. 5.
[5] *Molyneux* v. *Natal Land and Colonization Co.* [1905] A. C. 555; in appeal from Natal (24 N. L. R. 259), per Sir Henry de Villiers, at p. 569.
[6] Ibid. at p. 563. The P. C. judgment in Appeal is reproduced in 26 N. L. R. 423.

a status. Until the interdict has been removed and the removal notified he is for most purposes subject to the same legal incapacities as a minor, and, like the minor, he can without his curator's authority enter into a contract which is solely advantageous.

CHAPTER VII

JURISTIC PERSONS

Juristic persons.

To enter upon a detailed discussion of this topic lies outside our scope. The Romans, more or less consciously, attributed an artificial personality to four several institutions :[1] viz. (1) Corporations (*corpora-universitates*) ; (2) Charities (*piae causae*) ; (3) the Fiscus ; (4) Hereditas jacens. These categories, or something like them, reappear in the Dutch Law of Holland.[2] In the modern law the second and the fourth may be ignored ; the second, because we no longer attribute any kind of personality to an unincorporated charity, the only personality which comes in question being that of the trustees in whom the trust-property is vested ;[3] the fourth, because it is of little or no practical importance. The first and the third remain. But the rights of the Fisc, i.e. of the State or Crown, may be said to belong rather to public than to private law ; while the rights, duties, and powers of corporations are, at the present day, most often defined by the terms of some general or special statute.[4] If on the one hand corporations, being persons, are *prima facie* capable

Corporations : their nature and capacity ;

[1] Goudsmit, *Pandecten-Systeem*, vol. i, pp. 61 ff.

[2] Fock. And., vol. i, pp. 140 ff.

[3] The various organizations known in South Africa as voluntary associations seem to fall under the same category. 1 Maasdorp, pp. 272–3. But see *Committee of the Johannesburg Public Library* v. *Spence* (1898) Off. Rep. 84. In Ceylon the English law of Corporations was introduced by Ord. No. 22 of 1866. This seems to leave no place for the *pia causa* as a distinct juristic entity. See Arunachalam, *Digest of the Civil Law of Ceylon*, vol. i, pp. 181 ff.

[4] In Brit. Gui. Ord. No. 17 of 1913 substantially enacts the English Companies Act of 1908.

of enjoying the same rights and of incurring the same liabilities as natural persons, on the other hand this general proposition receives a necessary limitation both from the mere fact of their artificial personality and also from the terms and objects of the incorporation in each particular case. Within these limits, a corporation may acquire, own, and possess property; may contract; may sue and be sued in Courts of law. But from the nature of the case it can only act through its agents properly authorized, whether permanently or for the particular work in hand.[1] Every corporation derives its being from the State, being created by a special act of the Legislature (or by the prerogative of the Crown) or under the provisions of a general Act, as is the case with most trading companies.[2] It ceases to exist: (*a*) when it has been called into existence for a limited time and that time has expired; (*b*) when all the individuals composing it (*corporators*) are dead—if only one member survives, it seems that the corporation still continues in his person; (*c*) when the members (and in the absence of contrary provision the majority of members voting) resolve that the corporation shall be dissolved, provided that in the particular case such mode of dissolution is not forbidden or excluded by law or by the constitution of the corporation; (*d*) when any other event occurs which the law prescribes for the dissolution of the corporation in question. With these few words on the nature of corporations in general we leave the student to pursue the subject, as he may find desirable, in the law of the particular Colony which concerns him.

how created;

how dissolved.

[1] Goudsmit, vol. i, p. 69.

[2] 1 Maasdorp, p. 270; Goudsmit, p. 71: Eene corporatie is dan aanwezig, zoodra meerdere personen met een gemeenschappelijk en geoorloofd doel zich hebben vereenigd tot het scheppen van een van de bijzondere leden afgescheiden rechtspersoon en deze als zoodanig van staatswege is erkend, hetzij ten gevolge van eenen algemeenen rechtsregel, hetzij telkens door eene bijzondere vergunning.

APPENDIX A

Form of Grant of Venia Aetatis in Ceylon

By His Excellency

Sir Henry Edward McCallum, Knight Grand Cross of the Most distinguished Order of Saint Michael and Saint George, Governor and Commander in Chief in and over the Island of Ceylon with the Dependencies thereof.

(Sgd.) Henry McCallum.

To all to whom These Presents shall come Greeting.

Whereas A. B. of by his Petition to us dated the solicited Letters of Venia Aetatis to supply his want of age and to enable him to manage transact and administer his affairs and property as fully and effectually to all intents and purposes as if he had attained his full age.

And whereas it appears to us that the said A. B. is capable of managing his own affairs.

Now these presents witness that having taken the said Petition into consideration we do hereby grant these our Letters of Venia Aetatis to the said A. B. thus supplying his want of age as fully and effectually to all intents and purposes as if he had attained the age of twenty-one years.

And we do hereby also authorize him the said A. B. to administer or cause to be administered all and singular his affairs and property and to manage and dispose of such property according to the Laws and customs of this country as if he had attained the said age of twenty-one years provided that he the said A. B. shall not alienate any immovable property whatsoever without the sanction of the District Court within the Territorial Jurisdiction of which such property shall be situated, and except as aforesaid all and singular the acts matters and things that the said A. B. shall or may do by virtue of these presents shall be considered valid and Legal to all intents and purposes without the same being impeached or called in question on the ground of minority of the said A. B.

And we do hereby require and Command the several Courts of Justice in this Island and all subjects of His Majesty the King to conform themselves to these Presents all objections to the contrary notwithstanding.

Given under Our Hand and the Public Seal of the Said Island on this day of in the year of Our Lord one thousand nine Hundred and

By His Excellency's Command
Colonial Secretary.

APPENDIX B

Form of Ante-nuptial contract in use in South Africa

[From *The Notarial Practice of South Africa*, by C. H. Van Zyl, p. 201.]

Know all whom it may concern,

That on this the day of one thousand nine hundred and before me, A. B. of Cape of Good Hope, Notary Public, by lawful authority, duly sworn and admitted, and in the presence of the subscribing witnesses, personally came and appeared C. D. of Bachelor, and E. F. of Spinster, who declared that whereas a marriage has been agreed upon, and is intended to be shortly had and solemnized between them, they do, by these presents, contract and agree, each with the other, as follows :

FIRST.—That there shall be no community of property or of profit or loss between the said intended spouses, but that he or she respectively retain and possess all his or her estate and effects movable or immovable, in possession, reversion, expectancy or contingency, as fully and effectually as if the said intended marriage did not take place.

SECOND.—That the one of them shall not be answerable for the debts and engagements of the other of them, whether contracted before or after the said intended marriage.

THIRD.—That all inheritances, legacies, gifts, or bequests, which may devolve upon, or be left, given or bequeathed to either of the said intended spouses, shall be the sole and exclusive property of him or her upon whom the same shall devolve, or to whom the same may be left, given, or bequeathed.

FOURTH.—That each of the said intended spouses shall be at full liberty to dispose of his or her property and effects by will, codicil or other testamentary disposition, as he or she may think fit, without the hindrance or interference in any manner of the other of them.

FIFTH.—That the marital power which the husband by law possesses over the property and the estate of his wife, is hereby excluded, and that he is expressly deprived thereof over the estate of his intended spouse.

UPON ALL WHICH conditions and stipulations the appearers declared it to be their intention to solemnize the said intended marriage, and mutually promised and agreed to allow each other the full force and effect hereof under obligation of their persons and property according to law.

THUS DONE, contracted and agreed at aforesaid, the day, month, and year first aforewritten, in the presence of the subscribing witnesses.

As witnesses : (Sgd.)

1. G . H . C . D .
2. I . J . E . F .

Quod Attestor.

A . B .

Notary Public.

BOOK II

THE LAW OF PROPERTY

The 'Law of Things'.

THE Roman institutional writers make the Law of Things the second great division of the Jus Privatum. Under this general head they include: (1) Ownership, and Modes of Acquisition; (2) Proprietary rights less than ownership, such as Servitudes; (3) Inheritance, Testamentary and Intestate; (4) Obligations arising from Contract and from Delict. What the common element is which makes these various topics all referable to one great branch of law is not at once apparent. Probably it is ownership. 'The true point of contact between the various res seems in reality to be the fact that whoever has a res is actually or prospectively so much the better off.'[1] Accordingly Grotius defines 'things' as 'whatever is external to man and in any way useful to man'.[2] This, however, is not wide enough, for 'thing' in its legal significance includes not merely material things but also rights over material things (*jura in rem*) and rights to services (*jura in personam*). Voet's definition of res as 'everything of which the Courts take cognizance'[3] is perhaps to be preferred. It is, however, unprofitable to labour to define what is scarcely definable.

In the following pages we shall follow modern practice and treat as separate and principal divisions of the Law:—the Law of Property, the Law of Obligations, and the Law of Succession. The subject of this Book is the Law of Property.

[1] Moyle, Justinian's *Institutes*, 5th ed., p. 187.

[2] Gr. 2. 1. 3: Zaken noemen wy hier al wat daer is buiten den mensch, den mensch eenichsints nut zijnde.

[3] Voet (*Elem. Jur.* 2. 1. 1): Res est omne id de quo jus dicitur. Jus namque dicitur inter personas, de rebus, auxilio actionum.

CHAPTER I

THE MEANING OF OWNERSHIP

Dominion or Ownership

DOMINION or Ownership is the relation protected by law in which a man stands to a material thing which he is able to: (*a*) possess, (*b*) use and enjoy, (*c*) alienate.[1] To constitute full ownership these rights must be exclusive. Where all these rights are vested in one person to the exclusion of all others he is sole owner.[2] Where all these rights are vested in two or more persons to the exclusion of all others they are co-owners. If one or more of these rights is vested in one person, the remainder in another or others, the ownership of each of such persons is qualified or restricted.[3] Thus, if you have by contract or otherwise acquired the right to: (*a*) possess, or (*b*) use, or (*c*) alienate, my property, my ownership is, so far, restricted; and ownership is, so far, vested not in me but in you. But since to speak of us both as owner would be misleading, unless the degree of ownership of each of us were on every occasion exactly specified, it is usual to speak of one of us only as owner of the thing, and as having a restricted ownership in it, while the other is spoken of as owner of the right, and as having a *right* of possession, *right* of use and enjoyment, *right* of alienation, in or over the property of another. Hereupon the question arises which of two or more such competitors is to be regarded as owner, which not as owner. The answer depends not so much on the extent of the right or of the profit derived from it as on the consideration where the residue of rights remains after the deduction from full ownership of some specific right or rights of greater or less extent. Thus, if I give you a right of way over my field, clearly your right is

Full ownership and qualified ownership.

Jura in re aliena.

[1] Holland, *Jurisprudence* (11th ed.), p. 205; V. d. L. 1. 7. 1. The right to possess may be taken to include the *jus vindicandi* which Grotius (2. 3. 1) puts in the forefront in his definition of ownership: Eigendom is de toe-behoorte tot een zaeck, waerdoor iemand, schoon het bezit niet hebbende, 't zelve vermag rechtelick te bekomen.

[2] Gr. 2. 3. 10.

[3] Gr. 2. 3. 11; 2. 33. 1.

specific and limited, mine is unlimited and residuary.[1] I therefore am owner, you not. The same applies if you have the usufruct of property, the residuary rights over which are vested in me, or even if you have an inheritable right of the kind termed emphyteusis.[2] In all these cases the dominion remains in me, but in the two last, being reduced to a mere shadow, at all events for the time, it is merely bare ownership (*nuda proprietas*), i.e. ownership stripped of its most valuable incidents. All the above-mentioned rights, it must be noted, whether greater or less, are rights of property, and as such protected by appropriate remedies against all the world (*jura in rem*); but while the residuary right, however reduced, is a right of ownership (*dominium—jus in re propria*), the specific rights, however extended, are rights inferior to ownership (*jura in re aliena*). In the following chapters we shall ask:

Topics of the 'Law of Property'

1. How things are classified in law (chap. ii).
2. How the ownership of things is acquired (chap. iii).
3. What ownership means and what an owner may and may not do with his own (chap. iv).
4. What is the nature and scope of the various rights connected with and derived from ownership under the names of Possession (chap. v), Servitude (chap. vi), and Hypothec (chap. vii).

CHAPTER II

CLASSIFICATION OF THINGS

How 'Things' are classified.

WHEN we speak of the classification of things, we mean their classification according to the legal system which we are examining. In the Roman-Dutch system things are classified first, according to their relation to persons, i.e. in regard to the question whether they are or are not

[1] Gr. 2. 33. 5.

[2] Gr. 2. 33. 1; Dig. 6. 3. 1.: Qui in perpetuum fundum fruendum conduxerunt a municipibus, *quamvis non efficiantur domini*, &c.

objects of ownership; and secondly, according to their nature, as corporeal and incorporeal, movable and immovable.[1] The significance of these distinctions will appear from the sequel.

Things as objects of ownership.

THINGS AS OBJECTS OF OWNERSHIP. Justinian distinguishes things as (*a*) res communes, (*b*) res publicae, (*c*) res universitatis, (*d*) res nullius, (*e*) res singulorum.[2] A simpler arrangement would classify things as:

A. Things legally incapable of ownership (*res extra commercium*).

B. Things legally capable of ownership (*res in commercio*); which again are either:

1. Ownable in law, but unowned in fact (*res nullius*); or

2. Ownable in law, and owned in fact; whether (*a*) by individuals (*res singulorum*), or (*b*) by corporations and similar juristic persons (*res universitatis*).

Things unownable.

Things unownable. Things common and things public are legally incapable of ownership.[3] To the class of things common, i.e. common to all mankind, are referred the air, flowing water, the sea, and the sea shore.[4] The class of things public includes harbours,[5] public rivers or lakes [6] and public roads.[7] The distinction between things common and things public is not always maintained in the texts of the Roman Law,[8] and indeed is of small importance. The substantial thing is that none of the abovementioned things can be owned either by individuals or by corporations, i.e. they are all extra commercium. Thus, the air is insusceptible of ownership; but it is not inconsistent with this that a land-owner has certain rights in respect of the air incumbent on his land, so that, e.g.

Res communes and res publicae.

The air.

[1] Gr. 2. 1. 4. [2] Inst. 2. 1. pr.; Gr. 2. 1. 16; Voet, 1. 8. 1.

[3] Voet, indeed, treats *res publicae* as *res alicujus* scil. populi, but the arrangement in the text is preferable. Cf. Dig. 41. 1. 14. pr.

[4] Inst. 2. 1. 1; Dig. 1. 8. 2; Gr. 2. 1. 17 and 21; Voet, 1. 8. 3.

[5] Inst. 2. 1. 2. [6] Gr. 2. 1. 25–9; Van Leeuwen, 2. 1. 12.

[7] 'Herewegen.' Gr. 2. 35. 9; *Cens. For.* 1. 2. 14. 34.

[8] Voet, 8. 1. 2. Thus in Inst. 2. 1. 1, we read: communia sunt omnium haec: aer et aqua profluens et mare et *per hoc litora maris.* But in Dig. 43. 8. 3. pr. Celsus says: Litora, in quae populus Romanus imperium habet, populi Romani esse arbitror.

he may require his neighbour not to project his building into it.[1]

The seashore.

The seashore is insusceptible of ownership.[2] The use of it is common to the people of the State, so that every member of the community may use it for any lawful purpose not inconsistent with the rights of others.[3] The seashore extends on the land side as far as the highest winter flood.[4]

Public rivers.

Rivers are either public or private. Public rivers are such as flow perennially;[5] rivers which do not flow perennially are private. But a public river does not become private merely from the circumstance of its having dried up in one summer.[6] Private rivers are matter of private right and call for no further reference in this place. Public rivers are publici juris. As such they cannot be privately owned, but may be used and

[1] Gr. 2. 1. 23; 2. 34. 8.

[2] Grotius (2. 1. 21), apparently in order to reconcile two inconsistent texts of the Roman Law (Inst. 2. 1. 1 and 2. 1. 5), makes the shore below mid-tide *res communis*, the shore above mid-tide *res publica*; but the distinction is devoid of significance. As to the rights of the Crown and of the public in the seashore in the modern law, see Appendix A to this Book (*infra*, p. 182).

[3] This in Roman Law included the right of building; and the ground occupied became the property of the owner of the fabric, but only for so long as the building stood. Dig. 1. 8. 6. pr.; 41. 1. 14; Voet, 1. 8. 3.

[4] Inst. 2. 1. 3. On the seaside it extends presumably so far as the lowest ebb, but this is not stated.

[5] Dig. 43. 12. 1. 3: Publicum flumen esse Cassius definit, quod perenne sit. Does the same criterion apply to a *rivus*? In Cape Law: 'Under the designation of public streams are included all perennial rivers, whether navigable or not, and all streams which, although not large enough to be considered as rivers, are yet perennial, and are capable of being applied to the common use of the riparian proprietors. Under the designation of private streams are included rivers and streams which are not perennial, and streamlets which, although perennial, are so weak as to be incapable of being applied to common use.' Sir Henry de Villiers C. J., in *Van Heerden* v. *Wiese* (1880) 1 Buch. A. C. at p. 7. In the (Union of South Africa) Irrigation and Conservation of Waters Act, 1912, public stream is defined (sec. 2) as 'a natural stream of water which, when it flows, flows in a known and defined channel (whether or not the channel is dry during any period), if the water thereof is capable of being applied to the common use of the riparian owners for the purposes of irrigation'; and 'a stream which fulfils these conditions in part only of its course shall be deemed to be a public stream as regards that part only'.

[6] Dig. 43. 12. 1. 2; *Vermaak* v. *Palmer* (1876) Buch. at p. 28; *De Wet* v. *Hiscock* (1880) 1 E. D. C. at p. 257.

enjoyed by all members of the community for navigation or fishing.[1] Amongst public rivers the Roman-Dutch Law, following the feudal law, distinguished further between (1) navigable rivers and their tributaries, (2) other public rivers.[2] The former class fell under the head of regalia,[3] with the result that fishing in navigable rivers and other inland navigable waters was not permitted without licence from Government.[4] Apart from any statutory provision this would seem to form part of the Roman-Dutch common law, and as such to be presumptively still in force. It does not appear that fishing in public non-navigable rivers is subject to the same restriction. Whatever has been said above as to the rights of the public in public rivers must be understood subject to the qualification that no person may exercise his right improperly to the public detriment. Accordingly an interdict lies to prohibit interference with navigation or the flow of the stream.[5]

Regalia.

The phrase res nullius is used in the Civil Law in three distinct senses:[6] (1) Res communes are said to be res nullius and humani juris. (2) Sacred, religious, and sanctioned things (churches, graveyards, city walls) are res nullius and

Res nullius.

[1] Voet, 1. 8. 8.

[2] This distinction appears already in the Roman Law in connexion with the topic of leading water. If the public stream was navigable, or a tributary of navigable waters it was not permitted to lead water from it. But from other public waters in the absence of statutory prohibition water might be led. Dig. 43. 12. 2; Voet, 1. 8. 8–9 (*ad fin.*).

[3] Lib. Feud. II. 56; Gudelin. *de jure novissimo*, 5. 3. 5; Groen. *de leg. abr. ad* Inst. 2. 1. 2; Vinnius *ad* Inst. 2. 1. 2, sec. 3; Gr. 2. 1. 25–7; Huber, *Heedensdaegse Rechtsgeleertheyt*, 2. 1. 17–19; Voet, 1. 8. 9 (*ad fin.*); 49. 14. 3; Heineccius, *Elem. Jur. Civ. ad* Inst., secs. 325 and 328; *Elem. Jur. German.*, lib. ii, tit. 1, sec. 16; Leyser, *Meditationes ad Pandectas*, vol. i, p. 255; Stockmans, *Decis. Brabant.* no. 85; Zypaeus, *Notitia Jur. Belg.*, lib. x, sec. *de jure fisci*; Bort, *Tractaet van de Domeynen van Hollandt, Werken*, deel 5; Van Zurck, *Codex Batavus, sub voce* Domeinen, sec. 6, n. 3; *Sententien en Gewezen Zaken van den Hoogen en Provincialen Raad*, nos. 5 and 166; Schomaker, *Consilia et Responsa Juris*, vol. v, cons. lvii; Schrassert, *Consultatien, Advysen en Advertissementen*, vol. iii, cons. cxxviii.

[4] Gr. 2. 1. 25–7; Van Leeuwen, 2. 1. 13; but rod-fishing was allowed. Gr. 2. 1. 28.

[5] Dig. 43, tits. 12 and 13.

[6] See Kotzé's Van Leeuwen, vol. i, p. 147 (translator's note).

divini or quasi divini juris.[1] (3) Things ownable, but unowned, are res nullius [2] and cede to the first occupant. With regard to the second of these classes, which alone here concerns us, it is sufficient to say that it has no place in Roman-Dutch Law, since all the things comprised in it are owned either by corporations or by individuals.[3]

Things ownable.

Things ownable. Passing over things ownable, but unowned in fact, of which we shall speak hereafter, we come to the last two classes in Justinian's division, viz. res universitatis and res singulorum. The first class comprises things owned by towns, villages, and similar societies or by corporations.[4] The second class comprises things owned by individuals. This distinction seems to be a distinction not of things, but of persons, i.e. according as they are: (*a*) artificial or juristic persons; or (*b*) natural persons. We may conclude, therefore, that in the modern law all things which are not unownable as common, or unownable as public, are (except such things as are unowned in fact, though ownable in law) owned either by corporations or by individuals.[5]

Res universitatis, res singulorum.

Things according to their nature: corporeal and incorporeal;

THINGS ACCORDING TO THEIR NATURE. Things are further classified according to their nature as corporeal and incorporeal.[6] Corporeal things can be touched, e.g. land, houses, cattle, clothes.[7] Incorporeal things consist in a right, as servitude, inheritance, obligations, debts, actions, rents.[8]

[1] Voet, 1. 8. 1.

[2] Inst. 1. 1. 12; Gr. 2. 1. 50–1.

[3] Gr. 2. 1. 15; Van Leeuwen, 2. 1. 9; Groen. *de leg. abr. ad* Inst. 2. 1. 8 and 9. For South African Law see *Cape Town and District Waterworks Co.* v. *Elder's Exors.* (1890) 8 S. C. 9, where it was held that the fact of burials having taken place in land with the consent of the owner did not make that land so sacred or religious as to be inalienable. On the other hand, in the Ceylon case, *Pullenayagam* v. *Fernando* (1900) 4 N. L. R. 88, Bonser C.J., citing *Cens. For.* 1. 2. 1. 10, said: 'By the law of this island a *res religiosa* is *res nullius*—no one's property.' No reference was made to conflicting authorities.

[4] Gr. 2. 1. 31 ff.; Voet, 1. 8. 10.

[5] The State (or what comes to the same thing, the fiscus) may, of course, own property *quâ* individual. Property so owned is not properly speaking *res publica*. It is *in patrimonio populi*, not *publico usui destinata*.

[6] Gr. 2. 1. 9; Voet, 1. 8. 11.

[7] Gr. 2. 1. 10.

[8] Gr. 2. 1. 14; Voet, 1. 8. 18.

immovable and movable.

Again, things are divided into immovables and movables.[1] This is properly a classification of corporeal things; but in law most incorporeal things are deemed to be comprised under immovables or movables.[2] This division, therefore, becomes the principal basis of classification. Where, however, the context requires it, incorporeal things form a third and separate class by themselves.[3] The class of things immovable comprises not merely things physically immovable, but also some movable and incorporeal things, which are deemed to be immovable and are governed by the law of immovables. The class of things movable comprises not merely things physically movable, but also some incorporeal things which are deemed to be movable and are governed by the law of movables. Immovable[4] things and things deemed to be immovable are: (1) land and houses;[5] (2) things naturally or artificially annexed to or associated with land and houses[6] (Under this head fall growing trees and fruits; minerals, stones, &c.; movables annexed to houses even though temporarily removed; certain movables not annexed to, but enjoyed along with, land and houses and destined for perpetual use therewith.);[7] (3) praedial servitudes;[8] (4) personal servitudes over immovables;[9] (5) actions in rem directed to the recovery of immovables;[10] (6) annual rents charged on land;[11] and (*semble*) (7) in the modern law leases of immovable property

What things are classed as immovables.

[1] Gr. 2. 1. 10; Voet, 1. 8. 11. [2] Voet, 1. 8. 18.
[3] Voet, 1. 8. 29; V. d. K. *Th.* 178–9.
[4] Ontilbaer ofte onroerbaer; res immobiles.
[5] Gr. 2. 1. 12. In the Old Dutch Law houses did not fall under the head of immovables unless the owner of the house was also the owner of the land. Fock. And., vol. i, p. 169. On the other hand, the larger kind of ship and all kinds of windmill were deemed immovable. Ibid. pp. 170–1.
[6] Gr. 2. 1. 13: Wat aerd-ofte naghel-vast is, word ghehouden als een gevolg van het ontilbare; Voet, 1. 8. 13–14. Van Leeuwen (*Cens. For.* 1. 2. 1. 4) adds title-deeds. For Ceylon see *Brodie* v. *Attorney General* (1903) 7 N. L. R. 81.
[7] Voet, *ubi sup.*; as dung, straw, &c. Dig. 19. 1. 17. 2 and 7.
[8] Voet, 1. 8. 20. [9] Voet, ibid. [10] Voet, 1. 8. 21.
[11] Voet, 1. 8. 24 ff.; but *semble*, only if they are irredeemable. Voet, 1. 8. 26; Schorer *ad* Gr. 2. 1. 13; V. d. K. *Th.* 180.

so far as they create rights in rem.[1] Mortgages, however, even of land, are classed as movables, the mortgage being considered as merely accessory to a principal and personal obligation, whose nature it, therefore, follows.[2] Since, however, a mortgage of land constitutes a charge on immovable property it would seem more in accordance with principle to class it with immovables.[3]

What things are classed as movables.

Movable things and things deemed to be movable are: (1) all movable things except such as are deemed to be immovable; (2) money, and rents accrued due[4]—this includes money destined to be laid out on land,[5] or arising from the sale of land[6]; (3) securities for money (including mortgages of immovable property?);[7] (4) personal servitudes over movables;[8] (5) actions in personam and actions in rem directed to the recovery of movables;[9] (6) annual rents not charged on land;[10] (7) all other property capable of classification as movable or immovable and not specifically assigned to the class of immovables. This includes most incorporeal rights other than such as have already been mentioned.

The importance of the distinction between immovables and movables.

The legal consequences and therefore also the importance of the distinction of things as immovable or movable are principally the following:[11] (1) In relation to the Conflict of Laws immovables generally follow the lex rei sitae, movables generally following the lex domicilii.[12] (2) Immovables may be affected with real charges, which will adhere to them, alienation notwithstanding, movables not.[13]

[1] In Roman Law a *locatio conductio* of land was purely contractual, and gave the conductor no real right. In Roman-Dutch Law the lessee was recognized as having a proprietary right (Huur gaat voor koop). *Infra*, p. 141.

[2] Voet, 1. 8. 27.

[3] In Cape Colony it was held to be a movable. *Eaton* v. *The Registrar of Deeds* (1890) 7 S. C. at p. 255.

[4] Voet, 1. 8. 22. [5] Voet, 1. 8. 15. [6] Voet, 1. 8. 16.

[7] Voet, 1. 8. 27; V. d. K. *Th.* 179–81. [8] Voet, 1. 8. 20.

[9] Voet, 1. 8. 21. According to Van der Keessel (*Th.* 179) an action on a kusting-brief (*infra*, p. 177) is an immovable.

[10] And not redeemable; Reditus redimibiles mobilibus annumerantur, Schorer *ad* Gr. 2. 1. 13; Voet, 1. 8. 23. [11] Voet, 1. 8. 30.

[12] Paul Voet, *De mobil. et immobil. natura*, cap. xxiii, secs. 1 and 3.

[13] Op. cit., cap. xix, sec. 8.

(3) Immovables require special formalities of alienation or hypothecation.[1] (4) Special rules apply to the alienation of the immovable property of minors.[2] (5) The process of execution upon immovables differs from the process of execution upon movables.[3]

The above distinctions, though a useful guide, are not invariably conclusive. A thing may, for instance, be treated as immovable for some purposes but not for all. Thus a mortgage of land, like a sale or other alienation, requires to be solemnly executed and registered if it is to bind third parties, and so far resembles immovable property ;[4] but is, nevertheless, as we have just seen, in other respects classed with movables.

CHAPTER III

HOW OWNERSHIP IS ACQUIRED

Modes of acquisition of corporeal things.

In this chapter we shall deal with the acquisition and extinction of ownership in corporeal things ; and principally with the legal modes of acquisition of ownership, i.e. the processes which, in law, make a thing mine. The modes of acquiring and losing ownership of incorporeal things will be considered in connexion with the various incorporeal things of which we shall speak hereafter. The modes of acquisition of corporeal things, i.e. of single things (*rerum singularum*)—for with acquisition per universitatem we are not here concerned—are principally the following : viz. (1) occupation ; (2) accession ; (3) tradition or delivery ; (4) prescription. We shall speak of these in order. Since the Dutch Law of modes of acquisition closely follows the Roman Law, we shall credit the reader with a knowledge of the first title of the second book of Justinian's *Institutes* ; and limit ourselves

[1] Op. cit., cap. xix, secs. 3 and 4. [2] Op. cit., cap. xviii, sec. 1.
[3] Op. cit., cap. xx, sec. 7 ; Van der Linden, *Verhandeling over de Judicieele Practijcq*, book iii, chap. vi ; Nathan, *Common Law of South Africa*, vol. iv, pp. 2206 ff. [4] Voet, 1. 8. 27.

to recalling the heads of classification therein contained, and to directing attention to some particulars in which the Roman-Dutch Law presents features of peculiar interest.

Occupation.

I. Occupation may be defined as the lawful seizing (with the intention of becoming owner) of an unowned corporeal thing capable of ownership.[1] This mode of acquisition is applicable to: (1) wild beasts, birds, and fishes;[2] (2) enemy goods;[3] (3) stones, &c., on the seashore;[4] (4) treasure (*thesaurus*);[5] (5) islands arising in the sea;[6] (6) abandoned things (*res derelictae*);[7] and, in short, to every ownable thing, which either never has been owned or having once been owned is owned no longer.[8]

Wild animals.

With regard to wild animals, in particular, the Dutch Law departed very widely from the law of Rome. It is, however, unnecessary to recall the obsolete feudal customs and game laws which formed a great part of the old law.[9] Such matters are now regulated in each of the Colonies by local legislation.[10] One doubtful point may be mentioned, viz. as to the ownership of tamed animals which have lost the animus revertendi.[11] According to several authorities they do not thereby revert to their natural liberty, but remain the subject of private ownership.[12] Falcons and sparrow-hawks are cited as examples. The instances given rather suggest that the rule itself belongs

[1] Voet, 41. 1. 2; Heinecc. *Elem. Jur. Civ. ad* Inst., sec. 342.
[2] Inst. 2. 1. 12–16. [3] Inst. 2. 1. 17. [4] Inst. 2. 1. 18.
[5] Inst. 2. 1. 39. [6] Inst. 2. 1. 22. [7] Inst. 2. 1. 47.
[8] Gr. 2. 1. 50. Two more cases of occupation occur in Roman Law: viz. (7) the seashore by building upon it (Dig. 1. 8. 6. pr.; 41. 1. 14. 1); and (8) specification, when the specificator is not owner of the material. Dig. 41. 1. 7. 7.
[9] For which see Gr., book ii, chap. 4; Van Leeuwen, 2. 3. 2 ff. They were swept away at the end of the eighteenth century (1795), (V. d. K. *Th.* 185–7); but fresh regulations were found necessary a few years later. V. d. L. 1. 7. 2.
[10] See e. g. Ceylon Ord. No. 1 of 1909, which amends and consolidates the law relating to the protection of game, wild beasts, birds, and fish. Pereira, p. 340.
[11] Inst. 2. 1. 15; Dig. 41. 1. 5. 5; Gr. 2. 4. 13.
[12] *Cens. For.* 1. 2. 3. 7; Voet, 41. 1. 7; Groen. *de leg. abr. ad* Inst., *ubi sup.*

to an order of ideas which has passed away. Things which have been lost by their owner remain his property and cannot be acquired by occupation.[1] A person who takes them in bad faith commits theft.[2] But if after proper inquiry the owner is not found, the finder of the goods may retain them.[3] Wreckage, however, Grotius tells us, 'used from of old to be regarded as the private property of the Counts, but in view of the increase of shipping in and about these lands the Count, nobles, and towns decreed that every one might recover his ship-wrecked and lost property.'[4] The claim must be made within a year and six weeks, and the owner must bear the costs of salvage.[5] If the wreckage remains unclaimed, it belongs not to the finder, but to the fiscus.[6]

Lost property.

Wreckage.

Treasure trove in Roman Law went, as a rule, half to the finder, half to the owner of the land where it was found,[7] and, therefore, if found by the owner of the land, wholly to the finder. In Holland it was matter of acute controversy whether treasure followed the rules of the Civil Law, or went to the Count or public chest. Grotius,[8] who is charged with official bias,[9] leaves the question open. Groenewegen decides against the Treasury;[10] and this view is confirmed by Voet,[11] Vinnius,[12] Van

Treasure.

[1] Voet, 41. 1. 9; V. d. K. *Th.* 189; V. d. L. 1. 7. 2.

[2] Inst. 2. 1. 48 (*ad fin.*); Dig. 41. 1. 9. 8 and 41. 1. 58; 47. 2. 43–4, and 11.

[3] Voet, *ubi sup.*; unless they are to be said to go to the fisc as bona vacantia. Groen. *de leg. abr. ad* Inst. 2. 1. 39, sec. 3; *Cens. For.* 1. 2. 3. 16. Van der Keessel (*Th.* 189) says 'cedunt inventori non fisco'. Groenewegen (*de leg. abr. ad* Inst. 2. 1. 47) distinguishes lost property from res derelicta. The former, he says, goes to the fisc, the latter to the finder.

[4] Gr. 2. 4. 36; Van Leeuwen, 2. 3. 9.

[5] V. d. L. 1. 7. 2 (*bergloon*).

[6] Grotius (*ubi sup.*) adds 'but may easily be redeemed'. See also V. d. K. *Th.* 193–7. For Ceylon Law see Ord. No. 4 of 1862, sec. 2; Pereira, p. 343.

[7] Inst. 2. 1. 39; Dig. 41. 1. 31. 1; 49. 14. 3. 10; Cod. lib. x, tit. 15.

[8] Gr. 2. 4. 38.

[9] He was appointed advocate fiscal in 1607 and pensionaris of Rotterdam in 1613.

[10] Groen. *de leg. abr. ad* Inst. 2. 1. 39, sec. 4.

[11] Voet, 41. 1. 11. [12] Vinnius *ad* Inst., *ubi sup.*, sec. 9 (*in fine*).

Leeuwen,[1] Schorer,[2] Van der Linden,[3] and Van der Keessel.[4]

Where several persons are interested in the same land, e. g. as dominus and usufructuarius, mortgagor and mortgagee, vendor and purchaser (before delivery), the question may well arise who is entitled to the owner's share.[5] The reader will find the matter carefully considered by Voet in his commentary on Digest, lib. xli, tit. 1.

Mines and precious stones.

Mines and precious stones, should, on general principles, belong to the owners of the soil, and that this was so by Dutch Law is the opinion of Voet, expressed, however, with no certain voice.[6] In the modern law such matters are commonly regulated by statute.[7]

Accession.

II. Accession is a mode of acquiring ownership whereby a thing becomes the property of a person by becoming physically or intellectually associated with some other thing of which such person is already owner.[8] The thing which accedes may either be previously unowned (*res nullius*) or previously owned (*res alicujus*). When two owned things become united by accession it may be questioned which of the two accedes to the other, i. e. which is principal, which accessory. Grotius says that 'accession takes place when of two things which are joined together the more valuable draws to itself the less valuable '.[9] But the test adopted by Ulpian is better: 'Whenever we ask which of two things cedes to the other, we look to see which is applied to ornament the other;'[10] so that, e. g. precious stones adhere to a silver plate in which they are set. If this test fails, it will usually be

[1] Van Leeuwen, 2. 3. 13; *Cens. For.* 1. 2. 3. 18.
[2] Schorer *ad* Gr. *ubi sup.* [3] V. d. L. *ubi sup.*
[4] V. d. K. *Th.* 198. In Ceylon by Ord. No. 17 of 1887, sec. 2, 'all treasure trove is the absolute property of His Majesty, and the person finding the same is not, as of right, entitled to any portion thereof.' Treasure trove is defined by Ord. No. 3 of 1891, sec. 2.
[5] Voet, 41. 1. 12.
[6] Voet, 41. 1. 13, and see 49. 14. 3.
[7] For Ceylon Law see Ord. No. 5 of 1890 and Pereira, p. 286.
[8] Voet, 41. 1. 14; Heinecc. *Elem. Jur. Civ. ad* Inst., sec. 354; V. d. L. 1. 7. 2.
[9] Gr. 2. 9. 1. [10] Dig. 34. 2. 19. 13.

found that the lesser thing accedes to the greater, the less costly to the more costly.

Cases of accession.

Accession comprises the following modes of acquisition: viz. (1) increment by birth of young animals;[1] (2) alluvion;[2] (3) accession of part of my neighbour's land to mine when detached from his by the force of a river;[3] (4) island rising in a river;[4] (5) change of river-bed;[5] (6) specification;[6] (7) industrial attachment (*adjunction*);[7] (8) confusion of liquids;[8] (9) planting;[9] (10) sowing;[10] (11) perception of fruits.[11] In this case, as in that of occupation, details will be noticed only so far as the Roman-Dutch Law presents features of peculiar interest.

Alluvion.

Alluvion is defined as a 'latent increment, whereby something is added to land so slowly that it is impossible to say how much is added at any one moment'.[12] By the Civil Law land so added by the wash of a river or stream belonged to the owner of the land to which it adhered.[13]

In the Netherlands the law of alluvion was very unsettled and varied from province to province.[14] According to one view alluvion being an incident of rivers fell under the head of regalia.[15] 'Certainly in South Holland', says Vinnius, 'no man was formerly found to claim this right of increment as his own unless on the ground that the right had been granted to him to hold by the same right as the Count had therein, that is, up to the river.'[16] On principle the claim of prerogative must be limited to

[1] Inst. 2. 1. 19. [2] Inst. 2. 1. 20. [3] Inst. 2. 1. 21.
[4] Inst. 2. 1. 22. [5] Inst. 2. 1. 23. [6] Inst. 2. 1. 25.
[7] Inst. 2. 1. 26 (*intextura*); secs. 29 and 30 (*inaedificatio*); sec. 33 (*scriptura*); sec. 34 (*pictura*).
[8] Inst. 2. 1. 27. [9] Inst. 2. 1. 31. [10] Inst. 2. 1. 32.
[11] Inst. 2. 1. 35. [12] Inst. 2. 1. 20.
[13] Gr. 2. 9. 13; Voet, 41. 1. 15.
[14] Gr. 2. 9. 18 ff.; Van Leeuwen, 2. 4. 2.
[15] *Cens. For.* 1. 2. 4. 12; Groen. *de leg. abr. ad* Inst. 2. 1. 23; Voet, *ubi sup.*; Bort, *Tractaet van de Domeynen van Hollandt*, cap. 5, secs. 16 ff.
[16] Vinnius *ad* Inst. 2. 1. 20, sec. 2, following Gr. 2. 9. 26; Van Leeuwen, 2. 4. 3: Tenwaar dat het Land opgedragen was tot de Rivier toe, of by den hoop, sonder juiste maat uit te drukken, in welken geval den eygenaar mede regt van aanwas heeft.

navigable public rivers, these alone falling under the head of regalia.[1] This limitation is not always expressed by the Dutch writers, who lived in a land where all rivers are navigable. The claim, whatever its extent, is not admitted without qualification by Van Leeuwen,[2] or by Voet except in the case of agri limitati. Grotius declares the claim of the Count in this case to be undoubted.[3] Beyond this he expresses no certain opinion.

Island rising in river.

Another case of accession is that of the island rising in a river. Here the claim of the Count is admitted by the Dutch writers, who consider that the ownership of the island follows the ownership of the stream.[4] The result is the same when a navigable public river wholly abandons its former course. The deserted river-bed belongs to the Crown.[5] But a partially abandoned river-bed accedes to riparian owners provided that they have the right of alluvion.[6]

Inundation.

If land is covered by flood it does not therefore the less continue to belong to its owner, who may resume possession, when the flood abates.[7] In Holland, naturally, the legal consequences of inundation were matter of serious interest. The rule of the Roman Law, which left inundated lands the property of their original owners, might have hindered efforts at reclamation. Accordingly the law provided that if the land had continued under water for a whole period of ten years, and the owner had not given any evident indication of an intention to retain possession (which, contrary to the Civil Law,[8] he might do by fishing merely), the land was held to be abandoned

[1] *Supra*, p. 115. [2] *Cens. For. ubi sup.* [3] Gr. 2. 9. 25.

[4] Voet, 41. 1. 17; Vinnius *ad* Inst. 2. 1. 22, sec. 7; Schorer *ad* Gr. 2. 9. 24; Van Leeuwen, 2. 4. 2, where Kotzé translates 'stromende Rivieren' as 'tidal rivers'; sed quaere?

[5] Voet, 41. 1. 18: Moribus nostris magis est ut alveus fluminis desertus fisco cedat. The same holds good of the beds of public lakes. Ibid. Cf. 1 G. P. B. 1252; and see Bort, *Domeynen van Hollandt*, cap. 5, secs. 38 ff.

[6] Vinnius *ad* Inst. 2. 1. 23, sec. 3. [7] Inst. 2. 1. 24.

[8] Dig. 7. 4. 23. The text is not altogether in point, but it is cited in this connexion.

and to go to the Count.[1] 'That inundated lands should go to the Count', says Grotius, 'is not strange, for the seashore and the dry beds of streams also belong to him, as was understood with regard to the dried beds of the river Maas ; and inundated lands become in effect shore or river-bed, and if in any way they afterwards become dry land they are no longer the old lands, which have disappeared, but new and unowned lands, which, like all other unowned things, have from of old been appropriated to the Counts.'[2] It is scarcely necessary to add that intermittent floods do not affect the ownership of property without further evidence of abandonment.[3] In Holland sand-drift was by custom assimilated to flood, so that if land had for a period of ten years remained unenclosed from the waste and completely covered by drift-sand it became by accession the property of the owner of the adjoining waste and sand-hills, i.e. usually the property of the fiscus.[4]

Sand-drift.

Another small difference between the Roman and the Roman-Dutch Law may be noted in connexion with the rights of the owner of material, which another person has used for building his own house.[5] By a rule, which dates from the XII Tables, the last-named person, at all events if the material were res furtiva, was answerable to the owner for double value (*actio de tigno juncto*).[6] In Dutch Law the double penalty was not admitted, but the owner of the material might recover damages in any case in which he might have sued by the Civil Law.[7]

Inaedificatio.

Under the head of 'mixed accession' the commentators speak at length of the 'perception' of fruits, and of the various rights in this regard of the bona fide possessor and the usufructuary.[8] The reader will find

Perception of fruits.

[1] Gr. 2. 9. 7 ; Voet, 41. 1. 19 ; Vinnius *ad* Inst. 2. 1. 24, sec. 2.
[2] Gr. 2. 9. 9.
[3] Gr. 2. 9. 8.
[4] Gr. 2. 9. 6 ; Voet, 41. 1. 20.
[5] Inst. 2. 1. 29–30.
[6] Dig. 47. 3. 1 ; 24. 1. 63 ; 6. 1. 23. 6 ; 10. 4. 6.
[7] Gr. 2. 10. 7 ; Groen. *de leg. abr. ad* Inst. 2. 1. 29 ; Voet, 47. 3. 2 (*ad fin.*).
[8] Voet, 41. 1. 28–33. See also Gr., lib. ii, cap. 6 ; and Van Leeuwen, lib. ii, cap. vi ; V. d. K. *Th.* 205.

the subject fully discussed in Voet's Commentary on the Pandects.

Tradition or delivery.

III. Tradition or Delivery [1] considered as a mode of acquisition may be described as a transfer of possession of a corporeal thing under such circumstances that it effects a transfer of ownership.[2] Normally, tradition implies a physical transference of possession from one person to another. But this is not always so. The transference may have taken place already for some other cause. Thus I have lent you my watch. Now I give it you.[3] As a rule the ownership in a gift does not pass until tradition. But here tradition has preceded and further handing-over is unnecessary. This is called 'brevi manu traditio'.[4] Conversely, I may agree to remain in possession, not as owner any longer, but as borrower, e.g. I give you my watch on condition that you are to lend it me until next week. Technically two transferences of possession are necessary, first to perfect the gift, secondly to effect the loan. But the two cancel one another, and I remain in physical possession, but under a new right. This is called 'constitutum possessorium'. An alleged agreement of the sort is regarded by the Courts with a good deal of suspicion and disfavour. In both of the above cases tradition is said to be 'feigned' or 'fictitious'; and so it is too when there is no actual handing-over, but a thing is placed in my sight or I am placed in sight of it, so that I may easily take possession. This is 'longa manu traditio'.[5] Another kind of tradition is said to be symbolical, e.g. when the keys of a warehouse are handed over

'Fictitious' tradition.

[1] Leevering ofte opdrachte. Gr. 2. 6. 2.

[2] Voet, 41. 1. 34. Heinecc. *Elem. Jur. Civ. ad* Inst., sec. 380, defines it in the following terms: Traditio est modus adquirendi derivativus, quo dominus qui jus et animum alienandi habet rem corporalem ex justa causa in accipientem transfert.

[3] Inst. 2. 1. 44; Dig. 41. 1. 9. 5. Cf. Dig. 12. 1. 9. 9 and 12. 1. 10.

[4] Gr. 2. 5. 11; Van Leeuwen, 2. 7. 2; Voet, 41. 1. 34.

[5] Dig. 46. 3. 79: Pecuniam quam mihi debes aut aliam rem si in conspectu meo ponere te jubeam, efficitur ut et tu statim libereris et mea esse incipiat; nam tum, quod a nullo corporaliter ejus rei possessio detinetur, adquisita mihi et quodammodo manu longa tradita existimanda est.

in sight of the building, the building and its contents are deemed to pass also.[1] But it seems that there is nothing symbolical or fictitious about this process, for the possession of the keys is the best means of giving the exclusive control over and therefore possession of the warehouse and its contents.[2] In other words, the possessor of the keys is *prima facie* also possessor of the building.

Essentials of tradition as a mode of acquisition.

Tradition will not operate as a means of acquiring ownership (but only as a transfer of possession) unless the following conditions concur:

1. The transferor must be owner, or at least act by authority of the owner, viz. as his servant or agent.[3] Ratification is equivalent to antecedent authority.

2. The transferor must have the intention of transferring ownership[4] ex justa causa.[5] Such intention is absent when a person transfers his own property in error, supposing that it is the property of another person.[6]

3. The transferor must be legally competent to alienate.[7] Therefore a minor (generally speaking) or an interdicted prodigal cannot pass ownership by tradition without the authority of his tutor or curator.[8]

4. The thing transferred must be legally alienable by delivery. This rules out things which cannot be owned

[1] Inst. 2. 1. 45; Dig. 18. 1. 74; 41. 1. 9. 6.

[2] Savigny, *Das Recht des Besitzes*, book ii, sec. 15; C. H. Monro on Dig. xli, 1, Appendix 1.

[3] Inst. 2. 1. 42–3; Dig. 41. 1. 20. pr.; Gr. 2. 5. 15; Van Leeuwen, 2. 7. 5; Voet, 41. 1. 35. Sometimes the authority is conferred by law and not by act of party. 'Accidit aliquando ut qui dominus non sit alienandae rei potestatem habeat' (Inst. 2. 8. pr.), as the pledgee, or the guardian as administrator of his ward's property.

[4] Inst. 2. 1. 40.

[5] This means that the legal disposition intended is of such a kind that the transfer of possession carries with it in law transfer of ownership. Dig. 41. 1. 31. pr: Nunquam nuda traditio transfert dominium sed ita si venditio aut aliqua justa causa praecesserit propter quam traditio sequeretur.

[6] Dig. 41. 1. 35: Nemo errans rem suam amittit.

[7] For prohibition of alienation in fraud of creditors see Gr. 2. 5. 3 (*ad fin.*) and 4; Van Leeuwen, 2. 7. 8–9; Voet, lib. xlii, tit. 8 (*actio pauliana*); V. d. K. *Th.* 199–200; and the learned judgment of Berwick D.J. (Ceylon) in D. C. Colombo, 70, 260 (1877) Ramanathan, 1872–6, 7, p. 89. In Ceylon, however, the English Law applies. Ibid.

[8] *Supra*, pp. 42 and 104.

by individuals, and things which cannot be alienated by this process.[1]

5. The transferee must have the intention of becoming and must be competent to become [2] owner in consequence of the transfer.[3]

Transfer of immovables in Roman-Dutch Law.

Thus far we have spoken of transfer in general, making no distinction between movables and immovables. Nor was any such distinction known to the later Roman Law. Land and movables alike passed by the same simple process of delivery. But in Roman-Dutch Law it was otherwise. The customs of the Saxons and the Franks (with regard to the Frisians we have no information) demanded something more than mere delivery to perfect a title to land.[4] In many parts of Holland the conveyance was required by local law to be passed before the Court of the district in which the land in question was situated.[5] This excellent practice was made general and obligatory by a placaat of the Emperor Charles V of May 10, 1529,[6]

Placaat of

[1] Res incorporales. Dig. 41. 1. 43. 1.

[2] If a person fraudulently purchases goods in anticipation of an insolvency, which shortly afterwards follows, he is bound to restore the goods to the seller. Van Leeuwen, 4. 17. 3; V. d. K. *Th.* 204.

[3] Dig. 44. 7. 55: In omnibus rebus quae dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium. But it was not necessary that the transferee should intend to become owner by the *causa*, which was in the contemplation of the transferor. Dig. 41. 1. 36. But see Dig. 12. 1. 18. The special rules of law relating to the transfer of ownership in things sold are considered in a later chapter. *Infra*, p. 251.

[4] Fock. And., vol. i, pp. 192 ff.

[5] Ibid., p. 194; Gr. 2. 5. 13; Voet, 41. 1. 38; V. d. K. *Th.* 202; *Rechtsg. Obs.*, pt. 3, no. 32. In the old law the person making cession of the land symbolized the transfer by handing over a sod or twig, later by handing over or throwing from him a straw (*halm*). Fock. And., vol. i, p. 192. The handing over of the title-deeds sometimes served the same purpose. Ibid. This process (called 'overdracht' or 'transport') passed the property, though not followed by entry on the land. Ibid., p. 195, n. 1. It would seem that, whatever may have been the case in Gelderland (Sande, *de effestucatione*, cap. 2, sec. 18), in Holland all such solemnities were in course of time disused. Fock. And., vol. i, p. 198. Even the handing over of the deed was not necessary to pass the property. V. d. K. *Th.* 202. The history of land transfer in R.-D. L. is considered by the Ceylon S. C. in *Appuhami* v. *Appuhami*. (1880) 3 S. C. C. 61.

[6] 1 G. P. B. 374; Gr. 2. 5. 13; *Cens. For.* 1. 2. 7. 6; Voet, 41. 1. 38–42; Groen. *de leg. abr. ad* Inst., lib. iii, cap. xxiii.

which enacts that 'henceforth no one shall presume to sell, charge, convey, alienate, or hypothecate any houses, lands, *Erven*, tithes, *Thinse*, or other immovable goods except before the Judge and in the place where the goods are situated'. All sales, &c., which do not comply with this provision are to be null and of no effect. An exception is permitted in case of feuds, which may be made in the Lord's Court according to ancient custom. A later placaat of the States of Holland, the first of many such, dated December 22, 1598, imposed a duty of the fortieth penny (2½ per cent.) on all transports[1] (half to be paid by the seller, half by the purchaser), and the Political Ordinance of April 1, 1580 (Art. 37) further required registration in the land book.[2] Failing compliance, the transaction is null and void.[3] This continued to be the law until the fall of the Dutch Republic, and it remains in its essential features the law of land transfers in the Roman-Dutch Colonies at the present day.[4] In South Africa the only important change that has taken place

Charles V of May 10, 1529.

The duty of the 40th penny.

Registration.

[1] 1 G. P. B. 1953; Van Leeuwen, 2. 7. 4.

[2] 1 G. P. B. 339. A similar provision is contained in the reissue of the Placaat of 1598, dated March 6, 1612. 1 G. P. B. 1957 and 1961.

[3] Art. 13 of the Placaat. 1 G. P. B. 1957.

[4] For the practice of land transfer in British Guiana see Appendix B to this Book (*infra*, p. 184). In Ceylon, by Ord. No. 7 of 1840, sec. 2, no sale, purchase, transfer, assignment, or mortgage of land or other immovable property, &c., shall be of force or avail in law, unless the same shall be in writing and signed by the party making the same or by some person lawfully authorized by him, in the presence of a licensed notary public or two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses. By Ord. No. 17 of 1852 deeds relating to land may be executed before a District Judge or Commissioner of a Court of Requests or Justice of the Peace. The property passes not on the execution of the deed, but on the delivery of the conveyance to the purchaser, and physical tradition of the land is not necessary to perfect the purchaser's title (*Appuhami* v. *Appuhami*, *ubi sup.*). By Ord. No. 8 of 1863, and now by Ord. No. 14 of 1891, a land register office is established; and by sec. 16 all deeds, &c., affecting land are to be registered. By sec. 17 an unregistered deed, &c., shall be deemed void as against all parties claiming an interest adverse thereto on valuable consideration by virtue of any subsequent deed, &c., which shall have been duly registered as aforesaid; provided that . . . nothing herein contained shall be deemed to give any greater effect or different construction to any registered deed, &c., save the priority hereby conferred on it.

The Deeds Registry in South Africa.

consists in the creation of a special department called the Deeds Registry, which supervises all transfers of land and exercises the functions formerly vested in the Court.[1]

Between the parties an informal transfer holds good.

It should be noted that though all transfers which fail to comply with the provisions of the Placaats of 1529 and 1598 are declared to be null and void, the transaction is in fact only avoided as against third persons, whether purchasers or creditors. As between the parties themselves the contract and the transfer hold good.[2]

Prescription:

in the latest Roman Law;

IV. Prescription. In the latest Roman Law long-continued possession by a non-owner sometimes conferred ownership upon the possessor (*acquisitive prescription*), sometimes merely barred the original owner of his remedy without making the possessor owner in his stead (*extinctive prescription*). Thus: (1) Possession of movables for three years, of immovables for ten to twenty years, if originating in just title and accompanied in its inception by good faith made the possessor owner. The thing possessed must not have been stolen (*res furtiva*) nor possessed by force (*res vi possessa*). (2) Possession, for thirty years, whether of movables or immovables, if accompanied in its inception by good faith, though not originating in just title, made the possessor owner even of a res furtiva but not of a res vi possessa. (3) Possession for thirty years though not accompanied in its inception by good faith and though not originating in just title even of res furtiva or of res vi possessa barred the owner of his remedy without, however, vesting ownership in the possessor.[3] Accordingly if the possessor lost possession he could not vindicate the property from the new possessor, while the original owner on the other hand could.

[1] Van Leeuwen, 2. 7. 4. For the law of South Africa herein see *Harris* v. *Trustee of Buissinne* (1840) 2 Menz. 105; *Van Aardt* v. *Hartley's Trustees* (1845) 2 Menz. 135; *Melck, Exor. of Burger* v. *David* (1840) 3 Menz. 468. [2] Wessels, *Hist. R.-D. L.*, pp. 498–9.

[3] Girard, p. 304; Cod. 7. 39. 8. Grotius is not entirely accurate in his statement of the law in 2. 7. 2 (last sentence).

In the Netherlands the whole subject of prescription was involved in the greatest uncertainty, according as local practice approached to or receded from the Civil Law.[1] The situation was further complicated by the presence of two new terms of prescription,[2] a shorter period of a year and a day (which meant in practice a year and six weeks),[3] and a longer period of a third of a century (which meant in practice thirty-three years and four months and, as some add, three or four days).[4]

in the Netherlands.

The first of these was of purely Germanic origin.[5] Its application was very limited, and it was available only as a defence.[6] We shall meet with it again in connexion with the possessory remedy known as 'complaincte'. Independently of this it fell out of use after the middle of the seventeenth century.[7]

The period of a year and a day.

The prescription of a third of a century—in origin, it would seem, merely a variant from the thirty years' prescription of the Theodosian Code[8]—came eventually to be the usual term of prescription, at all events for immovable property.[9] The 'Great Privilege' granted by Maria of Burgundy of March 14, 1476[10] (Art. 47), fixes the period of prescription for immovables (*leenen ende erffelijcke goeden*) at a third of a century,[11] and the same term is met with in numerous documents of the sixteenth century side by side with the shorter and longer periods of the Roman Law.[12] After Grotius pronounced in its favour it was very generally accepted as the proper

The period of a third of a century for immovables.

[1] Gr. 2. 7. 5; Fock. And., vol. ii, pp. 123 ff.
[2] Gr. 2. 7. 6 ff. [3] Voet, 44. 3. 4.
[4] Matthaeus, *Paroemiae*, no. 9, sec. 1. Voet (44. 3. 1) notes: In hodierna praescriptione longissimi temporis aut trientis seculi diem ultimum coeptum non haberi pro completo recte defenditur.
[5] Fock. And., vol. ii, p. 124.
[6] Ibid.; Gr. 2. 7. 7. [7] V. d. K. *Th.* 208.
[8] Cod. Theodos., lib. iv, tit. 14; Cod. 7. 39. 3 (A. D. 424); Van de Spiegel, *Oorsprong en historie der Vaderlandsche Rechten*, pp. 129–30.
[9] Gr. 2. 7. 8; Groen. *de leg. abr. ad* Cod. lib. vii, tit. 39; Van Leeuwen, 2. 8. 5; *Cens. For.* 1. 2. 10. 11.
[10] 2 G. P. B. 671.
[11] See Gr. 2. 7. 8.
[12] Groningen followed the law of Justinian—three years for movables, ten to twenty for immovables. Fock. And., vol. ii, p. 125.

term of prescription for immovables.[1] With regard to movables Grotius expresses no final opinion.[2] According to a decision of the Court of Holland of 1637 cited by Loenius,[3] prescription is completed in respect of immovable property and annual rents by the third of a century. Groenewegen, whose book was published in 1649, says distinctly that the period of prescription is a third of a century for immovables, but thirty years for movables.[4] This view, endorsed by Van Leeuwen[5] and Van der Keessel,[6] outweighs the inclination of Voet[7] and the opinions of Schorer[8] and Van der Linden[9] in favour of a term of a third of a century for both kinds of property.

The period of thirty years for movables.

Prescription at the Cape.

At the Cape the period of thirty years for immovable property is fixed by statute and for movables by the common law, whenever there is no express statutory provision to the contrary.[10]

[1] V. d. K. *Th.* 206.

[2] He seems to imply a uniform term of one third of a century for immovables and movables alike. So, at least, he is understood by Groenewegen (*ad* Cod. 7. 39, sec. 2), Van Leeuwen (2. 8. 5; *Cens. For.* 1. 2. 10. 11), and Voet (44. 3. 8). But Boel *ad* Loen. (*Decis. & Observ.* at p. 503) thinks it 'clear as daylight' that this was not his meaning.

[3] Loen. *Decis.*, no. 76, p. 500.

[4] Groen. *de leg. abr. ad* Cod. 7. 39, sec. 3.

[5] Van Leeuwen, *ubi sup.*

[6] V. d. K. *Th.* 206.

[7] Voet, 44. 3. 8.

[8] Schorer *ad* Grot. 2. 7 (*rubric*).

[9] V. d. L. 1. 7. 2 (*ad fin.*).

[10] Cape, Act 7 of 1865, sec. 106; 2 Maasdorp, p. 80. In Ceylon, by Ord. No. 22 of 1871, sec. 3, 'proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner when any plaintiff shall bring his action or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession, as hereinbefore explained, by such plaintiff or intervenient, or by those under whom he claims shall entitle such plaintiff or intervenient to a decree in his favour with costs. Provided that the said period of ten years shall only

Good faith and just title unnecessary.

Some other points in the law of prescription are less doubtful. Contrary to the Roman Law the Roman-Dutch Law requires neither good faith nor just title.[1] Even stolen goods may be prescribed. The sole question is whether the possession or quasi-possession of the person claiming by prescription has been quiet and continuous, undisturbed by the original owner and without recognition of his right.[2] Disturbance is either (1) natural, i.e. physical, or (2) judicial, i.e. by instituting proceedings to enforce an adverse claim. The possession of the predecessor in title, if adverse to the original owner, may be reckoned in calculating the period of prescription (*conjunctio temporum*) without any distinction of good or bad faith in either party.[3] Prescription generally runs against the Crown, provided that the property claimed by this mode of acquisition is such as the Crown might have alienated by grant.[4] Time does not run against minors nor, says Voet, against madmen and other such persons, who are deemed to be minors, and are subjected to guardianship ; nor against persons who are absent because of war or on other public business ;[5] nor against those who are disqualified from asserting their rights ; and therefore not against a fidei-commissary whose right is suspended by a condition, if the fiduciary alienates the property subject to the trust before the condition is fulfilled ;[6] nor against a married woman whose husband has improperly alienated

But prescription must be undisturbed.

Against whom prescription runs.

begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.' 'The effect of the Ordinance is to sweep away all the Roman-Dutch Law relating to the acquisition of immovable property by prescription except as regards the property of the Crown.' Pereira, p. 384. In Brit. Gui. the period of prescription for immovables is the third of a century. *Guyadeen* v. *Ferguson* (1905) *Brit. Gui. Off. Gaz.*, vol. xxi, p. 782. There is no decision as to prescription of movables [G.].

[1] Anton. Matthaeus, *Paroemiae*, no. 9, secs. 2–3 ; V. d. K. *Th.* 207.

[2] Voet, 44. 3. 9.

[3] Voet, *ubi sup.*

[4] Voet, 44. 3. 11.

[5] Voet, 44. 3. 9 ; citing Anton. Matthaeus, *Paroemiae*, no. 9, secs. 22–3.

[6] See *De Jager* v. *Scheepers* (1880) Foord, 120.

dotal property.[1] Schorer, however, states and perhaps endorses a contrary view :

'It has been advised that against this prescription of thirty years avails neither the frailty of sex, nor malice, nor absence, but that minority[2] alone is exempted from this penalty, for it is a rule of law that during minority prescription is dormant ; so that even ignorance is not relieved by restitutio in integrum.[3]

Effect of prescription.

The effect of prescription is to vest the ownership of the property in question in the possessor, so that he can vindicate it, if he subsequently loses possession, from the original owner as well as from third parties.

Limitation of actions.

From the acquisitive prescription above described the reader must distinguish the law as to the limitation of actions, which merely bars a plaintiff of his remedy.[4] This applies not only to claims for property, but also to all actions whatsoever. The limit of time is generally thirty years, but in the case of actions to recover immovable property and rents[5] charged on land a third of a century.[6] In relation to property therefore the same period bars the remedy and transfers the right. In other cases the rule is subject to numerous exceptions, e.g. restitution on the ground of minority is barred after four

[1] Voet, 44. 3. 11.

[2] 'Pupillarem aetatem' ; but this must be taken to include all minors. V. d. K. *Th.* 210.

[3] Schorer *ad* Grot. 2. 7. 9. Decker (*ad* Van Leeuwen, 2. 8. 12) says that even minors are not relieved from the operation of prescription *ipso jure*, but only by way of restitutio in integrum. For Cape Law see Act No. 6, 1861, sec. 6.

[4] Grotius (3. 46. 2) and Voet (44. 3. 10) say that *moribus* obligations are extinguished *ipso jure* by lapse of time. *Sed quaere.* See 4 Maasdorp, p. 158 ; and *S. A. L. J.* (1912), vol. xxix, p. 159.

[5] With regard to rents the books speak with uncertain voice. See Loen. *Decis.*, Cas. 76 ; Van Leeuwen, 2. 8. 7 ff. ; V. d. K. *Th.* 206. The limitation in the text seems to follow from the fact that rents if charged on land are classed with immovable property, otherwise not. *Supra*, p. 117.

[6] Grotius (3. 46. 3) says that the usual term of prescription is a third of a century ; but Groenewegen in his note ad loc. says that in the opinion of many jurists the Roman term of thirty years applies to movable goods and to real and personal actions. See also Schorer's note ad loc., and Bynkershoek, *Quaest. Jur. Priv.*, lib. ii, cap. xv.

years,[1] the actio injuriarum after one,[2] and actions by advocates, attorneys, servants, and merchants for salary and arrears after two years. This last limitation is contained in the Perpetual Edict of Charles V of October 4, 1540, Art. 16,[3] and a subsequent declaration of February 14, 1549; but this provision, Van Leeuwen says, seems to have become obsolete through disuse.[4]

CHAPTER IV

OWNERSHIP

Subject-matter of this chapter.

We have already spoken of the nature of ownership, and of the distinction between full ownership and the limited rights carved out of another's ownership, which are commonly known as jura in re aliena. In the present chapter we shall speak of the incidents of ownership and more particularly of the kinds of ownership in land.

Section I. The Incidents of Ownership in General

The incidents of ownership in general.

It is a common saying that a man may do what he will with his own. The proverb has an element of truth. Ownership comprises rights of possession,[5] user, and alienation; and all these rights are limited only by the duty which the law imposes upon all to have due regard to the rights of each according to the maxim 'male jure nostro uti non debemus'.

[1] *Supra*, p. 43.

[2] Cod. 9. 35. 5. This does not apply to the action for real injuries founded on the lex Cornelia, which was 'perpetual'. Voet, 47. 10. 21.

[3] 1 G. P. B. 319. *Infra*, p. 242.

[4] Van Leeuwen, 2. 8. 11. On this point there was much difference of opinion. V. d. K. *Th.* 876. For the statutory law as to prescription of actions, see Cape Act No. 6 of 1861; Transvaal Act No. 26 of 1908; Ceylon Ord. No. 22 of 1871 (Pereira, pp. 383 ff.).

[5] And by consequence of recovering the thing owned from a non-owner (*jus vindicandi*). V. d. K. *Th.* 183. For some possible, but doubtful, exceptions to the generality of this principle, see V. d. K *Th.* 184, and below, pp. 163, 251–2.

What is the landowner's duty towards his neighbour?

But what is 'male uti'? and what use of land is regarded in law as an injury to another? It is not possible to give a general answer except that a landowner may do what he pleases so long as he does nothing which can be referred to a recognized head of legal wrong. Thus, it may be very annoying to you that I should build a house with windows looking out over your garden, but apart from servitude you have no lawful ground of complaint or legal remedy. Again, if I sink a well in my field, the result may be that, owing to the interception of percolating underground water, the well in your field will run dry. But you are without redress.[1] It would be otherwise if I interfered with the flow of a defined underground stream.[2]

What then, apart from interruption of servitude, are the wrongs for which a landowner may obtain redress from his neighbour? or, to repeat the question in other words, what are the duties which one landowner owes to an adjoining landowner? They are mainly three: viz. (1) to respect his possession; (2) not to interfere wrongfully with his enjoyment; (3) not to cause a subsidence of his land or interrupt the accustomed flow of a stream.

1. To respect his possession.

(1) I must respect my neighbour's possession. Thus, I must not deprive him of possession or wrongfully exclude him from the possession of what belongs to him. Further, I must not interfere with his possession. This I should do, for example, if I constructed a building on my land so that some part of it projected above my neighbour's land, for this would be an interference with his right to build as high as he pleases upon his own land.[3] A like wrong is committed if I allow my trees to spread their branches over the boundary.

'By the common law every one may build or plant trees on his own land, even though his neighbour's light

[1] Dig. 39. 2. 24. 12; Cod. 3. 34. 8; Gr. 2. 34. 27; Van Leeuwen, 2. 20. 16; Voet, 8. 3. 6; *Struben* v. *Cape Town Waterworks Co.* (1892) 9 S. C. 68; *Smith* v. *Smith* (1914) *S. A. L. J.*, vol. xxxi, p. 317; provided that I acted sine animo nocendi vicino. Voet, 39. 3. 4.

[2] 2 Maasdorp, p. 103; Juta, *Water Rights*, pp. 5 ff.

[3] Gr. 2. 1. 23 and 2. 34, secs. 4, 8, 11, 19, 23. 'Quia ejus est caelum cujus est solum.' Schorer *ad* Gr. 2. 1. 23.

or view may be obstructed thereby ; but no one may by that law allow his trees to overhang the ground of a neighbour ; and the latter may cause whatever so overhangs his ground to be cut down,[1] and if he does not do so, he is entitled to the fruits which hang over.'[2]

2. Not to interfere wrongfully with his enjoyment.

(2) I must not wrongfully interfere with my neighbour's enjoyment. This is a topic to which the Roman and Roman-Dutch lawyers give little attention. In the modern law, which is largely derived from English precedents, the Court will interfere by injunction to prohibit any disturbance of my neighbour's enjoyment which amounts to a nuisance. What this is depends upon the circumstances and scarcely admits of definition. The safest guide in such matters is to be found not in any attempted generalization of principle, but in the practice of the Courts in dealing with other cases similar in character. Another test is afforded by the law of servitudes. An interference with enjoyment which can be justified as a servitude will often, in the absence of servitude, be found to constitute a nuisance.[3]

3. Not to cause subsidence or interrupt flow of stream.

(3) I must not cause a subsidence of my neighbour's land or interrupt the accustomed flow of a stream which passes from my land to his. As regards the first of these duties the law is, that, though I am free to dig in my own land I must not do so in such a way as to let down my neighbour's soil. In other words, he has a right to lateral support of his soil by mine. This right exists *jure naturae* without any servitude. Whether, apart from

[1] Voet, lib. xliii, tit. 27. As to the ownership of the severed branches see *De Villiers* v. *O'Sullivan* (1883) 2. S. C. 251.

[2] Gr. 2. 34. 21 ; Voet, lib. xliii, tit. 28. *Secus* jure civili. Groen. *de leg. abr. ad* Dig., lib. xlvii, tit. 28. Neither Groenewegen nor Voet bears out the statement in the text that the neighbour may take hanging fruits. They both speak of fructus decidentes. Further, there is no proof of a general custom of the kind alleged. Voet merely says ' ex moribus multorum locorum '. See *Rechtsg. Obs.*, pt. 3. no. 5. In like manner I may not, apart from servitude, allow the drip from my eaves to fall on another's land (Gr. 2. 34. 11) nor discharge an artificial stream of water over another's land. Ibid., sec. 16.

[3] As to the application of the principle of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330 to Roman-Dutch Law see below, p. 278.

servitude, he has a similar right of support for buildings is doubtful.[1]

Water-rights.

With respect to the flow of a stream whether above or under ground[2] the lower riparian proprietor is entitled to have the stream reach his land unimpaired in quantity, subject only to the upper proprietor's right of reasonable user and enjoyment. This is construed, at all events in the Cape Province, to mean that the upper proprietor: (1) may take as much water as is reasonably necessary for the support of animal life upon his property, and do so even, if need be, to the exhaustion of the stream; (2) may take water for agricultural purposes, but only so far as he can do so with due regard to the rights of lower proprietors to do the same; and (3) subject thereto and upon like conditions may take water for mechanical and industrial purposes as well.[3]

These rules, it must be remembered, apply only to public streams. The owner of a private stream, as pointed out above, may deal with it as he pleases.

When a private stream becomes public.

If a stream rises in a man's own land, it is in its inception private and may be dealt with as such; but if it has continued to flow in a defined channel for a considerable length of time (which in South Africa is taken to be thirty years) over adjoining land, the stream becomes public and the usual incidents of public streams attach to it.[4]

Just as a lower proprietor has rights against an upper proprietor, so he owes him duties. He must not do anything to interrupt the flow of the stream from the upper ground, or otherwise injure the upper proprietor's user of the stream.

With regard to rain-water the proprietor's rights are absolute. Apart from servitude he may dispose of it as he pleases.[5]

[1] 2 Maasdorp, p. 98. [2] (*Semble*) 2 Maasdorp, p. 103.
[3] 2 Maasdorp, pp. 112 ff.
[4] *Van Breda* v. *Silberbauer* (1869) L. R. 3 P. C. 84; *The Commissioners of French Hoek* v. *Hugo* (1885) 10 App. Ca. 336; *Vermaak* v. *Palmer* (1876) Buch. 25; Juta, *Water Rights*, pp. 41 ff.; 2 Maasdorp, pp. 106 ff.
[5] Gr. 2. 34. 14.

Section II. The Kinds of Ownership of Land

In what different ways land may be owned.

In this section we shall speak of what is commonly called land tenure, i.e. of the different kinds of land-ownership recognized by law. In England all land is held by feudal tenure mediately or immediately of the King, who is 'Sovereign Lord or Lord Paramount either mediate or immediate, of all and every parcel of land within the Realm'.[1] In Holland, feuds (*leen-goed*) existed side by side with lands held allodially (*eigen-goed*). Feudal lands were governed by the rules of the feudal law (*leenrecht*), which was administered by feudal Courts (*leen-gerechten*). Allodial lands were owned according to the ordinary principles of the common law and subject to the jurisdiction of the ordinary Courts. The principal difference between these two kinds of land-ownership is that feuds are always held by the landowner as tenant of another, while allodial property is owned, like movables, by an absolute and independent title.

Feudal and allodial ownership in Holland.

Leenen.

In Dutch law feuds (*leenen*) were always held on condition of military service.[2] This continued in theory to be the case until the end of the Republic, except where the land had been allodialized.[3] There was nothing in Dutch law precisely corresponding to the English tenure in free and common socage. But there existed from ancient times an institution which in many respects approached to socage tenure, though it exhibited also analogies with copyhold and leasehold. This was variously known as *tynsrecht* or *cynsrecht* (census right) or *erfpacht* (hereditary lease), *erfhuur* (hereditary hire), and by other like names.[4]

Cynsrecht or quit-rent tenure.

[1] Co. Litt. 65, a; 2 Bl. Comm. 53.

[2] Fock. And., vol. i, pp. 309–10.

[3] Ibid. The duty of military service was, however, disused by the seventeenth century. Gr. 2. 41. 44; Van Leeuwen, 2. 14. 13.

[4] Fock. And., vol. i, p. 319: Tijnsrecht, dat is het recht om een onroerend goed te hebben en te genieten tegen betaling van een jaarlijksch bedrag en somtijds het verrichten van zekere diensten. Grotius distinguishes *erfpachtrecht* (book ii, chap. 40) from *cijnsrecht* (book ii, chap. xlvi). Van Leeuwen includes under the general term *Erfpachtrecht*, 'Emphyteusis, Cynsregt, Pagten metten Houde (see Fock. And., vol. i, p. 325), Tynsregt en diergelyke meer.' Fockema Andreae (p. 320) says:

It was a grant of land for an indefinite or limited period subject to the payment of an annual rent (*cyns—census*). Originally, the grantor was regarded as owner of the land, the grantee merely as having a jus in re aliena. Later, the position was reversed. The grantee became the owner, with free rights of alienation *inter vivos* or by will, in default of which the land passed to his heirs by intestate succession.[1] The grantor, on the other hand, was now considered to have merely a rent-charge upon the land, which the grantee might, as a rule, redeem. On the other hand, the grantee must maintain the land, i.e. was liable for waste, and if the rent fell into arrear for a period which, under romanist influences, was often fixed at three years, or in case of other failure of duty, he incurred a forfeiture.[2] This mode of land tenure was not identical with the emphyteusis of the Roman Law, nor, it seems, derived from it. There can be no doubt, however, that it was influenced in its development by principles derived from the Roman Law. Even Grotius,[3] still more the distinctively romanist writers of the seventeenth and eighteenth centuries, fail to distinguish between the native and the exotic institution.[4]

Not the same as emphyteusis.

In addition to the above-mentioned modes of land-holding, villein tenure, which was always associated with villein status, played an important part in the old law. It did not survive the revolutionary influences of the end of the eighteenth century.[5] This institution, therefore, however interesting historically, need not detain us, since it has no counterpart in the modern law.

Villein tenure in Holland.

'Een vast verschil in den aard van het recht wijzen deze namen niet aan.' When an owner sold land reserving a rent the land was termed *oud-eigen*, and the rent might by agreement be made irredeemable. Gr. 3. 14. 14; *Cens. For.* 1. 2. 17. 1.

[1] It tended to become, and in the sixteenth century usually was, hereditary and perpetual. Fock. And., vol. i, p. 325. Grotius (2. 40. 2) describes erfpacht-recht as 'erffelicke tocht', and Van Leeuwen says (2. 10. 1) 'Erfpagt-regt is een erfelyk onversterfelyk regt', but recognizes also another sort of erfpagt-regt, which came to an end if not periodically renewed. Cf. Gr. 2. 40. 4–5.

[2] But see V. d. K. *Th.* 383.

[3] Gr. 2. 40. 2.

[4] E. g. Van Leeuwen, 2. 10. 2.

[5] Fock. And., vol. i, p. 52.

The life-interest in land (*lijf-tocht—usufruct*) will be considered in a later chapter. Usufruct.

It remains to speak of the contract of hire of land, so far as it affects the proprietary rights of the parties. In the older Germanic Law, as in the Civil and in the English Law, a lease of land had no such consequence. It was purely contractual in character, and gave no right against third parties, nor did the benefit of a lease pass on death to the heirs of the lessee. Thus, if the lessor sold the land, the purchaser, though aware of the lease, was not bound by it. This is expressed by the proverbial saying, *Koop breekt huur* (Sale breaks hire). The reason was that leases, being mere contracts, required no solemnity and consequently did not transfer any proprietary interest.[1] In later times the rule was reversed, *Breekt koop geen huur* (Sale breaks no hire), *Huur gaat voor koop* (Hire goes before sale); with the result that the hirer could make good his right to the land against any third person to whom his landlord might have sold it. In this sense the law is laid down by Grotius,[2] with the qualification, however, that a lessee of land has no such right unless his lease is in writing,[3] passed before the Schepenen (*coram lege loci*) or under the hand of the lessor.[4] Groenewegen goes further, for besides regarding writing as of the essence of all leases of lands[5] (but not of houses),[6] he requires further that

Lease of land, in early law was merely contractual.

Koop breekt huur.

But, later, conferred a real right.

Huur gaat voor koop.

Must a lease of land be in writing?

[1] I.e. did not create any right *in rem*. According to some authorities this continued to form part of the law of Holland. Thus Schorer (*ad* Gr. 3. 19. 3) writes: Hodie nullum licet in longum tempus facta sit locatio tribuat *jus in re*.

[2] Gr. 2. 44. 9; Van Leeuwen, 4. 21. 7; and see Voet, 19. 2. 17.

[3] Gr. *ubi sup.* and 3. 19. 3.

[4] 'By publijcke instrumenten ofte d' eygen handt van den Eygenaar' is the language of the Pol. Ord. 1580 (Art. 31), which Grotius purports to follow. See next note. His own words (3. 19. 3) are: 'Zonder schepenkennisse ofte schrift by den eighenaer gheteickent.'

[5] Groen. *de leg. abr. ad* Cod. 4. 65. 24, sec. 1; and notes 5–6 *ad* Gr. 3. 19. 3. As authorities for this proposition, reference is made to the Handvest of Philip Duke of Burgundy of June 11, 1452 (3 G. P. B. 586), the Placaat of Charles V of January 22, 1515 (1 G. P. B. 363), and the Pol. Ord. 1580, Art. 31 (1 G. P. B. 337). These enactments, however, relate not to original leases but to *nahuyr*. They are therefore no authority for the proposition advanced in the text. See V. d. K. *Th.* 672.

[6] Groen. *de leg. abr. ad* Cod. 4. 65. 24, sec. 2, non obstante *Holl. Cons.*,

a lease *ad longum tempus*, i.e. for ten years and upwards, should be executed *coram lege loci*, if it is to prevail against a purchaser.[1] The reason is that a lease *ad longum tempus* is in effect an alienation and demands the same solemnity of execution.[2] According to Groenewegen, then: (1) a short lease of land, if in writing, holds good against a purchaser; (2) a short lease of houses holds good against a purchaser even without writing; (3) a long lease holds against a purchaser if executed *coram lege loci*, otherwise not.[3] In South Africa, with some statutory exceptions, the validity of a lease as between the parties (and their heirs) is independent of the presence or absence of writing, and a lease which is good between the parties is also good as against persons claiming through the lessor by lucrative title. As regards purchasers and creditors the law is otherwise. A short lease is absolutely valid against them;[4] a long lease only if registered against

Groenewegen's statement of the law of leases.

Leases in South Africa.

vol. i, no. 262. Van der Keessel (*Th.* 670) agrees. Voet, however (19. 2. 2), and Decker (*ad* Van Leeuwen, 4. 21. 3) consider that the Edict of the States of Holland and West Friesland of April 3, 1677 (3 G. P. B. 1037) settled the law in the sense that leases of both lands and houses must be in writing. Van der Linden (1. 15. 11), though relying on different statutes, agrees with this statement of the law.

[1] *Ad* Cod. 4. 65. 9.

[2] In locatione enim longi temporis eadem solemnitas intervenire debet quae in alienatione, cujus naturam induit atque sortitur ex communi atque inveterata Doctorum sententia. Voet (19. 2. 1) expresses with some hesitation the same opinion. Van Leeuwen (4. 21. 9), equally with hesitation, pronounces the other way.

[3] Groen. *ad* Gr. 3. 19. 9, where he says: 'It being well understood that in no case can immovable property be let for more than ten years unless the written lease (*huurcedulle*) is passed before the Court of the place where the property is situated.' At the Cape leases *in longum tempus* must be executed in writing and registered in the office of the Registrar of Deeds. 3 Maasdorp, p. 201. In Ceylon by Ord. No. 7 of 1840, sec. 2, 'no contract for establishing any security, interest, or encumbrance affecting land or other immovable property, other than a lease at will or for any period not exceeding one month, is of force or avail in law unless the same is in writing and signed by the party making the same or by some person lawfully authorized by him, in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing is duly attested by such notary and witnesses.' The validity of leases at will or for a period not exceeding one month entered into verbally has not been questioned in any case. Pereira, p. 667.

[4] *Green* v. *Griffiths* (1886), 4 S. C. 346.

the title, or if the purchase was made or the credit given with knowledge of the lease. So the law has been laid down for the Cape Province.[1] In the other provinces it is substantially the same, subject to some statutory variations. In the Orange Free State a long lease is understood to be a lease for more than twenty-five years.[2] In Natal any contract to grant or take a lease or sublease of immovable property for a period exceeding two years from the time of making such contract or for the cession of any such lease or sublease having then more than two years to run, must, unless there has been part performance, be evidenced by writing.[3] In the Transvaal a lease for ten years or upwards has no effect whatever, even between the parties, unless notarially executed.[4] Over the whole of South Africa no distinction exists as regards the requirements of form and of registration between leases of land and leases of houses.

In the modern law a lease is a kind of land tenure.

From what has been said it is plain that in the modern law, as in the later stages of the Roman-Dutch Law of Holland, a lease creates not only contractual rights as between the parties, but also proprietary rights, which the lessee can, within the limits above stated, make good

[1] The lessee must, however, pay the rent to the purchaser, as a condition of retaining possession; and this though he may have already paid it in advance to his lessor. Voet, 19. 2. 19; 3 Maasdorp, p. 218.

[2] *Fichardt* v. *Webb* (1889) 6 C. L. J. 258. The term of twenty-five years is taken from an Ordonnantie op het middel van den veertigsten penning of the States of Holland dated May 9, 1744 (7 G. P. B. 1441). Art. 9 enacts: 'Gelyk meede van Huuren, welke voor langer tyd als vyf en twintig jaaren worden aangegaan, deezen Impost op den voet van Erfpachten zal moeten worden betaald'; and Art. 19 says: 'De aangeevingen van koop en verkoop, en van alle zoodanige handelingen, waar van deezen Impost betaald moet worden, zullen ter Secretarye moeten worden gedaan binnen veertien daagen en de opdrachten van dezelve binnen den tyd van zes weeken na het sluiten van de koop, of andere handelingen uit krachte van welke den opdracht moet gedaan worden.' Following this, Van der Keessel (*Th.* 673) says: 'Si in XXV vel plures annos locatio contracta sit, et 40as solutione et solenni in jure cessione opus est'; but Van der Linden (1. 15. 11) more correctly writes: 'Wanneer die tijd *langer dan* vijf en twintig jaaren zoude moeten duuren, moet de huur-cedulle gerechtelijk worden verleden.'

[3] Law No. 12, 1884, secs. 1 (c), and 2.

[4] Procl. No. 8 of 1902, sec. 29 (1). The reader should consult the section.

against all the world. We are fully justified, therefore, in regarding a lease as a species of ownership in land.[1]

Land tenure in the Colonies.

It does not fall within the scope of this work to describe in detail the systems of land tenure existing at the present day in the several Roman-Dutch Colonies. We will merely observe that in South Africa besides: (1) freehold, and (2) leasehold, (3) perpetual quit-rent tenure of lands held from Government was introduced into Cape Colony by a Proclamation of 1813, and exists also in various forms in the other provinces. In Ceylon and British Guiana this form of tenure is unknown.

CHAPTER V

POSSESSION

The theory of possession in Roman-Dutch Law.

WHATEVER theory of possession may have obtained in the native law of Holland, the theory of the Roman-Dutch lawyers approximates very closely to the doctrine of the Roman Law. The short chapter which Grotius[2] devotes to the subject reflects merely the views of the civilians. Since these are readily accessible from other sources we shall not occupy space with describing them. But the case is widely different with the remedies which

Possessory remedies.

Roman-Dutch Law afforded for the protection of possession. These, though they present some necessary analogies with the Roman interdicts, were, in fact, historically unconnected with them. In the modern law, again, they have ceased to exist as distinct institutions. Their histori-

[1] So in Ceylon. 'A lessee under a valid lease from the owner is *dominus* or owner for the term of his lease. He is owner during that term against all the world, including his lessor,' Hutchinson C.J. in *Abdul Azeez* v. *Abdul Rahiman*, Current Law Reports of Ceylon, vol. i at p. 275; and again: 'In my opinion we ought to regard a notarial lease as a *pro tanto* alienation,' Bonser C.J. in *Goonewardana* v. *Rajapakse* (1895) 1 N. L. R. at p. 219; approved in *Isaac Perera* v. *Baba Appu* (1897) 3 N. L. R. 48. With regard to British Guiana the proposition in the text seems more doubtful. See Appendix B to this Book (*infra*, p. 184).

[2] Gr., book ii, chap. ii.

cal importance, however, entitles them to some brief attention.

Following the Roman Law the Dutch Law distinguished possessory actions according as they were directed to the acquisition, the retention, or the recovery of possession. The process of the Court which the plaintiff invoked was called a mandament, and the various remedies available to him are distinguished as mandamenten van Immissie, van Maintenue, van Spolie, and van Complainte. We shall speak of these in order.

Mandament van Immissie.

1. *Mandament van Immissie.* This was the process whereby an heir sought to be put in possession of the deceased testator's or intestate's estate. It was, according to Van der Linden, in common use, but was seldom employed except when one coheir kept another coheir or a person entitled to a legitim out of possession of the estate. It was almost always sued for in conjunction with the mandament van Maintenue.[1]

Mandament van Maintenue.

2. *Mandament van Maintenue.* Any person disturbed in his possession might address a request either to the Hof or to the Hooge Raad for a mandament van Maintenue. To ground the action two conditions alone were necessary : (*a*) possession, (*b*) disturbance.[2] The suppliant prayed a mandament whereby he should be 'maintained, secured, and so far as necessary let into the possession or quasi-possession of the lands and goods in question, and that the defendant should be ordered to indemnify him against all past disturbance of possession and to abstain from the like in future'. In case of opposition to this prayer suppliant further asked to be placed in interim possession (*recredentie*).[3]

The defendant could defeat plaintiff's case by showing

[1] V. d. L. *Jud. Pract.* book ii, chap. xx.

[2] Fock. And., vol. i, p. 218 ; V. d. L., *ubi sup.*

[3] For the Formula of Request for a mandament of Maintenue see Van Alphen, *Papegay*, chap. xv. The material part of the petition runs : 'Versoekende Mandament daar by hy Suppliant werde gemaincteneert, gestijft en gesterkt (en voor zoo veel des noot zy) werde geimmitteert in de possessie vel quasi van de voorsz. Landen ende andere Goederen.'

that plaintiff's possession was aut vi aut clam aut precario ab adversario (*vitiosa possessio*).[1]

Physical disturbance unnecessary.

It should be noted that to maintain this action proof of physical disturbance was unnecessary. The mandament would be granted even in case of apprehended disturbance—propter metum oppositionis habendae et turbationis faciendae.[2] In case of serious threats of violence proceeding from powerful persons a process was granted called the mandament van Sauvegarde.[3] But this seems to have been not so much a possessory remedy as directed rather to the protection of person or property against apprehended violence.

Mandament van Sauvegarde.

Mandament van Spolie.

3. *Mandament van Spolie.*[4] This was a process directed to the recovery of possession. The plaintiff had to prove: (*a*) possession, (*b*) dispossession. The defendant's only plea was a denial of the facts alleged. The plea of vicious possession was not admitted.[5]

This writ was available in respect of every kind of property movable, immovable, or incorporeal. It lay against the spoliator and his heirs and also against all mala fide possessors. The remedy asked for was restoration and compensation and that plaintiff should be reinstated in possession. The plaintiff need not prove actual violence.[6]

[1] *Papegay* (ed. 1740), vol. i, p. 114; Fock. And., *ubi sup.*

[2] Vromans, *Tractaat de foro competenti*, 1. 2. 1, note: Men simpele Maintenue mag versoeken schoon geen turbatie in de possessie geschiet is. Cf. Bort, *Tract. van Complaincte*, tit. 1, secs. 31–2.

[3] Bort, *ubi sup.*, secs. 26–30; V. d. L. *Jud. Pract.*, 4. 5. 21.

[4] V. d. L., op. cit., book ii, chap. xxii; *Papegay*, chap. xiv (vol. i, p. 112). The material part of the petition runs: 'ende alsoo *Spoliatus ante omnia debet restitui* keert hem (de Suppliant) aan desen Hove versoekende Mandament by 't welke de voorsz. C. van wegen de Hooge Overigheyd belast ende bevolen zy, de handen te trekken ende te houden van 't voorsz. Land, ende den Suppliant daar mede te laten bewerden, als met zyn eygen goed, midsgaders kosteloos ende schadeloos af te doen alsulke Spolie ende belet, als hy den Suppliant in 't gebruyk van 't voorsz. Land gedaan heeft, ende ook te betalen de kosten hieromme gedaan,' &c.

[5] Fock. And., vol. i, p. 219.

[6] Fockema Andreae says: 'ontzetting met of zonder geweld'. Van der Linden says that this remedy is open to those 'die geweldadiger wijze van het hunne berooft worden'. But there is no allegation of violence in the Formula given by Van Alphen, *Papegay*, chap. xiv.

4. *Mandament van Complainte.*[1] The conditions of this writ were more stringent. Suppliant must show: (*a*) that he had possessed, (*b*) quietly and peacefully, (*c*) for a year and a day, (*d*) disturbance or ouster within the year next before action brought. It lay in the case of either disturbance or ouster,[2] and thus invaded the province both of Maintenue and of Spolie. According to circumstances suppliant prayed to be maintained in, or restored to, possession. The vitia possessionis might be pleaded as a defence.

Mandament van Complainte.

The above-named remedies were usually sued for in combination. Thus, as already mentioned, the Immissie was combined with the Maintenue. Similarly the Maintenue was asked for as a corollary either to the Complainte[3] or to the Spolie.[4]

The possessory mandaments often used in combination.

According to Van der Linden the most commonly employed of the above-named interdicts were the Immissie and the Maintenue. The advantage of the latter over the Complainte lay in the fact that the plaintiff had to prove much less in order to obtain his remedy.

In the modern law the enumerated possessory actions are no longer in use. 'The procedure in all three cases' (viz. maintenue, spolie, complainte), says Mr. Justice Wessels, 'was very formal and cumbersome, and has long ago been superseded in South Africa by a far simpler practice. We nowadays effect the same object by the ordinary interdicts, by an action or by a writ of spoliation; the latter, though the same in name as the old Dutch mandament, is far simpler in its nature.'[5] In the modern practice when spoliation is alleged, the Court will upon an *ex parte* application grant a rule *nisi*, calling upon defendant to show cause why he should not forthwith restore the property.[6]

Possessory actions in the modern law.

[1] V. d. L., op. cit., book ii, chap. xxi; Bort, *Tract. van Complaincte.*
[2] Fock. And., *ubi sup.* [3] Voet, 43. 17. 7.
[4] Vromans, *ubi sup.*; V. d. L., op. cit., 2. 22. 1; *Papegay*, vol. ii, p. 116. [5] Wessels, p. 482.
[6] *Exors. of Haupt* v. *de Villiers* (1848) 3 Menz. 341; *Swanepoel* v. *Van der Hoeven* (1878) Buch., 4. By Ceylon Ord. No. 22 of 1871, sec. 4,

Their scope and application.

It must be carefully remembered that the possessory remedies above mentioned are available only to the possessor in the proper sense of the word, or at most to the quasi-possessor of a servitude, and in the modern law to the lessee,[1] but not to a mere detainor, or to one who possesses nomine alieno. Voet, however, allows the interdict unde vi to a procurator, whose dominus is absent,[2] and a recent decision of the Privy Council has extended the same indulgence to the trustee of the Maradana Mosque at Colombo.[3]

CHAPTER VI

SERVITUDES

Servitudes.

THE next class of jura in re are Servitudes.[4] A servitude is a real right enjoyed by one person over or in respect of the property of another, whereby the latter is required to suffer the former to do, or himself to abstain from doing, something upon such property for the former's advantage.[5] The person for whose benefit such right is constituted may either enjoy it as incidental to and

'any person who has been dispossessed of any immovable property, otherwise than by process of law, may institute proceedings against the person dispossessing him at any time within one year of such dispossession.' The effect of this section has been considered in numerous cases. See Pereira, p. 543.

[1] *Swanepoel* v. *Van der Hoeven, ubi sup.*; *McLoughlin* v. *Delahunt* (1880) Foord, 129. So in Ceylon, *Pereira* v. *Sobana* (1884) 6 S. C. C. 61. See Pereira, pp. 544 ff.

[2] Voet, 43. 16. 3: ut tamen coloni et procuratores et similes extra ordinem audiendi videantur, qua tales, si absens sit dominus cujus nomine possident.

[3] *Abdul Azeez* v. *Abdul Rahiman Mudliyar* [1911] A. C. 746. Lord Shaw of Dunfermline, in delivering judgment cited with approval the Colonial cases, *Changarapilla* v. *Chelliah* (1902) 5 N. L. R. 270, and *Sivapragasam* v. *Ayar* (1906) 2 Balasingham 49.

[4] For a valuable note on this topic see Kotzé, *Van Leeuwen*, vol. i, pp. 302 ff.

[5] Voet, *Compendium*, 7. 1. 1: Servitus in genere est jus in re alterius alteri constitutum, qua res alteri quam domino utilitatem adfert contra dominii naturam. Gr. 2. 33. 4: Erfdienstbaerheid is een gerechtigheid om iet buiten 't ghemeene recht te hebben ofte te doen op eens anders grond tot dienste van de sijne.

inseparable from immovable property of which he is owner, or may enjoy it personally and without reference to any property of which he is owner. In the first case the right is termed a real or praedial servitude; in the second case it is termed a personal servitude.[1]

Real or praedial servitudes.

In the case of real servitudes, the land in respect of which the right is enjoyed is termed the praedium dominans, the land over which the right is exercised is termed the praedium serviens.[2] Real or praedial servitudes exist for the benefit of lands and houses, and the burden of them is imposed on lands or houses. Personal servitudes exist for the benefit of persons, and are enjoyed in respect of movable as well as of immovable property.[3] When the word servitude is used without qualification it is usually a real servitude that is meant.[4]

A real servitude is a fragment of the ownership of an immovable detached from the residue of ownership and vested in the owner of an adjoining immovable as accessory to such ownership and for the advantage of such immovable.[5] Though ownership is thus divided and vested in two persons, the detached fragment is, as a rule, relatively insignificant in comparison with what remains. It seems natural, therefore, to speak of the person to whom the residue belongs as owner of the land, while the person in whom the detached right is vested is said to have a jus in re aliena.[6] Personal servitudes approach more nearly to ownership in scope of enjoyment and have little in common with real servitudes except the name. For the present we shall confine our attention to real servitudes.

Real servitudes are distinguished as rustic and urban. The distinction has regard to the character of the dominant tenement according as it is used for the purpose of agricul-

[1] Voet, 7. 1. 1.
[2] Voet, 8. 1. 2.
[3] *Cens. For.* 1. 2. 14. 2.
[4] Voet, 8. 1. 1.
[5] In the Roman Law in consequence of the technical rule 'Servitutes natura perpetuae sunt', if a servitude, otherwise praedial, is constituted in favour of a particular person, for life merely, it is not real but personal. Voet, 8. 1. 4.
[6] Gr. 2. 33. 1.

ture and the like, or for residence.[1] It does not to-day involve any consequences of practical importance.

Rustic servitudes.

The following are the principal kinds of rustic servitudes[2] (*veld-dienstbaerheden*).

1. Rights of Way: (*a*) for walking and riding (*iter*) which the Dutch writers subdivide into foot-path (*voet-pad*)[3] and bridle-path (*rij-pad*);[4] (*b*) for driving cattle as well as for going on foot and horse-back, and for light vehicles (*actus—dreef*);[5] (*c*) for all kinds of traffic including laden wagons (*via—weg*);[6] to which may be added (*d*) a way of necessity (*nood-weg*), i.e. a way to be used only for the harvest, for carrying a corpse to burial, or other necessary purpose;[7] or a way giving necessary access to a public road.[8]

2. Water Rights: viz. right of leading water over or out of another's land (*aquae-ductus—water-leiding*);[9] right of discharging water on to another's land (*water-lozing*);[10] right of drawing water from another's private stream, well, or cistern (*aquae-haustus—water-haling*);[11] right of watering cattle (*pecoris ad aquam appulsus*);[12] right of access to water over another's land (*water-gang*).[13]

[1] Voet, 8. 1. 3–4; Girard, p. 362; who says 'Mais le critérium est loin d'en être incontesté'.

[2] See Fock. And., vol. i, pp. 275 ff.

[3] Gr. 2. 35. 2; Van Leeuwen, 2. 21. 2.

[4] Gr. 2. 35. 3; Van Leeuwen, 2. 21. 3; Voet, 8. 3. 1.

[5] Gr. 2. 35. 4; Van Leeuwen, 2. 21, 4; Voet, 8. 3. 2.

[6] Gr. 2. 35. 5; Van Leeuwen, 2. 21. 5; Voet, 8. 3. 3.

[7] Gr. 2. 35. 7; Voet, 8. 3. 4.

[8] Gr. 2. 35. 8 and 11; Van Leeuwen, 2. 21. 7; Voet, *ubi sup.* All rights of way must be exercised so as to burden the servient property as little as possible.—'Alle servituten van pad en weg moesten "te minster schade en te naaster lage" worden gebruikt.' Fock. And. vol. i, p. 276; Gr. 2. 35. 6; Van Leeuwen, 2. 21. 6.

[9] Gr. 2. 35. 14; Voet, 8. 3. 6.

[10] Gr. 2. 35. 16; Van Leeuwen, 2. 21. 15.

[11] Gr. 2. 35. 13; Voet, 8. 3. 7. The person who enjoys such right is, as a rule, bound to help to keep the well, &c., in repair. The right of access is implied. Van Leeuwen, 2. 21. 13.

[12] Gr. 2. 35. 19; Van Leeuwen, 2. 21. 14; Voet, 8. 3. 11, and see *Smit* v. *Russouw* (1913) *S. A. L. J.*, vol. xxxi, p. 194. Grotius adds ''t recht om te varen door een anders water', which Maasdorp renders 'the right of ford'; but it seems rather to be what Voet (loc. cit.) calls 'jus navigandi per alterius lacum perpetuum ad nostra praedia'. See also Van Leeuwen, 2. 21. 17.

[13] Van Leeuwen, 2. 21. 13.

3. Right of taking sand out of another's soil or of taking lime and having a lime-kiln on another's land.[1]

4. Right of pasture.[2]

The above list is not exhaustive. Other real servitudes may be created by agreement (or in any of the other recognized ways) provided that they are of such a nature as to benefit the dominant estate, and in other respects satisfy the legal conditions of servitudes.[3]

The following are urban servitudes :

Urban servitudes.

1. My right to require my neighbour to support the weight of my house or wall (*jus oneris ferendi—muurbezwaring*).[4] A peculiarity of this servitude is that, contrary to the general rule, it entails an active duty of keeping in repair. But if the owner of the servient tenement abandons it, the duty of repair also ceases.

2. My right to drive timber, &c., into my neighbour's wall (*jus tigni immittendi—inbalcking ofte inanckering*).[5]

3. My right to have a balcony or other thing projecting over my neighbour's land (*tigni projiciendi vel protegendi*).[6] This case differs from the last mentioned in respect of the remedy if a servitude is exercised without right. In the former case the person whose land is encroached upon may remove the obstruction ; in the latter case he must proceed by way of action.[7]

4. My right to require you not to raise the height of your buildings (*jus altius non tollendi—belet van hoger timmering*).[8] Scarcely distinguishable from this is my right that you should not interfere with my lights (*servitus ne luminibus officiatur—vrij licht*).[9] If we are to

[1] Jus arenae fodiendae, jus calcis coquendae, etc. Voet, 8. 3. 11.

[2] Het recht om eens anders land te beweiden. Fock. And., vol. i, p. 277 ; Voet, 8. 3. 10.

[3] Voet, 8. 3. 12.

[4] Gr. 2. 34. 3 ; Van Leeuwen, 2. 20. 2 ; Voet, 8. 2. 1.

[5] Gr. 2. 34. 7 ; Van Leeuwen, 2. 20. 6 ; Voet, 8. 2. 2.

[6] Van Leeuwen, 2. 20. 7 ; Voet, 8. 2. 3.

[7] Voet, 8. 1. 4 ; Dig. 9. 2. 29. 1.

[8] Gr. 2. 34. 18 ; Van Leeuwen, 2. 20. 12 ; Voet, 8. 2. 8. The contrary servitude *altius tollendi* is variously explained. See Voet, 8. 2. 5–7.

[9] Gr. 2. 34. 20 ; Van Leeuwen, 2. 20. 13 ; Voet, 8. 2. 11. This is my right to forbid any act on the part of the owner of the servient

adhere in this matter to the Roman Law the last-named right merely goes to the length of prohibiting interference with access of light to my upper windows. In this respect it is more limited in scope than the jus altius non tollendi. On the other hand, obstruction of light by trees would be an interference with the second right, but not with the first.[1] Another allied right is the right of prospect[2] (*vrij gezicht*), which seems, in Roman Law, to have implied access of light not only to upper but to lower windows as well.[3] In this case, too, I am entitled to require that my light should not be intercepted by trees.

5. My right to discharge the water from my eaves or spout on to your land (*jus stillicidii vel fluminis recipiendi—drop*);[4] or my contrary right to require you to discharge such water on to my land (*jus stillicidii vel fluminis non recipiendi—drop-vang*).[5]

6. My right to have an artificial drain passing through or over your land (*jus cloacae mittendae—goot-recht*).[6]

tenement, which will interfere with access of light to my upper windows. Dig. 8. 2. 16: (Paulus) Lumen, id est ut coelum videretur, et interest inter lumen et prospectum; nam prospectus etiam ex inferioribus locis est, lumen ex inferiore loco esse non potest. This servitude may also be interfered with by planting a tree. Dig. 8. 2. 17 pr. A general servitude of light according to Voet (loc. cit.) includes future lights as well as present lights. But whether this is so or not depends upon circumstances and the terms of the grant. *St. Leger* v. *Town Council of Cape Town* (1895) 12 S. C. 249.

[1] My neighbour may cut overhanging branches. Gr. 2. 34. 21. *Supra*, p. 137.

[2] Gr. 2. 34. 20; Van Leeuwen, 2. 20. 14; Voet, 8. 2. 12. Grotius adds (2. 34. 22) 'veinster-recht, i.e. 't recht om een veinster te hebben hangende ofte opgaende over eens anders grond'; or, as Voet (8. 1. 9) puts it, 'jus aperiendi fenestram pendulam supra aream alterius.' Gezichtverbod is my right to prohibit you from exercising a right of prospect over my land. Gr. 2. 34. 27. Jus luminum or jus luminis immittendi is my right to open lights or windows in your wall. Dig. 8. 2. 4; Voet, 8. 2. 9. Jus luminis non aperiendi is my right to require that you shall not open lights in your wall. Voet, 8. 2. 10.

[3] Latior pleniorque de prospectu quam de luminibus servitus. Voet, 8. 2. 12.

[4] Gr. 2. 34. 10; Van Leeuwen, 2. 20. 8. When the right is to discharge water in a stream it is called jus fluminis recipiendi (waterloop). Gr. 2. 34. 15.

[5] Gr. 2. 34. 13; Van Leeuwen, 2. 20. 9; Voet, 8. 2. 13.

[6] Gr. 2. 34. 24; Goot-recht—'t recht om een goot te hebben leghende ofte uitkomende op eens anders grond. Voet, 8. 2. 14; Dig.

How praedial servitudes are acquired.

Praedial servitudes are acquired by :

1. Agreement followed by acquiescence by the owner of the servient land.[1] In South Africa a registered grant is required to create a right in rem, though a bare agreement is sufficient to affect a purchaser of the servient land, who takes with notice.[2]

2. Prescription of one-third of a hundred years.[3] But no right can be grounded upon an enjoyment, however long continued, which was in its origin violent, clandestine or precarious (*aut vi aut clam aut precario*).[4] Further, no prescriptive claim can be based upon an enjoyment which is not adverse to the person against whose land it is claimed. Thus the mere fact that you have for upwards of a third of a century refrained from exercising a right gives me no negative servitude in derogation of your right. The servitude altius non tollendi, which, as has been

8. 1. 7 ; Voet (loc. cit.) mentions many other servitudes of less frequent occurrence.

[1] Gr. 2. 36. 2. Grotius seems to found upon texts of the Digest such as Dig. 8. 3. 1. 2 : Traditio plane et patientia servitutium inducet officium praetoris. Cf. Voet, *Elem. Jur.* lib. ii, tit. 3, sec. 36: Constituuntur praediales servitutes pactionibus et stipulationibus, accedente quasi-traditione, quae in usu et patientia vel in loci serviturі assignatione consistit. Dig. 8. 1. 20. Consistently with what he here lays down Grotius advised in vol. iii, pt. 2 of the *Hollandsche Consultatien* no. 316, that by the general usage of Holland servitudes are constituted under hand and not before the Court. But the contrary view is expressed by Groenewegen (*in notis ad* Gr. 2. 36. 2), Voet (8. 4. 1), Van Leeuwen (2. 19. 2), Decker (ad loc.), and Van der Keessel (*Th.* 369). See Kotzé's note at vol. i, p. 281, of his translation of Van Leeuwen, and *Steele* v. *Thompson* (1860) 13 Moo. P. C. C. 280, there cited. Van der Linden (1. 11. 4) alone supports Grotius.

[2] 2 Maasdorp, p. 205 ; *Judd* v. *Fourie* (1881) 2 E. D. C. 41. But see the dissenting judgment of Sheppard J. In Ceylon a servitude must (*semble*) be constituted by a notarial instrument in terms of Ord. No. 7 of 1840, sec. 2 ; and such instrument must be registered (Ord. No. 14 of 1891, sec. 16) ; but there is no provision for registering the servitude against the title to the land.

[3] Gr. 2. 36. 4 ; Van Leeuwen, 2. 19. 3. The term is now thirty years at the Cape (Act No. 7 of 1865, sec. 106). The authors of the *Rechtsgeleerde Observatien* point out (pt. 3, obs. 56) that Grotius is inconsistent with his own opinion in *Holl. Cons.* (vol. iii, pt. 2, no. 142) in favour (in some cases) of a prescription of thirty years. They further observe that many other periods of prescription existed in different parts of Holland.

[4] Van Leeuwen, 2. 19. 5 ; Voct, 8. 4. 4.

seen, is your right to forbid me building higher, affords an illustration of this principle. No one is bound to build on his land unless he pleases, and the fact that a landowner refrains from exercising this right of ownership over a long period of time does not in the least prejudice his right to exercise it when he chooses to do so. Therefore, the mere fact that I have for upwards of a third of a century enjoyed an uninterrupted prospect, or access of light, over your land gives me no right whatever to insist on the continuance of this advantage, which has been throughout merely a matter of fact and not of law.[1] So, if for a number of years an upper riparian owner, having, as such, a right to reduce the volume of the stream within the limits and for the purposes permitted by law, has, in fact, allowed a lower proprietor to enjoy an uninterrupted flow of water, the lower proprietor has not thereby acquired any right that this state of things shall continue for his benefit. The position would be different in both these cases if the one proprietor had refrained from exercising his proprietary right in deference to the other's claim of right to have him do so, and had so refrained during the whole currency of the term of prescription. What is here said only applies to negative servitudes. An affirmative servitude is from its nature adverse to the proprietor over whose land it is asserted and exercised.

Though the full period of prescription is necessary to constitute a servitude, it does not follow that the Court will always grant an injunction for the removal of a structure which has been maintained for a shorter

[1] Voet, 8. 4. 5; Schorer *ad* Gr. 2. 34. 20. A good illustration is afforded by Neostadius (*Supr. Cur. Decis.* no. 98). It relates to a claim of servitude in respect of access of light to a kitchen, which defendant had blocked. The report says: 'Cum enim naturalis haec aeris in culinam perceptio sit facultatis tantum, nullo unquam tempore praescriptionem parere potuit; hoc amplius, quod negativa haec servitus non nisi hominis praecedente facto acquiri potuit. Factum enim prohibitionis intercessisse oportuit, et praeterea huic prohibitioni obtemperatum; quorum neutrum hactenus intercessisse, vel fatente actore, verum est.'

period in derogation of another's right. Thus, by the *keuren* of Delft and other towns a building which had stood for a year and a day [1] without protest (*onbeklaagt*) was thereby sufficiently prescribed, i. e. its removal would not be decreed ; [2] but the party injured by its erection was entitled to compensation in damages.[3]

According to Voet, to make good a claim to a servitude by prescription bona fides is necessary,[4] though justus titulus is not. But the analogy of the general law of prescription in the Roman-Dutch Law suggests that neither the one nor the other is needed.[5] It is not required that the owner of the servient land should know that the servitude is being exercised against him.[6]

3. Last will.[7]

4. Judicial decree ; [8] e. g. in one of the judicia divisoria.

5. By operation of law (*implied grant*). According to Grotius, when the owner of two houses has used one of them in a way which, if the other house had not belonged to him, would have been in effect the exercise of a servitude, and the ownership is thereafter severed, each house retains its privileges and burdens as before.[9] This proposition is supported by Groenewegen [10] on the ground of various *keuren*, and is accepted by the authors of the *Rechtsgeleerde Observatien*.[11] Voet does not admit it, unless

[1] I.e. for a year, six weeks, and three days. Anton. Matthaeus, *Paroemiae*, no. ix, sec. 17.

[2] Voet (8. 4. 6) seems to contemplate two cases: (1) the building has been set up 'sciente vicino et operi non intercedente'; (2) 'vel, cum, eo ignorante, opus perfectum esset, is deinde intra annum et diem non contradixerit ac destructionem petierit.' In either event the building must have been set up either on my land or on your land in derogation of a servitude or of a local law or custom. *Prima facie* any one may build on his own land at pleasure. Gr. 2. 34. 19. See Fock. And., vol i, pp. 254 ff.

[3] Gr. 2. 36. 5; and Groen., ad loc.; Groen. *de leg. abr. ad* Cod. 3. 34. 1–2; Van Leeuwen, 2. 19. 4.

[4] Voet, 8. 4. 4; *Compendium*, 8. 4. 1.

[5] Cf. Anton. Matthaeus, *Paroemiae*, no. ix, secs. 2–3.

[6] Voet, *ubi sup.*

[7] Gr. 2. 36. 3; Voet, 8. 4. 2. But see 2 Maasdorp, p. 213.

[8] Voet, loc. cit.

[9] Gr. 2. 36. 6.

[10] *Ad* loc. cit.

[11] *Rechtsg. Obs.*, pt. 3, no. 58.

the servitude is constituted expressly or by the use of some formula which has the same effect.[1]

How praedial servitudes are lost.

Praedial servitudes are lost by:

1. Merger,[2] when the servient and the dominant land meet in the same hand; in accordance with the maxim 'nulli res sua servit'.[3] If the circumstances are such that the 'confusion' is permanent, the servitude is altogether gone; if the union of ownership is merely temporary, as would be the case if the ownership of the two lands was not 'perdurable' (to borrow a phrase from English Law), the servitude would be in suspense.[4]

2. Release,[5] which may be either: (*a*) express; or (*b*) tacit; as by acquiescing in some act of the owner of the servient land, which is inconsistent with the continued existence of the servitude.[6]

3. Destruction of the dominant or servient property.[7]

4. Determination of the grantor's interest in the servient land.[8]

5. Non-user for the third of a hundred years.[9]

6. Sale of land by public auction in pursuance of a judicial sequestration. In such case persons claiming rights of servitude, &c., are given an opportunity of asserting them, and if they fail to do so cannot afterwards make them good against a purchaser.[10]

[1] E.g. 'uti nunc sunt'. Voet, 19. 1. 6. He cites *Holl. Cons.*, vol. ii, no. 145, where a vendor of one house who retained the other was denied a 'jus stillicidii'. In this case even a general clause of the usual character 'met zoodanige Vrijdommen en servituten', &c., was said to be limited to servitudes of which the vendor was unaware.

[2] Dig. 8. 6. 1; Gr. 2. 37. 2; Van Leeuwen, 2. 22. 1; Voet, 8. 6. 2.

[3] Dig. 8. 2. 26.

[4] Schorer, *ad* Gr. 2. 36. 6; Voet, 8. 6. 3; *Salmon* v. *Lamb's Exor.* (1906) E. D. C. 351.

[5] Gr. 2. 37. 3; Voet, 8. 6. 5.

[6] Gr. 2. 37. 4; Van Leeuwen, 2. 22. 3; Voet, *ubi sup.*

[7] Gr. 2. 37. 5; Van Leeuwen, 2. 22. 6; Voet, 8. 6. 4.

[8] Gr. 2. 37. 6; Van Leeuwen, 2. 22. 5; Voet, 8. 6. 13.

[9] Gr. 2. 37. 7; Van Leeuwen, 2. 28. 4; Voet, 8. 6. 7. Rustic servitudes are lost by non-user, merely; but in the case of urban servitudes it is necessary that the non-user should have been due to some adverse act on the part of the owner of the servient land. Voet, 8. 6. 11. This was called *usucapio libertatis.* Dig. 8. 2. 6; 41, 3. 4. 28.

[10] Voet, 8. 2. 14; *Holl. Cons.*, vol. ii, no. 6.

Rules of general application to praedial servitudes.

Certain rules apply to all praedial servitudes, such as :

1. There cannot be a servitude over a servitude.[1] 'Servitus servitutis esse non potest.'[2]

2. The extent of the servitude may not exceed what is required for the convenience of the dominant land.[3]

3. There can be no praedial servitude without a dominant and a servient land ; which last must be near enough to the first to be useful to it, but not necessarily contiguous.[4]

4. The duty laid upon the owner of the servient land must, with the single exception of the jus oneris ferendi, be a duty to forbear, not to do. 'Servitutium non ea natura est ut aliquid faciat quis, veluti viridia tollat aut amoeniorem prospectum praestet, aut in hoc ut in suo pingat, sed ut aliquid patiatur aut non faciat.'[5]

5. A servitude must have a perpetual cause.[6] The rule is somewhat obscure. It seems to mean that the thing over which the right is claimed, as well as the right exercised, must from their nature be capable of perpetual continuance, and not depend merely upon the act of man. But the limits of the rule are ill defined ; and it may be doubted whether it forms part of the modern law.

PERSONAL SERVITUDES

Personal servitudes.

The principal kinds of personal servitude in Roman Law were usufruct and use. The corresponding institutions in Dutch Law are *lijftocht* and *bruick*. To describe these as servitudes is, perhaps, to make too great a conces-

[1] Voet, 8. 4. 7.

[2] Dig. 33. 2. 1.

[3] Voet, 8. 4. 13 ff. Hence a real servitude cannot consist in a mere amenity or personal enjoyment. Dig. 8. 1. 8 pr.: Ut pomum decerpere liceat et ut spatiari et ut cenare in alieno possimus servitus imponi non potest. Cf. Voet, 8. 4. 15.

[4] Voet, 8. 4. 19.

[5] Dig. 8. 1. 15. 1 ; Voet, 8. 4. 17.

[6] Dig. 8. 2. 28: Omnes servitutes praediorum perpetuas causas habere debent. See illustrations given in the text ; and for the modern law see Voet, 8. 4. 17, and Groen., *de leg. abr. ad* Dig., ad loc. Even in the Civil Law the exercise of a servitude might be limited to certain times of the day or to alternate days. Dig. 8. 1. 4. 2 and 8. 1. 5. 1.

Place in the legal system as arranged by Grotius.

sion to the exigencies of Roman terminology. Grotius departs from the arrangement of the Roman Law. From full ownership he distinguishes proprietary rights less than ownership, which he describes comprehensively as 'gerechtigheden'.[1] These, again, are either connected with the ownership of land or not so connected.[2] To the first of these sub-classes alone he accords the name of servitudes (*erfdienstbaerheden*).[3] For the second sub-class he has no distinctive name. It includes such various rights as: (1) usufruct;[4] (2) use;[5] (3) feuds;[6] (4) hereditary leases;[7] (5) tithes;[8] (6) mortgages;[9] and some others.[10] Such an arrangement is, perhaps, better suited to a treatise on jurisprudence than to the exposition of a system of positive law. In this book we have already mentioned feuds and hereditary leases under the head of ownership of land. Tithes we omit as having no place in the modern law. Mortgages will form the subject of our next chapter. Of the above-mentioned rights, therefore, usufruct and use alone remain to be considered in this place.

Usufruct.

In Roman Law usufruct meant the right of use and enjoyment of another's property,[11] usually for the life of the person entitled,[12] sometimes for a fixed or ascertainable period terminable on death.[13] A usufruct may be constituted over either immovable or movable property.[14] Fungible things are not, properly speaking, the subject of usufruct, but may be the subject of a quasi-usufruct.[15] Usufruct may be either of a single thing or of the whole of the grantor's estate.[16] In the last event it is usually created by testament.

The rights and powers of a usufructuary are:

[1] Gr. 2. 33. 1–2, and see Table iv to book ii, cap. i.
[2] Erfaenhangig, onerfaenhangig.
[3] Gr. 2. 33. 3. [4] Gr., lib. ii, cap. xxxix. [5] Cap. xliv.
[6] Capp. xli–xliii. [7] Cap. xl. [8] Cap. xlv.
[9] Cap. xlviii. [10] Capp. xlvi–xlvii. [11] Inst., 2. 4 pr.
[12] Gr. 2. 39. 1; Voet, 7. 4. 1. [13] Voet, 7. 1. 5; 7. 4. 13.
[14] Gr. 2. 39. 2; Voet, 7. 1. 14. [15] Gr. 2. 39. 20.
[16] Voet, *ubi sup.*

Incidents of usufruct. Rights and powers of the usufructuary.

1. As the name indicates, to use the property and to take its fruits [1] as owner.

2. To possess the property and to recover possession from the dominus or from a third party.[2]

3. To alienate the right of use and enjoyment, but only for the term of the usufruct.[3] If, however, the property held in usufruct is let on hire to a third party, the lessee must be allowed a reasonable time after the determination of the usufruct to look out for other accommodation.[4]

4. To give the usufructuary property in pledge or mortgage and to suffer it to be taken in execution, but only to the extent of his usufructuary interest.[5]

The duties of the usufructuary are :

Duties of the usufructuary.

1. To frame an inventory of the property comprised in the usufruct. In Roman Law this was advisable, but not compulsory.[6] In Roman-Dutch Law it may be compelled.[7]

2. To give security to the dominus : (*a*) for the use and cultivation of the property in a husband-like manner ; (*b*) for its restoration in proper condition upon the termination of the usufruct.[8]

[1] Fructus are distinguished as natural, industrial, and civil; and as *pendentes* (qui jam a solo separati asservantur), *consumpti* and *percipiendi* (qui licet percepti non sint, honeste tamen a diligente patre-familias percipi potuerunt). Voet, 41. 1. 28. The title to fructus naturales and industriales vests in the usufructuary as soon as he has gathered them (*fructus perceptio*: Inst. 2. 1. 36 ; Voet, 7. 1. 28), and not, as in the case of the bona fide possessor, as soon as they are by any means separated from the soil. Dig. 7. 4. 13 (*ad fin.*). *Fructus civiles*, such as rents of houses which accrue from day to day, are apportioned between usufructuary and dominus. Gr. 2. 39. 13 ; Voet, 7. 1. 30. The phrase *fructus civiles* is not strictly speaking Roman. Girard, p. 249.

[2] Dig. 7. 1. 60 ; Voet, 7. 1. 32.

[3] Dig. 7. 1. 12. 2 ; Voet, loc. cit. This seems quite clear, though the text in the Institutes (2. 4. 3), 'nam extraneo cedendo nihil agitur,' has given unnecessary difficulty. Van Leeuwen says quite correctly (*Cens. For.* 1. 2. 15. 25) 'Sic ut usufructus cessione extraneo facta non tam ipsum jus usufructus quam fructuum perceptionis commoditas translata videatur.'

[4] Voet, loc. cit. ; *Holl. Cons.*, vol. iv, no. 51.

[5] Voet, loc. cit.

[6] Dig. 7. 9. 1. 4.

[7] Voet, 7. 9. 2.

[8] Gr. 2. 29. 3 ; Van Leeuwen, 2. 9. 10 ; Dig. 7. 9. 1 pr.: Si cujus rei usus fructus legatus sit, aequissimum praetori visum est de utroque legatarium cavere ; et usurum se boni viri arbitratu et cum usus fructus ad eum pertinere desinet, restituturum quod inde exstabit.

The duty of giving security cannot be remitted to the usufructuary by the last will of the settlor ;[1] though it may be remitted by one who has granted a usufruct by act *inter vivos* ; and also by the heir of a testator, who has constituted a usufruct by his will.[2] The security may be demanded by the reversioner at any time during the currency of the usufruct.[3]

3. To keep in repair at his own cost ; but extraordinary expenses may be charged against the dominus.[4]

4. To pay all usual taxes and outgoings charged on the land.[5]

5. Not to commit waste by felling timber,[6] destroying houses,[7] and the like. The permitted uses of timber are very similar to those recognized by English Law. Undergrowth may be cut. Trees may be felled on timber estates in due course of husbandry,[8] and wood may be taken for vine-posts or necessary repairs. If large trees are thrown down by the wind they belong not to the usufructuary but to the dominus.[9]

6. Generally, to exercise all his rights with the care of a bonus-pater familias.[10]

The duties and rights of the dominus.

The duties and rights of the dominus are the counterpart of the rights and duties of the usufructuary. Thus, on the one hand, he may not prevent, hinder, or diminish the right of use and enjoyment ; may not, for example, burden land held in usufruct with a real servitude without

[1] Gr., *ubi sup.* ; V. d. K. *Th.* 371.
[2] Voet, 7. 9. 9.
[3] Voet, 7. 9. 11.
[4] Gr. 2. 39. 6 ; Van Leeuwen, 2. 9. 10 ; Voet, 7. 1. 36.
[5] Van Leeuwen, 2. 9. 11 ; Voet, 7. 1. 37.
[6] Gr. 2. 39. 7 : Een lijftochter mag geen boomen afhouden dan die houbaer zijn. *Houbaer* is a translation of *caedua*, i.e. quae succisa rursus ex stirpibus aut radicibus renascitur. Dig. 50. 16. 30 pr. The usufructuary may work or open mines, but, as a rule, has a usufruct merely, not property, in the minerals gained. Van Leeuwen, 2. 9. 4. Apparently it is not waste to change the course of husbandry. Voet, 7. 1. 24 ; Dig. 7. 1. 13. 5, and Gothofredus, ad loc.
[7] Voet, 7. 1. 21. Ameliorating waste. Ibid.
[8] Schorer *ad* Gr., *ubi sup.*
[9] Voet, 7. 1. 22 ; and therefore the usufructuary was not bound to replace them. Dig. 7. 1. 59. pr. ; Voet, ibid.
[10] Voet, 7. 1. 41.

the consent of the usufructuary.[1] On the other hand, he retains all such rights as are properly incident to his reversion, such as the right of alienating the property by sale or gift, subject, of course, to the usufruct.[2]

How usufruct is constituted.

Usufruct is constituted by: (1) agreement followed by acquiescence on the part of the dominus;[3] (2) last will;[4] (3) prescription of a third of a century;[5] (4) judicial decree.[6]

How usufruct is determined.

Usufruct is determined by: (1) the death of the usufructuary[7] or the arrival during his lifetime of the term or event fixed for its expiry[8] (The heirs of the usufructuary have no right to remove standing crops; but rents are apportioned between the usufructuary and the dominus.[9] When the usufructuary is a corporation the event corresponding to natural death is the dissolution of the corporation, or the effluxion of one hundred years from the date of the inception of the usufruct.);[10] (2) complete, but not partial, destruction[11] or change of form[12] of the subject-matter of the usufruct; (3) surrender;[13] (4) merger;[14] (5) non-user for one-third of a century.[15]

[1] Voet, 7. 1. 20. But 'jure civili ne quidem consentiente fructuario'. Dig. 7. 1. 15. 7.

[2] Voet, *ubi sup.*

[3] Gr. 2. 39. 8; Voet, 7. 1. 7.

[4] Gr. 2. 39. 9.

[5] Gr. 2. 39. 11.

[6] Gr. 2. 39. 12. Jure civili also in certain cases: (5) by operation of law. Voet, 7. 1. 6.

[7] Gr. 2. 39. 13; Voet, 7. 4. 1.

[8] Voet, 7. 4. 11–13.

[9] Inst. 2. 1. 36; Gr. *ubi sup.*; Voet, 7. 41. 28. Schorer says 'aliis magis placet jus Romanum'. But the exceptional case mentioned by Vinnius, *ad* Inst., loc. cit., sec. 3, in which the colonus has taken all the year's fruits before the expiry of the usufruct, but not paid all the year's rent, does not affect the generality of the rule laid down by Grotius.

[10] Gr. 2. 39. 15; Voet, 7. 4. 1.

[11] Gr. 2. 39. 14; Voet, 7. 4. 8.

[12] Voet, 7. 4. 9.

[13] Gr. 2. 39. 16.

[14] Gr. 2. 39. 17; Voet, 7. 4. 2, 3. Merger may take place in consequence of abandonment of the usufruct (Dig. 7. 1. 64–5) or cession thereof to the dominus or conversely, if the usufructuary becomes proprietor (*consolidatio*).

[15] Gr. 2. 39. 18; Voet, 7. 4. 6. Others say, for thirty years. Voet, loc. cit. Usufruct is not lost by 'abuse', the dominus being sufficiently protected by the *cautio fructuaria*. The Institutes indeed say (2. 4. 3) 'finitur usufructus non utendo per modum', which has given some difficulty to the commentators. Vinnius (ad loc., sec. 2) and Voet (7. 4. 5) admit this mode of determination in certain cases. Heineccius

Usus.

Usus or *bruick* is a lesser right than usufruct, but like it, is a life interest.[1] Its incidents are the same as in the Roman Law. Closely akin to usus is habitatio (*recht van bewoning over een huis*), but, unlike usus, it includes the right of letting the house for hire.[2]

Grotius refers to the same category of legal rights the right of grazing on common-lands and the hereditary right of fishing in another's water.[3]

Use, in general, is constituted and determined by the same modes as usufruct.[4]

CHAPTER VII

MORTGAGE OR HYPOTHEC

The nature of mortgage.

MORTGAGE is defined by Grotius as a 'right over another's property which serves to secure an obligation '.[5]

The obligation intended to be secured may be either civil or natural, provided that it is not one which the Civil Law expressly disapproves.[6] Anything may be mortgaged which belongs to the mortgagor whether in full or qualified ownership,[7] and whether such property be movable or immovable, corporeal or incorporeal, in possession or consisting in a right of action.[8] Generally speaking, a man cannot mortgage what does not belong to him,[9]

ad Vinn. (*ubi sup.*) explains it away. In English Law if a life tenant purported to alienate the fee-simple he forfeited his interest. There is no clear evidence of a corresponding rule in R.-D. L. *Cens. For.* 1. 2. 15. 25; Voet, 7. 4. 4. But see Groen. *ad* Gr. 2. 39. 16.

[1] Gr. 2. 44. 6; Voet, 7. 8. 3; *Potgieter* v. *Zietsman* (1914) *S.A.L.J.* vol. xxxi, p. 351.

[2] Gr. 2. 44. 8. [3] Gr. 2. 44. 7. [4] Gr. 2. 44. 10; Voet, 7. 8. 3.

[5] Gr. 2. 48. 1: gerechtigheid over eens anders zaeck dienende tot zeeckerheid van inschuld. By 'gerechtigheid' Grotius means a proprietary right less than ownership. Gr. 2. 33. 1.

[6] Voet, 20. 1. 18.

[7] Gr. 2. 48. 2. Grotius (ibid., sec. 3), founding on the Roman Law, says that the mortgage of urban servitudes and of agricultural instruments is forbidden, but Schorer dissents.

[8] Voet, 20. 3. 1. A mortgage itself may be mortgaged by the mortgagee to secure a debt due from himself (*sub-mortgage*).

[9] Voet, 20. 3. 3. As between mortgagor and mortgagee the transaction holds good, but not to the prejudice of the owner. V. d. K. *Th.* 539.

but sometimes he may. Thus a husband, by virtue of his marital administration, may mortgage the property of his wife, even though community of goods has been excluded ;[1] and pawnbrokers, according to some authorities, are not required to restore to the true owner things pawned with them by a non-owner, except on terms of payment of the debt for security of which the pawn was given.[2] Further, a thing may be effectually mortgaged by a non-owner if the owner consents or afterwards ratifies the transaction ; or if the mortgagor afterwards becomes owner of the property mortgaged.[3] But this last departure from the rule has no application to a special mortgage of immovables.[4]

The immovable property of a minor may not be mortgaged without judicial decree.[5]

Classification of mortgages.

Mortgages are either : (1) legal (or tacit) ; or (2) conventional (or express) ;[6] and each of these may be either general or special, according as the mortgage attaches to all the mortgagor's property, future as well as present,

[1] Voet, 20. 3. 7 ; *Holl. Cons.*, vol. i, no. 151. This case is a peculiarly strong one, since the mortgage was general. The jurist advised that it affected property which had belonged to the wife during the marriage even after its determination.

[2] Voet, *ubi sup.* ; Schorer *ad* Gr. 2. 48. 2. Voet's phrase is 'qui mensam foenebrem exercent'. The Dutch equivalent is 'Bank van Leening', for which the word 'Lombard' also served as a synonym. Van Leeuwen, 4. 13. 4 ; Groen. *de leg. abr. ad* Cod., lib. viii, tit. 16. But see *Muller* v. *Chadwick & Co.* [1906] T. S. 30.

[3] Voet, 20. 3. 4. For other cases see Voet, 20. 3. 7.

[4] Voet, 20. 3. 6.

[5] Decker *ad* Van Leeuwen, 4. 12. 4. In South Africa, by the Administration of Estates Act, 1913, sec. 87: 'No tutor and no curator (other than a tutor testamentary or a curator nominate duly authorized thereto by the will or deed under which he has been appointed) shall alienate or mortgage any immovable property belonging to a minor unless the Court or, when the Master is satisfied that the immovable property does not exceed three hundred pounds in value, unless he authorize the alienation or mortgage of such property: Provided that the Master may authorize the mortgage of immovable property belonging to a minor to an extent not exceeding three hundred pounds if satisfied that the mortgage is necessary for the preservation or improvement of the property or for the payment of expenses necessarily incurred in connexion therewith, or for the maintenance or education of the minor.' For other cases in which mortgage is not permitted see Decker's note.

[6] Gr. 2. 48. 7.

or only to some specific piece of property or collection of things, such as a flock of sheep or all the goods in a particular shop.[1] Tacit mortgages arise by operation of law apart from and without any agreement between the parties. Conventional mortgages, as their name implies, are created by agreement. The phrase judicial mortgage (*pignus praetorium*) is also in use, meaning an attachment of goods in execution of a judgment.[2]

Tacit mortgages.

Numerous tacit mortgages are mentioned in the books of which some seem to be questionable, and many have been abrogated in certain Colonies by express enactment or by tacit disuse. The following list is complete or nearly so :

1. The grantor of lands upon condition of a perpetual quit-rent[3] (*cynsen—thynsen—oud-eigen*)[4] has a tacit hypothec over the lands so granted for security of his rent.

2. The Ward[5] or *Dykring* for cost of works executed by it in constructing and maintaining dykes, windmills, and other such works has a tacit hypothec over the lands comprised within its area in respect of their several *pro rata* contributions.[6]

3. The lender of money for repairing a house or a ship as well as any one who has expended labour in doing so has a tacit hypothec over the house or ship in question.[7]

[1] Voet, 20. 1. 2.

[2] Morice (2nd ed., p. 66) ; *In re Woeke* (1832) 1 Menz. 554.

[3] Gr. 2. 48. 11 ; Van Leeuwen, 4. 13. 8 ; Voet, 20. 2. 27 and 20. 4. 19 ; V. d. L. 1. 12. 2.

[4] There is little difference of fact corresponding to the difference in name. See *Cens. For.* 1. 2. 17 ; Fock. And., vol. i, pp. 319 ff.

[5] Waard (polder) a drained lake—Sewel, *Groot Woordenboek* ; not 'reeve' as Sir H. Juta translates (V. d. L. *ubi sup.*).

[6] Gr. 2. 48. 12 ; and Schorer, ad loc. ; Voet, 20. 2. 31, and 20. 4. 19. All these writers agree in describing the right of the *Dijkring* as a tacit hypothec. But perhaps it should rather be described as a privileged debt, which was preferred even to anterior special hypothecs. Neostad. *Cur. Holl. Decis.* 24 and 35. The same privilege was allowed to all persons who had lent or spent money for the purpose.

[7] Gr. 2. 48. 13, and Groen. ad loc. Grotius says : 'Iemand die geld heeft gheleent om een huis ofte schip te bouwen ofte te herbouwen.' But the tacit hypothec does not extend to the case of the building or buying of a new house or ship. Groen. *ubi sup.* and *de leg. abr. ad* Dig. 20. 4. 5 ; Sande, *Decis. Fris.* 3. 12. 5. Persons, however, who had

Whether this hypothec applies to a ship as well as to a house has been doubted. Vinnius says that it does not.[1] But Voet,[2] Van Leeuwen, Huber,[3] Schorer,[4] and Van der Keessel[5] are of the contrary opinion. On the other hand, that it does not attach to a new house or ship is agreed, unless, perhaps, to a house built to replace another which has been burnt down or destroyed.[6]

This hypothec covers all necessary expenses, provided that the money has been actually applied to the repair of the house or ship. It does not cover impensae voluptuariae except so far as the value of the house or ship has been really enhanced.[7]

4. One who has advanced money for the expenses of a deceased person's last illness or burial has a tacit hypothec over all the deceased person's goods.[8] Whether the cost of mourning falls under the head of funeral expenses seems doubtful. Groenewegen[9] says that it does not, but an opinion in the contrary sense is to be found in the *Utrechtsche Consultatien*.[10] Van der Keessel allows that funeral expenses constitute a privileged debt, but says that they do not create a tacit hypothec.[11] On this

advanced money for such purposes were privileged after the Fisc. Dig. 42. 5. 26 and 34; Dig. 12. 1. 25. These passages speak of building a ship, but only of repairing a house. See also Decker *ad* Van Leeuwen, 2. 7. 3.

[1] Vinnius, *Select. Jur. Quaest.*, lib. xi, cap. iv.

[2] Voet, 20. 2. 29; Van Leeuwen, 4. 13. 8: Die iemand geld heeft geleent om een huis of schip nodig te herstellen. Cf. *Cens. For.* 1. 4. 9. 7.

[3] Huber, *Praelect. Jur. Civ.*, vol. iii, p. 17 (*ad* Dig. lib. xx, tit. 2), no. 8.

[4] *Ad* Gr. 2. 48. 13.

[5] V. d. K. *Th.* 417.

[6] Voet, 20. 2. 28; V. d. K. *ubi sup.*

[7] Voet, *ubi sup.* This hypothec has been abolished at the Cape (Act No. 5 of 1861, sec. 8, subsecs. 5 and 6), and in the Transvaal (Procl. No. 28 of 1902, sec. 130, subsecs. 10 and 11), with the proviso that nothing herein contained shall be construed so as to deprive any person of any right which he may now by law possess to retain any property whatsoever which shall be in his actual possession until his costs and charges incurred thereon shall have been paid.

[8] Gr. 2. 48. 14; Van Leeuwen, 4. 13. 9.

[9] *Ad* Gr. *ubi sup.*

[10] Vol. ii, no. 110.

[11] V. d. K. *Th.* 418: 'Qui in funus vel in ultimum defuncti morbum pecuniam credidit, utitur quidem privilegio etiam ante hypothecarios creditores; sed hypothecam tacitam habere non videtur.' This is the law at the present day in the Cape Province. Funeral expenses and

point, again, the *Utrechtsche Consultatien* speak in a decided sense to the contrary: 'wesende notoir rechtens dat voor doot-schulden ende tot repetitie ofte betaling van de selve *tacita et legalis hypotheca* competeert.'

5. The fiscus has a tacit hypothec over all the property of administrators and receivers of public funds, and also of public contractors, in respect of debts arising out of their office or position.[1] Similar rights were commonly delegated to farmers of the revenue, but they were required to enforce their claim within six months of the termination of their contract with the fisc.[2] A like hypothec was enjoyed by municipalities and various other smaller bodies such as churches, orphanages, &c., over the property of their administrators.[3]

6. The fiscus has a tacit hypothec over the property of persons liable for taxes and dues.[4] This hypothec still holds good in South Africa.[5]

The Dutch Law gave similar rights to municipalities.[6] But in South Africa they enjoy no such right unless expressly conferred by statute.[7]

medical fees rank as privileged claims, and as such take precedence of mortgage creditors (2 Maasdorp, p. 279; *Stewart* v. *Hyland's Trustee* (1907) 24 S. C. 254), but do not themselves create a right of hypothec.

[1] Gr. 2. 48. 15 and Groen. ad loc.; Voet, 20. 2. 8; V. d. K. *Th.* 420. *Query*, whether this hypothec extends to the property of every one with whom the Crown has entered into any contract. *Chase* v. *Du Toit's Trustees* (1858) 3 S. 78. Cf. Dig. 49. 14. 28; Cod. 8. 14 (15). 2. In the Cape and Transvaal Provinces it is not to apply to the estates of auctioneers and deputy-postmasters considered as collectors or receivers of the public revenue, nor to contractors with Government (Cape Act 5 of 1861, sec. 8, subsecs. 1 and 2; Trans. Procl. No. 28 of 1902, sec. 130, subsecs. 7 and 8).

[2] Voet, *ubi sup.*

[3] Gr. 2. 48. 18; Van Leeuwen, 4. 13. 12; V. d. K. *Th.* 425; abolished at the Cape by Act 5 of 1861, sec. 8, subsec. 4, and in the Transvaal by Procl. No. 28 of 1902, sec. 130, subsec. 9.

[4] Voet, 20. 2. 8; V. d. K. *Th.* 419.

[5] *Cape Government* v. *Balmoral Diamond Co.* [1908] T. S. at p. 688. 'It was common cause during the argument that by R.-D. L. the fiscus enjoys a tacit hypothec upon the general estate of a debtor for arrears of taxes due to it.' In the Cape Province not more than three years' arrears is covered by the hypothec (Act 5 of 1861, sec. 2). In the Transvaal this hypothec has been abolished by Procl. No. 28 of 1902, sec. 130, subsec. 6.

[6] Voet, 20. 2. 8.

[7] *Green Point Municipality* v. *Powell's Trustees* (1848) 2 Menz. 380. (This was a claim for preference in a case of insolvency.)

7. An orphan has a tacit hypothec over a surviving parent's whole estate in respect of property coming from a deceased parent [1] and over his guardian's whole estate to indemnify him against all losses for which the guardian is answerable.[2] This hypothec extends even to the property of a stepfather if the mother-guardian has not wound up the estate ; [3] also to the goods of the tutor's wife unless community of goods, or at least of profit and loss, has been excluded.[4] The same hypothec attaches also for the benefit of lunatics and prodigals over the estate of their curators.[5]

8. The lessor of a house has a tacit hypothec for rent, and for waste to the property, over movables and animals brought on to the premises by the hirer.[6] The lessor of land has the same right,[7] and a like right also over the fruits for his rent.[8]

This hypothec extends only to property which belongs to the hirer, or has at least been brought into the house or on to the land for the purpose of remaining there with the knowledge and consent of its owner.[9] It does not extend

[1] Abolished in the Transvaal by Procl. No. 28 of 1902, sec. 130, subsec. 5.

[2] Gr. 2. 48. 16 ; Van Leeuwen, 4. 13. 11 ; V. d. K. *Th.* 421 ; abolished in the Transvaal by Procl. No. 28 of 1902, sec. 130, subsec. 1. In the Cape Province the abolition is less far-reaching. The hypothec still exists in case of a testamentary guardian, surviving parent, or stepfather (Act 5 of 1861, sec. 8, subsec. 3) ; but its continuance is limited to a period of three (or five) years. Ibid., sec. 3.

[3] Or to the property of a stepmother whom the guardian-father has married. V. d. K. *Th.* 422.

[4] Voet, 20. 2. 11.

[5] Voet, 20. 2. 13 ; abolished in the Transvaal but not at the Cape.

[6] Gr. 2. 48. 17, and Schorer, ad loc.

[7] Van Leeuwen, 4. 13. 12 ; Voet, 20. 2. 2–3 ; V. d. K. *Th.* 423. In the Civil Law the tacit hypothec attached to the *invecta et illata* only in the case of houses, and to the fruits only in the case of land. Dig. 20. 2. 4, and 7 ; Cod. 4. 65. 5, and Groen. *de leg. abr.* ad loc. ; Voet, 20. 2. 2.

[8] Gr. *ubi sup.* ; Voet, *ubi sup.*

[9] Dig. 20. 2. 7 ; Groen. *ad* Gr. *ubi sup.* ; Voet, 20. 2. 5. Following the South African authorities we must add ' under such circumstances as would necessarily lead the landlord to believe that the goods belonged to the tenant, but not where the circumstances do not necessarily lead to such belief '. *Ulrich* v. *Ulrich's Trustee* (1883) 2 S. C. 319 ; *Lazarus* v. *Dose* (1884) 3 S. C. 42. Mr. Justice Kotzé's Van Leeuwen, vol. ii, p. 96, n. would add the further qualification that the goods have been

to goods placed in the hands of the hirer to be worked by him in the course of his trade.[1] It is not lost, Voet says, even though the lessor may have accepted a surety or a conventional mortgage for the payment of the rent, for no one ought to be prejudiced by an excess of caution.[2]

The lessor's hypothec in respect of invecta et illata, in the case of lands and houses alike, will not be effectual against third parties unless it is perfected by a decree of sequestration obtained from the magistrate before the goods have been removed from the leased premises.[3] The law is stated by Voet [4] in the following passage and holds good at the present day.

'We must remember that now with us and in many other countries the right of tacit pledge in the 'invecta et illata'' of a tenement, whether rural or urban, has no force unless they are sequestered (*praecludantur*) by public authority while they are still in the tenement; or, unless, when the tenant removes them, they are seized (*arresto detineantur*) by a vigilant creditor in the very act of removal, in which case the things which had been begun to be transferred, but had not yet reached the place destined for their concealment, are to be taken back to the land; . . . which sequestration (*praeclusio*) by our usages not only

brought on to the premises for the purpose of always remaining there for the use of the hirer. The landlord's hypothec is not effectual against the goods of a bona fide sub-tenant beyond the amount due for rent by such sub-tenant to his immediate landlord. Voet, 20. 2. 6; *Smith* v. *Dierks* (1884) 3 S. C. 142.

[1] Van Leeuwen, 4. 13. 12.

[2] Voet, 20. 6. 12; Schorer *ad* Gr. *ubi sup.*

[3] 'To render this hypothec effectual it is necessary to attach the property, and the general rule is that the attachment must take place while the things are on the leased premises.' *Webster* v. *Ellison* [1911] A. D. at p. 79, per Lord de Villiers C. J. 'The sheep had not been attached before their removal; and without such attachment the landlord's hypothec was ineffectual as against purchasers, without notice of the landlord's claim.' Ibid. at p. 84. It must be noted, however, that the landlord's hypothec does not require any judicial arrest to make it effectual over the tenant's property, so long as the property remains upon the premises. Over such property, being upon the premises, the landlord has a right of preference, in the event of insolvency, which prevails even against a *pignus praetorium* issued before the landlord has obtained an attachment or interdict in enforcement of his lien. *In re Stilwell* (1831) 1 Menz. 537; 2 Maasdorp, p. 264.

[4] Voet, 20. 2. 3 (Berwick's translation).

confirms (*firmat*) the lessor's right of hypothec, but also gives him a preference, though by the Roman Law he seems to be entitled only to a simple hypothec ; and by the law of Amsterdam only the rent for one year besides the current year has preference.' [1]

In the above passage Voet, it will be noticed, speaks of the possibility of seizure in the very act of removal ; and Grotius [2] says that the lessor preserves his right if he proceeds against the mortgaged property immediately after its removal from the land (ende dit recht behoudt de verhuurder, indien hy 'tgoed, van sijn grond vervoert zijnde, dadelick vervolgt). This is the doctrine of ' quick pursuit ', which was considered by the Appellate Division of the Supreme Court of South Africa in the case of *Webster* v. *Ellison*.[3] For the principle to apply there must be : (1) instant pursuit ; (2) seizure of the goods while still in transit to their place of destination. In no case can the landlord defeat the rights of third parties who, before sequestration, have obtained the goods for value without notice of the landlord's claim.

9. Justinian gave a wife a hypothec for her dower over the whole of her husband's property.[4] In the Roman-Dutch Law this right only attached when by ante-nuptial contract all community of goods and of profit and loss had been excluded, and the wife's property was protected from alienation by the husband. If these conditions were present the wife had a hypothec which was preferred to the claims of her husband's post-nuptial (but not ante-nuptial) hypothecary creditors.[5]

[1] By Cape Act 5 of 1861, sec. 5, the tacit hypothec of landlords shall not be claimable for any ' sum greater than one whole year's rent '. There seems to be no corresponding limitation in the Transvaal.

[2] Gr. 2. 48. 17.

[3] [1911] A. D. 73.

[4] Cod. 8. 17 (18). 12. 4.

[5] Groen. *de leg. abr. ad* Cod. 5. 12. 30 ; Voet, 20. 2. 20 and 23. 4. 52 ; V. d. L. 1. 12. 2. *Supra*, p. 92. In the Transvaal, Procl. No. 28 of 1902, sec. 130, subsec. 4, abolishes ' the tacit hypothecation possessed by women married out of community of property upon the estates of their husbands in respect of assets belonging to such women administered by their husbands '.

10. Legatees and Fidei-commissarii[1] have a hypothec over the estate of the deceased[2] but not one which can be made good to the prejudice of his creditors.[3]

11. A ship is bound to the owner of the cargo, if the cargo has been sold by the master for the expense of necessary repairs.[4] The ship and the cargo are bound to the master and his ship-mates for freight[5] and other charges.

12. A factor or commission agent has a tacit hypothec on goods sent him on commission for advances made upon such goods to the owner,[6] or for pledging his credit on behalf of the owner.[7]

13. A tacit hypothec—or, to speak more properly, a right of retention—attaches in favour of any person who has put his labour into property delivered to him by the owner for that purpose; e.g. when cloth has been delivered to a tailor to make up into clothes. By an extension of the same principle attorneys and other legal practitioners have a right to retain documents until paid their charges in connexion with legal proceedings to which the documents relate.[8] The innkeeper's lien may, perhaps, be referred to the same head.[9]

[1] Transvaal Proc. No. 28 of 1902, sec. 130, subsecs. 2 and 3, abolishes the tacit hypothecs of legatees and fidei-commissary heirs or legatees. The Cape Act by sec. 4 limits the legatee's hypothec (nothing said about fidei-commissaries) to a period of twelve months, which may be extended in case of disability, but not beyond five years.

[2] Cod. 6. 43. 1. 1; Voet, 20. 2. 21; V. de L. *ubi sup.* The hypothec did not extend to the general estate of the legatee or fidei-commissary. Cod. 6. 43. 1. 5.

[3] Voet, *ubi sup.*

[4] Gr. 2. 48. 20; Voet, 20. 2. 30.

[5] Gr. 2. 48. 19; Van Leeuwen, 4. 13. 13 and 4. 40. 2; V. d. K. *Th.* 682. In this case the master is not necessarily the owner of the ship.

[6] Van Leeuwen, 4. 13. 13; V. d. L. 1. 12. 2.

[7] Gr. 2. 48. 21: Voor de schade die hy zoude moghen lijden door het verstrecken van sijn gheloof voor den eighenaer van de zelve koopmanschappen. Van Leeuwen, 4. 13. 3: Een Factoor op de koopmanschappen van syn meester, voor de penningen die hy aan hem ten agteren is, of voor hem getekent heeft. Kotzé translates 'getekent' by 'paid'. Aliquando bonus dormitat Homerus. If I do not misunderstand Neostadius, *Cur. Holl. Decis.* 45, the hypothec may be claimed also in respect of a balance due upon a general account.

[8] Van Leeuwen, 4. 30. 2. Cf. *Trustees of Tritsch* v. *Berrange & Son* (1884) 3 S. C. 217.

[9] Van Leeuwen, loc. cit.

Effect of tacit mortgages.

The effect of a tacit hypothec, whether special or general, was in Roman Law precisely the same as the effect of a conventional hypothec, whether special or general; that is to say, the mortgaged property passed to a third party, by whatever title, subject to the encumbrance.[1] In the Roman-Dutch Law the rule is the same with regard to immovables. A tacit hypothec of immovables, whether special or general, follows the property into the hands *cujusvis possessoris*,[2] so that the hypothec attaches to the land even in the hands of a third person, whether he takes by onerous or by lucrative title.[3] In the case of movables, however, the benefit of the tacit hypothec only lasts so long as the debtor, or creditor, remains in the possession of the mortgaged property. It is extinguished by transfer to a third party whether by onerous or lucrative title; and, if a third party acquires a special hypothec accompanied by delivery, or a right of retention, over specific goods of the debtor, he is preferred to the creditor under the earlier hypothec.[4] This is one more instance of the well-known rule, 'mobilia non habent sequelam'—'meubelen en hebben geen gevolg'.

Conventional mortgages.

Conventional mortgages are created by agreement between mortgagor and mortgagee. We shall consider, first, their form; secondly, their effect.

1. Requirements of form.

1. In Roman Law no form was required for the creation of a mortgage. All that was needed was the agreement of the parties, which might be expressed verbally or in writing.[5]

[1] Voet, 20. 1. 14.

[2] But a general conventional hypothec does not bind the property in the hands of a bona fide purchaser for value. Voet, loc. cit. *Infra*, p. 176.

[3] V. d. K. *Th.* 429. In the Cape Province this has been altered by statute, and tacit hypothecs no longer affect property in the hands of a purchaser for value without notice. But no mortgagee is for the purpose of this section deemed to be a purchaser. Act 5 of 1861, sec. 9.

[4] Voet, 20. 1. 14 (*ad fin.*). Voet is speaking here of general tacit hypothecs. But the same rule would apply also to a special tacit hypothec.

[5] In the later law an instrument executed publicly or subscribed by three witnesses was preferred to other mortgages. Cod. 8. 17 (18) 11. 1 (Leo; A.D. 472).

In Roman-Dutch Law the matter is not so simple. We have to distinguish five cases :

(*a*) Special mortgage of immovables;
(*b*) General mortgage of immovables;
(*c*) Special mortgage of movables;
(*d*) General mortgage of movables;
(*e*) General mortgage both of immovables and of movables (*general bond*).

(*a*) Special mortgage of immovables.

(*a*) Special mortgages of immovables were required by the Placaat of Charles V of May 10, 1529, to be executed by solemn writing passed 'before the Judge and in the place where the goods are situated'.[1] The transaction must be duly registered[2] in the land-book. A duty must be paid of $2\frac{1}{2}$ per cent.[3] of the amount of the loan.[4] All these conditions[5] were indispensable if the mortgage was to affect third parties, i.e. to bind the property.[6]

(*b*) General mortgage of immovables.

(*b*) General mortgages of immovables required the same conditions of execution,[7] registration,[8] and payment of the

[1] 1 G. P. B. 374. *Supra*, p. 129.

[2] Political Ordinance of April 1, 1580, Art. 37 (1 G. P. B. 339). It should be noted that the reference in that article is to the Placaat of May 9, 1560 (2 G. P. B. 7. 59 and 1402) and not to the Placaat of 1529.

[3] Placaat der 40 Penning, December 22, 1598, as reissued 1632. 1 G. P. B. 1953. The duty must, however, have been imposed before that date, for it is already mentioned by Grotius (2. 48. 30), whose work was written in 1619 and published in 1631. See Boel *ad* Loen. p. 118.

[4] V. d. K. *Th.* 427.

[5] Van der Keessel (*Th.* 433), speaking of registration, says: 'qua tamen insinuatione neglecta hypothecae constitutio non est nulla, frustra dissentiente Boel *ad* Loen. *Decis.* 17, p. 117.' Boel, however, is supported by the express words of the Placaat der 40 Penn., Art. 13 (1 G. P. B. 1957).

[6] Gr. 2. 48. 30: Bizondere onder zetting over ontilbaer goed is krachtig zo wanneer de selve geschied voor 't gerechte van de plaetse alwaer het goed is gelegen mids dat oock den veertigsten penning daervan zy betaelt ende de onderzetting te boeck aengheteickent, maer anders niet.

[7] Pol. Ord., Art. 35 (1 G. P. B. 339).

[8] Ibid., Art. 37; Gr. 2. 48. 23, and Placaat der 40 Penn., Art. 12 (1 G. P. B. 1937).

fortieth penny,[1] but might be passed before any Judge in the province of Holland.[2]

(c) Special mortgage of movables.

(c) Special mortgages of movables are either accompanied by delivery of the subject of the mortgage to the mortgagee, or unaccompanied by delivery. In the first case the transaction is commonly called a pledge (*pignus—pand ter minne*). To the validity of a pledge transfer of possession is essential. An agreement, therefore, which allows the pledgor to retain the goods pledged as a loan or deposit by the pledgee renders the pledge invalid, any such arrangement being looked upon as a fraud upon the law, which insists upon delivery as an essential element in the transaction.[3] In the second case the hypothec gives a right of preference against unsecured creditors provided it is executed before three witnesses or before a notary and two witnesses. So the law is stated by Grotius.[4] The advertisement of 1665 added the further requirement of the payment of the fortieth penny,[5] and (*semble*) registration is also necessary.[6]

It follows that when Van der Linden says: 'In order that a pledge of movables may be valid not only as against the debtor himself, but also as against third parties, delivery of the property to the creditor to whom it is pledged is necessary,'[7] his words must not be taken to

[1] Waerschouwinge van de Staten van Hollandt ende West-Vriesland, February 5, 1665 (3 G. P. B. 1005). This enacts that no hypothec general or special, whether on movables or immovables, shall give any preference unless the fortieth penny is paid at the time of the passing of the mortgage. Certain exceptions are specified: (*a*) mortgages in favour of orphans (verbanden gedaan op Weeskamers recht, ten voordeele van Wees-Kinderen, welckers Goederen ter Weeskamere gebracht ende onder d'administratie van Weesmeesteren ghestelt zijn); (*b*) legal hypothecs; (*c*) pledges of movables accompanied by transfer of possession; (*d*) bottomry bonds. Kusting-brieven (Gr. 2. 48. 40; 3. 14. 25) required solemn execution, but not payment of duty. Voet, 20. 1. 11.

[2] Pol. Ord., Art. 35; Voet, 20. 1. 12; V. d. K. *Th.* 428.

[3] Voet, 20. 1. 12; *Holl. Cons.*, vol. iii, pt. 2, no. 174, p. 470; V. d. K. *Th.* 536.

[4] Gr. 2. 48. 28. The three witnesses are taken from the jus civile. Cod. 8. 17 (18). 11. 1.

[5] V. d. K. *Th.* 427.

[6] *Francis* v. *Savage & Hill* (1882) 1 S. A. R. 33.

[7] V. d. L. 1. 12. 3.

exclude the possibility of a mortgage of movables by notarial deed duly registered but unaccompanied by delivery.[1]

(*d*) General mortgage of movables.

(*d*) General mortgages of movables, according to Voet, may be made under the same conditions as a general mortgage of immovables ;[2] that is, they require execution *coram judice*, registration, and payment of the fortieth penny.

(*e*) General bond.

(*e*) A general mortgage of immovables and movables, in other words of all the property of the debtor, is constituted by an instrument called a general bond, or more often by a general clause in a special bond. According to Van der Linden it was not valid unless the payment of the fortieth penny ($2\frac{1}{2}$ per cent.)[3] was made to the State. It could be executed before the Court, before a notary and witnesses, or even under hand.[4]

How conventional mortgages are constituted at the present day: in South Africa ;

Such, then, are the ways in which conventional mortgages are constituted in the Roman-Dutch Law, and the method is substantially the same in the Colonies at the present day. In South Africa a special mortgage of immovable property is constituted by means of a bond executed before the Registrar of Deeds.[5] A general conventional mortgage, whether of immovables or of movables, is constituted by a general bond or by a general clause in a special bond. A general bond may be executed either before the Registrar of Deeds or before a notary and

[1] Kotzé's Van Leeuwen, vol. ii, p. 107 ; *Francis* v. *Savage & Hill*, *ubi sup.* ; *Tatham* v. *Andree* (1863) 1 Moo. P. C. C. (N. S.) 386. For Ceylon Law see Ord. No. 8 of 1871 and No. 21 of 1871; Pereira, p. 528. In Brit. Gui. a mortgage of movables unaccompanied by delivery will not prejudice general creditors unless judicially executed. *Exors. of Forshaw, re Estate Watt* (1892) 2 Brit. Gui. L. R. (N. S.), 116.

[2] Voet, 20. 1. 12 : Potest tamen procul dubio generalis hypothecae constitutio etiam sine ulla traditione secundum Hollandiae mores efficax esse, si coram aliquo Hollandiae judice solemniter constituta et actis publicis insinuata et quadragesima debiti aerario illata sit. In the case of *In re Insolvent Estate of Loudon ; Discount Bank* v. *Dawes* (1829) 1 Menz. 380, it was said that there is no authority to show that the law required registration of a general hypothec of movables.

[3] Waerschouwinge of February 5, 1665, *ubi sup.*

[4] V. d. L. 1. 12. 3. For Cape Law see 2 Maasdorp, p. 236.

[5] 2 Maasdorp, p. 235.

two witnesses.[1] A special mortgage of movables (unaccompanied by delivery) is effected in the same way as a general mortgage. In all the above-mentioned cases registration in the office of the Registrar of Deeds is necessary to give the mortgagee preference over other creditors.[2]

In Ceylon, by statute, general mortgages give no right of preference, and therefore are, in effect, abolished.[3] A special mortgage of immovables must be executed before a notary and two witnesses or a District Judge, and must be registered.[4] A special mortgage of movables must be made in writing, and registered.[5] in Ceylon;

In British Guiana mortgages are passed before a Judge of the Supreme Court.[6] in British Guiana.

2. Effect of conventional mortgages.

In Roman Law, as above remarked, a mortgage, whether general or special,[7] whether of movables or immovables, whether express or tacit, bound the mortgaged property into whose hands soever it might come. This result was quite independent of notice of the existence of the mortgage. In Roman-Dutch Law we must distinguish between the different kinds of mortgage. Thus: (*a*) a special mortgage of immovable property, validly executed, has the same effect as in Roman Law, and creates a *jus in re* available against all third parties;[8] (*b*) a general

[1] Maasdorp, p. 236. [2] Ibid., p. 238. [3] Ord. No. 8 of 1871, sec. 1.
[4] Ord. No. 7 of 1840, sec. 2; Ord. No. 17 of 1852, sec. 1; Ord. No. 14 of 1891, sec. 16.
[5] Ord. No. 8 of 1871, sec. 3; Ord. No. 21 of 1871, sec. 3.
[6] See Appendix B to this Book (*infra*, p. 185).
[7] Voet, 20. 1. 14–15. There was a difference, however, as regards alienation, which in the case of a general hypothec was permitted subject to the burden—*cum sua causa*—(Cod. 4. 53. 1), but in the case of a special hypothec was forbidden. Dig. 47. 2. 67 (66) pr.: Si is qui rem pignori dedit vendiderit eam, quamvis dominus sit, furtum facit, sive eam tradiderat creditori, sive speciali pactione tantum obligaverat.
[8] Gr. 2. 48. 32; Voet, 20. 1. 13. The only qualification is that in certain cases the creditor may be estopped by his conduct from asserting his right. Ibid. In practice the mortgagee, at all events in South Africa, is completely protected by the fact that his mortgage is registered against the title to the property. At the Cape 'it will be the duty of the Registrar to decline to register anything that can in any way amount to an interference with the dominium, and where he fails to do so the mortgagee may apply to the Court for redress.' 2 Maasdorp, p. 266.

mortgage of immovable property affects the property in the hands of an alienee who takes titulo lucrativo, or with notice ; it does not burden the property in the hands of an alienee, who takes titulo oneroso and without notice;[1] (*c*) a special mortgage of movables, whether constituted by delivery (*pledge*), or by notarial bond, binds the property so long as the mortgagee or mortgagor retains possession, and also in the hands of any third party who takes (by lucrative title or ?) with notice,[2] but not in the hands of an alienee, who takes titulo oneroso and without notice;[3] (*d*) a general mortgage of movables affects the property so long as it remains *in dominio debitoris* [4] (But an alienee,[5] whether by onerous or by lucrative title, takes free of the encumbrance, and his position is the same whether he takes with or without notice.) ; (*e*) a general bond in modern practice has the same effect as a general mortgage of movables.

'A general conventional mortgage gives the mortagee no possessory or quasi-possessory rights over any portion of the debtor's property, whether movable or immovable, and consequently he has no power either to interfere with the debtor's right of alienating or disposing of his own property or pledging or mortgaging the same to third parties, or to prevent other creditors, who have obtained judgment against the debtor from attaching such property in execution of such judgment. The only right it does confer upon the mortgagee is a right of preference (if the mortgage has been duly registered) upon the estate

[1] Voet, 20. 1. 14: Nostris moribus immobilia generali hypotheca solemniter coram lege loci devincta, si quidem titulo oneroso in tertium bona fide accipientem alienata sint, non amplius vinculo pignoris obnoxia manent; at si lucrativo titulo, durat etiamnum pignoris causa, et hypothecaria adversus possidentem titulo lucrativo salva est.' Cf. V. d. K. *Th.* 429.

[2] *Coaton* v. *Alexander* (1879) Buch. 17; Kotzé's Van Leeuwen, vol. ii, p. 105, n.; V. d. K. *Th.* 432.

[3] But a right of pledge is commonly extinguished if the creditor restores possession to the debtor. Voet, 20. 1. 13. Non aliter creditori securitas in mobilibus specialiter obligatis et traditis superest quam si ipse possessioni sibi traditae adhuc incumbat remque teneat. 2 Maasdorp, p. 234.

[4] Voet, 20. 1. 14; V. d. K. *Th.* 432.

[5] Including a subsequent pledgee. Voet, *ubi sup.*

of the debtor in case it should afterwards be sequestered as insolvent.'[1]

Priorities amongst mortgages are governed by the following rules : Priorities.

1. A legal right of retention (*jus retentionis*), and a pledge of movable property perfected by delivery, give the creditor an inexpugnable right to retain the property concerned against all rival claimants until his own claim is satisfied.[2] To the same category belongs the landlord's tacit hypothec when it has been confirmed by attachment.[3] The so-called *pignus praetorium*, which arises from the attachment of property in execution of a judgment, belongs to the same class.[4] Within this group no question of priority arises, for the simple question is, 'Who is in actual possession of the property ? ' Thus, if a creditor with a right of retention parts with the possession to the debtor, who subsequently pledges the property with a third party, the pledgee's right is paramount both against the prior creditor and also, so long as he retains the possession, against a judgment creditor who seeks to attach the property under an execution.

2. Subject to the prior claims of mortgages falling under class 1, the rule is that all mortgages, however constituted, rank in order of time.[5] But an unpaid vendor of land who has secured himself by taking an express hypothec contemporaneous with the transfer, termed a *kusting-brief*, in respect of the unpaid purchase-money, is preferred before all other mortgages for the principal sum, and also if he has expressly stipulated for it, for arrears of interest as well.[6]

[1] Van Leeuwen, 4. 13. 19 ; 2 Maasdorp, p. 270 ; Morice, *English and Roman-Dutch Law* (2nd ed.), p. 63.

[2] Voet, 20. 1. 12 ; 20. 4. 19. Cf. V. d. K. *Th.* 437.

[3] Voet, 20. 4. 19 ; V. d. K., *ubi sup.*

[4] *In re Woeke* (1832) 1 Menz. 554.

[5] Cod. 8. 17 (18). 2 : Nam eum de pignore utraque pars contendat praevalet jure qui praevenit tempore. Gr. 2. 48. 34–6 ; Voet, 20. 4. 16.

[6] Kusting-brief is een schuldbrief spruitende uit een restand van koop-penningen, die den Verkoper houd op het verkogte goed, en

3. By Art. 35 of the Political Ordinance of 1580 general conventional mortgages of immovables are postponed to special conventional mortgages, though of later date.[1] This rule has no reference to general tacit mortgages, as to which the statute is silent.[2] These, therefore, rank in their proper place in order of time, and are preferred to all mortgages of later date whether general or special.[3]

4. Subject to the above exceptions the general rule holds good that mortgages rank in order of time, i. e. from date of execution, which in modern practice means from the date of registration, where registration is required by

gepasseert werd ten tyde van de opdragt, en heeft voor alle verbanden praeferentie omtrent de hoofdsom, dog niet omtrent de verscheene interesse, tenwaare zulks uitdrukkelyk was bedongen. Boey, *Woordentolk, sub voce.* Cf. Gr. 2. 48. 40 and 3. 14. 25; V. d. K. *Th.* 437.

[1] 1 G. P. B. 338; Gr. 2. 48. 34; Voet, 20. 1. 14; V. d. K. *Th.* 436.

[2] 'Altum de legali in dict. art. 35 silentium est', says Voet (20. 1. 14), 'quo etiam fundamento responsum generalem legalem anteriorem adhuc hodie potiorem esse speciali posteriore conventionali'; citing *Holl. Cons.*, vol. iv, nos. 189 and 392. The words of Art. 35 of the P. O. literally translated run as follows: *The effect of general hypothec preceding special hypothec.* 'And concerning the constitution and bond of general hypothec which shall be passed after two months from the publication hereof, the same shall in no wise hinder or prejudice him who afterwards shall acquire constitution or bond of special hypothec, so that he to whom any immovable goods shall be specially bound in the said special hypothec and the monies therefrom proceeding shall be preferred to him to whom (the property ?) shall be mortgaged by general hypothec after the two months aforesaid from the publication hereof; but the aforesaid constitution of general hypothec passed before the Court shall have place and take effect against those who have like constitution or bond; under whom the oldest constitution shall be preferred to the younger, without in that case, distinction made or regard had before what Judges in the said lands the general constitution of hypothec shall be passed, and in like manner the general constitution aforesaid shall have place and take effect against those who have a merely personal action, according to the disposition of the written laws.' Van der Keessel says (*Th.* 437) that a tacit or legal mortgage has the same force as a special mortgage and therefore—(*a*) is preferred to a subsequent special conventional mortgage, and to a prior general conventional mortgage; (*b*) is postponed to a prior special conventional mortgage (and to a prior tacit mortgage, general or special). But rule (*a*) does not apply if the subsequent special mortgage is a pledge of a movable accompanied by possession, or a kusting-brief of an immovable (*supra*, p. 177, n. 6); and rule (*b*) does not apply if the legal mortgage is privileged or if the legal mortgage over *invecta et illata* (*supra*, p. 167) is confirmed by arrest.

[3] This is still the law even at the Cape. Act 5 of 1861, sec. 9.

law. Tacit hypothecs take effect from the moment when the circumstances exist which give birth to them.

With the exception noted above of general hypothecs of immovables, it makes no difference whether the mortgage is conventional or legal,[1] general or special. All rank in order of time.[2] 'Qui prior est tempore potior est jure.' General bonds, however, and specific mortgages of movables unaccompanied by delivery, as observed above, only bind the property of the mortgagor so far as he has not alienated it. They are, in fact, merely a floating charge, which takes effect in the event of the debtor's insolvency or death, and attaches only to such property as is still in his possession at one or other of these two dates.[3]

Rights of mortgagee and mortgagor.

The mortgagee is entitled to the possession of the mortgaged property, not, as in English Law, because the mortgage has passed the ownership, but because the right to possess is considered to be incidental to the right of hypothec. By the actio hypothecaria, which is a species of vindication, he asserts his right to possess against the mortgagor and against every one else except a mortgagee with prior or better title.[4] Not being owner, the mortgagee, even if in possession, has no power of granting leases.

In principle there is no reason why a mortgagor should not deal with the mortgaged property as he pleases, subject to the rights of the mortgagee. But in fact it is otherwise. In South Africa he cannot do so. For since transfer of land on which a mortgage is registered cannot take place without the consent of the mortgagee, without

[1] Gr. 2. 48. 36; Voet, 20. 4. 28; V. d. K. *Th.* 437.

[2] According to Voet (20. 4. 19) all the above-mentioned special tacit hypothecs are privileged: 'Qui proinde singuli in rebus singularibus sibi lege vel more devinctis, vel jure retentionis ante reddita impendia facta non restituendis, potiores erunt aliis tum chirographariis tum hypothecariis, utcunque hypotheca conventionali expressa vel legali sive generali sive speciali anteriore munitis.' But it seems doubtful whether in the modern law any special tacit hypothecs are recognized except as rights of retention. 2 Maasdorp, p. 281.

[3] Morice, *English and Roman-Dutch Law* (2nd ed.), p. 63.

[4] Girard, pp. 777–80.

his consent the land cannot be alienated. A mortgagor is not prohibited from granting a lease, but he cannot thereby prejudice the mortgagee's rights.[1] The imposition of a servitude, being plainly prejudicial, is not permitted.[2]

Special covenants contained in mortgages.

Any covenants which are lawful and not contrary to public policy may be annexed to the contract, e. g.: (1) that the destruction of the pledge without fault on his part shall free the debtor; (2) that the pledge shall not be redeemed for a certain time; (3) that if the debt is not paid within a certain time the creditor may *propria auctoritate* enter into possession of the mortgaged land; (4) that the creditor is to repay himself out of the rents and profits of the land; (5) that if the debt is not paid the creditor (or a surety who pays) may buy the property at a fair price; (6) that the creditor may sell the pledge[3] (This right passes to heirs and is assignable); (7) that the creditor shall take the profits in lieu of interest (*antichresis*).[4]

An agreement for forfeiture in the event of non-payment (*pactum commissorium*) is not permitted.[5]

Enforcement of mortgages.

In the Roman Law the mortgagee ultimately acquired a power of sale, which could not be excluded by express agreement. This right, however, was enjoyed only by a first mortgagee.[6] He could also, in certain cases, obtain an order of foreclosure (*impetratio dominii*).[7]

In the Roman-Dutch Law neither of these remedies is generally available. Foreclosure is unknown, and sale cannot be effected except with the consent of the debtor. The proper and only mode of realizing a mortgage is by obtaining a judgment of the Court upon the mortgage debt and taking out a writ of execution against the

[1] *Watson* v. *McHattie* (1885) 2 S. A. R. 28; *Dreyer's Trustee* v. *Lutley* (1884) 3 S. C. 59; *Reed's Trustee* v. *Reed* (1885) 5 E. D. C. 23.
[2] *Stewart's Trustee* v. *Uniondale Municipality* (1889) 7 S. C. 110.
[3] Voet, 20. 1. 21.
[4] Voet, 20. 1. 23.
[5] Voet, 20. 1. 25; Cod. 8. 34 (35). 3. pr. (Constantine, A. D. 326); *Dawson* v. *Eckstein* (1905) 10 H. C. G. 15.
[6] Girard, p. 782, and note 5; Cod. 8. 17 (18). 8
[7] Girard, pp. 780–4.

property.[1] In South Africa, if the mortgaged property is immovable, a special order of Court is required declaring the property executable before it is taken in execution.[2]

The mortgaged property may be sold without an order of Court with the consent of the debtor ;[3] but an agreement for extra-judicial sale contained in the mortgage-deed will not be enforced if the debtor afterwards objects, or if a private sale would be prejudicial to other hypothecary creditors.[4]

If the debtor is insolvent the mortgaged property is sold not by the mortgagee, but by the trustee of the insolvent estate.[5]

In the Roman-Dutch Law, differing herein from the Roman Law,[6] a later mortgagee cannot[7] redeem or buy out an earlier mortgagee against his will so as to step into his place.[8] But he can do so indirectly, by suing the mortgagor and obtaining a sale in execution, in which

[1] 2 Maasdorp, p. 298. For Ceylon see Civil Procedure Code (Ord. No. 2 of 1889), secs. 640 ff.

[2] See cases cited by Maasdorp, *ubi sup.* *Semble*, by R.-D. L. this was required in all cases ; not in the case of immovables alone. Voet, 20. 5. 3.

[3] Voet, 20. 5. 6 (and authors there cited). Nemini licet hodie privata auctoritate pignus vendere invito debitore, licet id ita ab initio fuisset actum, sed impetrata sententia condemnatoria pignus subhastatur auctoritate judicis. Voet, *Compendium*, 20. 5. sec. 8. Van der Keessel, however (*Th.* 439), says that a pledgee may sell a pledge which has been delivered to him, if it was stipulated *ab initio* that he might sell it ; or rather, says Lorenz (ad loc.), where there has been no stipulation to the contrary.

[4] 2 Maasdorp, *ubi sup.* In *Insolvent Estate Evans* v. *S. A. Breweries, Ltd.* (1901) 22 Natal Law Reports, at p. 126, Mason A. C. J. said: 'Voet (20. 1. 21) lays down, and innumerable cases in South African Courts, and the unbroken practice in Natal for a very large number of years have decided conclusively, so far as this Court is concerned, that the mortgagee is entitled to exercise the right of selling the mortgaged property if conferred upon him by the instrument of mortgage.' But the Witwatersrand High Court took the opposite view in *John* v. *Trimble* [1902] T. H. 146. The authorities are collected in the above-named cases. See also Kotzé's *Van Leeuwen*, vol. ii, p. 407 n.

[5] Maasdorp, *ubi sup.* [6] Cod. 8. 17 (18). 1 *et passim.*

[7] Van der Keessel (*Th.* 441) merely says 'an possit, non sine caussa dubitari potest.'

[8] But he (or any one else) may, by agreement, take an assignment of the mortgage. Gr. 2. 48. 43 ; Voet, 20. 4. 35 (and authorities there cited).

event he will have the same right as any one else[1] of making a bid for the purchase of the mortgaged property.[2] When property is sold in execution it is the practice to pay the purchase-money to the judgment creditor only on condition of his giving security *de restituendo* in the event of prior claims emerging. Thus, if a second or later mortgagee sells, the prior encumbrancer is secured against loss. The purchaser on the other hand gets a good title.[3]

APPENDIX A

Rights of the Public and of the Crown in the Seashore

The rights of the public and of the Crown respectively in the shore lying between high and low water are scarcely settled by authority. In *Anderson and Murison* v. *Colonial Government* (1891) 8 S. C. 293, Sir Henry de Villiers C.J. said: 'Upon the cession of this Colony to the English Crown the laws of the country were retained. Under these laws the public had the right to the free use of the seashore as I have defined it (viz. the land between high and low water marks), and it is no more in the power of the Government than it is of any private individual to deprive the public of that right. No doubt the Government are, in one sense, the custodians of the seashore, but they are such only on behalf of the public. They may, as Voet points out (1. 8. 9), grant permission to individuals to build upon the seashore, and without that permission no one is at liberty so to build; but that permission is, I take it, subject to the condition that the rights of the public shall not be interfered with. Any structure between high and low water marks, which materially interferes

[1] *Secus*, jure civili. Voet, 20. 5. 3.

[2] 2 Maasdorp, p. 301.

[3] Voet, 20. 5. 11. Van der Keessel says (*Th.* 442) that the mere knowledge of a creditor that property mortgaged to him is being sold, even though by public auction, is not to be taken as a tacit remission of his mortgage.

A mortgage is lost by prescription, if a third party has been in possession for thirty years, or the debtor (or his heir) for forty years without payment of interest (V. d. K. *Th.* 443).

with the general use of the shore, whether constructed with or without the consent of the Government, would be a nuisance, which this Court would be justified in restraining.' Mr. Justice Buchanan concurred. In the later case, however, of *Colonial Government* v. *Cape Town Town Council* (1902) 19 S. C. 87, the Chief Justice seems to place the right of the Crown upon a higher plane when he says: 'The Crown is not the owner of land adjoining the coast and covered by the sea in the same sense that it owns Crown Lands above high water mark, but it enjoys the supreme right of control which carries with it the right of claiming the ownership of the land itself, whenever the land ceases to be covered by water.'

If the Chief Justice is right, the Crown is not the *owner* of the shore between high and low water mark, though, according to his later view it may easily become owner. But a different conclusion is suggested by the Dutch authorities who follow the feudal law in referring all *res publicae* to the head of *Regalia* with the consequence, it is submitted, that such things must be regarded as the property of the Crown. Thus Voet writes (1. 8. 9 *ad fin.*): 'Caeterum, quia moribus nostris et aliarum gentium maris littora et flumina Regalibus seu Domaniis Principum adnumerantur, *lib. 2, feudorum, tit. 56*; non ita si navigationem et ejus sequelas excipias communis omnibus usus est, neque piscari retibus in flumine cuique licet, multoque minus extra ripae munitionem aedificare in fundo fluminis, aut in maris littore, aut aquam ducere ex flumine aut exstruere molendina, nisi nominatim id a Principe, vel eo, cui demandata dominiorum cura, concessum fuerit; sic ut illa veniae impetratio, quae ex jure Romano prudentiae erat, nunc absolutae necessitatis sit.'

I have found little direct authority for the proposition that the *seashore*, specifically, comes under the head of Regalia; but numerous writers assert the general principle that in the modern law *res communes* and *res publicae* fall under this category. See, for example, Heineccius, *Elem. Jur. Civil.*, Arts. 325 and 328; and *Elem. Jur. German.*, lib. ii, tit. 1, sec. 16; Leyser, *Meditationes ad Pandectas*, vol. i, p. 256. (In Monarchiis omnes publicae res ad regalia referuntur); Stockmans, *Decis. Brabant.*, no. 85; Zypaeus, *Notit. Jur. Belg.*, lib. x, sec. *de jure fisci* (Res Communes, flumina, viae, aliaeque

Regiae factae sunt). In Ceylon Burnside C.J., in *Attorney-General* v. *Pitche* (1892) 1 S. C. R. 11, said : ' Assuming for the purpose of this case that the foreshore . . . is the property of the Crown, it is assuredly a right not in general for any beneficial interest to the Crown itself, but for securing to the public its privileges between high and low water mark, and the Crown itself could do no act to interrupt those privileges. . . . And if the Crown itself is incapable of doing so, it could not empower others by any means whatever, whether it be by grant, or lease, or licence, to do so.' On the other hand, in *Rowel Mudaliyar* v. *Pieris* (1895) 1 N. L. R. 81, Lawrie A. C. J. held that it was competent to the Crown by its regularly appointed agents to grant licences to fishermen to spread their nets *on the seashore* or on land belonging to the Crown adjacent to the shore, and to charge a rent in respect of such licences. But it appears from the report that the land in question was land *bordering the foreshore* ; and Ord. No. 12 of 1911, which empowers the Governor to proclaim any part of the seashore of the Island as an area from which no sand or other substance may be removed without licence, seems by implication to negative the Crown's right of property in the shore. Perhaps the question was not very fully considered.

APPENDIX B

The System of Conveyancing in British Guiana

By W. J. Gilchrist, Esq., of Gray's Inn, Barrister-at-Law, Stipendiary Magistrate, British Guiana.

Transfer of Immovables. Sale. Lease. Mortgage.

Sale. The transporter gives written instructions to the Registrar to advertise transport of property to and in favour of purchaser. An advertisement is then inserted to this effect in the *Official Gazette* for three successive Saturdays. Transport may be passed before one of the Judges of the Supreme Court on any day after the third publication. The title-deeds of the property accompanied by an affidavit must have been previously deposited with the Registrar for examina-

tion and to establish the right of the transporter to transport the property. The seller and purchaser must each file an affidavit or declaration as to the purchase price of the property. If everything is in order and no opposition has been entered in the Record Book kept for such purpose, the parties appear before the Judge and sign the deed of transport prepared by the Registrar. The Judge also signs the deed and the Record Book. The deed is filed in the Registrar's office and a *grosse* signed by a Sworn Clerk and given to the purchaser is accepted in all Courts as his title to the property. Office fees are charged; also stamp duty on the consideration. Should transport not be passed within three months, readvertisement as above becomes necessary. The procedure is laid down by rules of Court. See *Changadoo* v. *Ramswamy* (1890) 1 Brit. Gui. L. R. (N.S.), at p. 237; *Hogg* v. *Butts* (1893) 3 Brit. Gui. L.R. (N.S.), 88.

Lease. By the practice of the Colony leases for ten years and upwards are treated as alienations and must be judicially executed. The same applies to servitudes.

It seems that a lease for however short a term is not safe against a purchaser. In *Huree* v. *Bascom* (1860) 2 Brit. Gui. L.R. (O.S.), 37, defendants were proprietors of 'Good Success'. Plaintiff claimed three fields under a lease from former proprietors, and tendered evidence to show that at the time of transport it was agreed that the rights of lessees should be respected. No lease was reserved in the transport. The evidence was held inadmissible as the effect would be to vary the transport. The Court said, 'The plaintiff, if he had chosen, might have opposed the transport unless his rights were recognized and reserved expressly in it'.

Mortgage. The mortgagor gives written instructions to the Registrar to advertise the mortgage in favour of the mortgagee. This is done as in the case of transports. The mortgage may be special, that is charged upon a particular property; or general, that is charged upon all the property of the mortgagor movable and immovable; or both special and general.

The title-deeds of immovable property in the case of a special mortgage is deposited with the Registrar for examination. In the event of no opposition the parties appear before the Judge

and sign the deed, which is prepared by the mortgagor, or at his instance by the Registrar on payment of a fee. The Judge signs the deed and the Record Book. The deed is filed in the Registrar's Office and a *grosse* given, as in the case of transports, to the mortgagee.

Office fees and stamp duty are charged on the amount of the deed. The mortgage deed is, as a rule, prepared by the mortgagor.

Should the mortgage not be passed within three months, readvertisement is necessary.

As to general conventional mortgages see *In re da Silva*, (1904) *Brit. Gui. Off. Gaz.*, vol. xx, p. 843.

Enforcement of mortgages. In British Guiana a mortgage is realized by writ of execution after judgment of the Court. The Court's judgment limits the right to levy on the property mortgaged if the action is *in rem*; if *in personam* the judgment gives the right to levy execution—this being granted first on the mortgaged property, and secondly on the general estate of the mortgagor. To entitle the mortgagee to priority he must levy on the mortgaged property.

The creditor before proceeding to execution on the general property must make an affidavit in the terms required by the Rules of the Supreme Court.

The ownership in property purchased at an execution sale does not vest in the purchaser until he has paid the whole of the purchase-money. *Ex parte Oukama, re Provost Martial*, (1891) 1 Brit. Gui. L. R. (N. S.) 328.

It is worthy of remark that the transport system in British Guiana is not, as might be expected, an institution of Dutch origin. It was not until the British occupation that it became requisite to advertise transports and mortgages intended to be passed. The practice was introduced by an order of the Court of Justice dated May 7 and published May 16, 1807. (*Records of British Guiana*, by Mr. N. Darnell Davis, C.M.G. *Timehri*, vol. ii, N. S., p. 339.)

BOOK III

THE LAW OF OBLIGATIONS

The meaning of 'Obligation'.

FROM the law of property, or real rights, we pass to the law of obligations or personal rights. A real right, as we have seen, constitutes a claim which the law will sustain against any and every invader. It is a right against all the world. A personal right, on the contrary, is a right against some specific person and against him alone. When between two persons such a relation exists that the one is legally entitled to demand from the other some specific act or forbearance, such relation is termed an obligation. When we say that one person is legally entitled we imply that the other person is legally bound or obliged. Accordingly, Justinian defines obligatio as 'juris vinculum quo necessitate adstringimur alicujus solvendae rei secundum nostrae civitatis jura'[1]—'Obligation is a legal fetter by which we are bound with the necessity of performing some matter in terms of the laws of our country.' Any giving, doing, or forbearing, may be the subject-matter of an obligation,[2] provided only that it be something possible and not contrary to law.[3] From legal obligations as defined in the last paragraph, or 'civil obligations', as they are specifically called, the Roman lawyers distinguished 'natural obligations'. These are personal claims founded not in law, but in morality,[4] e.g. the claim of a father to receive services of duty and affection from his children. More precisely, the phrase 'natural obligation' was limited to claims which, while not enforceable by action, were, nevertheless, available as a defence and had certain other important consequences

Obligations are 'civil' and 'natural'

[1] Inst. 3. 13 pr.
[2] Voet, 44. 7. 1.
[3] Voet, 2. 14. 16.
[4] Voet, 44. 7. 3.

in the field of positive law.[1] In the modern law this distinction has lost much of its former significance.

How obligations arise.

A legal bond or obligation between two persons may arise in many different ways. These have been variously classified by the jurists. We adopt as most convenient the arrangement chosen by Gaius in his book called *Aurea*, or *Golden Words*.[2] According to this, obligations arise: (1) from agreement; (2) from wrongdoing; (3) from various other causes. This arrangement we shall follow, and discuss obligations under the three heads of Contractual, Delictual, and Miscellaneous.

PART I

OBLIGATIONS ARISING FROM CONTRACT

The definition of contract.

The subject-matter of the law of contract is in all legal systems the same, viz., agreements and promises. What agreements, what promises will the law enforce? This is the problem to be solved, and it is solved by different systems of law in different ways. But the definition of contract in the abstract is always the same, viz. 'an agreement enforceable at law' or, what comes to the same thing, 'an agreement which creates an obligation between the parties to it.' An agreement which produces this effect is a contract; an agreement which fails to produce this effect, however much it may be intended to do so, is a void contract, i. e. no contract at all.[3] Sometimes the agreement has in law the effect that it lies in the option of one of the parties whether he

Contracts are:

valid,

void,

[1] Voet, *ubi sup.*

[2] Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam jure ex variis causarum figuris. Dig. 44. 7. 1 pr.

[3] Or we may, if we please, define contract as 'an agreement which creates or is intended to create a legal obligation between the parties to it' (Jenks, *Digest of English Civil Law*, § 182). This will permit us without abuse of language and in harmony with common usage to speak of a 'void contract', i. e. a contract which is intended to create, but does not create, a legal obligation between the parties.

will be bound by it, or not. In that case it is said to be voidable by such party. Agreements directed to illegal ends are usually void; agreements procured by fraud or menace are usually voidable. Instances will be given in the following pages. voidable.

From what has been said it is apparent that the law of contract is concerned not with all agreements, but only with such agreements as are intended to create an obligation between the parties. If the parties do not wish to be bound the law will not bind them.[1] Therefore no legal consequence attaches to words spoken and understood as a jest,[2] nor to agreements for the performance of something patently impossible,[3] for they cannot be supposed to have been seriously intended.[4] There is no contract unless the parties intend to contract.

In discussing the law of contract we shall have to consider: (*a*) the formation of contract, i.e. the conditions of its existence; (*b*) its operation or effect; (*c*) its interpretation; (*d*) its determination. These topics will form the subject of the following chapters. Divisions of the law of contract.

CHAPTER I

FORMATION OF CONTRACT

To constitute a valid contract: (A) the parties must be agreed; (B) the requisite forms or modes of agreement (if any) must be observed; (C) the agreement must not have been procured by fraud, fear, misrepresentation, or undue influence; (D) the agreement must not be directed to an illegal object; (E) the parties must be competent to contract. The elements of a valid contract.

[1] Pothier, *Traité des Obligations*, sec. 3. The generality of this statement must be qualified to the extent of admitting that a person may in certain cases have acted in such a way as to induce another to believe that he intended to contract with him, and may be estopped from denying that his apparent intention corresponded with his real intention.

[2] Vinnius *ad* Inst. 3. 14. 2, sec. 11; Van Leeuwen, 4. 1. 3.

[3] Gr. 3. 1. 19 and 42; Voet, 2. 14. 16; 45. 1. 5; V. d. L. 1. 14. 6.

[4] Voet, 28. 7. 16; Vinnius, *ubi sup.*

Section I

The parties must be agreed.

A. Agreement. How agreements are made.

The nature of agreement is explained in many well-known works. We are here concerned with the modes in which agreements are concluded and with some circumstances in which agreement is absent. Agreement usually results from the acceptance of an offer, or from the reply to a question. Thus, if I say 'I offer to buy your horse for £50'; and you answer 'Agreed'; the contract is complete, from the moment that your answer makes known to me your acceptance of the offer made to you.[1] So, if I say 'Will you sell me your horse for £50?' and you answer 'I will'; there is a contract completed by your answer, expressing a willingness to sell, given in reply to my question expressing a willingness to buy. In Roman Law the contract known as the stipulation was normally expressed in the form of question and answer. In Roman-Dutch Law neither offer and acceptance, nor question and answer are indispensable, but any expression of a common intention, whether conveyed by spoken or written words, or by conduct, or partly by words and partly by conduct, will constitute an agreement which (other necessary conditions being satisfied) the law will enforce.[2] But without union of minds there can be no agreement.[3] Therefore, a mere declaration of intention not intended to be assented to[4] or not yet assented to, or a mere offer unaccepted, is destitute of legal consequences.[5]

[1] The general rule is as stated in the text. But in the case of acceptances through the post actual communication to the offeror is not indispensable (see next page); and the offer may in some cases, from its nature or by express terms, dispense with communication of acceptance.

[2] Van Leeuwen, 4. 3. 1.

[3] *Rose Innes D. M. Co.* v. *Central D. M. Co.* (1884) 2 H. C. G. 272.

[4] Gr. 3. 1. 11.

[5] Gr. 3. 1. 48; Van Leeuwen, 4. 1. 3. Grotius says that a pollicitation made in God's honour or ex praecedenti causa for public purposes is binding. This is taken from the Civil Law (Dig. 50. 12. 1. 1 and l. 2). But it scarcely holds good to-day. Such a pollicitation, however, if accepted, might be binding as an actionable pact or contract. See Groen. *de leg. abr.*, ad loc.

To such unilateral declarations of intention the Roman lawyers gave the name of 'pollicitation'.[1] Since an unaccepted offer does not bind the offeror until acceptance, before acceptance it may at any time be revoked.[2] Once accepted, it becomes irrevocable. An offer, if not accepted within the time specified for acceptance or, where no time is specified for acceptance, within a reasonable time, lapses,[3] and *ipso jure* determines in the event of the death of the offeror [4] or offeree before acceptance.

Contracts concluded through the post.

In the case of negotiations through the post, or by other such medium of correspondence, it is often matter of importance to determine whether and when a contract has been concluded. Suppose, for instance, an offer made through the post and an acceptance posted which never reaches the offeror, or reaches him late. Can it be said that the offer has been accepted? English Law is now settled in the sense that the posting of a letter of acceptance concludes the contract, so that both parties are from that moment bound. Modern decisions upon the Roman-Dutch Law incline to the same view.[5] Voet's view seems to be that the contract is concluded when and where the letter of acceptance reaches the offeror, 'ubi literae negotium concludentes acceptatae sunt' [6]—'where the letter concluding the contract is received'.

The acceptance of railway tickets, &c.

The acceptance of railway tickets, cloak-room tickets and the like has raised the same difficulties in modern Roman-Dutch Law as in English Law, and with similar results. A party is bound if he has had a reasonable

[1] Pothier, sec. 4; Gr. 3. 1. 11 and 48. Grotius renders pollicitatio by 'belofte'. An offer intended to be accepted is 'toezegging'.

[2] This applies particularly to a promise to keep an offer open, e. g. an option to purchase. So decided in Cape Colony in *Garvie & Co.* v. *Wright and Donald* (1903) 20 S. C. 421, on the ground of want of consideration; but query whether this decision is in accordance with the principles of R.-D. L.

[3] Gr. 3. 1. 48; Van der Linden, translation of Pothier, *Traité des Obligations*, p. 9, note.

[4] Voet, 5. 1. 73.

[5] *Naudé* v. *Malcolm* (1902) 19 S. C. 482; *Fern Gold Mining Co.* v. *Tobias* (1890) 3 S. A. R. 134; *Bal* v. *Van Staden* [1902] T. S. 128; 3 Maasdorp, p. 32.

[6] Voet, *ubi sup.*

Effect of agreement to reduce contract to writing.

opportunity of acquainting himself with the contents.[1] Sometimes it is agreed between the parties that their contract shall be reduced to writing. Whether they are bound independently of the writing or not before the contract has been written down is in each case a question of fact.[2]

No contract where agreement is vague or uncertain.

There is no agreement if it is left to one of the parties to perform or not, as he chooses: 'nulla promissio potest consistere quae ex voluntate promittentis statum capit';[3] nor if the subject-matter of the negotiations is so vague that its meaning cannot be ascertained.[4]

Effect of mistake.

Without union of minds there is no agreement. Mistake excludes agreement.[5] 'Non videntur qui errant consentire.'[6] 'Nulla voluntas errantis est.'[7] It is important to distinguish and determine the different ways in which mistake affects contract.

Mistake consists in a misapprehension as to the existence or non-existence of a fact or state of facts. All mistake is mistake of fact. But a mistaken belief that a rule of law exists or does not exist is distinguished from other

Mistake of law.

mistakes of fact and is called specifically mistake of law.[8] With regard to this the maxim applies 'juris ignorantiam cuique nocere';[9] which means that no one

[1] *Peard* v. *Rennie & Sons* (1895) 16 N. L. R. 175; *Central South African Railways* v. *McLaren* [1903] T. S. 727.

[2] Voet, *ubi sup.*; *Noel* v. *Green* (1898) 15 C. L. J. 282; *Richards* v. *Mills* (1905) 15 C. T. R. 447.

[3] Dig. 45. 1. 108. 1; Van Leeuwen, 4. 3. 5; Voet, 44, 7. 1.

[4] V. d. L. 1. 14. 6.

[5] Gr. 3. 1. 19; 3. 14. 4; V. d. L. 1. 14. 2.

[6] Dig. 50. 17. 116. 2. [7] Dig. 39. 3. 20. [8] Voet, 22. 6. 1.

[9] Dig. 22. 6. 9. 1: (Paulus) Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. An exception may perhaps be admitted when a law is of merely local application, in favour of a stranger to the locality. Voet, 22. 6. 2. Some indulgence is allowed to minors and women. Voet, 22. 6. 3. The question has been much debated whether ignorantia juris excludes the condictio indebiti. Voet (12. 6. 7) held that it does, dissenting from Vinnius (*Select. Quaest.* I. 47). Grotius (3. 30. 6) is of the same opinion as Vinnius, but his commentator Schorer agrees with Voet, and Van der Keessel (*Th.* 796) inclines to the same view. See *Rooth* v. *The State* (1888) 2 S. A. R. 259, where all the authorities are collected in Kotzé C. J.'s learned judgment.

can excuse himself from performance of a contract by alleging that he would not have entered upon it but for some mistaken belief as to the existence or non-existence of a rule of law.[1] As distinct from mistake of law, mistake of fact often affects the validity of a contract, and that in various ways. The mistake may be common to both parties, that is both may labour under the same mistake, or it may be mutual, that is each may misapprehend the intention of the other. Where the mistake is common to both parties it usually happens either that the mistake consists in common error as to some fact, but for which error the parties would not have contracted,[2] or that the parties are in fact agreed, but the writing to which they have reduced their agreement fails to express their real meaning. In the first case the contract collapses from its foundation and is destitute of legal effect. An instance is when the parties have contracted for the purchase and sale of something which in fact does not exist.[3] In the second case the Court will decree rectification or cancellation of the instrument.[4] When the error is mutual, each side being under a misapprehension as to the intention of the other, different considerations apply. The question then is 'Who is in fault?' A man, it may be argued, is responsible for his own mistakes. If you have in terms contracted with me, why should you escape performance on the ground of an error to which I have not contributed? This argument so far carries weight that a person seeking to treat a contract as void on the ground of mutual mistake cannot succeed unless his

Mistake of fact.

[1] Ignorance of law means ignorance of a rule of law. Ignorance of one's own rights is not necessarily ignorance of law. Cf. *Umhlebi* v. *Umhlebi's Estate* (1905) 19 E. D. C. 237.

[2] The common error may, however, relate only to a term in the contract. *Van der Byl* v. *Van der Byl & Co.* (1899) 16 S. C. 338, in which case the defendants were offered the alternatives of rectification or cancellation.

[3] Gr. 3. 1. 42. The contract may also be said to be void on the ground of impossibility of performance.

[4] *Port Elizabeth Harbour Board* v. *Mackie, Dunn & Co.* (1897) 14 S. C., per de Villiers C. J. at p. 479.

has no effect unless 'reasonable'.

mistake was reasonable (*justus—probabilis*),[1] i.e. not imputable to his own carelessness. If he can do so the contract will be held void for want of the essential condition of agreement between the parties. This applies whether the mistake relates: (*a*) to the nature of the transaction;[2] or (*b*) to the identity of the subject-matter;[3] or (*c*) to the quality of the subject-matter;[4] or (*d*) to the identity of the other party to the supposed contract.[5]

Different kinds of mistake.

Mistake as to quality.

With regard to mistake as to the quality of the subject-matter everything turns upon the question, what was the agreement between the parties.[6] 'Videamus quid inter ementem et vendentem actum sit' says Julian in the Digest.[7] Thus, if the contract was for the sale of *these* candlesticks, it is immaterial that you, the purchaser, thought them to be silver when in fact they were plate. You have got what I agreed to sell and you agreed to buy. The fact that you were mistaken as to the quality is irrelevant to the contract. But if you mistakenly supposed that I was contracting to sell you 'silver candlesticks', when, in fact, I intended only to sell 'candlesticks', and if your error was not imputable to your own carelessness,[8] the contract would be void for want of consensus as to its essential terms. If, again, both parties believed the candlesticks to be silver and contracted for the purchase and sale of 'silver candlesticks' the contract would be void on the ground of common error as explained above.

Mistake as to the person.

Mistake as to the person with whom one contracts renders the contract void except where the individuality

[1] Voet, 12. 6. 7; 22. 6. 6; *Logan* v. *Beit* (1890) 7 S. C. at p. 216; *Merrington* v. *Davidson* (1905) 22 S. C. 148.

[2] Pothier, sec. 17.

[3] Ibid.; *Maritz* v. *Pratley* (1894) 11 S. C. 345.

[4] Pothier, sec. 18.

[5] Pothier, sec. 19.

[6] Pothier, sec. 18.

[7] Dig. 18. 1. 41 pr. Cf. Code Civil, sec. 1110: L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet. B. W., Art. 1358: Dwaling maakt geene overeenkomst nietig dan wanneer dezelve plaats heeft omtrent de zelfstandigheid der zaak welke het onderwerp der overeenkomst uitmaakt.

[8] If it were so, you would be liable *quasi ex contractu*. Pothier, sec. 19.

of the other party is unimportant.[1] Thus, where an order is sent to one tradesman and in error executed by another, in the absence of special circumstances the goods must be paid for, though the purchaser may have been under a misapprehension as to the person who supplied them.

Mistake induced by fraud.

A contract procured by the fraud of a third party is null and void if the circumstances are such as to exclude consent. The same principle would seem to apply to a contract procured by the fraud of one of the contracting parties, if the fraud is of such a character as to exclude any consensus whatever; e.g. when a man is deceived as to the nature of the transaction. Certainly, in such a case he would have no contracting mind.[3]

Property alienated under mistake.

The effect of mistake, where it operates, being to render the contract void, not voidable, property alienated under mistake can be recovered even from bona fide possessors. It is, however, not unusual to take active steps to protect oneself against liability by applying to the Court for cancellation or rescission of the contract, and this is particularly matter of prudence when the contract is expressed in writing.

Section II

The requisite forms or modes of agreement, if any, must be observed.

B. Requirements of form.

The historical development of the law of contract follows substantially the same course in the various legal

[1] Pothier, *ubi sup.* It seems more consonant with principle to state the rule thus than conversely, as in the Code Civil, sec. 1110: (L'erreur) n'est point une cause de nullité lorsqu'elle ne tombe que sur la personne avec laquelle on a intention de contracter, à moins que la considération de cette personne ne soit la cause principale de la convention. B. W., sec. 1358: Dwaling is geene oorzaak van nietigheid indien zij alleenlijk plaats heeft omtrent den persoon met wien men voornemens is te handelen, tenzij de overeenkomst voornamelijk uit aanmerking van dezen persoon zij aangegaan.

[2] In this case the duty seems to be rather quasi-contractual than contractual.

[3] In both the cases mentioned in this paragraph the statement in the text is subject to the qualification that the fraud in question must not be imputable to the negligence of the defrauded party. *Standard Bank* v. *Du Plooy* (1899) 16 S. C. 161.

systems known to us. In a primitive society few promises are enforced by law, and only upon condition of their being accompanied by some solemnities of form or expression, which serve to mark their serious character and to distinguish them from the mass of agreements and promises of which the law in its initial stages fails to take account.[1] Later, the categories of actionable agreements are multiplied, or the conditions of enforceability made more simple. Lastly, a stage is reached in which all agreements intended to create legal relations, contracted by competent persons for lawful objects, are upheld by the tribunals. It may be, however, that the law still requires that all agreements indifferently should satisfy some condition which is taken to be the test of the serious intention of the parties. It may be, further, that for special reasons some kinds of agreement are still required to be expressed in writing or in solemn written form.

Contracts in Roman Law.

The Roman Law, as is well known, was far from enforcing all agreements. In Justinian's system only the following classes of agreement were actionable, viz.: (1) real contracts, nominate and innominate; (2) stipulations; (3) the four consensual contracts; (4) certain pacts, which had at various times and in various ways been clothed with actionability, and thus become contracts in everything but name.

Pacta nuda.

All other agreements remained bare pacts (*pacta nuda*). They could not be enforced by action, but might be pleaded by way of exception.[2] 'Nuda pactio obligationem non parit sed parit exceptionem.'[3] The stipulation in its latest stages was almost always reduced to writing, so that it is substantially true to say that in Justinian's law any agreement whatever would be enforced provided that it was expressed in a written instrument, but other agreements only if they fell within certain known classes, or if one party had performed his part and was demanding corresponding performance from the other.

[1] Maine, *Ancient Law*, p. 327.

[2] Gr. 3. 1. 51.

[3] (Ulpian) Dig. 2. 14. 7. 4.

Contracts in the early Dutch Law.

The ancient Dutch Law has been partly made known to us by the researches of Professor Fockema Andreae and other scholars. It may be, as Grotius and others assert, that the Germans of old attached the highest importance to the duty of keeping faith,[1] but it was not the case that every promise was legally enforceable. Here, as elsewhere, the history of the law of contract is the history of a slow transition from form to formlessness.[2]

Contracts in Roman-Dutch Law.

In the Roman-Dutch Law—the system derived from the two above-named sources—the process of development, aided, as some think, by the influence of the Canon Law,[3] has reached its furthest limit. The phraseology of the Roman Law is retained, but it has ceased to correspond with facts. It is no longer necessary that an agreement should be referable to any specific head of contract or actionable pact, for by the Roman-Dutch Law all contracts are consensual,[4] and any pact whatever is enforceable [5] provided only that it is freely entered upon by competent persons for an object physically possible and legally permissible. 'If I have to consult the law of our own fatherland,' says Mr. C. W. Decker [6] in a well-known passage, 'I merely consider: (1) whether the persons were capable of binding themselves; (2) whether the agreement was made deliberately and voluntarily; (3) whether it has a physical and moral possibility or reasonable cause. If these essentials concur, I say with safety that a valid action for performance arises.'

All contracts consensual.

Decker on the essentials of contract.

Roman-Dutch Law requires neither form nor consideration.

From the above description of the essential elements of contract it is apparent that the Roman-Dutch Law pays no attention to the formal requirements of the Roman Law. It is equally a stranger to the English requirement of Form or Consideration. Whether a long course of

[1] Gr. 3. 1. 52; Heineccius, *Elem. Jur. Germ.*, lib. ii, secs. 330–1.
[2] Fock. And., vol. ii, pp. 1 ff.
[3] Vinnius, *De pactis*, cap. vii, sec. 5; Voet, 2. 14. 9.
[4] Heineccius, *Elem. Jur. Germ.*, lib. ii, sec. 345; Decker *ad* Van Leeuwen, 4. 2. 1, n. 1.
[5] 'Moribus hodiernis ex nudo pacto datur actio.' Groenewegen, *de leg. abr. ad* Inst. 3. 20 (19). 19; Gr. 3. 1. 52; Voet, *ubi sup.*
[6] Van Leeuwen, 4. 2. 1, n. 1 (Kotzé's translation, vol. ii, p. 10).

judicial decision has introduced the English doctrine of consideration into the legal system of any of the Roman-Dutch colonies is a question with which we are not here immediately concerned. It may be asserted with some confidence that this doctrine did not form part of the Roman-Dutch Law of Holland. The late Lord de Villiers, indeed, on more than one occasion, judicially advanced the view that in the Roman-Dutch Law every contract must be based upon some reasonable cause (*redelijk oorzaak*), and that reasonable cause, as understood and applied by the Dutch lawyers, was in effect indistinguishable from the ' quid pro quo ' which passes for consideration in English Law.[1] But other persons of eminent authority do not accept this identification, which is, indeed, historically improbable ; and, further, it may be doubted whether the doctrine of causa really occupied the important place in the Roman-Dutch Law which has been assigned to it in recent discussions.[2] It is probable that when Grotius,[3] Van Leeuwen,[4] Huber,[5] and Van der Keessel [6] require that a contract should have a reasonable or just cause, they imply little more than Voet [7] and Vinnius [8] when they say that an agreement to be legally enforceable must be entered upon with a serious and deliberate mind. Decker, then, is quite correct when he makes reasonable cause equivalent with ' physical and moral possibility '. Finally, Van der Linden reduces causa to its proper compass when he says : ' Contracts are also null and void whenever they have no cause at all,

The doctrine of causa or redelijk oorzaak.

[1] For the South African case law on the subject the reader should refer to Maasdorp, *Institutes of Cape Law*, vol. iii, pp. 46 ff. See in particular the Cape case of *Mtembu* v. *Webster* (1904) 21 S. C. 323, and the Transvaal case of *Rood* v. *Wallach* (1904) T. S. 187. For Ceylon see *Lipton* v. *Buchanan* (1904) 8 N. L. R. 49, and (1907) 10 N. L. R. 158. The British Guiana case of *De Cairos* v. *Gaspar* (1904) *Off. Gaz.*, vol. xix, p. 1274, is *nihil ad rem.*

[2] The doctrine of *causa* is in fact a juristic figment. I am glad to find this view confirmed by Prof. Marcel Planiol (*Traité élémentaire de droit civil* (6th ed.), vol. ii, pp. 342 ff.).

[3] Gr. 3. 1. 52–3.

[4] Van Leeuwen, 4. 1. 4–6.

[5] Huber, *Hedensdaegse Rechtsgeleertheyt*, 3. 21. 6–7.

[6] V. d. K. *Th.* 484.

[7] Voet, 2. 14. 9.

[8] Vinnius *ad* Inst. 3. 14. 2, sec. 11.

or a false cause, or a cause which offends against justice, good faith, or good morals.'[1] By this he means that there is no contract if the parties: (1) (*nulla causa*) did not mean to contract or meant to contract, but the contemplated object and foundation of the contract has failed; (2) (*falsa causa*) thought that a certain object or foundation of the contract existed when in fact it did not; or (3) (*turpis causa*) contemplated by their agreement an object condemned by law.[2] The language of Van der Linden reappears in the Civil Code now in force in Holland.[3]

The modern law in some cases requires that contracts should be in writing.

It was said above that even in a developed legal system *form* may sometimes be required in particular cases. Thus English Law sometimes requires a deed, in other cases that a contract should be evidenced by writing. In the Roman-Dutch Law no such requirement exists. Van der Linden,[4] indeed, says that an ante-nuptial contract must be in writing, but Van der Keessel disagrees.[5] It is not necessary that contracts relating to land should be in writing.[6] However, by Cape Law an ante-nuptial contract

[1] V. d. L. 1. 14. 2 (*ad fin.*), and cf. *Code Civil*, Art. 1131: L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet. B. W., Art. 1371: Eene overeenkomst zonder oorzaak, of uit eene valsche of ongeoorloofde oorzaak aangegaan is krachteloos. The *Ontwerp* of 1820, Art. 2148, attempts a definition or explanation of 'oorzaak', which merely amounts to saying that a contract in the legal sense must be an 'act in the law'. It runs as follows: Er bestaat geene inschuld zonder oorzaak, dat is zonder het aanwezen eener zoodanige verpligting of verbindtenis van de zijde dergeenen, tegen wien de rechthebbende zijne inschuld wil doen gelden, als aan welke door de wet het regt van inschuld, of de bevoegdheid tot regtsvordering, verbonden is.

[2] It is plain from the footnote to Van der Linden's text that this passage has reference to the Civil Law and the various condictiones known as condictio causa data causa non secuta; condictio sine causa; condictio ob turpem vel injustam causam; condictio indebiti.

[3] Note 1, *supra*.

[4] V. d. L. 1. 3. 3; *supra*, p. 83, n. 5. [5] *Th.* 229.

[6] I.c. not by the R.-D. common law, but writing may in this and other cases be required by statute, as in Ceylon by Ord. No. 7 of 1840, sec. 2; in the Transvaal by Procl. No. 8 of 1902, sec. 30; and in Natal by Law No. 12 of 1884, sec. 1. There is no such enactment in British Guiana. In Ceylon by Ord. No. 7 of 1840, sec. 21, no promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorized by him or her, shall be of force or avail in law for any of the following purposes: (1) for charging any person with the debt, default, or

will not affect third parties unless registered in the office of the Registrar of Deeds, and transfers, mortgages, and long leases of land are, as has been seen in an earlier part of this work, subjected to the same condition.

Section III

The agreement must not have been procured by Fraud or Fear.

C. Agreement must be free.

All contracts derive their validity from the mutual and free consent of the contracting parties. Free consent is absent when a contract has been procured by fraud or fear.

Fraud.

Fraud is defined by Labeo as 'omnis calliditas, fallacia, machinatio, ad circumveniendum, fallendum, decipiendum alterum adhibita'[1]—'any craft, deceit, or contrivance employed with a view to circumvent, deceive, or ensnare another person'.

In the Roman Law dolus produced (*inter alia*) the following effects: viz. (1) It might be pleaded by way of exception (*exceptio doli*). (2) It grounded an action (*actio doli*). (3) It entitled the person deceived to rescission of any contract or conveyance entered upon or made in consequence of the deceit (*restitutio in integrum*).[2] The scope of these two last remedies was somewhat limited.

miscarriage of another; (2) for pledging movable property, unless the same shall have been actually delivered to the person to whom it is alleged to have been pledged; . . . (4) for establishing a partnership where the capital exceeds one hundred pounds, provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parole testimony concerning transactions by or the settlement of any account between partners; and by the Sale of Goods Ordinance (No. 11 of 1896, sec. 4) a contract for the sale of any goods shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or pay the price or a part thereof, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

[1] Dig. 4. 3. 1. 2. This definition, together with the English Law as interpreted in *Derry* v. *Peek* (1889) 14 App. Ca. 337, is discussed in *Tait* v. *Wicht* (1890) 7 S. C. 158. See also *Roorda* v. *Cohn* [1903] T. H. 279.

[2] Girard, *Droit Romain* (ed. 5), p. 421.

Remedies in case of fraud in Roman-Dutch Law.

In Roman-Dutch Law the victim of fraud could either : (*a*) set up the fraud as a defence ;[1] or (*b*) sue for damages ;[2] or (*c*) take steps to have the contract set aside.[3] This he did by applying to the Hooge Raad for a writ directing a Court of first instance to inquire into the truth of his allegations and, if they were well founded, to grant relief.

In the Roman-Dutch Colonies the procedure has been simplified, but the remedies are substantially the same.

Are contracts induced by fraud void or merely voidable ?

With regard to the effect of fraud on Contract, the Roman Law distinguished between fraud which was of such a character that but for it the defrauded party would not have contracted at all (*dolus dans locum contractui*), and fraud which was merely incidental to a contract (*dolus incidens in contractum*), e. g. a fraudulent misrepresentation as to the value of an article sold. The operation of these two cases of fraud differed, again, according as the contract concerned was bonae fidei or stricti juris. This last-named distinction was of little or no importance in the Dutch Law.[4] Some writers, however, amongst them Voet and Van der Linden, retain it in connexion with the much-debated question whether fraud which goes to the root of a contract renders such contract void, or merely voidable. Voet[5] and Van der Linden[6] say that fraud of this character renders a bonae fidei contract absolutely void,[7] while in the case of a stricti juris contract it merely gives a claim to relief. Grotius

[1] Gr. 3. 48. 7 ; Van Leeuwen, 5. 17. 13.

[2] Decker *ad* Van Leeuwen, 4. 2. 2 (Kotzé's translation, vol. ii, p. 13).

[3] Van Leeuwen, 4. 42. 2 and 4. Apparently a claim for restitution must always be made by way of mandament van relief or request civil. Gr. 3. 48. 5 ; *Cens. For.* 1. 4. 42. 5 ; *Papegay*, cap. xliv, vol. i, p. 614; Kersteman, *Woordenboek, sub voce* Relief ; Van der Linden, *Verhandeling over de Judicieele Practijcq*, 4. 1. 4 (vol. ii, p. 172).

[4] Decker *ad* Van Leeuwen, 4. 2. 1 (Kotzé's translation, vol. ii, p. 11) ; Van der Linden's Pothier, sec. 9, *in notis*.

[5] Voet, 4. 3. 3 and 6.

[6] Van der Linden, *Supplement. ad Pandect.* 4. 3. 3. Van der Linden thinks that the same consequence follows dolus incidens. Ibid. sec. 4.

[7] So also V. d. K. *Th.* 666. Girard says (p. 463, note 4) : 'Mais cette opinion est aujourd'hui abandonnée.'

states, in absolute terms, that a person is not bound by anything he does when misled by fraud.[1] The distinction is perhaps not so sharp as it looks, for on the one hand the victim of fraud may always at his option affirm the contract, which he could scarcely do if it were really void ; and on the other hand, it was matter of prudence and the common practice to apply for relief, even in the case of contracts which *ex hypothesi* were wholly void.[2] Mr. Justice Kotzé in his edition of Van Leeuwen says : ' It must be borne in mind that fraud does not necessarily render a contract void, but voidable at the election of the party sought to be defrauded.' [3] Pothier is to the same effect.[4]

Importance of the distinction.

As between defrauded and defrauder the distinction between void and voidable is perhaps of no great importance, but it affects the rights of innocent third persons to whom property obtained by fraud has passed. If the transaction is wholly void the third party has no title, and the defrauded person can recover it from him by vindication.[5] If the transaction is merely voidable the innocent possessor is in the better position.[6] It would seem that the South African Courts have adopted this view.

Innocent misrepresentation.

It must be noted that dolus always implies an intention to deceive. In the Dutch Law innocent misrepresentation inducing a contract gave no right of action nor claim to relief. It was, however, available as a defence, for it

[1] Gr. 3. 1. 19. But Van der Linden says (1. 14. 2 ; Juta's translation, p. 103) : ' Only that which is a manifest violation of bona fides is considered by the Court to be an actual fraud, sufficient to rescind the contract, e.g. all wrongful practices and artifices used by one party in order to induce the other to enter into the contract, without which the latter would not have made the contract.' In another passage (3. 17. 3) Grotius says that ' if the whole sale was induced by the seller's fraud and otherwise would not have taken place, the sale is annulled at the instance of the purchaser '. This amounts to saying that the contract is not void, but voidable.

[2] Voet, 4. 1. 13 ; Van der Linden's Pothier, sec. 22, note ; V. d. K. *Th.* 877.

[3] Kotzé's Van Leeuwen, vol. ii, p. 13. [4] Sec. 29.

[5] Voet, 4. 3. 3. This is expressly stated also by Groenewegen *ad* Gr. 3. 48. 7, citing Neostad. *Supr. Cur. decis.* no. 5.

[6] Voet, 4. 3. 10.

is inequitable to sue upon such a contract.[1] The modern law, influenced by English practice, allows a plaintiff to sue for rescission of a contract so induced, but no more than the Dutch Law allows an action for damages. The extraordinary remedy in case of *laesio enormis* was the one exception admitted by the Dutch Law.[2] This has been superseded in some of the colonies by statute.[3]

Fear. Fear is another ground of invalidity in contract. 'Quod metus causa gestum erit ratum non habebo,' said the Roman Praetor in his edict.[4] Ulpian defines fear as 'a disturbance of mind caused by instant or future peril'.[5] Grotius describes it[6] more largely as 'a great terror as of death, dishonour, great pain, unlawful imprisonment of oneself or of one's belongings'.[7] It is an old controversy whether a contract procured by fear is void or merely voidable. The latter view is now generally adopted, following the well-known dictum of Paulus, 'coactus volui',[8] to which the glossator adds the

[1] Van der Linden, *Supplement. ad. Pandect.* 4. 3. 1 (*ad fin.*). For South African Law see *Viljoen* v. *Hellier* [1904] T. S. 312.

[2] The rule that a vendor of land for less than half its real value might get back his land on returning the price, unless the buyer preferred to pay the full value, is attributed in Justinian's Code (4. 44. 2 and 8) to constitutions of Diocletian and Maximilian (A. D. 285 and 293), but perhaps was of later origin. Girard, p. 542. In the Dutch and perhaps in the Roman Law, a similar indulgence was allowed to a purchaser who had paid more than double value, and in Dutch Law the principle was extended to other contracts besides sale. Gr. 3. 17. 5; 3. 52. 2. Van Leeuwen, 4. 20. 5. Did the rule extend to movables as well as to land? Girard, *ubi sup.*

[3] It has been abolished in Cape Colony by the General Law Amendment Act No. 8 of 1879, sec. 8, and in the Free State by Procl. No. 5 of 1902, sec. 6. It still obtains in the other R.-D. Colonies (except Southern Rhodesia, which follows Cape Law): viz. in the Transvaal, *McGee* v. *Mignon* [1903] T. S. 89; in Natal, *Bergtheil* v. *Crowly* (1896) 17 N. L. R. 199; in Ceylon, *Gooneratne* v. *Don Philip* (1899) 5 N. L. R. 268. In British Guiana the defence of *laesio enormis* was raised with success in *Haly* v. *Vieira* (1913), *Brit. Gui. Off. Gaz.*, vol. xxxvii, p. 511, in which case it was further held that the doctrine is not confined to land [G.].

[4] Dig. 4. 2. 1.

[5] Metus instantis vel futuri periculi causa mentis trepidatio. Ibid.

[6] Gr. 3. 48. 6.

[7] I. e. wife and children. Voet, 4. 2. 11.

[8] Dig. 4. 2. 21. 5; Gr. *ubi sup.*; Voet, 4. 2. 1; Pothier, *Traité des obligations*, sec. 22, with V. d. L.'s note in the Dutch translation; Van der Linden, *Supplement. ad Pandect.* 4. 2. 2.

explanation 'voluntas coacta est voluntas'. Accordingly a contract induced by fear remains good until repudiated or rescinded,[1] and may be ratified expressly or tacitly when the fear is removed.[2] It is not every kind of fear that affects the formation of a contract, but only a just or reasonable fear—'metus non vani hominis'[3]—regard being had, however, to the age, sex, and condition of the person intimidated,[4] and a fear of unlawful not of lawful violence.[5] Mere threats are not enough, unless they are of a serious character and are likely to take effect.[6] The action 'quod metus causa' lies against the intimidator, and against any other person into whose hands the proceeds of the intimidation[7] have come, or who has otherwise benefited by it,[8] at the expense of the plaintiff.[9] But a person seeking to avoid a contract or conveyance on the ground of metus can only do so on condition of restoring the defendant to his former position.[10] This applies equally to the intimidator and to third parties, so that the position of a third party, whether he be a bona fide or a mala fide possessor, is better in a case of metus than in a case of error. An action to set aside a transaction on the ground of fear is prescribed in thirty years.[11]

Undue influence.

The topic of undue influence, as distinct from metus, is not developed in the Roman-Dutch writers. However, the books contain hints which might have been worked out by judicial decisions without the aid of English precedents.[12]

[1] Voet, 4. 2. 2.
[2] Voet, 4. 2. 16.
[3] Dig. 4. 2. 6; Voet, 4. 2. 11; V. d. L. 1. 14. 2.
[4] Voet, *ubi sup.*
[5] Voet, 4. 2. 10.
[6] Voet, 4. 2. 13.
[7] Voet, 4. 2. 4.
[8] Voet, 4. 2. 5–6.
[9] In the Roman Law the action lay for four-fold damages in case of failure to restore (Dig. 4. 2. 14. 1); but in R.-D. L. the action was always *in simplum.* Voet, 4. 2. 18.
[10] Voet, 4. 1. 22; 4. 2. 9.
[11] Gr. 3. 48. 13; *Cens. For.* 1. 4. 41. 8; Voet, 4. 2. 18.
[12] Voet, 2. 14. 19; 4. 2. 11.

Section IV

The agreement must not be directed to an illegal object.

D. Legality of object.

The next requisite of a valid contract is that it should be directed to a proper object. An object is improper if it is condemned by statute or by common law.[1] In all mature legal systems the principal heads of illegality will be much the same. But since social progress brings with it new conditions and fresh abuses, the illegalities of one age will not be identical with the illegalities of another. Accordingly, the categories of unlawfulness in contract are not in the modern law quite the same as they were in the Roman Law or in the Dutch Law of the eighteenth century.

Effect of illegality.

Unlawful contracts are regarded by Roman Law as civilly impossible.[2] For this reason Decker speaks in the same breath of physical and of moral possibility (i. e. legality) as together making one of the essentials of contract.[3] It is, however, more in accordance with modern usage to keep these topics distinct. Unlawful contracts are null and void.[4] No action can be grounded upon them. On the other hand, money paid in pursuance of an unlawful contract cannot be recovered back, for, as was said by an English Judge: 'Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court, to fetch it back again. You shall not have a right of action, when you come into a Court of justice in this unclean manner to recover it back.' The same doctrine is expressed in the Civil Law maxim, 'in pari delicto potior est conditio defendentis'.[5] This rule

[1] Gr. 3. 1. 42–43; Voet, 2. 14. 16.

[2] Voet, *ubi sup.*

[3] *Supra*, p. 197.

[4] Gr. 3. 1, secs. 19, 42, and 43; V. d. L. 1. 14. 6. Under unlawful contracts are included contracts subject to a suspensive condition which is unlawful. Gr. 3. 14. 29.

[5] *Aliter*, In delicto pari potior est possessor. Dig. 12. 7. 5 pr.; Gr. 3. 1. 43; *Woolman* v. *Glensnick* (1905) 26 N. L. R. 379 (money lent for an illegal object irrecoverable).

excludes cases in which the promisee alone is guilty. For if an innocent party has paid money or transferred property for a purpose in fact unlawful, he may get it back (together with fruits and accessions), or the value, by the process which in Roman Law was known as the condictio ob turpem causam;[1] and the principle has been extended to the case of a plaintiff guilty, but not equally guilty with the defendant, as for instance if he entered upon the transaction under the influence of compulsion or menace.[2]

Condictio ob turpem causam.

What contracts are illegal:

The principal categories of illegality in contract are the following:

A. *Contracts made in breach of statute.*

Contracts made in breach of statute.

If a contract is expressly prohibited by law, or is directed to an object expressly condemned by law, there can be no question that the whole transaction is void. But whether a contract to which a statutory penalty attaches is thereby rendered: (*a*) illegal, or (*b*) void, or (*c*) merely expensive to the parties, is in each case matter of construction. Likewise, apart from any question of penalty, a contract may be rendered void by law without being therefore necessarily illegal.

B. *Contracts prohibited by the common law.*

Contracts prohibited by the common law.

Such are: 1. Agreements to commit a crime or civil wrong;[3] promises inducing the commission of a crime or civil wrong; promises made as an inducement to the promisees to abstain from such wrongful acts.

2. Agreements which tend to prevent the course of justice, e.g. to stifle a prosecution,[4] to condone the com-

[1] Voet, 12. 5. 1; *Sandeman* v. *Solomon* (1907) 28 N. L. R. 140.

[2] See *Wells* v. *Du Preez* (1906) 23 S. C. 284. It seems further that money can sometimes be recovered back where the illegality is not so much the object as the consequence of the contract, at all events when nothing further has been done in pursuance of the contract. Cf. Dig. 12. 7. 5 pr.: Avunculo nuptura pecuniam in dotem dedit neque nupsit; an eandem repetere possit quaesitum est. Papinian answered yes.

[3] Inst. 3. 19. 24; Gr. 3. 1. 42; Voet, 2. 14. 16.

[4] V. d. K. *Th.* 520; *Hotz* v. *Standard Bank* (1907) 3 Buch. A. C. 53; *Bezuidenhout* v. *Strydom* (1884) 4 E. D. C. 224.

mission of a future crime,[1] to pay a witness a fee for attendance larger than the amount fixed by law.[2] To this class may be referred such agreements as in English Law are known by the names of maintenance and champerty—viz., agreements to promote and maintain legal proceedings in which the promisor has no direct concern, and in particular to do so with a view to sharing with a plaintiff the proceeds of a suit.[3] Voet mentions in this connexion an agreement *de quota litis* between lawyer and client, an agreement that a lawyer is not to be paid unless the suit is successful, an improper agreement for the purchase of another's right of action.[4] Cession of actions is, however, free from objection, unless of a speculative character, or for other reasons contrary to legal policy.

3. Agreements for the sale or procurement of public[5] offices or otherwise tending to injure the public service.

4. Agreements tending to injure the State in its foreign relations.

5. Agreements directed to a fraud upon the public.[6]

6. Agreements tending to sexual immorality.[7]

7. Agreements in restraint of marriage;[8] e g. an arrangement between two persons that whichever of the two marries first shall pay a sum of money to the other. But agreements to procure marriage for reward, contrary to English law, are not unlawful by Roman-Dutch law.[9]

8. Agreements in undue restraint of trade.[10]

9. Agreements in fraud of creditors.[11]

10. Agreements relating to a future right of succession

[1] Gr. 3. 1. 42; Voet, *ubi sup.* [2] *Knox* v. *Koch* (1883) 2 S. C. 382.
[3] Gr. 3. 1. 41. For Brit. Gui. see *Mitchell* v. *Legatt* (1904) *Off. Gaz.* vol. xxi, p. 5.
[4] Gr. 3. 1. 41; and Schorer ad loc.; Voet, 2. 14. 18.
[5] Van Leeuwen, 4. 14. 6; V. d. K. *Dictat. ad* Gr. 3. 1. 42.
[6] *St. Marc* v. *Harvey* (1893) 10 S. C. 267.
[7] Voet, 12. 5. 6; *Aburrow* v. *Wallis* (1893) 10 S. C. 214.
[8] Voet, 2. 14. 21.
[9] Bynkershoek, *Quaest. Jur. Priv.*, lib. ii, cap. vi; V. d. K. *Th.* 482. In *King* v. *Gray* (1907) 23 S. C. 554, however, the Court adopted the principle of the English case of *Hermann* v. *Charlesworth* [1905] 2 K. B. 123; and made no reference to the Roman-Dutch authorities.
[10] *Edgcombe* v. *Hodgson* (1902) 19 S. C. 224.
[11] Gr. 2. 5. 3; and V. d. K. *Dictat.* ad loc.; Gr. 3. 1. 27.

or limiting freedom of testation.[1] This is a head of illegality derived from the Roman Law. As expounded by Voet in his Commentary, the law reprobates any agreement relating to the succession of an ascertained person still alive, even though made with such person's consent. Such agreements are contrary to public policy, 'tanquam continentia votum captandae mortis et eventus tristissimi ac periculosi plena'.[2] Nor can a person contract to make another his heir.[3] Nor can two persons mutually stipulate that they shall succeed to one another.[4] The general rule extends to legacies, so that a promise to leave money by will cannot be enforced against a deceased person's estate, nor found an action for damages.[5] An agreement, however, relating to the estate of an uncertain person still alive, or of a deceased person, is free from objection. Agreements in ante-nuptial contracts relating to the succession of the spouses *inter se*, or of the spouses to a third party, or of a third party to the spouses, and agreements for the division of an inheritance amongst co-heirs (*de familia erciscunda*), are permitted.

Agreements which burden the obligor without benefiting the obligee,[6] and promises which are merely silly and foolish,[7] though not illegal in the sense of being contrary to law, are devoid of legal effect.[8]

Gaming and wagering contracts.

Gaming and wagering contracts occupy a peculiar position, for, though not positively illegal, it is the policy

[1] Gr. 3. 1. 41; V. d. K. *Th.* 479, and *Dictat.* ad loc.; Voet, 2. 14. 16; *Cens. For.* 1. 4. 3. 15; unless such agreement is contained in an antenuptial contract. Gr. loc. cit.; V. d. K. *Dictat.* ad loc., and *ad* Gr. 2. 12. 8; V. d. K. *Th.* 235 ff., and *Th.* 479.

[2] Cod. 2. 3. 30. 2; Voet, *ubi sup.*

[3] *Holl. Cons.*, vol. iv, no. 30.

[4] *Holl. Cons.*, vol. v, no. 225. If, however, two persons contracted as to the succession to a third, and such third person assented, and did not subsequently revoke his assent, the contract was allowed to be good. Cod. *ubi sup.*, sec. 3; *Cens. For. ubi sup.*; Voet, *ubi sup.*

[5] Voet, loc. cit. (*ad fin.*), 'et si quis alteri pollicitatione', &c.

[6] Voet, 2. 14. 20.

[7] Voet, 2. 14. 16.

[8] Grotius (3. 1. 40) adds: Contracts for the sale or use, &c., of res extra commercium; but these, like the last, are not so much illegal as invalid. The sale of a res litigiosa is not forbidden in R.-D. L. V. d. K. *Th.* 630.

of the law to discourage them.[1] Whether by the Roman-Dutch common law wagers were or were not invalid is a question which, in view of the great variety of opinion expressed by different writers, must be considered to be quite unsettled.[2] In the modern law the tendency of judicial opinion has been decidedly against their enforcement. Thus, in a case decided in the Transvaal Supreme Court in 1905, Innes C. J. said: 'I think, having regard to the general current of legal decision in South Africa, the Court should not enforce contracts in the nature of wagers '.[3] On the other hand, money paid under a wager cannot be recovered back by the loser. But one who has deposited money or any other thing to abide the result of a wager may reclaim it from the stakeholder at any time before it has been paid over to the winner (even after the determination of the event ?) and, if the stakeholder nevertheless hands it over to the winner, may maintain an action for its value.[4] A person who has made bets for me as my agent must hand over the winnings.[5] Whether money lent to make [6] or to pay bets can be recovered is not yet settled. A person to whom a negotiable instrument has been given in respect of a gaming or wagering transaction cannot recover upon it, but a bona fide holder for value would probably not be under the same disability.

Statute Law in South Africa.

At the Cape, Act No. 36 of 1902, reproducing the provisions of the Imperial Gaming Act of 1845 (8 and 9 Vic. c. 109), by sec. 11 enacts: 'All contracts [or] agreements, whether verbal or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or

[1] The reader will do well to consult a careful article on 'The Roman-Dutch Law in relation to Gambling and Wagering'. *S.A.L.J.*, vol. xxiii, p. 21.

[2] See Gr. 3. 3. 49; Van Leeuwen, 4. 14. 5; V. d. K. *Th.* 514.

[3] *Dodd* v. *Hadley* [1905] T. S. at p. 442.

[4] *Sloman* v. *Berkovitz* (1891) 12 N. L. R. 216. In this case the wager had not matured; but does this matter ?

[5] *Dodd* v. *Hadley, ubi sup.*

[6] Van Leeuwen (4. 14. 5) says that money lent to gamble or bet with is irrecoverable. In *Sandeman* v. *Solomon* (1907) 28 N. L. R. 140, money lent for the purpose of discharging a cheque given in payment of a gambling debt was held to be irrecoverable.

maintained in any court of law for recovering any sum of money or valuable thing alleged to be won upon any wager, or which has been deposited in the hands of any person to abide the event on which any wager has been made : Provided always that nothing in this section shall be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize or sum of money to be awarded to the winner of any lawful game, sport, pastime or exercise.'

Section V

The parties must be competent to contract.

E. Capacity of parties.

The law relating to capacity of parties has been already considered under the head of the Law of Persons.

CHAPTER II

OPERATION OF CONTRACT

In this chapter we shall consider :

I. The persons affected by a contract.
II. The duty of performance.
III. The consequences of non-performance.

Section I

The persons affected by a contract.

The persons affected by a contract.

A contract primarily affects the parties to it and none others. In other words, no one can be bound or benefited by a contract to which he is not a party. Such was the Roman Law expressed in the maxims 'Nemo promittere potest pro altero'; 'Alteri stipulari nemo potest'.[1]

Nemo promittere potest pro altero.

Nemo promittere potest pro altero. This means that a promise made by A cannot impose a burden on B, for no one can be bound by another man's contract.[2]

[1] V. d. L. 1. 14. 3.

[2] Certissimum enim est ex alterius contractu neminem obligari. Cod. 4. 12. 3 ; Gr. 3. 1. 28 ; Van Leeuwen, 4. 2. 4.

In the Roman Law the rule was carried so far that a promise by A that B would do something was destitute of legal effect,[1] not binding A because it was not intended that it should, not binding B because it was not his promise. However, such a promise would now generally be construed as equivalent to a promise by A that he would procure B to do the thing in question.[2] It must be noted further, that the rule nowadays has no application to the relation of principal and agent. A servant[3] or agent, acting within his authority, contracts for his principal and binds his principal by his contract. Moreover, there are certain legal relations other than that of principal and agent which give to one person in greater or less measure the power of binding another by contract. Thus a husband binds his wife,[4] a tutor his ward,[5] a father his child,[6] and a master of a ship the ship-owner.[7]

Alteri stipulari nemo potest.

Alteri stipulari nemo potest.[8] This rule is the converse of the one stated above. It means that just as a person cannot be burdened by a contract to which he is not a party, so neither can he be benefited by it.[9]

Like the other, this maxim is qualified in the modern law by the rule which permits an agent to acquire a contractual right on behalf of his principal[10] and is also modified in favour of the wife, the ward, the parent, and the child, who may benefit by the contracts respectively of husband, guardian, child,[11] or parent, made on their behalf.

But does the rule itself hold good in the Roman-Dutch

[1] Inst. 3. 19. 3; Vinnius, ad loc.
[2] Gr. 3. 3. 3; Van Leeuwen, 4. 2. 5; Groen. *de leg. abr. ad* Inst. 3. 19 (20). 3, sec. 3; Vinnius, ibid.; Voet, 45. 1. 5.
[3] Van Leeuwen, 4. 2. 6–7.
[4] Or rather her goods. Gr. 1. 5. 22. [5] Gr. 3. 1. 30.
[6] Gr. 3. 1. 28. A father who has sons in his power may bind them to perform anything which a person *sui juris* might undertake by contract; e. g. he may let out their services on hire. V. d. K. *Dictat.* ad loc.
[7] Gr. 3. 1. 32. [8] Inst. 3. 19. 19; Dig. 45. 1. 38. 17.
[9] Gr. 3. 1. 36; 3. 3. 38. [10] V. d. L. 1. 14. 3 (*ad fin.*).
[11] V. d. K. *Th.* 509.

Is this law at the present day?

Law? The contrary is asserted *inter alios* by Voet,[1] Groenewegen,[2] Heineccius,[3] and with accustomed vehemence by Decker,[4] and this view was adopted by Sir Henry de Villiers, in the case of *Tradesmen's Benefit Society* v. *Du Preez*, subject, however, to the qualification that there must be some consideration moving from the original promisee.[5] But if we turn to Van der Keessel we find the law stated with much more caution. According to this writer, the third person acquires no right in the case supposed, unless either: (1) he accepts the promise, or (2) the original promisee is a notary.[6] Having regard to this statement of the law and to the terms in which Huber,[7] Heineccius,[8] and Decker[9] express themselves, we may question whether these jurists intended more than to assert the principle that if B, assuming without authority to act for C, contracts with A on C's behalf, C may, on coming to know of it, make the benefit of the contract his own by ratification without cession of action by B.[10] This is a proposition which to-day is beyond dispute, but it is no foundation for the further proposition that, if A and B contract as principals that one or both of them will pay a sum of money to C, C may sue one or both of them if the money is not paid. It would seem, therefore, that, leaving out of account the exceptional treatment of the notary, which can scarcely hold good in the modern law, apart from: (1) ratification, and (2) an

[1] Voet, 45. 1. 3.

[2] Groen. *de leg. abr. ad* Inst. 3. 20 (19). 19; see also Vinnius *ad* Inst. 3. 20 (19). 4, sec. 3, and *Tract. de Pactis*, cap. xv.

[3] Heineccius, *Elem. Jur. Germ.*, sec. 347.

[4] Decker *ad* Van Leeuwen, 4. 2. 5 (Kotzé's translation, vol. ii, p. 17).

[5] *Tradesmen's Benefit Society* v. *Du Preez* (1887) 5 S. C. 269.

[6] V. d. K. *Th.* 510; Vinnius, *ubi sup.*

[7] Huber, *Hedensdaegse Rechtsgeleertheyt*, 3. 21. 40.

[8] *Ubi sup.*

[9] *Ubi sup.*

[10] This appears to be all that Grotius intends when he says (3. 3. 38) that a third person may accept the promise and thus acquire a right, unless the promisor revokes the promise before acceptance by such third person. The words in the text 'voor de toezegging' should be corrected to 'voor de aanneming'. V. d. K. *Dictat.* ad loc. Van der Linden (1. 14. 3, and note) agrees with Grotius, rejecting the view of Groenewegen and Voet.

express declaration of trust, the rule 'Alteri stipulari nemo potest' still obtains.

Cession and transmission of actions.

Cession and Transmission of Actions. It has been said above that a contract primarily affects the parties to it and none others. But persons not originally parties may become so, either by agreement (*cession of actions*) or by operation of law (*transmission of actions*).

By agreement, contractual rights and duties may be transferred so as to substitute another person in place of the original debtor. But there is a great difference between assignment of duties and assignment of rights.

Assignment of contractual duties.

Contractual duties cannot be transferred except in consequence of a substituted contract (*novation*), which requires the consent of the original parties and also of the substituted debtor. The effect is to discharge the original debtor from further liability, the substituted debtor taking his place.

Assignment of contractual rights: in the Roman Law;

Contractual rights are now, with some exceptions, freely transferable by cession of actions. Such is the result of a long process of legal development, of which the beginnings must be sought far back in the history of Roman Law. The Civil Law never, it seems, quite reached this point. For though in the latest Roman Law an assignee was 'allowed: (1) to secure to himself the benefit of the obligation, even before bringing an action, by giving the debtor notice of the assignment (Cod. 8. 41. 3); and (2) to sue not in the assignor's name, but in his own by actio utilis;' yet, 'it is disputed whether the effect of the change was to make the assignee sole creditor, or whether in relation to the debtor he did not still legally continue a mere agent, enforcing by action in his own name the right of another; in other words, whether a genuine assignment by which the assignee simply and actually stepped into the shoes of the assignor, who simultaneously dropped altogether out of the matter, was recognized at any time in Roman Law.'[1]

[1] Moyle, *Institutes of Justinian* (5th ed.), p. 483.

in the Roman-Dutch Law.

This doubt does not exist in the modern law; for now: (1) Contractual rights and rights arising from breach of contract (exceptions apart) are freely assignable without the consent and against the will of the debtor.[1]

2. The cession can generally be completed by bare agreement without formality;[2] but the law requires that the intention to effect the cession should be clear and beyond doubt, and that no further action on the part of the assignor (*cedent*) should be necessary to make the cession complete.[3]

3. The effect of cession is to substitute the assignee (*cessionary*) in place of the cedent as creditor in respect of the obligation ceded,[4] and to vest in the cessionary all the cedent's rights against the debtor.[5]

[1] Sande, *De actionum cessione*, cap. ix, sec. 5; *Paterson's Exors.* v. *Webster, Steele & Co.* (1881) 1 S. C. at p. 355, per de Villiers C.J.: 'No rule is more clearly established in our law than that rights of action may be ceded to third parties without the consent of the party liable; *Cullinan* v. *Pistorius* [1903] O. R. C. 33.

[2] Sande, cap. ii, sec. 2.

[3] *Wright & Co.* v. *Colonial Government* (1891) 8 S. C. at p. 269; *McGregor's Trustees* v. *Silberbauer* (1891) 9 S. C. 36; *Van de Merwe* v. *Franck* (1885) 2 S. A. R. 26.

[4] Sande, cap. viii, secs. 7, 18, and 19; *Fick* v. *Bierman* (1882) 2 S. C. at p. 34. By the constitution *Per diversas* (Cod. 4. 35. 22), commonly known as the *lex Anastasiana*, enacted by the Emperor Anastasius (A. D. 506) and confirmed by Justinian (Cod. 4. 35. 23), a cessionary of a debt (not merely of a *res litigiosa*; Girard, p. 737, n. 5) could not recover from the debtor a sum in excess of that for which he had acquired the debt from the cedent. Gr. 3. 16. 14; Voet, 18. 4. 18. There was great difference of opinion as to whether this rule had been adopted in Holland. See Groen. *de leg. abr. ad* Cod. 4. 35. 22. But the better opinion seems to have been that it was accepted in the sense that when a debtor was sued upon a ceded right of action he could, usually within a year after he became aware of the cession (Groen. *ad* Gr. *ubi sup.*; Voet, 18. 4. 19) require the cessionary to declare on oath what sum he had paid to the cedent, and discharge himself by paying the same amount. Voet, 18. 4. 18. The *lex Anastasiana* has been declared to be obsolete in South Africa. *Seaville* v. *Colley* (1891) 9 S. C. 39 (Cape); *Machattie* v. *Filmer* (1894) 1 O. R. 305 (Transvaal). It seems doubtful whether and how far it obtains in Ceylon. Pereira, p. 654. With regard to British Guiana the Report of the Common Law Commission says (p. 7) 'as to the local non-validity of the *lex Anastasiana* there can be no doubt whatever'.

[5] Sande, cap. ix, sec. 1. The intention, however, may be not to transfer the debt, but merely to indicate a source from which the creditor of the so-called assignor may receive payment. The Civilians call this 'assignatio' as contrasted with 'delegatio', which corresponds

4. Therefore, the debtor after cession is no longer liable to the cedent and cannot be required by him to perform the contract, nor be sued by him in case of non-performance.[1] After notice of the cession, payment must be made to the cessionary and not to the cedent.[2]

5. If, however, the debtor, in ignorance of the cession, satisfies the claim of the cedent, his liability is at an end.[3] For this reason, at all events, it is matter of prudence for the cessionary at the earliest possible date to acquaint the debtor with the fact of the cession.

6. Whether, in the event of the creditor ceding the same debt twice over to successive cessionaries, a second cessionary who has anticipated a first cessionary in giving notice to the debtor will be preferred to the first cessionary seems to be unsettled. Opinion inclines to a negative answer ; in other words, priorities are determined not by date of notice but by date of cession.[4]

7. A cessionary cannot, generally, be in a better position than his cedent.[5] Therefore all defences which might have been pleaded against the cedent at the date of cession may equally be pleaded against the cessionary.[6]

8. Generally speaking, any right may be ceded which is transmitted by the death of the party entitled.[7] This

to 'assignment' in the modern sense of the word. Assignatio (aenwijzinge) does not discharge the *assignans* nor render the *assignatus* liable. Gr. 3. 44. 5 ; V. d. K. *Th.* 837–8.

[1] Voet, 18. 4. 15 ; *Fick* v. *Bierman, ubi sup.*

[2] V. d. L. 1. 18. 1.

[3] Voet, *ubi sup.* The same result follows, according to Voet, if the debtor satisfies the debt by bona fide payment to the cedent even with knowledge of the cession, but before notice from the cessionary. The reason given by Voet is not entirely satisfactory 'cum utique ei solvat cui obligatus fuit, nec ipsi factum tertii obesse queat quamdiu denunciatio haud intercessit'. But he has said immediately above: 'Plane nostris moribus circa cessas actiones magis placuit jus omne cedentis cessione extinctum esse'.

[4] This is the opinion of Voet (18. 4. 17) dissenting from Sande, *de act. cess.*, cap. xii, sec. 8. See *Morkel* v. *Holm* (1882) 2 S. C. 57 ; *Wright & Co.* v. *Colonial Government* (1891) 8 S. C. 260.

[5] *Anderson's Assignee* v. *Anderson's Exors.* (1894) 11 S. C. at p. 440 ; Voet, 18. 4. 13.

[6] Sande, cap. xiii. At all events 'exceptiones in rem' may be so pleaded (sec. 2).

[7] This excludes poenal actions *ex delicto*, e. g. the *actio injuriarum.*

excludes cases in which the debtor's duty of performance does not extend beyond the person of the creditor, and the debtor, therefore, may decline to recognize as entitled any other than the creditor in person (*delectus personae*).[1] Contrary to the Roman Law, the Roman-Dutch Law permits the transfer of a thing in litigation (*res litigiosa*);[2] but this does not imply the lawfulness of the cession of a right of action in a suit which has been already commenced.[3] With these exceptions, it seems that all contractual rights are freely cessionable, whether before or after breach, whether arising out of liquid or illiquid claims, whether obligations to give or obligations to do.

Formalities required in certain cases.

It has been said that, exceptions apart, a cession of actions requires no formalities. The principal exceptions are: (1) negotiable instruments (which are governed by rules of their own); (2) the transfer of shares in companies (which are commonly regulated by statute); (3) leases of rural tenements (the benefit of which cannot (*semble*)[4] be transferred to a third party without the leave of the lessor).

In addition to these, Roman-Dutch Law required that a right arising out of the hypothec of immovable property should be transferred *coram lege loci* and subject to a transfer duty of $2\frac{1}{2}$ per cent. In the Cape Province, at all events, this rule no longer obtains.

By operation of law, contractual rights are transmitted on insolvency and death.[5] Insolvency lies outside the scope of this work. With regard to the effect of death on contract, it may be said that all contractual rights and duties,[6] unless they be of a purely personal character,

But there is no rule that actions *ex delicto* as a class are not assignable. Sande, cap. v, secs. 1, 2, and 11.

[1] *Cullinan* v. *Pistorius* [1903] O. R. C. at p. 38.

[2] Gr. 3. 14. 10; Groen. *de leg. abr. ad* Cod. 8, tit. 37; V. d. K. *Th.* 630.

[3] Sande, cap. v, secs. 15–22.

[4] See below, p. 259.

[5] Also by marriage in community, for which see Book I, p. 81.

[6] Gr. 3. 1. 44. Where there are several coheirs they are liable *pro rata portione* unless the claim is in its nature indivisible, in which case each is liable *in solidum* and has his remedy over against the others.

pass upon death to the representatives of a deceased person, who may sue or be sued in respect of them. In the modern law their liability in no case exceeds the assets of the estate.

Section II

The Duty of Performance.

'Stare pactis.'

The duty of a party to a contract is faithfully to perform his part with the care and diligence proper in the circumstances, and with due regard to any rules of law or lawful customs by which the character of the performance due from him is determined.

Generally the parties make their own terms.

Generally speaking, the parties to a contract may incorporate in it any terms they please, and each is bound to the other to do what he has undertaken. When the parties have expressly agreed, and the object contemplated is not unlawful, the function of the Court is limited to interpreting the terms expressed. The rules of interpretation will form the subject of a later chapter.

But the law may impose terms

Generally, the Court will not make a contract for the parties. They must make up their minds what they mean, and they must express their meaning clearly and fully. But within limits law and usage operate to determine the content of the contract and therefore the duties of the parties.

absolutely,

If a rule of law is imperative the parties must conform to it. They cannot contract themselves out of an express legal duty. But if, as often happens, the law merely lays down rules which are to govern a particular transaction in the absence of agreement to the contrary, it is open to the parties to modify or to depart from the rule in their absolute discretion, for 'conventio vincit legem'. The same remark applies to customs, whether local or relating to some particular trade or business. They bind only so far as the parties have not seen fit to exclude their operation.

or in the absence of contrary agreement by the parties.

In this chapter we shall speak of various rules of law by which the duty of performance is determined where

the parties have not departed from them by express agreement.

All contracts are commonly referred to one or other of two classes: viz. (*a*) contracts to give; (*b*) contracts to do or to abstain from doing.[1] But it is evident that both of these duties may be incumbent upon the same person under the same contract. Thus, if I agree to make a cabinet according to certain specifications and to deliver it when made to a purchaser, I incur an obligation first to do and then to give. Indeed the distinction is of no great importance. The substantial thing is that whatever the nature of the contract I must carry it out according to its terms.[2]

Performance.

In the Latin texts of the Roman and of the Roman-Dutch Law the words '*solvere*' '*solutio*' are used in an extended sense to express the performance of any contractual duty. 'Solvere dicimus eum qui fecit quod facere promisit.'[3] The use of the Dutch 'betaling'[4] and of the English 'payment' in the same wide sense can only be justified as a permitted abuse of language. We shall, so far as possible, limit the word 'payment' to express a payment of money. The principles applicable to a money payment will, however, in many cases be found to be no less applicable to any other performance of a contractual duty.

By whom performance may be made.

Performance may be made either by the debtor in person or by his agent acting within the scope of his authority. Indeed performance may be made by an independent third party in the name of the debtor, even without his knowledge and against his will, with the result that the debtor will be discharged from his liability, unless the performance is of such a personal character that it cannot be effectually made except by the person originally

[1] Gr. 3. 39. 8; V. d. L. 1. 14. 6; Pothier, *Traité des Obligations*, sec. 53.

[2] Voet, 46. 3. 8.

[3] Dig. 50. 16. 176: Solutio est naturalis praestatio ejus quod debetur. Voet, 46. 3. 1.

[4] V. d. L. 1. 18. 1: Betaaling, dat is de dadelijke vervulling van het geen men zig verpligt heeft te geven of te doen.

liable.[1] This means, in effect, that performance of this character is permitted when the debtor's obligation consists in giving, but seldom when it consists in doing.[2]

Persons under disability:

A person under disability cannot discharge a legal debt without his tutor's or curator's authority. If he does so, the sum of money or other thing alienated can be recovered by vindication, if still extant; if it has been consumed, the debt is deemed to be discharged.[3] This only applies, however, if the debt in question springs from a valid civil obligation.

minors,

If a minor has contracted without his tutor's authority, the thing delivered, or its value, can always be recovered back.[4]

married women.

A married woman, being in law a minor and unable to contract without her husband's authority, is also unable to make a valid payment. Consequently, money paid by her may be recovered by the husband stante matrimonio, or by herself after its dissolution. She may even recover money paid after the dissolution of the marriage in respect of a debt contracted during its continuance, provided that she made the payment in ignorance of her rights and under the mistaken idea that she was effectively bound.[5]

To whom performance may be made.

Payment may be made to the creditor or his nominee or to any person to whom payment is agreed to be made, such person being regarded as the creditor's mandatary to receive payment.[6] Payment may in any case be made to the creditor's agent, if to receive payment falls or fell within the scope of his authority, until the debtor has notice that the authority is revoked.[7] Payment made to a person who has no authority to receive payment on behalf of the creditor will nevertheless become good *ex post facto* if the creditor ratifies the transaction or if the money paid is applied to his use.[8] A person employed to serve a summons or execute process is not an agent to

[1] Gr. 3. 39. 10; Voet, 46. 3. 1. [2] V. d. L. *ubi sup.*
[3] Gr. 3. 39. 11; Voet, 4. 4. 21 and 46. 3. 1.
[4] Voet, loc. cit. [5] Voet, 12. 6. 19.
[6] Gr. 3. 39. 13; Voet, 46. 3. 2; V. d. L. *ubi sup.* Such a person is said to be *solutioni adjectus.*
[7] Voet, 46. 3. 3. [8] V. d. L. *ubi sup.*

receive payment, unless, perhaps, in case payment has been extorted from the debtor by threats.[1] Payment to servants is valid, if it is within their authority to receive it.[2] Payment of a debt due to a minor is validly made to his guardian, unless the debt is of large amount, in which case an order of the Court is desirable.[3] If the minor's father is alive, payment to him as natural guardian may be made without having him first confirmed as guardian by the Court.[4] Payment to a married woman of a debt due to her or to her husband, made without his knowledge or against his will, is invalid, unless it has been applied to his use, or unless it is of small amount and may be supposed to have been applied by the wife to the purposes of the household.[5] Payment may safely be made to a fiduciary pending the condition of a fidecommissum.[6] In the event of the creditor's death payment must be made to (his heirs [7] and now to) his personal representatives.[8] When two persons both claim payment of the same debt, payment cannot safely be made to either. The debtor should deposit the money in Court, or if he pays to one of the rival claimants, take from him security against the claim of the other.[9] Payment to a creditor's creditor, apart from express authority, can only be justified, if at all, on the ground of negotiorum gestio. But a sublessee may pay an overlessor to avoid an execution upon his own goods. Payment made in good faith to an invading enemy under pressure of vis major operates a discharge.[10]

[1] Voet, *ubi sup.* [2] Voet, 46. 3. 4.

[3] Gr. 3. 39. 14; Voet, 4. 4. 22 (*ad fin.*); *Holl. Cons.*, vol. i, no. 167, and vol. iii (1), no. 182. The Court, and in South Africa the Master, here, as elsewhere, takes the place of the Orphan Chamber.

[4] See *Van Rooyen* v. *Werner* (1892) 9 S. C. 425.

[5] Groen. *ad* Gr. 3. 39. 14; Voet, 23. 2. 50 and 46. 3. 5; Neostadius, *Supr. Cur. Decis.*, no. 88.

[6] Voet, 36. 1. 63 and 46. 3. 5.

[7] V. d. L. *ubi sup.*

[8] Payment made to the supposed heir of a deceased person discharges the debt, Voet says, if made through reasonable error of fact and not of law. Voet, 46. 3. 5.

[9] Voet (46. 3. 6) says 'consignandum'. Interpleader with payment into Court is the modern equivalent.

[10] Voet, 46. 3. 7.

Obligatio generis.

When a debtor is bound by contract to deliver a thing of a certain genus, he must deliver a thing of the kind of average quality.[1]

Part performance.

The creditor may, if he chooses, demand, but the debtor is not compellable to render, nor the creditor to accept, a part performance.[2] Part performance, if accepted, extinguishes the debt *pro tanto*, and in the case of a money debt prevents the further accrual of interest.[3]

Alternative performances.

When one of two performances is agreed to be rendered in the alternative, the choice of alternatives rests with the debtor, unless it has been expressly given to the creditor.[4]

Substituted performance.

Substituted performance may be made with the consent of the creditor, but not otherwise.[5] It has the same effect as performance of the thing originally agreed to be done.

Effect of performance.

The effect of performance is to discharge from further liability the principal debtor, his co-debtors, if any, and all personal sureties and real securities for performance.[6] But if one of several co-debtors, or if a surety, pays the debt, he may demand from the creditor a cession of actions against co-debtors or sureties and thus keep the debt alive.[7] If the thing given in payment, or one of several things given in payment, is recovered from the creditor by a third party (*eviction*), the payment is, in the absence of a contrary intention, rendered void, and all former rights revive, unless the creditor prefers to sue the debtor for damages on the ground of eviction. The same result follows if the debtor has fraudulently misrepresented the value of the property given in settlement.[8]

Penalty for non-performance.

When a penalty is agreed to be paid in the event of non-performance, payment of the penalty releases the debtor, unless the penalty falls short of the value of the

[1] Voet, 46. 3. 9 (*ad fin.*); Groen. *de leg. abr. ad* Dig. 17. 1. 52. But Brunneman, ad loc., says: 'In obligatione generis liberatur quis praestando vilissimum. Groenwegen hanc legem putat abolitam, sed nullo fundamento.'

[2] Gr. 3. 39. 9; Voet, 46. 3. 11; V. d. L. *ubi sup.*

[3] V. d. L. 1. 18. 1.

[4] V. d. L. 1. 14. 9.

[5] Gr. 3. 42. 4–5; Voet, 46. 3. 10; V. d. K. *Th.* 834.

[6] Voet, 46. 3. 13; V. d. L. 1. 18. 1.

[7] V. d. L. *ubi sup.*

[8] Voet, *ubi sup.*

Proof of payment.

principal liability, i. e. of the measure of damages due to the creditor for non-performance.[1]

Payment may be proved by any lawful evidence and, in particular, by producing a receipt for the money, signed by the creditor or his agent. A creditor is bound to give a receipt, and a debtor is not otherwise compellable to pay.[2] When yearly or half-yearly (or other periodic) payments are due from the debtor, three several receipts, for the last three payments, furnish presumptive evidence that earlier payments have been duly made.[3]

Appropriation of payments.

When several distinct debts are due from the same debtor to the same creditor, questions often arise as to the appropriation of payments. The rules relating to this subject are stated by Voet [4] in considerable detail, and are the following: (1) The debtor may appropriate the payment to any debt he chooses; failing which—(2) The creditor appropriates;[5] but he must do so as he would were he himself the debtor,[6] and therefore not to—(*a*) a disputed debt; or (*b*) a debt not yet accrued due; or (*c*) a debt due naturally and not civilly; or (*d*) a debt for which the debtor is surety in preference to a debt due from him as principal.[7] Appropriation must be made *in re praesenti*,[8] i. e. at the moment of payment, so as to give the creditor an opportunity to refuse to accept, or the debtor to refuse to pay.[9]

If a payment is made to a person who has a claim in his own name, and also in the name of another, in the absence of expression to the contrary the payee is supposed to apply the payment to his own and not to his principal's claim, for charity begins at home—'Dum ordinata charitas a se ipsa incipit.'[10]

[1] Voet, *ubi sup.* [2] Voet, 46. 3. 15. [3] Voet, 46. 3. 14.
[4] Voet, 46. 3. 16; and see Gr. 3. 39. 15; and V. d. L. 1. 18. 1 (*ad fin.*).
[5] The best evidence of appropriation by the creditor is a statement to that effect in the receipt. *Scott* v. *Sytner* (1891) 9 S. C. 50, per de Villiers C. J. [6] Dig. 46. 3. 1–2. [7] Gr. *ubi sup.*
[8] Statim atque solutum est seu dum solvitur. Voet, *ubi sup.*—Ter selver stonde. Grot. *ubi sup.*
[9] Dig. 46. 3. 2; Cod. 8. 42 (43). 1; *Stiglingh* v. *French* (1892) 9 S. C. 386. [10] Voet, *ubi sup.*

(3) Failing appropriation by debtor or creditor, the law appropriates the payment as follows: viz. (*a*) to interest before principal; (*b*) to the debt which the debtor at the time of payment is legally compellable to pay; and if more than one debt is of this nature, then—(*c*) to the debt which lays the heaviest burden on the debtor, i. e. to that debt which it is most for his interest to discharge;[1] and subject thereto—(*d*) to a debt due from him as principal in preference to a debt due from him as surety; and subject thereto—(*e*) to the debt which is earlier in time;[2] and in case of debts of equal date, finally—(*f*) to all such debts proportionately to their amount.[3]

Interest.

The subject of payment suggests the subject of interest. This may either be agreed between the parties, or be allowed by the law as damages, if one or other party is in default (*damage-interest*).[4] As regards the legal rate of interest, Grotius says that ordinary citizens are allowed to stipulate for one-sixteenth, i.e. 6¼ per cent. per annum. Groenewegen in his note applies this to secured debts only. In the case of unsecured debts, interest at the rate of seven or eight per cent. was permitted.[6] Merchants, by the Perpetual Edict of 1540 (Art. 8), enjoyed the special privilege of stipulating for interest up to twelve per cent.[7]

An agreement for interest in excess of the legal rate is void only for the excess, which may be either recovered by action or imputed to the capital debt.[8] In South Africa it has been held that there is no general legal rate

[1] *Watermeyer's Exors.* v. *Watermeyer's Exor.* (1870) Buch. 69; *Insolvent Estate of Wilhelm* v. *Shepstone* (1878) N. L. R. 1.

[2] Gr. 3. 39. 15; Voet, *ubi sup.*; *Scott* v. *Sytner* (1891) 9 S. C. 50.

[3] Voet, *ubi sup.* For the law as to appropriation of payments in Brit. Gui. see *British Guiana Bank* v. *Herbert* (1904) *Off. Gaz.* vol. xx, p. 6.

[4] Voet, 22. 1. 1.

[5] Gr. 3. 10. 10 (*ad fin.*); Loen. *Decis.* Cas. 21; Voet, 22. 1. 3; V. d. K. *Th.* 545. Van der Linden's statement (1. 15. 3) that anything in excess of this is usurious and punishable is scarcely borne out by his authorities.

[6] But, as appears from Groenewegen, could not always be enforced.

[7] 1 G. P. B. 317. Van der Keessel (*Th.* 547) says that this privilege was disused so early as 1590.

[8] Voet, 22. 1. 5. The same applies when a penalty for non-payment is agreed in excess of the legal rate.

of interest, nor can any agreed rate of interest be pronounced usurious, except in view of the circumstances of the particular case.[1] The rule of the Roman-Dutch Law prohibiting compound interest[2] still retains its force, as well as the rule that the amount of interest recovered in any one action cannot under any circumstances exceed the amount of the principal.[3]

Compound interest.

No interest payable except by agreement.

In the absence of agreement, no interest can be claimed except when the law allows interest by way of damages for default. Where interest has been agreed to be paid, but no specific rate of interest has been fixed, the current rate of interest is payable.[4] This is determined, *prima facie*, by the lex loci solutionis.[5] The mere payment of interest for several years without any previous agreement in that behalf does not confer any right to have such payment continued.[6] A continued payment of less than the agreed interest may be construed as a tacit agreement for such lesser amount, but mere non-payment is not evidence of an agreement not to pay.[7]

How the obligation to pay interest is determined.

The obligation to pay interest is determined: (1) by release;[8] (2) by payment of the principal debt (but without prejudice to the right to recover interest already accrued due);[9] (3) by judgment. A claim for damage-interest is merged in the judgment, but, according to Voet, this does not apply to interest stipulated for in a contract.[10]

Tender.

'Tender' is an offer of payment which, to be effectual,

[1] *Dyason* v. *Ruthven* (1860) 3 S. 282; *Reuter* v. *Yates* [1904] T. S. 855; *Cloete* v. *Roberts* (1903) 20 S. C. 413. The law is the same in Ceylon; *Pulle* v. *Candoe* (1875) Ramanathan, 1872–6, p. 189; *Peria Carpen* v. *Herft* (1886) 7 S. C. C. 182; and in Brit. Gui.; Money Lenders Ordinance (No. 16 of) 1907.

[2] Voet, 22. 1. 20; V. d. K. *Th.* 548; (Ceylon) *Pulle* v. *Candoe, ubi sup.*

[3] Voet, 22. 1. 19; V. d. K. *Th.* 549; (Ceylon) Ord. No. 5 of 1852, sec. 3. In Brit. Gui. the rule of the Roman-Dutch Law as to compound interest holds good; and interest may not be claimed in excess of the principal [G.].

[4] Voet, 22. 1. 8.

[5] Voet, 22. 1. 6.

[6] Voet, 22. 1. 13.

[7] Voet, 22. 1. 14.

[8] Voet, 22. 1. 15. By the Roman-Dutch common law rent is *ipso jure* remitted in case of hostile incursion and other calamities, but the law does not, as a rule, give a similar indulgence in the matter of interest.

[9] *Cens. For.* 1. 4. 4. 30.

[10] Voet, 22. 1. 16.

must be made 'to a person who is competent and authorized to receive payment, and must be clear and unqualified and unconditional, and in strict conformity with the terms of the original contract'.[1] According to Voet mere tender of principal and interest does not prevent interest continuing to run unless accompanied by consignation and deposit.[2] In the modern law consignation is not in use. The same effect now results from simple tender, if regularly made, and *a fortiori* from payment into Court.

Rules of law as to: (*a*) place of payment;

The law lays down special rules as to place and time of payment by which, in the absence of contrary expression, the parties are bound. As regards *place*, performance must *prima facie* be made where the obligation was contracted, unless another place of performance has been expressly or impliedly agreed.[3] But, where a *thing* is in question, the debtor is not as a rule bound to bring it to the house of the creditor. Such at least is the opinion of Voet, who says that other writers think differently.[4] It follows from this view that in the absence of agreement or clear proof of custom to the contrary the delivery of goods sold should be made at the place where they were when sold,[5] and if goods are to be manufactured the place of delivery will be the place of manufacture.[6]

(*b*) time of payment.

Next as regards *time*, if no time for performance is expressly or impliedly agreed, performance falls due immediately,[7] i. e. after a reasonable time.[8] If the contract is expressed to take effect from a certain day or

[1] 4 Maasdorp, p. 141. [2] Voet, 22. 1. 17.

[3] Gr. 3. 39. 9; Voet, 46. 3. 12.

[4] Voet, *ubi sup.* See also Schorer *ad* Grot. loc cit., and Van Leeuwen, 4. 40. 6; *Cens. For.* 1. 4. 32. 14–15.

[5] *Gilson* v. *Payn* (1899) 16 S. C. 286.

[6] *Richards, Slater & Co.* v. *Fuller & Co.* (1880) 1 E. D. C. 1; *Goldblat* v. *Merwe* (1902) 19 S. C. 373.

[7] Gr. 3. 3. 51; Voet, 46. 3. 8; V. d. L. 1. 14. 9.

[8] Dig. 46. 3. 105: quod dicimus . . . debere statim solvere, cum aliquo scilicet temperamento temporis intellegendum est; nec enim cum sacco adire debet. What is a reasonable time depends upon the circumstances. *Goldschmidt* v. *Adler* (1884) 3 S. C. 117; *De Waal* v. *Adler* (1887) L. R. 12 App. Ca. 141.

subject to a suspensive condition, performance is not due until the day arrives or the condition is satisfied.[1] When a day is named for performance the debtor is not in default until the day is wholly past, for he has the whole day for performance.[2] The same principle applies when a thing is to be done in a named month or year. Sometimes a stipulation as to time is implied from an agreement as to place;[3] for if a place is named for performance time enough is understood to be allowed to enable the promisor conveniently to reach the place destined for performance,[4] unless it appears that the matter has been previously arranged so as to allow of performance taking place by means of agents at the place intended.[5] Even when a contract fixes a definite time for performance the Court will consider whether the true intention of the parties at the time of contracting was to fix a reasonable time or to make time of the essence of the contract.[6] Whether time is or is not of the essence of the contract must be decided by the Court in view of the circumstances of each particular case.

May performance be made before it is due?

Just as a debtor cannot be compelled to perform before performance falls due,[7] so it would seem reasonable that a creditor should not be compellable to accept performance before the time agreed. But there is a text in the Digest[8] which seems to imply the contrary, for Venuleius says: 'quod in diem debetur ante solvi potest, licet peti non potest.' Voet, however, suggests that this *dictum* should be limited to the case where postponement of payment has been agreed upon for the exclusive benefit of the debtor. It would not apply, for instance, where money had been lent at interest for a fixed period.[9] Schorer[10]

[1] Voet, 46. 3. 12.
[2] Gr. 3. 3. 50; Voet, 45. 1. 19.
[3] Gr. 3. 3. 53.
[4] Dig. 45. 1. 73 pr.
[5] Dig. 45. 1. 141. 4; Voet, 45. 1. 19.
[6] *Bergl & Co.* v. *Trott Bros.* (1903) 24 N. L. R., at p. 518, per Bale C.J.
[7] Voet, 46. 3. 12.
[8] Dig. 45. 1. 137. 2 (*ad fin.*); Sande, *Decis. Fris.* 3. 16. 1. Grotius (3. 39. 9) agrees, and Van der Linden (1. 14. 9).
[9] Voet, 12. 1. 20; Van Leeuwen, 4. 40. 5; *Cens. For.* 1. 4. 32. 16; V. d. K. *Th.* 542.
[10] *Ad* Grot. 3. 39. 9.

admits prepayment in this case also, but it must include payment of future interest as well as of interest already accrued due.

Section III

The Consequences of Non-performance.

In what cases failure to perform is justified:

In the last section we discussed the duty of performance. We are now to consider what happens if that duty is not carried out. If a party fails to perform or fails in performing what he has undertaken, either he can justify his failure or he can not. If he can, he incurs no liability. If he cannot, he has broken his contract and must suffer the consequences.

The cases in which non-performance is justified may be referred to one or other of three heads: viz.

(1) impossibility of performance; (2) suspensive condition; (3) failure on the other side.

(*a*) impossibility of performance;

1. *Impossibility of performance.* 'Impossibilium nulla obligatio est.' If performance is physically impossible at the time of agreement, no obligation arises. The same principle applies if performance is legally impossible or positively illegal. If performance becomes impossible subsequently, the obligation is in certain cases discharged,[1] as it is in every case if performance becomes illegal.

(*b*) sus-

2. *Suspensive condition.* If a person has undertaken to

[1] It is not easy to assign the topic of impossibility to any one place in the theory of contract. The impossibility may be such as to negative any serious intention to contract (*supra*, p. 198); or it may operate to make the agreement of the parties ineffectual on the ground of fundamental error (*supra*, p. 193), and to relieve the promisor from the duty of performance. This is the connexion in which the subject is dealt with here. The general rule is that if the impossibility is absolute or objective the promisor incurs no liability; but if it is relative or subjective (i. e. impossible for him, but not for everybody) he is bound. Dig. 45. 1. 137. 5: Si ab eo stipulatus sim qui efficere non possit, cum alio possibile sit, jure factam obligationem Sabinus scribit. Lastly, the impossibility may arise subsequently to the contract and in that case it will sometimes operate to discharge the promisor from liability (*infra*, p. 240). See on the whole subject Moyle, *Institutes of Justinian* (4th ed.), p. 409; Windscheid, *Lehrbuch des Pandektenrechts*, vol. ii, § 264.

pensive condition; perform in a certain event, it is plain that unless and until that event happens performance cannot be demanded.

(c) failure on the other side. 3. *Failure on the other side.* Where performances are due from both parties to a contract, performance by one is usually conditional upon performance by the other. It may be that one is to perform before the other, or that both are to perform concurrently. In the first case performance on the one side is said to be a condition precedent of performance on the other. In the second case each performance is a concurrent condition of the other. Thus, if I am to buy your house provided that you first put it in repair, if you fail to repair I am not bound to buy. Again, in an ordinary contract of sale, in the absence of agreement to the contrary, payment and delivery are concurrent conditions. I need not deliver, unless you are ready and willing to pay. You need not pay, unless I am ready and willing to deliver. If the one party sues for delivery without tendering payment, or for payment without tendering delivery, in either case the other party is under no liability to perform. Once more : I am not bound to continue ready and willing to perform, if you on your side make it quite plain that you do not intend to do your part.[1] Therefore, if you refuse to perform, or disable yourself or me from performing, or announce your intention not to perform,[2] I on my side am released from the duty of performance. If you do not wholly decline to perform, but perform badly or incompletely, it is a question of fact in each case whether your failure in performance will justify me in refusing to perform. As a rule I am not released from my duty of performance unless your failure in performance amounts in effect to a repudiation by you of your duty under the contract.

Breach of contract and In the absence of any of the above excuses for non-performance a party who fails to perform or who fails in

[1] Voet, 22. 1. 29.

[2] *Bergl & Co.* v. *Trott Bros.*, *ubi sup.* at p. 515.

its consequences.

performance has broken his contract and is liable to the consequences which the law attaches to his default.

The consequences to the defaulting party of breach of contract are principally three: (1) He becomes or may be placed *in mora* and incurs the further liabilities consequent thereon. (2) He is liable to pay damages. (3) He may, in a fit case, be compelled to specific performance. We will deal with these three consequences in order.

1. Mora, which is either:

1. **Mora.** The word means 'delay' or 'default'. In its technical sense it means a culpable delay in making or accepting performance.[1] Whether in any given case such delay has taken place is a question of mixed law and fact.[2]

(*a*) mora ex persona; or

Mora is distinguished as mora ex persona and mora ex re. 'Mora ex persona' occurs when a debtor after demand regularly made fails to perform. Demand may be made either to the debtor or to his agent; in which last case it takes effect so soon as it comes to the debtor's knowledge.[3]

(*b*) mora ex re.

'Mora ex re' takes place by operation of law without demand according to the maxim 'Dies interpellat pro homine', i. e. lapse of time takes the place of demand.[4] This means that when performance is to be made on or by a fixed day, if performance is not made on or by such day, the party liable is at once *in mora*, demand being in such case unnecessary.

In some cases mora arises by immediate operation of law—'lege ipsa quasi interpellante'. Instances are: (*a*) the thief, until he returns the stolen property; (*b*) one who owes money to a ward or to the Treasury; (*c*) a purchaser who takes the fruits of the property without having paid the purchase-money; (*d*) a partner, a negotiorum gestor, or other such person who converts partnership money or the principal's money to his own use.[5]

[1] Voet, 22. 1. 24.
[2] Dig. 22. 1. 32 pr.; Voet, *ubi sup.*
[3] Voet, 22. 1. 25; unless in the circumstances notice to the agent were held to be notice to the principal.
[4] Voet, 22. 1. 26.
[5] Voet, 22. 1. 27.

Effect of mora: (*a*) on the part of the debtor;

The effect of mora as regards the debtor is to render him liable for mora-interest and mesne profits; for any agreed penalty; for damages; for any increase in value since the date of delay of a thing to be delivered, if the thing perishes before delivery; and, generally, for any accidental destruction, unless the thing would have equally perished in the hands of the creditor.[1]

(*b*) on the part of the creditor.

Mora on the part of the creditor, i. e. delay in accepting payment or performance, determines an antichresis and transfers the risk of a thing from the debtor to the creditor. Mora usually affects the guilty party alone; a co-debtor is not prejudiced. Whether a surety is liable for the mora of his principal depends largely upon the extent of the obligation which he has undertaken.[2]

Judicial and extra-judicial mora.

Mora is further distinguished as judicial and extra-judicial. The first arises from the institution of legal proceedings; the second where there is no demand, or where the demand is extra-judicial. According to Voet extra-judicial mora does not usually ground a claim for mora interest.[3] But in the modern law, as a rule, no distinction is made between judicial and extra-judicial demand.[4] In one case the distinction is still of importance, viz. that acquisition by prescription and the limitation of actions are interrupted by judicial demand alone.[5]

Mora-interest.

Where mora-interest is claimable the amount is defined by the custom of the country or by the practice of the Court.[6] After judgment nothing can be claimed as mora-interest which has not been allowed in the judgment.[7] The Court may, if it sees fit, allow a time for pay-

[1] Voet, 22. 1. 28.

[2] Voet, *ubi sup.* and 46. 1. 13. Failure in performance by the principal always renders the surety liable (Dig. 22. 1. 24. 1; 45. 1. 88); but he is not always liable for mora-interest or mesne profits.

[3] Voet, 22. 1. 11. But see V. d. K. *Th.* 483.

[4] *Snook* v. *Howard* (1893) 8 E. D. C. 55.

[5] Voet, 41. 3. 20; 22. 1. 28; 44. 3. 9.

[6] Schorer *ad* Gr. 3. 10. 10; Stockmans *Decis. Brabant.* 77; Voet, 22. 1. 11. In contracts of assurance either party being in mora paid interest at the rate of 12 per cent. Gr. 3. 24. 19; Voet, 22. 1. 3.

[7] Voet, 22. 1. 16; *Cens. For.* 2. 1. 33. 5.

ment ; in which case the debtor is not liable for interest until the time has elapsed.[1] How mora is purged.

Mora may be purged : (*a*) by novation of the principal debt ; (*b*) by release ; (*c*) by mora of the creditor, e. g. if the debtor fails to pay punctually because the creditor was not present to receive payment at the appointed time and place ;[2] (*d*) by subsequent tender on the part of the defaulter,[3] but not so as to deprive the creditor of any fresh right which may have already accrued to him, such as the right to exact a penalty in respect of the original default.[4]

2. **Damages.** A person who has broken his contract is liable to make compensation to the injured party. The law relating to this subject is treated in modern books under the head of ' the measure of damages '. The Roman-Dutch writers have not very much to say about it. Voet, however, lays down three rules which are of general application : [5] viz. (*a*) Under the head of damages account is taken of advantage lost and damage sustained (*lucrum cessans, damnum emergens*). (*b*) Damages must not be too remote. (*c*) The standard is a commercial standard. The plaintiff's peculiar affections and feelings are not taken into account. For the rest, the law of damages in the modern Roman-Dutch Law is substantially the same as in English Law. It is necessary in each case to inquire whether the law lays down any special rule as to the measure of damages in the class of contracts in question. Thus, in a contract of sale, when the purchaser refuses to take delivery and the property is re-sold at a loss, the measure of damages recoverable from the Damages.

[1] Voet, 22. 1. 29. A debtor cannot plead difficulty of performance as an excuse. Dig. 45. 1. 2. 2 (*ad fin.*) ; but casus superveniens and other special circumstances may entitle him to indulgence. Voet, *ubi sup.* ; Dig. 22. 1. 21–2.

[2] Voet, 22. 1. 30.

[3] Dig. 45. 1. 73. 2 : Stichi promissor post moram offerendo purgat moram : certe enim doli mali exceptio nocebit ei, qui pecuniam oblatam accipere noluit.—Dig. 46. 3. 72. 1 : Verum est eum qui interpellatus dare noluit, offerentem postea periculo liberari.

[4] Voet. 22. 1. 31.

[5] Voet, 45. 1. 9.

original purchaser is the difference between the contract price and the amount realized on the re-sale.[1]

Penalty and liquidated damages.

If the parties to a contract have agreed for a penalty in the event of non-performance, the penalty in question is incurred by the party in default. In the Dutch Law if the penalty was much larger than the actual loss it was within the competence of the Court to reduce it.[2] On the other hand if the penalty proved insufficient to cover the damages the aggrieved party might fall back on his original cause of action.[3] The modern law has taken over the English distinction between Penalties and Liquidated Damages.[4]

(3)Specific performance.

3. **Specific Performance.** When the performance due from a party to a contract consisted in an *act* it was a moot question with the Dutch jurists whether, except in case of a promise to marry, the law permitted a decree of specific performance. In other words, could a party to a contract be compelled to do the very thing which he had promised, or was it always optional for him to pay the damages instead? The latter view is taken by Grotius and by Voet.[5] But in the modern law the Court, following the English practice, will in a fit case decree specific performance. This it does more particularly in relation to contracts for the purchase and sale of land.

[1] *Brest & Ladon* v. *Heydenrych* (1896) 13 S. C. 17.

[2] Voet, 45. 1. 13. See (Ceylon) *Fernando* v. *Fernando* (1899) 4 N. L. R. 285. When a penal rate of interest is stipulated for, the amount recoverable may not exceed the amount of the principal. V. d. K. *Th.* 481.

[3] Voet, 46. 2. 4.

[4] (South Africa) *Bartholomew* v. *Johnson* (1901) 22 N. L. R. 79; *Chaffer* v. *Richards* (1905) 26 N. L. R. 207; *Commissioner of Public Works* v. *Hills* [1906] A. C. 368. (Ceylon) *Saibo* v. *Cooray* (1892) 1 S. C. R. 233; *Webster* v. *Bosanquet* [1912] A. C. 394.

[5] Gr. 3. 3. 41; Voet, 46. 3. 10. *Contra*: Van Leeuwen, 4. 3. 13 and 4. 17. 1; Groen. *ad* Gr. *ubi sup.*; Neostad. *Supr. Cur. Decis.* no. 50; V. d. K. *Th.* 512; Wessels, *History of the R.-D. L.*, pp. 612 ff. See *Bergl & Co.* v. *Trott Bros.* (1903) 24 Natal Law Reports at pp. 512 ff. where the South African cases are collected by Bale C. J. Damages may as a general rule be claimed either alternatively with—(*Ras* v. *Simpson* [1904] T. S. 254)—or in addition to—(*Silverton Estates Co.* v. *Bellevue Syndicate* [1904] T. S. 462)—specific performance. For Ceylon Law see Pereira, p. 579.

CHAPTER III

INTERPRETATION OF CONTRACT

Proof of contract.

If an action is brought upon a contract, the plaintiff must prove its terms, and identify the defendant as the party liable. The proof of contract is part of the law of evidence, and as such lies outside the scope of this work. Let it suffice to point to the general rule that in every case the best evidence must be produced. In the case of a written contract this means the original written instrument together with so much parol evidence as is necessary to explain the circumstances of the contract and the nature of the liability alleged. When the written contract has been produced, the next step is for the Court to interpret its meaning, i.e. to construe its language and to determine its legal effect. To assist the judge in this task the law lays down certain rules of construction, which, however, must be regarded not as rules of law from which there is no escape, but rather as finger-posts or *indicia*, whereby the Court may arrive at the intention of the author or authors of the instrument. It is true that a man must be taken to mean what he says, and, as a rule, if he uses technical phrases he will be understood to have used them in their technical meaning. None the less, a man is his own interpreter, and a rule of construction, however respectable, will not be allowed to override a reasonable inference as to the disposer's intention, to be collected from an examination of the whole and of every part of the instrument in question.

Interpretation of contract.

Rules of construction.

The following rules of construction are taken from Van der Linden's *Institutes*.[1]

1. In agreements we should consider what was the general intention of the contracting parties rather than follow the literal meaning of the words.

2. When a stipulation is capable of two meanings it should rather be construed in that sense in which it can

[1] V. d. L. 1. 14. 4.

have some operation than in that in which it cannot have any.

3. Whenever the words of a contract are capable of two meanings they should be construed in that sense which is most consonant with the nature of the agreement.

4. That which appears ambiguous in a contract should be construed according to the usage of the place where the contract was made.

5. Usage has such weight in the construction of agreements that the usual stipulations are understood to be included in them, although not expressly mentioned.

6. A stipulation must be construed by the aid of the other stipulations contained in the contract, whether they precede or follow it.

7. In cases of ambiguity a stipulation must be construed against the party who has stipulated for anything, and in favour of the release of the party who has contracted the obligation.

8. However general the expressions may be in which an agreement is framed, they only include the matters in respect of which it appears that the contracting parties intended to contract, and not those which they did not contemplate.

9. Under a general term are comprehended all the specific matters which constitute this generality, even those of which the parties had no knowledge.

CHAPTER IV

DETERMINATION OF CONTRACT

How contracts are determined.

A CONTRACT may be determined in any one of the following ways: viz. by (1) performance and its equivalents; (2) release; (3) novation; (4) impossibility of performance; (5) condition subsequent; (6) prescription. We shall deal with each of these in order.

1. Performance and its

1. **Performance and its equivalents.** The subject of performance and of substituted performance has been

considered in a previous chapter. We shall speak here of various processes, which in certain cases have the same legal consequences as if the contract had been actually carried out. equivalents.

Tender is an offer of performance. If the debtor's duty consists in something to be done, it is not his fault if he duly offers performance and the creditor refuses to accept. In such an event the debtor may usually treat the contract as determined by the creditor's refusal. He is not required to waste his time in soliciting an acceptance, which may never be given. If, on the other hand, the performance due from the debtor consists in giving, the case is different. Mere tender does not, as a rule, discharge the debt. The debtor, tender notwithstanding, must continue ready and willing to pay, and if sued for the money must plead the tender and pay the money into Court. He will then be entitled to his costs in the action. Tender.

The effects of valid tender are[1]: (1) to relieve the debtor from liability in case of accidental destruction of the thing to be given; (2) to discharge a penalty agreed to be paid in the event of non-performance; (3) to arrest the accrual of interest, and to prevent mora-interest from arising.[2] This third consequence followed in some cases in the Roman Law and follows in all cases in the modern law. In the Roman-Dutch Law of Holland tender did not arrest the course of interest unless it took the form of cónsignation and deposit.[3] Effects of tender.

Consignation and deposit was an institution, no longer in use in the modern law,[4] which permitted a debtor with Consignation and deposit.

[1] Voet, 46. 3. 28.

[2] Voet, 22. 1. 17; Groen. *de leg. abr. ad* Cod. 4. 32. 6.

[3] Grotius (3. 40. 2–3) calls it *onderrecht-legging*. Tender made in court prevented mora-interest from running. Voet, *ubi sup.*; Van Leeuwen, 4. 11. 3.

[4] It existed already in Roman Law. Cod. 8. 13 (14). 20 (consignato atque deposito); Dig. 22. 1. 7 (obsignavit ac deposuit). In the Dutch Law tender was first made through an officer of the Court or a notary with two witnesses 'met opene beurse en klinkende geld'. Boey, *Woorden-tolk, sub voce* Consignatie. See also V. d. K. *Th.* 824; Pothier, *Traité des Obligations*, secs. 536 ff. The institution exists in most modern systems of law. (Fr.) Cod. Civ., secs. 1257 ff.; (Germ.) B. G. B.,

the approval of the Court to seal and deposit a specific thing or sum of money with some third person to hold for the benefit of the creditor and at his risk. Such deposit validly made, and not revoked by the debtor, had the same legal effect as payment.[1]

Merger.

Confusion or 'merger'[2] takes place when by succeeding to the claim or liability of another, a person who owed to that other a duty or had against that other a claim, becomes in his own person both creditor and debtor in respect of the same performance, with the result that the obligation is extinguished. This usually occurred when, without benefit of inventory, the creditor succeeded as heir to the debtor, or *vice versa*.[3] Since universal succession is unknown in the modern law, confusion of this kind no longer occurs as a direct consequence of death. But it is still possible in the case of a residuary legatee, who has a claim against the estate; for if the estate is solvent he may not think it worth his while to anticipate the distribution of assets by demanding payment from the executor of the deceased. Another case of confusion occurs when a principal debtor becomes surety, or a surety becomes principal debtor, in respect of the same debt, with the result that the accessory obligation is extinguished.[4]

Compensation or set-off.

Compensation or set-off[5] takes place when a debtor has a counter-claim against his creditor. If the creditor sues his debtor, the creditor's claim is deemed to have been extinguished or reduced by the amount of the counter-claim from the moment when the right to enforce

secs. 372–86 (*Hinterlegung*); (Holl.) B. W., secs. 1440–8 (*consignatie of bewaargeving*); (Ital.) Cod. Civ., secs. 1259–66. The modern equivalent is payment into Court. But money so paid can probably not be withdrawn without an order of Court. 4 Maasdorp, p. 144.

[1] Gr. 3. 40. 3; Voet, 46. 3. 29. Pothier (sec. 545) discusses the position of a surety in case the debtor has made a valid consignation and afterwards resumes the property.

[2] Vermenging, Schuldvermenging. Gr. 3. 40. 4; Voet, 46. 3. 18–27; V. d. L. 1. 18. 5; Boey, *Woorden-tolk*, *sub voce* Confusie; Pothier, secs. 605 ff.

[3] Gr. 3. 40. 5; Voet, 46. 3. 27.

[4] Voet, 46. 3. 20; Pothier, secs. 383 ff.

[5] Vergelyking, compensatie, schuld-vereffening. Gr. 3. 40. 6 ff.; Voet, 16. 2. 1; V. d. L. 1. 18. 4.

the counter-claim by action vested in the defendant or in his predecessor in title.[1] Compensation is only allowed where both claim and counter-claim are liquid, unconditional, and presently enforceable,[2] and relate to fungible things *ejusdem generis*.[3] Thus, money may be set off against money or wine against wine, but not wine of one quality against wine of another. A merely natural debt is available as a set-off [4] except in cases where the law forbids it. In certain cases compensation is disallowed on grounds of public policy. Thus, a person who has got possession of property by theft or other wrongful act may not plead a set-off against the owner's claim to recover what belongs to him; nor is this defence available to one who is indebted to the State or to a local government for taxes or rates.[5]

Effect of compensation.

The effect of compensation (which, however, must be specially pleaded [6]) is to extinguish the creditor's claim in whole or in part,[7] and in the same measure to arrest the accrual of interest, to set free sureties and real securities, and to relieve the defendant from a penalty to which he would otherwise be liable, provided that the right of set-off has vested before the date when payment would, but for the set-off, have fallen due.[8] Further, if defendant has paid his creditor without claiming set-off he may get his money back to the extent of the set-off by the condictio indebiti.[9] Where a right of action has been ceded, the debtor may set up against the cessionary any set-off available to him against the cedent; for since compensation,

[1] Voet, 16. 2. 2. A counter-claim is ineffectual as compensation unless it is available against a plaintiff in the capacity in which he is suing. *De Villiers* v. *Commaile* (1846) 3 Menz. 544.

[2] Cod. 4. 31. 14. 1; Gr. 3. 40. 8; *Cens. For.* 1. 4. 36. 3; Voet, 16. 2. 17.

[3] Voet, 16. 2. 18. [4] Voet, 16. 2. 13.

[5] Gr. 3. 40. 11; Voet, 2. 16. 16. In the Roman Law compensation could not be pleaded to an actio depositi directa. Cod. 4. 31. 14. 1; 4. 34. 11. This does not hold good in the modern law. 4 Maasdorp, p. 188. [6] Van Leeuwen, 4. 40. 2.

[7] Gr. 3. 40. 7; Voet, 16. 2. 2. Van der Keessel (*Th.* 827) cites a decision to the effect that compensation may be set up, after sentence, against execution of a judgment; but this cannot be the law to-day.

[8] Voet, *ubi sup.*; V. d. L. 1. 18. 4. [9] V. d. L., *ubi sup.*

if pleaded, takes effect *ipso jure*, the amount of the debt is mechanically reduced by the amount of the counter-claim from the moment when the right to assert it first vested in the debtor.[1]

2. Release.

2. **Release.**[2] A debt may be released by way of gift,[3] i.e. as an act of mere liberality on the part of the creditor, or in exchange for some advantage.[4] In the absence of proof to the contrary a release is presumed to be gratuitous.[5] No form of words is required.[6] It is enough that the creditor by words or conduct[7] declares his intention to abandon his right, and that this is accepted by the debtor or by some one else on his behalf. No one can release a debt who is not competent to alienate his property.[8] A promise not to sue[9] operates as a release unless it is merely personal in its incidence, e.g. a promise not to sue A does not necessarily release his representatives after his death.[10] But with this reservation a promise not to sue releases co-debtors and sureties,[11] and a promise not to sue a surety releases his principal.[12] If an instrument of debt is returned to the debtor, the debt is presumed to be discharged.[13]

Promise not to sue.

Mutual release.

In case of reciprocal promises each party may by agreement release the other from performance, each returning

[1] Voet, 16. 2. 4. For the law of compensation and set-off in Brit. Gui. see Rules of S. C. 1900 and Petty Debts Recovery Ord. No. 11 of 1893 and Rules thereunder [G.].

[2] Quijtschelding—Acceptilatio—Liberatio.

[3] Gr. 3. 41. 5. [4] Voet, 46. 4. 1. [5] Gr. 3. 41. 6.

[6] *Secus*, jure civili. Inst. 3. 29. 1.

[7] Gr. 3. 41. 7; V. d. L. 1. 18. 3.

[8] Gr. 3. 41. 8; nor persons charged with the administration of another's property without power of alienation. Ibid.

[9] Pactum de non petendo. Van Leeuwen, 4. 40. 7 and Decker, ad loc.

[10] Gr. 3. 41. 9.

[11] Gr. *ubi sup.*; Voet, 46. 4. 4.; V. d. K. *Th.* 828; V. d. L. 1. 18. 3. Pothier, however, *Traité des Obligations* (sec. 581), says that a release of one co-debtor only releases the other to the extent to which the second is prejudiced by the release of the first by being deprived of the opportunity of claiming contribution from him. This view was adopted by the Transvaal Supreme Court in *Dwyer* v. *Goldseller* [1906] T. S. 126.

[12] Gr. *ubi sup.*; Voet, *ubi sup.* But V. d. L. dissents.

[13] Gr. 3. 41. 10; V. d. L. *ubi sup.*

to the other any advantage he may have derived from the contract.[1]

3. Novation.

3. Novation.[2] The parties to a contract may, if they please, enter into a new contract, putting an end to an original liability, and substituting a new liability in its place. This is called Novation. Any agreement in that behalf express or tacit is sufficient ;[3] but in case of doubt an intention to novate is not presumed.[4] Thus, a creditor is not held to novate his debt by merely allowing his debtor an extension of time for payment. Such an allowance, therefore, does not set free sureties or mortgages.[5] Novation fails to take effect if the second contract is *ipso jure* void ; or conditional and the condition is not implemented ; or if the thing which forms the subject of the novating contract has previously perished.[6]

Any debt may be novated, as well natural as civil and whether arising from contract or delict or judgment.[7] The effect of novation is to discharge the old liabilities with all their incidents, such as interest, real and personal securities, and to purge any previous mora.[8] Novation may consist not only, as above, in the substitution of one debt for another, but also in the substitution of one debtor for another. This was known in Roman Law as delegation.[9] The consent of all three parties is required ; for though the law allows the assignment of a claim without the consent of the debtor, so that a new creditor takes the place of an old one, there is no corresponding rule allowing the debtor to make over his liability to a third party, unless

Delegation.

[1] Handelbraeck—Recessio a contractu. Gr. 3. 42. 2 ; V. d. K. *Th.* 833.

[2] Schuldvernieuwing—Novatie. Gr. 3. 43. 1 ; Voet, 46. 2. 1 ; V. d. L. 1. 18. 2.

[3] Gr. 1. 43. 3 ; Voet, 46. 2. 2–3. Groenewegen (*de leg. abr. ad* Inst. 3. 30. 3) does not allow a tacit novation.—'Mores nostros ab hoc jure civili non recessisse censeo.'

[4] V. d. K. *Th.* 835.

[5] Gr. 3. 43. 4 ; V. d. K. *Th.* 836 ; nor a subsequent stipulation for a penalty (Voet, 46. 2. 4), or for substituted performance, or for interest, or for a higher rate of interest (Voet, 46. 2. 5).

[6] Voet, 46. 2. 7.

[7] Voet, 46. 2. 9–10.

[8] Voet, 46. 2. 10 ; *Holl. Cons.*, vol. ii. no. 126.

[9] Overzetting—Delegatie. Gr. 3. 44. 2.

the creditor, and, of course, the third party,[1] agree. In this case, as in the last, the intention to novate must clearly appear. The mere assignment by a debtor to his creditor of the debtor's claim against a third party, even though the third party consent, does not itself effect a novation.

Novatio necessaria.

A third case of novation in Roman Law was incidental to judicial proceedings[2] and took place at the moment of litis contestatio. This, though admitted by Grotius,[3] did not entail the usual consequences of novation,[4] and may therefore be left out of account.

Assignation.

From delegation properly so called must be distinguished assignation,[5] which takes place when a debtor requests his own debtor to pay his creditor, or refers his creditor to his own debtor for payment. The effect is to discharge the debtor from liability,[6] if, and only if, the creditor recovers his debt from the third party, unless of course the creditor agrees to accept the assignation in full discharge.[7] In other words, assignation is, as a rule, a conditional delegation. In the modern law the same result usually follows if a debtor gives his creditor a cheque or other such instrument in payment of a pre-existing debt.

4. Impossibility of performance.

4. **Impossibility of Performance.** If a contract, possible when made, subsequently becomes impossible of performance, the parties may be discharged from future liability. The extent of this rule is not very accurately determined. It relates more particularly to the destruction, without fault of the debtor and before he was *in mora*, of some specific thing which in terms of the contract he was bound to deliver.[8] It may extend also to other

[1] Gr. 3. 44. 3. [2] Gaius, iii. 180; Dig. 46. 2. 29.
[3] Gr. 3. 43. 3. [4] Voet, 46. 2. 1.
[5] Aenwijzing—Assignatie. Gr. 3. 45. 1. [6] Gr. 3. 44. 5.
[7] Van Leeuwen, 4. 40. 10; Voet, 46. 2. 13.
[8] Gr. 3. 47. 1. In these cases the distinction between absolute and relative impossibility (*supra*, p. 227, n. 1) does not apply. 'Where the impossibility arises ex post facto its absoluteness or relativity is immaterial: the only question is whether it is due or not to the fault of the debtor; provided, of course, that it is a fault for which, in the

cases, as, for example, when the parties contemplated as the foundation of their contract some condition or state of things which has since ceased to exist; or when the party liable is disabled by illness, or prevented by a public enemy.[1] Mere difficulty of performance furnishes no excuse for non-performance.[2] But a contract is discharged if performance becomes legally impossible (e. g. if the thing to be given passes extra commercium),[3] or positively illegal.

5. Condition subsequent.

5. **Condition Subsequent.** A contract may include, either expressly or by implication, a provision for its determination after the lapse of a certain time or upon the happening of a specified event. Upon the expiry of the time or the happening of the event, the parties are discharged from their obligations and the contract is at an end. Pothier gives in illustration a contract of suretyship whereby the surety undertakes to be answerable for the payment of a loan for the period of three years only, or until the return of a certain ship. If the creditor has not put his debtor in mora by demanding payment before the term has expired or the ship returned, the liability of the surety is at an end. But if there has been default on the part of the debtor before the accomplishment of the term or the happening of the event, the surety continues bound to make it good, for he is now bound unconditionally to answer for the principal debtor's default.[4]

6. Prescription.

6. **Prescription.** Grotius treats prescription as a release of a debt effected by operation of law,[5] in consequence

particular relation, he is answerable.' Moyle, *Institutes of Justinian* (4th ed.), p. 409; Windscheid, *Lehrbuch des Pandektenrechts*, vol. ii, § 264. In recent cases, English and South African, the issue has been made to turn on what was, or ought to have been, in the contemplation of the parties at the time of contracting. See, e. g. *Ward* v. *Francis* (1896) 8 H. C. G. 82; and *Morgan & Ramsay* v. *Cornelius & Hollis* (1910) 31 Natal Law Reports, 447.

[1] Dig. 14. 2. 10. 1.

[2] Dig. 45. 1. 2. 2 (*ad fin.*): Non facit inutilem stipulationem difficultas praestationis.—Dig. 45. 1. 137. 4: Et generaliter causa difficultatis ad incommodum promissoris, non ad impedimentum stipulatoris, pertinet; i. e. difficulty of performance prejudices the promisor, and does not deprive the promisee of his action.

[3] Gr. 3. 47. 1 and 4.

[4] Pothier, secs. 224–5 and 636.

[5] Quijtschelding door verjaring. Gr. 3. 46. 1.

Does it extinguish the right or merely bar the remedy ?

of the lapse of a certain period of time. His opinion, which is also that of Voet, is that the effect of prescription is not merely to bar the remedy, but to extinguish the right.[1] But Van der Keessel says that this view is not free from difficulty,[2] and in South Africa 'the more correct view is that prescription merely affords a ground of defence or exception to an action, and does not act as an extinguishment of the obligation *ipso jure*'.[3]

Periods of prescription in Roman-Dutch law.

The periods of time fixed by the Roman and the Roman-Dutch Law for the prescription of actions varied very greatly,[4] and, as the law relating to this matter is now generally regulated by statute, it is not necessary to enumerate them in detail.[5] Unless the law provides otherwise, the term of prescription is the third of a century, or, as some say, thirty years.[6] This is the usual period also for demanding restitutio in integrum, but, as we have seen, a claim to set aside a transaction on the ground of minority is barred after four years from the attainment of majority.[7] A well-known clause (Art. 16) of the Perpetual Edict of 1540, dealing with the prescription of actions, is now of little interest save as an exercise in translation. Since, however, it formed part of the law of the Transvaal until repealed by Act No. 26 of 1908, its content is appended.[8]

Perpetual Edict of October 4, 1540. Art. 16.

'All salaries of all Advocates, Attorneys, Secretaries, Physicians, Surgeons, Apothecaries, Clerks or Notaries or other workers ; hire of servants of either sex ; as also the price of merchandize sold by retail, and payment of tavern debts must be judicially demanded within two years of the day of the service, or work done, merchandize

[1] Gr. 3. 46. 2 ; Voet, 44. 3. 10.
[2] V. d. K. *Th.* 874.
[3] 4 Maasdorp, pp. 158–9.
[4] See Voet, 44. 3. 5–7.
[5] For Ceylon see Ord. No. 22 of 1871 and Pereira, pp. 796 ff. ; for Brit. Gui. Ord. No. 1 of 1856.
[6] Gr. 3. 46. 3 ; Van Leeuwen, 4. 40. 8 ; Voet, 44. 3. 8 ; Bynkershoek, *Quaest. Jur. Priv.* lib. ii, cap. xv (*ad init.*) ; V. d. K. *ubi sup.* ; V. d. L. 1. 18. 8.
[7] *Supra*, p. 43 ; Gr. 3. 48. 13 ; V. d. K. *Th.* 881.
[8] It was repealed in Cape Colony by Act No. 6 of 1861, sec. 4. Is it in force in O. F. S. ? See *Rabie* v. *Neebe* (1879) O. F. S. 5 ; Nathan, *Common Law of S. A.*, vol. iv, p. 2400.

delivered, or score credited;[1] and after the expiry of the said time no such claims may be lawfully pursued unless there shall be thereof a *cedulle* or letter of obligation; by force whereof the creditor may sue for such debts within ten years against the principal debtor. But if such debtor shall die, then the creditor shall be bound to pursue his claim against the heirs within two years after the debtor's death, reckoned from the day on which the creditor shall have had knowledge of the death of his debtor, and not afterwards. But after the expiration of the said time such debts shall be considered duly discharged, and no action shall lie in respect thereof.'[2]

Against whom prescription does not run.

Prescription does not begin to run against minors or lunatics or other persons under like disability, nor against such as, owing to war or public service, are absent from the jurisdiction and unable to prosecute their claim.[3]

How prescription is interrupted.

Prescription is interrupted by judicial interpellation or by any acknowledgement of the debt.[4] Such at least was the Roman-Dutch common law; but as the matter is regulated in the Colonies by local Acts and Ordinances, the student should be careful to consult the statute law of his own Colony.

Prescription of rights of action for breach of contract.

Rights of action arising out of breach of contract are in Roman-Dutch Law extinguished in the same way as primary rights arising ex contractu.[5]

[1] Gelagh gheborcht. See 25 *S. A. L. J.* p. 429.

[2] 1 G. P. B. 319; Gr. 3. 46. 7; Van Leeuwen, 2. 8. 11. Van der Keessel (*Th.* 876) discusses the question whether this article is still observed in practice, and concludes 'in this conflict of opinions the proof of a custom contrary to the law may, I think, be justly thrown on the party alleging it'. Van Leeuwen, however, in the seventeenth century, thought it already obsolete through disuse.

[3] Voet, 44. 3. 9 (*ad fin.*): Neque minoribus currit aut furiosis aliisque similibus, qui minorum jure censentur ac sub cura sunt, neque belli aut alias reipublicae causa absentibus. But Schorer *ad* Gr. 2. 7. 9 (note 37) admits no exception except 'pupillarem aetatem' (quia est regula quod durante pupillari aetate dormiat praescriptio). Decker (*ad* Van Leeuwen, 2. 8. 12) says that neither minors nor those who are unable to manage their own affairs nor persons absent from the jurisdiction are relieved *ipso jure*, i. e. without restitutio in integrum.

[4] Voet, *ubi sup.*

[5] But not by the same term, for the effect of litis contestatio is to render the obligation 'perpetual'. Voet, 22. 1. 28; Dig. 27. 7. 8. 1 (*ad fin.*): Nam litis contestatione et poenales actiones transmittuntur ab utraque parte et temporales perpetuantur.

CHAPTER V

PLURALITY OF CREDITORS AND DEBTORS

Co-creditors and co-debtors.

THE parties to a contract are liable or entitled as co-creditors or co-debtors (*correi stipulandi vel credendi—correi promittendi vel debendi*) when two or more stipulate or promise as principals and not as sureties at the same time in respect of the same performance, with the intention of becoming thereby entitled or liable severally in respect of the whole performance (*singuli in solidum*) and not merely *pro rata parte*.[1]

Co-debtor distinguished from surety.

The position of a co-debtor must be distinguished from that of a surety. Each co-debtor is liable as principal. The liability of the surety, on the other hand, is merely accessory and secondary. To constitute the relation of co-creditor or co-debtor, as above defined, it is not enough that two or more persons should stipulate for or promise the same thing at the same time, unless they do so with the intention of becoming each entitled or each liable in respect of the whole debt. In the absence of evidence of such intention, the parties, even in the earlier civil law, were not correi but were each entitled or liable only in respect of his rateable share.[2] In the Roman-Dutch Law, following herein the latest Roman Law, a co-debtor cannot be made liable *in solidum* unless there is an express agreement in that behalf,[3] and the other debtor or debtors are evidently insolvent or absent from the jurisdiction,[4] or

Beneficium divisionis: when available.

[1] Voet, 45. 2. 1, and *Compendium*, 45. 2. 1.

[2] Dig. 45. 2. 11. 1–2 (Papinian).

[3] Authent. *ad* Cod. 8. 39 (40). 2. Hoc ita si pactum fuerit speciale unumquemque teneri in solidum. . . . Sin autem non convenerint specialiter, ex aequo sustinebunt onus. Sed et si convenerint, ut uterque eorum sit obligatus: si ambo praesentes sint et idonei, simul cogendi sunt ad solutionem. See Groenewegen, ad loc. The authentica is taken from Nov. 99 *c.* 1 (A. D. 539), which only refers to sureties, but is nevertheless, according to the general opinion and common consent, also extended to two or more joint principal debtors. Van Leeuwen, 4. 4. 1; V. d. K. *Th.* 494.

[4] But one of two co-debtors is not liable for the share of an absentee co-debtor unless he has specifically bound himself *in solidum*. *Alcock* v. *Du Preez* (1875) Buch. 130.

unless the defendant has clearly renounced the beneficium divisionis. It follows that, where the above conditions do not exist, all the co-promisors must be made defendants to the action and condemned *pro virili parte*. If the plaintiff proceeds against one co-promisor in solidum, the defendant may plead the beneficium divisionis, and reduce the plaintiff's claim to the amount of his rateable share of the liability,[1] or except to the action on the ground of misjoinder of parties. This is the case even when the original liability was in its nature indivisible; for, at all events, the liability to make compensation in damages is divisible, and admits of apportionment amongst the persons severally liable for non-performance.

Plurality of creditors.

The same principle, it seems, applies also in the modern law in case of plurality of creditors, so that in the absence of express agreement to the contrary each is entitled, and may sue, only in respect of his rateable share of the performance which forms the subject-matter of the contract.[2]

Excepted cases.

In the excepted cases the rules of the older Civil Law apply. In case of plurality of creditors each one may sue for the whole debt, but payment or its equivalent, or novation, made to one promisee, discharges the whole

[1] Gr. 3. 3. 8–11; Van Leeuwen, 4. 4. 1 and Schorer, ad loc.; Voet, 45. 2. 4 and *Compendium*, 45. 2. 5. According to the statement in the text, a co-debtor who has bound himself *in solidum* and whose co-debtor is absent or insolvent may still claim the benefit of division, unless he has expressly renounced it. This, according to a jurist in the *Bellum Juridicum* (Cas. 24), is known to every one who has 'licked the spoon' of jurisprudence. But de Haas *ad* Van Leeuwen, *Cens. For.* 1. 4. 17. 1, and Van der Linden (Translation of Pothier, *Obligations*, vol. i, sec. 270, and *Handbook* (1. 14. 7)) say that a co-debtor who has bound himself *in solidum* cannot claim the benefit of inventory. De Haas cites Grotius, 3. 3. 29 (*ad fin.*): 'Die haer verbinden een voor al, ofte elck sonderling, worden verstaen de voorsz. rechten af te staan.' But Grotius is here speaking of sureties. Van der Keessel (*Th.* 494) seems to agree in effect with Van der Linden that co-debtors who bind themselves 'singuli pro omnibus tanquam rei principales' are deemed to have renounced the benefit of division. Mr. G. T. Morice says (*English and Roman-Dutch Law* (2nd. ed.), p. 89): 'It is probable that the latter view (viz. that persons who have expressly bound themselves *in solidum* or each for the whole amount cannot claim the benefit of division) will be adopted in South Africa.'

[2] *De Pass* v. *Colonial Government* (1886) 4 S. C. 383.

liability,[1] for 'in utraque obligatione una res vertitur; et vel alter debitum accipiendo vel alter solvendo omnium peremit obligationem et omnes liberat'.[2] But an agreement not to sue one of several debtors, being merely personal in its incidence, has no effect upon the liability of the others.[3] The debtor, on his side, until, but not after, action brought, may pay any co-creditor that he pleases. In case of plurality of debtors the creditor may proceed against any one of them for the whole or any part of the debt; and his election to sue one does not preclude him from going against another, since it is not his election, but only payment or its equivalent, or novation, which discharges the liability of the other co-contractors. If one co-debtor has voluntarily paid part, but not the whole, of the debt, the creditor is not precluded from suing for the balance, unless he has expressly or tacitly agreed to that effect. The case is different if the creditor has taken proceedings against one co-debtor in respect of his rateable share of the debt; for by so doing he precludes himself from taking fresh proceedings for the balance. However, as explained above, these rules of the *jus civile* are generally inapplicable to the modern law.

Contribution between co-creditors and co-debtors.

If one co-creditor recovers the whole debt, or, if one co-debtor pays the whole debt, the other co-creditors in the first case may sue, and the other co-debtors in the other case may be sued, in respect of their rateable share of the benefits or loss. Such is the modern law.[4] In the Roman Law no action for contribution lay except in the case of partners.[5]

[1] Voet, 45. 2. 4. [2] Inst. 3. 16. 1.

[3] Gr. 3. 3. 8. If the creditor becomes heir to one of two co-debtors, the other co-debtor remains liable *in solidum*, unless the co-debtors are partners, in which case the remaining co-debtor is only liable for half the debt. Voet, 45. 2. 5. A debt may be extinguished by prescription against all co-creditors and in favour of all co-debtors; but a demand in judicio against one keeps the debt alive against all. Voet, 45. 2. 6.

[4] Gr. 3. 3. 8; Voet (45. 2. 7) says: Quae cum ita sint, non mirum quod nunc vulgo a pragmaticis tradatur, ex aequitate uni solidum solventi adversus reliquos regressum dari opportere aliquando in solidum, aliquando pro virili, prout aut nihil aut aliquid ad solventem pervenerit ex eo cujus intuitu correi facti sunt, etiam sine cessione actionis. He does not say that a co-creditor who has recovered the whole is obliged to share it with the other co-creditors (not being partners) but presumably he is so obliged *jure hodierno*.

[5] Voet, ibid. Cf. Dig. 35. 2. 62 pr.

CHAPTER VI

SPECIAL CONTRACTS

In Roman-Dutch Law all contracts are consensual.

To undertake a detailed statement of the law applicable to the various kinds of contracts into which men may enter, lies outside the scope of an elementary treatise. As observed above, in Roman-Dutch Law all contracts are consensual. The differences of the Roman Law between contracts *re verbis litteris* and *consensu* have in a great measure lost their significance ; and the ancient distinction between contracts and pacts is equally a thing of the past. It follows that the principles which have been stated with regard to contracts in general apply to every kind of contract, except so far as the parties have chosen to depart from them, or the law attaches special rules to contracts of the class in question. The term 'special contract' is in fact rather misleading. All contracts partake of the same nature ; and all take a special colour from the subject-matter with which they deal. If we select some contracts for special treatment it is only because they concern certain relations of mankind which are of such frequent occurrence that every reasonably equipped lawyer must be prepared to deal with them. A young lawyer may be excused if he knows little of the law relating to marine assurance or to apprenticeship in the cloth-trade, but he will be expected to have some acquaintance with such common transactions as sale, hire, deposit, mandate, and suretyship.

Why some contracts are selected for special treatment.

Enumeration of special contracts.

In this chapter we shall describe in briefest outline some of these contracts of frequent occurrence. We shall speak of: (1) Gift or Donation ; (2) Sale ; (3) Exchange ; (4) Hire ; (5) Mandate or Agency ; (6) Partnership ; (7) Loan for Consumption ; (8) Loan for use ; (9) Deposit ; (10) Pledge ; (11) Suretyship or Guarantee ; (12) Carriage by water and by land.

1. Donation or Gift.

1. **Donation** or **Gift**[1] is regarded in Roman-Dutch Law as a contract. A distinction is drawn, as in the case of sale, between the contract, which binds the parties, and the handing over, which passes the property.[2] Any promise to give is legally enforceable, provided that it is made with a serious and deliberate mind.[3] The capacity of parties, generally, is the same as in other contracts. Thus minors cannot make a gift, nor can guardians in their name.[4] According to Grotius, parents cannot make gifts to their unemancipated children,[5] but this proposition scarcely holds good at the present day. In the Roman Law, gifts between husband and wife were invalid[6] until confirmed by death.[7] This rule was received in the

[1] (Donatio—Schencking) Gr. 3. 2. 1; Van Leeuwen, lib. iv, cap. xxx; Voet, 39. 5. 1; V. d. L. 1. 15. 1.

[2] Gr. 3. 2. 14.

[3] Grotius says (3. 2. 11) that a gift *inter vivos* of all one's goods—present as well as future—is bad 'om dat het maecken van de uiterste wille daer door werd belet.' So also Van Leeuwen, 4. 30. 6. Van der Keessel says (*Th.* 487): Jure Romano quidem ex saniori doctrina omnium bonorum donatio non fuit prohibita: sed cum contraria sententia olim juri civili magis consentanea haberetur, eadem a plerisque in foro recepta et nostris quoque probata videtur.

[4] Gr. 3. 2. 7.

[5] Dig. 41. 6. 1. 1; Gr. 3. 2. 8; V. d. L. *ubi sup.* Voet says (*Compendium*, 39. 5. 7): *Moribus.* Donatio inter patrem et filium familias omnino consistit. But in his Commentary on the Pandects (39. 5. 6) he declares such gifts to be invalid, citing *inter alios* Van Leeuwen, *Cens. For.* 1. 4. 12. 8; who however endorses Voet's earlier, not his later view. Van der Keessel (*Th.* 485) agrees, subject to acceptance by a notary on behalf of the minor. In South Africa a parent, being solvent, may make a valid gift to a child, who (*semble*) may accept on his own behalf. See 1 Maasdorp, p. 234, and cases there cited. The Ceylon Courts have upheld the practice in that Colony of parents to donate to their minor children. Grandparents and parents, when not also the donors, may accept for them. *Fernando* v. *Weerakoon* (1903) 6 N. L. R. 212.

[6] Dig. 24. 1. 1 (Ulpian): Moribus apud nos receptum est ne inter virum et uxorem donationes valerent. In Ceylon, by The Matrimonial Rights and Inheritance Ordinance (No. 15 of) 1876, secs. 13 and 11, spouses may make gifts to one another, but not so as to prejudice the creditors of the donor. The Roman-Dutch writers seem to have experienced great difficulty in deciding whether a gift to a concubine was valid. See de Haas ad *Cens. For.* 1. 3. 4. 41, who answers the question affirmatively. Contra, *Decisien en Resolutien van den Hove van Holland* ('s Hage, 1751) Cas. 29: Of eene donatie door iemand aan zijne Bijzit toegezegd naar Rechten bestaanbaar is, en of daar uit door haar tot praestatie kan geageerd worden. Bij 't Hof is verstaan van neen.

[7] Dig. 24. 1. 32. 2; Girard, p. 945.

Roman-Dutch Law,[1] which also, as we have seen above, rendered wholly null and void gifts, whether ante- or post-nuptial, made by a minor, who contracted marriage without the necessary consents, in favour of the other spouse (not being a minor).[2]

The constitution of Justinian,[3] which, subject to some exceptions, required registration of gifts exceeding 500 aurei in value, was admitted into the Roman-Dutch Law,[4] and has been recognized as in force in South Africa,[5] the aureus being taken as equivalent to the pound sterling. Gifts in excess of the permitted value are void only to the extent of the excess.[6] Reciprocal and remuneratory donations do not fall within the rule, provided in the latter case that the gift does not exceed the value of the service rendered by more than £500.[7] The rule applies if several gifts are made by the same person at the same time to different persons.[8]

A gift being gratuitous there is no implied guarantee against eviction or against latent defects.[9] If the property given does not belong to the giver the gift is void.[10]

In what cases gifts may be revoked.

Gifts are as a rule irrevocable.[11] Therefore, if property has been handed over by the donor, it cannot be recovered back; and if the donor fails to hand over the property, he can be sued by the donee for breach of contract. But exceptions are admitted in both cases. Property which has passed may be recovered: (*a*) on the ground of gross ingratitude;[12] and (*b*) if the donee fails to make good

[1] Gr. 3. 2. 9; Van Leeuwen, 4. 24. 14; V. d. K. *Th.* 486.
[2] Gr. 3. 2. 10.
[3] Cod. 8. 53 (54). 36. 3 (A. D. 531); Inst. 2. 7. 2.
[4] Van Leeuwen, 4. 30. 3; Voet, 39. 5. 15. But Grotius (3. 2. 15) says: waer van ick in onzes lands wetten niet en vinde, misschien, om dat de mildheid hier niet te groot en is geweest. Van der Keessel (*Th.* 489) says that a solemn cession of immovable property *in judicio* or in the case of movables a declaration before notary and witnesses has the same effect as registration. Van der Linden (as usual) follows Grotius.
[5] 3 Maasdorp, p. 96.
[6] Cod. 8. 53 (54). 34. 1; Van Leeuwen, 4. 30. 5.
[7] Voet, 39. 5. 17. [8] Voet, 39. 5. 16. [9] V. d. L. *ubi sup.*
[10] Gr. 3. 2. 5. [11] Gr. 3. 2. 16.
[12] What amounts to ingratitude is specified in Cod. 8. 55 (56). 10 (A. D. 530). See Gr. 3. 2. 17; Van Leeuwen, 4. 30. 7; Voet, 39. 5. 22;

a condition attached to the gift (*donatio sub modo*).[1] If the property has not passed, the donor may defend an action on the ground of want of means (*beneficium competentiae*); and the claims of creditors must be preferred to the claim of the donee.[2]

In the later Roman Law the rules of the querela inofficiosi testamenti were, with modifications, applied also to gifts (*querela inofficiosae donationis*).[3] This practice was followed in the Dutch Law,[4] and may be supposed to be in force to-day in British Guiana, which alone of the Roman-Dutch Colonies still retains the legitima portio as a living institution.

Another ground of revocation was the subsequent birth of legitimate children to the donor; which, however, was limited in the Roman Law to the case of gifts made by patrons to freedmen,[5] and was available only between the original parties to the contract, so that the right of revocation was neither actively nor passively transmissible. In the Roman-Dutch Law, according to the prevailing opinion, the privilege was extended to all donors,[6] and was available to the donor's heir.[7]

The rules of law prohibiting gifts and other alienations in fraud of creditors belong to the topic of Insolvency and, like gifts *mortis causa*,[8] lie outside the scope of this chapter.

V. d. L. *ubi sup.* This ground of avoidance does not apply to remuneratory gifts. Voet, 39. 5. 25. For Ceylon see D. C. Colombo 54,687 (1871) Vanderstraaten, p. 144, and *Sansom* v. *Foenander* (1872) Ramanathan, 1872–6, p. 32.

[1] Cod. 4. 6. 8; Girard, p. 946.

[2] Dig. 39. 5. 12: Qui ex donatione se obligavit, ex rescripto divi Pii in quantum facere potest convenitur. Sed enim id quod creditoribus debetur erit detrahendum; haec vero, de quibus ex eadem causa quis obstrictus est, non debebit detrahere. Voet, 35. 9. 19.

[3] Dig. lib. xxxi, lex 87. 3; Cod. 3. 29. 9; Girard, p. 868.

[4] Gr. 3. 2. 19; Voet, 39. 5. 36; V. d. K. *Th.* 491. Grotius says that if the gift is made in fraud of the children it is wholly void, but in the absence of fraud is only reduced by the amount necessary to make up the legitim. But Voet (39. 5. 37) says that the last result follows in either case. This seems to be correct. See Girard, p. 946.

[5] Cod. 8. 55 (56). 8; Girard, *ubi sup.*

[6] Gr. 3. 2. 18; Voet, 39. 5. 26 (*ad fin.*).

[7] Van der Keessel (*Th.* 490) maintains the opposite opinion.

[8] For which see Van der Keessel *Th.* 492–3, and *Th.* 100; and (Ceylon) *Parasatty Ammah* v. *Setupulle* (1872) 3 N. L. R. 271; *Kannappen* v. *Mylipody* (1872) 3 N. L. R. 274.

2. **Sale.**[1] The Roman-Dutch Law on this subject is fundamentally Roman Law varied at some points by Dutch custom. In the South African Colonies, however, the law has been largely moulded by English precedents. In Ceylon, Ordinance No. 11 of 1896, follows the English Sale of Goods Act, 1893. The same may be said of the very recent enactment of the Legislature of British Guiana, Ordinance No. 26 of 1913. 2. Sale.

When the Contract of Sale is complete.

The contract of sale is complete so soon as the parties are agreed as to the price ;[2] i. e. so soon as the price is certain or readily ascertainable. In English Law, when no price is fixed, there is a presumption that the parties intended to contract for a reasonable price. In the Roman-Dutch Law such a contract would not, perhaps, satisfy the strict requirements of the definition of sale.[3] But this is a question of words. The Courts could scarcely fail to give effect to it as an innominate contract or actionable pact.

When the property passes under a Contract of Sale.

The property in things sold passes, as a rule, upon delivery. But: (*a*) if the sale is made subject to a suspensive condition the property does not pass until the condition is satisfied ; and (*b*) where credit has not been given the property does not pass until payment of the purchase price.[4] Subject to some exceptions the goods are at the purchaser's risk from the moment when the contract is concluded.[5]

[1] Emptio Venditio—Koop ende Verkooping. Gr. lib. iii, cap. xiv ; Van Leeuwen, lib. iv, cap. xvii ; Voet, lib. xviii, tit. 1 ; V. d. L. 1. 15. 8.

[2] Inst. 3. 23 pr.: Emptio et venditio contrahitur simul atque de pretio convenerit. Cf. Van Leeuwen, 4. 17. 1. The parties must also be at one as to the *res*.

[3] Gr. 3. 14. 1 and 23.

[4] Inst. 2. 1. 41 ; Gr. 2. 5. 14 ; Voet, 19. 1. 11. Consequently an unpaid vendor may follow up and reclaim the property in the hands of a third person (Van Leeuwen, 2. 7. 3 ; 4. 17. 3 ; *Daniels* v. *Cooper* (1880) 1 E. D. C. 174), even though the sale was not *expressed to be* for cash (V. d. K. *Th.* 203), unless a sale in open market (op een openbare markt) has intervened (Van Leeuwen, 2. 7. 3), in which case the owner cannot recover his property unless he indemnifies the second purchaser (ibid.). But see next page, n. 4.

[5] Inst. 3. 23. 3 ; Gr. 3. 14. 34 ; V. d. K. *Th.* 639. The right to the

It is not an implied condition in the contract of sale that a vendor should make a good title to the thing sold.[1] A man can contract to sell res aliena no less than res sua. But he is bound to give vacua possessio to the purchaser. If he fails to do so, or if after delivery the purchaser is evicted by superior title, the vendor is liable in damages.[2]

Except in the case of negotiable instruments, a vendor cannot give to an innocent purchaser a better title than his own. It seems that, by the law of Holland, a purchaser who had no notice of his vendor's defect of title might sometimes retain the goods against the true owner, unless the latter paid him the price which he had given for them.[3] But it is doubtful whether any such right exists in the modern law.[4]

fruits and other accessories accompanies the risk. Gr. ibid. and 3. 15. 6; Van Leeuwen, 4. 17. 2.

[1] It is otherwise as regards land in British Guiana. 'He who sells as owner guarantees, if he does not stipulate to the contrary, that he can and will give the purchaser a valid transferable title.' *Black* v. *Hand-in-Hand Insurance Co.* (1892) 2 Brit. Gui. L. R. (N. S.) 53.

[2] In case of eviction the purchaser has the option to sue for damages or for the value of the thing sold, as on the day of sale. Gr. 3. 15. 4. The indemnity in case of eviction cannot be claimed, in the absence of agreement, by one who knowingly purchases a *res aliena*. V. d. K. *Th.* 641. If the vendor is *in mora* the purchaser may claim either the thing as it then is, together with profits and with compensation for depreciation, or alternatively damages for non-delivery. Gr. 3. 15. 6. There is no warranty against eviction if the vendor merely sold a thing or right for what it was worth (zoo goed ende quaet als 't is, zonder daer voor in te staen, 't welck men noemt met de voet stoten). Gr. 3. 14. 12. Even in this case the vendor must restore the price. Van Leeuwen, 4. 18. 2.

[3] Gr. 2. 3. 6; Van Leeuwen, 2. 7. 3–4; *Cens. For.* 1. 4. 19. 20; Voet, 6. 1. 7; V. d. K. *Th.* 184. The holder's right to retain against the owner only arose in case he could not recover from the actual vendor.

[4] See Nathan, *Common Law of South Africa*, vol. ii, p. 701; 2 Maasdorp, p. 62; Morice, *English and Roman-Dutch Law*, p. 127; *Van der Merwe* v. *Webb* (1883) 3 E. D. C. 97; *contra*, *Retief* v. *Hamerslach* (1884) 1 S. A. R. 171; the doubts are: (1) whether the rule at any time formed part of the common law of Holland; (2) whether, if it did, it has not in the Colonies been abrogated by disuse. Grotius mentions as an exception to the general rule a bona fide purchase in a free market (uitghenomen wanneer iemand iet ter goede trouwe heeft ghekocht op een vrije mart). Van Leeuwen (2. 7. 3) speaks of sale in a public market (op een openbare markt,; in publico emporio *Cens. For.* 1. 4. 19. 20). In the last-cited passage he makes the rule of merely local application. See Kotze's learned note (Van Leeuwen, vol. ii, p. 134).

The vendor is understood to warrant the purchaser against latent defects in the goods sold.[1] Where the latent defect is of such a character that, had he known it, the purchaser would not have entered into the contract, he may rescind the sale and recover the purchase-money by the actio redhibitoria. If the defect would not have had this consequence, but would have reduced the purchase price, the purchaser may recover the excess in the actio quanti minoris.[2]

In Holland, by general custom, the Count had a right of pre-emption over feuds; and, by local custom, relatives and others had a similar right over other immovable property. This right was called *naasting* or *jus retractus*.[3] It has no equivalent in the modern law, but a right of pre-emption may of course be the subject of express stipulation.[4]

3. **Exchange.** The rules applicable to the contract of sale are *mutatis mutandis* applicable to the contract of exchange. In the Roman Law, exchange was a real contract, i. e. no obligation arose until one party had delivered property to the other. In the modern law, an agreement to exchange is actionable per se. In the Roman Law the property exchanged must be res sua, not res aliena, and in this respect exchange differed from sale.[5] In the modern law, there seems no reason why, if you agree to give me the horse of Titius in exchange for my ox, you should not be bound by your agreement. 3. Exchange.

4. **Hire.**[6] In the Roman Law, the contract locatio 4. Hire.

[1] In the absence of contrary agreement (Van Leeuwen, 4. 18. 7), which would be another case of 'met den voet stooten'.

[2] Gr. 3. 15. 7; Van Leeuwen, 4. 18. 4; V. d. K. *Th.* 642. If the vendor knows of a defect and does not reveal it, he is liable to the purchaser for all damages arising from the defect; and if he has deceived the purchaser by representing the value of the property to be higher than was actually the case, the purchaser may bring an action for the return of the excess (Gr. loc. cit.). For laesio enormis see above, p. 203.

[3] Gr. lib. iii, cap. xvi; Van Leeuwen, lib. iv, cap. xix; Voet, 18. 3. 9 ff.; V. d. K. *Th.* 643 ff.

[4] 3 Maasdorp, p. 140.

[5] Voet, 19. 4. 2.

[6] Locatio conductio—Huir ende Verhuiring. Gr. lib. iii, cap. xix;

conductio has a very wide extension. It covers not only the hire of things (*locatio conductio rei*), but also the hire of services (*locatio conductio operarum*). Under the first head are included the hire of movables, such as a horse or carriage, and the hire of land, or what is nowadays commonly known as a lease. The term hire of services covers contracts between master and servant, and all other contracts of employment. In the modern law, it includes also contracts for professional services, which having originally been in theory, if not in fact, honorary in character, were referred by the Roman Law to the head not of hire, but of mandate.[1]

In the Roman-Dutch Law the rules relating to the hire of movables and the hire of services correspond closely with the Roman Law, and need not detain us.

Hire of land:

The contract of hire of land calls for separate treatment. The rules which we shall state with regard to it are in many respects applicable to the hire of movables as well.

in relation to the law of property;

In an earlier chapter we have considered the hire of land in relation to the law of property, and have inquired how far a lease creates a right in rem.[2]

as regards form.

As regards form, we have seen that sometimes, to produce this result, the lease must be effected by a judicial act or by a notarial deed duly registered, and that the law of some of the Colonies requires that leases for shorter periods should be evidenced by writing.[3]

Landlord's lien.

The landlord's lien has been mentioned in the chapter on Hypothec.[4]

Hire of land in relation to the law of contract.

In its more purely contractual aspect, the contract of hire of land (*lease*) involves the consideration of the rights and duties which, in the absence of contrary agreement, the law confers and imposes upon lessor and lessee; the rights of the one being the counterpart of the duties of the other.

Van Leeuwen, lib. iv, capp. xxi–xxii; Voet, lib. xix, tit. 2; V. d. L. 1. 15. 11.

[1] Girard, p. 571.

[2] *Supra*, pp. 141 ff.

[3] *Supra*, pp. 142–3.

[4] *Supra*, p. 167.

Duties of the lessor.

The duties of the lessor[1] are: (1) to deliver the subject of the lease to the lessee;[2] (2) after delivery to abstain from interfering with the lessee's occupation and enjoyment, and to guarantee him against justifiable interference by others;[3] (3) to keep the subject of the lease (if it admits of it) in such a state of repair that it may be conveniently used by the lessee;[4] (4) to see that the subject of the lease is free from such defects as will prevent its being properly and beneficially used for the purpose for which it was leased;[5] (5) to pay all taxes imposed upon the property.[6]

Duties of the lessee.

The duties of the lessee[7] are: (1) to pay the rent agreed in terms of the contract;[8] (2) to take proper care of the property leased—thus, not to injure or destroy it;[9] (3) not to use it for any other purpose than that for which it was leased;[10] (4) to retain the leased property until the lease expires;[11] (5) to restore it to the lessor in a proper state of repair on the expiry of the lease.[12]

When the lessee may claim remission of rent.

The lessee may in certain cases claim a reduction or remission of rent. These are: (1) if the lessor fails to deliver to the lessee the whole of the property agreed to be leased;[13] (2) if the lessee is evicted[14] or if his use or

[1] 3 Maasdorp, p. 203. [2] Voet, 19. 2. 26; V. d. L. 1. 15. 12.
[3] V. d. L. ibid.
[4] Gr. 3. 19. 12; Voet, 19. 2. 14; V. d. L. *ubi sup.* But there is no duty to rebuild in case of destruction, e. g. by fire. Windscheid, vol. ii, p. 677, § 400 (*in notis*).
[5] If the lessor neither knew nor ought to have known of the defect he will not be liable in damages, but the lessee may claim remission of rent. Voet, 19. 2. 14. In other cases he is liable in damages. Gr. 3. 19. 12; 3 Maasdorp, p. 209.
[6] Gr. 3. 19. 12; Van Leeuwen, 4. 21. 5; 3 Maasdorp, p. 210.
[7] 3 Maasdorp, p. 210.
[8] Voet, 19. 2. 22. Strictly speaking, where no rent is agreed there is no contract of letting and hiring, but the owner of the property is entitled to compensation for 'use and occupation'. *Murphy* v. *London & S. A. Exploration Co.* (1887) 5 S. C. 259; Pereira, p. 667.
[9] Gr. 3. 19. 11; Van Leeuwen, 4. 21. 4; Voet, 19. 2. 29. He may not (e. g.) convert pasture into arable land (V. d. K. *Th.* 680 (mistranslated by Lorenz)).
[10] Inst. 3. 24. 5; V. d. L. *ubi sup.*
[11] Gr. 3. 19. 11 (*ad fin.*).
[12] Voet, 19. 2. 32. For measure of damages see Voet, 19. 2. 22.
[13] Voet, 19. 2. 26. [14] Voet, ibid.

enjoyment is interfered with, either by the lessor or by some third person in the exercise of a legal right ;[1] (3) if the lessor fails to keep in repair ;[2] (4) if the lessor fails to see that the thing leased is free from defects ;[3] (5) if the property leased has been destroyed completely[4] or to such an extent as to be useless for the purpose for which it was let ; (6) if the lessee is disturbed in his possession by hostile attack or other just cause of fear ;[5] (7) if there has been an extraordinary failure of crops, due to tempest or the like, or to interference with cultivation, by fire, flood, or foe.[6]

Most of these grounds for remission rest upon the broad principle that the duties of lessee and lessor are reciprocal. If the latter fails in his duty the former need not pay his rent. But for the last two grounds of remission the lessor is no more to blame than the lessee. Accordingly in the Cape Province the General Law Amendment Act No. 8 of 1879 provides (sec. 7) that the rent accruing under a lease shall not be incapable of being recovered on the ground that the property leased has through inundation, tempest, or such unavoidable misfortune produced nothing (or on the ground that the lessor himself has absolute need of the land).[7] By judicial interpretation the phrase ' unavoidable misfortune ' has been extended to acts of war.[8]

State of the law in the Cape Province.

[1] Voet (19. 2. 23) gives as an instance the case of the lessor selling the property before the lease has expired. But this would only hold at the present day in cases in which koop gaat voor huur (V. d. L. 1. 15. 12). Another case is—si non commodus sit praestitus rei usus—e. g. if a lessee's lights are wholly obscured by a neighbour ; but slight interferenee does not entitle the lessee to relief. Dig. 19. 2. 27 pr. ; Voet, 19. 2. 18. It may be necessary for the lessor to deprive the lessee of possession for the purpose of effecting repairs. The lessee while so out of possession pays no rent. Voet, 19. 2. 16. See below, p. 260, n. 7.

[2] Gr. 3. 19. 12 ; Voet, 19. 2. 23.

[3] Dig. 19. 2. 19. 1 ; Voet, 19. 2. 14.

[4] Voet, *ubi sup.*

[5] Such as ghosts—spectra in aedibus dominantia ; or if the house becomes ruinous or dangerous. Voet, *ubi sup.*

[6] Gr. 3. 19. 12 ; Van Leeuwen, 4. 40. 7 ; Voet, 19. 2. 24–5. May the lessor require the lessee to set off extraordinary gain in one year against extraordinary loss in another (sec. 24) ? What is extraordinary loss (sec. 25) ?

[7] See below, p. 260, n. 9.

[8] 3 Maasdorp, p. 213.

Compensation for fixtures.

A lessee is entitled to compensation for fixtures annexed with the lessor's consent, and for necessary improvements made even without consent, and also for ploughing, sowing, and seed corn.[1]

In the case of fixtures, the right to compensation is secured by a legal hypothec upon the land.[2] Fixtures may be disannexed and removed before the expiry of the

[1] In the Civil Law a lessee was entitled to compensation for necessary or useful improvements. In other cases he had merely the right to take away what he had annexed (unless the lessor were willing to pay compensation ?) Dig. 19. 2. 55. 1 and lex 19. 4; Windscheid, vol. ii, p. 679, § 400. For Holland the law is laid down in a Placaet van de Staten van Hollandt tegens de Pachters ende Bruyckers van de Landen, September 26, 1658 (2 G. P. B. 2515), re-enacted verbatim by Placaat of February 24, 1696, Art. 10, which allows the outgoing tenant after vacating the land compensation for (1) fixtures (*Getimmer*) annexed to the land with the owner's consent, (2) ploughing, sowing, and seed corn.

Art. 11 defines the compensation for fixtures as the value of the bare materials at the time of the assessment just as if they had then been removed from the land. Payment is secured by a tacit hypothec. Art. 12 provides that fixtures annexed without consent must be removed before the expiry of the term, otherwise to become the property of the landlord. This Placaat has been held to be in force in Cape Colony and to apply to urban as well as to rustic tenements (*De Beers Consolidated Mines* v. *London & S. A. Exploration Co.* (1893) 10. S. C. 359, affirmed in appeal to P. C. (1895) 12 S. C. 107). In Brit. Gui. the Placaat was applied in *Liquidator of the B. G. Ice Co.* v. *Birch* (1909) *Brit. Gui. Off. Gaz.*, vol. xxx, p. 3. It may be noted here that by the Roman-Dutch Law the bona fide (V. d. K. *Th.* 212) but not the mala fide possessor (V. d. K. *Th.* 214) is entitled to compensation for 'useful' expenses. The mala fide possessor is entitled to compensation for necessary expenses only (Gr. 2. 10. 8 *ad fin.*). For Ceylon Law see *General Ceylon Tea Estates* v. *Pulle* (1906) 9 N. L. R. 98, dissenting from *Tikiri Banda* v. *Gamagedera Banda* (1879) 3 S. C. C. 31. The Placaat is silent on the subject of necessary improvements, i.e. improvements necessary for the preservation or protection of the property leased. 'But there is ample authority for holding that compensation must be paid for such improvements made by a lessee in the same way as if such lessee had acted as *negotiorum gestor*' (*De Beers Consolidated Mines* v. *S. A. Exploration Co.* per de Villiers C. J. at p. 369). It seems that in this case compensation is due whether the improvements were made with or without the landlord's consent. On the other hand, there is no right of removal (ibid.).

As to the lessee's right of removal in general, the law seems to be that with the above exception all other improvements, whether annexed with consent or without consent, may be disannexed and removed before, but not after, the expiration of the lease (*De Beers* case, *ubi sup.* at p. 372).

[2] Which, however, does not give a right of retention. V. d. K. *Th.* 213.

lease.[1] If this has not been done, they vest in the owner of the land.

Compensation for trees planted by lessee.

The lessee is not entitled to compensation for trees planted by him, unless he can prove that he planted them at the lessor's instance (*last ende bevel*), and even in that case he is only entitled to recover the initial cost of planting.[2] Whether the lessee may remove such trees during the continuance of the lease is uncertain.[3]

Assignment and sub-lease.

The interests of the lessor and lessee respectively are assignable by act of party.[4] The effect of assignment is to substitute the assignee (*cessionary*) in the place of the original lessor or lessee, who thereupon ceases to be bound or entitled under the contract.[5] A sub-lease has no such

[1] Dig. 19. 2. 19. 4; Voet, 19. 2. 14; V. d. K. *Th.* 213. See next note.

[2] Placaat of September 26, 1658, Art. 13; *Oosthuizen* v. *Estate of Oosthuizen* [1903] T. S. at pp. 692–3. The question of compensation for improvements goes beyond the case of the lessee and arises as regards all possessors whether bona fide or mala fide. Grotius (2. 10. 8) lays down the principle that a bona fide possessor is entitled to compensation for useful and of course for necessary improvements (and even for voluptuary improvements unless the land-owner prefers to allow their removal); but a mala fide possessor only for necessary expenses. This is the view of Van der Keessel also (*Th.* 212–4). Other authorities, however—as Groenewegen (*de leg. abr. ad* Inst. 2. 1. 30); Van Leeuwen (*Cens. For.* 1. 2. 11. 7 and 8); Schorer and Voet (6. 1. 36 (*ad fin.*)) hold that in the modern law the mala fide possessor no less than the bona fide possessor is entitled to compensation for impensae utiles. The former view was declared by the Supreme Court of Ceylon to be in conformity with the usage of that Colony (*General Ceylon Tea Estates Co.* v. *Pulle* (1906) 9 N. L. R. 98, dissenting from the dicta of Berwick J. in *Tikiri Banda* v. *Gamagedera Banda* (1879) 3. S. C. C. 31). The more liberal view has been asserted at the Cape (*Bellingham* v. *Bloometje* (1874) Buch. 36; *De Beers* case, *ubi sup.* at p. 257, n. 1). The right to compensation, when it exists, may in the modern law be enforced not only by exception, as in the Roman Law, but also by action. Voet, 5. 3. 23 (*ad fin.*). Groen. *de leg. abr. ubi sup.*

[3] 3 Maasdorp, p. 229. *De Beers Consolidated Mines* v. *The London & S. A. Exploration Co.* (1893) 10 S. C. 359 at pp. 369, 373. But see *Houghton Estate* v. *McHattie & Barrat* (1894) 1 Off. Rep. 92 on p. 102. By Art. 14 of the Placaat, fruit trees and timber trees (vruchtbare Boomen ofte opgaende Hout) are not to be lopped or cut down without the landlord's written consent. Van der Keessel says in general terms (*Th.* 215): Plantatae in fundo conducto arbores solo cedunt, nec earum pretium dominus qui plantari non jussit restituit.

[4] If the lessor assigns, the lessee must pay the rent to the assignee even though he may have paid the lessor in advance. Voet, 19. 2. 19.

[5] *Reeders & Wepener* v. *Jo'burg Town Council* [1907] T. S. at p. 654.

effect. It is a contract whereby the original lessee lets the property to a third party for the whole or for a part of the unexpired term of the original lease. As between lessee and sub-lessee there is an assignment of the lessee's rights of use and enjoyment; but the lessee does not cease to be liable to the lessor, nor does the sub-lessee become liable to or acquire any rights against the lessor. As between lessor and sub-lessee there is no privity of contract.[1] The right to assign or sublet may be restricted by covenant, but in the absence of such agreement the lessee of a praedium urbanum is free to assign or sublet without the consent of the lessor. Whether the lessee of a praedium rusticum may do the same has long been a vexed question. The Courts of Cape Colony have held consent to be necessary.[2] The Courts of the Transvaal have held it to be unnecessary.[3]

Is the consent of the lessor necessary in case of assignment or sub-lease?

[1] Voet, 19. 2. 21; *Green* v. *Griffiths* (1886) 4 S. C. 351.

[2] *De Vries* v. *Alexander* (1880) Foord 43; *Friedlander* v. *Croxford* (1867) 5 S. 395. The law is the same (*semble*) in O. F. S. (*Cullinan* v. *Pistorius* [1903] O. R. C. 33); and in Brit. Gui. *Trotman* v. *de Souza* (1906) *Off. Gaz.* vol. xxiv, p. 412.

[3] *Eckhardt* v. *Nolte* (1885) 2 S. A. R. 48. Grotius (3. 19. 10) says in general terms that a hirer may let the subject of the hire to another person in the absence of agreement to the contrary, but in the case of houses, he adds, this is usually forbidden by the *keuren* of the towns to be done without the landlord's consent. Voet (19. 2. 5), on the other hand, says that consent is necessary for the sub-location of lands, citing as authority the edict of Charles V of January 22, 1515 (1 G. P. B. 363), and Pol. Ord. of April 1, 1580, Art. 30 (1 G. P. B. 337). In the case of houses, he says, the landlord must be offered the opportunity of taking the house himself. Van der Keessel (*Th.* 674) says that a sub-location is valid *ex jure communi*, but not of lands without the written consent of the landlord, and bases this last proposition on the Placaat of September 26, 1658 (2 G. P. B. 2515), re-enacted by Placaat of February 24, 1696 (4 G. P. B. 465). Van Leeuwen (4. 21. 4 and *Cens. For.* 1. 4. 22. 9) agrees with Grotius. It seems doubtful whether the enactments cited by Voet and Van der Keessel have the effect which they attribute to them. The conflict of opinions amongst the jurists is reflected in the decisions of the South African Courts; and besides the question of the interpretation of the Placaats there is the further doubt whether they form part of the law of South Africa. See on the one side, *De Vries* v. *Alexander* (*ubi sup.*); on the other, *Eckhardt* v. *Nolte* (*ubi sup.*). See also Kotzé, Van Leeuwen, vol. ii, p. 158.

There is a somewhat ill-defined rule that a lessor may object to a sub-location which he deems to be prejudicial to his interest, e. g. if the sub-lessee is likely to use the premises in a way unsatisfactory to him. Voet, 19. 2. 5: Si conductor secundus ejus conditionis sit ut

How the contract of hire is determined.

The contract of letting and hiring is determined: (1) by expiration of the term fixed or implied for its duration ;[1] but in the case of a lease at will by a declaration of intention by, or by the death of, either party ;[2] (2) by the determination of the lessor's interest,[3] e. g., if he is merely a usufructuary[4] or fiduciary ; (3) by the insolvency of the lessor[5] or of the lessee ; (4) by destruction of the subject-matter ;[6] (5) by merger of the titles of lessor and lessee in one person ;[6] (6) by mutual agreement ; (7) by renunciation by either party for just cause. A just cause exists if the conduct of either party amounts to a repudiation by him of his duties under the contract. Such would be an entire failure to keep in repair by the party liable for repairs,[7] or on the part of the lessee acts of waste,[8] or a contumacious refusal of rent.[9] It is safer, however, instead of leaving the law to determine whether a cause of forfeiture has occurred, to provide for the event by express agreement.[10] But in no case may the lessor

magis utendo nociturus sit rebus conductis quam primus aut aliis usibus rem locatam destinaturus. See *Rolfes, Nebel & Co.* v. *Zweigenhaft* [1903] T. S. 185. But why cannot the lessor, if he apprehends anything of the kind, protect himself by express stipulation ? Consult on the whole subject Wille, *Landlord and Tenant in South Africa*, chap. vii, *Subletting and Assignment*; Moriee, *English and Roman-Dutch Law*, p. 172.

[1] V. d. L. *ubi sup.*

[2] Voet, 19. 2. 9.

[3] In which case, however, the lessee must have a reasonable time to turn round. He must not be bundled out ' velut Jovis ignibus ictus '. Voet, 19. 2. 18.

[4] Voet, 19. 2. 17.

[5] V. d. K. *Th.* 676: Conductore vel etiam locatore foro cedente locatio post modicam dilationem eo tempore quo solent cives migrare exspirat, quod varie in diversis locis definitum est.

[6] V. d. L. *ubi sup.*

[7] Gr. 3. 19. 12 (lessor). If it is necessary to rebuild or repair the house the lessor may resume and retain possession for the purpose. Meanwhile the lessee pays no rent. Van Leeuwen, 4. 21. 7 and Decker, ad loc.

[8] Voet, 19. 2. 16 ; i. e. of a serious character. Voet, 19. 2. 18.

[9] Grotius (3. 19. 11) and Decker *ad* Van Leeuwen, *ubi sup.*, say, 'if the rent is more than two years in arrear'. Cf. Dig. 19. 2. 54. 7 ; and lex 56. In the Roman and Dutch Law a lessor might also resume the property in case of pressing need, if he showed that it was necessary for his own use. Cod. 4. 65. 3 ; Gr. 3. 19. 11 (*ad fin.*) ; Van Leeuwen, 4. 21. 7 ; Voet, 19. 2. 16. Van der Keessel (*Th.* 675) doubts. In any event this is no longer law in Cape Colony since the General Law Amendment Act of 1879.

[10] See, e. g., Voet, 19. 2. 5 (clause providing for forfeiture in the event of sub-letting without leave).

(or any other person who wishes to eject the lessee) take the matter into his own hands. He must apply to the Court to declare the lease forfeited, and to replace him in possession ;[1] and the Court will, in a fit case, relieve against forfeiture in the exercise of its equitable jurisdiction.

5. Mandate or agency.

5. **Mandate or Agency.**[2] The Roman-Dutch writers reflect the inadequate treatment of agency met with in the Roman Law and typified in the fact that the word 'mandate' points principally to the relation between principal and agent, i. e. between employer and employed, while the word 'agency' points rather to the juristic relation established by the agent between his principal and third parties.[3] In this state of things, the English law of agency has been substantially adopted and followed in all the Roman-Dutch Colonies.[4] Such differences as exist between the two systems belong to the theory of contract in general or are matter of detail, upon which we have not space to enter.

6. Partnership.

6. **Partnership.**[5] In Ceylon the English law of Partnership for the time being in force has been introduced by statute.[6] In South Africa and in British Guiana the law of partnership depends partly on statute, partly on

[1] Voet, 19. 2. 18.

[2] Mandatum—Lastgeving. Gr. lib. iii, cap. xii; Van Leeuwen, lib. iv, cap. xxvi; Voet, lib. xvii, tit. 1; V. d. L. 1. 15. 14.

[3] The Roman-Dutch Law, however, was tending to or had reached the same result as the English Law. See V. d. K. *Th.* 478 and 572.

[4] In Ceylon Ord. No. 22 of 1866 introduces the English law of principals and agents for the time being in force.

[5] Societas—Societeit—Compagnieschap—Maetschap—Vennootschap. Gr. lib. iii, cap. xxi; Van Leeuwen, lib. iv, cap. xxiii; Voet, lib. xvii, tit. 2; V. d. K. *Th.* 698 ff.; V. d. L. 4. 1. 11.

[6] Ord. No. 22 of 1866. By Ord. No. 7 of 1840, sec. 21: 'No promise, contract, bargain or agreement, unless it be in writing and signed by the party making the same or by some person thereunto lawfully authorized, shall be of force or avail in law:—(4) for establishing a partnership where the capital exceeds one hundred pounds: Provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parole testimony concerning transactions by, or the settlement of any account between, partners.'

the Roman-Dutch common law.[1] But it is very far from being the case that the partnership law of these Colonies differs entirely from the partnership law of England. 'Developed from a common source, viz. the mercantile custom of Europe, the two systems exhibit a great similarity, together with some notable divergences. Whatever theoretical differences may be found to exist between the Roman-Dutch and English systems, the South African Courts have been guided and will continue to be guided by the analogies of English Law. This is natural. The commercial conditions of to-day are not what they were one or two centuries back. The English rules have stood the test of practice, while much of the Roman-Dutch Law on this subject is purely theoretical. The channel of reception for the English Law is custom, which in the matter of partnership is much the same in South Africa as in England.'[2]

Comparison of English and Roman-Dutch partnership law.

Kinds of partnership in South Africa:

The law of South Africa recognizes various kinds of partnerships, in addition to joint-stock companies, which in South Africa, as in Ceylon and British Guiana, are regulated by special statutes and which do not fall within the scope of this chapter. Partnerships proper are either ordinary or extraordinary. The law of ordinary partnerships corresponds in most particulars with the law of England. The principal difference consists in the fact that in English Law the liability of partners for partnership debts is joint, while in Roman-Dutch Law it is joint and several.[3] But in South Africa, as in England, actions arising out of partnership transactions must be directed

(*a*) Ordinary.

[1] See *The South African Law of Partnership*, by Manfred Nathan, M.A., LL.D. (Johannesburg, 1913), which summarizes the law in a convenient form.

[2] *The Commercial Laws of the World* (*South Africa*), vol. xv, pp. 84–5. In an early Ceylon case, *Boyd* v. *Stables* (1821) Ramanathan, 1820–33, at p. 21, Giffard C.J. observed upon the affinity of the commercial law of England with that of Holland, and added 'We look upon every decision of the Courts of Westminster upon commercial subjects as a commentary upon the Dutch Commercial Law, the law which we are bound to observe.'

[3] V. d. K. *Th.* 703. So in Brit. Gui. by Ord. No. 20 of 1900, sec. 11.

against the firm, not against individual partners, and all the partners must, as a rule, be joined as defendants.[1]

(*b*) Extraordinary.

Extraordinary partnerships are either: (*a*) anonymous partnerships; or (*b*) partnerships *en commandite*;[2] or (*c*) (in Cape Colony) statutory limited partnerships created by Act 24 of 1861. The common element in all three cases is that certain non-active partners incur a limited liability, or no liability at all, to creditors of the firm. In the last two cases, but not in the first, the liability to active co-partners is limited to the amount agreed upon. In the first case it is unlimited.[3] But a dormant partner may not, any more than a declared partner, compete with the creditors of the firm in respect of debts due to him from the other partners.[4]

7, 8. Loan for consumption —Loan for use.

7 & 8. **Loan for Consumption**[5]**—Loan for Use.**[6] All this is pure Roman Law. Some matters connected with money-loans and the permitted rate of interest have been considered above in the chapter on Operation of Contract.[7]

9. Deposit.

9. **Deposit.**[8] This too is essentially Roman Law. But

[1] *Commercial Laws of the World*, vol. xv, *ubi sup.*; Morice, 2nd ed., p. 199.

[2] V. d. K. *Th.* 704.

[3] Morice, p. 193.

[4] *Watermeyer* v. *Kerde's Trustees* (1834) 3 Menz. 424; *Sellar Bros.* v. *Clark* (1893) 10 S. C. 168.

[5] Mutuum—Verbruickleening. Gr. lib. iii, cap. x; Van Leeuwen, lib. iv, cap. v; V. d. L. 1. 15. 2.

[6] Commodatum—Bruickleening. Gr. lib. iii, cap. ix; Van Leeuwen, lib. iv, cap. x; Voet, lib. xiii, tit. 6; V. d. L. 1. 15. 4.

[7] *Supra*, pp. 223–4. The S.C. Macedonianum of the reign of Vespasian forbade loans of money to filiifamilias. It did not avoid the loan *ipso jure*, but might be pleaded by way of exception (Girard, p. 519). The f.f. might renounce the benefit of the S. C. after full age. It has been doubted whether, and how far, the S. C. has place in the modern law. It is, of course, not applicable to a f.f. of full age. But in case of minority there is a general inclination to hold that it may sometimes be usefully pleaded. Groenewegen, *de leg. abr. ad* Cod. lib. iv, tit. 28, says: Quum ne hodie quidem filii minorennes sui juris sint, in iis S. C. etiam moribus nostris obtinere nullus dubito. See also Voet, 14. 6. 5 (*ad fin.*); and *Compendium*, 14. 6. 5; *Cens. For.* 1. 4. 3. 12; V. d. K. *Th.* 475.

[8] Depositum—Bewaergeving. Gr. lib. iii, cap. vii; Van Leeuwen, lib. iv, cap. ii; V. d. L. 1. 15. 5. Depositum sequestre and consignation (*supra*, p. 235) are varieties of deposit. Gr. 3. 7. 12; V. d. L. loc. cit.

the double penalty in case of depositum miserabile is no longer in use.[1] A so-called deposit with a bank is not deposit but loan.[2] A depositary sued for the return of the thing deposited may not avail himself of set-off (*compensatio*) or right of retention.[3]

10. Pledge.

10. **Pledge.**[4] The contract of pledge, which defines the personal relations between pledgor and pledgee, is governed by the rules of Roman Law. The real rights created by pledge have been discussed in Book II.[5]

11. Suretyship or guarantee.

11. **Suretyship or Guarantee.**[6] A contract of suretyship is a contract whereby one person agrees to be answerable for the debt[7] or delict[8] of another. The principal debt may be civil or natural, but must not be illegal.[9] Any male person capable of contracting may conclude a contract of suretyship.[10] But by the well-known enactments Senatus-Consultum Velleianum[11] and Authentica si qua mulier[12] women are prohibited from binding themselves as sureties, and, in particular, married women are prohibited from binding themselves as sureties for loans of money to their husbands.[13] Why the second of these enactments was passed, while the first, which was wide enough to cover all cases falling under it, was still in force, is unexplained.[14] The effect of these laws is so far-reaching

Special rules of law as to women sureties.

[1] Voet, 16. 3. 11; Groen. *de leg. abr. ad* Dig. 16. 3. 1.

[2] Dig. 42. 5. 24. 2: Aliud est enim credere, aliud deponere. Cf. Voet, 20. 4. 14; 46. 2. 5. These passages speak expressly of a deposit with a bank which bears interest. But (*semble*) in the modern law if the money is to be used by the bank the contract is in every case a mere loan. 3 Maasdorp, p. 104.

[3] Voet, 16. 3. 9.

[4] Pignus—Pandgeving ofte Verzetting. Gr. lib. iii, cap. viii; Van Leeuwen, lib. iv, cap. xii; Voet, lib. xiii, tit. 7; V. d. L. 1. 15. 7.

[5] *Supra*, pp. 162 ff.

[6] Fidejussio—Borgtogt. Gr. lib. iii, cap. iii; Van Leeuwen, lib. iv cap. iv; Voet, lib. xlvi, tit. 1.; V. d. L. 1. 14. 10.

[7] Gr. ꝑ. 3. 12.

[8] Gr. 3. 3. 21; Voet, 46. 1. 7.

[9] Gr. 3. 3. 22; Voet, 46. 1. 10–11.

[10] Even minors with the authority of their guardians. Voet, 46. 1. 5.

[11] Passed in the consulship of Marcus Silanus and Velleius Tutor (A.D. 46). Dig. 16. 1. 2 pr. and 1; Van Leeuwen, 4. 4. 2.

[12] Nov. 134 *c.* 8 (A.D. 556). [13] Van Leeuwen, *ubi sup.*

[14] In *Oak* v. *Lumsden* (1884) 2 S. C. at p. 150 Sir Henry de Villiers C. J. said: 'I have never found any satisfactory explanation of the passing

that money paid by a woman under a contract of suretyship may be recovered back if she was ignorant of the benefit conferred by them,[1] and even sub-sureties, i. e. persons who have bound themselves as sureties for the female surety may plead them as a defence.[2] There are, however, some exceptions to the rule of non-liability. These are principally the following:—(1) if the woman has acted fraudulently, and in particular if she has professed herself to be a co-principal debtor;[3] (2) if she has benefited by the principal contract,[4] or if she has gone surety for her creditor;[5] (3) if, after the lapse of two years, she has confirmed her suretyship by a new agreement;[6] (4) if, being a public trader, she has become surety in relation to her business;[7] (5) if expressly and with full knowledge of what she was doing, she has renounced the benefits of the Senatus-Consultum and of the Authentica.[8] A woman who has renounced the benefit of the first will not be held by implication to have renounced the benefit of the second. There must be a separate and distinct renunciation of each, if a married woman is to be held liable for her husband's debts.[9]

Cases exeepted from their operation.

By the Roman-Dutch common law a contract of suretyship need not be in writing.[10] But in Ceylon[11] no contract for charging any person with the debt, default, or miscarriage of another shall be of force or avail in law unless

In Ceylon contract of suretyship must

of the new law known as the Authentica si qua mulier, whereby married women are specially protected against their contracts of suretyship for their husbands, seeing that they were already protected under the general terms of the senatus consultum.'

[1] Voet, 16. 1. 12. [2] Voet, 16. 1. 2.

[3] Gr. 3. 3. 15; Voet, 16. 1. 11.

[4] E. g. if she has received consideration for becoming surety. Voet, *ubi sup.* and 46. 1. 32. [5] Gr. 3. 3. 16. [6] Voet, *ubi sup.*

[7] Gr. 3. 3. 17; Voet, *ubi sup.* This does not apply when she has gone surety for her husband.

[8] Gr. 3. 3. 18; Voet, 16. 1. 9; V. d. L. *ubi sup.* It is an unsettled question whether the renunciation must be notarially executed. See V. d. K. *Th.* 496 and translator's note, ad loc.; *Mackellar* v. *Bond* (1884) 9 App. Ca. 715 (in appeal from Natal).

[9] Gr. 3. 3. 19; Voet, 16. 1. 10.

[10] V. d. K. *Th.* 501. [11] Ord. No. 7 of 1840, sec. 21.

be in writing.

it be in writing and signed by the party making the same.

The benefits available to sureties:

In the Roman Law up to the time of Justinian a surety might be sued before the principal debtor. Indeed, it was common practice to proceed against the surety first, for if the principal debtor were sued first, the surety's liability was extinguished by litis contestatio.[1] Justinian, however, required the creditor to excuss the principal before pursuing the surety.[2] If he failed to do so, in case the principal debtor was solvent and within the jurisdiction, the surety might plead in his defence the beneficium ordinis seu excussionis.[3] In the Dutch, but not in the Roman Law, the surety has the further advantage that he may require the creditor to realize any real security which he may have for his debt before seeking to render the surety liable upon his personal obligation.[4] In the Dutch Law, as in the Roman, sureties may also invoke the beneficium divisionis[5] and the beneficium cedendarum actionum.[6] They may, however, renounce them.[7]

beneficium ordinis seu excussionis;

beneficium divisionis;

beneficium cedendarum actionum.

12. **Carriage by land and by water.** In the Roman Law the section of the praetor's edict—de nautis, stabu-

12. Carriage by

[1] Girard, pp. 755–6.

[2] Nov. 4, cap. i (A. D. 535); Van Leeuwen, 4. 4. 7.

[3] Gr. 3. 3. 27; Voet, 46. 1. 14.

[4] Gr. 3. 3. 32; V. d. K. *Th.* 507 and *Dictat.* ad loc. where he says: In Hollandia diu consuetudine receptum et petentibus Hollandiae Ordinibus etiam a Philippo II, 21 Feb., 1564, speciali lege confirmatum est, ut fidejussores ejus debiti pro quo pignus vel hypotheca obligata est non prius in judicio conveniantur aut excutiantur quam excussa fuerit hypotheca et sic apparuerit eam ad solvendum non sufficere licet hypotheca ista pervenerit ad tertium possessorem (1 G. P. B. 387). The last clause only applies to a special hypothec of immoveables and perhaps also to a general hypothec of immoveables when the pledge has passed into the hands of a third party *titulo lucrativo*. It has no application to moveables (V. d. K. *Dictat.*, loc. cit.). In Roman Law the rule was just the other way; viz. the creditor must excuss the surety personally before pursuing the hypothecated goods of the debtor in the hands of third parties. Nov. 4, cap. ii (A. D. 535).

[5] Gr. 3. 3. 28; Voet, 46. 1. 21; V. d. L. 1. 14. 10.

[6] Gr. 3. 3. 31; Voet, 46. 1. 27; V. d. K. *Th.* 506.

[7] Gr. 3. 3. 29; V. d. K. *Th.* 502; and, in some places, says Van der Keessel, are taken to have renounced them, if the sureties bind themselves 'one for all', or 'each severally', or 'each as principal debtor.' Cf. Gr. loc. cit. For del credere contracts see V. d. K. *Th.* 504.

lariis et cauponibus—made carriers by water, along with livery-keepers and inn-keepers, the insurers of goods entrusted to them.[1] Except in case of damnum fatale or of vis major their liability was absolute.[2] The language of the edict does not in terms cover the case of carriers by land, and it has been doubted whether in the modern law they must be taken to be included within its scope. An affirmative answer has been given in the Cape Province.[3] If the edict does not apply to them, they are liable as locatores operarum to show the highest diligence, but will not be answerable in damages except on proof of culpa.[4]

land and by water.

PART II

OBLIGATIONS ARISING FROM DELICT

THE second principal class of obligations is those which arise from delicts. A delict is a wrongful act which grounds an action in favour of the person injured. In this branch of law, as in others, the jus civile was received in Holland. In the pages of Grotius and occasionally of Voet we detect indications of a more archaic order of ideas derived from Teutonic sources. But the Roman Law drove the native law out of the field. In the text-book writers

The law of delicts is principally Roman in origin.

[1] Dig. 4. 9. 1 pr.: Ait praetor Nautae caupones stabularii quod cujusque salvum fore receperint nisi restituent in eos judicium dabo. Cf. Van Leeuwen, 4. 2. 10.

[2] Dig. 4. 9. 3. 1: Hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpa ejus res periit vel damnum datum est nisi si quid damno fatali contingit. Inde Labeo scribit siquid naufragio aut per vim piratarum perierit non esse iniquum exceptionem ei dari. Idem erit dicendum et si in stabulo aut in caupona vis major contigerit.

[3] *Tregidga & Co.* v. *Sivewright* N. O. (1897) 14 S. C. 86 per de Villiers C. J. and Buchanan J., dissentiente Maasdorp J.

[4] In Ceylon by Ord. No. 22 of 1866 the law of England for the time being is made applicable to all questions relating to carriers by land. In Brit. Gui. on the other hand by Ord. No. 6 of 1864 the law of England is applied to the carriage of passengers and goods by ships.

and probably also in the practice of the Courts of the eighteenth century the Roman-Dutch law of delicts was substantially the same as the Roman Law expounded in the Digest and the Institutes of Justinian. Such a complete break in historical continuity is easily regretted. It is enough in this place to record it as a fact.

The Roman theory of delict.

The Roman law of delicts, derived from the XII Tables and from a still more primitive customary law, came in time, thanks to the directing influence of jurists and of praetors, to express a very complete theory of civil liability. A few simple principles covered the whole ground, and, adopted in modern codes, have been found sufficient to provide for the complexities of modern life. A man must see that he does not wilfully invade another's right, or carelessly cause him pecuniary loss. If he does either of these things he is answerable in damages. There may also be cases, resting upon a more archaic principle, in which he is answerable absolutely for damage which he has caused, though without intention and without negligence. Such in a few words is the Roman theory of delictual liability.

Dolus and culpa.

Exceptional cases of absolute liability.

Defective terminology.

In one respect the Roman law of delicts has suffered from the simplicity of its principles, namely, in its vocabulary. It is convenient to distinguish by different names the various groups of circumstances which give rise to liability. The English Law—poor in principle, rich in detail—does so. It distinguishes various heads of liability under the names of assault, trespass, libel, slander, malicious prosecution, and the rest. The Roman Law has no such distinctions or corresponding terminology.

Influence of the English law of torts in the colonies.

In the Roman-Dutch Colonies the English law of torts has imposed itself upon the Roman-Dutch law of delict much as the Roman law of delict imposed itself upon the native law of Holland. The adoption of English nomenclature has accompanied the adoption of much of the substance of the English Law. The process has gone further in some colonies than in others, but in all the influence of English Law has been very great. South Africa, here as elsewhere, is most retentive of the Roman-

Dutch common law. In Ceylon and in British Guiana the reception of the English Law has gone further.

Difficulty of a systematic presentation.

The course of events briefly described in the foregoing paragraphs makes it a matter of some difficulty to apply to the law of delicts the method of treatment applied in this volume to other departments of the Roman-Dutch Law. In writing of the law of persons, of things, and of contract we have tried to build upon the foundations laid in the seventeenth century by Grotius, Van Leeuwen, and Voet and in the eighteenth and early nineteenth centuries by Bynkershoek, Van der Keessel, and Van der Linden. For the law of delicts the foundations are wanting or must be sought in the pure Roman Law (which we suppose to be known to our readers), while the superstructure, as observed above, is largely English in character, and the complex whole varies in the various colonies. In this chapter we shall state very shortly the general principles of the Roman-Dutch law of delicts so far as it is at all applicable to the conditions of modern life, and indicate how far these principles have been recognized as still in force in the Roman-Dutch Colonies. As a justification for treating the subject of delict rather in principle than in detail we may point to the example of modern codes.[1]

Method adopted.

The general meaning of injuria.

Any wrongful act or omission which grounds an action, i.e. any act or omission which is wrongful in law, is known in Roman Law as an injury. 'Generaliter injuria dicitur omne quod non jure fit.'[2] An injury may or may not cause pecuniary loss (*damnum*), but every injury gives rise to an action for pecuniary compensation (*id quod interest —schade en interessen—damages*). In some cases there is no injury or right of action unless pecuniary loss is proved; in other cases there is an injury and right of

[1] The law of delicts occupies in the French Code five articles (1382–6), in the Dutch sixteen (1401–16), in the German thirty-one (823–53); in the Swiss *Code des Obligations* twenty-one (41–61). In the *Digest of English Civil Law* (ed. E. Jenks) it has been found possible to compress the law of torts into about three hundred articles.

[2] Inst. 4. 4 pr.; Dig. 47. 10. 1 pr. (Ulpian): Omne enim quod non jure fit injuria fieri dicitur.

Injuria sine damno. Damnum sine injuria.

action, whether pecuniary loss is proved or no (*injuria sine damno*); in others, again, pecuniary loss may be proved, and yet no action lie (*damnum sine injuria*), because the law does not condemn either the act in itself or the act together with the consequent damage as constituting a legal wrong.[1]

Classification of delicts: in Roman Law;

The classification of delicts is a matter of some difficulty. In the Roman Law the delicts proper were four in number: viz. (1) furtum; (2) rapina; (3) damnum injuria datum; (4) injuria (specifically so-called).[2] Since rapina was merely an aggravated form of furtum, the principal heads of delict may be reduced to three. This classification, however, is by no means exhaustive. There were other grounds of liability such as dolus, and there were certain quasi-delicts which differed from true delicts in little but in name.

in Grotius, Van Leeuwen,

In writing of delicts proper Grotius and Van Leeuwen adopt a different arrangement.[3] In their system delict (*misdaad*) is directed: (1) against life; (2) against the person; (3) against freedom (*vryheid*); (4) against honour; and (5) against property. Both these writers treat the subjects of wrongs principally from the point of view of crime. Van der Linden [4] follows their lead except that he includes 'wrongs against freedom' under the head of wrongs against honour, thus making four classes in place of five.

and Van der Linden.

Classification adopted in this chapter.

Neither the Roman nor the Dutch arrangement is completely satisfactory. In this chapter we shall speak of:

1. Wrongs against the person;
2. Wrongs against property;
3. Wrongs against reputation;
4. Wrongs against domestic relations;
5. Wrongs not falling under any of the above-mentioned heads.

[1] Thus in *Greyvensteyn* v. *Hattingh* [1911] A. C. 355 it was held that no action lay against an adjoining owner, who hindered locusts from settling on his own land with the result that they settled on the land of the Appellant.

[2] Dig. *ubi sup.*: Specialiter autem injuria dicitur contumelia.

[3] Gr. 3. 33. 1; Van Leeuwen, 4. 32. 9.

[4] V. d. L. 1. 16. 1.

General theory of delicts in Roman-Dutch Law.

But first a few words must be said about the theory of delictual liability in general, which is essentially the same as in Roman Law.

In the modern law the Roman terminology serves not as an enumeration of particular delicts, but as a general touchstone of liability. The underlying principles of injuria and damnum injuria datum are applicable to all kinds of delict. To-day all delictual liabilities (with few exceptions) are referable to one or other of these two heads.[1] I am answerable for wilful aggression on another's right (*injuria*). I am answerable for careless aggression on another's right which causes pecuniary loss (*damnum injuria datum*).[2] In principle it would seem that any act which, if wilful, would produce liability under the first head, should equally, if careless and attended by loss, produce liability under the second. But this cannot safely be affirmed of the anglicized systems of Roman-Dutch Law which exist to-day. Thus an action lies for a false statement upon which I act to my pecuniary detriment, but not, probably, for a careless misstatement made with no intention to deceive.

An act or omission, wilful or careless, will not support an action unless the act or omission was the breach of a duty owed to the plaintiff.[3]

Apart from the general theory of responsibility there are, as we shall see below, a few cases of absolute liability.

Specific delicts.

1. Wrongs against

1. **Wrongs against the Person.** To this head may be referred the wrongs which in English Law are known as assault, battery, false imprisonment, malicious arrest.

[1] 'With us all wrongs are either damna injuria data or injuriae proper.' 4 Maasdorp, p. 5.

[2] Some decisions in South Africa have gone far, and it is respectfully submitted too far, in the direction of laying down a general principle that where *contumelia* is absent no action lies without proof of pecuniary loss. See e. g. *Edwards* v. *Hyde* [1903] T. S. 381. But where the ground of action is defendant's negligence the proposition is unquestionable.

[3] Thus other persons do not always owe me a duty to abstain from the contravention of a public statute; but they do owe me a duty not to cause me special damage by such contravention. 4 Maasdorp, p. 4.

the person.

If the wrongful act is an intentional aggression the plaintiff recovers damages measured in the discretion of the Court by the nature of the outrage.[1] If the act is unintentional but careless the plaintiff is entitled to compensation for actual damage, if proved. In this case the action is usually termed an action for negligence.[2]

In principle, then, there is no liability without dolus or culpa. But in an action for false imprisonment it will be no defence to plead that the defendant acted in good faith and without negligence.[3] This is a departure from principle due to the fact that this action, like the action for malicious arrest and the action for malicious prosecution (of which we shall speak hereafter), is derived from English Law and governed by English precedents.[4]

Action for seduction.

The action for seduction (*defloratie*) may be conveniently mentioned under the head of wrongs against the person. In Dutch Law a virgin who had been deflowered might bring an action to compel marriage or alternatively to obtain compensation for the loss of her maidenhood,[5] and if she were with child also for her lying-in expenses (*kraam-kosten*).[6] In the modern law the action lies for

[1] Gr. 3. 34. 2 ; Van Leeuwen, 4. 35. 9.

[2] The corresponding actions in Roman Law were the actio injuriarum, when the wrong was intentional (Voet, 47. 10. 7), and the utilis actio legis Aquiliae for damnum culpa datum (Voet, 9. 2. 11).

[3] Nathan, *Common Law of S. A.*, vol. iii, p. 1693 (sec. 1649).

[4] This, it is submitted, is the fact, though attempts have been made, as by Connor C.J. in *Cottam* v. *Speller* (1882) 3 Natal Law Reports at p. 133, to accommodate these actions to the principles of the Roman-Dutch Law. They are in fact an alien element in the modern system. See 'Malicious Prosecution in Roman-Dutch Law'. *S. A. L. J.* vol. xxix, p. 22.

[5] Voet, 48. 5. 3: 'aut ducere aut dotare'. The measure of damages is the additional amount of dos required to procure her a suitable marriage. Ibid. At common law the action did not lie if the woman knew that the man was married (but see V. d. K. *Th.* 801), or if she declined to marry him or could not lawfully marry him, or had married some one else. Voet, 48. 5. 4. But in South Africa the fact that the plaintiff is unwilling to marry the defendant has been held to be no longer available as a defence, the Marriage Order in Council, 1838, having abolished the action to compel marriage. *Seaville* v. *Colley* (1891) 9 S. C. 39 ; *Mulholland* v. *Smith* (1901) 10 H. C. G. 333.

[6] Gr. 3. 35. 8 ; also in case of the death of the child for the payment of the funeral expenses ; and for reasonable maintenance for the benefit of the child. V. d. L. 1. 16. 4. If the woman knew that the

damages only.[1] This action has no resemblance to the English action for seduction which a father can bring only for the pretended loss of his daughter's services.[2]

2. Wrongs against property.

2. **Wrongs against Property.** Any intentional invasion of another's right to own, to possess, or to detain is actionable.[3] Any person whose right is invaded may bring the action, whether entitled in possession or in expectancy.

The corresponding actions in English Law are conversion, detinue, trespass to land and to goods.

Damage to property falls under the same head.

In this case if the act which caused the damage was unintentional but negligent the action is usually termed an action for negligence.

In all these cases the character of the wrong and the nature of the remedy is largely determined by English Law.

The law of nuisance has been borrowed in substance from English Law.[4]

In regard to trespass to land the modern Roman-Dutch Law retains something of its original character. An action will not lie unless the trespass was injurious or caused damage.[5] A trespass is injurious when it is

man was married she may sue for lying-in expenses and maintenance. V. d. L. *ubi sup.*; Voet, 48. 5. 6.

[1] Nathan, *Common Law of S. A.*, vol. iii, p. 1678. Voet (48. 5. 5) says that the action is passively transmissible but not actively transmissible before litis contestatio. However, as the last part of this proposition is based upon the argument that the death of the woman deprives the man of the alternative of offering marriage, it may be that it does not hold good at the present day. As to the term of prescription in the action for seduction see *Carelse* v. *Estate de Vries* (1906) 23 S. C., at p. 539, and 4 Maasdorp, p. 125.

[2] But the father may sue for lying-in expenses if he has defrayed them or made himself liable for them. *Webb* v. *Langai* (1885) 4 E. D. C. 68; 4 Maasdorp, p. 122.

[3] Gr. 3. 37. 5; Voet, 9. 2. 10.

[4] See for instance *Demerara Electric Co. Ltd.* v. *White* [1907] A. C. 330 (Brit. Gui.).

[5] 4 Maasdorp, p. 3. 'Where a person innocently and inadvertently comes on the land of another without any ulterior object no Court will award any compensation in damages unless some actual damage to the land be proved.' Ibid., p. 37—'Take the case of a man trespassing on another's land. If he does so inadvertently and innocently though he commits a tort, I can scarcely imagine that the Court would be justified in any circumstances in awarding even nominal damages against him.' *Edwards* v. *Hyde* [1903] T. S. at p. 387, per Solomon J.

committed in defiance of or as a denial of another's right or accompanied by circumstances of insult or contumely.

It may seem out of place to mention offences against life under the head of wrongs against property, but the action which the law gives to the relatives and dependants of a dead man is in fact referable to this title. Such persons if they have suffered pecuniary loss by the death may maintain an action for damages against the person by whom the death was intentionally or negligently caused.[1]

Wrongs against reputation.

3. **Wrongs against Reputation.** All the authorities agree that an action lies for written or spoken defamation. Grotius devotes a short chapter to *lastering* or *misdaed jegens eer* which he describes as an outrage upon 'the good opinion which others have of us'.[2] Van Leeuwen[3] in his corresponding chapter speaks of outrage upon a man's 'honour and good name'.[4] Both these writers evidently regard defamation as a species of injuria, which, as we read in the Digest, is a wrong directed against a man's person or affecting his dignity or reputation.[5] If this identification is correct the plaintiff in an action for defamation, as in other cases of injury, must make out the animus injuriandi as part of his case. This, however, is not the law, for if the language complained of is clearly defamatory in character, the intention to injure will be

The animus injuriandi.

[1] Gr. 3. 32. 16; 3. 33. 2; Van Leeuwen, 4. 34. 14; Voet, 9. 2. 11: Nec dubium quin ex usu hodierno latius illa agendi potestas extensa sit: in quantum ob hominem liberum culpa occisum uxori et liberis actio datur in id quod religioni judicantis aequum videbitur, habita ratione victus quem occisus uxori liberisque suis aut aliis propinquis ex operis potuisset ac solitus esset subministrare. See also, for a full discussion of this action, *Union Government* (*Minister of Railways and Harbours*) v. *Warneke* [1911] A. D. 657. For the law of Brit. Gui. see *Lunke* v. *Demerara Co., Ltd.* (1906), *Brit. Gui. Off. Gaz.*, vol. xxiv, p. 49; and *Burke* v. *Brit. Gui. Gold Mines, Ltd.* (1909), *Brit. Gui. Off. Gaz.*, vol. xxix, p. 677.

[2] Gr. 3. 36. 1 (het goed ghevoelen dat anderen van ons hebben).

[3] Lib. iv, cap. xxxvii.

[4] For defamation of the dead and consequent actions see Voet, 47. 10. 5.

[5] Dig. 47. 10. 1. 2: Omnemque injuriam aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere (Labeo cited by Ulpian).

presumed.[1] In short the injurious mind required by the modern Roman-Dutch Law of defamation amounts to little, if to anything, more than the implied malice of the English law of libel.[2] In other respects, too, such as in regard to the law of innuendo and of absolute and qualified privilege, the English Law is closely followed. But the Roman-Dutch Law departs from the English Law in two important particulars: (1) It makes no distinction between spoken and written defamation;[3] And (2) according to the more probable opinion the truth of a defamatory statement is no defence to an action for damages.[4]

Malicious prosecution.

Malicious prosecution is a kind of defamation and should be governed by the same rules. In Holland private prosecutions for crime were infrequent, and the books speak on this topic with uncertain voice. The writers of

[1] Voet, 47, 10. 20: Sin tales fuerint prolati sermones qui per se et propria significatione contumeliam inferunt, injuriandi animus adfuisse creditur, eique qui illa protulit probatio incumbit injuriae faciendae consilium defuisse. But in the modern law good intentions are no excuse for defamation, so that if the words are defamatory the presumption of malice is irrebuttable. So in the Ceylon case of *Appuhami* v. *Kirihami* (1895) 1 N. L. R. 83 defendants pleaded that the words complained of were spoken without malice and in the bona fide belief that they were true. Mr. Justice Withers said (at p. 85) 'What is contumelious in itself, as such language is, presumes the animus et affectus injuriandi, which is an element of slander.'

[2] In *Botha* v. *Brink* (1878) Buch. 118, de Villiers C. J., said: 'The rule of the Roman-Dutch Law differs, if at all, from that of the English Law in allowing greater latitude in disproving malice. Under both systems the mere use of defamatory words affords presumptive proof of malice; but under our law, as I understand it, the presumption may be rebutted, not only by the fact that the communication was a privileged one—in which case express malice must be proved—but by such other circumstances (examples of which are given in Voet, 47. 10. 20) as satisfy the Court that the *animus injuriandi* did not exist.'

[3] 4 Maasdorp, p. 95.

[4] Gr. 3. 36. 2; Voet, 47. 10. 9. But see V. d. K. *Th.* 803. The law has been settled for South Africa in the sense of the text. *Botha* v. *Brink*, *ubi sup.* A further question is whether publication is necessary to ground an action for defamation (Morice, p. 250). In South Africa the question has been answered affirmatively. *Hall* v. *Zietsman* (1899) 16 S. C. 213; *Marais* v. *Smuts* (1896) 3 Off. Rep. 158. For the law of defamation in Brit. Gui. see *Davis* v. *Argosy Co., Ltd.* (1909) *Brit. Gui. Off. Gaz.*, vol. xx, p. 5; and *Godfrey* v. *Argosy Co., Ltd.* (1909) *Brit. Gui. Off. Gaz.*, vol. xx, p. 65. Ord. No. 3 of 1846 introduced the English law of slander, but not the English law of libel. *Davis* v. *Argosy Co., Ltd.*, *ubi sup.*

the seventeenth century give some indications that any person who failed to secure a conviction exposed himself to an action for damages. In the eighteenth century it seems probable that he would not have been liable in the absence of affirmative proof of injurious intent. However this may be, the question is merely of historical interest, for all the Roman-Dutch Colonies have adopted the English law of malicious prosecution, which requires the plaintiff to establish not merely the element of malicious intention but also the absence of reasonable cause.[1]

Amende honorabel en profitabel.

In Holland and Germany actions for injury were brought very frequently and upon the slightest occasion. By his statement of claim the plaintiff asked for 'amende honorabel' and 'amende profitabel.'[2] The first was an apology from the defendant.[3] The second consisted in a sum of money to be paid to the plaintiff or applied to the use of the poor. In the modern law the amende honorabel is no longer in use;[4] the action for damages remains.

The Roman actions for injuries included many cases of affront or insult, which cannot, except by an abuse of language, be described as defamation. In the modern law an insult which did not convey a defamatory meaning would probably not be actionable as such.[5] This marks a departure from the point of view of the Roman Law.

Injuries

In the Roman Law an injury to wife, child, or servant

[1] (Brit. Gui.), *Hansaratch* v. *Nehaul* (1890) 1 Brit. Gui. L. R. (N. S.) 117; (Ceylon), *Corea* v. *Peiris* [1909] A. C. 549; (South Africa) 3 Maasdorp, p. 80.

[2] Gr. 3. 35. 2; 3. 36. 3; Voet, 47. 10. 17. For the form of request in the action for injuries see Papegay, vol. i, chap. viii.

[3] The defendant must make his palinodia before the Court 'bloots hoofts op zijn knyen biddende de Justitie ende den Impetrant om vergiffenis'. Ibid.

[4] 'In South Africa the action for apology has somewhat fallen into disuse.' 4 Maasdorp, p. 88. In Ceylon the Dutch form of apology was declared to be obsolete in *Moss* v. *Ferguson* (1875) Ramanathan, 1872–6, p. 165.

[5] In *Epstein* v. *Epstein* [1906] T. H. 87 an interdict was granted to a wife who was annoyed by the attentions of private detectives. But this scarcely goes the length of proving that to 'shadow' another person is an actionable wrong.

was construed as an injury to the husband, parent, or master.[1] It seems unlikely that this is so at the present day. to wife, child, &c.

4. Wrongs against the Domestic Relations. An action for damages lies against an adulterer[2] which in modern practice is usually (but not necessarily) combined with the action for divorce against the guilty spouse. Apart from adultery a husband has an action against one who deprives him of the consortium of his wife,[3] and a father or master has an action against one who takes from him his child or servant.[4] 4. Wrongs against the domestic relations.

5. Wrongs not falling under any of the above-mentioned Heads. The kinds of liability already mentioned are certainly not exhaustive. For example, the actio doli lay in Roman Law in any case where the plaintiff had been cheated by the defendant and had no other remedy.[5] Probably the action for fraud is now governed by the same conditions as in English Law.[6] Other questions readily suggested themselves. Have I a right of action if one interferes with my livelihood, my trade, or my contracts? What about patents, trade-marks, 5. Miscellaneous wrongs: e. g. fraud; interference with livelihood, trade, or contract.

[1] Gai. iii. 221; Inst. 4. 4. 2; Gr. 3. 35. 6; Voet, 47. 10. 6. In the Ceylon case of *Appuhami* v. *Kirihami* (1895) 1 N. L. R. 83 it was said that a father is not entitled to sue for words defamatory of his daughter, although he may have felt pained and distressed.

[2] Gr. 3. 35. 9; *Sutcliffe* v. *Sutcliffe and Westgate* (1914), *S. A. L. J.*, vol. xxxi, p. 224; *Norton* v. *Spooner* (1854) 9 Moo. P. C. C. 103.

[3] *Kramarski* v. *Kramarski* [1906] T. S. 937; *Union Government* (*Minister of Railways and Harbours*) v. *Warneke* [1911] A. D. at p. 667 per Innes J. The action is based on injuria. Damages cannot be claimed for mere loss of consortium due to culpa. 'It is not a material loss, however deeply felt, and affords no ground for patrimonial damages.' Ibid.

[4] In Roman Law a filius familias might be stolen and become the subject of an actio furti. Inst. 4. 1. 9. But Mr. Morice, speaking of the action 'per quod servitium amisit' says: 'Such wrongs do not seem to be known to Roman-Dutch Law' (*Eng. and Rom.-Dutch Law*, 2nd ed., p. 249). I do not think that the Roman-Dutch Law is so impotent as to afford no remedy for a flagrant wrong.

[5] Dig. 43. 1. 4; Voet, 4. 3. 8; Girard, p. 422.

[6] In *Douglas* v. *Sander & Co.* [1902] A. C. at p. 437 Lord Robertson delivering the judgment of the Board said: 'Their Lordships think it right to add that they do not desire to assert as on their own authority that an action of deceit in Natal will only lie under the conditions stated in the texts of the Roman Law.'

copyright, and the like? At what point and under what conditions does an act of yours (e. g. in the way of business competition) cease to be the exercise of a right and become an actionable wrong? Questions such as these point to some of the most complex situations of modern life. The old writers may suggest an argument but hardly supply an answer. The various colonial judicatures will arrive each at its own solution guided, probably, in the absence of legislation, more by British or American decisions than by text-writers of the seventeenth or eighteenth centuries.[1] As bearing on some of these questions, perhaps one may hazard the opinion that as a general rule an act otherwise innocent will become guilty if prompted by an injurious motive.[2] If this be so the nature of the motive will go further than in English Law towards determining the quality of the act.

Doubtful cases of absolute liability.

It has been said above that a man is liable for intended wrongs, and for negligence which causes damage. Are there also cases in which his liability must be stated higher, viz. as an absolute duty not to cause injury even in circumstances which exclude dolus and culpa? Perhaps a man's liability for mischief done by his animals[3] is of this character. If my dog bites you, you may obtain damages without proof of scienter or of negligence. In like manner I am liable for damage done by trespassing cattle, and by wild and savage animals which I have brought upon my land and which have escaped. It is doubtful whether there is any other case of absolute liability.[4] There are cases in which the duty of taking care is very high and the liability for carelessness proportionately great. But these

[1] Trade Competition, &c. (South Africa). 4 Maasdorp, pp. 32 ff.
[2] Animus nocendi vicino. Voet, 39. 3. 4.
[3] See Appendix to this Book (*infra*, p. 283).
[4] The Judicial Committee may be thought to have incorporated the Rule in *Rylands* v. *Fletcher* into the Law of Cape Colony by its decision in *Eastern and S. A. Telegraph Co., Ltd.* v. *Cape Town Tramways Cos., Ltd.* [1902] A. C. 381. As to whether an upper proprietor is, in the absence of negligence, liable for damage caused by a discharge of water from his land on to that of a lower proprietor, see *Van der Merwe* v. *Zak River Estates, Ltd.* (1914), *S. A. L. J.*, vol. xxxi, p. 195.

fall under the head of negligence and conform as a rule to English Law.

Who are liable for delicts. Any person is answerable for his wrongful acts if he had intelligence to understand that he was doing wrong. This excludes lunatics and young children.[1] Corporations are answerable ex delicto for the wrongful acts of their agents, principals and masters for the wrongful acts of their agents and servants,[2] provided in all these cases that the act was done in the course of the employment or service.

Who are liable for delicts ?

An action lies as a rule against the (heirs or) personal representatives of a wrong-doer.[3] All persons who have in any way caused a wrongful act or its consequences, whether as principals or accessories, are answerable.[4] Every such person is liable in solidum, but if one makes satisfaction the others are discharged,[5] and cannot be called upon to contribute.[6]

Who may sue. Any person and the (heirs or) personal representatives of any person who has been wronged may sue for damages.[7] Infants and lunatics may sue, assisted

Who may sue ?

[1] Gr. 3. 32. 19; Voet, 9. 2. 29; 47. 10. 1. As to drunkards see Voet, ibid.

[2] Grotius (3. 38. 8) says that masters are not as a rule bound by the delicts of their servants except to the extent of unpaid wages; nor are fathers bound by the delicts of their children. Schorer, ad loc.; Van Leeuwen, 4. 2. 8; V. d. K. *Th.* 476. But if the wrongful act was committed by servant or son in the course of employment (quotics illi deliquerunt in officio aut ministerio cui a patre dominove fuerunt praepositi) the master or parent is liable in solidum. Voet, 9. 4. 10. Van der Keessel, however (*Th.* 477 and *Dictat.* ad loc.), says that masters are not as a rule liable, even then, if they have not been benefited (*locupletiores facti*) by the delict. Husbands (*semble*) are not answerable for the delicts of their wives (V. d. K. *Th.* 225; *vide supra*, p. 89, n. 7). But see Melius de Villiers, *The Roman and Roman-Dutch Law of Injuries*, pp. 48–9, and Nathan, *Common Law of South Africa*, vol. ii, pp. 1547–8. There is a strange want of authority on the subject.

[3] Gr. 3. 32. 10 and Schorer, ad loc.; Voet, 9. 2. 12. But an action for 'injuries' is not passively transmissible before litis contestatio. Inst. 4. 12. 1; Voet, 47. 10. 22; Sande, *Decis. Fris.* 5. 8. 4. Grotius says (3. 35. 5) 'unless carried through to judgment' (dan nae gegeven vonnisse), but wrongly.

[4] Gr. 3. 32. 12.

[5] Gr. 3. 32. 15; Voet, 9. 2. 12.

[6] Voet, 9. 2. 20 (*ad fin.*).

[7] Gr. 3. 32. 10. But where there is no special damage as in most cases of defamation the action is not actively transmissible before litis contestatio. Gr. 3. 35. 4; Voet, 47. 10. 22. The children of a

by their tutors or curators. Corporations may sue for wrongs against property, but not for wrongs against reputation, for a corporate body as such has no reputation to lose. A wife may sue her husband for real injuries of a serious character.[1]

General exceptions.

General exceptions from liability. No one is liable for inevitable accident,[2] or for acts done in the lawful exercise of a right[3] or performance of a duty.[4] No action lies against a judge for acts done or words spoken in honest exercise of his judicial office. If he acts in bad faith or with injurious intention he will, perhaps, be liable.[5] No action lies, as a rule, if the plaintiff consented to the alleged wrong.[6]

Measure of damages.

Measure of damages. The damages recoverable for delict vary according as damages are or are not of the gist of the action. If actual pecuniary loss to the plaintiff is a necessary condition of defendant's liability, the sum recoverable as damages will be adjusted, so far as possible, to the loss actually sustained.[7] If actual pecuniary loss is not a necessary condition of defendant's liability the assessment of damages lies in the discretion of the judge,[8] who will take account not only of the loss,[9] if any, actually sustained, but also, especially in the case of actions in the nature of injuria, of circumstances which aggravate or

defamed person, however, may sue for the consequential injury to their own reputation. Gr. loc. cit.; Voet, 47. 10. 5.

[1] Voet, 47. 10. 2.

[2] Gr. 3. 34. 4; Voet, 9. 2. 15 and 29. 'Act of God,' Voet, 9. 2. 21 (*ad fin.*).

[3] E.g. defence of one's person: Gr. 3. 33. 9; 3. 34. 4; Voet, 9. 2. 22—defence of one's own property: Dig. 43. 24. 7. 4; Voet, 9. 2. 28—parendi necessitas: Voet, 47. 10. 3—error: Voet, 47. 10. 20—provocation: ibid.

[4] E. g. intervention to stop a breach of the peace. Voet, 9. 2. 29.

[5] Voet, 47. 10. 2.

[6] Voet, 47. 10. 4; Dig. 47. 10. 1. 5: Quia nulla injuria est quae in volentem fiat. For contributory negligence see Voet, 9. 2. 17; who says 'novum non est ut in concurrente duorum culpa is teneatur cujus culpa major conspicitur.' See also Pollock, *Torts*, Appendix D, 'Contributory Negligence in Roman Law.' In the modern law English decisions are followed. 4 Maasdorp, p. 70.

[7] Voet, 9. 2. 6 and 11.

[8] Or jury.

[9] Voet, 47. 10. 18.

mitigate the offence.[1] Sometimes damages are exemplary, sometimes merely nominal.[2] But whenever actual loss is taken into account it is essential that the damages (or, more correctly, the damage) should not be too remote, i.e. that the loss to the plaintiff which forms the basis of assessment should be connected not too remotely with the wrongful act or omission alleged.[3] In other words the loss must have been not merely the consequence of a wrongful act or omission but also a consequence which the defendant foresaw, or, judged by ordinary standards, might or could have foreseen had he been reasonably careful and prudent. In estimating damages account is taken not merely of actual expense, depreciation of property, and the like (*damnum emergens*), but also of the loss of probable profit (*lucrum cessans*).

In case of injury to the person, physical pain and disfigurement go to enhance the damages,[4] but allowance is not made for mental suffering and anguish. All this is in substantial conformity with English Law.

Quasi-delicts

Quasi-delicts.[5] Under the title of obligationes quasi ex delicto the Roman Law mentions the following cases of liability: (1) the occupier of a house or room from which anything is thrown or poured down so as to do damage to a person passing or standing beneath (*actio de effuso vel dejecto*);[6] (2) the owner or occupier of a house who keeps something placed or suspended which falls on some one passing or standing on the road beneath (*actio de posito vel suspenso*);[7] (3) the keeper of a ship, tavern, or stable on whose premises a theft is committed or damage done whether by his servants or by others, not being merely travellers or passengers (*actio de damno in nave aut*

[1] Voet, 47. 10. 13 and 17.

[2] The South African Courts have, however, in many cases shown a marked disinclination to giving nominal damages. *Supra*, p. 271, n. 2.

[3] Voet, 9. 2. 16 ff.

[4] Gr. 3. 34. 2; Voet, 9. 2. 11.

[5] Gr. lib. iii, cap. xxxviii; Van Leeuwen, lib. iv, cap. xxxix.

[6] Inst. 4. 5. 1.

[7] Inst. loc. cit.; Gr. 3. 38. 5; V. d. K. *Th.* 810; and see *Rechtsg. Obs.*, pt. i, no. 98.

caupona facto).[1] These may be regarded as cases of absolute liability or (which comes to the same thing) as cases in which the law draws an irrebuttable inference of culpa and of consequent liability.[2]

Actions of this class are actively, but not passively, transmissible.[3]

Limitation of actions.

Limitation of Actions. Actions arising out of delict are usually prescribed by the lapse of thirty years, but actions for verbal or written injuries[4] by the lapse of one year from the time when the injured party had knowledge of the wrong. The law as to limitation of actions now, however, depends for the most part upon statutes in the various colonies.

PART III

OBLIGATIONS ARISING FROM SOURCES OTHER THAN CONTRACT AND DELICT

Obligationes ex variis causarum figuris.

WHENEVER the law gives one man a personal claim against another and an action for damages in case of failure to perform the corresponding duty, the relation between the parties may be termed an obligation. We can, for example, if we choose, speak of the duties arising out of the domestic relations, e.g. the mutual duties of husband and wife, parent and child, guardian and ward, so far as they are capable of legal enforcement, as arising from obligations created not by agreement or wrong, but by operation of law. Many other obligations of the same kind suggest themselves, such as exist between executor and legatee, fiduciary and fideicommissary, trustee and cestui-que-

[1] Inst. 4. 5. 3; Gr. 3. 38. 9; V. d. K. *Th.* 811.

[2] Another case of quasi-delict was 'si judex litem suam fecerit'. Inst. 4. 5. pr. The subject of judicial liability in the modern law has been touched on above.

[3] Inst. 4. 5. 3 (*ad fin.*).

[4] Gr. 3. 35. 3 (and Groen. ad loc.); 3. 36. 4; Voet, 47. 10. 17 (*ad fin.*) and 21; Van Leeuwen, 4. 37. 3, and Kotzé's note; *Beukes* v. *Coetzee* (1883) 1 S. A. R. 71.

trust, or such as arise from payment of money by mistake to a person not entitled (*indebiti solutio*). Some of these are classed in Roman Law under the head of 'obligationes quasi ex contractu'[1] or 'quasi-contracts,' owing to the fact that they approach more nearly to obligations arising from contract than to obligation arising from wrong. But, in fact, they differ both from contractual obligations and from one another. We prefer, therefore, following Gaius, to refer them to a vague and undefined class as obligations arising from various kinds of cause (*Obligationes ex variis causarum figuris*). To speak of them in detail lies outside the scope of this work.

APPENDIX

LIABILITY FOR INJURY BY ANIMALS

In Roman Law an owner's liability for mischief done by his animals was an absolute liability independent of negligence. If there was no dolus or culpa on his part he might, instead of paying damages, surrender the animal to the plaintiff (*noxae deditio*). The actio de pauperie lay in respect of harm done by domestic animals (originally only cattle, later any domestic animals; Dig. 9. 1. 4) contra naturam sui generis (contra naturam nocere dicuntur animalia quoties mansueta feritatem assumunt. Voet, 9. 1. 4). An analogous action (*de pastu pecorum*) lay for damage done by trespassing cattle. Paul. *Sent. Recept.* 1. 15. 1. In the Dutch, but not in the Roman Law there was also the right to impound. Gr. 3. 38. 11; Groen. *de leg. abr. ad* Dig. 9. 2. 39. 1; *Cens. For.* 1. 5. 3. 4; Voet, 9. 1. 3.

It seems doubtful whether a person from whose custody a wild animal had escaped was ever in Roman Law liable for mischief done by it in the absence of dolus or culpa. Dig. 9. 1. 1. 10: In bestiis autem propter naturalem feritatem

[1] Inst. lib. iii, tit. 27; Gr. lib. iii, capp. xxvi–xxviii (verbintenisse door wets-duiding); Van Leeuwen, lib. iv, capp. xxviii and xxix.

haec actio (*sc.* de pauperie) locum non habet; et ideo si ursus fugit et sic nocuit: non potest quondam dominus conveniri, quia desinit dominus esse ubi fera evasit: et ideo et si eum occidi meum corpus est. Windscheid, vol. ii, sec. 457: Für den Schaden, welchen ein nicht gehörig bewachtes gefährliches Thier anrichtet, haftet derjenige den die Schuld trifft nach den Grundsätzen des Aquilischen Gesetzes. See Inst. 4. 9. 1 (*ad fin.*) and Vinnius, ad loc. Noxal surrender was allowed in Dutch Law in the same cases as in Roman Law. Vinnius (*ad* Inst. 4. 9. 1) says that noxal surrender is disused (Hodie noxae deditio non usurpatur sed damnum datum aestimatur arbitrio judicis). But Groenewegen (*ad loc.*) dissents. To the same effect are Gr. 3. 38. 10; Van Leeuwen, 4. 39. 6; Voet, 9. 1. 8.[1]

In South Africa the Courts have inclined to treat a man's liability for the acts of his animals as based on culpa. This has let in by a back door the doctrine of scienter, which forms no part of the pure Roman-Dutch Law. See the somewhat unsatisfactory judgments of the Appellate Division in *Robertson* v. *Boyce* [1912] A. D. 367. Grotius apparently excludes dogs from the rule of noxal surrender; but Voet (9. 1. 6) makes no such distinction. See Decker *ad* Van Leeuwen, *ubi sup.*, and *Rechtsg. Obs.*, pt. ii, no. 96.

Noxal surrender has been declared to be obsolete in South Africa (*Parker* v. *Reed* (1904) 21 S. C. 496), but (*semble*) still obtains in Ceylon (*Folkard* v. *Anderson* (1860) Ramanathan, 1860–8, p. 68; *Jacobs* v. *Perera* (1896) 2 N. L. R. 115; *Thwaites* v. *Jackson* (1895) 1 N. L. R. 154). For the law relating to injuries by animals in Brit. Gui., see *Vandeyar* v. *Richter* (1907) *Brit. Gui. Off. Gaz.*, vol. xxv, p. 1485; and in appeal *Richter* v. *Vandeyar* (1907) *Brit. Gui. Off. Gaz.*, vol. xxvi, p. 16. It is not necessary to prove scienter.

[1] Prof. Fockema Andreae makes it clear that in the early Dutch Law noxal surrender if not universal was at all events very general. See *Het Oud-Nederlandsch Burgerlijk Recht*, vol. ii, pp. 113 ff; and the author's notes to Gr. 3. 33. 6 and 3. 38. 10.

BOOK IV

THE LAW OF SUCCESSION

In this book we shall speak of the devolution of property upon death, under the two titles of testamentary and intestate succession. But first it will be convenient to preface some remarks on succession in general.

CHAPTER I

SUCCESSION IN GENERAL

The position of the heir in Roman Law.

It is familiar knowledge that, according to the principles of Roman Law, the heir, whether testamentary or intestate, until the time of Justinian was, and under that emperor's legislation might be, the universal successor of the deceased.[1] As such, he assumed the dead man's rights and liabilities, the latter in full and without reference to the sufficiency of the assets. Hence the phrase 'damnosa hereditas', meaning a succession which involved more loss than gain to the acceptor. Further, in the early law, the family-heir, if the paterfamilias had not excluded him by testament, could not refuse the inheritance, which vested in him immediately upon the death of his ancestor. For this reason he was known as 'heres suus et necessarius'. His liability in this regard was the same, whether he was instituted heir in his ancestor's will, or left to succeed upon an intestacy.[2] In the maturity of Roman Law, however, he might abstain from the inheritance (*beneficium abstinendi*),[3] and so avoid liability. But if he intermeddled with the estate, he 'sustained the person' of the

Heres suus.

[1] Dig. 50. 17. 62: (Julianus) Hereditas nihil aliud est quam successio in universum jus quod defunctus habuerit.

[2] Girard, p. 794.

[3] Inst. 2. 19. 2; Dig. 29. 2. 57; Girard, p. 893.

deceased, and succeeded not only to the benefits of the inheritance, but also, without limit, to its burdens.[1]

Heres extraneus.

The 'extraneus heres', that is, any one who was not suus et necessarius,[2] was, originally, in a better position. As soon as the testator died,[3] the inheritance was said to be 'delated' to the heir;[4] but he need not accept unless he pleased. If he neither accepted nor acted as heir (*pro herede gerere*), he incurred no liability. If he accepted or acted as heir, he was said to 'adiate' the inheritance (*adire hereditatem*), and from that moment was in the position of a universal successor. It might happen that the heir hesitated to enter, apprehensive that the inheritance might prove 'damnosa'. In such case the creditors of the estate would apply to the praetor to fix a 'spatium deliberandi',[5] a period within which he must accept, if he meant to do so; and a similar indulgence was given on the application of the heir himself.[6] If at the end of the time fixed[7] he had failed to accept, he was treated by the praetor as having refused the inheritance, which was then offered or delated to the person next entitled. Such was the law until the time of Justinian. But that emperor's legislation gave him two alternatives.[8] (1) He might enter at once, subject to the benefit of inventory (*beneficium inventarii*). If he did so, he was liable not as universal successor, but only to the extent of the assets. This was a change of far-reaching consequence. 'It

Changed position of the heir in Justinian's system.

[1] Inst. 2. 19. 6; Cod. 6. 30. 22. 14.

[2] Inst. 2. 19. 3: Ceteri qui testatoris juri subjecti non sunt extranei heredes appellantur. The case of the slave (*heres necessarius*) does not concern us.

[3] I.e. in the simple case of a sole heir instituted unconditionally. Girard, p. 870.

[4] Dig. 50. 16. 151: Delata hereditas intellegitur quam quis possit adeundo consequi.

[5] I.e. to give the heir the option of asking for it, or of allowing the creditors to realize the estate. Gaius, ii. 167; Dig. 28. 8. 5. pr.; Girard, p. 879.

[6] Dig. 28. 8. 1 and 5.

[7] Originally not less than one hundred days. Dig. 28. 8. 2. Justinian allowed nine months when deliberation was granted by the magistrate, one year when granted by the emperor. Cod. 8. 30. 22. 13 a.

[8] Inst. 2. 19. 5 and 6; Cod. 6. 30. 22. 14 a (gemini tramites). The inventory must be completed within three months. Cod. 6. 30. 22. 2.

was', as Dr. Hunter observes, 'a bold and successful stroke to convert the heir into a mere official, designated by the deceased for the purpose of winding up his affairs and distributing his property. The heir was now a mere executor, with the privilege of being residuary legatee.' [1] (2) On the other hand, if he did not choose to take advantage of the procedure by inventory, he might, as under the old law, claim the spatium deliberandi. In that event, under Justinian's system, if he did not expressly repudiate the inheritance within the time allowed, he was deemed to have accepted.[2] An acceptance [3] or repudiation,[4] once made, was irrevocable except by a minor, who might obtain from the praetor restitutio in integrum.[5]

The Dutch Law of testaments is Roman in origin.

No department of the Roman-Dutch Law is more thoroughly penetrated by the Roman tradition than that of testamentary succession. The institution was unknown to early Germanic Law.[6] The whole law of testaments, therefore, is derived from foreign, namely from Roman, sources, and principally through the channel of the Canon Law. As to the intestate heir—though ascertained in accordance with rules of customary, not of Roman, origin—once determined, he is in the same position as the heir instituted by testament. In the later stages of the Dutch Law, as in the Roman Law, both the one and the other were universal successors of the deceased.[7] In English Law the universal successor is unknown.[8] In his place we find an executor or administrator charged with the office of applying the dead man's personalty in payment of

[1] Hunter, *Roman Law* (3rd ed.), p. 755.

[2] Cod. 6. 30. 22. 14. [3] Inst. 2. 19. 5. [4] Cod. 6. 31. 4.

[5] Some further indulgence was allowed to a suus heres of full age, provided that the estate had not been sold by the creditors. Cod. 6. 31. 6.

[6] Tacitus, *Germania*, cap. 20; Fockema Andreae, *Het Oud-Nederlandsch Burgerlijk Recht*, vol. ii, pp. 313 ff.; Gr. 2. 14. 2.

[7] Gr. 2. 14. 7: Erfgenaem ofte oir is een die intreed in des overledens boedel als sijn recht ende last in't gemeen verkregen hebbende. Cf. Van Leeuwen, 3. 10. 3. In the Dutch Law the heres suus et necessarius was unknown. Even descendants were free to accept or repudiate as they thought fit. Voet, 29. 2. 2.

[8] At all events we must go back to the time of Glanville to find him. E. Jenks, *Short Hist. of Eng. Law*, p. 63.

debts and legacies, and of distributing the surplus amongst his next of kin, i.e. the persons entitled to succeed in the event of intestacy. Since 1897, the deceased's realty also passes in the first instance to his personal representatives, who apply it, if necessary, in payment of debts; and also, if the testator has so directed, but not otherwise, of legacies.

The testamentary executor in Roman-Dutch Law,

Testamentary executors were not unknown to the law of Holland, but their functions were confined within narrow limits. They were, in fact, as Van der Keessel [1] observes, 'procurators appointed by the testator to manage his funeral, to recover what is due to him, to pay legacies and debts, and to administer his property until a division thereof can be effected.' But they 'cannot debar the heirs from the inheritance, unless the testator has directed otherwise, nor alienate the property without their consent'. It would seem from this that the appointment of executors did not affect the position of the heir as universal successor [2] (in every case where he had not obtained benefit of inventory),[3] nor prevent him from suing or being sued in respect of debts due to or by the deceased. An office so alien to English ideas of the function of an executor, has not held its ground in the Colonies against the competing analogy of the English Law.[4] By legislation or by practice executors and administrators of the English type have superseded at once the executor

and in the modern law.

[1] V. d. K. *Th.* 323.

[2] Gr. 2. 21. 7; *Cens. For.* 1. 3. 1. 3; Fock. And., vol. ii, p. 348.

[3] In Holland the benefit of inventory was not granted as of course. Voet, 28. 8. 11: Nec promiscue beneficium hoc omnibus ex ipsa lege patet, sed ad id rescriptum impetrandum est, sic ut simpliciter inventarium conficiens non liberetur necessitate aeris alieni in solidum solvendi. The application must be made to the Sovereign or, in Holland, to the Hooge Raad. *Instructie van den Hoogen Raad in Holland* of May 31, 1582, art. 23; Gr. 2. 21. 8 ff, with Schorer's note ad loc.; *Holl. Cons.*, vol. i, no. 27; Van Leeuwen, 3. 10. 7 ff; V. d. L. 1. 9. 10; 3. 1. 7; *Papegay*, vol. i, chap. 18.

[4] The older conception of the executor's office is reflected in the P. C. cases, *De Montfort* v. *Broers* (1887) 13 App. Ca. 149 (Cape), and *Farnum* v. *Administrator-General of British Guiana* (1889) 14 A. C. 651. See also (for Ceylon) *Staples* v. *de Saram* (1867) Ramanathan, 1863–8 at p. 275.

and the universal successor of the old law. To-day 'an inheritance is the net balance of the estate of a deceased person which is left after the debts and legacies have been paid, and which has to be handed over by the executor to the heir. The heir, therefore, is merely a residuary legatee '.[1] If the deceased dies intestate the heir is in the same position as if he had been appointed sole legatee by will.

The position of the heir in the modern law.

The heir, having been reduced in the modern law to this entirely secondary position, it is matter of complete indifference whether a testator does or does not institute an heir by his will. The institution of the heir,[2] which was once 'caput et fundamentum testamenti', is no longer a necessary formality. Consistently with this, again contrary to the Roman Law, a man may die partly testate, partly intestate.[3] What he fails to dispose of by his will goes to his intestate successor.[4] In Roman Law it would have gone to the instituted heir by accrual.[5]

It is common to testamentary and to intestate succession that a child or grandchild of the deceased must bring into account what has been advanced to him during the deceased's lifetime. The Romans called this process of accounting 'collatio bonorum'. The Dutch lawyers call it 'inbreng'.[6]

[1] Maasdorp, p. 104. For the history of the law and the position of the heir in South Africa see *Fischer* v. *Liquidators of the Union Bank* (1890) 8 S. C. 46. For Ceylon Law see *Pulle* v. *Pulle* (1893) 2 S. C. R. at p. 106. In British Guiana the heir continued to incur all the liabilities of a universal successor until the year 1909. (Deceased Persons Estates Ordinance (No. 9 of) 1909, sec. 7.) For the older law see *Colonial Bank* v. *Representatives of Werk-en-Rust* (1890) 1 Brit. Gui. L. R. (N. S.) at p. 141.

[2] Fock. And., vol. ii, p. 329; Vinnius *ad* Inst. 2. 14. 12; Van Leeuwen, 3. 2. 2 and Decker ad loc.; V. d. K. *Th.* 290. If the testator does not appoint an heir the (debts and) legacies are paid by his executor or intestate heir. Voet, *Compendium*, 28. 5. 6.

[3] Voet, 28. 1. 1; 28. 5. 26.

[4] V. d. K. *Th.* 309 and 322.

[5] Voet, 29. 2. 40: Jus accrescendi, quatenus Romani juris subtilitatibus nititur, inter coheredes locum non habet. See, however, this passage. Grotius (2. 24. 19 and 2. 26. 4) merely follows the Roman Law. Van der Linden says (1. 9. 6) that the jus accrescendi applies, unless each of the heirs is appointed to a separate portion. Voet (*ubi sup.*) and Schorer *ad* Gr. 2. 26. 4 make the question depend upon the intention of the testator. See also Van Leeuwen, 3. 4. 4 (and Decker *ad loc.*) and 3. 6. 8; and V. d. K. *Th.* 326.

[6] Van Leeuwen, lib. iii, cap. xvi.

CHAPTER II

TESTAMENTARY SUCCESSION

Contents of this chapter.

In this chapter we shall consider: (1) how wills are made; (2) who may make a will; (3) who may take under a will; (4) who may witness a will; (5) restrictions on freedom of testation; (6) institution and substitution of heirs; (7) acceptance and repudiation of the inheritance; (8) legacies; (9) codicils; (10) how wills and legacies are revoked; (11) fideicommissa; (12) mutual wills.

The different kinds of will in Roman Law.

1. **How Wills are made.** By the latest Roman Law wills were either: (A) solemn, or (B) privileged; and each of these, again, might be either: (1) written, or (2) spoken (*nuncupative*).[1]

The solemn will: (*a*) written,

A solemn written will was one which was wholly committed to writing by the testator, or by another at his request.[2] It must be: (1) produced by the testator; (2) to seven[3] competent witnesses; (3) asked to witness it;[4] (4) all present at the same time; (5) the testator declaring in their presence that it was his will; (6) and in their presence signing it;[5] (7) the witnesses afterwards signing; (8) and sealing; (9) the whole taking place *uno contextu*.[6] If the testator could not write, another person (not a witness) might do so for him. The signature of the testator was unnecessary if the will was holograph, i.e. wholly written in his own hand.[7]

[1] Voet, 28. 1. 3. [2] Gr. 2. 17. 13.

[3] A blind man's will required the presence of a tabularius or of an extra witness. Cod. 6. 22. 8; Gr. 2. 17. 15.

[4] Voet, 28. 1. 6. They must be 'specialiter ad hoc rogati, aut saltem ante testimonium certiorati ad testamentum se adhiberi'. Dig. 28. 1. 21. 2. [5] Voet, 28. 1. 5.

[6] Cod. 6. 23. 21. 2; Voet, 28. 1. 4; Dig. 28. 1. 21. 3: Est autem *uno contextu* nullum actum alienum testamento intermiscere.

[7] Cod. 6. 23. 28. 6: Si quis sua manu totum testamentum vel codicillum conscripserit et hoc specialiter in scriptura reposuerit, quod sua manu hoc confecit, sufficiat ei totius testamenti scriptura et non alia subscriptio requiratur neque ab eo neque pro eo ab alio.

A solemn nuncupative will was made when the testator declared his last will and testament by spoken words in the presence of seven competent witnesses, all present at the same time, and convoked *ad hoc*.[1] (*b*) nuncupative.

Privileged wills (*privilegiata—minus sollemnia*), like the solemn will, were either written or spoken. Of the first sort there were several kinds known to the Roman Law: viz. testamentum—(*a*) tempore pestis conditum; (*b*) ruri conditum; (*c*) parentum inter liberos; (*d*) militare.[2] Most of these were recognized by the Dutch Law. Voet says that in Holland a will made in time of fierce pestilence in the presence of two witnesses is good, provided that the presence of a notary cannot be secured.[3] In the case of a will made in the country, the Roman Law was content with the presence of five witnesses.[4] Voet sees no reason why a will so made should not be upheld, though the general opinion was that the modern law admitted no relaxation of general rules in favour of dwellers or sojourners in the country.[5] The military testament, i. e. one made by a soldier *in expeditione*, required no solemnities whatever.[6] Voet, following Grotius, permits Privileged wills.

[1] Gr. 2. 17. 10–11; Voet, 28. 1. 10–11.

[2] To the above may be added testamentum principi oblatum and testamentum actis magistratus insinuatum (in modern times known as t. judiciale), which derived their validity from the authority of the Princeps or magistrate and required no further solemnity. Cod. 6. 23. 19; Gr. 2. 17. 14. Voet (28. 1. 19) dismisses the view that testaments in favour of pious causes are privileged. Grotius (2. 17. 31) doubts. Van der Keessel (*Th.* 302) expresses no decided opinion.

[3] Voet, 28. 1. 12. Van Leeuwen (3. 2. 15) doubts. Jure civili the usual number of witnesses was required, but they need not be present at the same time. Cod. 6. 23. 8. 1. *Semble*, the will only holds good if the testator dies of the sickness. V. d. K. *Th.* 301. From Grotius (2. 17. 31) it would seem that according to one view such a will might be made underhand, or nuncupatively in the presence of two witnesses. See Groenewegen, *de leg. abr. ad* Cod. 6. 23. 8; and *Rechtsg. Observ.*, pt. i, no. 40. Grotius adds as another doubtful case a testament made 'by verloop van oorlog'.

[4] Cod. 6. 23. 31. 3: Si in illo loco minime inventi fuerint septem testes, usque ad quinque modis omnibus testes adhiberi jubemus.

[5] Voet, 28. 1. 13. Grotius (2. 17. 30) and Van Leeuwen (3. 2. 15) are against it. Van der Keessel (*Th.* 300) agrees with Voet, 'saltem in casu necessitatis'.

[6] Inst. lib. ii, tit. 11; Dig. lib. xxix, tit. 1; Cod. lib. vi, tit. 21; Gr. 2. 17. 29; Van Leeuwen, 3. 2. 14.

the same informal mode of testation to ambassadors and their suites residing abroad in the course of duty.[1] The testament whereby an ascendant disposes of property amongst his or her children or remoter descendants, if written out in full in the testator's own handwriting, requires no witness.[2] The last-named kind of will may even be nuncupative (*minus sollemne nuncupativum*), but must, in that case, be proved by two witnesses.[3] The testator may distribute the property amongst his children in any proportion he pleases. 'Children' means legitimate children, at all events if the father is the testator; in the case of a mother, perhaps illegitimate children may be considered to be on the same footing as legitimate issue.[4] It seems that, though only children may be *instituted* in this kind of will, legacies may be made to a wife, or even to a stranger, if the will has been read and declared in the presence of witnesses.[5] It is essential that the document put forward as a holograph will should really be a declaration of the testator's last wishes, and not merely a draft or memorandum of a will to be executed afterwards. Further, every child must be named, and no one of them may be disinherited.[6]

So far, we have spoken of wills framed upon Roman

[1] Voet, 28. 1. 14.

[2] Nov. 107, cap. i (A.D. 541); Voet, 28. 1. 15; Van Leeuwen, 3. 2. 13; *Cens. For.* 1. 3. 2. 19. Voet says that if the will is written by another person by testator's direction it requires two witnesses. Van Leeuwen merely says that he must subscribe it himself. So Grotius (2. 17. 28).

[3] Gr. 2. 17. 28; Voet, *ubi sup.*; *Cens. For.*, *ubi sup.* The witnesses may be male or female. Groenewegen, *de leg. abr. ad* Inst. 2. 10. 6; de Haas *ad Cens. For.*, *ubi sup.*

[4] Voet, 28. 1. 16.

[5] Nov. 107, cap. i (abrogating Cod. 6. 23. 21. 1 and 3. 36. 26); Voet, *ubi sup.* Whether two witnesses were sufficient, and whether the witnesses were a condition of validity or merely of proof, are points upon which the commentators are not in agreement. See Windscheid, *Lehrbuch des Pandektenrechts*, vol. iii, sec. 544. 4 and notes.

[6] Voet, 28. 1. 17. The texts on the subject of the testamentum parentis inter liberos are not very clear. The principal enacting words of the Nov. run (in Latin) as follows: Nos igitur volumus si quis litteras sciens inter filios suos voluerit facere dispositionem, primum quidem ejus praescribere tempus, deinde quoque filiorum nomina propria manu, ad haec uncias in quibus scripsit eos heredes, non signis numerorum significandas, sed per totas litteras declarandas, ut undique clarae et indubitatae consistant.

models. The authorities generally agree that no one is forbidden to make his will in Roman form ; though, they add, it is not usual to do so.[1] Dutch custom prescribed other forms of will-making, of which we shall now speak.[2]

How wills were made in Holland.

In the seventeenth century, Grotius tells us,[3] wills were usually made in one of two ways : either (1) before two Schepenen and the Secretary of the Court ;[4] or (2) before a notary and two witnesses. If the testator wished to disherit a child, the witnesses must be Schepenen.[5] In the case of the notarial will, the notary must know the testator,[6] or failing that, must know the witnesses,[7] who must know the testator ; and in the last event, the fact of knowledge must be recorded in the instrument.[8] As to the manner of executing the notarial will, the procedure varied. Sometimes the will, verbally pronounced by the testator, was reduced to writing by the notary, and entered in his protocol, from which a copy might afterwards be obtained.[9] Sometimes the notary read[10] to the

[1] Gr. 2. 17. 16 ; Voet, 28. 1. 20 ; V. d. K. *Th.* 293 ; V. d. L. 1. 9. 1, whose statement, however, does not extend beyond the nuncupative will with seven witnesses. But this mode, he adds, is now very seldom used.

[2] For the early history of wills in the Netherlands see Fock. And., vol. ii, pp. 313 ff. and Wessels, *Hist. R.-D. L.*, pp. 510 ff.

[3] Gr. 2. 17. 17–18 ; Van Leeuwen, 3. 2. 6 ff. ; V. d. L. 1. 9. 1.

[4] Van der Keessel (*Dictat. ad* Gr. 2. 17. 16) says : Hic modus testandi fuit antiquissimus et inde ab anno 1400 receptus. See *Rechtsg. Obs.*, pt. iii, no. 44.

[5] V. d. L. 1. 9. 5. (*ad fin.*) ; V. d. K. *Th.* 294. This seems to have been enacted by an Edict of Charles V of unknown date : 'edicto quodam Caroli V'. Vinnius, *ad* Inst. 2. 10. 14, sec. 4, citing Groenewegen, *de leg. abr. ad hunc tit.* ; *Sententien van den Hoogen en Provincialen Raad*, no. 72.

[6] Perpetual Edict of Charles V of October 4, 1540, art. 14 ; 1 G. P. B. 319 ; Gr. 2. 17. 22 ; Voet, 28. 1. 24.

[7] These must be males, of full age and good repute (Luyden van eeren, weerdich van gheloove). Perpetual Edict, *ubi sup.* ; G. 2. 17. 21.

[8] Gr. 2. 17. 22. A will is not void which fails to express this fact, says Voet (28. 1. 24). But see *Resolution of the States of Holland and West Friesland* of March 18, 1671 ; 3 G. P. B. 487.

[9] Gr. 2. 17. 23. This process, which seems to have been very common, is neatly described by Neostadius : *Decis. van den Hove*, no. 1 (*ad fin.*) : Notarius excipit viva voce mentem testatoris et deinde, ad probationem, redigit ejus voluntatem, nuncupative prolatam in scriptis, et registro suo inserit.

[10] By Cape Act No. 3 of 1878, sec. 1 ; Transvaal Ord. No. 14 of

testator in the presence of witnesses a will previously committed to writing, after which he asked the testator if he had understood it, and acknowledged it as his last will. If the testator assented, it was held sufficient, though without the signature or seals of testator or witnesses.[1] Vinnius[2] objects to this latter method, that it affords an opportunity for fraud. Wills of the above-described kinds are termed 'open wills'.[3]

A special kind of notarial will is the 'closed will' (*besloten testament*).[4] This is an instrument written by the testator, or by another by his direction,[5] and signed by him, which he produces to a notary and two competent witnesses, declaring it to be his last will. The notary then encloses the will in a wrapper, seals the wrapper on the outside, and adds a note of the testator's declaration, which is subscribed by the testator[6] and the witnesses (*acte van superscriptie*).[7]

A testament, Voet says, must be dated; otherwise it

1903, sec. 5; and O. F. S. Ord. No. 11 of 1904, sec. 5: No notarial will shall be taken to be invalid by reason that the same was not read over by the notary or by any other person to the testator in the presence of the subscribing witnesses. The Cape Act was passed in consequence of the decision in *Meiring* v. *Meiring's Exors.* (1878) Buch. 27; 3 Roscoe 6, that a will of this kind, which had not been read by the notary to the testator in the presence of the witnesses, was invalid. Voet, 28. 1. 23; *Cens. For.* 1. 3. 2. 8 (*ad fin.*); Sande, *Decis. Fris.* 1. 4. 5.

[1] Voet, 28. 1. 23, citing Groenewegen, *de leg. abr. ad* Inst. 2. 10. 3; V. d. K. *Th.* 296. Van der Linden says (1. 9. 1): 'Although it is necessary that the testator should sign in the presence of the notary and witnesses, yet a will clearly declared by word of mouth to the notary and the witnesses must be followed as a valid will in case the testator should die before the minute was properly drafted and was thus unable to sign.'

[2] Vinnius *ad* Inst. 2. 10. 14, sec. 4.

[3] V. d. L. *ubi sup.*

[4] Van Leeuwen, 3. 2. 5; Voet, 28. 1. 26; V. d. L. *ubi sup.*

[5] Provided such other takes no benefit under the will. V. d. L. *ubi sup.*

[6] Voet, *ubi sup.* The testator's endorsement was (*semble*) usual, but not necessary. See de Haas *ad Cens. For.* 1. 3. 2. 7, citing Gr. 2. 17. 25, which he understands to apply to the closed will.

[7] When the will was opened it was usual for the notary and witnesses to be present. Gr. 2. 17. 26; Decker *ad* Van Leeuwen, *ubi sup.* The fact was placed on record by the notary (*acte van opening*). V. d. L. *ubi sup.*

will be held void, unless the circumstances exclude the risk of fraud.[1]

In the modern law no particular form of words is required.

In the modern law, it is not required that a will should be framed in any particular form of words. Even an institution of heirs is unnecessary. Of course, the law lays down certain rules of construction of words and phrases,[2] which in the absence of evidence of a contrary intention on the part of the testator, the Courts will follow. But we must not allow them to detain us. Here it will be enough to mention two particular clauses frequently inserted in wills, which were known in the Dutch Law as the 'clausule reservatoir' and the 'clausule derogatoir', each of which requires a few words of explanation.

Clausule reservatoir.

The clausule reservatoir[3] is a clause in which the testator reserves to himself the right of adding to, or subtracting from, the dispositions of the will, and ratifies by anticipation any further dispositions which he may make under his hand, such dispositions to have the same effect as if inserted in the testament. Voet expresses a strong opinion against this practice, but hesitates to declare it illegal.[4]

Clausule derogatoir.

The clausule derogatoir is one in which the testator purports to disable himself by anticipation from departing from the tenour of his will, either by any subsequent disposition whatever, or by any disposition not expressed in a particular form of words or the like.[5] Voet justly observes

[1] Voet, 28. 1. 25.

[2] See Gr. lib. ii, cap. xxii.

[3] *Cens. For.* 1. 3. 11. 10; *Holl. Cons.*, vol. i, no. 125; Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, capp. iv–v; V. d. K. *Th.* 337; V. d. L. 1. 9. 2. The reservatory clause is expressly retained by Cape Ord. No. 15 of 1845, sec. 4, which applies both to notarial and to under-hand wills. *In re Sir John Wylde's will* (1873) Buch. 113. See also *Nelson* v. *Currey* (1886) 4 S. C. 355, where de Villiers C.J. said: 'All the writers whom I have consulted are agreed that the reservatory clause in a will cannot confer validity on a subsequent testamentary instrument unless that instrument is incontestably proved to have been executed by the testator, and unless it purported to be and was executed under and by virtue of the reservatory clause in the will.'

[4] Voet, 28. 1. 29.

[5] Gr. 2. 24. 8; e. g. containing the words 'arma virumque cano' (Voet, 28. 3. 10), or the whole of the credo (*Holl. Cons.*, vol. v, no. 42), or the words 'Heaven be my portion' (V. d. L. 1. 9. 11), or 'Our soul waits upon the Lord. He is our help and shield' (Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, cap. vii).

How wills are made in the colonies.

that such a clause contains merely a signification of future intention and no derogation from testator's power of changing his will.[1] Whether he has done so or not depends upon the true construction of his subsequent testamentary dispositions. Express revocation of the clausule derogatoir is not necessary.[2]

In the various Roman-Dutch Colonies the formalities necessary to the execution of wills have been the subject of legislative enactment, and the general effect has been to sanction wills of the English type executed in the presence of two witnesses either in addition to or in substitution for other types of testament of Dutch or Roman origin. Thus in all the South African Colonies wills may, and generally speaking must, be executed by the testator or by some person in his presence and by his direction in the presence of two or more competent witnesses.[3] Notarial wills are not abolished but are not in frequent use at the present day.[4] Privileged wills, such as the testamentum parentis inter liberos, are still permitted except in Natal.[5] In British Guiana the English type of will was made optional by Ord. No. 3 of 1839 and

[1] Voet, 28. 3. 10. Schorer (*ad* Gr. *ubi sup.*) and Van Leeuwen (3. 2. 16) agree.

[2] de Haas *in notis ad Cens. For.* 1. 3. 11. 6. The whole question is fully discussed by Bynkershoek in *Quaest. Jur. Priv.*, lib. iii, capp. vi and vii. See also Van Leeuwen, 3. 2. 16–17, and V. d. K. *Th.* 328.

[3] Cape Ord. No. 15 of 1845, sec. 3; Natal Law 2 of 1868, sec. 1; Transvaal Ord. No. 14 of 1903, sec. 1; O. R. C. Ord. No. 11 of 1904, sec. 1. It should be noted that the Cape Act requires that the testator and witnesses should sign at least one side of every *leaf* upon which the will is written. The Transvaal and O. F. S. Ordinances require them to sign 'every sheet'.

[4] 1 Maasdorp, p. 125; Nathan, *Common Law of South Africa*, vol. iii, p. 1830.

[5] The Cape Ordinance by implication, the Transvaal and O. F. S. Ordinances in express terms, preserve the privileged will. By Natal Law No. 2 of 1868, sec. 1, all wills must be signed by the testator in the presence of two witnesses. But (sec. 12): Nothing in this Law contained shall in any wise affect the validity of any will or codicil executed before a notary public; and (sec. 3) Any person being in actual military service, or being in Africa but not in this Colony, on a journey, or a trading, exploring, or hunting expedition or the like, or any marine or seaman, being at sea, may dispose of his property in a testamentary way, or may execute an effectual will or codicil in the same manner as he might have done if this Law had not been passed.

compulsory by Act No. 12 of 1906. The last-named enactment expressly abolishes the notarial will, and by implication the privileged will. In Ceylon a will must be executed either in the presence of a notary and two witnesses, or in the presence of five witnesses,[1] if a notary is not present.[2]

2. Who may make a Will? All persons may make a will except: (*a*) minors under the age of puberty;[3] (*b*) persons mentally incapable[4] and drunkards;[5] (*c*) interdicted prodigals (*hofs- ofte stads-kinderen*).[6] There seems no reason why a deaf-mute, though born so, if of sufficient understanding, should not make a will at the present day.[7] Active testamentary capacity.

[1] Ord. No. 7 of 1840, sec. 3; Pereira, pp. 418 ff. There is a saving in favour of the wills of 'any soldier being in actual military service, and any mariner or seaman being at sea', who 'may dispose of his personal estate as he might have done before the making of this Ordinance' (sec. 13).

[2] I.e. if a notary is not present acting in his notarial capacity. *Perera* v. *Perera* [1901] A. C. 354.

[3] Gr. 2. 15. 3; Van Leeuwen, 3. 3. 2; Voet, 28. 1. 31; V. d. L. 1. 9. 3. In this case 'ultimus impuberis aetatis dies coeptus pro completo habetur.' Voet, loc. cit. In Ceylon: 'No will made by any male under the age of twenty-one years or by any female under the age of eighteen years shall be valid unless such person shall have obtained letters of *venia aetatis* or unless such person shall have been lawfully married. Ord. No. 21 of 1844, sec. 2. In Natal 'No will or codicil shall be valid unless the testator shall at the time of execution or re-execution thereof have attained the age of twenty-one years, or have otherwise become entitled to the privileges of majority by emancipation from paternal power by *venia aetatis* or otherwise'. Law 2 of 1868, sec. 6.

[4] Gr. 2. 15. 4; Voet, 28. 1. 34.

[5] Voet, 28. 1. 35.

[6] Gr. 2. 15. 5; Van Leeuwen, 3. 3. 2; Voet, 28. 1. 34. But see Van der Keessel (*Th.* 281), who says: 'The will of a prodigal which is just and equitable under the 39th Novel of Leo is supposed to be valid in Holland also, as held by the Court on the 22nd Nov. 1616' (*Decis. van den Hove van Hollandt*, no. 116). Leo's rule was: ut quae judicium erroneum quodque prodigum designet, dictet, neque approbatione neque confirmatione digna habeantur; quae vero ad utilitatem spectent suscipiantur atque nequaquam reprobentur. Quid enim si prodigus aut hereditatem necessariis suis relinquere aut pauperibus sua distribuere aut denique gravem servitutis torquem servorum cervicibus adimere velit? See authorities cited by Voet, *ubi sup.* Van der Linden (1. 9. 3) says: De laatstgemelden worden nogthans tot het maken van uitersten wil toegelaten mits zij zulks doen na bekomen octroij en ten voordeele hunner bloedvrienden. See also Van Leeuwen, 3. 3. 2.

[7] Grotius (2. 15. 6) and Voet (28. 1. 36) say that, if a dumb man cannot write, he should obtain a licence from the Sovereign (*landoverheid*; *Princeps*), and Van der Linden recommends this course in

Married women and minors may make wills without the authority of their husbands [1] and guardians [2] respectively. If a deceased spouse, married in community, has left something to the survivor, and at the same time directed how the common property shall devolve after the survivor's death, acceptance by the survivor of the benefit in question deprives him or her of the power of disposition over his or her share of the joint-estate.[3] We shall return to this subject later.[4]

Passive testamentary capacity.

3. **Who may take under a Will.** Except as hereafter stated any person whether native or foreigner,[5] individual or corporate, born or unborn, may take under a will, provided he be ascertained or ascertainable.[6] The exceptions were or are: (1) spiritual persons or houses (*geestelicke luiden ende huizen*) prohibited from taking immovable or movable property;[7] (2) the tutors and curators or administrators of minors, and their children, as well as the godparents and concubines of such minors prohibited from taking under the will of

the case of persons who become thus afflicted after birth. See *Rechtsg. Obs.*, pt. ii, no. 38. A blind man jure civili must make his will before a notary or other eighth witness. Cod. 6. 22. 8. Whether a third witness was necessary in the case of a notarial will was debated. Voet, 28. 1. 37.

[1] Voet, 28. 1. 38; V. d. K. *Th.* 100.

[2] Gr. 1. 8. 2; Voet, 28. 1. 43. [3] Gr. 2. 15. 9.

[4] For other cases of incapacity now obsolete or inapplicable see Van Leeuwen, 3. 3. 4 ff.; Voet, 28. 1. 39–40; Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, cap. ii; V. d. K. *Th.* 277–80; V. d. L. *ubi sup.* The last-named author does not refer to the Placaat of the States of Holland of February 25, 1751 (8 G. P. B. 535), which punishes a man or woman who elopes with a woman or man of any age who has parents living, or with a minor who is under tutelage, with loss of testamentary capacity (Zullen inhabil zyn om te konnen disponeeren onder de leevenden of ter zaake des doods van de Goederen, &c.).

[5] Gr. 2. 16. 1; but not outlaws (woestballingen); or those who adhere to the enemy. Van Leeuwen, 3. 3. 9; Voet, 28. 5. 5.

[6] Gr. 2. 16. 2; Voet, 28. 5. 2.

[7] Gr. 2. 16. 3; or by gift *inter vivos.* Edict of March 20, 1524 (1 G. P. B. 1588). The prohibition, so far as regards title by succession, was extended to movable property by Placaat of October 16, 1531 (2 G. P. B. 2974; Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, cap. i). Further provisions in the same sense were enacted by the States of Holland by Placaat of May 4, 1655 (1 G. P. B. 1592); Voet, 28. 5. 3; V. d. K. *Th.* 284; V. d. L. 1. 9. 4. The effect of this obscure enactment is fully considered by Bynkershoek, *ubi sup.*

such minors any immovable property or interest therein;[1] (3) a person who has contracted a betrothal or marriage with a minor without the necessary consents of parents, relatives, or of the Court, prohibited from taking any benefit under the will of such minor;[2] (4) adulterine and incestuous bastards prohibited from taking directly or indirectly under the will of either parent more than is sufficient for their necessary maintenance[3]—other illegitimate children, however, may be benefited without restriction, unless the testator has at the same time legitimate children, in which case the bastard issue may not take more than one-twelfth of his estate;[4] (5) persons

[1] Perpet. Edict of October 4, 1540, art. 12 (1 G. P. B. 318); Gr. 2. 16. 4; Voet, 28. 5. 8; V. d. K. *Th.* 285–6; V. d. L. 1. 9. 4. Voet suggests that the same prohibition extends to a tutor's wife (*sed quaere*), and to some other cases. Van Leeuwen speaks (3. 3. 12) in general terms of the tutors, curators, and administrators of minors, their wives or children, godparents, concubines, &c. The restriction does not apply to parent-guardians (Lybreghts, *Redenerend Vertoog over 't Notaris Ampt*, vol. i, cap. xix, sec. 7), and other guardians who are near relatives. The limits of this exception are ill defined. See Grocnewegen, *de leg. abr. ad* Cod. 5. 37. 17; Bynkershoek, *Quaest. Jur. Priv.*, lib. iii, cap. iii. Van Leeuwen (3. 3. 12) says that the restriction does not extend to any persons who without last will would by law inherit the property of such minors *ab intestato*. Van Leeuwen (loc. cit.) and others extend the prohibition to 'movable property of considerable value' (roerende goederen van merkelyke waarden). Bynkershoek dissents, as also de Haas *ad Cens. For.* 1. 3. 4. 43. Van der Keessel (*Th.* 286) agrees with Van Leeuwen. It seems clear that by 'concubines' is meant concubines of the minors, though Van Leeuwen takes it to mean concubines of the tutors, &c.

[2] Perpet. Edict of 1540, art. 17 (1 G. P. B. 319); Gr. 2. 16. 5; Van Leeuwen, 3. 3. 16; Voet, 28. 5. 7. The Placaat of February 25, 1751, extends the prohibition to persons of any age (having parents or guardians) who have eloped together.

[3] Gr. 2. 16. 6; Van Leeuwen, 1. 7. 4 and 3. 3. 10; Voet, 28. 2. 13–14; V. d. L. 1. 9. 4. According to Voet the same disability attaches to grandchildren 'sive legitimi nepotes sint ex filio incestuoso sive incestuosi ex filio legitimo'; and incestuous parents cannot be instituted by their children. As to the question whether in South Africa an adulterine child can take under the will of its mother, see the affirmative judgment of the Eastern Districts Local Division (Kotze J. P. and Graham J.) in *Fitzgerald* v. *Green* [1911] E. D. L. D. 432 on the one hand, and the negative answer of the Cape Provincial Division (Maasdorp J. P. and Searle J.) *Fitzgerald* v. *Green & Steytler* [1913] C. P. D. 403, on the other. The Appellate Division has now answered the question affirmatively. A criticism of this decision will be found in *S. A. L. J.* vol. xxxi at p. 139.

[4] Nov. 89. 12. 2 (A.D. 539); Voet, *ubi sup.*; V. d. K. *Th.* 287.

who have committed adultery or incest together prohibited from taking under each other's will;[1] (6) a surviving spouse is prohibited from taking under the will of a deceased spouse (who was previously married) more than the smallest share left by the deceased spouse to any child of his or her previous marriage;[2] (7) a woman who marries within the *annus luctus* prohibited from taking anything under her late husband's will;[3] (8) a notary prohibited from taking any benefit under a will made and passed before him. A like disqualification attaches to any other person who writes a will for another and inserts therein a disposition for his own benefit;[4] and in the modern law to an attesting witness of a will[5] who takes, or whose wife or husband takes, a benefit thereunder.

Of the above prohibitions some are certainly, and others probably, obsolete in the modern law. But the

This is still law in British Guiana. *In re Evans* (1903) *Brit. Gui. Off. Gaz.* vol. xviii, p. 1322.

[1] Voet, 28. 5. 6. In British Guiana held by Rayner C. J. and Earnshaw J., *dissentiente* Dalton A. J. that this is no longer law, principally on the ground that adultery is no longer a crime, and an adulterer is not, in law, a *turpis persona*. *Bert Chunkoo* v. *Beechun* (1912) *Brit. Gui. Off. Gaz.* vol. xxxvi, p. 1437. *Semble* a testamentary gift to a concubine holds good. Voet, loc. cit.; de Haas *ad Cens. For.* 1. 3. 4. 41.

[2] Cod. 5. 9. 6 (*lex hac edictali*); Gr. 2. 16. 7; Van Leeuwen, 3. 3. 17; Voet, 23. 2. 110 and 28. 5. 6; V. d. K. *Th.* 288; V. d. L. 1. 9. 4. The lex hac edictali was repealed in Natal by Law No. 22 of 1863, sec. 3; in Cape Colony by Act No. 26 of 1873, sec. 2; in the Transvaal by Procl. No. 28 of 1902, sec. 127; in the O. F. S. by the Law Book of 1901, chap. xcii, sec. 1; in British Guiana by Ord. No. 12 of 1906, sec. 10. In Ceylon it seems to be disused.

[3] Cod. 5. 9. 1; Voet, 28. 5. 5; and the second husband cannot take more than one-third of her estate by will. Ibid., sec. 6. But the *penalties* for remarriage within the *annus luctus* are stated by Van Leeuwen to be obsolete. *Cens. For.* 1. 1. 13. 27.

[4] Van Leeuwen, 3. 2. 5 and 3. 3. 15; Voet, 34. 8. 3; *Holl. Cons.*, vol. vi, part 2, no. 43; *Serfontein* v. *Rodrick* [1903], O. R. C. 51. But see V. d. K. *Th.* 292. Quaere, does the prohibition extend to the wife or relations of the Notary or other person? See Nathan, *Common Law of South Africa*, vol. iii, pp. 1811 ff. If the Notary were instituted heir the will would at common law have wholly failed, the heir being an incompetent witness.

[5] Cape, Act No. 22 of 1876, sec. 3; Natal, Law No. 2 of 1868, sec. 7; Transvaal, Ord. No. 14 of 1903, sec. 3; O. F. S., Ord. No. 11 of 1904, sec. 3.

penalty of unauthorized marriages (no. (3) *supra*) remains in force, at all events in South Africa ;[1] and the same may be said of the prohibition which stands last in the list (no. 8).

A gift to a person incapable of benefiting under a will is taken *pro non scripto*.[2]

4. Who may witness a Will. In the Roman Law 'those persons only can be witnesses who are legally capable of witnessing a testament. Women, persons below the age of puberty, slaves, persons deaf or dumb,[3] lunatics, and those who have been interdicted from the management of their property or whom the law declares worthless and unfitted to perform this office, cannot witness a will '.[4] Persons connected by potestas were incompetent to witness one another's will ;[5] so was the heir and those connected with him by potestas, but legatees and fideicommissaries were under no such disability.[6]

Who may witness a will: in Roman Law,

Generally speaking, the Dutch Law followed the Roman Law as regards the capacity and qualification of witnesses.[7] But in some respects it departed from it. Thus : (1) It was unnecessary that the witnesses should be specially

in the modern law.

[1] *Mostert* v. *The Master* (1878) Buch., 83.

[2] Grotius (2. 24. 22) says that if the gift is clandestine it is forfeited to the fiscus ; but Van der Keessel (*Th.* 333) following Bynkershoek (*Quaest. Jur. Priv.*, lib. iii, cap. ix) excludes the fisc in favour of the legitimi heredes. Nowadays the lapsed gift would go to the substituted heir or fall into residue. Grotius adds (sec. 23) that gifts to persons adhering to the enemy or to outlaws (*woestballingen*) are forfeited to the fisc. So also Van Leeuwen (3. 3. 9). Groenewegen ad loc. dissents. If a beneficiary under a will has : (*a*) caused testator's death ; (*b*) failed to discover the author of his death ; (*c*) disputed the will ; (*d*) slandered the memory of the deceased ; (*e*) after the execution of the will entertained a deadly enmity against the testator ; (*f*) defiled his wife ; (*g*) plundered the inheritance ; (*h*) in the testator's lifetime contracted with regard to the inheritance with a third party—by the Roman Law he forfeited the benefit to the fiscus, but not, says Grotius (2. 24. 24), to the prejudice of an innocent substitute direct or fideicommissary. Groenewegen (ad loc.) says that, even where there is no substitute, in all these cases an innocent heir is preferred to the fisc. Van der Keessel (*Th.* 334) comments on the first of the abovementioned cases alone, and says that, though the guilty party could not take, his children might.

[3] Or blind. Voet, 28. 1. 7.

[4] Inst. 2. 10. 6 ; Dig. 28. 1. 20.

[5] Inst. 2. 10. 9.

[6] Inst. 2. 10. 11.

[7] Van Leeuwen, 3. 2. 8.

requested to witness the will. It was enough that they knew that they were doing so.[1] (2) A legatee was not a competent witness to an open will[2] notarially executed, but to a closed will he was.[3] On the other hand, the Dutch Law followed the Roman Law: (*a*) in requiring capacity in the witnesses only at the date of the will;[4] and (*b*) in considering a woman[5] as an incompetent witness, as also the heir.[6] Further (herein exhibiting a greater stringency than the Roman Law), it excluded as witnesses persons too nearly related to the heir or testator by blood or affinity.[7]

[1] Voet, 28. 1. 22. [2] Voet, *ubi sup.*; V. d. L. 1. 9. 1.

[3] Voet, 28. 1. 26. Groenewegen, however (*ad* Inst. 2. 10. 11, sec. 7), says in general terms: Etiam hodie legatarios et fideicommissarios in testamentis testes adhibere a juris ratione alienum puto. Van Leeuwen (*Cens. For.* 1. 3. 2. 6) is to the same effect. Voet refers to the view expressed in *Holl. Cons.*, vol. i, no. 103 that (as in English Law) a legatee-witness disqualifies only himself, and says that it is altogether erroneous. Van der Keessel, however, adopts it (*Th.* 291), and it is now statutory in South Africa (*supra*, p. 300, n. 5), in Ceylon (Ord. No. 7 of 1840, sec. 10), and in Brit. Gui. (Ord. No. 12 of 1906, sec. 7).

[4] Voet, 28. 1. 22.

[5] Voet, ibid.; Groenewegen, *de leg. abr. ad* Inst. 2. 10. 6.

[6] Gr. 2. 17. 12; *Joubert* v. *Exor. of Russouw* (1877) Buch. 21.

[7] Voet, 28. 1. 22: Nec tales qui heredem institutum nimis propinquo sanguinis aut affinitatis vinculo contingunt, ut inde suspectum eorum testimonium habendum foret, ita suadente non tam juris civilis subtilitate quam potius recta ac naturali ratione. It does not appear that this limitation extends further than to exclude a son from witnessing, or acting as notary for, a will in which his father is instituted and vice versa. Lybreghts, *Redenerend Vertoog over 't Notaris Ampt*, vol. i, cap. xix, sec. 10; Voet, *ubi sup.* As regards nearness of kin to the testator the restriction here mentioned was taken to extend to the fifth degree of consanguinity inclusive. Lybreghts, *op. cit.* vol. i, cap. xix, sec. 12: De Notaris en de getuigen in eenig Testament moeten den Testateur niet bestaan in Bloedverwantschap tot in den vyfden graad, zynde anderzints reprochabel. Cognati enim et affines ad quintum gradum a testimonio prohibentur. See also *Holl. Cons.*, vol. iv, no. 245. The authority for this proposition—viz. Dig. 22. 5. 4—seems altogether insufficient. But the rule was accepted by the Cape Court of Appeal in *Le Sueur* v. *Le Sueur* (1876) Buch. 153; *Van Niekerk* v. *Raubenheimer's Exor.* (1877) Buch. 51. But see Voet, 22. 4. 5 and 28. 1. 22. The restriction applied to notarial wills only, not to under-hand wills. *Semble* in the case of under-hand wills the Roman Law excluding *domesticum testimonium* (Inst. 2. 10. 6) was in force in Holland. Voet, 28. 1. 8.

At the present day in the Cape Province every person above the age of fourteen years who is competent to give evidence in a court of law is qualified to witness a will. Act No. 22 of 1876, sec. 2. Similar pro-

5. Restrictions on Freedom of Testation. (A) THE LEGITIM. The Roman Law as early as the time of Ulpian accorded the querela inofficiosi testamenti to three classes of persons: (1) descendants; (2) ascendants; (3) brothers or sisters passed over in favour of turpes personae.[1] In the latest law descendants were entitled to one-third of their intestate share, if the deceased left four children or less, to one-half if he left more than four;[2] ascendants and brothers and sisters were entitled to one-fourth of their intestate share.[3] Further, descendants[4] and ascendants[5] must be instituted heirs, though not necessarily to the amount of the legitim. If they were not instituted (except for good cause) the will failed so far as concerned the institution of the heir.[6] The same result followed if brothers and sisters (who need not be instituted) took nothing under the will.[7] In other cases, if the persons entitled did not receive their legitim, they had an 'actio ad supplendam' to bring their share up to the legal limit.[8]

Restrictions on testamentary disposition. A. The legitim: in Roman Law;

The general principles of the Roman Law were accepted in Holland.[9] A child, unjustly disinherited or passed

in Dutch Law;

visions in Transvaal (Ord. 14 of 1903, sec. 2), and O. F. S. (Ord. 11 of 1904, sec. 2), but not in Natal (Nathan, *Common Law of South Africa*, vol. iii, p. 1819). Similar provision in Brit. Gui. (Wills Ordinance (No. 12) of 1906, sec. 6). The Ceylon Law contains no general provision as to the competency of attesting witnesses, with the exception of Ord. No. 7 of 1840, sec. 9, to the effect that: 'If any person who shall attest the execution of any will, testament or codicil shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will, testament or codicil shall not on that account be invalid'.

[1] Girard, p. 864.

[2] Nov. 18, cap. i (A. D. 536).

[3] Girard (p. 865) seems to be of this opinion. Others think that Justinian intended that parents and brothers and sisters should take a third instead of a fourth. Van Leeuwen, 3. 5. 1; *Cens. For.* 1. 3. 4. 12; Voet, 5. 2. 46; Windscheid, vol. iii, sec. 580.

[4] Nov. 115 (A. D. 542), cap. iii (*ad init.*). Fourteen grounds of disherison are enumerated in the text, to which the Dutch Law added one more, viz. when a daughter under age marries without her parents' consent Gr. 2. 18. 13–14. It was not necessary that the child should be instituted. A legacy or gift *inter vivos* was sufficient to satisfy the law. Gr. 2. 18. 11; Van Leeuwen, 3. 5. 4.

[5] Nov. 115, cap. 4 (*ad init.*).

[6] Ibid., capp. 3 and 4 (*ad fin.*).

[7] Voet, 5. 2. 13.

[8] Girard, p. 867.

[9] Gr. 2. 18. 5.

over by an ascendant,[1] could upset the will as regards the institution of the heir;[2] but only with effect in the absence of a codicillary clause. If such were inserted or even implied,[3] the inheritance must be made over to the instituted heirs.[4] The phrase 'child' included the issue of a deceased child.[5] If the *de cujus* was a father, only legitimate children could bring the querela; in the case of a mother's will the same privilege extended to natural issue.[6] The amount of the legitim was the same as in the Roman Law.[7] If the child were left something, he had the actio ad supplendam.[8] A testator might not burden with fideicommissum the legitima portio of his children, but he might give them the choice of taking either the legitim unburdened or their rateable share of the whole inheritance subject to fideicommissum.[9] Parents were not allowed to bring the querela unless: (*a*) they were entitled to succeed ab intestato[10] (which was not always the case, for, as we shall see, in South Holland a sole surviving parent was entirely excluded); and (*b*) they had not been disinherited for good cause.[11] Brothers and sisters, if themselves of good fame, might impeach a will in which a turpis persona[12] had been instituted to the extent of such institution.[13]

[1] Gr. 2. 18. 10.

[2] Gr. loc. cit.; Van Leeuwen, 3. 5. 6; Voet, 5. 2. 7.

[3] Voet, 29. 7. 7; Schorer *ad* Gr. 2. 24. 7.

[4] The praeteritus, however, was entitled, jure civili, to his legitim, and by the Dutch Law also to the quarta Trebelliana, making together one-half. Voet, 5. 2. 14; 28. 2. 11; Sande, *Decis. Fris.* 4. 2. 2. Van Leeuwen's editor agrees (3. 5. 6). So does Van der Keessel (*Th.* 307). But Decker (*ad* Van Leeuwen, 3. 4. 6 and 3. 5. 6) protests loudly. The effect seems to be, as stated by Van der Keessel (*Th.* 332), to leave the will otherwise undisturbed.

[5] Gr. 2. 18. 6.

[6] Gr. 2. 18. 7.

[7] Gr. 2. 18. 8.

[8] Gr. 2. 18. 10.

[9] V. d. L. 1. 9. 8.

[10] V. d. K. *Th.* 308.

[11] Nov. 115, cap. iv; Gr. 2. 18. 15–6. Justinian gives eight grounds of disherison which Grotius recounts.

[12] Van Leeuwen says (3. 4. 9): 'Infamous persons are considered to be not only those who have by sentence been declared such, but also those whose conduct is such that they are generally reputed not to be honest persons.'

[13] Gr. 2. 18. 17; Voet, 5. 2. 9. The plaint might be brought by germani and consanguinei, but not by uterini. Girard, p. 864.

In British Guiana the right of children to their legitimate portion, is expressly saved by statute.[1] In the other Colonies the legitimate portion and the law relating thereto have been abolished,[2] in South Africa expressly, in Ceylon (*semble*) by implication.

in the modern law abolished except in British Guiana.

(B) QUARTA FALCIDIA. In Dutch, as in Roman, law, the heir is entitled to retain, as against legatees, a clear fourth of the estate or of the share in which he is instituted after payment of funeral and other expenses and debts; the legacies are, if necessary, reduced *pro rata*. But this law has no application: (1) if expressly excluded by the testator;[3] (2) against legacies to hospitals (*Godshuizen*) or to the poor; (3) if the legacy is accompanied by a prohibition against alienation, i. e. charged with a fideicommissum over to a third party; (4) to soldiers' wills; (5) if the heir delays to carry out the will or to make an inventory in case he has obtained the beneficium inventarii.[4]

B. The Falcidian portion.

(C) QUARTA TREBELLIANA. The principle of the Lex Falcidia was applied by later legislation to the relation of fiduciary and fideicommissary. We shall deal with this topic in a later section.

C. The Trebellian portion.

Both the Falcidian and the Trebellian portions have been abolished in the Colonies.[5]

6. **Institution and Substitution of Heirs.** It is unnecessary to linger over the rules relating to this topic, which Grotius[6] and other writers have taken over in detail

Institution and substitution of heirs.

[1] Deceased Persons' Estates Ordinance (No. 9 of) 1909, sec. 4.

[2] Cape, Act No. 23 of 1874, sec. 2; Natal, Law 7 of 1885, sec. 1; O. F. S. Law Book of 1901, cap. xcii, sec. 3; Transv. Procl. No. 28 of 1902, sec. 128. There is no express abolition in Ceylon, as pointed out by the late Mr. Justice Thomson (*Institutes of the Laws of Ceylon*, vol. ii. p. 208); but see Ord. No. 21 of 1844, sec. 1.

[3] Or when a gift *inter vivos* has been made with the express intention of excluding the Falcidian portion. Dig. 35. 2. 56. 5; Voet, 35. 2. 10.

[4] Gr. 2. 23. 20; Van Leeuwen, lib. iii, cap. xi; Voet, 35. 2. 11 ff. But the Dutch Law, unlike the Roman, did not refuse the Falcidian portion to an heir who did not formally claim the benefit of inventory. V. d. K. *Th.* 324.

[5] Cape, Act 26 of 1873, sec. 1; Natal, Law 7 of 1885, sec. 2; Transv. Procl. No. 28 of 1902, sec. 126; O. F. S. Law Book of 1901, cap. xcii, sec. 2; Brit. Gui. Ord. No. 12 of 1906, sec. 9. As to Ceylon there may be some doubt. Thomson, *Institutes*, vol. ii, p. 225.

[6] Gr. lib. ii, capp. xviii and xix.

from the Roman Law. As observed above, the institution of an heir is no longer necessary to the validity of a testament. Vulgar substitution is the same as in the Roman Law.[1] Pupillary and exemplary substitution in the Roman sense are not in use,[2] the same result being sufficiently obtained by fideicommissa.[3] Two particular departures from the Roman Law may be noticed: first, that an institution subject to an impossible condition, is commonly regarded as not seriously intended and therefore void;[4] secondly, that an institution *a die* or *in diem* is good, the effect being to shift the property *from* the intestate heir (*institutio a die*) or *to* the intestate heir or substituted heir named by the testator (*institutio in diem*).[5]

Acceptance or repudiation of the inheritance.

7. **Acceptance or Repudiation of the Inheritance.** Contrary to the Roman Law, no one need accept unless he pleases.[6] Descendants may refuse without beneficium abstinendi. Every heir may either: (*a*) accept unconditionally; or (*b*) accept with benefit of inventory; or (*c*) claim spatium deliberandi; or (*d*) refuse.[7] Married women cannot accept without the consent of their husbands. Guardians accept for their wards. Acceptance or refusal may be indicated by words or by conduct.[8]

[1] V. d. L. 1. 9. 7.

[2] Voet, *Compendium*, 28. 6. 16; Van Leeuwen, 3. 7. 5; V. d. K. *Th.* 106. But Van der Keessel (*Th.* 312) and Van der Linden (1. 9. 7) admit exemplary or quasi-pupillary substitution. See *Rechtsg. Obs.*, pt. i, no. 41.

[3] Or, says Van der Linden, by *verkiezing van het landrecht* (Gr. lib. ii, cap. xxix), which bears some analogy to pupillary substitution. Cf. V. d. K. *Th.* 360 ff.

[4] Gr. 2. 18. 20. Voet (28. 7. 16) dissents. Van der Keessel (*Th.* 310) agrees with Voet.

[5] Gr. 2. 18. 21; V. d. K. *Th.* 311; and see *Th.* 106.

[6] Voet, *Compendium*, 29. 2. 14.

[7] Gr. 2. 21. 2. Grotius (2. 21. 4) and Voet (28. 8. 2) allow a year for deliberation; but Van der Linden (1. 9. 10) says that it lasts only so long as the creditors choose to wait, as they have the right of compelling the heir to accept or repudiate the inheritance. In South Africa (Cape Province) 'the Act of Deliberation is wholly in disuse and there is not a recorded case, at all events after the passing of the Ordinance No. 104 (1833), of any application to the Court for the writ of benefit of inventory'. *Fischer* v. *Liquidators of the Union Bank* (1890) 8 S. C. at p. 52, *per* de Villiers C. J. In British Guiana the spatium deliberandi was limited to six months by Ord. No. 8 of 1838 and abolished by Ord. No. 9 of 1909, sec. 9.

[8] Gr. 2. 21. 3 and 5.

Acceptance or refusal once made cannot be recalled except by minors, who may sue for restitutio in integrum.[1] If an heir to whom an inheritance has been delated dies before acceptance, the right of acceptance passes to the dead man's heirs, or may be disposed of by his will.[2] In Holland the benefit of inventory was by no means granted as of course, but only on application to the Sovereign or to the Hooge Raad, and not in case a substituted heir was willing to accept unconditionally.[3]

8. **Legacies.** In regard to the creation and interpretation of legacies, the rules of the Roman Law are closely followed. We may be content on this topic to refer to the usual sources of information.[4] Legacies.

9. **Codicils.** In Roman Law, codicils were informal documents in the nature of notes or memoranda containing directions from the deceased to his heir testamentary or intestate. In Justinian's legislation they were generally executed in writing by the maker,[5] in the presence of at least five witnesses, male or female,[6] who added their signatures.[7] Though as regards form, therefore, they fell little short of regular wills, in several respects they differed from them. Thus: (*a*) they could not dispose of the inheritance, and therefore could not institute or substitute an heir (directly), nor contain a clause of disherison.[8] On the other hand: (*b*) their validity did not Codicils.

[1] Gr. 2. 21. 6.

[2] V. d. K. *Th.* 321.

[3] Gr. 2. 21. 8–9. For the formalities required see Gr. loc. cit., secs. 10–11.

[4] For the treatment of the topic by the Roman-Dutch writers see Gr. lib. i, capp. xxii and xxiii; Van Leeuwen, lib. iii, cap. ix.

[5] He need not sign. Voet, 29. 7. 1. They might also be nuncupative. Cod. 6. 4. 3. pr.

[6] Gr. 2. 25. 2; Voet, *ubi sup.*

[7] Cod. 6. 36. 8. 3: In omni autem ultima voluntate excepto testamento quinque testes vel rogati vel qui fortuito venerint in uno eodemque tempore debent adhiberi, sive in scriptis sive sine scriptura voluntas conficiatur, testibus, videlicet, quando scriptura voluntas componitur subnotationem suam accommodantibus.

[8] Inst. 2. 25. 2; V. d. L. 1. 9. 2. Van der Linden says further that a will can never be contained in an under-hand instrument whereas a codicil may, if the testator has in his will reserved to himself this power by the clausule reservatoir. But this must be understood subject to the law relating to the testamentum parentis inter liberos.

depend upon the institution of, or the acceptance of the inheritance by, a testamentary heir—if there were none such, the codicils still remained in force and bound the heres ab intestato; (*c*) they might be made either before the will or after the will or in the absence of any will; (*d*) though a man could only leave behind him one valid will, he might leave any number of valid codicils.[1]

Any one might make or take under a codicil who could make or take under a will.[2]

Owing to the greater elasticity of the codicil, and the liability to failure of the formal will, it became usual among the Romans to insert in every will a clause providing that if the instrument failed to take effect as a will it should take effect as a codicil. This was called the clausula codicillaris. It cured defects of form but not of substance, and even the first only if the form satisfied the requirements of the law in case of codicils.[3]

Does the distinction between wills and codicils exist in the modern law?

The Dutch jurists discuss at some length whether there was any longer any difference between wills and codicils.[4] Voet says: 'The law of codicils has been very nearly assimilated to that of testaments, and so not merely do codicils demand the same solemnities as wills, but also anything can be done by way of codicils that can be done by way of will, such as a direct institution or disherison. From which it follows that a woman cannot witness a codicil any more than a will . . . and that the failure

[1] Inst. 2. 25. 3.

[2] Dig. 29. 7. 6. 3; Voet, 29. 7. 2; Girard, p. 923.

[3] Gr. 2. 24. 7. Grotius says also that a will in which an heir is not instituted takes effect as a codicil by virtue of the codicillary clause. But even in the absence of such a clause the will held good. Van Leeuwen, 3. 2. 2, and Decker *ad loc.* Decker is wrong in saying that Voet lays down (29. 7. 7) that the codiciallary clause is always implied.

[4] Grotius simply follows the Roman Law with the addition (2. 25. 3) that 'With us codicils are commonly made (like wills) before two members of the Court and the Secretary, or before a notary and two witnesses'. Groenewegen says (*de leg. abr. ad* Inst. lib. ii, tit. 25): Inter testamenta et codicillos nullam hodie differentiam agnoscere licet. Decker *ad* Van Leeuwen (3. 2. 2) argues with much force that the Roman law of codicils is entirely foreign to the law of Holland. Van der Keessel (*Th.* 289) speaks of existing differences between wills and codicils.

of the will does not involve the failure of the codicils'.[1] Van Leeuwen observes[2] that since two wills cannot co-exist,[3] if a testator has left two wills behind him the second invalidates the first, unless the intention is indicated that the first should take effect as codicil. At the present day the difference between wills and codicils seems, as in English law, to be one of name merely, and not of substance.

10. **How Wills and Legacies are Revoked.**[4] A will, validly made, may be revoked: (1) by a subsequent will,[5] unless the intention is expressed or implied to keep the first will alive;[6] revocation may take place even though no one accepts the inheritance under the second will; a testament parentis inter liberos must be revoked in solemn form,[7] unless the second testament itself contains only a disposition inter liberos;[8] Revocation of wills.

(2) by declaration of intention to revoke;[9] if the institutus was a stranger, this may be done with the formalities necessary to a codicil; otherwise, with the formalities proper to a will; in the case of a closed notarial will a revocation, endorsed on the will and signed

[1] Voet, 29. 7. 5: nec corruere codicillos corruente testamento, e. g. if the instituted heir does not take up the inheritance. See also Voet, 36. 1. 6.

[2] *Cens. For.* 1. 3. 2. 2. Cf. Gr. 2. 24. 11.

[3] But they can, as Van Leeuwen himself observes lower down (*Cens. For.* 1. 3. 11. 9), and Voet (28. 3. 8), and Decker, *ubi sup.*

[4] For Natal Law see Law 2 of 1868, secs. 8–10; for Ceylon, Ord. No. 7 of 1840, sec. 5.

[5] Gr. 2. 24. 9.

[6] Gr. 2. 24. 11; V. d. K. *Th.* 329. But Voet (28. 3. 8) says that there must be an express revocation of the earlier will, otherwise effect is given, so far as they are not irreconcilable, to both. Schorer *ad* Gr. (loc. cit.) agrees; so does Groenewegen (*de leg. abr. ad* Inst. 2. 17. 3). Van Leeuwen (3. 2. 17) says that the second testament would be considered as a codicil except in so far as it contains a general or special revocation of the first will. Van der Linden (1. 9. 11) seems to agree with Grotius. Munniks (vol. ii, p. 136) follows Voet.

[7] Gr. 2. 24. 18; V. d. K. *Th.* 331; but a general declaration of revocation (in proper form) suffices. Van Leeuwen, 3. 2. 18.

[8] Schorer, *ad* Gr. *ubi sup.*

[9] Gr. 2. 24. 16–7, and Groenewegen, ad loc.; Voet, 28. 3. 1; V. d. L. 1. 9. 11. See the contrary views expressed by four members of the Frisian Supreme Court on the one side, and by three professors of Louvain on the other, in *Holl. Cons.*, vol. v, no. 16.

by a notary and two witnesses, will deprive the original of its effect ; [1]

(3) by destruction animo revocandi ; [2]

(4) by marriage, followed by birth of issue.[3] Grotius says further, that a will is revoked by a declaration to the Court (*inter acta*), or made before three witnesses, that the testator does not desire his will to stand, provided that ten years have elapsed since the date of its execution.[4] This piece of Romanism finds no place in the modern law.

By the Civil Law a will was always liable to fail, owing to non-acceptance of the inheritance. But in the modern

[1] Voet, 28. 3. 1, and *Holl. Cons.*, vol. v, at pp. 87 ff.

[2] Gr. 2. 24. 15 ; Voet, 28. 4. 1. If the will has been executed in duplicate it is a question of intention whether destruction of one duplicate destroys the effect of the other (*Nelson* v. *Currey* (1886) 4 S. C. 355). The destruction of the copy or grosse of a notarial will has no effect (at all events if the will was orally pronounced and taken down in writing by the notary). So say Voet (*ubi sup.*) ; Groenewegen (*ad* Gr. *ubi sup.*); Van Leeuwen (3. 2. 17); and Van der Linden (1. 9. 11). To the same effect is *Holl. Cons.*, vol. iii, pt. 2, no. 156, with which agrees Neostadius, *Decis. van den Hove*, no. 1. The opinion in *Holl. Cons.*, vol. i, no. 109 is directly contrary. Van der Keessel says (*Th.* 330) : Deleto testamenti exemplo (de Grosse) quod testator adservat, non rumpitur exemplar (de Minute) quod in protocollo Notarii invenitur, nisi probetur testatorem delevisse, ut intestatus decederet. Partial destruction, if intentional, *prima facie* only revokes the part destroyed. Voet, 28. 4. 3. But cutting the strings or breaking the seals of a closed will destroys the whole. V. d. L. *ubi sup.*

[3] Van der Linden seems to be the only authority for this statement, which rests upon the assumption that the birth of a postumus renders the will void. See V. d. K. *Th.* 306. But does it ? In the modern law praeteritio is regarded as tacit disherison (Voet, *Compendium*, lib. xxviii, tit. 2 (*ad fin.*)), with the result that the testament is treated as inofficious (Voet, 5. 2. 7), and the praeteritus comes in to the extent of his legitim, as if expressly disinherited. Even Voet, who seems to have suggested to Van der Linden the view expressed in the text, does not profess that the birth of a postumus always avoids the will, but only when the father, having no other children, has in ignorance of the fact that his wife was with child instituted a stranger (Voet, 5. 2. 17). The opinion in *Holl. Cons.*, vol. iv, no. 21 is to the same effect. In Natal, by Law 2 of 1868, sec. 8, a will is (subject to some exceptions) revoked by marriage. In the other provinces (*semble*) this is not so. In Ceylon (Ord. No. 7 of 1840, sec. 5) a will is revoked by marriage. The Brit. Gui. Wills Ord. of 1906 has nothing to say on the subject of revocation.

[4] Gr. 2. 24. 14. This is taken from Cod. 6. 23. 27. See *Holl. Cons.*, vol. i, no. 89. Groenewegen (*de leg. abr.* ad loc.) doubts. Schorer, (*ad* Gr. loc. cit.) dissents : 'moribus vix admitti potest'. Van Leeuwen (3. 2. 17) admits it without comment.

law, which, as we have seen, dispenses with the institution of an heir altogether, the non-acceptance of the inheritance by the instituted heir is not allowed to operate to the prejudice of legacies,[1] which must be duly paid by the intestate successors,[2] or, if there are none such, by the fisc. The result is the same if the testator has erased the names of the heirs without intending thereby to revoke the whole will.[3]

Revocation of legacies.

Legacies in particular are extinguished :

(1) if expressly revoked by will or codicil ; [4]

(2) if impliedly revoked, which happens if the subject-matter of the legacy is given away or (except under stress of necessity) sold ; [5]

(3) if the legatee dies before the testator, or before the condition (if any) of the legacy has been implemented ; [6]

(4) by erasure, &c., in the will animo revocandi.[7]

Fideicommissa: in Roman Law,

11. Fideicommissa. The student who derives his knowledge of Roman Law at first or second hand from the Institutes of Gaius and Justinian, may be supposed to be familiar with the origin and history of fideicommissa, as made known to us in those works. He has learnt that the fideicommissum owed its beginning to the cumbersome technicalities of the Roman system of testamentary succession, and, in particular, to the fact that none but

[1] Schorer (*ad* Gr. 2. 24. 19) attributes this consequence to the codicillary clause ; but the insertion of this clause is certainly not necessary to-day.

[2] Voet, 28. 3. 14 ; who says : quod et moribus nostris conveniens est propter clausulam codicillarem testamento addi solitam. But (*semble*) the same result follows even in the absence of such clause. V. d. L. 1. 9. 11.

[3] Voet, 28. 4. 3.

[4] Gr. 2. 24. 27 ; Voet, 34. 4. 3.

[5] Gr. 2. 24. 28; Voet, 34. 4. 5–6. Grotius, following Dig. 34. 4. 3. 11 and lex 4, adds 'serious enmity between testator and legatee.' Groenewegen doubts (*de leg. abr. ad* Dig. lib. xxxiv, tit. 4). Voet (34. 4. 5) affirms and extends the principle. According to Grotius (2. 24. 27) a legacy may be revoked by a declaration before two witnesses—*sed quaere*. Van der Keessel says (*Th.* 335) that a legacy may be revoked by a marginal note in the grosse or copy of a notarial will signed by the testator. See *Holl. Cons.*, vol. v, no. 45.

[6] Gr. 2. 24. 29, and Schorer, ad loc. ; Voet, 34. 4. 9.

[7] Gr. 2. 24. 27.

Roman citizens[1] could be validly instituted as heirs. But he may sometimes have wondered why the fideicommissum retained its importance in a later age, when the codicil (which was the usual vehicle of the fideicommissum) so far as form went was little less technical than the formal testament; and when, as a rule, the classes disqualified from taking by will were equally disqualified from taking by way of fideicommissum.[2]

employed to settle property.

It is possible that it may hardly have occurred to him that the great part which the fideicommissum played in the Roman Law was due, not merely, and perhaps not principally, to the fact that it afforded an escape from the fetters of form, but much more to the fact that it supplied an easily adaptable method of tying up property through successive generations. The fideicommissum of the jus civile was in fact the equivalent of what English lawyers call a settlement.[3] When, therefore, we read the well-known formula: 'Be Titius my heir, and let him restore the inheritance to Maevius', we must remember that, to aid our comprehension, the situation is presented, as it were, *in vacuo*. In practice it is highly probable that the direction would be that Titius should hand over the estate at his death, or, perhaps, after the lapse of a fixed time or on the occurrence of some certain or uncertain future event. In the first case, Titius takes what an English lawyer would describe as a life-estate with remainder to Maevius; in the other cases he takes the ownership subject to an executory limitation over in favour of Maevius. Perhaps the latter phrase suggests a better analogy in the first case also; for the Roman Law knew nothing of any doctrine of 'estates'. There was no half-way house between dominium and servitude. If you were not dominus you had merely a jus in re aliena. To speak of a man as owner for life is to use a phrase which,

[1] And Latins. Girard, p. 110. Gaius, ii. 285: Peregrini poterant fideicommissa capere: et fere haec fuit origo fideicommissorum.

[2] Girard, p. 923.

[3] See examples in Hunter, *Roman Law*, p. 823.

to the Roman lawyer, would have been unfamiliar and inartistic, if not positively incomprehensible.

Fideicommissa and trusts.

It is not unusual to describe fideicommissa as testamentary trusts.[1] Passing by the objection that they were frequently intended to take effect upon an intestacy, we may remark that, to apply the terms of art proper to one system of law to another system in which they are not at home, is always dangerous and often misleading. The differences between the trust and the fideicommissum are fundamental. Thus: (1) the distinction between the legal and the equitable estate is of the essence of the trust; the idea is foreign to the fideicommissum; (2) in the trust, the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent, and often co-extensive; in the fideicommissum the ownership of the fideicommissary begins when the ownership of the fiduciary ends; (3) in the trust, the interest of the beneficiary, though described as an equitable ownership, is properly 'jus neque in re neque ad rem';[2] against the bona fide alienee of the legal estate it is paralysed and ineffectual; in the fideicommissum the fideicommissary, once his interest has vested, has a right which he can make good against all the world, a right which the fiduciary cannot destroy or burden by alienation or by charge;[3] (4) a further difference, more familiar perhaps but not more important than the others already mentioned, is that while a trust is created as often by act *inter vivos* as by last will, in the Roman Law a fideicommissum always, or almost always, took effect *mortis causa* by virtue of a testament or codicil; Voet,[4] indeed, and other writers say that a fideicommissum could also be created by act *inter vivos*; but the passages from the Corpus Juris

In the Roman Law fideicommissa usually took effect on death;

[1] E. g. Hunter, p. 809.

[2] *Chudleigh's* case (1589) 1 Co. Rep. at 121 b.

[3] Cod. 6. 43. 3. 3; Voet, 6. 1. 6; 18. 1. 15; 36. 1. 64; V. d. L. 1. 9. 8. The Roman Law on this point is clear, but the Courts in South Africa and Ceylon have shown a very strong disposition to refuse relief against a bona fide purchaser for value. See *Lange* v. *Liesching* (1880) Foord at p. 59.

[4] Voet, 36. 1. 9; Vinnius, *Tract. de pact.*, cap. xv, nos. 11 and 12.

but in the Dutch Law might be created by act inter vivos.

cited in support of this view are neither numerous nor convincing.[1] In the law of Holland it was otherwise. Though the books have little to say on the subject, it is clear that fideicommissa were created by ante-nuptial settlement or other act *inter vivos*.[2] As to the modern law there can be no question. If we deny this we shall hardly find a place in any existing system of Roman-Dutch Law for the trusts which, made familiar by settlements framed upon English models, have invaded the Courts and even the statute book. Implied and constructive trusts no less than express trusts have been recognized as an institution of the Roman-Dutch Law of the present day.[3] But a development which no doubt is necessary, if the legal system is to keep pace with the *rationes vitae* of modern times, is certainly attended by difficulty. A doubt may arise whether the circumstances which in a given case raise a trust in the law of England will equally raise an implied fideicommissum in the Roman-Dutch Law. A still more fundamental question relates to the

Fideicommissa in the modern law.

[1] Dig. 16. 3. 26. pr.; Dig. lib. xxxii, lex 37. 3; Cod. 3. 54 (55). 3; Dig. lib. xxx, lex 77. The last-cited passage contains the words: Ab omni debitore fideicommissum relinqui potest, i.e. every debtor may be charged with a fideicommissum. But such a f.c. falls short of a f.c. in the full sense, if Voet and Vinnius are right in saying that it gave rise to a personal action merely, not to a vindication. All that the passage last cited from the Digest means is that a debtor may be directed to make payment to a third party, and if he does so may repel a claim by his creditor's heir.

[2] It seems that they were recognized to have the same effect as fideicommissa arising *mortis causa*. By a Placaat of the States of Holland and West Friesland of July 30, 1624 (1 G. P. B. 375), all fideicommissa or prohibitions of alienation affecting immovable property were to be destitute of effect unless registered. But this Placaat, as Voet tells us (36. 1. 12), was never introduced into practice and so became obsolete. *Rechtsg. Obs.*, pt. i, no. 42; V. d. K. *Th.* 319. For the law requiring registration in Utrecht see Abraham à Wesel, *Comment. ad Nov. Constit. Ultraject.*, Art. 22. For an early case, in the modern law, of fideicommissum created by ante-nuptial contract see *Buisinne* v. *Mulder* (1835) 1 Menz. 162. See also *Du Plessis* v. *Estate Meyer* (1913) *S. A. L. J.*, vol. xxxi, p. 184. Fideicommissa created by act *inter vivos* are even more strictly construed than fideicommissa created by testament. *Holl. Cons.*, vol. iii, pt. 2, no. 111.

[3] See the very able judgment of Mr. Berwick in the District Court of Colombo confirmed by the full Court in Appeal in *Ibrahim Saibo* v. *Oriental Bank Corporation* (1874) 3 N. L. R. 148.

effect of the trust in the modern law. The Colonial Courts have manifested a strong inclination to 'receive' into the law the English theory of trusts with all the consequences of the distinction between the legal and the equitable estate.[1]

Method of treatment.

Since all the text-books of the Roman-Dutch Law follow the Roman Law in their treatment of fideicommissa, it will be convenient to pursue the same method, and to regard the fideicommissum primarily as a mode of testamentary substitution which derives its importance from its utility as a means of tying up property through successive generations.[2] The student will find no difficulty in applying the rules which we shall proceed to state, to dispositions *inter vivos* as well.

No form of words required to create a fideicommissum.

No particular form of words is needed for the creation of a fideicommissum. All that is required is that the testator's meaning should be clearly expressed or implied,[3] for the law is unfriendly to fideicommissa and will not lightly presume in their favour.[4]

Fideicommissa are: (*a*) express,

An express fideicommissum is created by such words as these: 'I make my wife my heir, but when she comes to die I desire that she will let the property go to those who shall be then nearest to me in blood' or to certain named persons.[5]

(*b*) implied.

An implied fideicommissum is created in many ways, for example, by prohibition of alienation.[6]

Effect of prohibition of alienation.

But such a clause is strictly construed, and is never allowed to be good unless some person is named or clearly indicated as the person for whose advantage the prohibition is imposed.[7] Thus, a general prohibition of alienation is not upheld. But a prohibition of alienation followed by a gift over

[1] Cf. *Lange* v. *Liesching* (1880) Foord at p. 58.

[2] Huber, *Hedensd. Rechtsg.* (2. 19. 5) says: 'Schier altoos valt de beswarenisse heedensdaegs niet anders op den eersten erfgenaem als om nae sijn doodt de goederen over te dragen.' But sometimes the fiduciary plays the part of a 'bare trustee'. Ibid. sec. 11.

[3] Van Leeuwen, 3. 8. 4; V. d. L. 1. 9. 8.

[4] Voet, 36. 1. 72; Huber, *op cit.* 2. 19. 76–7.

[5] Huber, 2. 19. 37.

[6] Van Leeuwen, 3. 8. 6; Huber, 2. 19. 53.

[7] Gr. 2. 20. 11; Voet, 36. 1. 27; Huber, 2. 19. 54.

upon the death of the first taker creates a fideicommissum in favour of the person indicated as successor. If the heir is forbidden to alienate the property out of the family the law raises a fideicommissum in favour of the intestate heirs,[1] so that the heir is not free to dispose of the property either by act *inter vivos* or by will.[2] Such was the effect in Holland generally. But in Amsterdam a proviso of this nature was almost destitute of effect ; for it was construed as merely prescribing the course of descent in respect of so much of the property as the heir had not alienated *inter vivos* or disposed of by his testament.[3]

Fideicommissum residui.

Nearly, but not quite, the same freedom of alienation is enjoyed by the heir who is given power to diminish or waste the property, with a direction to make over the residue to some person named by the testator (*fideicommissum residui*).[4] In this case the heir may freely dispose of three-quarters [5] of the estate, leaving one quarter only to the fideicommissary ; if he has alienated more than three-quarters, the goods last alienated may be followed into the hands of the alienee.

Conditional fideicommissa.

Very often the fideicommissum depends upon a condition, as where a wife is appointed heir with a gift over in the event of remarriage : e.g. ' I appoint my wife Jane my heir ; but, if she marries again, I desire her to make over the property to my brother Henry ' ; or when a son

[1] I.e. of the last possessor (usually), not of the settlor. Huber, 2. 19. 68.

[2] Gr. 2. 20. 12 ; Voet, 36. 1. 27 ff. ; *Josef* v. *Mulder* [1903] A. C. 190. Huber (sec. 59) says that if the direction is that the property is not to be alienated out of the family the fiduciary may leave it by will to any one of the family near or remote. *Secus*, if the property is left *to* the family (gemaekt aen het geslachte).

[3] Gr. *ubi sup.* ; Voet, 36. 1. 5. See V. d. K. *Th.* 318.

[4] Gr. 2. 20. 13 ; Van Leeuwen, 3. 8. 9 ; Huber, 2. 19. 103 ; V. d. K. *Th.* 320. The same result follows when a usufruct with a power of alienation has been left subject to a condition that the property should be restored after death. ' V. d. K. *Th.* 372.

[5] Grotius says one-fourth ; but this is a slip corrected in Groenewegen's and later editions. In certain cases he might dispose of the whole, viz. ex causa dotis seu propter nuptias donationis seu captivorum redemptionis vel si non habeat unde faciat expensas. Nov. 108, cap. 1 (A. D. 541) ; Authentica *ad* Cod. 6. 49. 6.

is appointed heir with a gift over in the event of his dying under the age of five-and-twenty.[1] But the commonest condition of all is that which provides that the goods are to go over if the first taker dies without children. The formula is something of this kind: 'If my heir dies without children I will that he shall let the property which comes to him from me go to my nearest of kin then in being'. The effect is that the gift over is only realized in case the heir leaves no legitimate children surviving him at the date of his death.[2]

The clause 'si sine liberis decesserit'.

If the clause *si sine liberis decesserit* was expressly inserted as the condition of a gift over taking effect, and the first taker had children who survived him, the gift over would certainly fail; but whether a fideicommissum would be implied in favour of the children was disputed. Grotius says that a negative answer is commonly given unless the testator was an ancestor, or the children are themselves charged with a fideicommissum, or from other circumstances it appeared that the testator intended that they should benefit under his will.[3]

If however the testator was an ancestor, not only does the above-mentioned clause create a fideicommissum in favour of the children, but even if the clause has been omitted it will be read into the will with the same result. For if an ascendant confers a benefit by his will upon a descendant who was childless at the date of the will, with an unqualified gift over in the event of such descendant's death, none the less, if, at the date of his death, such descendant leaves children surviving him, a fideicommissum will be implied in their favour, in derogation of the express fideicommissum contained in the testator's will.[4]

[1] Huber, 2. 19. 44. [2] Voet, 36. 1. 13 ff.; Huber, 2. 19. 45–6.

[3] Gr. 2. 20. 5; Huber, 2. 19. 30. I institute my brother; if he dies without children, the property to go over to my nephew. This does not create a f.c. in favour of the brother's children. Ibid. sec. 55. Voet (39. 5. 44) observes: Nititur scilicet tota quaestionis hujus definitio ex determinatione controversiae, an positi in conditione censeantur etiam positi in dispositione. See also Van Leeuwen, 3. 8. 12.

[4] Voet, 36. 1. 17; Huber, 2. 19. 49. See *Galliers* v. *Rycroft* [1901] A. C. 130. It was held in this case that in Roman-Dutch Law, differing

The effect of fideicommissum as regards the ownership of the property subject to it.

In the Roman Law it was the duty of the fiduciary to 'restore' the property to the fideicommissarius either forthwith or upon the vesting of the fideicommissum. The texts of the Corpus Juris leave us in some uncertainty as to what was required to constitute restitution. *Prima facie* the property in question vests in the first instance in the fiduciary, as heir or legatee, by title of inheritance or legacy; and it would appear that some act of restitution—delivery or its equivalent—was necessary to vest the property in the fideicommissary.[1] But Justinian put fideicommissa and legacies on an equal footing, and gave to all legatees the real action which, before his time, had been limited to legatees by vindication.[2] As regards res singulares, at all events, the effect would be to vest the property in the fideicommissary *eo instanti* that the fideicommissum matured. In the modern law it would seem reasonable to infer the same result in every case of fideicommissum. If this be so, the true parallel in English Law to the fideicommissum is not the trust but the grant to uses under the statute. If the fideicommissum is expressed to take effect at once, the fiduciary will be a conduit-pipe to convey the property to the beneficiary. If, on the other hand, the vesting of the fideicommissum is postponed, the fiduciary will be in the position of an owner in fee simple subject to an executory limitation over to another. Upon the happening of the contemplated event the ownership will shift over to the fideicommissary. If the terms of the fideicommissum involved active duties in relation to the property, the case would, no doubt, be different. In such a case an actual conveyance would be necessary to transfer the property to the fideicommissary owner.

Parallel in English Law.

in this respect from Scots Law, the clause 'si sine liberis decesserit' is implied in case of fideicommissary substitution only, and not also in case of direct substitution.

[1] Dig. 36. 1. 38 (37). pr.; Voet, 36. 1. 34; Huber, 2. 19. 108; Sande, *Decis. Fris.* 4. 5. 13, where it is laid down that before 'restitution' a fideicommissary cannot maintain an action against a third party in possession.

[2] Inst. 2. 20. 2; Cod. 6. 43. 1. 1.

Let us now confine our attention to the most usual case of fideicommissum, viz. where the fiduciary is intended to take a life interest and to ' restore ' the property upon his death. What is his position ? In the first place, unless the testator has directed otherwise,[1] he must give security for the restoration of the property, undiminished in amount and value, to the person entitled to succeed him.[2] In the interval he is dominus, and may exercise all rights of dominion not inconsistent with the rights of his successor. Like the usufructuary, he may transfer his right of enjoyment to another, remaining liable, however, to the fideicommissary for the acts and defaults of the transferee.

Fideicommissum taking effect on death.

Next, put the case of a fideicommissum expressed to take effect upon the happening of a contemplated event during the lifetime of the fiduciary, which event has happened. Has he *ipso jure* ceased to be dominus ? It is submitted that he has. At all events, he cannot deal with the burdened property, so as to give a good title to a purchaser, however innocent. This is expressly enacted in Cod. 6. 43. 3 to the following effect : ' If a legacy or fideicommissum be left to any one with a condition of substitution or restitution, either in an uncertain event or in a certain event but at an indefinite time, he will do better if in these cases he refrains from selling or mortgaging the property, lest he should expose himself to still greater burdens under a claim of eviction. But if in his lust for wealth he should hastily proceed to a sale or mortgage in the hope that the conditions will not take effect : let him know that, upon the fulfilment of the condition, the transaction will be treated as of no effect from the beginning, so that prescription will not run against the legatee or fideicommissary. And this rule will, in our opinion, equally obtain whether the legacy has been left

Fideicommissum taking effect during the lifetime of the fiduciary. Can the fiduciary give a good title to a purchaser without notice ? In Roman Law ;

[1] Van Leeuwen, 3. 8. 18 ; Huber, 2. 19. 134 ; V. d. K. *Th.* 511 (mistranslated by Lorenz).

[2] Huber, 2. 19. 83 and 131. He must also make an inventory. From this duty he cannot be excused even by the testator himself. Voet, 36. 1. 36.

unconditionally or conditionally to take effect at some certain or uncertain future time, or in an uncertain event. But in all these cases let the fullest liberty be given to the legatee or fideicommissary to claim the property as his own, and let no obstacle be placed in his way by those who detain the property '.[1]

in Roman-Dutch Law.

That the principles set forth in this law were accepted as part of the law of Holland admits of no doubt. The reader will observe that the tenderness for the bona fide purchaser for value, which characterizes the jurisprudence of the Court of Chancery, has no counterpart in the Roman-Dutch law of fideicommissa.

In what cases alienation is permitted.

In a limited number of cases alienation was permitted so as to pass the property free of a future or contingent fideicommissum. The rule and its exceptions are stated in the following passage of Van der Linden: 'The person in possession of any fideicommissary property has, however, no power to pledge or alienate that property as he pleases, except for the payment of the debts with which the property itself is charged; or with the consent of all the remaindermen, and for reasons of pressing necessity. In which case, however, previous release and authorization [of the Court] should be obtained.'[2]

The position if: (*a*) fiduciary dies before testator; (*b*) fideicommissary dies before vesting.

Next let us consider the position: if (*a*) the fiduciary dies before the testator; or (*b*) the fideicommissary dies before the vesting of the fideicommissum. The result in each case is the same; the fideicommissum fails. In the first case there is never any one burdened;[3] in the second case there is never any one entitled.[4] A cautious testator can, no doubt, by taking the proper steps provide against

[1] *De Jager* v. *Scheepers* (1880) Foord at p. 123, *per* de Villiers C. J.

[2] V. d. L. 1. 9. 8.

[3] Voet, 36. 1. 69; Huber, 2. 19. 114–21. The result is the same, Huber says, if the fiduciary dies before he has accepted the inheritance. But see Girard, p. 934, n. 4.

[4] Voet, 36. 1. 67; Huber, 2. 19. 31 and 50. In some cases, however, the fideicommissary may claim the property even before the vesting of the f.c., notably if the fiduciary has alienated all the property. Ibid. sec. 125. If the fiduciary dies after the vesting of the inheritance but before the fideicommissary, the f.c. must be implemented by the heir. Ibid. sec. 120.

such a result.[1] But if he has failed to do so, there is no escape from the legal consequences.

Distinction between life interest created: (*a*) by fideicommissum; (*b*) by usufruct.

This is why when a life interest is given by will it is of the utmost importance to find out whether the testator intended to create the life interest by way of fideicommissum or by way of usufruct. From the point of view of the life tenant the result is, perhaps, much the same in either case. But from the point of view of the person who is to take after him the distinction is of vital importance. If the life tenancy is created by way of usufruct the dominium vests forthwith in the person who is to take as successor. He acquires from the very moment of the testator's death a real right, which he can dispose of *inter vivos* or by will or transmit to his intestate heirs. But if the life tenancy is the consequence of a fideicommissum, the fideicommissary takes no immediate interest. He must be alive when the fiduciary dies. If he predeceases the fiduciary, he transmits nothing to his heirs,[2] for he had nothing to transmit, and the ownership, which was from the beginning vested in the fiduciary, being now freed from the burden of the fideicommissum, is his to dispose of in any way he pleases. This fundamental distinction is seldom present to the mind of lay people who make wills, and the task of construing their dispositions is often a matter of some difficulty. A clause forbidding alienation by the life tenant points to a fideicommissum, but affords merely a presumption, not a positive rule of law.[3] The tendency of the Courts in doubtful cases seems to be to decide against fideicommissum and in favour of usufruct.

[1] Huber, 2. 19. 38.

[2] Voet, 7. 1. 13; 36. 1. 26. But 'although there is a presumption in the case of a fideicommissum that a testator intended a fideicommissary legatee to have no transmissible rights unless he survives the fiduciary legatee, such presumption would have to yield to other clear indications in the will of an intention to the contrary'. *Samaradiwakara* v. *de Saram* [1911] A. C. at p. 765, *per* Lord de Villiers.

[3] Voet, 7. 1. 10; *Samaradiwakara* v. *De Saram*, *ubi sup.* at p. 762. Conversely if a person is instituted as heir in the usufruct of a thing with power of alienation, he is considered to have been instituted in the ownership. Van Leeuwen, 3. 8. 17. Cf. V. d. K. *Th.* 374–5.

The Trebellian portion;

It will be remembered that the Senatus-Consultum Pegasianum (between A. D. 69 and 79) allowed the fiduciary heir or legatee to retain one fourth share against the fideicommissarius. Justinian, while abrogating the Senatus-Consultum as a whole, re-enacted this clause as part of the S. C. Trebellianum.[1] In the modern books, therefore, this fourth share is commonly known as the quarta Trebelliana (*Trebellianique portie*).[2] The Roman-Dutch Law adopted this provision of the Roman Law and extended its scope. By the Roman Law children and other descendants were not permitted to retain the legitima portio and, in case they were burdened with fideicommissa, the Trebellian portion as well. The Canon Law, however, allowed them to claim under both heads, and this practice was adopted into the law of Holland and of other countries.[3] The result was that a son or other descendant charged with a universal fideicommissum and unprovided for by legacy or otherwise, deducted first of all his legitima portio, which (if there were not more than four sons) would be one third of his intestate share, and, then, the Trebellian portion, namely one fourth of the residue. An only son, therefore, got in the aggregate $\frac{1}{3}+(\frac{1}{4}\times\frac{2}{3})=\frac{1}{6}=\frac{1}{2}$. It is often said that he takes two quarters—a simpler, though inaccurate, way of expressing the actual result. Whatever the number of the children, they did not in Holland in any event retain more than one half of the whole estate between them.[4]

in Roman-Dutch Law might be accumulated with the legitim;

abolished in the modern law.

We need not say any more about the quarta Trebelliana, for it has been disused or abolished by statute in all the Roman-Dutch Colonies.[5]

It has been observed more than once that the chief use

[1] Inst. 2. 23. 7.

[2] Voet, 36. 1. 47 ff.

[3] Gr. 2. 20. 10; Voet, 5. 2. 14; 36. 1. 52; Huber, 2. 19. 85. The testator, however, might put his child to election whether he would take the legitim unburdened or his whole intestate share subject to a fideicommissum. V. d. L. 1. 9. 8; *Simpson* v. *Forrester* (1829) 1 Knapp, P. C. at p. 243.

[4] Neostad. *Decis. van den Hove*, nos. 3 and 17; *Decis. Supr. Cur.* no. 21; Voet, 5. 2. 14; V. d. K. *Th.* 316.

[5] *Supra*, p. 305, n. 5.

of the fideicommissum was to tie up property through succeeding generations. We are told in the Institutes that a testator might charge a fideicommissum not only on an heir or legatee, but also on a fideicommissary. In this way the testator might tie up the property for so long as he pleased. Had the Roman and the Roman-Dutch Law, then, no Rule against Perpetuities? Yes; but one which gave way before the clearly expressed intention of the testator to override it. The rule, which is derived from Justinian's 159th Novel (A. D. 555), is stated by Voet in the following terms: [1]

The rule against perpetuities in Roman and Dutch Law.

'Now since there has been frequent mention of a perpetual fideicommissum in the preceding sections, it should be made clear that it has been generally held that where there is any doubt such perpetuity only extends to the fourth generation, and that thereafter the property is unburdened, so that the fifth generation is able to dispose thereof at will; unless there be clear evidence of a contrary intention on the part of the testator, to the effect that the property should be subject to a further burden in the hands of one desiring to take it. For it would seem that we cannot deny the testator's right to continue the grades (degrees) of fideicommissary substitution at his discretion *ad infinitum* after the manner of the direct substitution.'

The testator, then, may tie up the property for ever if he pleases. But the mere use of the word 'perpetual', or the like, is not sufficient to produce this result.[2]

Thus, if he says: 'I will that my goods after the death of my first heir shall descend to my next of kin then in being, and that they shall always go from one to the other of my blood-relations, and shall not at any time pass outside my family',[3] these words will not be sufficient

[1] Voet, 36. 1. 33 (translated by Mr. Justice A. J. McGregor).

[2] Cf. Sande, *Decis. Fris.* 4. 5. 4, where the head-note runs: 'Perpetuum fideicommissum non extendi ultra quartum gradum, nisi enixa Testatoris voluntas aliud suadeat.' See on the whole subject, and particularly on the mode of computing the four degrees, *Strickland* v. *Strickland* [1908] A. C. 551.

[3] Huber, 2. 19. 63.

to tie up the property beyond the fourth generation inclusive, unless he goes on to add that: 'the fideicommissum shall not at any time or in any event whatsoever come to an end', or other words of like import.[1] By the fourth degree is meant not the fourth degree of descent from the testator, but the third degree after the instituted heir, who himself makes the first degree.[2]

Mutual wills.

12. **Mutual Wills.** This topic has been referred to above. It was in Holland, and is in South Africa, the common practice for two or more persons, usually but not necessarily two spouses, to join in making a single disposition of property which is known as a reciprocal or mutual will.[3] The principles of law applicable to such dispositions are briefly and accurately stated by Van Leeuwen in the following passage: [4]

'A husband and wife may together make their joint will in one writing. Such joint will, however, is considered as two separate wills, which either of them may specially and without the knowledge of the other, or even after that other's death, always alter; except only where either of them has reciprocally benefited the other thereby, and directed how the disposition of the property of their joint estate after the death of the survivor is to be regulated; in this case the survivor, if he or she has enjoyed or wishes to enjoy the benefit, cannot make any other

[1] Huber, 2. 19. 64–5: ten ware de Testateur met zeer krachtige en dringende woorden hadde belast dat hy immers de bezwarenisse ten eeuwigen dage wilde hebben uitgestrekt, in welken gevalle de wille van de Testateur plaets soude moeten hebben.

[2] Huber, 2. 19. 65. But Van Leeuwen (3. 8. 7) says: 'The first degree does not commence with the first heir but with him upon whom the entailed property after the death of the first heir comes to descend (Kotzé's translation). In Ceylon by Ord. No. 11 of 1876 immovable property may not by any will, deed, or other instrument be made inalienable for a longer period than the life or lives of persons who are in existence or *en ventre sa mere* at the time of its execution and are named described or designated in it, and the life of the survivor of such persons' (sec. 2); and any prohibition or restriction of alienation so far as it extends beyond the above-mentioned period is null and void (sec. 3).

[3] Gr. 2. 15. 9; 2. 17. 24, and Groenewegen, ad loc.; *Cens. For.* 1. 3. 2. 15 and 1. 3. 11. 7; Voet, 23. 4. 63; Boel *ad* Loen. Cas. 137; V. d. K. *Th.* 283, 298.

[4] Van Leeuwen, 3. 2. 4 (Kotzé's translation).

disposition or will of his or her half unless the benefit bestowed has been repudiated and renounced.'

In another place he writes : [1]

'Whenever two spouses have bequeathed to one another some benefit, and coupled therewith a direction indicating how the property of the common estate shall be disposed of upon the death of the survivor, the latter, having enjoyed the benefit, cannot alter by subsequent will the disposition of his or her share.'

Mr. Justice Kotzé, commenting upon the first of these passages, observes [2] that all the propositions therein laid down were approved and adopted by the Privy Council in *Denyssen* v. *Mostert* (1872) L. R. 4 P. C. 236; and also, it may be added, in many subsequent cases.[3]

It must be carefully remarked that if the above principles are to apply it is essential that there should be a massing of or joint dealing with the *whole* estate. It would be quite possible for husband and wife to execute a joint will in which each one dealt exclusively with his or her half of the joint estate without dealing in any way with the moiety belonging to the other spouse. Even acceptance of a benefit under the will of the predeceasing spouse would not in such a case affect in any way the testamentary freedom of the other. Observe, further, that for the rule to apply actual acceptance or, as it is often called, 'adiation' by the survivor is essential. The opinion expressed by Fitzpatrick J. in *S. A. Association* v. *Mostert* [4] that the parties to a joint will were mutually bound by contract not to change their dispositions except by mutual consent and that this was so whether benefit was accepted or not, was dissented from by his colleague Mr. Justice Denyssen, and overruled by the Judicial Committee.

[1] Van Leeuwen, 3. 3. 8.
[2] Translation of Van Leeuwen, vol. i, p. 318.
[3] Such as *Dias* v. *Livera* (1879) L. R. 5 App. Ca. 123 (Ceylon); *Abeyesekera* v. *Tillekeratne* [1897] A. C. 277 (Ceylon); *Natal Bank, Ltd.* v. *Rood* [1910] A. C. 570 (Transvaal).
[4] (1869) Buch. 231.

CHAPTER III

INTESTATE SUCCESSION

The law of intestate succession.

A MAN is said to die intestate when he dies without leaving a valid will, or if no one accepts a benefit under his will.[1] Further, since one may in the modern law die partly testate, partly intestate, an intestacy also arises with regard to any property of the deceased which falls under either of the above-mentioned categories, although he may not die intestate in respect of other property.

Bewildering variety in the Netherlands.

The law of intestacy in the United Provinces presented a bewildering picture. It varied from province to province and, almost, from town to town. In Holland and West Friesland in particular two systems of intestate succession principally prevailed, the geographical limit which defined the two being, in the main, determined by the River IJssel.[2] This stream (which is not to be confounded with another river of the same name, which discharges into the Zuyder Zee) was from ancient times the boundary line between North and South Holland. South of it prevailed a system of intestate succession known as Schependoms-recht, so called because it was laid down in the dooms or judgments of the local magistrates called Schepenen.[3] North of it, prevailed a different system known as Azingdoms-recht or Aasdoms-recht, because derived from the dooms of a judicial authority called the Azing, who in Friesland and some adjoining districts was anciently associated with other men of the neighbourhood in the administration of justice.[4] These two systems differed *toto coelo*.[5] The principal characteristic of each is expressed in the proverbial maxims, ' Het goed moet gaan van waar het gekomen is ' and ' Het naaste bloed erft

Schependoms-recht.

Aasdoms-recht.

Different theories of these two systems.

[1] Inst. 3. 1. 1. pr.: Intestatus decedit, qui aut omnino testamentum non fecit aut non iure fecit, aut id quod fecerat ruptum irritumve factum est, aut nemo ex eo heres exstitit.

[2] Gr. 2. 28. 2. [3] Gr. 2. 28. 10–11. [4] Gr. 2. 28. 7–9.

[5] Vinnius *ad* Inst. lib. iii, tit. 5, *in appendice* '*de forma succedendi ab intestato apud Hollandos et Westfrisios*,' sec. 1.

het goed'. By the Schependoms Law 'the goods must go whence they came'; [1] which means that the goods of a deceased person were taken by a fiction of law to have devolved upon him *mortis causa* from both parents equally. If, therefore, the deceased left one surviving parent behind him, the deceased's estate was supposed to have come to him wholly from the dead parent and not at all from the living one. Accordingly it reverted to the side from which it was supposed to have come: viz. if the father were dead, to the relatives *ex parte paterna* to the exclusion of the mother; if the mother were dead, to the relatives *ex parte materna* to the exclusion of the father. This rule, together with the further principle of unlimited representation [2] in the descending and collateral lines, was the key-note of the old Schependoms Law, which accordingly determined the succession as follows: [3]

Canons of succession under the old Schependoms Law.

1. Children succeed equally, males and females alike, with representation *per stirpes in infinitum*.

2. Failing children of the deceased both parents surviving succeed to equal moieties.

3. If one parent only survives the whole estate goes to the children of the deceased parent, i. e. to the brothers and sisters of the intestate, whether of the whole or of the half blood, with representation *per stirpes in infinitum*.

4. If both parents are dead, the estate goes in equal moieties to the children of the deceased father and to the children of the deceased mother, i. e. one moiety to brothers and sisters of the intestate, whether of the whole or of the half blood *ex parte paterna*, with representation as before stated; the other moiety to brothers and sisters of the intestate, whether of the whole or of the half blood *ex parte materna*, with representation as before stated. From this it will be seen that whole brothers and sisters take 'with the whole hand', i.e. take twice over: once as children of intestate's father, once as children of

[1] Gr. 2. 28. 6; Vinnius, *ubi sup.*, sec. 2; V. d. K. *Th.* 347.
[2] Van der Vorm, *Versterfrecht*, ed. Blondeel, cap. vii, p. 34.
[3] Van der Vorm, pp. 35–6.

intestate's mother. Half brothers and sisters, however, take only with the half-hand, i. e. take only once—viz. in competition with the brothers and sisters of the deceased of the whole blood in respect of the father's or the mother's moiety according as they were related to the deceased on the father's or on the mother's side.[1]

5. Failing children, parents, and issue of parents, the estate goes in like manner to the four quarters (*vier vierendeelen*), i. e. to the grandparents of the intestate *per lineas*, viz. one moiety to the paternal grandparents, the other moiety to the maternal grandparents. Within each line identically the same principles are applied as have been stated above in rules (2), (3), and (4)—a sole surviving grandparent taking nothing—representation of uncles and aunts by their issue being admitted *per stirpes in infinitum*—the half-blood always taking with the half-hand.

6. Failing children, parents, and issue of parents, grandparents and issue of grandparents, the estate goes in like manner to the eight quarters, viz. to the stocks of the eight great-grandparents, and so on *in infinitum*.

Canons of succession under the old Aasdoms Law.

By the Aasdoms Law 'the nearest blood inherits the goods'.[2] This rule, together with the preference of descendants to ascendants and of ascendants to collaterals, and the total exclusion of all representation, furnishes the key to this system; which, further, makes no distinction between the whole and the half blood, and has no theory as to the source from which the goods may be supposed to have come.

Accordingly the order of succession is:[3]

1. Descendants—children excluding grandchildren, grandchildren excluding great-grandchildren, &c.

[1] But, if only one parent was dead, the half-blood on the side of the deceased parent took with the whole hand in concurrence with the children of the whole blood. This principle is of universal application, and will be assumed as known, wherever the half-blood is said to take with the half-hand.

[2] Gr. 2. 28. 3; Vinnius, *ubi sup.*, sec. 3; V. d. K. *Th.* 346.

[3] Van der Vorm, cap. ix, pp. 79–80.

2. Ascendants—two surviving parents equally; one surviving parent solely; in default of parents grandparents (on both sides or on one side) equally; a single surviving grandparent solely; and so on, to the exclusion of collaterals.

3. Collaterals—brothers and sisters, of the whole or of the half-blood equally, to the exclusion of nephews and nieces; collaterals of the third or remoter degrees equally without representation.

Succession under the Political Ordinance of April 1, 1580.

In 1580 the States of Holland and West Friesland, desiring to establish one uniform system of intestate succession for the whole Province, enacted the Political Ordinance of April 1 of that year.[1] The system therein laid down, which came to be known as the New Schependoms Law, departed from the Old Schependoms Law in one particular only, viz. in restricting representation in the collateral line to the fourth degree.[2]

Succession under the Political Ordinance therefore is as follows:

1. Children[3] (*ut supra*, p. 327).

2. Parents[4] (*ut supra*, ibid.).

3. Brothers and sisters being the issue of a deceased parent, their children and grandchildren, according to the system above described.[5]

4. Remoter descendants of such brothers and sisters *per capita* according to proximity of degree.[6]

5. Grandparents *per lineas*[7] and the children and grandchildren (but not remoter descendants) of a deceased grandparent, according to the system above described.[8]

6. Remoter descendants of grandparents *per capita* according to proximity of degree.

7. Great-grandparents and the descendants of a

[1] Ordonnantie van de Policien binnen Hollandt, in date den eersten Aprilis 1580, Arts. 19 ff. (1 G. P. B. 335); Gr. 2. 28. 11; Vinnius, *ubi sup.*, sec. 4; Van Leeuwen, lib. iii, cap. xiii.

[2] Van der Vorm, cap. vii, sec. 14, p. 37.

[3] P. O. Art. 20. [4] P. O. Art. 21. [5] P. O. Arts. 22 and 23.

[6] P. O. Arts. 22, 24, and 28. [7] P. O. Art. 25.

[8] P. O. Arts. 24 and 28.

deceased great-grandparent according to the system above described, collaterals of equal degree taking *per capita* to the exclusion of remoter degrees;[1] and so on *in infinitum*.[2]

8. Failing all relatives whatsoever, the fisc succeeds to the property as *bona vacantia*[3] to the exclusion of a surviving spouse.[4]

It must be borne in mind that the principle of splitting the inheritance, when the two parents are dead (or alive), and in case one parent alone is dead, of carrying the whole inheritance to the issue of the deceased parent, persists throughout the whole scheme of intestate succession. Each ascendant in his (or her) own person makes a fresh line, and if such line is exhausted the share belonging to that line must be divided into halves, and carried half and half to the paternal and maternal lines of such ascendant. This is why grandchildren of uncles and aunts (though in the fifth degree) come in before great-grandfathers or great uncles, though in the third and fourth degree respectively. Though this consequence is not clearly stated in the Political Ordinance, it is a necessary inference from the root principles of the Schependoms-recht; and is expressed in the maxim 'Het goed klimt niet geern'; or, in other words, descendants are preferred before ascendants.[5]

The Interpretation of May 13, 1594.

This new system of succession and an Interpretation[6] of it, dated May 13, 1594, failed to win the adhesion of most of the towns and districts of the northern part of Holland. Accordingly, in 1599 the States, yielding to the representation of fourteen principal towns, enacted a placaat, under date December 18, designed to supply

[1] P. O. Art. 28. [2] V. d. K. *Th.* 364.

[3] V. d. K. *Th.* 366. However, if there is a complete failure of kin on one side only the relatives on the other side are admitted before the fisc. Ibid. In the case of bastards the whole estate goes to the relatives *ex parte materna*. This is so both by Schependoms and by Aasdoms Law. V. d. K. *Th.* 368. [4] V. d. K. *Th.* 365.

[5] Van der Vorm, *Versterfrecht*, cap. viii, sec. 64, p. 68.

[6] 1 G. P. B. 342.

a common law for North Holland in substitution for the Political Ordinance.[1] The order of succession in the placaat, though known as the New Aasdoms Law, departs considerably from the Old Aasdoms Law, approaching more nearly in some respects to the Schependoms Law, in other respects to the Roman Law.

Succession under the Placaat of December 18, 1599.

The order of succession prescribed by the Placaat is as follows :

1. Descendants ; as in the Old and New Schependoms Law.[2]

2. Father and mother, both being alive.[3]

3. If one parent survives, one moiety goes to such parent, the other moiety to brothers and sisters of the deceased (being the children of the deceased parent), and their children and grandchildren by representation,[4] as in the Schependoms Law ; with this difference, however, that if there are no such brothers or sisters alive, descendants of deceased brothers and sisters have no independent right of succession to the inheritance, which in that case goes wholly to the surviving parent.[5]

[1] Placaat op 't stuck van de Successien ab intestato, December 18, 1599 (1 G. P. B. 343) ; Gr. 2. 28. 12 ; Vinnius, *ubi sup.*, sec. 4 ; Van Leeuwen, lib. iii, cap. xiv, and cap. xii, sec. 8, where a list is given of the towns and places which followed the placaat of 1599.

[2] Placaat, Art. 1.

[3] Placaat, Art. 2.

[4] Placaat, Art. 3. The Placaat says: ende alsser egeene volle Broeders ofte Susters in't leven zijn, sal de langstlevende Vader ofte Moeder in alle de goederen by den overleden ontruymt, universaliter succederen, ende voor andere collaterale Vrienden gheprefereert zijn, alwaer 't oock soo datter kinderen ofte kintskinderen van des overledens volle Broeder ende Suster, ofte oock halve Broeders ofte susters waren. But this must not be understood so as to postpone to a sole surviving parent the half brothers or sisters on the deceased side, or the children or children's children of such brothers or sisters if either full brothers or sisters or half brothers or sisters on the deceased side are still alive ; in other words, to give the true meaning of the Placaat we must : (1) insert after the words 'volle Broeders ofte Susters' the words 'ofte halve Broeders ofte Susters van de bestorvene zijde' ; and (2) either : (*a*) insert before the words 'halve Broeders ofte Susters' the words 'van des overledens' so as to read 'ofte oock van des overledens halve Broeders ofte Susters', scil. 'van de bestorvene zijde' ; or (*b*) add after the words 'halve Broeders ofte Susters' the words 'van de onbestorvene zijde.' See Van der Vorm, *op. cit.*, cap. x, secs. 20–22, pp. 92 ff., and V. d. K. *Th.* 356.

[5] Van der Vorm, *ubi sup.*, sec. 22, p. 95.

4. If both parents are dead the estate goes in equal moieties to the brothers and sisters (their children and grandchildren by representation) on the two several sides, as in the New Schependoms Law.[1] But if, on either side, there are only brothers' and sisters' children, or only brothers' and sisters' children's children living, they take *per capita* and not *per stirpes*, but if on either side there are both brothers' and sisters' children, and also the children of deceased brothers' and sisters' children living, the latter come in *per stirpes* as representing their deceased parent.[2]

If there is a complete failure of brothers and sisters, their children and children's children, on the side of one parent, the moiety in question goes to the nearest ascendants of such parent *per capita* : in default of ascendants, the whole inheritance goes to the brothers and sisters on the side of the other parent and to their children and grandchildren by representation.[3]

5. Failing parents, brothers and sisters, their children and grandchildren, the estate will not go, as in the new Schependoms Law, to the remoter descendants of brothers and sisters at once, but first goes to remoter ascendants of the deceased *per capita* according to proximity of degree, the nearer excluding the more remote, without distinction of sides or of lines, all ascendants of the same degree taking equally *per capita* without representation.[4]

6. Next in succession come the remoter descendants of brothers and sisters, whether of the whole or of the half blood, according to proximity of degree *per capita*, the nearer excluding the more remote.[5]

7. Then follow uncles and aunts *per capita*, without

[1] Placaat, Arts. 4–5.

[2] Placaat, Arts. 11–12. In other words, in collateral successions the Placaat borrows from the Schependoms Law the principle of unequal representation to the fourth degree inclusive, but not the principle of equal representation. Van der Vorm, cap. x, sec. 54, p. 113. Representation is said to be equal 'so wanneer de geene die totte successie (by representatie) komen, al te samen den overleden even na in grade bestaan.'

[3] Placaat, Art. 6. [4] Placaat, Art. 7. [5] Placaat, Art. 8.

distinction between sides or lines, or between whole and the half blood: the children, but not the grandchildren, of a deceased uncle or aunt representing their parent, *per stirpes*.[1] But if there are no uncles or aunts living, the children of a deceased uncle or aunt do not succeed in this class as representing their parents, but are only admitted in the next class along with other collaterals of equal degree.[2]

8. Next come other collaterals in the fourth or remoter degree *per capita in infinitum*,[3] without distinction between sides or lines, or between the whole and the half blood. Thus first cousins (there being no uncle or aunt alive) come in, share and share alike, with great-uncles and great-aunts, being like them in the fourth degree of succession to the deceased.[4]

9. Finally, all successions not provided for above are to be governed by Roman Law.[5] This lets in the widow,[6] and in the last resort the fisc.[7]

The comment of Van der Vorm on Art. 14 is worth quoting: 'No cases, at all events few cases, can be imagined, which are not provided for in this Placaat; if not expressly and specifically with regard to each point, at least tacitly and with relation to similar points. Therefore, if any cases are here omitted, the foundation for which is nevertheless laid, and which proceed by a necessary consequence and by concatenation from this foundation; in such case the disposition of the fundamental law must be followed, and not the Roman written laws, where they in such cases rest upon another foundation. Also the intention of the legislator was not that one should be guided exactly by the letter and words of the Placaat, but rather by its sense and intention. "Scire enim leges non hoc est verba earum tenere sed vim ac potestatem."

[1] Placaat, Art. 9. [2] Placaat, Art. 10. [3] V. d. K. *Th.* 364.
[4] Placaat, Arts. 10, 13. [5] Placaat, Art. 14; V. d. K. *Th.* 359.
[6] V. d. K. *Th.* 365. Van der Vorm (cap. x, sec. 63, p. 119) says not, but see 'The Intestate Succession of Husband and Wife in Roman-Dutch Law', *Journ. Comp. Leg.*, N. S. 5, vol. xiii. (1912) p. 310.
[7] Van der Vorm, *ubi sup.*

Dig. 1. 3. 17. Therefore one must not act upon the Roman Laws in all cases, which are not here specifically and individually determined; but only in the cases the basis whereof is not laid down in the Placaat, or the foundation whereof is built upon the Roman Law. For example, if dispute should arise with regard to nearness of degrees, where the nearest in degree are called to the succession, the decision will be drawn from the Roman Law.' [1]

Thus far we have described the two prevailing systems of intestate succession of the province of Holland. Each of the other provinces had its own scheme, and there were, besides, numerous local variations. In view of this great variety of usage the question of intestate succession in the Dutch Colonies must have been insoluble except by legislative authority.

Intestate succession in the Duteh Colonies.

Accordingly, we find the States-General prescribing the canons of intestate succession for the East and West Indies, in a way, however, which sometimes tended rather to deepen than to remove the obscurity in which the subject was involved.

We shall speak first of the East Indies, including Ceylon and South Africa.

1634. The case of Gregorius Cornely.

In the year 1634 one Gregorius Cornely, domiciled at Middleburg in Zeeland, died in the Indies leaving two children, who also died. The States-General directed that the succession should go according to the Political Ordinance and the laws of Zeeland.[2] It does not appear that this order was intended to lay down a general rule.

1642. The old statutes of Batavia.

In 1642 Governor A. Van Diemen promulgated his collection of statute law known as the Old Statutes of Batavia.[3] It is expressed to be provisional in character,[4]

[1] The Placaat says: 'Eyntlick alle andere successien daer van hier vooren niet en is ghedisponeert sullen ghereguleert worden nae de waerlycke beschreven Rechten.' 'Waerlycke' is doubtless an error for 'Waereldlycke', i.e. the jus civile as contrasted with the jus canonicum.

[2] J. A. Van der Chijs, *Nederlandsch-Indisch Plakaat Boek*, vol. i, p. 363. [3] *Op. cit.*, p. 472. [4] *Op. cit.*, p. 474.

and to remain in force until the Council of Seventeen with the authority and approbation of the States-General should otherwise determine. With regard to intestate succession in particular it provides that 'the law of the towns of North Holland shall be followed as was ordained in the year '16 on directions from the Council of Seventeen'.[1] The detailed rules which follow correspond in all particulars with the Placaat of 1599 and are, therefore, pure Aasdoms Law.

1661. The Octrooi to the East India Company;

In 1661 the States-General, moved thereto by representations from the Company's officials, issued the well-known Octrooi or Charter of January 10.[2] Having considered the regulations of 1629 and 1636 issued for the West Indies, which introduced the Political Ordinance into those regions, they resolved 'after ripe deliberation that the same law together with the Interpretation of 1594 should apply to all Lands, Towns and Peoples in India obedient to the State of the United Netherlands and under the direction of the East India Company', and also in respect of succession to persons dying on the outward or homeward voyage. The Octrooi does not contain the terms of the Political Ordinance, but incorporates them by reference, subject to an important deviation in the sense of the Aasdoms Law in favour of a sole surviving parent, who by the Political Ordinance is not admitted to the inheritance of a deceased child. This interpolated section corresponds closely, but not exactly, with Art. 3 of the Placaat of 1599, and lends some colour to the statement that the Octrooi is based upon the law neither of North Holland nor of South Holland, but is partly derived from both. The statement, however, is misleading, for except for the above-mentioned modification it corresponds in every particular with the law of South Holland.

in what respect it differs from the Political Ordinance.

In 1766 Governor Van der Parra submitted for the

[1] *Op. cit.*, p. 543.

[2] 2 G. P. B. 2634; Van der Vorm, p. 631. The Charter was promulgated in Batavia on February 7, 1661. Van der Chijs, vol. ii, p. 340.

1766. The new Statutes of Batavia.

approval of the Seventeen and of the States-General, the collection known as the new Statutes of Batavia.[1] This Code, though in use in the Courts—so Mr. Van der Chijs informs us—for nearly a century, never in fact received recognition from the highest authority. It had not therefore, strictly, the force of law.[2] In respect of intestate succession, it reproduces seriatim the substance of Van Diemen's earlier Code, together with the express provisions of the Octrooi above cited. This is plainly wrong. The old Statutes of Batavia as regards succession cannot have continued to exist side by side with the Octrooi, which is inconsistent with them. That the Octrooi, and therefore the Schependoms-recht, was in fact the law of succession for Batavia appears *inter alia* from another portion of Van der Parra's Statutes, where it is laid down that Orphan Masters are not liable to actions, except on the ground of wilful default, or if they act contrary to the clear language of statutes or of the Octrooi on intestate succession.[3]

Intestate succession in Ceylon:

So far we have spoken of the East Indies in general. It remains to see how the law stood, and stands, in Ceylon and in South Africa in particular. In neither of these countries was the matter free from doubt.

conflicting opinions,

For Ceylon we have the guidance of two cases in which the question of intestate succession was carefully considered. In the first of these, decided in 1822,[4] Sir Hardinge Giffard C. J. delivering the judgment of the Court of Appeal, pronounced, not without considerable hesitation, in favour of the view that the North Holland Law obtains in Ceylon. In 1871 the same Court, over which Sir Edward Creasy then presided as Chief Justice, clearly indicated an opposite opinion.[5] The writer submits that the latter is the better view.

[1] Van der Chijs, vol. ix, p. 404.
[2] *Op. cit.*, p. 25.
[3] *Op. cit.*, p. 229. A like provision recurs more than once in later volumes of Van der Chijs.
[4] *Dona Clara* v. *Dona Maria* (1822) Ramanathan, 1820–33, p. 33.
[5] *Anon.* Van der Straaten, p. 172, and Appendix H.

To-day, the question is of merely historical interest. The law of intestate succession in this colony is now regulated by the Matrimonial Rights and Inheritance Ordinance (No. 15 of) 1876, which provides (sec. 40) that 'in all questions relating to the distribution of the property of an intestate, if the present Ordinance is silent, the rules of the Roman-Dutch Law as it prevailed in North Holland are to govern and be followed '. now settled by statute.

The law of South Africa, like the law of Ceylon, exhibits some confusion between the two systems of succession. In Cape Colony, in the case of *Spies* v. *Spies*,[1] ' the counsel for both parties admitted that, by the Placaat of January 10, 1661, the law of North Holland, including the Political Ordinance of April 1, 1580, and the Interpreting Ordinance of May 13, 1594, was made the law of the Colony.' Counsel, however, were wrong. In *Raubenheimer* v. *Exors. of Van Breda*,[2] which settled the law for Cape Colony, de Villiers C. J. referred to a Resolution of the Governor-General in Council, bearing date June 19, 1714, whereby the Board of Orphan Masters was directed in all cases of succession *ab intestato*, to follow secs. 19 to 29 of the Ordinance of 1580, and the Edict of 1594, in so far as they have been adopted by the charter of 1661. The charter therefore determines the law for the Cape Province. The learned Chief Justice indeed goes on to say that ' it is a mistake to speak of the North Holland Law or of the South Holland Law as the law of this Colony ', nevertheless, since the Octrooi itself rests upon the Schependoms Law, except where it expressly departs from it, we may accept as generally true the *dictum* of Mr. Justice Smith, that ' the South Holland Law as included in the Political Ordinance of 1580 is the law of inheritance *ab intestato* in the Colony '. Intestate succession in South Africa: at the Cape;

Upon a total failure of blood relations the Crown is entitled to claim a vacant inheritance.[3]

For Natal the case of *In re the intestate estate of P. K.* in Natal;

[1] (1845) 2 Menz. 476. [2] (1880) Foord, 111.
[3] *Ex parte Leeuw* (1905) 22 S. C. 348.

Gledhill[1] decides in favour of the Schependoms Law. Van Breda's case was cited and followed.

Apart from statute, a surviving spouse in South Africa does not succeed *ab intestato* to the predeceasing husband or wife. In Natal there has been some legislation. By Law No. 22 of 1863, sec. 2 'Community of goods . . . shall not attach to any spouses who have been or shall be married elsewhere than in South Africa, unless the spouses by agreement exempt themselves from this law', and by sec. 5 'When the husband of any marriage, from which community of goods is excluded by the provisions of this law, shall die intestate and leave his wife him surviving then in any such case the wife so surviving her husband shall be entitled to receive and have one-half of the property belonging to her deceased husband'; but if there is lawful issue of the marriage, by a later law she takes one-third.[2] It has been held that the above section applies whenever community of goods is excluded, whether under sec. 2 (*supra*), or by ante-nuptial or post-nuptial contract.

in the Transvaal and the Orange Free State.

In the Transvaal and Orange Free State Provinces, intestate succession does not seem to have been the subject of legislation or of judicial decision. One might suppose that, since these colonies were settled from the Cape and from Natal, they must have the same law of intestate succession. The learned Dr. Nathan, however, makes the startling suggestion that perhaps this is not so. 'It is argued that, inasmuch as at the time of promulgation of the charter, the Dutch East India Company had in South Africa jurisdiction only over those territories known as the Colony of the Cape of Good Hope, the charter cannot without a special promulgation be of any force or effect in colonies . . . which came into existence after the jurisdiction of the Dutch East India Company over the Cape Colony had ceased to exist.'[3] But if the law of

[1] (1891) 12 Natal Law Reports 43.
[2] Law No. 14 of 1882, sec. 1.
[3] Nathan, *The Common Law of South Africa*, vol. iii, p. 1951.

Cape Colony was not carried into the territories of the Republics, what was ? Apart from this channel of influence, there seems to be no reason for deciding in favour of either of the competing schemes of intestate succession in preference to the other, and in the absence of proof of established custom we should be driven to the paradoxical result that these provinces had no law of succession at all. Pending further information, it will be better to assume the common law on this subject to be the same in all four provinces.

Intestate Succession in the West Indies.

It remains to speak of intestate succession in the colony now known as British Guiana. Here, too, the course of legislation was uncertain and inconsistent. In 1629 the States-General issued an Order of Government for the places conquered and to be conquered in the West Indies.[1] This applied to such lands 'the Political Ordinance of 1580, and further the common customs of South Holland and Zeeland, since the same are most known, can easily be applied, and will introduce the least obscurity and alteration'. Thus the settlements in the West Indies were to be governed by the Schependoms-recht, the law of succession of South Holland.

1629. Ordre van Regieringe.

1732. Octrooi for Berbice.

In the year 1732 a new rule was enacted for the colony of Berbice. The charter of December 6 of that year,[2] after reciting the importance of providing for the intestate succession to colonists and others who shall have established themselves in the colony aforesaid, enacted that every person going thither shall be allowed to choose such known law of intestacy as shall please him,[3] but in default thereof, the charter given to the East India Company under date January 10, 1661, shall be followed. This charter, of which we shall hear again, is in its main features (with one important modification) Schependoms Law. Finally, for Demerara and Essequibo, by resolution

[1] *Ordre van Regieringe*, October 13, 1629, Art. 59 (2 G. P. B. 1235); Van der Vorm, p. 634.

[2] Van der Vorm, p. 637 ; V. d. K., *ubi sup.*

[3] Verkiezing van land-recht. Gr. lib. ii, cap. xxix.

of October 4, 1774,[1] the States-General enjoined the observance of the Aasdoms Law of North Holland as contained in the Placaat of 1599.

Intestate succession in British Guiana.

The three settlements of Demerara, Essequibo, and Berbice have from 1831 been combined in the Colony of British Guiana. Since no statutory change has harmonized the law of intestate succession in the three counties, this Colony to the present day retains within its limits the two principal schemes of intestate succession which obtained in the old motherland, viz. for Demerara and Essequibo the Aasdoms Law, for Berbice the Schependoms Law as modified by the Octrooi to the East India Company of 1661.[2] The particular matter of the succession of the spouses is, however, now dealt with by statute. By the Deceased Persons' Estates Ordinance (no. 9) of 1909, sec. (1): 'When any person dies intestate, without leaving any child or descendant of any child him or her surviving who is entitled to inherit, the surviving husband or wife of such person shall be entitled to one half of the inheritance left by such person: provided that nothing in this section shall be construed to affect any ante-nuptial contract or marriage settlement or any property held under such contract or settlement.' This clause, which took effect on April 3, 1909, superseded a similar provision in Ord. No. 9 of 1887 relating only to spouses married in community By Ord. No. 12 of 1904, which came into operation on August 20 of that year,[3] community of goods is no longer a consequence of marriage. Presumably the above-cited enactment leaves unaffected the common law right of a surviving spouse to succeed in Demerara and Essequibo to the whole of the

[1] *The Laws of British Guiana* (ed. 1905), vol. i, p. 1.

[2] In the case of *Ex p. Administrator-General, re Estate Alexander* (1890) 1 L. R. of B. G. (N. S.), 6, the Court considered the law of intestacy of Berbice. All the above-mentioned enactments were cited, and the decision was in accordance with them. Nevertheless the learned editor of the Reports wrongly notes in the Index: 'The distribution of an intestate estate in Berbice is prima facie under the North Holland Law'.

[3] *Brit. Gui. Off. Gaz.*, vol. xx, no. 16.

deceased spouse's estate in default of all relations by blood.

Summary of the Law of Intestate Succession in the Roman-Dutch Colonies.

The result of our inquiry is that in Ceylon the law of intestate succession is now defined by statute. In Demerara and Essequibo the Aasdoms Law obtains; over the whole of Roman-Dutch South Africa as well as in Berbice the rules of intestate succession are those of the New Schependoms Law as modified by the Octrooi of 1661. In Natal and British Guiana there is a statutory succession of husband and wife, but in Natal only when the spouses are married out of community.

Translation of the Octrooi of January 10, 1661.

We conclude this chapter with a translation of the Octrooi and a summary of the order of succession which it establishes.

'*Charter for the East-India Company of these lands relating to the law of Intestate Succession in the East Indies and on the voyage thither and thence.*'

'The States-General of the United Netherlands make known that we, after report received from Mr. Huigens and our other Commissioners having viewed and examined the Memorial presented to us by or through the Administrators of the East India Company of the United Netherlands aforesaid, tending thereto that a settled law in the matter of the succession *ab intestato* to those, who die in the East Indies or on the voyage thither or thence should be introduced by us; and taking into consideration that we heretofore in the years 1629 and 1636 have permitted and ordained that the Political Ordinance issued by the States of Holland and West Friesland over the said province in the year 1580 in the places conquered by those of the West-Indian Company and Brazil, should be followed and there accepted as a general rule: after ripe deliberation have found good to consent, grant and allow, to the East India Company, as we consent grant and allow hereby, that in the matter of succession *ab intestato* and what therefrom depends, over all Lands, Towns and Peoples in the Indies aforesaid, being subject to the State of the United Netherlands and to the administration of the Company aforesaid, as also with regard to the same on the outward and homeward voyage, the said Political Ordinance shall be followed and ensued;

so and in such manner as the same by further declaration of the States of Holland aforesaid dated May 13, 1594, was elucidated; and with this understanding that, the bed between parents of the deceased being severed, and one of them, whether father or mother alone surviving, the surviving parent shall, along with the brothers and sisters of the deceased and their children and children's children by representation, succeed to the deceased's whole inheritance; that is to say, the surviving father or mother to the one half and the sisters and brothers, their children and children's children to the other half; it being understood that in such case the half brothers and sisters together with their children and children's children must be related to the deceased on the side of the deceased parent. And in case the deceased left no sisters and brothers, but left sisters' and brothers' children and children's children, in such event the said children and children's children of the deceased brother and sister by representation alike and along with the surviving father or mother shall succeed to the one half of the estate. And if there are no brothers or sisters, nor children or children's children of brothers or sisters living, in that case the surviving father or mother shall succeed as universal heir to all the goods of the deceased and shall be preferred to all collateral relatives; all with the understanding that in so far as the inheritance of such deceased persons shall be found to include Lands, Houses or other fixed and immovable goods, in regard thereof shall be followed the Law and Customs of the Provinces, Quarters or Places, under which the same fixed and immovable goods are situated.'

Canons of succession in South Africa and Berbice.

The combined effect of the Political Ordinance of 1580, the Interpretation of 1594, and the Octrooi of 1661, is to establish the following order of succession as the Common Law of South Africa and of Berbice.[1]

[1] The rules which follow seem to me to give the true effect of the Octrooi, which deviates from the Pol. Ord. only in the particulars above stated. All the writers on the South African Law agree in carrying (in default of prior claims) one half of the paternal or maternal moiety to a sole surviving grandparent and so in case of remoter ascendants. I can find no authority for this in the Octrooi, which follows in sense and almost in words the language of Art. 3 of the Placaat. But this article relates exclusively to parents, not to remoter ascendants. If the pretended succession of a surviving grandparent to one half of the divided estate is not expressly enacted by the Octrooi,

1. Children succeed equally, males and females alike, with representation *per stirpes in infinitum.*

2. Both parents surviving succeed to equal moieties.

3. If one parent survives, one moiety goes to such parent, the other moiety to brothers and sisters of the intestate being the children of the deceased parent, their children and grandchildren by representation. If there are no brothers and sisters of the intestate surviving, but only children and grandchildren of deceased brothers and sisters, such children and grandchildren take *per stirpes* as representing their deceased parents. In this respect the Octrooi departs from Art. 3 of the Placaat of 1594, as above explained ; from which in other respects this canon of succession is borrowed.

If there are no brothers or sisters (or children or grandchildren of deceased brothers or sisters), being the children of the deceased parent, surviving, the whole estate goes to the surviving parent.

4. If both parents are dead, the estate goes in equal moieties to the children of the deceased father and to the children of the deceased mother, i. e. one moiety to brothers and sisters of the intestate, whether of the whole or of the half blood, *ex parte paterna,* their children and grandchildren by representation ; the other moiety to brothers and sisters of the intestate, whether of the whole or of the half blood, *ex parte materna*, their children and grandchildren by representation. The whole brothers and sisters (and their children and grandchildren) take with the whole hand—half brothers and sisters (their children and grandchildren) take with the half hand as above explained.

4 a. Failing the above, the whole estate goes to remoter descendants of brothers and sisters *per capita* according to proximity of degree without representation.

5. Failing children and issue of parents, the estate goes in like manner to the four quarters (*vier vierendeelen*),

where does it come from ? It is not Schependoms-recht, nor Aasdomsrecht, nor jus civile.

i. e. to grandparents of the intestate *per lineas*, viz. one moiety to the paternal grandparents (both living), the other moiety to the maternal grandparents (both living). If in either line, paternal or maternal, one grandparent alone survives, such surviving grandparent takes no part of the moiety of the inheritance belonging to that line, but such moiety goes wholly to the uncles and aunts of the intestate, being the children of the deceased grandparent, and to their children (but not grandchildren) by representation.[1]

If both grandparents in either line are dead, the moiety of the inheritance belonging to that line is again divided into moieties, one of which goes to the uncles and aunts of the intestate, being the children of the deceased grandfather, and to their children by representation, the other of which goes to the uncles and aunts of the intestate, being the children of the deceased grandmother, and to their children by representation.

5 a. Failing uncles and aunts of either side in either line, their portion of the estate goes to the remoter descendants of such uncles and aunts *per capita* according to proximity of degree without representation.

6. Failing all the above, the estate goes to the 'eight quarters', viz. to great-grandparents and to the descendants of deceased great-grandparents, according to the system above described, collaterals of equal degree taking *per capita* to the exclusion of remoter degrees.

7. In default of all[2] blood relations of the deceased, the estate goes (in the absence of statutory provision to the contrary) not to the surviving spouse but to the fisc as *bona vacantia*.

[1] In other words, a grandparent never succeeds to any part of the inheritance unless his or her wife or husband is also alive, in which case they divide the part in question between them.

[2] V. d. K. *Th.* 364.

APPENDIX

PRECEDENT OF MUTUAL WILL FROM SOUTH AFRICA

I

NOTARIAL WILL

BE it hereby made known that on this twentieth day of December in the year of our Lord one thousand eight hundred and eighty-seven before me Conrad Christian Silberbauer of Cape Town Cape of Good Hope Notary Publie duly admitted and sworn and in the presence of the subscribed witnesses personally came and appeared [*name, description, place of abode.*] and his Wife [*name.*] And these Appearers being in health of body of sound and disposing mind memory and understanding and capable of doing any act that required thought judgment or reflection declared their intention to make and execute their last Will and testament—Wherefore, hereby revoking and annulling all Wills codicils and other testamentary acts heretofore passed by them or either of them the Appearers declared to nominate and appoint the survivor of them together with the child or children begotten by them during their marriage to be the sole and universal heirs of the first dying of all his or her estate goods effects stock inheritance chattels credits and things whatsoever and wheresoever the same may be nothing excepted which shall be left at the death of the first dying of them whether moveable or immoveable and whether the same be in possession reversion remainder or expectancy. And if the Testator the said . . . . . shall happen to survive the Testatrix the said . . . . . then the Appearers declared to nominate and appoint the Testator to be the Executor of this their Will and administrator of their estate and effects and guardian of their minor heirs. And if the Testatrix shall happen to survive the Testator then the Appearers declare to nominate and appoint the Testatrix together with the Testator's brother [*name,*

description, place of abode] to be the Executors of this their Will administrators of their estate and effects and guardians of the minor children of the Testator hereby giving and granting unto them all such powers and authorities as are required or allowed in law and especially those of assumption substitution and surrogation.

The Testators declare to reserve to themselves jointly during their joint lives the power from time to time and at all times hereafter to make all such alterations in or additions to this Will as they shall think fit either by a separate act or at the foot hereof desiring that all such alterations or additions so made under their own signatures shall be held as valid and effectual as if they had been inserted herein.

All which having been clearly and distinctly read over to the Appearers they declared that they fully understood the same and that it contains their last Will and testament desiring that it may have effect as such or as a codicil or otherwise in such manner as may be found to consist with law.

Thus done and passed at Cape Town aforesaid the day month and year first aforewritten in the presence of the consignatory witnesses.

As Witness

(Sgd.) C. E. J. (Sgd.) G. P. H. [*Husband*]
(Sgd.) J. J. E. (Sgd.) F. E. S. [*Wife*].

QUOD ATTESTOR

(Sgd.) C. CHRISTIAN SILBERBAUER
NOTARY PUBLIC.

II

UNDERHAND WILL

[From Foster's *Legal Forms*]

WE, A. B. and L. B., born S, married in community of property, do hereby revoke all former testamentary dispositions made by us, either jointly or severally, and declare this to be our last will and testament.

(1) We appoint the children born of our marriage to be the sole and universal heirs, in equal shares, of all the estate and effects of whatsoever kind which shall be left by the first dying at his or her death.

(2) We appoint the survivor of us, together with G. H. of . . . . . to be the executors of this our will, administrators of our estate and guardians of our minor children, granting to our said executors and guardians all power and authority allowed in law, and especially those of assumption.

(3) We reserve to ourselves jointly the power to make all such alterations in or additions to this our will as we shall think fit, either by a separate act or at the foot hereof, desiring that all such alterations or additions so made under our signatures shall be held as valid and effectual as if they had been inserted herein.

In witness whereof we have hereunto set our hands at . . . . . this . . . . . day of . . . . . , nineteen hundred and . . . . . in the presence of the subscribing witnesses.

A. B.
L. B.

Witnesses
C. D.
E. F.

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