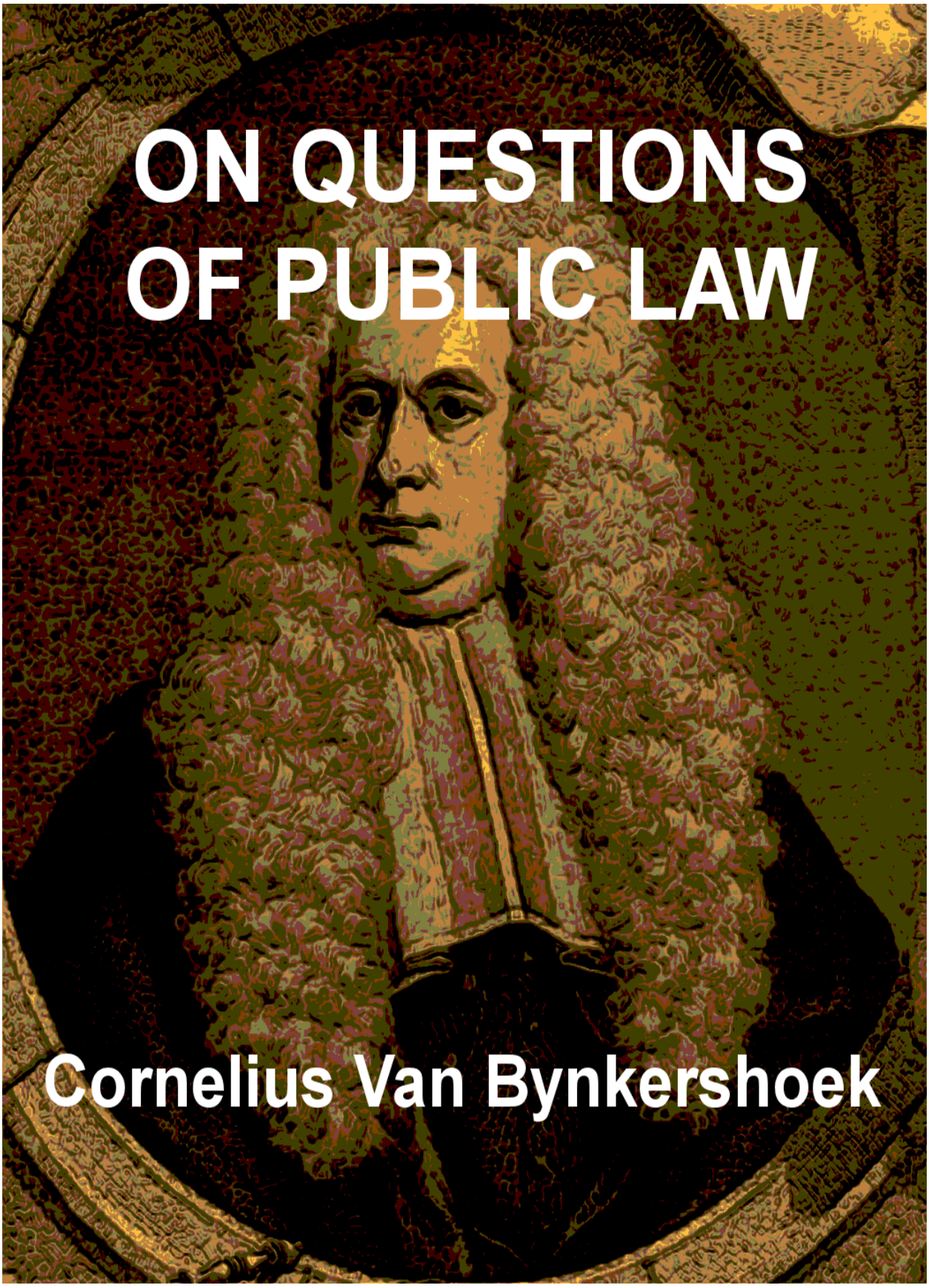
ON QUESTIONS
OF PUBLIC LAW
Cornelius Van Bynkershoek

CORNELIUS VAN BYNKERSHOEK
JURISCONSULT AND PRESIDING JUDGE

ON QUESTIONS OF PUBLIC LAW

IN TWO BOOKS (1737)

[Quaestionum Juris Publici, Libri Duo]

of which the First is ON WAR
the Second ON MISCELLANEOUS SUBJECTS

Translated into English by Tenney Frank (1929)
Footnotes have been omitted in this edition.
Spelling has been modernized.

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Dedication

TO THE DISTINGUISHED AND REVERED WILLIAM VAN CITTERS, JURIST, REPEATEDLY MAGISTRATE OF THE CITY OF MIDDELBURG, DIRECTOR OF THE EAST-INDIA COMPANY FOR ZEALAND, etc., etc., etc.

CORNELIUS VAN BYNKERSHOEK sends greetings.

MANY reasons have induced me to dedicate this book of Questions of Public Law to your eminence. If one were to seek for an illustrious name, none is more distinguished than yours. Your family, already famous in lineage, you have honored with meritorious deeds that win praise, whether counsel is sought for the common weal of the United Provinces or for our own province of Zealand. You are devoted to the welfare of both, but since the position which you hold has detained you in the services of the province, it is particularly her welfare which is to you the supreme law; and so far has she engaged your thought that for many years she has enjoyed the benefits of all your efforts. Therefore I may say, if I am a worthy prophet, that the welfare of our Zealand is wholly linked with yours, that she will be safe while you survive, that she has no fears so long as she may employ your services in times of danger, and no one envies but those inferior in rank. You have aided your fellow citizens to such an extent with your devotion that your city's wealth in public as in private channels has grown, commerce once nearly dead has revived, and houses once falling and deserted are rising higher and more beautiful. Not long ago it was difficult to find men to purchase or rent them, now it is difficult to supply the demand. Who knows you, knows that you administer public business as a good householder manages his private affairs, with generosity and integrity. But I shall not catalogue your virtues lest I be overwhelmed with the abundance, and become a burden to your modesty. There every man may find something to admire, no one what he could equal. The equability of your temperament and your self-restraint, apparent in all your deeds, I would not pass over in silence, because this is a rare quality in Zealand. There are some who think that the Mattiaci mentioned by Tacitus in the twenty-ninth chapter of his Germany were the ancestors of the Zealanders, and you recall that Tacitus said of them that they were 'like the Batavians except that they are more belligerent because of the position and climate of their land'. In this respect you are not a Mattiacus, or perhaps the Mattiaci were not Zealanders. Accordingly I could not find a more worthy or more dignified name to place at the beginning of my book, and I have used it, not to coax good fortune by the dedication nor to win authority for my opinions, for I have no ulterior purposes, and I know full well that a work should stand or fall by its own merits; but I wished to announce myself publicly as among those who do deference to your estimable qualities.

And if I were to seek a friend, there is none to whom I could give preference. For from the day when you first honored me with your friendship you have given so many proofs of it that I should be ungrateful unless I publicly acknowledged it. Permit me to say that our friendship has now lasted very many years without a stain, based not upon that conventional politeness that is satisfied with charming phrases, but which often fails when put to the test; it has been honest and without pretense. It is characteristic of the real candid Zealander to act frankly and not to seek to conceal his affections when once truly bestowed. I have known men who wished to be considered prudent who, however, hide their real sentiments, and please their friends with mere phrases, but, when friendship calls for a reckoning, they are found wanting. You first consider with care whether candidates for your friendship are worthy, and if they are and so long as they are, you exert yourself to promote their

welfare, while you do not permit yourself to be distracted by mere idlers: I speak as one who knows, for ever since I became your friend you have never ceased to favor me and mine in all my wishes. I have tried to reciprocate in some small measure, for it is but little that I can bring to one so exalted.

If, finally, I were to seek a judge competent to evaluate the opinions expressed here, you could readily pronounce judgement. As knowledge of the Roman law was once considered almost an inheritance in the family of the Scaevolas, so the knowledge of the law of nations has passed from father to son in yours. And by this I do not mean mere theoretical knowledge, but knowledge applied in the public service. Hence from your family have come the magistrates, the ambassadors, the presidents of governments, and the many others born for public office. To this inherited glory you have added, using your every endeavor, and laying out your goods for the acquisition of those things that might make you a more learned and better administrator of the commonwealth. You therefore will be the best judge as to whether I have here offered anything of use to the public service, and I shall feel sufficiently rewarded if I have satisfied you and a few who are like you. But I shall cease, lest I seem, contrary to my custom, to praise you in your presence. Farewell, and may many years remain to you for the public weal and the joy of your friends.

THE HAGUE, HOLLAND, April 28, 1737.

Preface

TO THE READER

WHEN four years ago I published the four later books of the *Observations juris Romani,* I indicated that I had then given enough attention to Roman law, and that it was my purpose, if I should extend my labors, to pass from those subjects which are usually discussed from the chairs of instructors to the subjects that are treated in the governmental and judicial chambers. Hence I promised to devote the rest of my days to public or constitutional law. Not that it is my intention to produce complete commentaries on these subjects, for I should then be compelled to repeat many things that have been said before, but it is my purpose rather to select and discuss some striking problems which might provide pleasure as well as profit. Here is now a part of my pledge, for I have begun with public law, in two books of Questions of Public Law, of which the first deals with the laws of war, the second with miscellaneous questions. And since there are two branches of public law, one treating of the regulations that obtain between nations, the source of which is reason, the other of the constitution of states, my work embraces both divisions. Moreover, it has been my purpose to give especial attention to the questions of most frequent use, and my method in deciding controversies has been to appeal first and foremost to sound reason. Then I have added treaties of nations, edicts and decrees of our own States-General, and also, not infrequently, cited precedents from the history of our own and of other nations, since public law draws its support partly from precedents, and so with the aid of these things I have tried to argue each case with due reserve.

Though the questions I have treated here may have interest in any state, they are all closely connected with the affairs of the Belgic Confederation, for I have not taken up any problem that did not have reference to our government, nor on which I have not cited all the relevant laws of our state from the very beginnings up to our own times. I have added my own opinion upon each problem, thinking that, especially in a free republic, this liberty was permissible. But I have thought wise to omit it in questions near our own day, lest I expose myself to ill will or seem to take up swords against the authority of any one still living, if I happened to express a dissenting view. I have taken even greater care to withhold my opinions on questions still in court, for I was unwilling to define by my opinion matters which have not yet been defined, lest my position might be prejudicial to some one. This reserve will be noticed here and there in my discussion of the right of eminent domain, as well as elsewhere.

As regards litigation of years past, it is permissible to think what we choose and to say what we think, and no man could deny this liberty to any one. I know that I have not always agreed in questions of public law with the opinions of the States-General of the Belgic Confederation nor with the Estates of the individual provinces, and this fact I have at times made known; but in matters which are derived from reason alone, that does not always seem just to Titius which seems so to Maevius; here every one has his own judgement, since every one yields to his own reason. Even the very States-General themselves have not always employed one and the same opinion, now deciding this way, now reversing themselves, and in these matters every one has the liberty to choose the course which seems necessary to be followed. Although it would be advantageous to all states if no such changes of opinion occurred in cases of public law, and if such changes did not stir the wrath of foreign governments, no state is or has ever been so blessed that this unvarying consistency could be obtained. Indeed, our constitution is such that the members which form the body of the States-

General are constantly changing, and who will wonder that with the change in membership opinions also change? Even our supreme court, which pronounces its judgements as if divinely inspired, though it is bound by oath to observe the laws, nevertheless frequently alters its decisions on one and the same purely legal question, even when there has been no change in the membership; for it may be that the members who were not so wise before, have gained in wisdom, or a previous decision may be forgotten in a question which is properly defended on both sides, or different laws may seem of paramount importance at different times, or there may be other considerations that I need not mention.

And even if the government were always consistent, it would be permissible to differ from her, not indeed in matters of fact, since by our constitution the government is there the final authority, but we may differ when, as frequently in this work, we appeal to reason alone to define questions of equity and right and to establish the principles of justice. In such questions the weight of no man's opinion is valid, if reason refuses assent. Grotius and Pufendorf and the commentators who have produced all the arguments cannot compel me to adopt a view contrary to reason, and on questions of the law of nations reason usually offers arguments on both sides. Hence I have generally abstained from heaping up citations of authorities with which I could otherwise have overburdened this work. To be sure I have often called Grotius and Pufendorf to witness, but only because they hold the place of honor in this subject, and lead a troop of followers; the authorities of the lesser nations I have usually passed over in silence. Yet even from these two men I have differed when it seemed to me that I had reason with me in doing so. Reason I have constantly consulted, for unless she carries the day nothing should in the realm of public law.

Nevertheless I would not refuse to cite authorities in order to add weight to reason, but I should prefer to draw upon usage long continued in the making of treaties between nations, and upon widely established precedents, rather than upon the testimony of ancient poets and orators, whether Greek or Latin, for these are indeed but miserable teachers of public law. Citations from these are of more use in displaying erudition than in mustering support for public law. I have more respect for the opinion of those who have associated with men and had experience in affairs of state, and have grown wise from practical administration; such men usually draw up treaties according to the customs of nations. Nor would I slavishly bow before their authority without reason, but when they accord with reason I would yield to them rather than to poets and orators. Ancient precedents and treaties, to be found in Greek and Roman histories, have indeed some value, but as the habits and customs of nations change, so does the law of nations. To be sure, reason remains immutable, but when reason argues in behalf of both sides so that it is doubtful where the preponderating weight lies, we must appeal to custom for a decision. There were formerly many practices which now no longer exist, as for instance in the ratification of treaties that had been made by delegated envoys of the government. That is the reason why I have preferred to use precedents and treaties of recent date rather than old ones. Furthermore, since I desired to have my work of immediate practical value, I have drawn more fully upon modern than upon former instances. However, I have not discussed all the treaties of all nations, for that would require too great care, but from the instances which I have adduced it will not be difficult to understand what is the consensus of opinion among nations on the problems that I have discussed. Such were my principles in undertaking the work; the public may judge of their correctness.

I have added my authorities because I did not wish to go forth without my bondsmen, and I have also

cited the precise passage, though I have reduced the references to foot-notes to save the reader's time. I have not thought it necessary to give references for facts generally known or readily accessible. I have used Aitzema's Historien and his Herstelde Leeuw in the quarto edition and have cited it by volume and page. The ordinary edition of edicts and decrees called Het Groot Placaat-boek, I have cited simply as Plac.1, and the numbers that follow refer to volume, book, title, part, and paragraph. However, the volumes are not consistently paragraphed, parts and titles being sometimes omitted, and in the fifth book, and in the appendix of the second, the subdivisions were so incomplete that I have cited these by pages. But those who are accustomed to the use of books will comprehend what the numbers mean that are cited with these various tomes, even if like me they fail to understand why publishers vary so much in making their subdivisions. It would indeed have been more convenient to cite the page of each volume, but even if I had omitted repetitions and superfluities and cited the specific edition of each work by page there would be no agreement in the pagination of the various editions.

Other titles and abbreviations will be readily understood. I have used some edicts and decrees and indeed some other documents which were not yet published in books, and in such cases I was compelled simply to refer to the official records or to my own collections. I have used De Resolutien van Consideratie ten tyde van de Wit in the folio edition of 1672, and the page numbers are accordingly of that edition. Some of the clauses of the edicts and decrees I did not translate into Latin but left in the original Dutch, for the reason that the meaning was not entirely clear, and hence I preferred to leave them to the intelligence of the reader rather than try to determine the meaning by a version of my own. This will suffice by way of preface. Farewell.

BOOK 1
On War

CHAPTER 1

The Definition of War And an Explanation of The Definition

WHEN Cicero said that there are 'two kinds of contests, one by means of discussion, the other by means offeree', he had reference in the latter case to 'war'. However, he did not in this way intend to define war, as Grotius thought, for such a definition would be incomplete. Equally imperfect is the definition of Alberico Gentili, who says that war is 'a just contest carried on by the state's armed forces'. Although the former of these two definitions is approved by Grotius, both will appear to be incomplete from the one which I add, a definition which, if I mistake not, embraces all the conditions of war: 'War is a contest of independent persons carried on by force or fraud for the sake of asserting their rights.' Let us now examine this in detail.

Our definition specifies 'independent persons'. This applies of course to nations, but also to individuals not living in an organized state; for both may be independent. Furthermore though the war be between individuals it cannot be called a private war, since the term 'private' has no meaning except with reference to the term 'public', and this does not apply where there is no state. This war of individuals can no longer exist when the individuals form a state. So, for instance, if I extort from my debtor the ten pieces he owes me I incur the penalty of the 'Julian law against private force', since the extortion of debts through illegal means constitutes 'force' as defined by law quite as much as the infliction of wounds.

The definition also specifies 'for the sake of asserting their rights'. In other words, the only correct ground for war is the defense or recovery of one's own. However, I do not hold this to be the sole object of war. It is the accepted view that a nation which injures another is, together with its realm, forfeited to the injured nation; and if the injured nation so desires it may make the confiscation the object of the war. Certainly the war does not and ought not to end" upon the reparation of the injury suffered. And since the whole state, including persons as well as things, belongs to the sovereign, we seize in war the person of the hostile sovereign together with the whole commonwealth, just as in the case of a debt we seize our debtor and all his property. To be sure, we do not exact from a debtor more than he owes us; but in war all social obligations are in a measure severed. We attempt therefore to subjugate the enemy and all that he has by seizing all the power that the sovereign has over the state, that is to say, by exercising complete dominion over all persons and all things contained in that state. Indeed war is by its very nature so general that it cannot be waged within set limits. By defining war as a 'contest' I did not mean to express merely the act of fighting, but also the state of things obtaining during war, for the definition of the thing implies the inherent conditions. Thus, in defining slavery we have in mind not only the act by which free men are subjected to the control of others but also the state and condition of servitude. Grotius has also made this distinction in the definition of war which he adopted from Cicero.

In defining war as a contest 'by force', I did not say 'lawful force'; for in my opinion every force is lawful in war. So true is this that we may destroy an enemy though he be unarmed, and for this purpose we may employ poison, an assassin, or incendiary bombs, though he is not provided with such things: in short everything is legitimate against an enemy. I know that Grotius is opposed to the use of poison, and lays down various distinctions regarding the employment of assassins. I know that Zouche, who seldom reaches a decision, is in doubt upon this question also. But if we follow reason, who is the teacher of the law of nations, we must grant that everything is lawful against

enemies as such. We make war because we think that our enemy, by the injury done us, has merited the destruction of himself and his people. As this is the object of our welfare, does it matter what means we employ to accomplish it? We do not call a judge unjust for ordering a convicted criminal to be put to death by the executioner's sword, though the victim be bound and unarmed; for if we should unbind and arm him we should no longer have the punishment of a crime, but a trial of courage and good fortune. Indeed, if you hold that you may employ only such means of compulsion as your enemy uses, you must also hold that his cause is as good as yours despite the fact that you have decided to vanquish him because of the injuries he has done you. With respect to you, your enemy bears the relation of a condemned criminal, as you do with respect to him, while in the eyes of a third person who is a friend of both, the cause of both is equally good and you are both equally in the right.

In my definition I was not even willing to omit 'fraud', since it is immaterial whether we employ strategy or courage against the enemy. Opinions differ, to be sure, and Grotius offers a great number of authorities and precedents on both sides. I would permit every kind of deceit with the sole exception of perfidy, and I make this exception not because anything is illegitimate against an enemy, but because when an engagement has been made the enemy ceases to be an enemy as far as regards the engagement. And indeed, since the reason that justifies war justifies every method of destroying the enemy, I find but one way of explaining why so many authorities and precedents oppose the employment of deceit. This opposition is clearly due to the fact that writers, as well as military leaders, improperly confuse justice, which is the subject of our present inquiry, with generosity, a sentiment that often appears in warfare. Justice is indispensable in war, while generosity is wholly voluntary. The former permits the destruction of the enemy by whatsoever means, the latter grants to the enemy whatever we should like to claim for ourselves in our own misfortune, and it desires that wars be waged according to the rules of the duel which was formerly admissible in some states. Considerations of justice permit us to have larger forces than the enemy, and to use firearms and other devices that differ from theirs, while generosity forbids this. Justice permits every manner of deceit except perfidy, as I have said; generosity does not permit it even, apparently, when the enemy employs it; for cunning is a work of fear. The words of St. Augustine concern justice, indeed, justice is the subject under discussion: 'When a righteous war is undertaken it is immaterial to the claims of justice whether we contend with open force or with strategy.' But I attribute to generosity the deed of the Roman consuls when they wrote to King Pyrrhus: 'It is not our intention to contend with you by means of bribery, head money or fraud.' Many nations have often preferred generosity to justice, or vice versa; even the Romans have varied in their preference. Accordingly, if you explain the authorities and precedents in the manner I have just indicated, we need not disagree concerning the means to be used in warfare. We need only remember that justice may always be insisted upon, while generosity may not.'

CHAPTER 2

Wars May Be Lawful Without a Formal Declaration

WRITERS on the law of nations have laid down various elements that are essential in a lawful war, and among these is the requirement that a war should be openly declared either by a special proclamation or by sending a herald; and this opinion accords with the practices of the modern nations of Europe. Indeed I grant that before we resort to force we must demand satisfaction for the injuries sustained or complained of. However, the question here at issue is whether we may apply force without a declaration of war as soon as reparation has been demanded and refused. Alberico Gentili thinks this unlawful, for he holds that there must be a public renunciation of friendship so that the war be not secretly commenced. Grotius agrees with me that the law of nature does not require a declaration of war, and he quotes authorities that have held wars lawful without a declaration. However, in accordance with the law of nations he would have a 'formal protest by which it may appear that in no other way can we obtain our property or our debt'. Then he adds concerning public declarations: these are required, 'that it might be clearly known that the war was undertaken not as a venture of private persons but by the will of the two peoples or their heads'. Pufendorf holds the same view regarding the law of nations, and Huber uses the same argument as Grotius. There are some, however, who add certain exceptions, notably the above-mentioned Gentili and Zouche. Hertius moreover, while admitting that the declaration of war has become part and parcel of the practices of nations, thinks that those practices are not obligatory and that the nations which disregard them are merely to be excluded from the group which we call the most civilized.

Christian Thomasius, a man of sound judgement, rightly, in my opinion, considers a declaration of war as an act of mere humanity, which no one can be compelled to perform; and he properly asks what difference there is, or has ever been, between a war that has and one that has not been declared, and whether there is a different law for the one and for the other. He therefore disagrees with Grotius, who, quoting Dio Chrysostom to the effect 'that wars are generally entered without previous declaration', believes that this condition merely concerns the law of nature. Thomasius, on the contrary, considers that this practice of not declaring war constitutes a part of the law of nations, and he presently adds that the question is worthy of fuller discussion in a special dissertation.

Although I cannot give a special study to the question, I wish to devote the present chapter to it. My opinion, then, is that a declaration is not demanded by any exigency of reason, that while it is a thing which may properly be done, it cannot be required as a matter of right. War may begin by a declaration, but it may also begin by mutual hostilities. This the States-General seemed to imply by their edict of January 17, 1665, which held that it was possible to lay claim to the ships taken by the English because they had been taken before a declaration of war, and 'before the Dutch had commenced hostilities'. War may also begin properly upon the denial of a demand, which in my opinion does not differ from actual force. I grant to the fullest extent that we ought first to demand what is due to us, but not that the demand must be accompanied with threats of war or with an actual declaration. What Grotius says about interpellatio applies only to a demand, but not what he says presently about a public declaration. Nevertheless it was from his and others' unreasonable prejudices that a subject otherwise clear began to become obscure. It should indeed have been clear that, where, as in the case of different sovereigns, no courts have jurisdiction, each one may properly seize the property which another has wrongly taken and refused to restore. If this be true, every one is at liberty to make or to withhold the declaration, otherwise a declaration is a certain solemn form

that could only have been introduced by an agreement between nations a thing which does not exist.

However, nations and princes endowed with some pride are not generally willing to wage war without a previous declaration, for they wish by an open attack to render victory more honorable and glorious. But here I must repeat the distinction between generosity and justice which I laid down in the preceding chapter. The latter permits the use of force without a declaration of war, the former considers everything in a nobler manner, deems it far from glorious to overcome an unarmed and unprepared enemy, and considers it base to attack those who may have come to us in reliance upon public amity and to despoil them when such amity has suddenly been broken through no fault of theirs. Hence Polybius highly praises the custom of declaring war which was peculiar to the Achaeans and the Romans, as indeed he praises these peoples because they avoided fraud and deceit in warfare; but in both instances the praise was meted out for their generosity. Speaking of the Achaeans, Polybius adds that they even were accustomed to appoint a place for battle. Indeed we read that certain Counts of Holland in ancient times not only issued a declaration, when about to make war, but even appointed a time and a place for battle. This appointment of time and place Grotius admits is not necessary, and yet he insists upon the declaration of war as an essential. If we ask for the difference between the two we shall not find any other than that it is not now customary in Europe to appoint time and place. Hence it is apparent that Grotius wrote his books *On the Law of War and Peace*, not concerning the actual law of nations, but rather concerning the practices that hold in most of the European nations; and yet Grotius himself teaches us that customs do not constitute the law of nations. But as in this case, so also in others he has frequently deduced the law of nations from customs, and consequently when customs differ he has hardly dared to decide the question.

Moreover, because of the fact mentioned by Polybius, that it was an honor peculiar to the Achaeans and Romans that they made declarations of war, we sufficiently understand that Dio Chrysostom spoke truly in saying that wars are generally waged without a previous declaration, so that we agree not only with the law of nations but also with the practice of nations. Indeed, with the exception of the two above-mentioned nations, the custom of declaring war was not frequently observed among the ancients. For when the Greeks were about to open hostilities against other Greeks or barbarians they were not in the habit of making a public declaration; nor do we read that the Jews, fighting at God's command, ever declared war against the enemy, nor did the Macedonians who so gloriously destroyed the empire of the Persians. Even now, as far as I can discover, European nations are the only ones that make formal declarations of war, and even these do not all do so nor at all times. However, when they do, they follow the customs of the Romans, solely for the reason, I suppose, that they are to a great extent descendants of the Romans. At any rate the European nations have held the Romans in such high esteem that they have taken over their customs as well as their laws, although their customs, as for instance this very practice of declaring war, differed from those of other nations. Therefore, if any European sovereign should begin a war without a declaration, as was done by Gustavus Adolphus upon the Germans in the last century, his action would be considered contrary to the general custom of European nations; but only those would call his act contrary to the law of nations who consider as universal law the customs they observe in their own country.

But let us examine the dictates of reason, whose authority is so great in defining the law of nations. As I have just said, reason does not require any other formalities than that we should in a friendly

manner demand the restoration of that which has been forcibly taken from us. Perhaps it will not even require this, since all laws permit the repelling of force by force, nor do I know whether the law of nations recognizes any formalities that are to be employed before meeting an armed attack. However, let us grant that, since the noble must act with generosity, a formal demand for restitution is desirable; but if that is refused shall we still forbid the employment of force? I should not, though Grotius and others would, provided there has been no formal declaration of war. However, the arguments by which they generally support the requirement of such a declaration are of no worth. Grotius disapproves of the one offered by Gentili, but his own argument, which I have quoted above, if not worse is at least very poor. For if two sovereigns are engaged in hostilities without having declared war, can we have any doubt that war is being waged according to the will of both? In that case there can be no need of a declaration, since it is being waged publicly and needs no proof. This argument therefore has no force, and yet Grotius preferred to rely upon it rather than deduce the necessity of an open declaration from the prevailing practice of European nations, for he knew well that custom does not constitute the law of nations. Reason, I repeat, is therefore the soul of the law of nations, and if we refer to reason, we shall find no argument to support the need of a declaration, but many, which I have mentioned, to the contrary.

But even if this question were to be decided on the score of custom- alone, we might add illustrations from the practices of European nations. To omit reference to the infinite number of precedents in ancient times, the war of extermination which was carried on between Spain and the United Provinces from the time our republic was founded until the year 1648 was begun by mutual hostilities without any formal declaration. Because of this fact shall we doubt the legality of the war, of the victory, and of the peace which followed it in 1648? For my part I do not. However, the Estates of Holland seem to have held a contrary opinion when on March 4, 1600, they published an edict declaring that satisfaction should be given the owners of the vessels which Philip III had confiscated in Spain in 1598, on the ground that they had been seized without a previous declaration, though the Dutch had freely resorted to Spain before that time. That decree I do not intend to support, for who could justly have required the King of Spain to declare war when the Dutch had continued to make open warfare against him since the year 1581? Certainly the mutual use of force may properly begin a war, not to mention other cases which may fall into this class, and which according to the jurists do not require a previous declaration.

The Estates of Holland add in the preface and again in the body of this edict that formerly, that is to say before 1598, the Belgians enjoyed free commercial intercourse in Spain. But I have not been able to discover whether this statement is true, and if it be, I do not see its bearing upon the justice of the case, as I shall presently explain. If the Belgians resorted to and traded in Spain they did so on sufferance or by the negligence of the authorities rather than in accordance with the laws of war. Indeed, in the preamble of the edict by which on April 4, 1586, the Earl of Leicester, with the advice of the States-General and the Counsellors, prohibited the people of the United Provinces from carrying on commerce with the Spaniards, it is stated that the King of Spain had already confiscated Dutch ships in Spain and Portugal. Furthermore, in the first section of this same edict as well as in the edict of July 18 of the same year, the Earl of Leicester forbade all commerce with the Spaniards. To be sure in the edict of August 4, 1586 (l) he restricted this prohibition to the places in Belgium held by the Spaniards, thus permitting commerce with Spain proper; but this was done solely with a view to aiding Dutch merchants; it brought no change to the laws of war, which could not be altered without the consent of the Spaniards.

Even if a declaration had been necessary, this would not have aided the Belgians in preventing the confiscation of their ships. What if the Spanish King in 1598 had solemnly declared war, and then later, perhaps that same day, had seized the ships! This he might well have done according to the laws of war; for when war suddenly breaks out neither the Dutch nor any other state has the custom of giving notice to the subjects of their enemies that they must remove their possessions under penalty of having them seized. You will not find any authority that has required this; indeed Tryphoninus explicitly states the contrary. And this is the practice of all nations unless there is an explicit agreement to the contrary, as is sometimes the case. Here are a few instances of such agreements. In the fourth clause of the Treaty of Utrecht with Muiden and Weesp dated July l, 1463, it was agreed that the peace should last fourteen days, 'after we, the said city and cities shall have written to each other', within which period the subjects of those cities were to be permitted to depart with all their possessions from the domain of their enemies. In the 16th clause of the treaty between the King of Portugal and the States-General (dated August 6, 1661) it was agreed, that if differences should arise between the two parties, this fact should be set forth in a declaration, and within two years from that declaration it should be unlawful to do any injury to the property of the subjects of either party. And since in 1662 the King of France and the States-General had agreed that in case of war the subjects of both states should have the privilege of departing with their possessions within six months, the said king in declaring war against the Dutch in 1672 issued a special decree, under date of April 14, declaring that he would observe in favor of the Dutch the terms of the convention of 1662. The same states again granted a term of six months for the same purpose by Article 15 of the Peace of Nimeguen, August 10, 1678; nine months by Article 39 of the Marine Treaty signed the same day; nine months by Article 14 of the Treaty dated September 20, 1697; and again nine months by Article 36 of the Peace Treaty of April 11, 1713. Article 32 of the Treaty between England and the States-General, dated July 31, 1667, states that if a war should break out between the signatories, the property of the subjects of either power found in the territory of the other should not be confiscated but should be permitted to be carried out within six months. If this were not enough I could add further instances, and others are to be found in Zentgravius. However, when such conventions for the suspending of a state of war do not exist, war may be commenced at once, whatever writers may say. Grotius, who insists upon a formal declaration, does not require any interval between that and the beginning of hostilities, with whom agree Zouche and Zentgravius. Accordingly the King of Spain in 1598 might have declared war and at once seized the Dutch ships, since there was no convention prohibiting such action; indeed there could not well have been such a convention between the King and those whom he considered his own subjects.

Here we have an example of a famous war carried on for a very long time without a formal declaration. I do not even know how the Belgians could have demanded a declaration from the Spaniards since they neither at the beginning nor after the truce ever made such a declaration to the Spaniards. Indeed, even if such a formality were necessary, the Spaniards would perhaps have raised the objection that it was necessary only in case of war between independent powers, but that it was never used in civil war, for in that case it was lawful for a sovereign to seize the property of his rebellious subjects. This argument, however, I do not press: it is enough for my purposes if I have otherwise made it clear that it was not the laws of war, but the interest of the Dutch merchants that brought into being the edict of March 4, 1600. It was the same interest that led the Hollanders astray in 1639 and brought them into an unseemly conflict with the States-General in another case which was no less dependent on the laws of war. For when certain men had treacherously taken the Governor of the Canary Islands and brought him to this country, and the States-General decided that

he had been lawfully taken and should be kept as a prisoner, the Hollanders indeed objected, but only in the interest of their commerce, as Aitzema says. One would think that they might have based their objections on the very merits of the case, since the deed was far more base than the confiscation of ships by the King of Spain in 1598; for although the goods of an enemy are usually seized and hostilities may begin at once after a declaration, unless some convention forbids, it certainly is not permissible to betray a friend. The Dutch had of their own free will resorted to the Canary Islands as friends and for the sake of trade, and there was on both sides the privilege of commercial intercourse, freely exercised. A Dutch captain thus admitted for purposes of trade, pretending that he would convey the Governor from one island to another, seized him and carried him to Rotterdam to make him a prisoner. This appears to me to be the same as going to the enemy with a flag of truce only to kill him on the first occasion.

But let us pass on to other wars that have been waged without a formal declaration. The facts about Gustavus Adolphus invading Germany are well known, and it is also known how, when Ferdinand II complained that he had come without a previous declaration, he responded that the Emperor also had formerly invaded Prussia without any declaration of war. In this way sovereigns, though they are not subject to a higher court, nevertheless force upon each other the principle that 'a man be dealt with after the like rule to that which he maintained against another'. The same thing happened in the year 1657, for when the French in the midst of peace seized the goods of the Dutch subjects among them, the Dutch in the same manner seized the property of the French under the edict of the Holland States of April 26, 1657, and the decree of the States-General of May 6, 1657. The States-General in their decree concerning this matter hold that, according to the law of nations, this seizure among friendly states is manifestly unlawful, unless for a just cause and after satisfaction has been demanded and refused. But no sovereign will make such a seizure except for some cause that he considers just. In fact, since injuries can hardly be made known in any other way, I would also admit of a previous demand, but on account of the present general employment of ambassadors we need hardly concern ourselves about this, for ambassadors are constantly raising objections at every trifling incident that may offend their sovereign. But let us proceed. We read that even the Portuguese in 1657 detained the ships of the Dutch before war was declared and before hostilities commenced. And in the war between the King of England and the States-General, which was concluded by the peace of 1667, the States-General sent on September 16,6, a letter to the King of England complaining that much property was taken from them and their subjects, and quite unlawfully, since war had not been declared. Whether this argument is good the reader may judge for himself from the trend of my discussion. In 1667, Louis XIV did not declare war on Spain, and yet, as though keeping the peace, he decided to expel the King of Spain from dominions that he possessed, offering the excuse that there was no need of a declaration of war to recover one's own property. But, indeed, if ever a declaration be necessary, who would ever accept such a pretext? For war is nothing else than to take forcibly from an unwilling prince or people what we think is due to us. On this subject there is a verbose complaint of the States-General in an edict against the French, dated March 9, 1689, declaring that this same French King in 1688, without a formal declaration, detained the Dutch, their ships, and their merchandise, and that presently, when the declaration of war had barely been published at Paris, he took up arms and seized the goods of Dutch subjects. The first part of this complaint is wholly just, for such detention was contrary to Article 15 of the Peace of Nimeguen and Article 39 of the Marine Peace of August 10, 1678; for since the time had not elapsed which was stipulated for the removal of alien property, the state of war being to that extent suspended, the seizure of those goods that might have been rescued within the limited time was an

act of injustice. But there was no convention regarding the other property, and so I doubt whether the latter part of the complaint was equally just. But be this as it may, the instances which I have adduced are sufficient to prove that we need not think so favorably of European customs as to deduce from them the unquestioned necessity of making declarations of war.

CHAPTER 3
On the Status of War as Applying to the Belligerents

WE might suppose that enmity and the conditions of war ought to be displayed between the hostile princes for whose interests alone, in most cases, war is carried on, rather than between their subjects, who certainly are not actuated by so hostile a spirit except when their own cause is at stake. However, since enemies must be met with hostile acts, no one would have expected that we would adopt the custom of complimenting and greeting our enemies. Indeed, the majesty and dignity of the Roman people displayed itself in the conduct of Caius Popilius, who although he was saluted by King Antiochus, then his enemy, refused to return the salutation while the war continued. So Plutarch tells the story. Livy and Polybius also relate how Popilius refused to take the proffered hand of Antiochus. Yet Roman consuls also, when it was to the interest of the commonwealth, sent greetings to Pyrrhus, then an enemy, according to a letter found in Aulus Gellius. And so addicted to flattery was the last century and the present one, that princes even in the midst of hostilities resort to adulation; so that now enemies invoice prosperity upon each other, call each other friends, and pretend to be sorry for their mutual losses. There are examples of this in the letters of the States-General addressed to the King of England on July 10, September 16, and November 26, 1666, and in the letters of the King addressed to the States-General on August 4, and October 4, of the same year. Although both nations were at that time bent upon mutual destruction, yet the States-General in the first of the above-cited letters said that there was nothing incompatible between the duties of war and an interchange of civilities. And the King of France, in 1666, who was then at war with the King of England, sent an envoy to him to express his grief over the burning of London. It is noble to practice kindness, mercy, piety, and other virtues of a generous soul in warfare, but it is certainly disgusting to trifle with words, for what else can you call it when you express grief for the burning of a city which you yourself would like to set on fire!

Since the conqueror may do what he likes with the conquered, no one doubts that he also has the power of life and death over him. There are so many records and instances of the exercise of this right among all nations of ancient time, that one thick volume would not contain a full account of them; and writers on public law have already exercised their industry upon this subject. But although the right of executing the vanquished has almost grown obsolete, this fact is to be attributed solely to the voluntary clemency of the victor, and we cannot deny that the right might still be exercised if any one wished to avail himself of it. We can show clearly that there are still remains of this right here and there, for it is in my opinion on the basis of such a survival that we can explain and defend the edict of the States-General of October 1, 1589, by which they proclaimed the death penalty against those who might be found with the traitors of Geertruidenberg, and also their other edict of February 24, 1606, by which they threatened the same penalty upon those who should approach the shore within the navigation marks, or should land on the coast for the sake of plunder. For surely, as far as concerns the laws of war, a man is hardly guilty of crime for being in the company of his fellow soldiers even if these be traitors, nor is it a crime to invade a hostile shore in the hope of making booty. You may drive such an invader off if you can, but if you cannot, why treat him differently from other enemies? It is on the ground of the same right of life and death that I defend the conduct of the Dutch who, as we are informed sometimes hanged Spaniards who were not ransomed. It is lawful to hang prisoners of war; but if it were not, the failure to procure a ransom would not excuse the act; indeed we shall presently see that such executions are not customary.

To the right of slaying the captured enemy there succeeded the right of making them slaves, which was formerly exercised for a long period. But this custom has also fallen into disuse among nations. To be sure Cujas has written that even among Christians war captives are still enslaved, though their servitude is now milder; but he supports his statement only by reference to the right of ransoming prisoners. But in my opinion, the custom of ransoming prisoners, and the consequent detention until they are ransomed, no more entails servitude than our custom, for instance, of detaining foreign debtors until they pay their debts. For such debtors are never released unless they pay the money due or give security for it, as is also the case with prisoners of war. Even prisoners of war, if they are not redeemed, are very often released without any payment of money. So, for instance, the supreme military council of the United Provinces on December 14, 1602, permitted the release of twenty-four unredeemed prisoners that had been taken at the siege of Bois-le-Duc, lest they should perish by the hardships of imprisonment. It would have been quite unexpected and contrary to prevalent custom if the council had ordered these captives hanged or sent into slavery. Accordingly when the Count of Solms in his Irish campaign in 1690 had ordered the prisoners to be deported to America to become slaves, the Duke of Berwick served notice that if this were done he would send to the galleys in France whatever prisoners he should take. But since slavery has now generally fallen into disuse among Christians, it is no longer employed against war captives. Yet we may make use of it, if we so desire, and indeed at times we do against those who exercise the right against us. For this reason the Dutch usually sell as slaves to the Spaniards the people of Algiers, Tunis, and Tripoli that they capture on the Atlantic or in the Mediterranean, for the Dutch do not use slaves except in Asia, Africa, and America. Indeed, in 1661 and again in 1664 the States-General ordered their admiral to sell into slavery all the pirates he should take.

To the custom of enslaving prisoners succeeded the practice of exchanging them according to their respective rank and station, or of detaining them until redeemed. And treaties sometimes make redeeming obligatory and specify a certain amount of ransom money according to the rank of each person that may be captured. When this sum has been paid, that right of life and death which the victor may exercise over the vanquished comes to an end. The Romans also exercised the right of capture against those of the enemy who at the outbreak of the war happened to be within their territory, but in modern times this right is seldom exercised, although it can be. Even Louis XIV of France when on January 26, 1666, he declared war on land and sea against the English and forbade all commerce with the enemy, so that the English who were in France feared for their persons and property, issued on February 15 a second decree declaring that their fears were groundless, for, he added, by the previous edict he had declared war only upon the English who should be found upon the-seas, or who should commit hostile acts within the French Empire, not upon private individuals who had established their domiciles in France. He stated, however, that he would be pleased if the English dwelling in France unnaturalized would depart within three months, going wheresoever they pleased. I have argued in the preceding chapter that such acts are to be attributed solely to generosity, unless there be agreements which suspend the conditions of war. But since there generally exist such agreements, the right of -war is seldom exercised against those who have entered a foreign country in time of peace, and are found there when war suddenly breaks out.. Accordingly, when the time has elapsed which has been granted for departure either by treaty or by special dispensation, those who have remained or who have come without permission may lawfully be arrested. On this principle the States-General on April 4, 1674, issued an edict declaring that if any enemies should remain within the United Provinces or in the dominions of the States-General without permission, they should be duly arrested and should not be liberated until redeemed.

The right to put captives to death has fallen into disuse; there is a question, however, whether we may use this right without the least disgrace against those who defend themselves too obstinately. There are some who believe this, but I hold it is most disgraceful, unless we think worthy of punishment some weak and defenseless maiden who may obstinately defend her chastity against the attack of libertines. Everything is lawful against an enemy, but nothing could be more cruel than to punish him for his courage. Indeed, we ourselves admire courage in our enemies and are indignant at acts of cowardice in them. I remember reading that the corsairs of Algiers heaped with insults and tore to pieces a certain captain simply because he had disgracefully given up an excellently manned vessel after stipulating for the liberty of his own person. Apparently courage is honored and cowardice held in contempt even with the enemy. If you wish to see what others have written upon this subject you may find pleasure in reading Gentili, Grotius, and Zouche.

We have set forth what it is lawful to do with captives, but what customs obtain in the treatment of the dead? Formerly the bodies were exposed to beasts and birds, but now the victors bury them or permit the vanquished to do so. Sometimes even more is done out of regard for humanity. On September 16, 1666, the States-General had embalmed and sent home the body of the British vice-admiral which had fallen into their power: indeed they had already on July 10, 1666, written to the King of England to inquire whether he wished the body sent to England or buried in Holland, and he had chosen the former. The French did the same thing in 1692.

Judging from the nature of war we can hardly doubt that all commercial intercourse ceases between enemies. Of what value, pray, are commercial rights if, as is clearly the case, the goods of the enemy that are brought in or that are found in the country are confiscate? But so long as the right of slaying an enemy obtains, would you approve that men might go to the enemy's country with merchandise only to have some enemy cut them down in the midst of the trading? Certainly all commercial intercourse must cease. Hence commerce is generally prohibited in declarations of war, and also in subsequent edicts. According to Article 11 of the edict of the Earl of Leicester, dated April 4, 1586, prohibiting trade with the Spaniards, it was enacted that subjects engaged in commerce with the enemy contrary to that law should be hanged, and their ships and goods employed in the unlawful commerce should be confiscated, while foreigners engaged in this trade should have their ships and cargoes confiscated. The same penalties were announced by the Earl in Article 12 of the edict of August 4, 1586. Furthermore, by Article 13 of the former edict and by Article 14 of the latter the intention of carrying on commerce with the enemy was declared punishable to the same extent as the act itself, and indeed the Estates of Holland had already so enacted on July 27, 1584. It was, furthermore, added in all these edicts that indictments for these crimes, whether the culprits were taken in the act or not, should not be annulled by any statutes of limitation. Furthermore, by the last-mentioned edict of the Estates of Holland the pecuniary penalties imposed upon the delinquent should be recoverable even from his heirs. But I must add that this last point does not seem to me to conform to Roman law, for, to be candid, the crime, against which these edicts are directed, cannot be classed with treason, but is rather of a peculiar land that springs not from treasonable intent but from greed.

Moreover, even when there is no specific prohibition of commerce, it is made impossible by the very laws of war, as the phrasing of the formal declaration proves; for every man is ordered to attack the subjects of the hostile prince, to seize their goods, and to do them all possible harm. But the interests of the mercantile class and the mutual needs of peoples have almost annulled the laws of war

relating to commerce. Hence prohibitions are made and permissions granted that vary with each war, according as sovereigns think it most to their own advantage and the interest of their subjects. A commercial people is anxious to trade, and accommodates the laws of war to its varying power of doing without the merchandise of the other nation. Thus sometimes a mutual permission to engage in general commerce is given, sometimes a partial permission with respect to certain articles, sometimes it is prohibited altogether. But in whatever manner we permit it, whether generally or specifically, a permission is always in my opinion to that extent a suspension of the laws of war, and in that case there is in part war, in part peace, between the subjects of the two sovereigns. The herring fishery was permitted on both sides by the edicts of the French and Dutch in 1536, and by the Decree of December 22, 1552, commercial intercourse was partly permitted but under certain restrictions. To this you may add what was done during the whole of the Spanish, Portuguese, and English war in the years 1653, 1665, and 1672, as well as in the French war in 1672,, and 1702, for it would require too much space to tell it.

One might question whether friends are to be treated as enemies if they have been captured and are found among the enemy. Pierino Belli does not think they are, while Zouche reaches no decision. I should consider them as such, at least so far as concerns their goods which they possess within the hostile territory, and I should hold that such goods could with entire propriety be seized by us according to the laws of war, if the enemy has already taken them from our friends. We may lawfully seize whatever belongs to the enemy, and such goods are a part of the hostile power, which can be of use to them and hence harmful to us. If, however, the property of our friends be within our own domain, even though they themselves are with the enemy, detained as prisoners of war, the case would be wholly different, since the property would then not be in the possession of, nor serviceable to, the enemy. Furthermore, as the exigencies of war demand that we should do all possible harm to our enemies, why should we not take from them goods which they have seized by the law of war and from which they derive advantage? I know the arguments by which some writers support the contrary opinion, for they argue that though our friends are in the enemy's country they are not themselves hostile to us, nor are they there from free choice, while the matter must be decided from the viewpoint of motive and animus. However, in my opinion the decision does not rest wholly upon motive, since even among the subjects of our enemy there are some, be they ever so few, who are not hostilely inclined towards us; the matter, indeed, rests upon the point of law that the property is in the hands of the enemy, and the material fact that they provide aid to the enemy for our destruction.

CHAPTER 4
How and When Ownership Is Established in Captured Property and in Ships

IN the preceding we have treated of the persons of the enemies. We shall now speak of their property and of their actions. It is evident that the enemy's goods, whether movable or not, may be taken by the laws of war. I shall not now discuss who gains possession of the property taken or whether, when men have gone foraging without authority, the booty falls to them, for I shall have something to say on that topic in Chapter 20. At present I shall rather discuss a question no less important which arises daily, namely, from what moment possession changes by capture. I shall not distinguish here between the different kinds of movable goods that may be taken, whether it be a person, a ship, merchandise, furniture, or anything else that can fall into the hands as booty. By the Roman law, as Grotius correctly observes, booty becomes the property of the captor when it has been brought into defensible ground, the sole reason for this doctrine being that then every hope of pursuing and recovering the thing is at an end. Grotius observes in the next paragraph: 'Hence it seems to follow that at sea ships and other things captured are understood to be captured when, and not till, they are brought into dock or harbor, or to the place where the whole fleet is; for then recovery is despaired of.' 'But', he adds, 'we find that it has been established by the more recent law of nations among Europeans that such things are understood to be captured when they have been twenty-four hours in the possession of the enemy.' This principle he applies in his notes also to things that have been captured on land. The doctrine of Grotius has been fairly restated by Zouche and Loccenius. But Grotius's statement that the rule of the twenty-four hours was now being observed by all nations without regard to whether the captured ship has or has not been brought to port by the captor, has been answered by the counselor of state in the court of admiralty at Amsterdam, as well as by others.

For my part I have never been able to find this custom observed. To be sure, the military court rendered such a decision on December 24, 1624, and also upon another occasion, but who would give heed to men, mostly ignorant of law, who clearly make no use of authorities and are perhaps misled by the words of Grotius alone. Even in the United Provinces this statement is contradicted by the laws and customs as I shall abundantly prove in this and the succeeding chapter. I know that the ambassador of the States-General to England requested the States-General in 1631 to lend their approval to the legal principle which recognized legal possession after twenty-four hours, but I cannot find that they approved. The principle is also contrary to reason, for if you judge the matter in the light of reason, the real and sole reason for a change of property consists in a real possession, and a thing is really possessed which can safely be retained. Then what virtue lies in a period of twenty-four hours, since there may be real possession before, and there may be instances in which no real possession can be established in that period? Indeed various cases will prove to differ so widely that a fixed and general principle cannot be laid down in the matter; the individual cases will have to be treated separately and judged on the principle that the captor has not established ownership unless he is able to keep and defend the article. In Roman law 'things taken in war belong to him who has first taken possession of them', and 'he is not considered as having possession of a thing who is not able to retain it'. This is the true doctrine of the jurists sprung from the very law of nations. However, circumstances differ so greatly that we are not permitted to define precisely the period of time within which it may or may not be said that we are able to retain possession. We may, however, agree with Roman law and hold that we seem capable of retaining possession when we

have brought the captured object within a defensible place (intra praesidia), by which term we mean forts, ports, cities, and fleets, since such places could devote themselves to the defense of the captured articles.

But twenty-four hours would hardly suffice for a change of ownership, if as some hold the bringing of the object intra praesidia is not sufficient. This illogical view is even held by some whose authority we must in other respects honor very highly. For they assert that captured ships do not become the property of the enemy until they have been taken to the enemy's port, duly condemned, and afterwards freely navigated to a neutral port. They should have said the same about merchandise and other booty which reasonably fall into the same class, but I suppose they were ashamed to. Note what the States-General said about captured ships in their decree of November 27, 1666: 'That if ships, taken by the enemy and brought to England, or a country subject to England, and there declared confiscated and purchased by neutrals, should be captured by our ships on their way from the enemy's ports, either in the very exit or afterwards, before arriving at their port of destination or at some other free p6rt, such ships should then and thereafter be declared lawful prize as was usual in ancient times, and mutatis mutandis in accordance with the settlement of the fourth point of the case stated of June 26, 1630.' I have quoted the exact words so that no one should think I was telling incredible things. You will wonder, as I do, how it concerns the case whether or not the ships reach the harbor of the purchaser or some other friendly port. Apparently the friendly port in question In some undefined way is supposed to bestow something upon somebody. It could hardly bestow the right of property upon the enemy, who has already seized the ship and sold it, nor upon the purchaser, who in that case must be assumed to have bought our property from a man who was not the owner, and the friendly port must be assumed to have deprived us of our property. It would have been better to adopt the fiction that the ship on being captured by the enemy became the enemy's property, and remained so until it could be purged of that taint, and that this could not be done except by bringing it into the purchaser's or some other friendly port, until which time it might be lawfully retaken. But such a fiction is not permissible, because the thing belongs to the purchaser by the act of purchase, nor is it material whether it belonged originally to the vendor, or whether it became his by capture and condemnation.

However, I would have you notice how improper it was to appeal to ancient usage and to the other decree of the States-General dated June 26, 1630, which is supposed to have provided the basis for such usage. This decree was issued in answer to an inquiry of the admiralty at Amsterdam. To the fourth point of the several brought up, the States-General responded thus: 'On the fourth point their noble highnesses declare that ships taken by the enemy, brought into Flanders, and purchased by neutrals, but which shall be taken in the act of coming out of the enemy's port, or subsequently, before they have been into their own or in other free ports, shall be lawful prize, as was always the custom in ancient times, by virtue of the right herein before alleged as to the first point, and likewise such vessels, which being so captured and purchased, and having run out of the said Flemish ports into other ports under the dominion of the King of Spain, and coming thence, shall be captured by our ships.' It is apparent from the case stated that this decree has nothing to do with the principle now under discussion; indeed the States-General by referring to the 'first point' disclose clearly enough what was their reason for issuing the decree. The fact is that the States-General had blocked the ports of Flanders with naval vessels in order to shut off commerce, and for that purpose they seized and condemned all vessels of whatsoever nation bound to those ports or sailing from them. For it is reasonable, and in accord with international usage, that when cities are besieged nothing

should be permitted to be carried in or out. And that is why the Admiralty held and the States-General decreed that the same principle also held for ships which had formerly been taken from us and sold, since in a blockade it is lawful to intercept even the ships of friendly nations. And this holds true if the ships are taken before the voyage is complete, and while employed in illicit trade; and the voyage is not considered complete until the vessels have reached their own or a friendly port. This in fact was all that the States-General had in mind in that decree of June 26, 1630. But from that decree you cannot get any support for the point now at issue unless you can show that in 1666 the States-General were actually blockading England, Scotland, Ireland, and all the English possessions in Asia, Africa, and America. We are indeed told that the States-General in 1652 made some such boast about the English, namely, that they had shut off the English commerce to all the world, but how justly the boast was made I cannot now inquire. I will only note that in 1663 when the Spaniards pretended to have all of Portugal under blockade, the States-General refused to recognize that right which they had before claimed for themselves against the English. Thus it is related in the annals.

From what I have said it is apparent that the decree of the States-General of November 27, 1666, cannot be defended. And if we decided to adopt its arguments we should soon be involved in dangerous consequences, for as the poet says: 'If the first plummet swerves from the straight line... the whole building will be faulty and without symmetry.'

From that edict it will clearly follow that all enemy's goods will be placed in the same predicament, since what the enemy have secured from capture is just as much theirs as what they have by inheritance, purchase, or by any other title. The same must therefore be said, not only, as I indicated above, about merchandise and other things taken from us by the enemy, but also regarding ships and all other things which they have otherwise than by taking it from us, and which our friends have purchased from them. And if you admit this much you also admit that princes have a complete right to forbid their enemies the use of fire and water, so to speak, and you grant to them the power of prohibiting the commerce of any nation, a thing which has hitherto been customary only with regard to contraband. The result will be that whatever friends may purchase from the enemy will fall under the ban unless they have been brought into a free port.

But it is a serious thing to draw up a general rule based upon unreasonable decisions made for a special case. In this way a pretext is furnished sovereigns for committing acts of injustice. Certainly there was no justice in the edict of Louis XIV of France, dated September 17, 1672, by which he ordered the capture and confiscation of all ships bought, even by his friends, in the United Provinces and found coming thence for the first time. Accordingly, on the following day there was taken and confiscated by the French a ship built and purchased in Holland, manned by a Hamburg crew, which the purchasers were taking home to Hamburg. In answer to this decree of the French King the States-General, ready to be equally unjust even to their own friends (for friends generally bear the brunt of the suffering from such rules), retorted with the following: 'That all ships purchased by neutrals within the dominions of the King of France, although manned by a neutral crew, which, sailing for the first time from the enemy's ports, and not having been in the neutral port to which they were bound, should fall into the hands of Dutch cruisers, should be lawful prize.' One might suppose that this edict was founded upon the right of retorsion, but retorsion can only be exercised against one who has inflicted wrong, it cannot involve a friend. Therefore, that edict of the States-General of November 29, 1666, cannot be defended with the plea that the English had

previously progressed even further on the road of injustice when their envoy, on December 23, 1664, gave notice to the Hanseatic towns, at that time friendly both to the English and the United Provinces, that whatever ships they might purchase in the territory of the States-General would be considered enemy's without distinction of voyage. He who has done no injury cannot justly be punished.

One might suppose that those decrees of the States-General of 1630 and 1666 had at least decided this point that the ships purchased by our friends from our enemies could not be taken from them if once they had reached a friendly port, for they hold that these may lawfully be seized 'before they have been into their own or some other free port'. But not even this point is clear. Indeed the Admiralty of Amsterdam consulted the States-General on this point also, but they without reaching a definite decision simply answered by the letter of June 26, 1630: 'As to ships taken by the enemy from the inhabitants of this country, brought into Flanders and there condemned, which without being taken should be brought into England, France, or some other country, and should be captured by our ships on their way from such a place while bound on other free voyages, and finally be declared lawful prize, we ought to have some brief time for consideration, requesting that in the meantime you will communicate to us the sentences that have been given in similar cases, and the decisions that have been rendered in other countries in this matter.' In the year following, that is in 1631, I find that the Court of Holland was consulted on this very question, but I do not know what it answered, if at all. And confusion has continued on the question, although certain Dutch jurists, when consulted on the same point, responded correctly and according to good legal principles that our ships, captured by the enemy and then purchased by our friends clearly became the property of the enemy by the act of capture, and consequently of those also who purchased them from him. Now then, in order that the doubts of the States-General of 1630 may not in the future prove prejudicial in similar cases, I must repeat what I said above, that the case then at issue was a peculiar one, namely the blockaded ports of Flanders; and it was the failure to notice this fact that created the confusion. And I added that you could not argue from this instance as to ports not blockaded and where egress and ingress was free. The decree of November 27, 1666, is sufficiently unjust, lest we add the iniquity of arguing from special cases.

But if the intention of the States-General was that the ownership of the vessel is not altered 'unless it is captured and brought into the enemy's port and has afterwards freely sailed from there and arrived in a friendly port, what ground will you find for those decrees by which, in the case of ships captured by the enemy and recovered by us, they allow a certain part to the recaptor and a part to the original owner. That is, if mere capture transfers ownership, what right has the original owner? And if not, what right has the recaptor to a definite share, since the former owner may reclaim his property? And does it profit to bring or not to bring the ship into a friendly harbor, if the original owner has no rights against the recaptor after the ship has been brought into a hostile port and condemned? With such a theory I would find no justice left; and with me agree other authorities and the observances of nations everywhere. Indeed such suppositions cannot be reconciled with the decree of November 27, 1666, nor with reason nor with law.

CHAPTER 5
On the Recapture of Movable Property and Especially of Ships

THE points I merely touched upon in the last chapter, I must now discuss and examine more fully. And first we must observe that while immovable property upon recapture returns to the previous owner by postliminy, movable property, of which we are now treating, does not, as Labeo has said: 'Whatever is taken in war is a prize and does not return by postliminy.' But though ships are reckoned among movables, he makes the distinction that those which are useful in war return by postliminy, though not others. However, Grotius rightly observes that this and other distinctions laid down by Roman law with respect to movable things have grown obsolete by the practices of nations; consequently all movable property, without distinction, is now considered prize without any right of postliminy. It has seemed to follow logically that goods captured by the enemy, then subsequently retaken, became the property of the recaptors, because just as capture in war transfers ownership, so recapture also transfers it; but we can recover for ourselves only the things that have become the enemy's by full right, otherwise the former owner may still vindicate his right. At what point of time, however, movable property shall be listed as enemy property by full right, depends upon the arguments we have offered in the preceding chapter.

Now though it is difficult to define this matter, so much is at least very certain, that movable things absolutely become the property of the enemy when brought within their praesidia, and consequently, if they be retaken, the property of the recaptors. The same we say of ships that have been retaken after having been captured and brought into the enemy's port; consequently, as I said at the end of the preceding chapter, their original owner has absolutely no claim upon them. Following this principle, the King of England and the States-General then allies, when they agreed on October 22, 1689, that each should restore to the original owner, at a certain sum, whatever ships of the other nation might be recaptured, specified that this agreement should hold only in case the said ships had not already been brought into the praesidia or ports of the enemy, for in the latter case complete ownership should pass to the recaptors.

This point then is sufficiently clear, but not equally so the question of what praesidia or ports. Is it the ports of those who captured the ships, or also of their allies? One would suppose that allies would be included, especially if they are allies in the war and therefore a part of the enemy, since in the ports of such an ally ships would be as safely guarded as in the enemy's own ports, and there would be no hope of recapture unless they sailed out again. Unfortunately the States-General in the following case did not adopt this point of view. The French had on December 28, 1675, captured two Hamburg ships in which there were cargoes belonging to merchants of Amsterdam; after having them in their possession fourteen days they brought them into the port of Hull in England; then the admiralty at Dunkirk, before the return of the French, condemned the ships and cargoes and the French even sold a part of the goods at Hull; now when these ships with the rest of the condemned goods were being brought to Dunkirk, they were taken by the Zealanders, brought to Zealand, and there condemned with the goods that were left. However, the States-General when appealed to by the merchants of Amsterdam decreed on October 23, 1676, that the retaken goods must be restored to the original owners, on the strange ground that they had not been brought into the enemy's harbor, condemned, and distributed. By the 'ports of the enemy' the States-General understood those of the captors, for they said 'of the aforesaid enemy', so that it did not suffice to bring the ship into another port, whether of a friend or of an ally in war. It seems to me that the Zealanders had the right on their

side, though the States-General had the technical support of authority.

Ships, therefore, captured by the enemy and taken into their ports become the property of the enemy. But what if instead of being so brought into the enemy's port they have remained for some time in the port of a friend or ally, or have navigated for some time with the capturing ship? If we consider the laws of our country and the authority of jurists who have written about customs, we can hardly reach the conclusion that length of time elapsed since capture, or position however safe, could transfer ownership in the vessels unless they be brought to harbor. Hence jurists simply say, that whatever has been recovered before being brought into the enemy port has the right of postliminy even though it has been captured for some months and has remained in the port of a common friend, for unless the enemy have brought it into their port it does not become the property of the enemy. The use of the word postliminy in that way is very careless, for those who know the meaning of the word know that it cannot correctly be applied except to things that have previously become the property of the enemy. They should have said that before things are brought to port they do not become the property of the enemy but remain the property of the original owner, and accordingly when recaptured they return to him and do not go to the recaptor.

It will be profitable to consult the laws that have been made in this country on this subject, taking them in chronological order because of their variety. Some think that the edict of the Estates of Holland of March 4, 1600, recognized the right of former owners to claim their captured ships wherever taken, even if they had been brought into the enemy's port. This is true, but this edict concerned ships which the Estates of Holland believed condemned contrary to the laws of war as I explained in the second chapter. Consequently this edict is not pertinent. If the ships have been lawfully captured, brought to port and condemned, every claim ceases, and if they have sailed out again there remains only the right to recapture, and whoever recaptures becomes complete owner. But it may be interesting to know, in the case of recaptured vessels that had not yet been brought into an enemy port and condemned, what right belongs to the former owner and what to the recaptor; though obviously, if we know what belongs to the one we know at the same time that the remainder belongs to the other.

So far as I know the oldest law on this subject is that of the States-General of July 4, 1625, which grants one-eighth to private recaptors if the vessel is taken within twenty-four hours, one-fifth if within forty-eight hours, and a third, if thereafter. And on July 22, 1625, they extended the application of this rule to 'warships that recovered the vessels of private owners. Next there was passed a law of the same body on March 11, 1632 which, without any distinction of time, entitled privateers to two-thirds of what they recaptured. Then again the States-General adopted a different rule on September 1, 1643, for according to Articles 56, 57, and 58 of the edict then issued, if the ship is recovered within twenty-four hours, the recaptor is to have one-eighth, if within forty-eight hours, one-fifth, and thereafter one-third, just as according to the decrees of July 4 and 22, 1625, which I have cited above. Presently again they returned to two-thirds without any distinction of time, for following the decree of 1632, Article 16 of the edict of February 8, 1645, entitled privateers to that amount. It also added that the recaptor and former owner should amicably estimate the value of the vessel and its cargo, and that if this proved impossible the Admiralty should have jurisdiction. Again the same States-General adopted a different attitude, for by the decree of April 19, 1659, only one-ninth of the value of the vessel and of the cargo was allowed to the recaptors, and the same was allowed to naval vessels as to privateers, but this decree again abolished every distinction of time.

This decree was not published, but I have found it among the acts of the States-General, and it is also mentioned elsewhere. At last the States-General on April 13, 1677, preserving, as they say, the ancient laws regarding naval vessels (what ancient laws they refer to I do not know since these have varied widely), made this decree regarding private recaptors; that they should be entitled by way of salvage to a fifth of the value of recaptured ships and cargoes if these had been in the possession of the enemy less than forty-eight hours, a third, if more than forty-eight and less than ninety-six hours, and a half, if more than ninety-six hours. And this same distinction of time and the same rates of salvage were agreed to between the King of England and the States-General on October 22, 1689, in the above cited convention, in case a privateer belonging to the one should recover from the enemy ships and cargoes belonging to some subject of the other nation; however, if a ship of war performed the deed, only one-eighth the value was allowed, but without distinction of time.

Now why is there so much variety and why is the time element introduced, and in such different ways? And why does difference in time permit now greater, now smaller, rewards? And if distinctions in time are actually necessary, on what principle is the salvage varied so greatly while at times the recaptor without any distinction of time may receive the large share of two-thirds and at others the very small share of one-ninth? Indeed, it is difficult to explain things which have generally been decided without any application of a rational principle. Here if ever it is permissible to apply the line: non omnium you know the rest. 'It is impossible to assign the principle of every rule of law laid down by our ancestors.' Yet the exigencies of international peace and of the tranquility of our own people demand that we reach some settled decision based upon reason. The matter rests entirely upon the question of when, in our view, the captured ships and cargo are completely the property of the enemy. The law has indeed decided that they so become by a real and complete occupation. But circumstances vary so greatly that we cannot always know whether occupation is real and complete, that is to say, whether the occupation is such that the enemy can retain and defend his booty. What the enemy has taken in the open sea far from his land he may lose, and often loses to recapture. If he brings his prey to his own ports no one will doubt that it has completely become his property. For my part, I would say the same if he brought it into the port of a friend or ally, but if this, as I said above, is not granted, let us grant that things captured at sea must be brought within the captor's port or fleet, and that not till then are they considered fully his.

What then shall we decide if they are recaptured before that point is reached? In that case the former owner shall have the right to claim his property, since ownership has not passed to the enemy, and therefore not to the recaptor; and I said 'former owner' recognizing that some form of occupation has intervened. Then another question arises, whether the owner shall claim his property from the recaptor without paying salvage or reward for recapture, without giving any remuneration for his work and the expenses incurred in the recapture? Equity, the mistress of the law of nations, would not permit this. She demands that salvage or remuneration or reward, or whatever you may call it, be given. The recaptor has saved a ship and cargo that would otherwise have been lost to the owner: why should he incur danger without hope of reward, or why should he fight for another's property as though in self-defense? Why should he expose his forces and his men to no purpose? He has managed the business of the owner with profit, and to recover the expenses incurred in the deed, he is entitled to an action as 'voluntary agent'. I do not know of any other action applicable to the recaptor if we must decide the matter according to Roman law, and since this action is applied even now for the recovery of wages, as Jacques Godefroy correctly observes, and we still use this law, this action is the only proper one both for recovery of expenses and for wages. But by what law it

has been decided to give to the recaptor a portion of the recovered goods I do not know, and even less do I comprehend how that portion varies in size according to the time during which the goods were in the hands of the enemy. What matters twenty-four, forty-eight, and ninety-six hours here? The longer or shorter possession cannot in my view bestow greater or less right to the recaptor, provided the thing was not in a place of safety.

Therefore if we wish to consider the subject from the viewpoint of reason, my opinion is that every distinction of time must be abolished, and instead of that we must take into consideration the labor and expense which the recaptor laid out, the danger to which he exposed himself, and the value of the ships and cargoes rescued. From all these considerations impartial arbitrators must decide what should be allowed to him for his labor, his expenses, and his reward, and that not with a miserly but with a liberal hand in order to encourage the industry of recaptors. Surely we ought to take into consideration whether the task was difficult or easy, whether the recaptor fought with courage or not at all, whether he incurred heavy expenses, whether the booty was worth much or little. But if you think such considerations would bring in so many doubts as to protract the litigation too long, I would answer that litigation even now may be, and is, often protracted over the value of vessels and cargoes and the deductions to be made before the true value can be determined.

And now if you still wish to give a part of the ship, do so, but not in proportion to the time during which the enemy had the prize, but rather in proportion to the expenditure of labor, as is customary in other cases of salvage. Thus the Rhodian law allowed a reward for the salvage of ships, and indeed gave a part of the salvage by way of reward, fixing the portion according to the amount of labor bestowed, as is related by Harmenopulus, and according to this I interpret the 'reasonable salvage' which Mary of Burgundy allowed to those who saved shipwrecked property by her law made for Holland and Zealand on November 14, 1476. Furthermore, the edict which Philip II issued in the name of William of Orange on May 15, 1574, also allowed as salvage certain parts of the shipwreck, a regulation frequently re-enacted, as recently as April 2, 1676; and indeed it allows the salvor even a larger proportion than that explicitly named if he has incurred greater labor and expense. The Estates of Holland also seem to have reference to this rule when on July 22, 1677, they promised a reasonable salvage to those who brought to the shipbuilder's company at Dordrecht the timber that was found floating down the streams without any guard. The aforesaid laws do not define how long the wreckage and the drifting timbers may float about at the mercy of seas, rivers, and winds, since there is no reason for such distinctions; they left it rather to the arbitration of impartial men to determine the amount of the reward for the labor and expense. This is indeed the very rule that I think should be followed in the case of ships and cargoes recovered from the enemy.

In fact, the book called Il Consolato del Mare defines the matter in this very way, for it commands the man who has recovered a ship and cargo from the enemy to restore both to the former owner, retaining a salvage which for the sake of equity is reckoned in proportion to the labor and expense employed in the recapture; but there is no distinction made as to the time that the ship and cargo may have been in the possession of the enemy. The book very properly adds that restitution of the ship is called for only if the ship has not been brought to a safe place, that if on the contrary it has so been brought, since by this act ownership is plainly vested in the enemy, the ships and cargo recovered become wholly the property of the recaptor. And this agrees completely with the arguments I have offered in this chapter. I wish that all the statements found in that compendium of nautical laws were equally correct, but there are things there which are not sound.

CHAPTER 6

On the Limits of Possession of Immovables Taken in War

IT is worth considering how far extends the possession of immovables taken in war and the consequent rights of property. Grotius does not admit every land of possession as sufficient, but requires 'firm possession', a phrase which he explains thus: 'the land which is included in permanent defenses so that it is evident there is no access to it till these are carried'. May we decide then that when a city is taken, its lands also are taken, and if so, what are the limits of possession? Grotius has nothing to say about this, though he raises the question frequently in connection with the capture and occupation of places. An example will make the matter clearer. The French had occupied Caselle and Turin in Piedmont, but when a truce was made it was agreed that each party should during the truce continue to hold possession on the principle of *uti possidetis* of the part he had occupied in the war. Then the question arose regarding the territories and townships which were dependencies of these cities, now in the hands of the French, and which provided services even to the French during the war. Some jurists decided the case against the French saying that possession by the law of nations, and naturally acquired, must be shown, and that the occupied part does not draw along with it the unoccupied part, that furthermore the services provided by the inhabitants did not inure to the French, since the citizens were themselves held against their will. This is the argument of Pierino Belli, whether or not Zouche agrees, I cannot say. At any rate Belli is certainly mistaken if he applies the principle to the case of a truce, as in the present instance, since that general phrase *uti possidetis* embraces an implied as well as an actual possession. This implied possession consisted in providing and, accepting services and duties that are generally rendered only to a master; what actual possession is will appear from the following.

We must accordingly adduce from reason what possession of immovables taken in war really is: it then becomes clear that when a part has been occupied, the whole is occupied and possessed if such is the intention of the captor, and thus Paulus also decides the matter. That this is a principle of natural as well as of civil law is abundantly proved by experience and by custom, that best of teachers. Possession extends over what is occupied, and by natural law, what is occupied is brought into our possession, but even that which has not been touched all around by our hands and feet is conceived of as occupied, if that be the intention of the occupant, and the nature of the object so requires, as is the case with lands. If you disagree you will find difficulty in defining what occupation and possession are; for if you should insist that everything must be touched, it would not suffice to touch the surface of the ground, you would even have to walk all about it and to dig down into it.

But though it be true that when a part is taken the whole is taken if it be taken with this intent, the statement will hold only provided no other person has taken a part of the land concerned, for if another also possessed a part of the same whole, he would by the same reason possess the whole. But this cannot be, since, as Paulus truly says, two persons cannot possess the whole of the same thing, for the ownership of one would exclude the ownership of the other. Accordingly, if one possesses a thing, and a second person takes a part which the first person does not bodily occupy, he has taken nothing beyond what he has occupied by natural means. Neither will it be possible to divide possession in the unseized part into halves or into shares apportioned according to the size of the parts occupied, for in that part the rights of the former occupant are paramount and cannot be excluded by the similar claims of a second, supposing that the strength of the two are equal. And in

that part which he holds, the latter occupant has done away with the so-called legal possession of the former only because he has seized the portion by natural means, and natural possession has superseded the legal one. This is the very thing that Celsus says: 'If an army has entered with great force it obtains possession only of that part which it has entered.' When he says 'with great force' he implies that there was resistance and that there were those who defended even by force the property rights of the former owners. Hence the enemy's army did not occupy the fields farther than it compelled ours to recede. This may perhaps be the meaning of Paulus when he says that upon a partial occupation the whole is indeed- occupied, if that be the intention, up to boundaries (*usque ad terminum*). This I interpret to mean: up to that part which another possesses, whether that other be a neighbor living upon the neighboring estate, or some one else dwelling upon the very estate whose occupation is in question.

Hence in an occupied region it is not difficult to discover what ought to be considered as properly occupied. The metropolitan law has no bearing upon the case, for this is civil government which the defeated prince has established wherever he chooses. And if this be so, we readily comprehend that if the stronghold should be seized from which a region is ruled it does not follow that the cities, towns, and forts still in the possession of the sovereign shall also be considered occupied; their condition must be judged from the act itself of occupation and possession. Consequently we hold that, when a part of a region has been occupied, the whole is considered occupied unless the vanquished sovereign retains some part; if he still holds a part, only that may be considered occupied which the victor has forcibly taken from the vanquished and retains in his possession. But regarding several different countries that belong to one sovereign we may well ask whether we should use the same distinction that we employ in the case of contiguous private estates. If Titius has three contiguous farms, A, B, and C, and Gaius occupies a part of A, it is agreed that he occupies the whole of it, but that he does not occupy B and C; for in taking possession of a given property we take possession up to its boundaries but not beyond. He who has entered upon a part of farm A is supposed to do so with the sole purpose of taking full possession of the one of which he has occupied a part; he is not supposed to have farms B and C in mind. When a part is seized, the boundary of possession is marked by the whole which constitutes a distinct thing separated from the rest, and that boundary we do not overstep whether the thing in question be a house, a farm, a storehouse, or anything else that falls in civil law under the term 'immovable property'. But in my opinion immovables that are occupied by right of conquest fall under a different principle. It is the intention of the victor not only to invade one country but the whole of the hostile empire, and to possess himself of all the countries of that empire, and the only boundary in question here is the territory which the vanquished sovereign still retains in his actual possession. If there is nothing that the victor cannot make his own, what is going to prevent him from progressing and taking possession? If the vanquished retains nothing, and the victor has occupied only one country, or even only the capital city, that will give him possession of the whole empire. Accordingly, the words were truly spoken which the envoy of the Emperor Justinian said to Chosroes, the Persian King: 'Is not he who is master of the ruler, also master of the ruler's subjects?' However, if the vanquished still retains something, then what the victor has taken from his empire and holds forcibly will not properly be considered 'a subject'. Deservedly, therefore, have sovereigns been ridiculed who because they held Rome and Constantinople claimed the dominion of the whole Roman world, while at that very time other princes occupied other important parts of the empire. Of the same nature was the arrogance of Belisarius as described by Procopius, for when Justinian had reduced Carthage and King Gelimer, he boasted openly that now everything belonged to him which Gelimer had possessed

in Sicily. This was of course incorrect, for the right which he had over Carthage and the person of the King could not transfer to him the possession of the things which were in Sicily. Sicily defended itself by its own forces, and his whole dominion was not captured by his capture. Actual occupation is essential, or a cession, if this be agreed upon in the treaty. Now let us see what edicts and decrees the estates of the United Provinces have issued upon this subject. When by Article 3 of the truce between the Archduke of Austria and the States-General (April 9, 1609) it was agreed that each should continue during the truce to hold what he then possessed, and the Archduke had posted his edicts in the territory of Cuyk, the States-General, on August 20, 1609, decreed that this territory belonged to them, since they possessed the city of Grave to which that territory was subject, and they prohibited all others from exercising dominion there. Again, when the States-General had taken some forts in the Overmaze, and the Spaniards had nevertheless ordered the inhabitants not to submit themselves to the jurisdiction of the council of Brabant, sitting at The Hague, the States-General in retaliation opposed them by the decree of March 8, 1634. Furthermore when Bois-le-Duc belonged to the States-General, and the Spaniards created disturbances over the territory of that town, the States-General retorted by a number of decrees, namely on January 30, 1630, August 3, 1630, May 13, 1631, June 20, 1634, February 2 and December 2, 1636, and December 24, 1642. In two decrees, namely those of March 8, 1634, and February 2, 1636, there is cited the edict of the Spanish King dated July 10, 1628, in which that King argues at length that the territory that belongs to a city follows the conquest of the city. And this is the law that the States-General also with entire propriety adopted in the aforementioned edicts, because those who rule at pleasure over a territory are considered to have occupied that territory. However, if there be some as yet unoccupied stronghold in the territory, the possession and dominion of the invader does not extend over the port dominated by said stronghold.

If, as I think, the foregoing conclusions are correct, the council of Brabant, which legislates at The Hague for those regions of Brabant that the States-General have taken in war, was entirely correct when on October 26, 1629, it decreed that the fiefs of the territory of Bois-le-Duc must request the proper investiture from them, not from the Council of Brabant sitting at Brussels. And it also appears that the King of Spain had no right to issue the contradictory decree of November 15, 1629, of which Aitzema relates in detail. For when Bois-le-Duc was captured by the States-General the surrounding territory fell to them, and they became lords of the fiefs situated there, for a conquered vassal owes allegiance and services to the victor, not to the vanquished lord. There is even less doubt that if a province is ceded, the whole of it is ceded. Regarding this matter there is an edict of the States-General dated December 22, 1610, concerning Twent, a part of Overyssel.

CHAPTER 7

Whether the Enemy's Actions and Credits May Properly Be Confiscated at the Outbreak of War

IF there are conventions between sovereigns permitting the withdrawal of goods within a stated time after the outbreak of hostilities, of which treaties I cited numerous examples in the second chapter, it follows that actions and credits may be withdrawn as well as goods. But if there are no such treaties, and if the goods and the actions are withdrawn, the question arises regarding the law in the case. And surely since the conditions of war are such that the enemies are proscribed and despoiled of every right, it is reasonable that whatever property of one enemy happens to be found in the country of the other changes its owner and is confiscated. Furthermore, it is a custom in almost all declarations of war to proclaim that the goods of the enemy, whether found among us or taken in war, shall be confiscated. Sometimes also there are special decrees concerning this matter either preceding or following the declaration of war. The Prince of Orange on August 25, 1572, inserted in the constitution which he then made for Holland: 'that the goods of all those who acted publicly as his enemies should be immediately registered by the magistrates of the place where they were found, and their rents and profits should be taken for the benefit of the state.' This applies to immovables, I think, for it is the custom to register these so that during the war the rents and profits from them may fall to the public treasury. If we followed the law of war to the full extent, we might even sell all immovables, bringing their price into the treasury, as is done with other goods; but throughout most of Europe real estate is only registered so that the profits from it might accrue to the Treasury during war, but after the war the real estate itself is restored to the former owners according to treaties. Again, the States-General on April 2, 1599, with reference to all kinds of enemy's property wherever found, decreed as follows: 'We declare as lawful prize all persons and goods found under the jurisdiction of the King of Spain, wheresoever these may be taken.' There is also extant a letter of the Estates of Holland to the Court of Holland, dated November 25, 1672 ordering the seizure and confiscation of the goods of those who reside among the enemies; in answer to which the court decreed on the same day that from that date such goods could not be restored to their owners.

I am not here discussing whether this decree fully agrees with the conventions signed between the King of France and the States-General in 1662. Since, however, the word goods (bona) applies largely to inheritances, it is clear that an enemy cannot acquire an inheritance situated among us, whether it be due him by will or by succession. Accordingly, when in 1695 a man died intestate in Holland, whose nearest relatives and heirs were in France, the property was confiscated, as I remember.

Since the edicts that I have cited speak in general and all-inclusive terms, it would seem that they must be applied to all kinds of goods whether corporeal or incorporeal. And yet we find that there are doubts regarding incorporeal goods like actions and credits, that in fact the States-General have sometimes expressed doubts, and have even contradicted this principle. When the French King and the bishops of Cologne and of Münster in 1673 had confiscated even actions, and had ordered the exaction of what their subjects owed to the citizens of the United Provinces, the States-General by the edict of July 6, 1673, disapproved, decreeing that payment could be made only to the real creditor, and that they would consider null and void such exactions whether made forcibly or by consent. But in fact it appears that by common law actions may be also confiscated, and that indeed by the same reason as any corporeal goods. Actions and credits are surely no less in our dominion

according to the law of nations than are other goods; why then should we not apply the law of war to the former as well as to the latter? And if no argument appears to show any real distinction between the two, reason alone supports the common law; nor are there wanting examples and authorities to support it. It is apparent from Polybius that Antiochus and the Romans agreed to restore actions as well as every other thing confiscated in time of war, and this gives proof that even actions had been confiscated on both sides. That the Kings of France and Spain also exercised this right against each other is indicated by Article 22 of the treaty they signed on September 17, 1678, for there it is agreed that confiscated credits should not be restored. The King of Denmark also, upon declaring war against the Swedes on March 9, 1676, issued a public edict demanding that the goods of Swedes on Danish territory and also the debts due to individual Swedes should be handed over to the Treasury within six weeks under penalty of double the value and further discretionary punishment against those who did not obey. The Danish King issued a similar edict against the English in 1667 as Aitzema relates.

That even the Dutch have not always been so averse to that doctrine is apparent from the edict of July 18,, from the edict of Philip II against the French dated March 27, 1556, and from the edict of the Estates of Holland dated January 29, 1591. There is also extant the edict which the Prince of Orange and the Court of Holland issued on December 7, 1577 over the assumed name of Philip II, King of Spain, in which they confiscated not only the goods of those who deserted to John of Austria, but indeed all the goods movable and immovable, and even actions and credits, of all their enemies. The States-General also, on June 4, 1584 declared the men of Bruges and of Vrye their enemies because they had gone over to the Spaniards, and ordered their goods, actions, and credits as well private as public confiscated. Likewise when those of Venio had gone over to the Spaniards, the Earl of Leicester declaring by the edict of July 9, 1586, that they were guilty of treason, ordered their goods, movable and immovable, their actions and credits confiscated. And lest some one assume that these decrees attacked the people of Bruges, Vrye, and Venio on the ground of treason rather than of general enmity, since they had taken the oath of fidelity to the confederation of Utrecht, I should like to observe that the penalties of the edict of June 4, 1584, are applied to all 'who consider themselves to be our adversaries in whatever manner it may be', precisely just as in the aforecited edict of December 7, 1577, traitors and enemies are classed together in the matter of confiscations.

As bearing on this subject we should note the decree of the States-General dated October 2, 1590, and that of the Estates of Holland dated October 29, of the same year, both of which contain the following clause: 'that those who come into these provinces from the enemy's country, even though provided with proper passports, shall not be qualified to bring any personal or real action either as plaintiff or as defendant, but shall be dismissed from court in order that hostility against the enemies, and the confiscation of their goods, rights, and actions, may remain to the fullest extent.' In accordance with these decrees not even personal actions can be brought, and the explanatory clause provides the reason for this, namely that actions as well as the goods of the enemy are confiscated by the law of war. Furthermore, when the King of France ordered the goods of Dutch subjects seized, the Estates of Holland on April 26, 1657, passed a similar decree regarding the goods of Frenchmen, prohibiting the making of any payment to them, and ordaining that if any one made such a payment, he must pay an equal amount into the Treasury, whence the loss could be made good to those who had suffered confiscation in France, and in addition half the amount of the debt by way of punishment. They also ordered the goods and credits of the French to be brought, under penalty, to officers appointed in each town for the purpose. It is apparent, therefore, that the Estates of

Holland then thought it proper to confiscate credits, and in this I agree with them. Hence our courts have rightly held that if a subject pays to his government, which has confiscated enemy credits, the debts he owed the enemy, he is properly discharged.

However, these rules are suspended when wars are waged with such moderation that commerce is permitted from both sides: for there can be no commerce without contracts, nor contracts without actions, nor actions without courts, nor courts without persons who have proper standing before the courts. Would any one bring goods for sale to the enemy without hope of exacting the price? And is there any hope of exacting the price unless one can employ the courts against the enemy purchaser? Accordingly, even though an enemy may not have standing in court, as the aforesaid decrees of 1590 simply assume and as courts and jurists have held, yet exceptions are rightly made if the privileges of commerce are enjoyed on both sides; but if not, actions, though arising out of commerce, may justly be confiscated. But are we to make a distinction between cases arising out of commerce and other cases, so that we grant the enemy standing in court in the former while we refuse it in the latter? The aforesaid decree makes this distinction, and if this is correct the distinction must of course apply to the confiscations of actions as well. But if we once permit the enemy to bring actions, it is difficult to distinguish from what causes they arise, nor have I been able to observe that this distinction has ever been carried into practice.

Moreover, if we forbid the enemy recourse to our courts, we cannot properly bring legal action against an enemy who happens to remain within our territory. Accordingly, the decision of our supreme senate confirming the decisions of the lower court and of the Court of Holland was unjust in holding that an enemy who had come to this country with a passport could be arrested and brought to trial. For it is manifestly wrong to forbid an enemy recourse to our courts,. as is done by the above-mentioned decrees of October 2 and 29, 1590,. without granting him the attendant privileges. By the law of war one must grant to the enemy what one arrogates to oneself.

What I said about the legality of confiscating actions holds true only if the sovereign has exacted for the Treasury the money that his subjects owed the enemy. If he has exacted it, the debt is paid in full; but if he has not, the right of the former creditor revives when peace is made, since the occupation caused by war consists more in fact than in law. Consequently, credits that were not exacted seem, as it were, to lie dormant during the war, and to return at peace to their former owner by a land of postliminy. On this principle it has generally been agreed among nations that credits confiscated in war are lost and forever extinct if they have been called in by the sovereign, but if not, they revive and return to the real creditors. Such agreements are found in Article 5 of the treaty between Frederick III of Denmark and Charles II of England, July 31, 1667, Article 37 of the treaty of September 21, 1667, between the Kings of Spain and England, and Article 22 of the treaty of September 17, 1678, between the kings of France and Spain. This last treaty I cited above to prove (as indeed the other two treaties also prove) that actions as well as goods have been confiscated in time of war, and have also not infrequently been exacted.

But it must not be supposed that actions are the only things that are not ipso jure confiscated, for this is also true of goods that are in an enemy's country and are perchance concealed. Hence the courts have rightly held that goods which we had in the enemy's country before the war and which were hidden during the war, hence escaping confiscation, became, if finally recaptured, not the property of the recaptors but of the former owners.

CHAPTER 8

Whether it Is Lawful to Pursue or Attack an Enemy in a Neutral Port or Territory

WE exercise the right of war against an enemy only in our own territory, the territory of the enemy, or the territory that belongs to no one. If we capture the enemy on our own territory there is nothing to hinder our treating him in a hostile manner, unless he has come with a safe-conduct. Considerations of war also permit us to invade the enemy's territory and capture booty there; and the same is permissible upon the high seas, as being the territory of no one. But he who commits hostilities on the territory of a neutral, makes war upon the sovereign who governs there, and who lawfully repels every attack by whomsoever it may be made. Therefore the Carthaginians, though superior in naval forces, did not dare attack the Romans in the harbors of the Numidian King, as Grotius, citing Livy, narrates. Zouche, who copies Grotius, brings up some contrary arguments, but even these Grotius had already mentioned and refuted.

Now although all writers on public law, without exception I think, prohibit the use of force in the dominions of another, it deserves to be considered whether or not the customs of nations and the decisions of our princes and legislative bodies have been in accord with this principle, and whether we ought in this discussion to distinguish between the right of pursuit and the right of aggression. To begin with the princes, Philip II, King of Spain, in his *Leges Nauticae* which he gave to the Belgians on October 31, 1563, ordained, under penalty of death, that no violence should be done on the sea for the sake of war or anything else against his subjects and allies, or against 'foreigners within sight of land or port'. It was understood, therefore, that the dominion of the mainland extended as far from land as the eye could see; and there are authorities who agree. But I have shown in my dissertation *De Dominio Maris* that this definition is too vague, for I hold that the territorial dominion ends where the power of weapons terminates. And I think I have shown in Chapters II and IV of the cited work that both the States-General and the Estates of Holland agree with me, in proof of which I cited two decrees relating to the salutation of princes.

It certainly is not permissible to attack or take an enemy in the port of a friend who is also on friendly terms with our enemy. If any one should do this, it is the duty of our friends to procure the restoration of the booty either at his own expense or at the expense of the injured party. That the restoration should be made at the expense of the latter has been agreed by Article 22 of the treaty of April 5, 1654, between the English Commonwealth and the States-General, Article 21 of the treaty of September 14, 1662, between the King of England and the States-General, and again in Article 29 in the treaty of July 31, 1667, between the same signatories. The same stipulation is made in Article 48 of the commercial treaty of April 27, 1662, between the King of France and the States-General, without, however, making any mention of a requirement that the one who sustained the injury should bear the expense. Indeed, such a requirement seems to me entirely unjust, for it is the duty of the sovereign himself to revenge the wrong done himself. Indeed, it is a wrong done the neutral power to violate a port which is open equally to all his friends. And if he who does the wrong presently sails away, can we expect the individual whose ship has possibly been taken, to wage a war at his own expense? Therefore the mention of expense is properly omitted in Article 35 of the commercial treaty of August 10, 1678, between the King of France and the States-General, and in Article 40 of the commercial treaty between the same signatories on September 20, 1697, and again in Article 39 of a similar treaty between these same parties on April 11, 1713, for treaties are usually

transcribed from previous ones without any further examination, as we saw above in the case of the English ones. All the aforecited articles hold merely that the sovereign of the port, bay, or river in which prey is taken from a friend of his shall exert himself to the utmost to have fully restored what has been taken there. If it is the duty of the sovereign to use his utmost endeavors for this, he will doubtless do it at his own expense, even going to war if there be no other means at hand. This is a law which is observed among all nations, and there is no basis for it except that it is not permissible to commit violence on foreign
territory within which are included ports, bays, and rivers. On this principle the Duke of Tuscany in 1695 compelled the Frenchman to restore at once the ship belonging to the powers that were fighting France but were friendly to Tuscany, for the Frenchman had captured the ship near Leghorn and brought it into port there, and as I have said, the sea which is near to the ports of a sovereign is a part of his territory.

From the aforesaid we may judge of the justice of the following cases. When in 1639 Admiral Tromp was blockading in the English port of Downs the fleet of the Spaniards who were on friendly terms with the English, the States-General on September 21 and 30, 1639, issued decrees commanding their admiral 'to destroy the Spanish fleet without paying any regard to the harbors, roads, or bays of the country where it might be found', even though the English and others should make resistance. This order the Admiral presently executed and the States-General approved and praised him for it, as Aitzema relates in full. This act can hardly be defended, nor that of the English, who on August 12, 1665, attacked ships of the Dutch East India Company in the Norwegian harbor of Bergen to the great indignation of the Danes, who used all their resources in repelling the English. However, two observations should be made, lest the deed of Tromp seem too unjust: one is that in 1627 the English took from a Dutch harbor a ship of the French King, who was then an enemy of England but on friendly terms with the States-General, the other is that the Spaniards themselves in 1631 were charged with having attacked the ships of the States-General in the harbors of the Danish King, a common friend. However, it is perfectly clear that when nothing intervenes which can justify retaliation it is wrong for the enemy to make an attack in the harbor of a common friend, and this very point was made by the States-General in 1623 in answer to a request of the English ambassador. Again, when in 1666 the commanders of the Dutch ships had committed hostilities against the ships of the English in the Elbe, a neutral stream, many complaints were raised, not only by the English, but also by Hamburg and various envoys of the German Empire. To the complaints of the English a ready answer could be given because of what they had done in Bergen the preceding year, but it was not so with the others, for this act of aggression rested wholly upon retorsion. Accordingly, when the French in 1693 hurled fire into some ships of Zealand in the neutral harbor of Lisbon, though the King of Portugal had not permitted the ships to be hauled out nor attacked with artillery, there can be no doubt that they acted unjustly. This deed I relate from my own memory.

There may be more reason to doubt whether it is lawful to pursue an enemy into a stream, station, port, or bay, of a friendly power, if we have found mm on the open seas and are pursuing in the heat of battle. The weight of the argument is in favor of permitting it, if certain precautions are taken which I shall presently enumerate. This certainly was the opinion of the States-General in 1623, when they answered the English Ambassador that it was not permissible to make an attack in the harbor of a common friend, 'with the understanding, however, that it was hoped his majesty would not be offended if in finding and pursuing any ships of Dunkirk they should chase them along the

coasts and into the harbors of his majesty'. The same opinion seems to be expressed in the decree of the States-General dated October 10, 1652, which, however, appropriately adds the warning that one must refrain from attacking forts of friends even if violence should be committed from them, and also that one must spare the enemy that has entered friendly harbors. Both of these exceptions are reasonable, for it is better to suffer injury in the territory of another than to be the aggressor, and if we must act, we must also take care lest the violence intended for the enemy does injury to a friend. Accordingly, if two fleets meet in conflict upon the high seas, and one gives way, I do not insist that the victor has no right to pursue the vanquished one though it take refuge within the territory of a friend; but I approve of the clause in the decree just cited which holds that one must refrain from violence at the harbor, because we cannot commit it there without endangering our friends. Following this principle, it is not permitted to begin a battle on the seas so near land that it is within reach of the cannon of the forts, but after battle is begun, it is lawful to pursue the enemy along the coast even near to land, or into a bay or river, provided we spare the land forts, though they should assist the enemy, and provided we do not involve our friends in the danger.

From incidents of later date we may conclude that the States-General approve of even this principle; for in 1654, when a Dutch commander had attacked an English ship upon the seas, pursued it into the harbor of Leghorn, and seized it when on the point of coming to anchor, and when the Grand Duke of Tuscany had sent a protest to the States-General, we read that the States-General refused to heed the complaint. The Grand Duke, however, had his revenge, for he confiscated the ship that had aided in the capture of the English vessel. Again, when the people of Ostend had fired at a Dutch vessel which was pursuing an English ship up to the very harbor, the States-General in 1665 protested to the Spaniards, alleging that the act was unlawful since the Dutch ship had not fired upon the English one at the harbor of Ostend. But their argument was not of any value except to emphasize the injury done to Ostend, for it is of little consequence what means are used in an attack, if it be with hostile purpose. However, it is evident that the States-General approved of the pursuit in both of these instances, because the violence was begun before and only continued in neutral waters.

The same principle that applies to the sea is valid also upon land, namely, that it is lawful to pursue an enemy into the territory of another when he is fleeing from a recent battle. Thus I interpret the decree issued in 1653 by the States-General, which held that it was lawful to pursue even into the domains of the Spanish King the troops of Lorraine that had ravaged the territory of the States-General; for the practice cannot be defended unless you apply it in the case of a fresh pursuit after a battle or act of devastation immediately preceding. Otherwise it is no more lawful to use friendly territory for the destruction of an enemy than a friendly harbor. Very properly the States-General, at the request of the French King, who then was at peace with the Spanish King, forbade upon pain of death the plundering of Spaniards within the dominions of the French King. When in 1666 'the troops of Münster, on passing through Spanish territory, committed depredations in the domains of the States-General, and the latter complained to Spain, demanding an indemnity for the damage done by the troops of Münster, the demand would have been just if the Spanish had knowingly and willingly permitted those of Münster to pass through their territory for the sake of plunder. But it does not anywhere appear that this is clearly established. Had they known, it would have been their duty to prevent violence from being committed against friends from their territory. Therefore, I do not approve of the conduct of the people of Wolfenbuttel, who, though said to be neutrals, permitted the Saxons to pass through their territory in 1700 to plunder Luneburg, and also

permitted the allies of Luneburg to kill the Saxons. At most, we may grant that after a recent battle it is lawful to pursue a fleeing enemy in the dominions of another, by the same principle that Philip II of Spain (76, of his criminal edict of 1570) permitted the pursuit of a criminal immediately and flagrante delicto into territory not our own. But it is one thing to begin an attack, quite another to press on in the heat of the engagement. For it is an old principle that an act may be valid when committed in a cause in which it could not originate. In a word, the fact that a territory is that of a common friend prevents the beginning of hostilities there, but it does not prevent the immediate continuation there of hostilities begun elsewhere.

This distinction, therefore, seems to have reasonable support, though I have not seen it mentioned in discussions of these questions made by writers on public law, nor indeed in the laws of any European nations except the Dutch. Yet reason supports and commands the observance of it, and usage in other branches of law is also favorable.

If we adopt it we may readily reach a decision in the following case:

> A French ship in time of war pursued a Spanish ship which fled into the port of Tor Bay, ran aground, and concealed her cordage, tackle, sails, etc., in the houses of the inhabitants. The French mariners landed, took these articles from the houses and brought them to their own ships. Was it lawful for the French thus to attack the houses of the English and carry away the articles kept there? It could not be done without injury to the English; the King of England was therefore wholly in the right when in 1668 he demanded the restoration of all the captured articles, and ordered his ambassador in France to continue the prosecution of the wrong. Aitzema tells of further complaints of the English for the violation of their ports by the French, and of damages paid by the French, but these I need not repeat, since the reader can be his own judge by employing the distinction I have suggested, if indeed he is as well satisfied with it as I am.

CHAPTER 9

How War Affects Neutrals

NEUTRALS (*non hostes*) I call those who belong to neither belligerent party and who owe no services to either party by treaty obligations. Those who have obligations are not mere neutral friends, they are allies. Grotius's term for neutral was medius, the middle man. Now the question arises what it is lawful for neutrals to do and not to do in their relationships with the two belligerents. Some may perhaps hold that everything is permissible which was permissible during peace, since the status of war seems not to extend beyond the belligerent parties; for, they argue, if it is not reasonable for us to look upon our friends' enemies as our own enemies, why should not our friends furnish to their friends, even if these be our enemies, the things which they formerly furnished, such as arms and men? And even if this view militates against our own advantage, the question is one of reason and not of advantage. They might also add that an unjust act was the sole cause of the war, and that this act affected only the person injured, except that in case the injured person was a prince, the injury extended to his subjects, though never to non-subjects. Consequently, oh this view, it would follow that an enemy of my friend was not my enemy, and that my friendship with him remained unchanged.

This view apparently met the approval of the counselors of the States-General when, on their report, the latter on March 3, 1640, decreed that 'according to ancient custom and the law of neutrality', it is lawful for neutrals to fight for us or for our enemy as they may choose. And when the Spaniards on March 30, 1639, had decreed that if any citizen of Liege fought in favor of the States-General, he must return within a month, taking the oath not to fight again against the Spaniards or the House of Austria, otherwise all pardon would be refused, a similar edict was issued in retaliation by the States-General on March 3, 1640; and I remember that this latter decree was to be in force as long as the Spanish one, and that it designated the Spanish decree as wholly unprecedented and unreasonable, using phrases like the following: 'an unreasonable edict', 'such novelty and unreasonableness', 'so long as the Spaniards shall continue in their unreasonable position'. Certain Dutch citizens expressed the same view in the assembly of the Estates of Holland on February 26, 1684, urging that the United Provinces should send auxiliary troops against the French, and saying that this could be done without injury to the amicable relations existing with the French.

But we cannot approve of this view, if indeed we have in mind those who are simply neutrals and not allies; for these must in every way guard against interfering in the war, and against showing favoritism toward or prejudice against either belligerent. This is the meaning of the phrase in Livy: 'let them not intervene in the war,' that is, let them not show preference to either belligerent so far as concerns the war, and this is the only proper course for neutrals. I am not sure that the rule of Grotius is satisfactory. 'It is', he says, 'the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war.' In my judgement, the question of justice and injustice does not concern the neutral, and it is not his duty to sit in judgement between his friends who may be fighting each other, and to grant or deny anything to either belligerent through considerations of the relative degree of justice. If I am a neutral I may not lend aid to one to an extent that brings injury to the other. But, you say, I will send to both whatever I choose, for thus friendship requires; and if one uses for the destruction of the other the things I send, that is not my fault. But you must not adopt such an opinion. We must rather consider the enemies of our friends from two different points of view, not only as our friends,

but also as enemies of our friends. If we consider them only as friends we may properly help them with advice, with troops, arms, and whatever else they need in war. But in so far as they are enemies of our friends we may not do this, because we would then show preference to one side in the war, and this the equality of friendship, which has first claim, forbids. It is better to preserve friendship with both than to show preference to one in war, and thus tacitly to renounce the friendship of the other.

This principle that I have just laid down is supported not only by reason, but also by the accepted usages of most nations. For however unrestricted may be our commerce with the enemies of our friends, yet, as I shall explain at length in the next chapter, custom ordains that we shall not aid either belligerent in the things by which war may be carried on against our friends. Accordingly, it is unlawful to carry to either party the things he needs in actual warfare, as for instance artillery, arms, and what he most needs, soldiers. Indeed, in some nations soldiers are excluded by agreements, and the material for building ships is sometimes prohibited if the enemy especially needs this for the construction of ships to use against our friends. Foodstuffs also are often excepted when the enemy is being besieged by our friends or is in some other way pressed by famine. These prohibitions against supplying the needs of their enemies have very properly been made because by such supplies we would ourselves appear in a manner to be making war on our friends. Therefore, if we consider the belligerents merely as friends of ours, we have a right to carry on commerce with them and to send them whatsoever we choose; if, however, we consider them as enemies of our friends we must make an exception of such merchandise as may do injury to our friends in war. The latter consideration, moreover, outweighs the former, for by aiding the one against the other in any manner we intervene in the war, and this is not consistent with the position of friendship. From this discussion you may judge which of the two edicts mentioned above was the more just, that of the Spaniards of March 30, 1639, or that of the States-General of March 3, 1640.

I have briefly explained my views about the duty of those who were in no way bound by treaty, but were absolutely independent of both belligerents. These I have called simply 'friends' to distinguish them from allies and confederates. If my view is correct, I cannot agree with the opinion of many writers on public law who hold that we may and ought to aid the friend whose cause appears to us the best and most just, not only by supplying military stores but also by open warfare if the case requires it. This view is certainly wrong, for it is by no means right to interfere in another's affairs. When neither friend has made any engagement with us why should princes, absolutely independent, stand or fall by our judgement? It is not our duty to avenge all the wrongs of every sovereign; it is sufficient if we avenge our own and those of our allies. If, however, the wrong of another becomes so evident that we must fear for ourselves, and the only hope remaining is that our destruction is reserved for the end, we may perhaps admit that the oppressed friend must be helped; but even in such a case the friendship must be dissolved first, for it cannot be otherwise than impious to make war upon one while he still bears the name of friend.

The theory is quite different regarding allies and confederates. If two nations with which we are allied wage war against others, we will supply to both what the terms of the alliance call for; but if they are engaged in a war against each other, shall we aid both or one, and how shall we decide? On this question there is as great variance between authorities as there is warfare between nations. Gentili rehearses the various views of the authorities and adds his own. Grotius, and following him, Zouche, lay down several distinctions. Certainly auxiliary troops are not to be sent to both allies

even if they are due according to the terms of alliance; for it would be very absurd to send our soldiers to both, only to have them fight and slay each. other. Those who hire out their soldiers often fall into this predicament, but that is not now our concern. For my part, whether our allies are at war with others or with each other, I think there is but one point to raise, and that is whether they have a just cause for war. If both are at war 'with outside nations and both have a just cause, I should aid both to the extent of my pledge; if only one proves to have a just cause, I will deny aid to the other. If our allies are at war with each other I shall perform the obligation of my treaty toward the one which has the juster cause, and of this I will be the judge, as you shall presently hear. Thus we can readily forego the opinions and definitions of others.

But what if we have promised aid to an ally who comes to blows with a power friendly to us? In my opinion we can and must fulfill our promises, since allies in this respect constitute one state to be defended by the resources of both powers. But here also there is room for a distinction, and we must inquire whether our ally has suffered wrong or whether he is the aggressor. If he is the injured one we will perform our promises, if he is the aggressor we will not, for we are not bound to aid an ally in an unjust cause; moreover, the party which promises aid has the decision as to whether or not the cause is just. I wish that this distinction that I have laid down regarding the justice and injustice of the cause were clearly and elaborately stated in international treaties: in the treaties that I have seen there is usually a simple clause demanding that one ally shall furnish to the other 'when attacked' such and such naval and land forces, and that is all. However, the only possible interpretation of that phrase 'when attacked' is that aid will be given to the ally which is unjustly attacked, that is to say, the injured party, not the aggressor. This, indeed, is the only true interpretation of 'the phrase, for what if the party attacked had previously committed a wrong, thereby affording a cause of war? Shall I in such a case send aid to an unjust ally? No. It would be better, then, to say that aid will be sent to one who is unjustly attacked, which would include the party that did not afford a cause of war, and that did not commit the fault or injury which provoked the war. Indeed Grotius has proved that although it be not openly expressed, the exception is always tacitly understood in treaties, and I have not found any writer who differs from him.

He who promises aid and he alone, as I just said, judges also regarding the justice of the cause and determines whether or not a casus foederis, as it is called, has taken place; nor do the contracting parties often submit this to the decision of arbitrators, a course which would prevent treaties from being made sport of as they now are. Otherwise, how many are there who will not interpret treaties in the way that they consider most advantageous? Who will not evade them by a false interpretation? The ancient Greeks and Romans, even in public matters, frequently entrusted to others the judgement of the justice and injustice of a cause, as is proved by the instances cited by Grotius, and this was the right course. But this practice has now fallen into disuse in international law, so that treaties are now little else than an empty name. What I have said above applies to treaties by which aid is promised before war, for, in my opinion, when war has once broken out it is not right to promise or send aid to either friend, and he who does so promise or send to one will violate his neutrality with the other.

The states that are under our protection also constitute a kind of neutral class, for though they are not our subjects, being those of another sovereign, they are not considered enemies, since that is precluded by the very nature of the protectorate. They can therefore aid their sovereign even when he is at war with us, but they may not aid him with arms and troops with which to wage war against

us. Accordingly, the counselors of the States-General on March 17,1, decreed that no one from the territory of Luxembourg and Namur could serve as soldier for the King of Spain, and again on July 18, 1646, they issued the same edict with reference to citizens of Luxembourg, and these decrees were entirely proper since these two states were under the protection of the States-General. Later on August 14, 1645, they issued a general decree that no neutral under our protection should fight for the King of Spain even if he had done so before, and that no one who had left such service should be recalled to it. Again, on February 23, 1636, they decreed that none of those who were under our protection should aid the enemy's armies with horses, wagons, or ships; and very properly, since this would be affording assistance to the enemy. The law is different as regards those things which are brought to our enemies for other than purposes of war, and therefore, though the States-General had formerly completely forbidden the exportation of grain, they decreed on May 23, 1631, that those who were under their protection might sell their grain to the Spaniards or to the United Provinces at pleasure. For a neutral may carry grain to an enemy except in the case of a siege or famine.

The States-General by the third clause of the edict of September 26, 1590, prohibited the treating of neutrals, their vessels and goods, in a hostile manner even in the enemy's territory, provided they were bound for the United Provinces, or coming from there. And yet I find men writing as if the States-General had decreed on December 15, 1672, that even ships of neutrals proceeding from enemy ports could properly be confiscated. But no credence can be given to the pettifoggers who have written so, for this edict was a special one, made only by way of retaliation for the confiscation of the Hamburg ship, as I showed in Chapter 5.

CHAPTER 10
About Contraband

IN ancient Rome it was a capital crime to sell arms to the barbarians, that is to say, it was capital in subjects, for whom alone the Romans made laws. And now as well, it is everywhere a capital crime for a subject to convey arms to the country's enemies. By the first section of the solemn edict of the States-General against the English, dated December 5, 1652, he is treated as an enemy, be he a subject or a foreigner, who conveys any merchandise whatsoever to England. However, in the edict of the States-General against the Portuguese, dated December 31, 1657, this rule is more justly restricted to that which we generally term contraband. By the first clause of the edicts of the States-General against the English and French, dated April 14, 1672, and April 11, 1673, and by the first clause of the edict of March 19, 1665, against the English, he is punished as a public enemy who carries to the hostile nation any ammunition of war, provisions, materials for the building or fitting of ships, or any other prohibited articles. The same penalty holds for any foreigner who conveys those things from our territory to the enemy.

Now, the States-General, as well as other sovereigns, may make laws at pleasure for their own subjects, but not for foreigners. Hence the fair question arises what it is permissible by the law of nations for us to carry to the enemies of our friends, or, what amounts to the same, what our friends may carry to our enemies. Whatever is not permissible is properly confiscated if our friend takes it, and thus alone the penalty of the law is satisfied. Grotius in discussing this question distinguishes between goods useful for purposes of war, those which are not, and those which are of use promiscuously both in and out of war. The first class he forbids neutrals to carry to our enemies, the second he permits, the third he sometimes prohibits and sometimes permits. If we follow the principles laid down in the preceding chapter, we need not concern ourselves seriously with the first two classes. Grotius divides the third class, permitting the intercepting of things of promiscuous use, but only in case of necessity, when we cannot otherwise protect ourselves and our property, and then under the obligation of restitution. But to pass over other objections, we must ask who will be judge of this necessity, for it is very easy to use this as a pretext. Shall the one who seized the articles? This, I think, is Grotius's view, but all laws prohibit men from sitting as judges in their own case except in so far as custom, the prince of tyrants, permits it when treaties between sovereigns are to be interpreted. Nor have I been able to discover that the practices of nations support this distinction drawn by Grotius; they rather support what he says in the following paragraph, that it is unlawful to carry to the besieged articles of the third class, since in doing so we should benefit one to the destruction of the other, as will be more fully explained in the next chapter. As to his next following rule that a distinction must be made between a just and unjust cause, I think I have proved in the preceding chapter that it may be applied to allies in a certain case but never to neutrals.

It is only from reason and custom that we can learn the general law of nations in this matter. Reason declares that I am equally friendly to both powers at war if both continue their amity with me, whence it follows that I cannot show preference to either so far as concerns the war. The rule of custom may be learned from the almost unbroken practices in treaties and edicts, for sovereigns have often made such regulations by treaties with a view to a possible outbreak of war, and also by edicts after war has broken out. I said 'almost unbroken practices', for one or two treaties which vary from the general usage do not alter the law of nations. It is agreed among almost all nations that it is not lawful for a friend to convey to our enemy, arms or other things that come under the designation of

contraband goods, nevertheless by the tenth section of the treaty of Westminster between the English and the Portuguese in 1654, it was agreed that the English should be permitted to carry such things to the enemies of the Portuguese, as Zentgravius observes. The United Provinces obtained the same permission from the Portuguese by the treaty of August 6, 1661, section twelve. Otherwise, this rule, supported by an almost unbroken line of treaties, is that neutrals may not carry contraband goods to our enemy, and that if they do, and are caught, the goods are confiscated; but with the exception of contraband, they may freely trade with either party and carry anything to them with impunity.

Following these principles the Dutch had permission, by the marine treaty between Spain and the States-General of December 17, 1650, to trade with the French in any kind of wares, just as it had had before the war between the French and Spanish; however, the restriction was added that the Dutch should not carry to the French, out of Spanish territory, articles that might be of service against Spain, and furthermore that the Dutch should not carry contraband goods to any of the other enemies of Spain, and a list of contraband articles is given in the sixth paragraph of the treaty. Again, in the second section of the above-mentioned edict of the States-General against the English on December 5, 1652, neutrals are forbidden to carry to the English any munitions of war or any material serving for the equipment of vessels. There is the same prohibition against contraband goods in section two of the above-mentioned edicts of 1665, 1672, and 1673, where, after an enumeration of various species of contraband articles, it is added 'and all other articles manufactured and prepared for warlike use'. Similar rules are found in Articles 27 and 28 of the commercial treaty between the French and the States-General (April 27, 1662), in Article 3 of the maritime treaty between Charles II of England and the States-General (December 1, 1674), in section 3 of the commercial treaty between the King of Sweden and the States-General (November 26, 1675), in section 15 of the marine treaty between the same signatories (October 12, 1679), the fifteenth article of the commercial treaty between the French and the States-General of August 10, 1678, in the eleventh article of the edict of the States-General of July 28, 1705, on contraband, and in other treaties of other nations, some of which are given by Zentgravius.

From these I understand that those articles are contraband which are proper for war, and it is of no consequence whether or not they are of any use outside of war. Very few of the instruments of war cannot also be of service out of war. We carry swords for ornamental purposes and we use them in the punishment of criminals; even gunpowder we employ for our amusement and to express public joy; yet we do not doubt that these fall under the title of contraband goods. About those things that may equally well be of use in war and peace, there might be an interminable discussion, even if we follow Grotius's opinion regarding necessaries and the various distinctions he lays down. If you will examine the treaties which we have mentioned, and others of other nations, you will find that everything is called contraband which serves warlike purposes in the form in which it is brought, whether it be an instrument of war or material by itself fit for use in war. It should be noted that the decree of the States-General against the Swedes, of May 6, 1667, declaring contraband all materials that might readily be adapted for purposes of war, even if not by themselves adapted, was founded on a special plea of the right of retorsion, as they say in the decree.

Hence you may judge whether the material out of which prohibited articles are made is also prohibited, an opinion toward which Zouche leans though he does not precisely state his view. I do not accept this, for reason and precedents incline me to the contrary-view. If we are to prohibit all materials out of which instruments of war may be made, there would be an immense catalogue of

prohibited articles, since there is hardly any material out of which we cannot readily make some article useful for war. If we prohibited this we would all but forbid all commerce, which would be quite useless. Section 4 of the treaty of December 1, 1674, also of the treaty of November 26, 1675, and section 16 of the treaty of October 12, 1679, all mentioned above, after prohibiting neutrals from carrying arms to enemies, permit the carrying of iron, bronze, metals, materials for building ships, in fact all things which are not made for purposes of war. Sometimes, however, it happens that materials for shipbuilding is forbidden, if the enemy is especially in need of this and cannot readily wage war without it. When the States-General, by Article 2 of the edict against the Portuguese of December 31, 1657, prohibited the supplying the Portuguese with those things which are generally considered as contraband of war, they especially added in section 3 of the same edict that, since they feared no harm from the Portuguese except on the sea, no one should carry to them the material needed for ships. Thus they made a clear distinction between material for ships and contraband, though it was prohibited for a special reason. For the same reason the material for ships is joined to articles of war in the second section of the said edict against the English, dated December 5, 1652, and in the edict of the States-General against the French, dated March 9, 1689. But these are exceptions that confirm the rule.

Some have asked whether scabbards should be classed as arms and instruments of war, and Pierino Belli notes, though with disapproval, that they have so been adjudged by military courts. Zouche is, as usual, content to give the arguments for and against without a decision. I would approve of the decision of the court rather than the opinion of Belli, since a scabbard, though of general use, is an instrument made for purposes of war: we could not use the sword without scabbards, and we could not have wars without swords. Even pistol-cases, saddles, and belts are enumerated among contraband goods in sections 2, 3, and 5 of the edicts and treaties mentioned above. In their use pistol-cases differ little from scabbards, since they are made to hold firearms as the latter to hold swords. Surely these and other articles might be excluded from the list if they were found in very small quantities, and the said article 3 of the treaty of November 26, 1675, contains an exception reading 'unless these instruments are so few that it might be inferred that they were not intended for purposes of war'.

A question has also been raised about sword-hilts. These I think are in the same class as scabbards, for they are articles made and suitable for purposes of war, and these are also enumerated among prohibited articles in certain of the edicts and treaties mentioned above. About saltpetre there might be more room for doubt, because it is not of itself a material suitable for warfare, and yet it appears in almost all the lists of prohibited articles that I have mentioned, for gunpowder is chiefly made from it, and that is now the principle article used in war. I have even noticed that saltpetre is often named without mention of gunpowder, though often it is mentioned together with the latter. When gunpowder is omitted, saltpetre is mentioned in lieu of it; when it is added the two words are considered as synonymous, unless nations have now come to exclude saltpetre entirely from the list of articles not directly fit for war, on account of its predominant service in war. Zouche relates that the English and the Spaniards have contended vehemently about the proper classification of tobacco, the latter judging it contraband to the great indignation of the English, who consequently issued reprisals against them. Whether this controversy has now gone up in smoke I know not; at any rate I cannot agree with the Spaniards because tobacco can certainly not be of service in destroying the enemy. It is certainly lawful for a neutral to carry tobacco to the enemy of his friends according to the above-cited articles 3, 4, 15, and 16, for by these articles it is permissible to carry to the enemies

of our friends all things which in their present state are not fit for purposes of war, and furthermore tobacco is explicitly mentioned among the permitted articles in the aforesaid clause 4 of the treaty of December 1, 1674.

It is clear according to the Roman law that if a pledge is confiscated the private claim is not extinguished. Hence if neutrals have shipped contraband goods to our enemies, and have pledged their goods for the freight, if the goods are taken on the voyage and confiscated as contraband, the Dutch courts have held that the captain is thence entitled to his freight as though the whole voyage had been completed. And it is related that it was thus decided by the Court of Admiralty of North Holland on May 6, 1665, and of Friesland on July 12 of the same year, on the principles that 'obligations go with the property' and 'private claims take precedence before public' and others of like nature. But the Court of Admiralty of Amsterdam-on July 9, 1666, decided differently, refusing to allow the claim for the freight, without prejudice, however, to claims against whomsoever else it might concern. This decision was entirely proper, for the freight is not due unless the voyage is completed, and in this case the enemy lawfully prevented its completion. Then contraband goods are condemned either ex delicto, in which case the captain is as much at fault as the owner of the prohibited articles, or ex re for the very carriage of the foods themselves: for though we may not be able to prohibit a neutral from engaging in commerce with our enemy, we can prevent him from aiding our enemy to our injury. Consequently, what is confiscated will be taken without respect to any person, and will be considered as having perished by the hand of Providence, so that every obligation is extinguished. But I am not surprised that those counselors held that the captain had a preferred claim for freight upon the condemned cargo; I rather wonder that they did not also give a preference to the owners of the contraband goods, for these also have jus in re, namely the right of property, which is the strongest of all.

It is held that the subject of an allied power who is trading with a common enemy cannot be punished by us, and that his goods cannot be confiscated by us, since every sovereign has the execution of his own decrees, and allies have no jurisdiction in such cases. However, reason, usage, and public utility have annulled this decision. On this matter the reader may consult Aitzema. I refrain from discussing it since it seems to me not to concern the subject of contraband.

CHAPTER 11
Whether it Is Lawful to Convey Goods to Besieged Cities, Camps, and Ports

ACCORDING to the dictates of common sense and the usages of nations, it is not lawful to carry any goods to besieged cities, as I said in a different connection in the fourth chapter. This is also the opinion of Grotius, who disapproves of the sending of supplies 'if it impedes the exaction of my right, and if he who sends them can know this, as, for instance, if I am besieging a town or blockading a port, and if surrender or peace is expected'. The fact that there is a siege is a sufficient reason why nothing should be supplied, whether it be contraband or not, for the besieged are brought to the point of surrendering not only by force, but also by want of food and other things. If it were lawful to bring the besieged the things which they need, the attacking power might perchance be compelled to abandon the siege, which would be an injury to it, and therefore an injustice. Moreover, since we cannot know of what things the besieged may be in use or in what they may be well supplied, all supplying is forbidden, otherwise there would be no end of disputes that might arise. So far I agree with the opinion of Grotius, but I wish that he had not made his rule contingent upon the condition 'if there was expectation of peace or surrender', and that he had not presently specified that 'he will be liable to the extent of the damage caused by his act', and, that 'if he has not yet caused damage, but has tried to cause it, I shall have a right, by the retention of his property, to compel him to give security for the future, by hostages, pledges, or in some other way'. These clauses, I say, Grotius should not have added, for they are not consonant to reason nor in accord with such treaties as occur to me. On what principle of reason is the carrier empowered to judge whether peace or surrender is near at hand? Or if they are not near at hand may he carry whatever he likes to the besieged? I should rather say that he may at no time so long as the siege lasts bring supplies, and he is not acting the part of a friend in ruining or in injuring in any manner the cause of his friend. Furthermore, why should not the carrier be liable for more than the damage caused by his act, since such conduct has always entailed capital punishment in the case of subjects, and even in the case of neutrals when previously warned by an edict, and often without such warning. And since those who thus aid besieged peoples in distress are usually private individuals in search of gain, let us imagine that an individual has saved a city from capture by his commerce: I should hardly think that any such individual would have wealth enough to pay an adequate indemnity for the loss of a city which has escaped capture by his act. Again, if an individual who has as yet brought nothing into a besieged city is intercepted while attempting to do so, can we be satisfied with the mere retention of his goods, and that too only until he gives security that he will not do the like again? This I cannot accept, for I have been taught by the common usage that the intercepted goods are confiscated at the least, and that often some corporeal punishment, if not a capital one, is inflicted.

Let us now turn to some treaties dealing with this subject. In Article 7 of the marine treaty of December 17, 1650, between the King of Spain and the States-General, it is simply agreed that even non-contraband goods may not be carried to besieged cities and places. The same agreement occurs in Article 29 of the commercial treaty of April 27, 1662, between the King of France and the States-General, in Article 4 of the marine treaty of December 1, 1674, between the King of England and the States-General, in Article 16 of the commercial treaty of August 10, 1678, between the King of France and the States-General, in Article 16 of the commercial treaty of October 12, 1679, between the King of Sweden and the States-General, as well as in many other treaties. All of these treaties hold simply, without specifying a penalty, that it is unlawful to carry any goods to a besieged

place, but if it be unlawful, then all goods so carried must be considered contraband, for what is carried contrary to treaties and edicts is contraband. It follows that goods so carried must, as I just said, be confiscated at the least, by the same principle that all goods actually called contraband are confiscated. And this practice is observed in usage as will be seen presently, and usage has also established that the offender is punished capitally or in some milder manner according to circumstances.

Not only cities but camps as well may be surrounded by troops and besieged, as it were; accordingly, it is just as unlawful to carry goods to besieged camps as to besieged cities. To camps not besieged, however, neutrals may, so far as I can see, properly carry goods that may be carried to cities, ports, and other places of the enemy not besieged, namely, goods that are not contraband. And yet the counselors of the States-General on August 9, 1622, decreed in the name of the latter that those would be treated as enemies who carried goods of any description to the camp of the Spaniards at Bergen-op-Zoom. The same body made the same general decree again on September 2, 1624, against any who supplied goods to the Spanish camp, and again on March 21, 1636. But these decrees are too unjust to deserve defense, if the camps are not besieged and the goods are not carried through our territory. The first two decrees applied not only to subjects but also to neutrals and to those under our protection. So far as concerns subjects, a sovereign may issue whatever command he desires, but so far as they concern neutrals and those under our protection these decrees cannot be defended unless we restrict them to the subject of contraband goods. The third decree is directed against neutrals who carried food and instruments of war to the Spanish fortresses, but, as the decree states, it was issued by right of retorsion because the Spaniards had treated as enemies those who had aided Maastricht with food and arms. The principle of retorsion therefore excuses the severity of this edict in the matter of food, since neutrals may carry food unless it be forbidden by treaty; but arms are always contraband, whether the place is besieged or not, and in this respect the aforesaid-third decree was entirely fair. As to other things, whether the Spaniards and the States-General have been fair in their edicts and decrees, depends wholly, it seems to me, upon the question whether or not the places were besieged.

The rules that apply to besieged cities, and which have with good reason been applied to camps surrounded and, as it were, besieged, apply also to hostile ports that are blockaded and therefore considered besieged. Regarding this matter there is a remarkable decree of the States-General issued on June 26, 1630, with the advice and opinion of the Court of Admiralty of Amsterdam and of other courts of admiralty, and even probably with the advice of some private lawyers. It may be found in De Hollandsche Consultatien. When in 1630 the States-General blockaded with ships of war the coast of Flanders, the question was raised whether neutral ships might enter the ports and carry merchandise in and out. The first clause of the decree specifies 'that ships and cargoes of neutrals shall be confiscated if found going in or coming out of the enemy's ports in Flanders, or being so near that there is no doubt that they intended to sail in, since the sovereign state kept those ports continually blockaded with their ships of war in order to prevent commerce with the enemy, as had been the custom many years before, after the example of all princes who had made use of a similar right in such cases'. The second clause ordains the confiscation of all ships and cargoes 'if from the letters and documents of the ships, it becomes evident that they were bound for the said Flemish ports, even though found at a distance; unless they of their own accord, before being sighted or pursued by our vessels, and before any act is committed should repent and alter their course; in which case the matter shall be decided as a new case according to conjectures and circumstances'.

The third clause ordains the confiscation of ships and cargo 'which come out of said ports, not having been forced into them by stress of weather, although they be taken at a distance, unless they have after leaving the enemy's port made a voyage to a port of their own country or to some other neutral or free port, in which case they shall not be condemned; but if in coming out of said enemy's ports they are pursued by our own ships, and chased into another harbor as, for instance, their own, or that of their destination, and found on the high sea coming out of such port, they are to be confiscated'. There is also a fourth clause which I quoted and explained in the fourth chapter, above, which I can therefore now pass over.

However, the first three clauses of this decree seem to require some explanation. The first point of the first clause is explicitly stated, and is entirely in accord with the recognized rights of war. The clause then proceeds to ordain confiscation for ships 'so near that there is no doubt that they intended to sail into the port'. This is reasonable, for contraband or forbidden goods if found at the confines of the enemy's territory are presumed to be on their way to the enemy, not only according to the general opinion of jurists, as quoted in Zouche, but also in accordance with the intentions of the States-General as expressed in the decree just quoted as well as in the following: that of December 5, 1652, against the English (clause 4), that of March 19, 1665, against the same (clause 4), those of April 14, 1672, and April 11, 1673, against the English and French (clause 4), and this is the presumption of these edicts unless the ships can prove that they were driven in by stress of weather, as the second clause of our edict specifies. However, to return to the coast of Flanders, the very same decree was issued in the early days of our commonwealth, for according to the edicts of the Earl of Leicester of April 4, 1586, and of August 4, 1586 (clause 9), in which he forbids subjects and foreigners to have any commerce with the Spanish, and according to the edict of the Estates of Holland of July 27, 1584, neutrals resorting to the ports of Flanders are punished by the confiscation of ships and cargoes; and that edict expressly provides that 'those who shall be found along the coast of Flanders or near any of the forbidden ports, shall be adjudged to have acted contrary to this decree, except in cases of extreme and well-proved necessity'. We cannot therefore approve of the opinion of Cinis who writes that they are to be punished on the ground of going to the enemy only when they have proceeded so far that they cannot return, and yet this view is approved by Alberico Gentili.

The second clause is as reasonable as the first, which I have just discussed; for the ships and cargoes found near blockaded places are confiscated only on the ground that their intention of going to the enemy is tacitly adduced from facts; and there is no doubt about this intention if this is found clearly stated in the ship's documents. However, what is said about repentance involves a subject difficult to investigate, but if the proofs are adequate that the course has been altered, I should not dissent.

In the third clause, the ships that have once reached their port of destination are considered to have completed their voyage, and to be beyond reach of confiscation, but a nice distinction is made with reference to the harbor into which a ship is chased, when caught in the act of violating a blockade. The disjunctive is used in the clause 'their own port or that of their destination', so that a doubt arises about the meaning and the justice of the rule. If 'the port of destination' is meant to be synonymous with 'their own port', there will be no doubts. But if, for instance, an Englishman sailing for Denmark from Flanders is driven into an English port, and when sailing out to proceed on his voyage is caught before he reaches the Danish port, it would seem to me that he is caught on his voyage and in the illicit act, and I do not see that it is of any consequence whether the port he entered was his own if

he had not finished the voyage in which he was engaged. Therefore, as disjunctives are often used as explicatives, I understand the words of the aforesaid clause 'their own port' to mean the port to which the vessel was bound, and 'the voyage' to refer to the completed course. Let us suppose, for example, that a vessel from Zierikzee is taken by the Dunkirkers, who condemn her at Dunkirk, where she is then bought by a Scotchman. According to the fourth clause of our decree of 1630, which I quoted above in Chapter 4, it is lawful to intercept and confiscate the ship on her way out, if she be taken before she entered into her own or into some other free port, but not afterwards. This ship, now belonging to the Scotchman, is sighted on her way out from Dunkirk, but escaping capture, runs into Yarmouth, to which she is not bound; then in coming out of Yarmouth, she is captured. The question is whether this ship entered 'her own port'. I would not say that she did, since she did not reach the 'port of her destination'. Aitzema relates that on the advice of the Admiralty of Zealand, given January 27, 1631, in a similar case, the States General decreed that the ship must be confiscated, and that this accorded with the decree of June 26, 1630.

Finally, what the third clause says about 'free ports' must be interpreted according to the meaning of the fourth, so that the phrase 'free port' does not mean a port of the same sovereign. Since this decree of June 26, 1630, was not put into execution at once, and there was in the meanwhile free intercourse with Flanders, it happened in 1642 that certain neutral ships bound for those ports were taken by us and brought into Zealand; and there the contraband goods were condemned and sold while the rest was released and restored. The question has arisen whether the contraband goods were lawfully taken, there being some who claim it was not. But we must approve of the decision, for though it might seem that the right of blockade, by which the goods of neutrals are seized, was relaxed, since the shores of the enemy were not being carefully guarded, nevertheless the general law of war was not annulled, according to which it is lawful to confiscate contraband goods, even that which is being carried to non-blockaded ports.

However, though the severity of this decree of 1630 can thus be defended, nevertheless it may be relaxed in proper circumstances, as in fact it sometimes has been. When Admiral van Tromp, who in 1645 was blockading the ports of Flanders with a Dutch fleet, asked the States-General whether he should take any action against neutral ships, the latter on July I of that year decreed that he should make every effort to prevent any and every ship from entering a Flemish port, that, however, non-contraband goods should not be confiscated. The States-General had therefore changed their opinion since 1630; but since men change what can prevent the change of decisions'?

By the aid of these principles, if my arguments in this and the two preceding chapters are correct, the reader can readily reach a decision regarding the disputes between the English and the Poles and others which are rehearsed by Zouche.

CHAPTER 12

Shall Non-contraband Goods Be Condemned Because of Contraband?

IF a neutral carries at the same time both. lawful and unlawful goods to the enemy and the ship is captured, it is asked whether the ship and whether the lawful goods should be confiscated on account of those that are unlawful, and the same question may arise at any time where lawful and unlawful goods are mixed together. Among a number of questions the Admiralty of Amsterdam proposed this one also to the States-General in 1631, in order to procure an interpretation of their edict of April 1, 1622. But though they answered the other questions, as Aitzema relates, they decided to take this one under advisement. And though I cannot find that they answered then or later, they did on May 6, 1667, publicly order their courts of admiralty not to condemn ships and non-contraband with the contraband goods, as Aitzema relates. This is all that Aitzema says, and the responses of September 18, 1665, based upon the several decrees of the States-General, go no farther.

But with some of the authorities cited by Zouche, I think a distinction must be made between the case where both lawful and unlawful goods belong to the same owner and that in which they belong to different persons: if they belong to the same person, everything is condemned for the purpose of checking wrongdoing, but if they belonged to different shippers then one must not suffer for the wrongs of the other; and the response of the Dutch lawyers properly adopted this opinion on July 31, 1692. Very strong support is provided for this view by the Digest, where, in the case of the owner of a vessel, Paulus raises the question whether or not he knew that something unlawful had been placed on board: if he knew of it, as for instance if it was done in his presence, the vessel is also confiscated, but if it was done by the master in his absence so that he was ignorant of it, the ship is restored to the owner as being innocent. Zouche, to be sure, brings evidence from Pierino Belli that lawful goods have without such distinctions been confiscated with the unlawful; but if you will refer to the case in Belli, the location of which Zouche failed to mention, you will find that both lawful and unlawful goods belonged to the same shipper, and that he was cognizant of the fraud and therefore punished by the confiscation of both. But of this we shall speak more fully presently.

Let us first examine the treaties and edicts to which our state has been a party with reference to this subject. In the navigation treaty of February 4, 1648, between the Spanish and the States-General, and in Article 12 of the marine treaty of December 17,, between the same signatories, it is simply agreed that it shall be unlawful for the subjects of either party to carry contraband goods to the enemy of the other, and that they may be confiscated if so carried; but the ships and non-contraband goods are exempt. The same simple regulation without distinction as to ownership is found in Articles 24 and 36 of the commercial treaty between the French and the States-General, dated April 27, 1662. The States-General adopt the same principle in section 2 of their edicts against the English, and against the English and French, dated March 19, 1665, April 14, 1672, and April 11, 1673, where, after enumerating a long list of contraband goods, they order the confiscation of these without any mention of non-contraband goods. But in Article 7 of the Treaty of December 1, 1674, between Charles II of England and the States-General, lawful goods are distinguished from unlawful, and the latter are ordered condemned while the former are not. The treaty even specifies that if the contraband goods are at once surrendered to the captors, the vessel with the rest of the cargo shall be dismissed to proceed upon its voyage, a rule contrary to section 4 of the above-cited edicts of 1665, 1672, and 1673, which specifies that the ship shall be sent to the Court of Admiralty for adjudication if any part of its cargo was unlawful. Again, Article 7 of the commercial treaty of

November 26, 1675, between the King of Sweden and the States-General, has the simple provision that contraband goods are condemned while the ship and the non-contraband are not. Another long list of treaties has the above-cited provision that ships and lawful goods are free, and that these are dismissed to proceed upon the destined voyage as soon as the contraband goods are surrendered by the captain; compare Articles 21 and 26 of the marine treaty between the Swedes and the States-General of October 12, 1679, Articles 21 and 26 of the commercial treaty of August 10, 1678, between the French and the States-General, Articles 26 and 31 of the commercial treaty of September 20, 1697, between the same signatories, and Articles 25and 30 of the commercial treaty of April 11, 1713, between the same.

Such are the treaties and edicts, and if we could deduce the law of nations from these, we must apparently conclude that vessels and lawful goods could never be condemned on account of the carrying with them of unlawful goods. But the law of nations cannot be deduced from these, for reason, the preceptress of the law of nations, will not permit us to give a general and indiscriminate interpretation to these practices. As for the ship, I think we must ask whether this belongs to the captain or to some one else; if it belongs to him we must again ask whether, as would usually be the case, he knew that unlawful goods had been put on board, or whether he was ignorant, as, for instance, if in the absence of the captain the sailors had concealed these things in the ship. If he knew, he is guilty of fraud because he hired out his ship for an unlawful use, and the ship will be condemned; but it will not be if he was in ignorance and was innocent of fraud. This is the sane and reasonable principle laid down by Paulus in the above cited passage from the Digest. We must apply the same principle if the ship belongs to another, for Paulus speaks in general about 'the master of the ship'. Accordingly, if the captain has placed unlawful goods in the vessel without the knowledge of the owners, their ship is not confiscated, but the case is different if they knew unlawful cargo was being taken, for in that case they would be parties to the fraud. It is unjust that owners should suffer from the act of a captain, but it is wholly just and fair that they should suffer because of their own act. However, this distinction between a captain who knows and one who is ignorant of his cargo, cannot now be as frequently applied as it was formerly, since it is now the custom for the captain to sign the bill of lading of the cargo, and to promise that he will use his proper endeavor to convey the goods to the consignee. And yet it may be applied if anything unlawful has been taken on board without the captain's knowledge, as I just said. In the case of other owners of vessels the principle may very frequently be applied even now.

As to owners of goods, I think that for the same reason a distinction should be made whether or not all the goods, lawful and unlawful, belong to the same owner, and as I said above, other authorities have also advocated this. If they belong to one and the same owner I think all are properly confiscated; just as in Roman law regarding revenue cases if any one carries in the same cargo both prohibited and lawful goods, declaring the latter while concealing the former, both are confiscated on account of the fraud of the carrier, as commentators on the above-cited Digest have properly collected from the text of that law and from the third law of the code De nautico fenore. Various other authorities make other distinctions: one would ask whether or not the lawful goods could readily be separated from the unlawful, holding that both should be condemned if they could not easily be separated, but that if they could, the former should be released, the latter condemned without considering whether or not all the goods belong to one and the same person. But since such separation can always be made, this distinction is not founded on reason, nor has it the support of any legal authority. There is more reasonableness in the question whether the lawful goods belong

to another than the one who commits the fraud, for this situation involves the principle that one man should not suffer on account of the deed of another. Furthermore, on this question we can appeal to a legal decision pronounced on an analogous case; for the Digest holds that if one of several coheirs defrauds the estate to escape the revenue, the other coheirs shall not lose their portions by way of punishment. It also holds, that if tenants or slaves of a landlord illegally make iron on the estate without the knowledge of the owner, the latter is not liable; and finally, the above-cited code of nautical insurance holds that if the whole ship's cargo is confiscated because of the fraud of the owner in shipping unlawful goods, the person who placed the ship's insurance shall not suffer.

But what if the owners of the lawful goods merely know that unlawful things were also being put on board, would this mere knowledge entail confiscation of the lawful goods? I have found such an opinion expressed, but I have not found any support for it and do not intend to accept it. The lawyer who advocated this might indeed have appealed to the above-cited passage of the Digest, which exonerates the landlord who is ignorant of the illicit manufacture of iron by his tenants or slaves; since one might infer from this that if the owner knew of the wrongdoing he would not be exonerated, because it was his duty to forbid it, and to command his tenants and slaves not to do anything unlawful upon his estate. But if, as usually happens, several owners ship their goods on the same merchantman, one owner cannot control the others, not even the captain who undertakes to carry the cargo. What therefore the owner of lawful goods cannot prevent, cannot involve him in damage; he might refrain from shipping his goods, but if he cannot conveniently do this he cannot be made liable for the act or fraud of others.

This is my opinion, and I wish that the treaties and edicts which I have cited had contained these principles and distinctions. You may think that the definitions not explicitly expressed are to be tacitly understood, and that these treaties and edicts may therefore be interpreted according to each particular case. I wish I might think so, but I fear that the documents are written in such general terms that this is impossible. What Alberico Gentili has written on all these subjects is full of obscurity and confusion.

CHAPTER 13

On Goods of Neutrals Found in Enemies' Vessels

WHEN in 1602 the Dutch captured several Portuguese ships, Portugal being then subject to Spain, Grotius wrote in his Historia Belgarum: 'It was more difficult to decide whether the goods of the Italians which were found on the captured ships became lawful prize. But the matter was settled by a compromise between equity and the law of war.' It would seem, therefore, that Grotius was then in doubt whether neutral goods found on enemies' ships should be considered as enemy goods. But he had no such doubt when in 1625 he wrote his work On the Law of War and Peace, for there he says that nothing is acquired by the law of war but what belongs to the enemy, and not the property of neutrals, although it be found on the territory of the enemy, as, for instance, in an enemy town or fortified place. And hence he infers that the common saying that 'goods found on enemy ships are considered as belonging to the enemy' does not accord with the law of nations, and that such goods may only be presumed to belong to the enemy until the contrary is proved. Then he proceeds, 'and this principle I found approved by the judgement of the full senate in our own Holland in 1338 when a war was raging with the Hanse towns, and the judgement has become law'. Grotius treats the same question in another place, referring again to the decision of the senate.

I am indeed ashamed at not being able to find this decision of the year 1338, and my failure to comprehend what senate might have made it, for it is well known that Philip of Burgundy did not institute the Court of Holland until almost a century later. Indeed, in the last passage cited, Grotius himself gives the year 1438 in a new edition, but the latest edition, and the octavo edition of 1632, which the author in a statement signed on April 8 of that year approved of as entirely accurate, print the year 1338 in the passage, and this is the year followed by those who have quoted Grotius, as, for instance, Zouche and Het Nederlandsch Advis-boek. My illustrious friend, Barbeyrac, also uses the year 1338 in his French version of Grotius, thinking perhaps that this is a different decision from the one cited, in Book 3, Chapter 1, section 5, n. 4, and which in the French version he attributes to the States-General, though this body never had judicial powers and has never been called a senate. But the same decision is referred to in both places, and the year 1438 should be restored in Book 3, Chapter 6, section 6, since Grotius referred to the Hanseatic war, on which there is a book preserved in the archives of the Court of Holland, entitled Oosterlingen.

To come to the subject-matter, I have, despite diligent search, failed to find the decision of 1438 but am ready to take the unsupported word of Grotius for the fact, and I readily believe that others as well have accepted the word and the judgements of Grotius without any support in law. Thus Loccenius speaks as though this were now the accepted law; and so do the six advocates quoted in Het Nederlandsch Advis-boek, at any rate, they add, unless there has been a public announcement that no neutral shall ship his goods in an enemy ship, or if the shipper was ignorant about the war. The same opinion is given again. These provisos seem unreasonable, for if by the law of nations a neutral may ship his goods in an enemy vessel, I fail to understand how this can become unlawful by the proclamation of another nation. It is lawful for us to carry on trade with nations friendly to us even if they are enemies of each other, unless, as usually obtains with reference to contraband, prevented by express or tacit conventions; but if one of the warring nations without the consent of the other forbade us to trade with her enemy, the prohibition would be entirely unjust except in so far as it touched that nation's own subjects. This also seems to be the opinion of Grotius where he discusses the matter fully. I say 'it seems', for in the passage cited he yields some respect to public

proclamations of nations, though in his notes he shows that such proclamations may be disregarded. Again, what difference does it make whether or not the shipper who placed his goods on an enemy ship knew of the war? Granted that he did, and also that he knew the ship was an enemy vessel, there will still remain the question whether or not he had a part in an act of fraud. But these are quibbles of lawyers by which they bait the ignorant public.

But before I express my own views, it will be worth the pains to consider what the various treaties have said. So far as I am aware these usually agree with the French law cited by Mornac: 'that the goods of an enemy produce the confiscation of those of a friend,' since on account of an enemy vessel confiscated, the goods of a friend are also confiscated. Grotius in On the Law of War and Peace, cites the French regulations which command the confiscation of ships because of the nature of the goods, and of the goods because of the ships; but to make them seem less harsh he interprets them to mean that only when enemy goods have been taken on board with the consent of the owner of the ship is the vessel confiscated, though it be neutral. But this type of case is now irrelevant, and will be treated in the next chapter. However, I will say, that if the consent of the owner subjects the ship to confiscation, why do we not confiscate neutral goods that have been placed on an enemy vessel by the consent of the owner of those goods? On this subject Grotius says nothing, and yet since the case is absolutely analogous it should be subject to the same rule.

But setting aside the discussion for a moment, let us turn to the treaties. In Article 13 of the marine treaty of December 17, 1650, between the Spaniards and the States-General it is agreed that neutral goods of whatsoever kind are condemned if found on enemy ships. The same provision is found in Article 35 of the commercial treaty of April 27, 1662, between the King of France and the States-General, in various commercial treaties made between the same powers, to wit, on August 10, 1678 (Article 22), on September 20, 1697 (Article 27), and on April 11, 1713 (Article 26). A similar agreement is found in Article 8 of the marine treaty of December 1, 1674, between Charles II of England and the States-General, in Article 8 of the commercial treaty of November 26, 1675, between Charles of Sweden and the States-General, and again in Article 22 in the treaty of October 12, 1679 between the same parties.

It is apparent that these treaties agree with the old French law in condemning neutral goods found in enemy vessels; and this does not accord with the decision that Grotius says the Court of Holland has made and which has become the accepted rule. However, these treaties that I have cited are subsequent to that decision, and in my opinion are not to be held binding except between the signatories. Certainly, they cannot be defended on rational grounds, for there is no reason why I should not be permitted to use for the transmission of goods the ships of a friend even though that friend be your enemy. As I said above, I may, unless some treaty forbids, trade with your enemy, and if that is permissible I may also enter into contracts, buy, sell, let, hire, and so forth. Therefore, if I have engaged his vessel and his labor to carry my merchandise across the sea I have engaged in an undertaking which is wholly lawful. You may indeed seize the ship since you are his enemy; but by what law will you seize my goods if I am your friend, especially if I can prove that the goods are mine? For I must agree with Grotius that there is some ground for presuming that goods found on board of an enemy's vessel are the property of the enemy.

But what are we to say if the owners of the goods knowingly consented to have their goods placed on a vessel which, though friendly, belonged to an enemy of yours? For my part I do not think that

that knowledge and consent constitute good grounds for confiscation. The question at issue is whether the owners of the goods in placing the cargo on an enemy vessel have acted lawfully or unlawfully. I have argued that the act was lawful because with those with whom I may properly trade I may also make any kind of contract, and hence I may make a bargain for the use of their ships in my service. You may therefore seize what belongs to the enemy if you can, but you must return to me what is mine, because I am your friend and I have not intended to harm you by shipping my goods.

With the above-said the regulations of the Consolato del Mare are in almost complete agreement in stipulating that an enemy vessel when captured belongs to the captor, but the owners of neutral goods if present may compound for the purchase of the vessel and thus continue their voyage. Moreover, if the vessel is not so purchased, the vessel may be brought into the port of the captor and the goods nevertheless restored to their owners upon the payment of the full freight that would have been due after a completed voyage. I approve of this general doctrine; but I cannot find the justice of the last clause regarding the payment of the freight. I well understand that the captor of an enemy ship has succeeded to all the rights belonging to the ship and its captain, but the freight was not due the ship or the captain unless the goods were carried to the destined port. By the premises, moreover, the ship is captured on the voyage, why then must I pay freight to the captor? If the captor is willing to carry the goods to the destined port I might understand the reason for this rule, but I cannot otherwise. For the imprudent act of placing my goods on an enemy vessel, I am sufficiently punished by the necessity of having to claim and carry away my goods at my own expense and risk. Imprudent writers have frequently made foolish proposals in this matter of exacting the freight; another example of this kind I have noted in Chapter 10.

CHAPTER 14
Concerning Enemy Goods Found in Neutral Ships

IF a neutral ship is taken carrying enemy's goods, two questions arise: the one, whether the neutral ship itself, the other, whether the enemy's goods, are liable to confiscation. As regards the first question, if we follow the ancient laws of the French, even the neutral ship is to be confiscated for carrying enemy's goods. That this was the old practice in France is apparent from the fact that the Hanse towns were explicitly exempted from such stipulations by Article 3 of the marine treaty between the King of France and the Hanse towns (dated May 10, 1655). Grotius, in the passage cited in the preceding chapter, thinks that this rule of the French does not obtain except when the owner of the neutral ship has consented to the placing of enemy's goods on board, and in support of this he urges the law of Paulus, in which, as I said in Chapter 12, a distinction is made whether or not the master of the vessel knew that goods were being unlawfully placed on board, with a stipulation that the ship was liable to confiscation if the master knew, but not otherwise. Loccenius agreed with this view. This distinction of Paulus is indeed very important and was of great use in Roman law, but at the present it is of little use if the ship belongs to the captain, for the captain usually receives the goods and attests the fact by a document which is generally called a bill of lading. However, the distinction is of more use if the shipowner is not the captain, and if the goods are taken on board without the owner's knowledge, as I have stated in Chapter 12. It may, however, be doubted whether other owners are not held responsible if they have entrusted the lading to the captain and he has taken on unlawful goods. It is a general rule that the principal who entrusts an unfit person with a task is held responsible for the faults and the frauds that he commits, and if we make a distinction between the owner who is master and other owners, the rule will entail great difficulties in its application.

But I will not base my objection upon this difficulty. Grant that other owners are held responsible for what the master receives on board even without orders, or grant that the master was commanded to receive the goods, grant even that he always knows what is placed in his ship, granted all this and furthermore that the master wittingly consented to have enemy goods placed on board, even then I should not permit the condemnation of the goods. I do not agree with Grotius that the case which Paulus discusses in the cited passage can be applied to the subject now under discussion, though so far as reason alone may apply, the rules of the law of nations may safely be drawn from Roman law. But I object because Paulus is speaking only of a master of a vessel who knowingly or unknowingly carries in goods subject to revenues, and in such a case it is true that he is committing a fraud if he knowingly carries the goods, for he defrauds the state if he conceals the merchandise which ought to be declared, and wittingly hires or lends his ship to such trade. Accordingly, it is now the general practice approved by the edicts of all sovereigns to confiscate vessels that are employed in smuggling, for the sole reason that they are employed in an illegal act. In Chapter 12 I employed this very distinction of Paulus in support of a rule that unless specific treaties forbade, we must condemn neutral vessels which, with their owner's knowledge, were carrying contraband goods to the enemy, since their owners were engaged in an unlawful act. But now we must stop and consider whether he has transgressed the law of nations who has in his own ship carried the goods of his friend though that friend is your enemy. You, who are my friend, certainly have no right to seize my ship though it carries goods of your enemy. I, being a friend to both, shall serve both with those goods that are harmful to neither; and in the same way, both will aid me with things that are not specifically forbidden. Your enemy may with propriety hire his vessel to me, and I may hire mine to him. About

such traders, who indeed act without intent to defraud, I have argued fully in the preceding chapter, and if that holds true we need no longer discuss the question. We may simply lay down the rule that a neutral ship is not liable to confiscation because it has enemy goods on board, whether or not the owner of the vessel knew of it, for in either case he knew that he was engaged in legal trade; and herein his case differs from that of the man who knowingly carries dutiable or contraband goods. Therefore, I do not approve of applying the above-cited distinction of Paulus to this question; I approve rather of the official opinion rendered by the Dutch lawyers which held simply that a neutral ship was not to be confiscated though laden with enemy goods.

Let us now come to the second question, whether enemy goods found in a friendly vessel are liable to be confiscated. You may be surprised that there is any doubt about my right to seize anything that belongs to the enemy, and yet in all the treaties cited in the preceding chapter (in Article 14 of the treaty of December 17, 1650, and in the following articles of the other treaties cited in order: 35, 22, 27, 26, 8, 8, 22) it is simply agreed that enemy goods found in neutral ships are exempt from confiscation, or as we usually phrase it 'free ships make free goods', except, however, contraband of war; for these, and these only, are liable to confiscation according to the treaties cited. And I interpret this last clause as referring only to contraband which is being carried to the enemy, for otherwise there is no particular reason why they should be confiscated. You may be surprised that this principle of free ships making free goods was even adopted in the four above-mentioned treaties between France and our republic, dated respectively 1662, 1678, 1697, and 1713, for if these treaties do not permit the condemnation of enemy goods in neutral ships, they much less permit the confiscation of the ships. It follows, therefore, either that the principle of the old French law, which I have mentioned above, has been entirely abandoned, or, what is more probable, that these treaties are to be considered as exceptions to it.

But however this may be, we must rather consider the dictates of reason than the phraseology of treaties. And in consulting reason, I cannot see why it should not be lawful to seize enemy goods found in neutral ships, for this is only taking what belongs to the enemy and falls to the victor by the laws of war. You may perhaps argue that it is impossible to seize enemy goods in a neutral ship without first seizing the ship, and that this act would involve a deed of violence against a neutral which would be as unlawful as attacking our enemies in a neutral port or carrying on depredations in neutral territory. In answer, I would remind you that it is entirely lawful to detain a neutral vessel in order to determine not only from her flag, which might be deceptive, but also from the documents found on board whether she really is neutral. After such a search a vessel proved neutral is dismissed while one proved hostile is seized. Now, since this is considered permissible by every law and is universally practiced, it will also be permissible to examine the documents relating to the cargo in order to discover whether any of the enemy's goods are concealed on board. If any are found why should they not be seized? The Dutch lawyers whose opinion I cited above and the Consolato del Mare pronounce, without hesitation, that the neutral ship is released while the enemy goods are brought into the port of the captor and condemned. But once more I must raise an objection against those authorities when they proceed to assert that the captor must pay the freight or cost of carriage to the master of such a vessel. This is not reasonable, since the freight is not due unless the goods are carried to the port of destination. You may argue that it was not the master's fault that the goods did not reach their destination, but it is also true that the master took the enemy goods on board at his own risk, knowing that they could be taken and accordingly brought into the port of the captor. He will, therefore, have no cause for complaint if the vessel is released empty, unless he has agreed

with the captor to carry the goods to the place of destination, thus transferring his shipping contract to his captor. In the preceding Chapter 1 laid down the same principles in a case which was the converse of this, that is to say, a case in which the ship was the enemy's, and the goods neutral.

I shall not now undertake to discuss every incident pertinent to the discussion, for if you agree with me and what I have said, you may yourself judge of the justice of what is said by Alberico Gentili and Zouche, and especially about the question which brought the English and Zealanders to such spirited contentions in the early days of our commonwealth. Zouche would release the neutral ships and condemn the enemy goods, but he follows the Consolato del Mare in paying freight to the master, though he would only pay pro rata for the portion of the voyage covered. Even if this last proposal were reasonable, as it is not, it would entail almost insuperable difficulties in the application.

After writing the above I have come upon the collected works of the illustrious Heineccius, which contain a study 'On the confiscation of ships for carrying prohibited goods'. In Chapter 2, section 9, of this essay, he briefly treats the two subjects that we have discussed in this and the preceding chapter. After reading what he says I am so far from altering my opinion that I rather feel confirmed by the judgement of that illustrious authority. If the reader has leisure to compare these views with mine he will understand why I have not seen fit to make any alteration.

CHAPTER 15
Whether Captured Goods Revert by the Right of Postliminy When Brought into the Territory of a Neutral

ONE would suppose that this question had been disposed of by Pomponius when he writes that a citizen who has been captured by the enemy is understood to be returned among us 'if he arrives among our friends or upon our territory'; for the rules of postliminy that apply to persons apply equally to things. When Pomponius uses the phrase 'among our friends' one might suppose that he intended to include neutrals, since neutrals might well be considered friends. But Grotius holds, and in my opinion rightly, that the word 'friends' does not include all with whom we are at peace, but only those who are engaged in the same war with us. And Grotius gives the same interpretation to the passage in Paulus, who says that not only those who have entered our territory are considered as having returned to us by right of postliminy, but also those who have arrived within the dominions of a 'friend or ally', because there they begin to have political protection. If we interpret the or as conjunctive, since it is frequently used as an explicative, the passage in Paulus will support the interpretation of Grotius, and the phrase means: a friend, or in other words, one who is allied to us. If we should interpret the or disjunctively, it would be sufficient for the prisoner to return to any country at peace with us, as Alberico Gentili holds. Gentili, in fact, ought not to base his whole argument upon the motive adduced by Paulus, namely, that 'there they begin to have political protection', for this argument would be even more applicable under our interpretation that the prisoner must return to the territory of an ally.

The opinion of Grotius was previously held by Antonio de Gama, whom Gentili therefore undertook to refute. Zouche is as usual content to relate the different opinions of others without giving his own judgement, although he seems to me somewhat to favor the view of Gentili. Grotius, moreover, supports his view merely by precedents without adducing reasons for what he says. In the note referred to above he says: 'Among those who are friends but not allies, captives do not change their status unless this has been stipulated in treaties,' a rule which he adduces from the second peace treaty between Rome and Carthage. But Zouche properly observes that it is not entirely clear whether the rule adopted in that treaty should be considered a principle of international law or an exception to it. In various treaties of modern as well as ancient times this uncertainty arises so frequently that it is a dangerous thing to adduce the rules of the law of nations from treaties alone without also consulting reason. In his notes Grotius adds that it appears from de Thou that the King of Morocco and Fez held the same opinion, but no one would care to accept such men as teachers of public law. Huber agrees with Grotius when he defines as 'returned' a prisoner who has come back to our territory or to that of an ally. Hertius also agrees when with many others he derives the right of postliminy not from the law of nations, but from national law. Hence he answers 'the question so often argued between nations, whether a captured person or article secures liberty by right of postliminy upon entering neutral territory'. His answer 'is in the negative, since neutrals must accept facts as law, and are not in a position to overrule the status of the captive'.

However, if we consider this question from the point of view of reason alone, this whole discussion seems to me so idle that I wonder that so many brilliant men have concerned themselves with it. He who returns to the territory of an ally has the right of postliminy because he seems to have returned to his own country, since allies constitute as it were one nation with us. At any rate, so far as concerns the war which is being fought with common forces, they are not to be considered as

separate nations. Therefore, I would interpret the term 'friends', as used by Pomponius, as being friends in the highest degree, that is to say, those who are in alliance with us against the same enemy; and when Paulus speaks of 'friend or ally' I would interpret the phrase as meaning: 'friend, that is to say, ally', otherwise he might have used only the word 'friend'. It is only among allies and because of the actual alliance, that the right of postliminy obtains, but among those who are simply friends of both parties the status of persons and things does not change, since there is no reason for a change. I am accordingly surprised at the view of Gentili and others, who think that whatever is brought within neutral territory reverts by right of postliminy, and consequently that prisoners of war become free on entering neutral territory. This incorrect doctrine about prisoners is fully stated by Joannes de Imola and Pierino Belli, with whom Zouche seems to agree. But it is so clear that the very contrary is true, that not even the Sceptics would seriously have doubted this fact; for all agree that ownership is established by capture in war, and that this right continues in the country of a friend. If this is true, then the prizes and prisoners that I have taken remain mine. By what right then can a sovereign who is our friend take from us goods that are lawfully ours and give them to others who are no more his friends than we are? It is absolutely clear that this cannot be done without injury to us. Neither can he do this by his courts of justice, for he cannot judge between us and our enemy except by agreement. Since, therefore, captured goods remain in the same status in neutral territory, the Swedish ambassador was wrong when in 1657 he claimed the right of possession of letters of his that had been intercepted by the enemy, the Danes, and delivered over to the States-General, a friendly power.

Sometimes, however, states adopt different regulations in their treaties, as for instance the Romans and Carthaginians in the above-cited second treaty of peace, which Grotius quoted from Polybius. Again, in Article 20 of the treaty of peace between the King of Portugal and the States-General, dated August 6, 1661, it was agreed that whatever property the enemy of either party should capture and carry into a port of the other should revert to the original owner if demanded within a definite time after the capture. But such treaties cannot but result in injury to those who capture goods and bring them into a friendly port in the belief that it is safe. Hence such treaties can neither alter reason nor the law of nations. He who desires a fuller statement of this view will find it in Cunaeus, De Causa Postliminii, and Loccenius, De Jure Maritime, who gives an epitome of the arguments of Cunaeus.

These principles obtain only if the goods have been captured in a just war, for if the captors are pirates, the goods must by all means be restored to their former owners. And such is the stipulation in Article 4 of the treaty of September 24, 1610, between the Sultan of Morocco and the States-General, in Article 20 of the peace of Portugal of August 6, 1661, in Article 45 of the commercial treaty between the French and the States-General of April 27, 1664, and in Article 11 of the peace of September 14, 1662, between the English and the States-General. It is indeed a rule of law adopted everywhere that capture by pirates does not change ownership; and this subject has been very fully treated by others as I shall show in Chapter 17.

According to the above-said, if our property that has been captured by the enemy reaches the territory of our ally, it is restored to us as though our ally had delivered it from the control of our common enemy. And yet the French in an instance of this kind once adopted a different practice, in consequence of which the States-General on December 4 and 5, 1637, retaliated by adopting the same practices against the French.

It is more doubtful whether our enemy can sell in neutral territory and exact the price for goods taken from us. Article 12 of the peace with England made on September 14, 1662, stipulates that such sales cannot be made, and that if the price has not been paid the article is returned to the former owner; and Aitzema relates that the States-General ordered the observance of this clause in a case that happened afterwards. But I should like to know what rational ground there was for this clause. Was it adopted in the belief that our enemy would benefit by the right to sell? But that is by no means certain. It certainly is lawful for us to aid our friends even though they be hostile to each other, provided we do not aid them with instruments of war or show more favor to one side than to the other. We cannot, therefore, be required to close our ports to our friends and prohibit all intercourse between them and our citizens. I therefore think that this Article 12 must be classed with special treaties, of which we do not know the particular grounds and reasons; for in general we may retain ownership of our property in neutral territory, whether we have acquired the property by the civil law or by the law of nations.

However, though this permission to carry captured goods into neutral territory and to sell it there is entirely reasonable, it has repeatedly been explicitly denied. On August 9, 1658, the States-General decreed that no foreign captor who might be compelled to bring his prize into our ports should sell it or unload any part, but he must announce his arrival to the master of the port, who must place a guard to watch the ship until it could depart, imposing furthermore a minimum fine of a thousand florins upon any one who would buy anything from the vessel or assist in unloading. On November 7 of the same year, they added to the edict a new clause to the effect that no one should bring such a vessel into the very harbor, but merely into the outer roads, for safety's sake, and that no one should sell anything or unload any part of the cargo, and that if any one acted to the contrary the prize should be treated as not captured and returned to the former owner, the captor should be arrested and his own vessel seized and condemned, if he was proved guilty. The rest of this supplement is in agreement with the edict of August 9, 1658. Whether this edict was wrested from the States-General through fear or through some other cause, I do not know; but we would do well to accept these rules as temporary, not as final, lest in the future they militate against rational principles.

CHAPTER 16
Miscellaneous Questions Regarding the Right of Postliminy

GROTIUS properly says that the principles of postliminy may be applied to a whole people, since, for example, a nation once free may regain its freedom if some ally liberates it from the dominion of the enemy. Hotman argues to the same purpose; and yet there is reason for doubt whether this principle has always been accepted everywhere in the United Provinces. In the case of the city of Groningen there apparently was no doubt; for although Groningen, when occupied by the Spanish, lost membership in the Union of Utrecht, yet when conquered again by the Prince of Orange, it returned to the Union, as is specifically stipulated by Article 2 of the regulations by which Groningen was surrendered on July 22, 1594. And yet I have never been able to discover that the city of Groningen ever subscribed to the articles of Utrecht, though I have found that the district of the Ommeland had. George van Lalaing, the Count of Rennenberg, who was governor of Friesland, Overyssel, and Groningen, subscribed to the articles on June 11, 1579, but he does not say that he signed as governor, hence it is a reasonable inference that he signed merely as an individual, as William I of Orange signed as an individual on May 3, 1579. If it is true that Groningen had not subscribed to the articles, the city might be taken by right of war, and in that case the city might be considered as captured rather than as recovered, and as belonging to the Union not by right of postliminy, but according to the rules of capitulation. Indeed, it is apparent from history that the people of Groningen were usually favorable to the Spanish, and that even after their surrender they were more agreeable than was seemly. However, the above-cited Article 2 speaks as if Groningen actually returned to the Union, not as if she was now for the first time admitted; and we have even stronger reasons for speaking of her as returning, because, as I have learned from the public documents, the people of Groningen on June 11, 1579, sent delegates to participate in the congress of the States-General, and to discuss the question of a commonwealth with the other members of the league. But even if this is so, Groningen did not return as a city of equal rights with the rest, since Article 5 of the above-cited regulations stipulates that, in case of unsettled disputes between the city and the Ommeland, the States-General should arbitrate, a provision which was forbidden by Article I of the Union of Utrecht. But of these things I may speak more at length in Chapter 23 of the next book. Here I wish only to call attention to the fact that, though Groningen returned to the Union, she did not regain her full rights of postliminy. For whatever reason, Groningen bound itself to the arbitration of the States-General by the above-cited Article 5; the people of the Ommeland did likewise, on account of the strength of the neighboring city, I suppose.

The people of Drenthe were received into the Union of Utrecht on April 11, 1580, but were afterwards subjected to the rule of Spain. Then when the Spaniards withdrew, they apparently reverted to their original status. And as early as 1618 they petitioned to be admitted as members of the Union in full standing. On October 27 and November 21, 1618, the States-General ordered a discussion of the question and referred the question to the assemblies of the various provinces. These were inclined to grant the petition, and most of them empowered their delegates to act favorably. Nevertheless no decree was passed. The people of Drenthe renewed their petition in 1633, but the States-General on February 19, 1633, passed the same decree as in 1618. Again the petition was presented a third time in 1643, but the States-General on October 9 and 13, 1643, answered as before. Furthermore, by a letter written in the name of the States-General (November 6, 1650), and erroneously signed by their presiding officer, the people of Drenthe were invited to an irregular meeting of the States-General, but when they arrived they were refused admittance. Again they

asked to be admitted, or at least to have their plea submitted to impartial judges, but in July, 1651, the case was simply referred to the ordinary session of the States-General. And they have not yet been admitted, and so far as I know they have not even been openly refused. It would indeed seem to be unjust that, while they are not admitted, neither the decrees of the general body nor those of the provinces give any reason for refusing. It might perhaps be said that the people of Drenthe did not renounce their allegiance to the King of Spain as the other members of the Union did on July 26, 1581, and that, having remained under the dominion of the Spaniards, they were to be treated as conquered people. But I would not exclude them on that account, since I am not certain that they forfeited their place in the Union by failing to renounce their allegiance to Spain; nor have I found this offered as the reason for refusing their petition. I therefore do not see why the people of Drenthe should not enjoy the right of postliminy.

The people of Brabant, who had been subject to the King of Spain, but subsequently taken by the United Provinces, also petitioned in 1648 for admission into the Union of Utrecht, or, if not that, at least that they might have autonomy. It is recorded that the assemblies of certain provinces empowered their delegates to grant this, but nothing was accomplished. They again presented the same petition at the special session of the States-General on March 22, 1651, but again without success. Their arguments as presented in 1648 and in 1651 may be found in Aitzema. Of the cities of Brabant here concerned, Breda alone had been received as a member of the Union on September 15, 1579. We may therefore say of the people of Breda what we said above of the people of Drenthe; the rest of the cities, however, had no right of postliminy.

The case of Gelderland, Utrecht, and Overyssel, three of the seven United Provinces, comes more properly within the law of postliminy. These provinces were taken by the French in 1672, and afterwards recovered by us when the French evacuated. When they fell into the hands of the enemy they lost their position in the Union, and their delegates were then properly ordered no longer to attend the sessions of the States-General. But when they were again recovered, they apparently returned by the right of postliminy to their original status, since parts of states that are sundered off, as in this case, are restored to full rights, even as the above-cited rule of Paulus grants full restoration to captive individuals who have returned 'to the territory of their own or of a friendly or allied state'. Indeed, on April 20, 1674, the States-General decreed that their former status and position in the Union should be restored to them. Nevertheless, Gelderland was deprived of one vote in the assembly of the States-General, and several other privileges were elicited from them by bargain before they were readmitted; indeed, they were ordered to take the oath of allegiance anew, as if they had not been members before, as the above-said decree reveals. But if, as is everywhere declared and practiced among nations, all privileges are restored by the right of postliminy, just as if the captivity had not taken place, everything should have been restored to those provinces which they enjoyed before their capture. The right of postliminy was theirs by every law, why then was a part of their rights retained; and if on the contrary they were not entitled to it, why was anything granted them? I know the arguments that are brought against the right of postliminy, but to enumerate them here, and, even more, to refute them, would be a thankless task. At least we need not adopt the argument of the state counselor who held that goods of allies rescued from the enemy are not restored by reason of postliminy, since the decrees of the States-General of April 19, 1659, and February 5, 1666, speak only of subjects. I grant that these decrees do not speak of allies, but that is merely because those decrees do not happen to be concerned with allies. And even if the point must be decided by those decrees, certainly those should be considered as subjects of this

commonwealth who constitute so large a part of it. Others hold more properly the opinion that there ought to be no difference between subjects and allies in the matter of postliminy. Therefore, the decree of the States-General of October 23, 1676, which I mentioned in Chapter 10, gave the right of postliminy not only in favor of those things which were taken on board of our vessels and afterwards recovered, but also of goods taken from the vessels of our allies, or of neutrals and again recovered. And, as I observed in the preceding chapter, the States-General expressed the same opinion at other times also, condemning the opinion of the French which followed a different principle.

When the States-General had taken from Spain, the then overlord, certain parts of Brazil and other places that had formerly belonged to Portugal, it was agreed in Articles 21 and 22 of the ten-year truce between Portugal and the States-General, dated June 12, 1641, that the latter could not permit the former to claim any restorations of such territory by any alleged rights of postliminy. However, the discussion arose again in 1657, for then, contrary to the treaty, the Portuguese King took from the Dutch certain places in America, and the Dutch accordingly sent them envoys to demand restitution. The Portuguese responded that, since the ten years had passed, that treaty was no longer binding, and that they neither could nor would restore the territory, though they were ready to make some compensation in money. And when the envoys of the States-General refused to accept this answer, a war was declared upon Portugal on October 22, 1657. Finally, the dispute was composed by the treaty of August 6, 1661. It is indeed apparent that the Portuguese were right in laying claim to the restoration of the places seized by the States-General, for the latter admitted that Portugal no longer belonged to the King of Spain. We must add that the Portuguese were allies of the States-General against Spain, in consequence of which the territories of the Portuguese, which had now fallen into our hands; reverted to the Portuguese ipso jure by the right of postliminy, according to the above-cited law of the Digest. It is indeed true that there were no kings of Portugal when those places came into our hands; however, when Portugal was restored, her king was entitled to resume possession of the places which her allies had taken from the enemy, saving the right of the States-General to place a claim for expenses incurred in the occupation, and to that fact the first article of the treaty of August 6, 1661, seems to refer.

CHAPTER 17
Regarding Pirates, and the Status of the Barbary Peoples of Africa

IT is of interest to define the terms 'pirate' and 'robber', since things captured by these are not considered to have changed masters, and accordingly do not require an application of the principles of postliminy. This rule is supported by reason, by Roman Law, and by various treaties, as I have shown in Chapter 15. I need not, therefore, add the authority of Grotius, Alberico Gentili, Zouche, and others, who hold the same opinion. Now, those who rob on land or sea without the authorization of any sovereign, we call pirates and brigands. Hence we punish as pirates those who sail out to plunder the enemy without a commission from the admiral, and without complying with Articles 5 and 69 of the rules of the Admiralty of August 13, 1597. Furthermore, the edicts of the States-General of July 27, 1627, and April 26, 1653, stipulate that no inhabitant of the United Provinces may sail out from a home or other port, with a commission from a foreign prince, and that no one who holds a commission from the admiral of the United Provinces, may accept another from a foreign prince without the permission of the States-General, and they add that any one who infringes these rules shall be punished by the forfeiture of life and goods, and the sum of money deposited as security before sailing. And it is indeed very reasonable that those should be treated as pirates, who sail out for depredations on a commission of a foreign prince, or of several princes, who have not the same friends and enemies, for if this were permissible they might plunder neutrals and bring our state into war with other nations. Even the States-General specifically announce that such must be considered as pirates by the edict of January 29, 1658, an edict that was perhaps called forth by the acts of those who, in November, 1657, committed depredations on double commissions from France and Portugal.

But what are we to say of those who use double passports, as shipmasters often do in order the more safely to carry contraband and commit other frauds? They are not indeed as guilty as pirates, and yet, Article 5 of the edict of the States-General against the Portuguese of December 31, 1657, has ordered the vessels and goods of such to be confiscated. Certain inconsequential lawyers have put forth the sophistical argument that such acts do no harm unless committed in such a way as to defraud us, but this is hardly convincing, for it is of importance to the state that good faith be preserved between sovereigns and their subjects, and that no injury be committed through fraud.

There are also various other persons who are punished as pirates on account of the atrocity of their crimes, though they are not actually pirates, as for instance those who sail too near the land contrary to the prohibition of the sovereign. So the States-General, on February 24, 1696, decreed that no French privateer should come close to land within the buoys, without a protecting fleet, under penalty of death, and the people of Groningen carried this decree into execution on March 14, 1696. I have discussed the justice of this act in Chapter 3. Those are also punished as pirates who commit frauds in matters of insurance according to Article 22 of the 'edict on insurances' of Philip II, dated January 20, 1570; and also those who cut the nets of the herring-fishers, according to Article 23 of Philip's decree, dated March 9, 1580.

However, I do not think that we can reasonably agree with Alberico Gentili and others who class as pirates the so-called Barbary peoples of Africa, and that captures made by them entail no change in property. The peoples of Algiers, Tripoli, Tunis, and Salee are not pirates, but rather organized states, which have a fixed territory in which there is an established government, and with which, as

with other nations, we are now at peace, now at war. Hence they seem to be entitled to the rights of independent states. The States-General, as well as other nations, have frequently made treaties with them, and I may refer to our treaties of April 30, 1679, and May 1, 1680, by way of example. Cicero defines as a regular enemy 'one that has a commonwealth, a senate, a treasury, the unified support of its citizens, and that shows some respect for treaties and covenants of peace when an occasion is offered to make one'. All these requirements they satisfy; they even have some respect for treaties, as other nations have, though nations are usually more concerned about their own advantage than about treaties. That they should have complete respect for treaties, no one could require, since we cannot require that even from other nations. And Huber observes that they do not properly deserve to lose the rights and the name of a sovereign state even if they acted with less justice than others. Indeed, the people of Algiers form a commonwealth so that envoys are sent to them, and those who are captured in war by them change their status and become slaves. Hence those who have been captured by Algerians have sometimes been redeemed not only privately but even publicly. So the Estates of Holland on September 25, 1681, decreed that the bailiffs should report to the respective magistrates the persons out of their cities that were captured by Algerians, and that these in turn should report to the counselors of the Estates of Holland so that these might take measures to effect the redemption of the captives. It may be that the Spaniards do not consider the Barbary people as deserving to be reckoned among regular enemies, but that applies only to the Spanish. Indeed the Dutch carry their Barbary captives to Spain and sell them into slavery there on the ground of retaliation; but this is practiced according to the laws of war, which can properly be invoked against any enemy under such conditions as I have discussed in the third chapter.

There was, however, a certain case which seemed to entail the inference that those Africans were to be considered as pirates, and that, therefore, property which they captured did not thereby change ownership. The Admiralty of Amsterdam on July 15, 1664, restored without salvage a vessel which the Algerians had taken from the English, and the Dutch admiral had later recovered from the captors; and, as Aitzema relates, this was done by order of the States-General at the request of the English ambassador in the hope that the English would do the same for us in similar cases. But lest this case be used as a general precedent, we must note that the Algerians had seized this ship at a time of peace soon after signing a treaty of peace with England and Holland, and that this circumstance was the sole reason why the ownership of the English vessel was not considered altered; at least that is the reason which Aitzema attributes to the English ambassador. Whether or not his argument is sound I shall not now consider; I am content to observe that the case must be considered as peculiar, as indeed it was considered by both parties involved.

There has often arisen a discussion regarding what court has jurisdiction in the trial of pirates. Our first question is whether cases of piracy belong to the common court or to the court of admiralty. So far as the United Provinces are concerned, and we are chiefly concerned with our own government, we may refer to the third clause of the regulations which the States-General drew up for the Admiralty on August 13, 1597: 'This court shall have jurisdiction over all booty and all prizes that may be taken and brought in by vessels of war or by privateers fitted out under orders of the admiral; it shall also have jurisdiction in all questions and differences that may arise between any of the above-mentioned vessels of war or regarding the aforesaid privateers in respect to all crimes and misdeeds that may be committed by any of these, and also over such as may be found in or accused of any act of piracy.' I have given this tedious phraseology in full so that the reader may judge for himself what it means; for the last clause, regarding piracy, might perhaps be taken merely as a

qualification of the preceding statement about warships and privateers. If this be true, the clause would merely mean that accusations of piratical acts brought against our own war vessels and privateers belong to the Admiralty, while other cases of piracy belonged to the common courts. But the clause may also be understood disjunctively as containing a general rule about pirates, as the phrase 'and also over such' implies. The same implication that the rule is general is found in the phraseology of Article 18 of the same regulations: 'When any pirate or any other public enemy is brought to port the lieutenant admiral shall if possible attend on all court days and especially when the final judgement is to be pronounced.' This certainly is a general statement applying to piracy, and is no mere qualification of another rule.

An Englishman, whose ship was captured by three Dutch commanders, claiming that the seizure was illegal, arrested one of the commanders and hailed him before the court at Amsterdam. This court, however, released the man and referred the case to the Admiralty, and, as Aitzema says, the States-General in a decree of 1662 pronounced this act to be in accordance with well-known principles. This decree was correct if, as in that instance, the commander is proved to have failed in his duty, or if it be a question of one who has sailed out as a privateer under official orders; for the Admiralty has jurisdiction in such cases only, according to the above-cited Article 3. Accordingly, all actions brought against others for the recovery of damages for illegal seizure belong to the ordinary courts, though this fact is sometimes disregarded through carelessness.

If any one who has committed depredations upon us should be captured, even though he be a foreigner, I do not doubt that he can properly be tried and punished by our courts, and that not only if he is arrested in the act, but also if he is arrested among us on any other occasion. To this principle every one will agree if he committed the plundering against us without letters of reprisal from his sovereign; if, however, he did it under a commission and it is only charged that he exceeded this, then there would be greater room for doubt. This question arose in 1667 between the English and the States-General when they were discussing those who had continued in time of peace the depredations which they had, under letters of reprisal, carried on during hostilities. The English contended that the sovereign who had given the letters ought to have jurisdiction; the envoys of the States-General urged that those who committed hostile acts without a legitimate commission from their sovereign, should be treated as pirates, that it was the law of all nations that such could be punished by any sovereign into whose hands they chanced to fall, and that this principle was supported by numerous precedents. The French envoys at that time concurred in this view, and this principle was accordingly adopted by the English and the States-General. But the question whether or not a man is a pirate depends upon whether he carries a commission as a privateer; if he has such a commission and it is charged that he has exceeded his commission, I should nevertheless not at once pronounce him a pirate. Sovereigns generally assume jurisdiction over their own commissions because the prizes are brought to them; however, I should readily permit such decisions to be made by the sovereign whose subjects complain about depredations if the culprit is taken in his territory or is brought before him. In Article 22 of the peace between the King of France and the States-General, dated April 27, 1662, it is agreed regarding ships seized by privateers that the cases of such should not be tried except in the courts of the sovereign which furnished the commission.

It is more difficult to decide whether a foreigner who has committed depredations upon foreigners can be brought before our courts when taken upon our territory. This question was raised in 1661 in connection with a man who had received a commission from the King of Portugal, and had

plundered subjects of a nation at peace both with us and with Portugal; since, however, the pirate died before the case was tried, there was no decision. In 1668, at the request of the envoys of the States-General, the King of England ordered the detention of an Ostend ship which, while bearing a commission from the Spanish King, had seized a Dutch ship, and he commanded that the laws be enforced against the commander. If, as in the two edicts of Holland cited at the end of Chapter 15, the laws ordain that no one may sell ships and goods captured on a foreign commission, except when condemned at the port of the sovereign issuing the commission, it might seem unjust to give an action against the captor, either to the government, on a criminal charge, or to the foreign owners of ships and goods, for the damage suffered. Both foreigners ought to have the same rights; either the injured party can here bring his case against the captor or he cannot; if he can, then the captor also should have access to this court to prove that his prize was legally captured. And yet it would be hard and unexampled to deny access to the courts to the owners of the ships and goods who found their property here in the hands of a foreigner who might depart at any moment. And if you grant that, you can hardly refuse the captor. Accordingly, there is an added reason why I do not approve of those two edicts of the States-General.

The usual punishment of pirates is the forfeiture of life and goods, as may be inferred from all the above-cited edicts dealing with those who are to be treated like pirates because of the atrocity of their crimes. We have also a special edict of the States-General, dated August 25, 1611, directed against pirates and their aiders and abettors, by which these are punished with the forfeiture of life and goods, one third of the goods being given to the informer. The penalty therefore is capital, and the judge does not have the privilege of mitigating the penalty, though the severity of the mode of inflicting the penalty is usually varied according to the prevalence of the crime and to other attendant circumstances. Indeed, this matter is usually left to the discretion of the judge, as is generally the case in crimes for which the death penalty is simply prescribed.

CHAPTER 18
Regarding Privateers

THE treatment of privateers also belongs to public law, not only because privateering requires public authorization, but also because controversies that arise out of it frequently disturb states and bring them into conflict. It was formerly the practice at Rome, that he who was not a soldier of the Roman people was not authorized to attack an enemy of the Roman people, according to Cato's opinion, quoted by Cicero and Plutarch. But later the Romans adopted the law of Solon mentioned by Gaius, in accordance with which a partnership formed for privateering was recognized. Princes have now, for a very long time, employed the resources of individuals in addition to their public resources against their enemies. Formerly, in the United Netherlands, those who managed the war vessels were private individuals, and to them, besides the premiums taken from captured and recaptured ships, there were paid certain sums from the public treasury proportioned to the expenses incurred and to the time during which they had served. Those ships of private individuals were called cruisers, and the States-General employed them to a great extent against the Spaniards. Several edicts were issued regarding them, which it is needless to recite. Now as formerly individuals have carried on war with their own ships, sailors, and soldiers, and at their own risk, with no other inducement than the hope of such maritime booty as they may take. These are called 'Capers' and 'freebooters', or by the more respectable name 'privateers'. I do not know whether the brigands (latrunculi) spoken of in the Roman law belonged to this class, nor can the question be determined. Furthermore, I cannot agree with Alberico Gentili who, in various passages of his De advocatione Hispanica, and even in his discussion of the law then observed, called privateers pirates, and considered them as deserving to be treated as pirates. But this is so absurd that it does not require a studied refutation, for privateers act wholly under authority, and they do not sail out except under commission from the States-General or the admiral, countersigned by the vice-admiral of each specific district, and after taking an oath under an appropriate bond not to do any damage to neutrals. These and similar rules pertaining to the regulation of privateers are to be found in the charter of the admiralty, in various edicts of the States-General, and in special laws (regulations of privateers) which the States-General have issued from time to time to privateers, when various nations have brought charges that their acts were unjust. But I have neither the time nor the inclination to enumerate and to quote all these documents, which are or at least can be made available to all.

It is more worth while to inquire whether captains, who have been put in command of privateering vessels by the holders of the commission and have been hired to commit depredations, can legally enter into a partnership with each other for sharing in the prizes which they may take separately. If they have been hired merely to take booty and they have no further charge, it is certain that they have no authority without the consent of their principals, and hence any agreement entered regarding the division of spoils is null and void. One cannot offer as a valid objection to this the fact that in the above-mentioned law of Solon cited by Gaius, partnerships formed to take prizes are valid, as I translated and explained the law in my Observations, for it is apparent that Solon had reference to those who are their own masters and go out to plunder on their own account, as, for instance, if owners of vessels thus go out using their own ships, sailors, and soldiers, like the receivers of commissions whom the Dutch call reeders. If such owners of vessels form partnerships for the division of the prizes or any other purpose these are certainly valid, because every man may dispose of his own as he sees fit; but one could not transfer this rule to captains of vessels unless, as is very seldom the case, these are also the owners of the vessels. Our present concern is with those who,

when hired merely as privateers, exceed their authority by entering into agreements with each other. There was an important case of this kind which was carried even to the court of review. A privateering vessel belonging to A and another belonging to B seized an enemy vessel together, and then, according to B, the captains of the two ships made an agreement to share equally in whatever booty would be taken thereafter. They presently separated, and the ship of A alone made a capture, which B at once claimed should be divided according to the agreement. A denied that the contract concerned prizes which they took separately, and held that even if it did, the contract would be void; and this view was sustained by the court of Flushing. But when B appealed to the supreme court he won his case on March 3, 1696, and the court of review sustained this decision on October 4, 1697. With this decision, the official opinions rendered in another case agreed, and the Admiralty of Amsterdam had even before, in 1665, given a similar decision.

But even if the contract was as B claimed, I hold that all of these decisions and opinions are erroneous except that of the court of Flushing. It was with amazement that I found, in reading the reports of the supreme court, into which were inserted the individual opinions of the judges of both courts, that in this case the only question discussed was whether there had actually been an agreement between the two captains that they should share prizes taken separately, or only those taken in the presence of both. But no one concerned himself about the point of law which particularly disturbs me. Grant that the contract called for the division of all booty, for I will not raise that question, I still hold that A cannot be involved by the contract of his captain. A sent out his captain with the intention of bearing losses and gains alone, and he commissioned him only to take prizes, not to enter into a partnership regarding gains and losses, for he could himself have made the contract with B had he so desired. Accordingly, whatever agreement A's captain made, he entered into without instructions, in which case he could not bind his principal. I grant that if B's ship had alone captured a prize, A might readily have been persuaded to accept a share, nor would it then have been difficult to persuade B to make the defense that A has made. The first prize, taken by their common efforts, became common property by a kind of implied contract arising out of the circumstances of the case, but this was not true of the second, which A's ship took while alone, and which A will keep as his prize if, as I think, he is not bound by the contract of his captain. Hence, setting aside the question of fact, I prefer on legal principles the decision of the court of Flushing to all the others.

Furthermore, we must carefully consider the question of the division of booty in cases where ships are present though not participating in the battle when one or more vessels are engaged in capturing a prize. With reference to warships there is a rule in the decree of the States-General of January 28, 1631: 'that one ship may aid another ship attacking, but not if the first shall call out that he does not need assistance.' However, this seems to me to be a special rule applying to war vessels, otherwise there is nothing to hinder one armed vessel from joining another in attacking and capturing a common enemy who is not yet subdued. For the same reason, I consider as a special rule the sixth article of the charter which the States-General on July 15, 1633, drew up for the privateers cruising against the Spanish in American waters, and which states that 'a privateer shall not have a share of the prize which he takes jointly with a ship of the West India Company unless he was explicitly called upon for aid'. I would also consider as a special rule the seventh article of the same charter, which states 'that privateers shall not, on pain of forfeiture of ship and goods, interfere with the captures which the company's ships wish to make'. However, if a privateer is called upon for aid, and takes a prize together with a ship of the Company, the prize is divided, but, according to a

principle now generally accepted, the division is made in proportion to their respective size and force, as the sixth of the above-cited charter of 1633 defines. And if the ships are equal in force each receives a half of the prize, otherwise it is better to observe what is called a geometrical proportion.

But what shall we say if two or more privateers pursue a hostile ship, or again if several ships are near by without being participants in the capture, while in either case a single ship captures the prize. According to the decree of January 28, 1631, which I mentioned above, 'the prize is divided between all the vessels of war which pursued the prize, but the ship which actually made the capture shall have the provisions, the small arms, and the plunderage'. But, as you see, the decree is concerned with vessels of war, the prizes of which the government has at its disposal; otherwise if it were a matter of privateers, I should rather assign the prize to that one alone who attacked the hostile ship and captured it, however numerous may have been the ships in pursuit or in sight. And yet there are those who grant a share of the booty even to those who were near or merely within sight, but with such a view I cannot agree. I grant that the mere presence of others might have the effect of making the capture or surrender easier, but we are not concerned with the causes of the surrender, but rather with the question of who made the capture. Neither would we admit to a share of the booty a fort, town, or fleet in whose presence a capture was made, even though it might be said that the capture was made especially through fear of one of these. But it is clear that if another vessel shared in the attack, an accidental partnership has come into being between them, which requires that the prize taken by their united strength be shared in proportion to the forces employed by each. But in a case of this kind we do not attempt to determine how great an effort each made, since this would be very difficult in practice, but whether the assisting vessel actually took part in the battle and contributed somewhat to the victory by actual deeds. The principle is somewhat similar to that of the civil law, which adjudges animals of the hunt not to all the huntsmen who pursue, but to those who actually make the capture.

If there be a contract for mutual defense, as is often the case with merchantmen, and one ship in the partnership takes a prize, the question arises whether all the partners share or whether the captor should have the whole prize. The counselors of State have held that if the capture was made without a special agreement, the prize falls to the ship which makes the capture, and that this rule is not vitiated by the fact that losses are shared by the partners, since these are not apportioned by any general rule of the partnership but on the principle of 'gross average'. This opinion seems to be correct, and it is on this principle that the States-General, in Article 54 of the edicts published from time to time regarding such partnerships, have decreed the public sale of booty 'for the reward of those who furnished assistance in the capture'. Such partnerships, indeed, are not made for the sake of gain, but only for the sake of avoiding loss. For that reason the losses are shared, as Grotius explains in his Inleiding tat de Hollandsche Rechtsgeleertheyd, and Loccenius, De Jure Maritime, properly observes that this practice of sharing is inherent in the very nature of the partnership.

But the contracts neither say nor imply anything concerning the sharing of gains, nor can there be any implied contract if the purpose of the partnership precludes it. And yet one might conclude from certain phrases that gains as well as losses were shared; for when Article 48 of the above-cited edict stipulates that losses shall be borne in proportion to the value of each vessel, Article 49 adds that the value of ships shall be so reckoned for damages as well as for profits. What then is the intention of this phrase unless booty is also shared by the whole partnership? This phrase can and must indeed be understood to refer to ships which actually aided in the capture, so that we are to divide the shares

for aid, as the above-cited Articles 54 and 9 explicitly state, and this proportion should, as I said above, be geometric and not arithmetic.

There remains the question of what court has jurisdiction in questions of military and naval booty. The edict of the Earl of Leicester of April 4, 1586, stipulates that the magistrates of the nearest place or those appointed for the task shall decide on questions of prisoners, and I assume that the general rules about prisoners should apply to all booty. Indeed, in the time of Leicester, the different provinces were more concerned than later that the States-General and their officials should not assume too much power. We should, so far as possible, support the constitution of the Earl of Leicester, but Article 3 of the charter of the Admiralty of August 13, 1597, from which I quoted in Chapter 17, precludes our following his regulations in the matter of maritime booty. When we consult this charter it becomes apparent, as I showed above, that the Admiralty had been granted jurisdiction only over booty taken at sea by war vessels or by privateers sailing under a commission from the Admiralty. This jurisdiction of the Admiralty is wholly delegated, and there is an invariable rule regarding delegated jurisdiction that what is not specifically delegated, reverts to the jurisdiction of the parent court. Hence, if ships, like merchantmen that sail without a commission from the Admiralty, should meet and capture an enemy vessel, the prize would come before the court that has ordinary jurisdiction. If soldiers should happen to capture an enemy vessel the military court would have jurisdiction. Nevertheless, when the count of Styrum, then prefect of Muiden, took some ships on the coast of Gelderland near Nijkerk, and decided that the military court of Muiden should adjudge the prize, the Estates of Holland decreed on April 14, 1673, that jurisdiction belonged to the Admiralty of Amsterdam, for it was a well-known and established rule that the Admiralty was competent in cases of booty taken upon the seas and rivers. But I do not see how this can be so, since the ships that-made the capture were neither vessels of war, nor privateers carrying commissions from the Admiralty. Let us conclude as follows: regarding booty taken by ships bearing commissions of the Admiralty, the Admiralty must judge, according to the cited Article 3; regarding booty taken on land or sea by soldiers, military courts must judge, since these have jurisdiction over the behavior of the army, and civil courts must judge in civil cases; and here I would define as civil courts those that have jurisdiction in ordinary cases. Regarding booty taken by soldiers on land, the counselors of the Estates of Holland formerly pronounced judgement in accordance with Article 10 of the ancient charter of January 22, 1590. But this article is not found in the new charter of October 4, 1670, and the old practice is no longer observed.

CHAPTER 19
On the Responsibility of Owners of Privateers

ACCORDING to Articles 5 and 69 of the charter of the Admiralty of August 13, 1597, privateers shall not sail out without giving an appropriate security for their actions, that is to say, that they will do no injury to neutrals, as is explained in Article 5 of the charter by which the States-General on July 15, 1633, authorized privateering against the Spanish in American waters. However, these articles simply say that security must be given without specifying whether the captains or the owners or both should give it. The edict of the States-General of April 1, 1622 also fails to be specific on this point. This edict in fact simply requires a bond of ten thousand florins 'secured by the ship and the cargo to insure that the prizes shall be brought to legal adjudication before the Court of Admiralty of the place where the security is given', without any prejudice to the case of injured parties against the captain or whoever else may have wrought any injury. It is apparent that the bond is here given for a different purpose from that of the above-cited sections 5 and 69. Though the last clause does not specify who is to furnish this bond often thousand florins, it seems to me that the captain alone is intended, since it is his duty to bring the prize to the port whence he sailed, and also because the decrees of the States-General of August 9, 1624, and of October 22, 1627, stipulates that the captain must enter security for ten thousand florins and the owner for twelve thousand, the latter amount being security to cover damages caused by the privateer. The last-named decree adds the stipulation that if the twelve thousand florins of the owner are not sufficient for the reparation of damages, then recourse might be had to the bond of ten thousand furnished by the captain. Such were the old stipulations; but according to section 3 of the most recent regulations drawn up for privateers by the States-General on July 28, 1705, a bond of thirty thousand florins is required without specifying whether the owner or the captain is to furnish it. I might add the various treaties signed by the States-General with various powers, which have stipulated that definite sums must be entered by owners and captains as security against the infraction of maritime treaties, but I can safely omit these, since I have spoken fully about privateers, and these are the only ones who are now required to furnish securities.

With these preliminary remarks, I shall proceed to the inquiry whether, if a privateer has made an illegal capture, the captain or his bondsmen or the owners must repair the damage, and to what extent they are liable. The counselors of state have given the opinion that when a captain of a privateer has illegally seized a neutral vessel, and has lost the vessel by placing her in the hands of an ignorant prize-master, the owner of the captured vessel may sue at his pleasure the captain of the privateer, his bondsmen, and the owner, all or singly, for the full amount of the value of his ship at its highest value. Let us now consider this opinion in detail. There can be no doubt that the captain is liable to the whole extent of the damage for wrongdoing. His commission was to plunder the enemy, not friends, and if he has attacked the latter he has exceeded his authority, and is therefore liable to the extent of the injury. This also the States-General indicate in their edict of April 1, 1622; for there, besides demanding security of ten thousand florins that the prize shall be brought to the port of departure, they add the clause: 'reserving however to those who may have suffered wrong by the captain beyond the extent of his commission, the right to take personal action against the captain and others who have caused the damage.'

Regarding bondsmen or securities, the opinion of the state counselors quoted above seems to me incorrect unless the bondsmen bound themselves for the whole amount of the damage; but if they

bound themselves for a definite sum, as is usual in the case of privateers, they are not liable beyond that sum, and for the specific purpose for which they bound themselves. So, for instance, if they entered security that the prize should be brought into the port of departure, they are free from liability as soon as the prize has been brought in, and it does not concern them whether the prize was taken legally or not, unless this matter was also specified in the bond. But since most captains are so poor that they cannot repair the damages caused, and bondsmen usually bind themselves only for a specified sum, which they may bring suit against the shipowner to recover, the whole affair becomes the concern of the owner in the end. Therefore, let us consider whether the owner is liable to the full extent of the damage, or only to the value of the ship and its cargo, on the principle of the Roman law concerning damage caused by animals and slaves. A case involving this discussion was once tried before the Supreme Court in Holland. Five Dutch ships had unlawfully taken a Venetian ship. The owners of the Venetian ship first brought suit against the offending captains, and obtained a judgement requiring only that the captains give back the vessel. When this was not done they brought suit against the owners of the five Dutch ships contending that they should jointly and severally be condemned to restore the ship with its cargo and also pay damages to the full amount. The court on July 31, 1603, condemned the owners to restore the ship and cargo completely, and, if these were no longer available, to pay their appraised value, but it added specifically that the execution of the sentence should be made upon the five ships that had made the capture, and that the owners should not be bound beyond the value of these. This precedent has been followed by the counselors of State.

With this opinion, however, I cannot agree, for I think that if the owner sent the captain out to take prizes, and he carries out his commission wrongfully, the owners are liable to the full amount of the damage caused. The captain who takes prizes under a commission is appointed for that purpose, and he who appoints him is by the act of appointment liable for all, whether good or bad, that his appointee does under the commission. Thus we permit an *actio institoria* against the owner of a shop who has placed an agent in charge of it, and if the agent has made a contract we do not distinguish in what manner he has made it. In the same way we give an exercitorian action against the owner of a vessel for the act of a captain, provided the captain was acting in a matter for which he was engaged; for if he was not, he does not bind the owner, as Ulpian has fully explained. The appointment is the sole cause why owners of shops and of ships are bound: that is to say, they are liable if the act was committed in the performance of a task for which the agent was appointed, but not otherwise. He who has placed a captain on a privateering vessel, knows that the captain's duty was to make captures, and if the captain performs this task improperly, the fault lies with the owner who employed an unskillful and dishonest man for the task. If a captain, having borrowed money for the repairing of his ship, applies it to his own use, Ofilius properly says: 'the owner is liable, and must impute it to himself that he employed such a person.' With this agrees the opinion of the States-General expressed in their decree of October 22, 1627: 'that the shipowners must take care to employ good captains.'

If owners of shops and of vessels are responsible for the acts of their agents, it is evident that they are responsible to the full extent of the damages, and that they are not discharged by the surrender of the shop or the vessel in question. I do not remember that I have ever read an opinion contrary to this; nor would such an opinion be reasonable, since those who are responsible for the acts of their agents are responsible to the full extent; hence owners of vessels are liable to the full for unjust captures made by their captains. A further support for this opinion is found in the edict quoted

above, which required the owner to furnish security of twelve thousand florins, and in the later edict which required security of thirty thousand florins that the privateer would not injure a friend or ally; for if our opinion were incorrect, it would be wrong, when the privateering vessel was of less value than these specified sums, to exact from the owners more than the ships themselves could provide. In that case the law should have required security to be placed in each instance at the estimated value of the ship. The above-cited section 3 of the charter of July 28, 1705, provides even better proofs for the correctness of our view, for after requiring security of thirty thousand florins, the owners are themselves held liable for possible damages from wrongful acts, and by a special land of lien all the equipment belonging to the privateering vessel is also held. Since then these facts make it evident that owners are liable beyond the value of their ships, we will refuse to apply to this question the principle of the Roman law concerning damage caused by animals and slaves, since that principle is not pertinent to this question.

The above-mentioned decision of the Supreme Court given on July 31, 1603, was therefore erroneous; for if the shipowners placed the aforesaid captains in charge of a privateer, thus giving them the commission to make captures, they should have been held liable for the full amount, just as a principle would be held liable to the full amount for the contract of an agent that he had placed in charge of a business with a mandate to perform the business involving that contract. You may perhaps approve of the sentence of the Supreme Court on the ground that the report in Coren does not state whether the five ships were privateers or not. If they were not privateers, it cannot be said that the owners appointed them in charge of making captures. But if that is the case, the decision must be faulty in another respect; for if there was no such charge, I should like to know why the supreme court condemned the owners to restore the Venetian ship and her cargo, and even granted execution against the vessels of those owners, for in that case they condemned them for an act which was not within the authority granted to their captains, which is clearly contrary to the principles of the above-cited law. In that case the affair would not concern the owners, for though the owners put the captain in their stead, they do so only in matters for which they commission him, and they are liable for him only in so far as he is guilty of fault or fraud in those matters. If you accept a vase to repair it, and you give it to your apprentice and he destroys it, you are held liable, but if your apprentice kills some one, even though he uses one of your instruments in the deed, you are certainly not held responsible. Therefore, we cannot apply to owners of vessels the principles of the law regarding damage caused by animals, just as we cannot apply this principle in a case where an animal has caused damage through the fault of its driver or keeper.

According to the principle that I have contended for, owners will not be held responsible if they have not appointed the captain for making captures; but if they have, they are liable not only to the extent of the value of the ship but also to the aforesaid sums of ten thousand and thirty thousand florins. And furthermore, those who have suffered wrong may, according to the decree of October 22, 1627, as said above, bring suit for the ten thousand florins by which the captain has bound himself to bring the prize to the port of departure. Such a demand, however, would seem unjust, though it is made in the decree, unless the bondsmen are warned and have agreed to accept liability on this point also. For if, as is usually the case, they have simply given security that the captain shall bring the prize to the port of departure, it would be inexpressibly unjust to hold them responsible on that security for any other cause, as I implied above when speaking of bondsmen. But if all these things that I have enumerated do not suffice to repair the damage, are we to demand even more, and are the owners to be held even further? In my opinion they are to be held liable until complete reparation

has been made, for in the case of a debt, Roman law does not consider that a bondsman or pledge liberates a debtor unless the debt is discharged in full.

Moreover, if the vessel in question is not a privateer, that is to say, if she has not received a legal commission to make captures, but only has a commission from the owner, I think the same principles hold as in the case of a real privateer; for the right arises out of the order and the appointment, and so far as the injured parties are concerned, it does not matter whether the injuries have been inflicted by a real privateer or by a vessel acting as one.

CHAPTER 20
To Whom Does a Prize Belong That Has Been Taken by a Vessel Not Regularly Commissioned as a Privateer

IF a ship not commissioned as a privateer should take a prize while defending itself from a hostile attack or in some other way, it is well to ask who acquires the prize. Some claim that the prize falls to the owner of the ship on the ground that he owned the ship and the arms which made the capture, and he employed the captain and sailors, so that it would appear that the prize was taken by his means. They argue also that it cannot fall to the captain and the sailors because these are employees and as such cannot claim anything but their wages; nor can it fall to the shipper, since he merely engaged the ship to transport his merchandise, and for no other purpose.

Others hold that the prize should belong to the captain and the sailors, since it was taken through their brave exertions. And these argue that it cannot fall to the owner of the ship or of the cargo since neither of these engaged the ship for making captures, that indeed the capture was wholly outside the scope of the contract.

Finally, some hold that the prize should belong to the shipper, since he engaged the ship, the arms, the sailors, and the right to their labor, not only for the transportation of his merchandise, but also for the defense of the ship for the sake of his cargo, and this defense must be considered broadly not merely as an act of repelling an attack, but also as possibly involving the necessity of capturing the enemy to prevent his doing an injury. They argue, moreover, that the prize does not belong to the owner of the ship nor to the captain and his sailors, since all of these ought to be satisfied with the rents and wages for which they have bargained. Such are the arguments with which they support their own views and oppose those of others. Before I give my own view, I must state that the board of nineteen of the West India Company has decreed: 'that a cargo vessel that makes a capture shall pay fifty per cent. of the value to the company'; and this order the States-General accepted and inserted in section 17 of the charter which they issued on July 15, 1633, to privateers cruising in American waters. It is apparent that the Company attended to their interests alone, nor did the States-General, in accepting it, have in mind any one but the Company, for they laid down no rules regarding others, whose interests were especially at stake. Accordingly this decree may be treated as a special case which is not to be used as a precedent.

I have never seen a general law on this matter, and I do not think that any exists, hence it must be decided on rational principles solely. The fair judge will, I think, give the prize to the captain and his sailors who made the capture, certainly not to the owner of the ship or to the shipper who owned the cargo- In fact, none but a very stupid person would think of assigning it to the shipper. The shipowner might have a better claim, but I should prefer the captain and sailors to him. In the following case I have found a variety of opinions. A vessel, for which the shippers had secured a license from the Dutch and French West India Company, took an English ship, in 1667, within the company's limits. The captain and sailors who made the capture decided to keep the prize with them, though she was slower than their own ship, 'since it would be an advantage to the owners and shippers as well as to themselves that she should be brought to the islands for sale where she would sell to better advantage'. When the question of adjudging the prize arose, the counselors of state gave the opinion that the sailors, being engaged for fixed salary and not for a share in the prize money, should have one-tenth, that the rest should be divided in equal parts between the shipowners and the

shippers. On what principle these lawyers granted one-tenth to the sailors I do not know, and perhaps they did not know. Of the remaining nine-tenths they assign one-half to the shipowners without raising any questions, but in assigning the other half to the shippers, they explain their decision on the ground that these contributed not a little to the seizure, since they secured the license which permitted the vessel to sail in those waters, and hence they ought to enjoy the same reward as the owners of the vessel. They also support this argument by referring to the above-mentioned decree of the sailors, in which these implied that they made the capture for the sake of the shippers as well as for the shipowners. They finally bring some arguments which seem to me very frivolous, as, for instance, that property can be acquired for us by persons employed by us as well as by ourselves; that the owners of the vessels were no more present at the capture than the shippers; and that had the vessel been unfortunate in the battle, the cargo would also have suffered.

However, these arguments in favor of the shipowner do not convince me any more than those which I cited above; for it is clear that the prize falls to the captors unless they acted by the command and under the appointment of another. The only question to decide, therefore, is who made the capture; and it is also evident that the captain and the sailors made the capture without any one's command and appointment. Their services were indeed employed, but only for the transporting of merchandise, not for anything else. Hence, whatever profit accrues from the transportation will fall to those who employed the services of the sailors in that very task, but they have no share in the prize, neither do the shipowners, since it was not for the making of captures that the sailors were hired. While they were engaged in the wholly different task of transporting goods, fortune threw something else in their way, as Tryphoninus neatly argues in an analogous case. And for this very reason I argued in my *Observationes Juris Romani*, that a laborer who finds a treasure while digging is entitled to it. The terms of the laborer do not extend beyond the service for which he was engaged, and the same may be said of the sailors in the case at issue. Whatever happens to the contracting parties outside of, and foreign to, the terms of the contract they alone bear, whether it be profit or loss. Let us take for example a case of agency. If an agent has wasted the money belonging to his principal he will not impute to the principal that he was robbed by bandits, or that he had lost goods in a shipwreck, or that he or his family had been taken sick, for, as Paulus says, these things are to be imputed to accident rather than to agency. Such losses as these follow the person of the agent. Accordingly the same Paulus reasons that it is 'according to nature' that gains and advantages which happen to accrue by occasion of the agency should also follow the person of the agent. If A has sent B to carry goods to C and B has happened to find some money on his way, or has extorted something from a brigand who tried to rob him, no one in his right senses would hold that the money so procured should belong to A, even though the things that A was sending to C might have been endangered on the way. A did not engage B to find money or to extort anything from brigands, he engaged B to carry goods which he did, and when the agency has been fulfilled A can ask nothing further.

The objections of the state counselors in the case in question were very trifling. The license which the shippers had obtained from the West India Company could not serve them in making prizes, it was of service only in permitting the vessel to sail in those waters. Nor need we concern ourselves about the decree of the sailors, since it might be interpreted in various ways. In my opinion the sailors simply intended to keep the prize with them for the present, whether it ultimately was to belong to the shipowner, the shipper, or to themselves, that in fact this was all they intended, and they showed no intention to divide the prize money into three parts assigning a part to each of the

three. Despite the phrasing of their edict, they may have thought that the prize belonged wholly to themselves; for if we may suppose that the prize was laden with things needed to sustain life, and that the sailors were in want of such necessities, their retaining the prize with themselves would obviously be advantageous both to the owners and the shippers, since it would enable the ship to continue its voyage; and there are numerous possible assumptions of this kind. Moreover, who would dare suppose that sailors weighed and tested every word with such care, or that if the prize was theirs they wished to boast in the edict of their possession. And even if they had believed that it was not theirs but rather the property of the shipowner or of the shipper, who would not gladly pardon their simple honesty if they revealed this belief in the edict? Yet this simple admission ought not to prejudice their rights, for if A gives up an article to B under the erroneous supposition that it belongs to B, he has not diminished his right of possession if the error is discovered. Furthermore, we should not hold an error in point of law against these sailors, since it is clear from the edict as well as from circumstances that they made no final determination, and that they had no intention of giving anything away. However, if the ship and cargo should suffer greater damage during the battle than the exigencies of the defense demand, it is clear that the sailors are held liable by the terms of their contract.

There was a somewhat similar case which the court at Brussels once decided on this principle. In that case a cavalry officer had lent his horse to a cavalryman about to enter battle; the officer claimed a share in the booty which the soldier took, but the court rejected the claim. I should not doubt the legality of this sentence, though Pierino Belli argues against it as Zouche relates. And yet there was in this case a better reason for awarding a part of the booty to the owner, since it was nothing to him whether the person who borrowed his horse should fight or not. However, he has no more claim to the booty than A has to the fish which B has caught with A's net.

Some may consider that I am wasting words on a useless question, thinking that it is not legal to take a prize without a privateer's commission from the government or the admiral, and that the one who makes a capture without a commission is so far from making the prize his own that he must even be condemned as a pirate, according to the principles discussed in Chapter 18. This view, however, is not correct. Grotius said very properly 'that private persons can acquire booty by private acts', and none of us doubts that booty which may chance to be in the way and is taken by private persons becomes the property of the captors. Pufendorf has been held to contradict this opinion, but erroneously, for he speaks of those who without public authorization go out for the sole purpose of making captures, not of those who overcome the enemy in self-defense, or of those who come upon booty by chance, and such are the cases that I am here discussing. If in either case you deny that it is lawful to take enemy goods, you must also deny the right to despoil one who would otherwise despoil you, and in a word you will annul the right of self-defense. For this right permits us, as does every declaration of war, to injure the enemy in every possible manner, that is, not only to avert the peril with which the enemy threatens us, but also to strip him of all his goods. The case is different with those who sail out to plunder without commissions, and without complying with the requirements of the law, for various edicts of the States-General prohibit this. But who will ask for public authorization from one who, while wholly bent upon a commercial errand, repels and perchance captures an aggressive enemy. If those who find fault with Grotius and Pufendorf had rather explained them in this way, they might have had no occasion to complain of them.

CHAPTER 21
Whether it Is Lawful to Insure Enemy's Property

IN kingdoms and republics which encourage commerce, there is, next to contracts of purchase, sale, and hire, none in more frequent use than that of insurance. It was, however, so little known in ancient days that not even its name is to be found in Roman law. The reason may be that commerce was not carried so extensively, or that the Roman navy made the seas secure from pirates, or that the magnitude of the Empire, extending over every sea which the merchants were wont to frequent, dispelled all fears of enemies. Furthermore, there was not then the same danger from the waters, for we do not cling close to the shore as they did, nor rest our ships during the winter months, but we sail our ships into mid-ocean at any season, however stormy, not knowing where fate may carry them. However, I have read in Suetonius' life of Claudius that, at a time of great scarcity, when the people reviled him and threw crusts of bread at him, the emperor offered great inducements for the building of merchant vessels, and certain profits to the merchants, 'taking upon himself the risk of any loss that might result from storms'. This was a kind of insurance, since, as practiced nowadays, insurance is nothing else than an engagement for the security of another's property by which the owner is liberated from the risk, which is assumed by the insurer in consideration of a certain fixed premium. Claudius, however, assumed the risk of the sea, though not that occasioned by pirates, and he did this gratuitously, not for a fixed premium; hence I have called it merely a kind of insurance.

I have premised a definition of insurance so that it would become apparent even from the definition that war by its very nature precludes the permission to insure ships, merchandise, and other goods of the enemy. For to assume the risks of the enemy is nothing else than to promote their maritime commerce, since insurance was invented in order that maritime commerce might readily be carried on at a smaller loss. Hence when we were at war with Spain, the States-General issued an edict on April 1, 1622, declaring void all insurances made and to be made by Dutch subjects on Spanish property, and laying a penalty of one hundred Flemish pounds on any one who should act to the contrary. This seems entirely proper because in every declaration of war every man is asked to do as much damage to the enemy as he can, and hence it follows that he is forbidden to be of any service. This the right of war generally requires, and the edict of the States-General of April 2, 1599 explicitly demanded it in our war with Spain. It might be argued that insurances of this kind bring more profit than loss to the insurers, and that therefore they benefit us more than the enemy. But this would be a very unsafe argument, since experience could hardly prove whether the assertion was true, whereas it is certain that such insurance aids the enemy to extend his commerce more widely. And since this is beneficial to the enemy and generally redounds to our great injury, it must in every possible way be prevented. And this reason alone would suffice, but as the edict of April 1, 1622, notes, there was a further consequence from such insurances, namely that enemy goods captured by our forces might be claimed by the underwriters; and why should they not if .the contract actually is legal? For the goods do in a measure belong to the insurers, and in respect to insured ships and cargoes the underwriters and owners are considered as on a par, as we can see from insurance policies that are printed and in everybody's hands. If, therefore, insurers could lawfully claim enemy's property, there would result a loss to our subjects who had lawfully captured it; and, as the aforesaid edict explains, they would thus be deterred from fitting Out cruisers with which to attack the enemy. That this is contrary to the laws of war is more than clear.

So far there is nothing objectionable in that decree of April 1, 1622; but I have discovered that on

May 13, the States-General restricted the edict to apply to insurances which had been or should be made subsequent to the publication of that of April I; as if this were a fitting place to apply the Roman prohibition of ex post facto laws. From this restrictive clause it is apparent that the States-General then approved of the insurance of an enemy's goods if it was not forbidden by a special law, for otherwise they would have annulled those contracts that had been made prior to the special prohibition, as indeed the decree of April I had declared them void. And since that decree of April I has the support of the law of war, and did not enact any new law, the supplement which later changed it should be attributed to an error and not considered binding. The clause about the penalty might well have been restricted to future cases, but not so the prohibition itself; unless perchance we hold that the practice of insuring enemy's property had grown so prevalent, that a long continued custom had established the practice. Nevertheless, even if we had very many examples of the insuring of enemy's property I would not consider it a custom so well established as to have the force of law, unless it were confirmed by an uninterrupted series of judicial decisions.

Therefore the States-General acted in accordance with the laws of war when on December 31, 1657, they decreed that it was not permissible to insure the property of the Portuguese, with whom we were then at war. But I doubt the legality of the general prohibition which they added against insuring any property on the way to or from Portugal; for if such property belonged to subjects of the States-General or of some friendly power, there is no reason to prohibit their being insured, since the trade with Portugal was not prohibited by the decree, except that in section 2, their trade in contraband with us and with others was prohibited. And if the property belongs to subjects of some other power, we will insist even more upon the right of insuring, since we have not the right to prevent commerce between our enemies and their friends. Hence this prohibition should have been restricted to the commerce in contraband. Again, on March 9, 1665, the States-General issued a similar edict in almost the same words against the English, with whom we were then at war, prohibiting the insurance of ships and goods going to or coming from England. And in section 13 of our declaration of war against France on March 9, 1689, the States-General forbade the insurance not only of French ships and property but of any ships and goods going to or coming from France; a general prohibition which therefore concerns foreigners, and interferes with legitimate commerce of foreign as well as our own subjects. In this way edicts are copied one from another, so that when an error subversive of international law has once found its way into one it continues to be copied, and no one takes the trouble to rectify it.

On the whole it appears from later edicts of the States-General also, that it is unlawful to insure the property of enemies. And since the practice is so general, I wish that this prohibition had been adopted in general laws as well as in the special decrees that the Dutch have issued from time to time concerning this kind of contract, and I would that Straccha, Santerna, and other semi-barbarians who have written about insurance had not omitted this subject entirely, contenting themselves with observing that unlawful goods like contraband could not be insured. We may put our opinion in this form; that it is unlawful to insure ships and goods which may be seized and condemned by the law of war, whatsoever they may be, but I see no reason for prohibiting the insurance of property which may not lawfully be seized and condemned.

Let us consider what some of our authorities have said about the insurance of property that may be lawfully condemned. Grotius gave the opinion that a person who insured contraband goods, not knowing them to be such, was not liable to pay the loss. Again, two lawyers following the opinions

of the merchants of Antwerp and Middelburg, have held that, if a person insures property on a general policy which does not name the owner, or, as the Roman law phrases it 'for the owner whosoever he may be', and if the owner proves to be an enemy, the insurer is not bound, since such a general formula is not considered to include enemies. But, in my opinion, even if it is expressly stated that the goods being insured are enemy's or contraband, the insurer is not liable, since the contract is void, and the contracting party may act at his own pleasure with such a contract, for a case that depends wholly upon the pleasure of the parties concerned has no standing in court.

CHAPTER 22

Whether it Is Lawful to Enlist Soldiers in a Neutral Country

I ENTER upon a question which is causing, as it has in the past, a great disturbance over a large part of Europe, namely whether it is lawful to enlist soldiers in a neutral country. I do not mean to imply that it might be lawful to entice away soldiers by bribes from the service of a friendly power in order to enlist them in our own army. Those who invite desertion are no less punishable than the deserters, and in some nations this crime is considered high treason. But there is a fair question, whether one power may hire private individuals in the territory of a friendly power and employ these as soldiers in their own war. If indeed a power prohibits its subjects from transferring their allegiance or serving as soldiers in other countries, it is clear that other powers may not hire such subjects for service in their armies; but when no such prohibition exists, and it is indeed seldom found in the states of Europe, subjects may, in my opinion, leave their own country, migrate to another, and serve under a foreign prince.

If, as I have just said, there is no law to prevent it, subjects may change their allegiance from one country to another, as all writers on public law agree. Grotius, who is of the same opinion, adds that the Muscovites do not permit this practice, and we have had public testimony more than once that the Chinese and the English do not consider the practice lawful. Louis XIV of France also, by the edict of August 13, 1669, threatened with forfeiture of life and goods any Frenchman who without permission left France with the intention of not returning. Before that year it was permissible in France, as indeed it is in every country that is not a prison. And since it is lawful to emigrate into the territory of another prince, it must also be lawful for the emigrant to seek honorable means of livelihood there, and why not by means of military or naval service? In the United Provinces there is certainly no law to prevent it, and many Dutchmen have in times past, and in our own day, served on land and sea in the forces of other powers.

We are, however, speaking only of friendly powers, for it is never permissible to enter the employment of the enemy for service either in the land or the naval forces, and this prohibition occurs in several edicts of the States-General. It might be supposed that many of the edicts of the States-General which prohibit military service under foreign princes are to be taken as general and permitting no exceptions, but if you examine them with care you will find that some were temporary restrictions drawn up during a war when we were in need of men, others had reference to those who had enlisted with the enemy or to deserters from our army who were serving with the enemy; indeed some of the edicts specifically mention both of these classes. When once a Dutch vessel was captured by a French ship whose eighty sailors, with the exception of six Frenchmen, were natives of Holland and Zealand, the States-General decreed on July 23, 1674, that if any of our subjects entered the naval service of the enemy, they should be drowned; and the same decree was issued again on April 4, 1676. These decrees deal with those who enter the service of an enemy, but it would not be reasonable nor in accord with the obligations of friendship to extend these prohibitions over those who enter into the service of allied or friendly powers.

If therefore our citizens, who are not needed in our army, and who are not forbidden by any law to change their allegiance, are permitted to enter military service in a friendly state, why should not that state in turn have the right to enlist soldiers in the territory of a friendly nation? Where it is lawful to let out to hire, it is also lawful to hire. Why should it not be as lawful to make a contract for

soldiers in friendly territory as to make any other contract of hire or sale and to carry on any kind of trade? Nor do I find any force in the objection that he who hires the soldiers may possibly use them in war against a power that is friendly to their own state, and may even employ them later against their own state. In answer to the first objection, I should say that neutrals ought to consider both belligerents as equally in the right. This is the principle that we generally observe with respect to trade in arms, for though we may not properly bring these to either belligerent, we may lawfully sell arms to both, though we are aware that they will use these arms against each other. To the second objection that these soldiers may later be employed against their own country, I answer that we must consider the present circumstances of the state and not remote possibilities. Furthermore, we do not forbid a friendly power to buy gunpowder, arms, and other munitions of war, although that friendly power might become hostile and then use these munitions against us. But as I said, we must keep in view present relations, for unless we do this there will be an end to friendships and the treaties that exist between friendly powers.

I think, therefore, that the same rule should obtain regarding the enlistment of soldiers in a friendly nation that obtains with respect to the purchase of arms, unless it is otherwise stipulated in a treaty between the two powers. Thus in the treaty between the Romans and Antiochus, the latter was compelled to agree not to enlist soldiers within the boundaries of the Roman empire, according to Livy and Polybius. But had the treaty been between equals, this would have been lawful, and the Romans could not have imposed this rule without injustice; for it is clear that there was no clause forbidding the Romans to hire soldiers in the empire of Antiochus. Hence this prohibition to do a thing which otherwise is permitted by the law of nations was imposed upon Antiochus alone, though in the first clauses of the same treaty both signatories bound themselves, like powers of equal standing, not to aid the enemy of the other with supplies.

In Holland, however, and in the rest of the Netherlands, it apparently has been and still is prohibited by law to enlist soldiers without permission of the government. There is a very old edict to this effect, dated January 8, 1529. And when the Danes, Swedes, and Muscovites were hiring soldiers in the Netherlands without the consent of the government, the States-General on August 1, 1612, decreed that no subject of the aforesaid nations should do this without the written consent of the government, and that, in case consent was given, no one should invite soldiers in the employ of the government to enlist, under penalty of death or some other discretionary punishment. With that edict those of the following dates agree:

December 16, 1622, March 3, 1627, March 30, 1646, July 21, 1648, May 27, 1650, January 20, 1652, and March 18, 1658. The Estates of Holland also decreed on March 27, 1652, and March 16, 1656, that if any man hired soldiers in Holland without the written consent of the government or its council, he should be liable, not to a discretionary penalty, but to the punishment of death, without remission. Such are the rules of the States-General and of the Estates of Holland in this matter, and with these I gladly agree, as is proper.

We may notice here a dispute which took place in the year 1666 between the States-General and the Governor of the Spanish Netherlands. The former complained to the Governor that the Bishop of Münster, with whom they were at war, was enlisting soldiers in the Spanish Netherlands. The Governor answered that he had not granted permission to do so, but that if he had, there was nothing to prevent him, because Spain was neutral in the war, and that the States-General might also have

the privilege of enlisting there. But we have already discussed whether this is lawful without the consent of the sovereign, and whether permission, when asked for, may be refused; from what has been said the reader can judge for himself whether or not the Bishop of Münster had a right to enlist soldiers in the Spanish Netherlands without the consent of the governor.

CHAPTER 23

Whether the Several Provinces of the United Netherlands Have the Power to Make War

As becomes apparent in reading our annals and public documents the peoples of the Netherlands formerly enjoyed such independence that not only the prince, but even the peoples and the separate cities and towns engaged in wars at their own expense. When, however, the power of the later Counts increased, these rights of independent action were gradually curtailed by the Counts, influence, by fraud, and even by force. But when the last of the Counts was driven out, one might reasonably hold that the ancient liberties had been restored to the separate provinces, except in so far as these were limited by the Union of Utrecht of January 23, 1579, and the formal abrogation of the Counts, authority on July 26, 1581. It is the general opinion that the right of individual provinces to wage war was annulled by the articles of the Union, and this opinion has grown so strong that if any man dares to utter a word against it he is supposed to be undermining the foundations of the Union and threatening the whole state with instant peril. I would therefore have you listen to me patiently while I discuss the question of states' rights; and even if I do not convince, you may at least recognize the truth of Cicero's remark 'that nothing is so incredible that it cannot be made to seem probable by a favorable presentation'.

While discussing another topic in his Apologeticus, Grotius said incidentally that according to the Union of Utrecht it was forbidden to engage in war except at the common consent of all the provinces, but individual provinces could act in self-defense in the case of internal disturbances. Now, if by the first statement he refers to wars of all the provinces in the Union, I agree; but if he would make this statement about any and every war, as I infer from the exception which he adduces, I must take issue. What Antonius Matthaeus says in De Criminibus on Digest, also seems to have reference to any and every war, for there, while citing arguments to prove that the individual provinces are sovereign, he goes on to say: 'this contention is not disproved by the fact that the provinces are competent to decide matters of peace, war and religion only in common council and by a common vote, since this is a requirement of a treaty of alliance and does not prove that the Union is a single state'. I may say by way of parenthesis that his inclusion of religion vitiates his argument since the articles of the Union clearly left the question of religion wholly in the hands of the several provinces; however, that is not the question now at issue. His words about peace and war must be judged by Article 9 of the Union, which reads as follows: 'It shall not be lawful to make treaties of truce or peace, to declare war, or to impose taxes which concern all the provinces, except by a common council and by a common vote of the aforesaid provinces; but in other matters, et cetera.' It is apparent that the unanimous consent of the provinces is required in these matters. However, the article continues with the provision that if any province gives a dissenting vote, the matter should be referred to the arbitration of the governors, and if these did not reach an agreement, other arbitrators should be added to their number, and the decision of this board should be held binding upon the dissenting provinces.

I do not intend to discuss here whether this requirement of a unanimous consent in matters of peace, war, and general taxes has always been observed, though I will say that it has not. The Peace of Münster in 1648 was made and accepted without the approval of Zealand; the Peace with Portugal in 1661, without the approval of Zealand and Utrecht, just as in 1657, the war had been declared against Portugal without the approval of Friesland, though she had to contribute to the expenses, and

this was done, as Aitzema relates, only because the war was advantageous to the other provinces. Were it not better to be discreet, I might cite other instances in which some one province was not permitted to register a dissenting vote, although unanimity is required by law. And these instances disprove the claim so often put forth that the articles of Union have perpetual validity. Lest, moreover, I may seem to be overbold in my statement that the articles have not always been observed, I will call to witness a statement made by the Estates of Holland. When on October 9, 1663, the delegates of Groningen proposed a decree to the States-General that all the representatives assembled at the session of the States-General should take an oath, inter alia, to observe the articles of the Union of Utrecht, the Estates of Holland on November 27, 1663, decreed, that before taking the vote the petitioners should draw up a new constitution of the Union to which they might swear allegiance, since a large part of the old articles had become obsolete, 'for', they said, 'the old constitution of the Union not only contains various passages, articles and phrases which are now obsolete, but also some that various provinces are not inclined any longer to hold in respect'.

But it is more important to know what is the meaning of this ninth article of the Union. It is now agreed by all, after Grotius in his Apologeticus proved the point, that each province has the powers of a sovereign state, for this power was never given to the federal government; in fact the first article of the Union forbids the federal government to interfere in the controversies between the individual provinces. The States-General assume the common concerns of the whole state, but the governments of the separate provinces take charge of the concerns of their respective provinces. If a war is to be waged for the common advantage of the whole state, the States-General conduct it, but not without the common consent of the provinces, if they abide by the laws of the Union, as they should. We must therefore consider whether there are occasions when individual provinces may properly conduct war. They might wage war against foreign states in behalf of all the United Provinces or in behalf of some of them, or in their own behalf, that is to say, in the defense of their rights or to repair an injustice that has been committed against the single province. In all of these cases we could hardly refrain from granting that the individual province had retained its right to make war. The people of a free republic may make war at its own discretion as any independent nation may, and this principle was recognized among the peoples of the Netherlands which are now united. What was formerly permitted to each province is still permissible unless the provinces have renounced the rights in question. The sovereign power of each province is not made void or diminished except by an explicit renunciation. And all this agrees fully with the opinions which the Estates of Holland explicitly expressed on July 25, 1654, in the pamphlet regarding the exclusion of the House of Orange. It is another matter if the constitution of the Union contains any exceptions to this principle, but we shall revert to that question presently.

There is no valid reason, therefore, why one province should not be allowed to wage war in behalf of the United Provinces if they consent. The above-cited Article 9 requires only common consent in such a case; it does not require a community of expenditure, so if one province should be willing to assume the whole expense, the others would only have cause for congratulations. Indeed the Estates of Holland in their pamphlet on military rights issued on May 17, 1657, proved at great length that single provinces had fought in behalf of the whole Union at their own expense, under separate commands, with their own forces, and with objectives of their own, quite apart from the forces of the States-General. And you may find there, if you desire, the proofs that this was also done in the early days of the Union, so that the constitution in no way prevented it. Indeed, that one province may wage war in behalf of the whole Union if the rest consent, is so well established that

it would be difficult to find any one to contradict it. Again, some of the provinces may defend themselves or avenge a wrong done them even if the rest take no part, as we must grant if we grant that individual provinces may take up arms for their own sakes, and this right may be defended by an argument that I have already mentioned, namely that each province retained in the Union their former independent status in matters of peace and war unless they surrendered it. Hence if a province is attacked by a foreign power and the other provinces do not hasten to aid with their common forces, whether through wilfulness or inability, the province may lawfully take up arms in requital or in defense of its right, unless some one can prove that it has renounced this right, a proof that no one has attempted to offer so far as I can remember. To be sure, the above quoted Article 9 may seem to provide such proof in saying: 'it shall be unlawful to wage war without the consent of the aforesaid provinces,' but we must bear in mind that this article was inserted in the constitution to protect the rights of individual provinces, not for the sake of destroying or diminishing such rights, and hence it stipulates that one group of provinces shall not have the right to compel others to enter a war, and thus be involved in the burdens of war against its will. It is the war in behalf of the whole Union, as the article expressly says, which cannot be declared except by common consent. But this does not prevent any one from waging a war in its own behalf and at its own expense.

The opinion of those who opposed the declaration of the war with France in 1684 agrees in general with what I have just said. For when in that year it was proposed to levy an army of sixteen thousand men against France and the Frisians and some cities of Holland and Zealand dissented, the objectors did not deny that war could be declared, but they held that they could not be compelled to bear a part of the expenses. This view is especially stated in a letter which the Estates of Friesland sent to the States-General in March 1684, and the same opinion was held by the people of Amsterdam and Middelburg, who also expressed their disapproval in a public protest. Thus they acted as in ancient Holland, where several cities joined together to form a federation, but not a state.

Now I seem to hear the objection that it will be dangerous if individual provinces are permitted to make war on their own account, for in that way some provinces will be exposed to immediate danger, since foreign nations do not discriminate between the provinces and will attack any part of the federation that is exposed. Hence if they should attack the province that may be preparing for war, there is danger that they may seize it, separate it from the others, and so render it useless to the federation. I grant the force of this argument, but the objector is disturbed about consequences while I am concerned with the law as it stands. But even if one should consider consequences first, consider how cruel it would be if a province which had been shamefully attacked were deserted by the rest and yet not permitted to avenge its own injuries. Since, therefore, consequences are so perilous on either supposition, we must hope that no province will ever be compelled to wage a war alone, even as that necessity has not arisen since the Union was formed. But let us return to the consideration of the law. Even on legal grounds you may object that single provinces are so far from being empowered to wage war, that they are not even empowered to do anything that may provide an occasion for war; and therefore Article 17 of the Union provides that no member of the Union shall do anything that may furnish an excuse to a foreign prince to make an attack, and if he does, the other members may coerce him, and on this plea the clause demands an upright exercise of justice. But it cannot be said that a province that has been wronged 'has provided an occasion for war'. A province that has suffered wrong has a just right to wage war to defend itself against injuries and to recover what was unjustly taken. Hence, whatever may be said of the right of waging war, he certainly has not the right who has acted unjustly and therefore provided the occasion. However,

the above-cited article contains a difficulty, for it is by no means clear who is competent to judge regarding the justice or injustice of a war. The provinces certainly are not if they are in disagreement; however, in this matter as in others we should observe the methods of reaching an agreement that are provided at the end of the first article of the Union of Utrecht.

Now since we have found that single provinces may wage war for the common good if they desire, the question remains whether unwilling provinces can lawfully be compelled to engage in a war for the common cause. If we insist upon the truth we must grant that they cannot, for this too is a subject for voluntary action. You may object that in Articles 1 and 2 of the Union the provinces pledged themselves to mutual defense even by war, since in both articles the phrase occurs 'with life, goods and blood', and furthermore that Article 3 of the same pact explicitly stipulates that any province which has suffered wrong or violence must be defended by the common forces against the enemy, be he foreign or domestic; and these are the very objections raised against the Frisians by the other provinces when the former in 1657 objected to the war with Portugal. But it is well to keep in mind the philosopher's words 'generalities are futile', and also the dictum of Celsus: 'It is imprudent to base a response upon a clause torn from its context and without reading the whole statute.' For after the phrases which I quoted above from the first articles, the pact continues with the words: 'provided that the assistance is decreed by the States-General after diligent examination of the case'. Consequently the other provinces cannot be compelled to aid unless the States-General so decide, that is to say, unless all the provinces agree, for Article 9 presently states that the States-General do not declare war unless all the provinces approve. Hence it is possible for one province to dissent, and thus prohibit a common war or a war waged in the name of the whole federation; and it may dissent either because it thinks that the injustice done one or more of the provinces did not concern it, or because it thinks the quarrel concerning their wrongs unjust (for the federation does not give aid to unjust complainants, since every obligation ceases in the case of an injustice, as I showed in the ninth chapter), or finally because the dissenting province cannot bear the expenses of a war, as is often the case.

However, if the cause was just and the province has the resources with which to enter the war, it is not a friendly act to fail a province that has been wronged, whether because the injustice does not seem to concern the dissenting province directly, or because of some less creditable reason. An association contains to a certain degree the rights of brotherhood, and that is why the partners of this federation have promised their mutual efforts for defense, and to this promise they certainly would be bound in any just cause unless the obligation were released by the liberty of each province to wage war at discretion. Thus there are many acts that are just, which, however, are not friendly.

CHAPTER 24

On Letters of Reprisal

I KEEP the term reprisal because I can think of no more suitable word for the expression of the practice. Some use the term *pigneratio* (pledging), others *clarigatio* (a demand for redress), but it is clear that neither gives the precise meaning. It is futile to try to express with a Latin word a practice unknown to the Romans. And this was unknown, for the federated and free peoples retained their liberties with respect to the Romans and remained owners of their goods, whether within the territory of the Romans or their own; and the same held true of Roman property within the territory of the allies, as Proculus relates. The Romans, therefore, were not accustomed to play the part of an enemy and lay hands upon property on land and sea while claiming to be friends. Hence there is not so much as a jot or tittle of this wicked practice in the whole Roman code. In view of this fact the phraseology of Article 11 of the truce between the United Provinces and Spain of April 9, 1609, as well as of Article 22 of the Peace of Münster of January 30, 1648, seems difficult to explain. In both there occur the words: 'that no letters of marque or reprisal shall be issued but with full knowledge of the cause, and only against persons on whom they may be granted by the laws and constitutions of the Caesars and according to the regulations prescribed by those laws'. But so far are the laws of the Caesars from providing the forms for the regulation of reprisals, that those laws do not even recognize the practice, if indeed we mean by that term the codes of Justinian, as is usually the understanding of the term in free republics. In fact I do not know how to rescue the learned men who composed these treaties from the charge of ignorance, unless perchance we may suppose that they meant the common law when they spoke of the laws of the Caesars. Now in general we understand the Justinian codes by this term, and since these codes are sometimes called the common law, so by a kind of inversion the common law might be called the laws of the Caesars. At least that is the only explanation that occurs to me; and if this is correct, it was the intention of the writers that letters of reprisal should not be granted except after a thorough examination of the cause, nor in causes or against persons which are generally exempt, nor in any instance contrary to accepted usage. And the accepted usage is that letters of reprisal shall not be given unless justice has clearly been refused. Hence in Article 31 of the truce and in Article 60 of the peace just cited, it is agreed by the Spaniards and the States-General that if any clause of the treaty were infringed without the orders of the respective governments, the peace was not thereby broken nor should war be declared, 'but it should be lawful in case of an open denial of justice to seek redress in the customary manner by issuing letters of marque and reprisal'. This is the common law which nations have long used and still use when justice has been refused, and which accords with the accepted opinion of those who have written on the subject. It must also be observed that there is no occasion for reprisals except in time of peace, though Mornac holds that they can be issued only in time of war. But this is certainly incorrect.

The denial of justice is therefore usually met by the issuance of letters of reprisal, and through them we receive from the government the license to seize the persons and goods of others, on account of the violence or injustice previously done the subjects of the government, if restitution for the injustice has been denied. Thus an injury done by force and not rectified by the courts is repaired by force. To prevent the bringing of unreasonable charges that justice has been denied, special provisions have been made in the treaties of various nations. In Article 24 of the treaty of April 5, 1654, between the English and the States-General, the practice of giving these letters was recognized only under restrictions, for it was there agreed! that such letters should not be issued unless the sovereign, whose subject complains of injury, shall lay the complaint before the sovereign whose

subject is accused of the wrongdoing, and the latter fails to have justice rendered within three months. And this provision is repeated in Article 31 of the treaty of July 31, 1667, between the same signatories. The matter has indeed frequently been attended to with much care, as for instance in Article 17 of the commercial treaty of April 27, 1662, between the King of France and the States-General. There, after the stipulation that such letters should not be granted except when justice has been refused, the provision is added that justice shall not be considered denied unless the petition for reprisal be also shown to the envoys of the sovereign whose subjects are complained of, so that he may inquire into the truth of the complaint, and if he finds them true he may have four months in which to have justice rendered. In this way the peace is not disturbed, and the sovereign may himself judge regarding the justice or injustice of the charge and pronounce his own sentence. It is a useful thing, therefore, to restrict this practice by such treaties; but considering the injustices practiced upon each other by subjects of different nations, we would not do well to take it away altogether. There was indeed an agreement in Article 9 of the treaty between the Emperor of Morocco and the States-General, on September 24, 1610, that neither should grant letters of reprisal and that both should render justice to each other's subjects, but there is little use in such an agreement. For when justice is not rendered, the injured party will certainly resort to reprisals on the claim that he had been compelled to by circumstances. If two powers agree to render justice they should abide by the agreement, but even without such an agreement sovereigns are bound to see that justice is done to foreigners, and in either case there is no occasion for reprisals unless justice has been denied. Article 16 of the above-cited treaty of April 5, 1654, between the English and the States-General might lead one to infer that this treaty completely forbade the practice, for it is there agreed that if any one infringes any part of the treaty, he alone is to be punished, and the court shall pronounce judgement within a definite period fixed by the same clause. However, in cases of this kind the practical difficulties are greater than the phrases of the treaties imply. If for instance the guilty party actually escaped punishment and no reparation is made, then reprisals follow; and clause 24 of the same treaty shows that this was the intention of the contracting parties, for there, as I have said, they prescribe the rules to be followed in the granting of letters of reprisal. Moreover, since the custom has grown common, these letters, and war, which usually soon results, are now the only remedies that independent sovereigns have for repelling unjust force; for they cannot make use of their own courts, which are helpless in such cases, and to submit themselves to the courts of a foreign sovereign they consider nothing less than a shameful prostitution of their majesty.

The sovereign alone seems to have the right to issue letters of reprisal, for it lies beyond the power of ordinary magistrates; this is certainly now the opinion everywhere, even in France where such letters were formerly issued by the higher courts. In the Netherlands, when formerly the cities had a right to wage war, they also issued such letters. An old law of Amsterdam specifies that if any citizen of that place suffers wrong outside the domains of the state, whether by force or by an unjust judgement, and lays his claim before the magistrate of Amsterdam, the latter may forward the claim to the magistrate of the place where the wrong was done; then if after receiving an answer the magistrate of Amsterdam still considers that an injustice has been done the subject of his city, reparation shall be made to the injured person by order of the court, by a process against such goods and persons of the foreign sovereign as may be found in the territory of Amsterdam.

The law uses the phrase 'by an unjust judgement', so that it does not suffice merely to pronounce judgement, it must also be just; and the magistrate is to be judge of the fairness, for this is a matter which is not usually submitted to the decision of others. To be sure, treaties of nations usually say only that letters are not to be given except 'when justice has been refused', but the plaintiff will

readily interpret it as a refusal even when a decision is given, but in an unfair way, and we may add that sovereigns will generally interpret all unfavorable decisions as unfair. It is apparent then that what this law of Amsterdam provides for is actually reprisal. I have also found many other instances of cities and towns exercising this right; but these are vestiges of the ancient liberties of the people of Holland, of the time when the parts of the province were more independent than the province as a whole is now. At present indeed, though the several provinces are independent states, even after the Union of Utrecht, yet they cannot give letters of reprisal entirely at their own discretion. In fact some one might claim that they have no authority to grant any, since the practice is a land of warfare, and the above-cited Article 17 expressly forbids the separate provinces to do anything that might provide foreign princes an occasion for war.

Nevertheless, I believe that circumstances which permit a province to wage war for itself, also permit it to issue letters of reprisal. That is to say the right depends wholly upon the principles of states' rights which we laid down in the preceding chapter. I shall not repeat what I said there; if you will only apply those principles to this subject, you will recognize that the right of reprisal cannot belong to the separate provinces in a case that concerns the whole of the United Provinces, and that in such a case the consent of all is required. But I know of no reason or law to prevent the individual province from exercising this right in its own cause if the cause is just. The province cannot be accused of providing a casus belli if, when the rest are unwilling to aid, it undertakes alone to procure reparation for wrongs done its subjects. I dare say that you will not find any proof for the assertion that the individual provinces have not this right.

From the abovesaid, it is apparent that the people of Zealand were in the wrong when they contended that they had a right to issue letters of reprisal in a case that concerned all the provinces, though the rest refused their consent, furthermore that they were wrong when they threatened to grant such letters to the West India Company against the Portuguese if the States-General refused to do so. There is also a third instance in which they were in error with respect to such letters. When the States-General had repeatedly refused letters of reprisal to some traders of Middelburg, against the people of Bremen, because the plaintiffs had themselves protracted the trial pending at Bremen so that there was not yet a just cause for reprisals, the Estates of Zealand, on March 21, 1659, decreed that the States-General should again be urged to issue letters 'and that meanwhile it should be permissible to lay hands upon all things belonging to the subjects of Bremen that might be found in the province'. But this decree seems to me unjust, not only because the traders of Middelburg, on the suggestion of the Court of Holland, were protracting the case in the courts of Bremen, but also because, while the people of Bremen had granted a trial and their court had even given a decision favorable to the plaintiffs, the latter were, through no fault of Bremen, appealing the case to the court of Espierres. In 1665 the province of Holland also undertook on its own authority to avenge a wrong done the whole state. The English had imprisoned a secretary of the ambassador of the States-General; hence the Dutch by way of retaliation arrested in public the secretary of the English ambassador sent to the States-General, and threw him into prison. But the Estates of the other provinces, and especially of Zealand, were very indignant over it, saying that a single province had no right to judge whether or not an injustice had been done the States-General of the United Provinces when the latter had not been consulted and had not given their consent. With this view I would also agree, but I wish that my fellow citizens of Zealand had not forgotten the arguments they had formerly used to prove the opposite view.

CHAPTER 25
Miscellaneous Questions

I. THOUGH the States-General had promised that they would withdraw their troops from the fortress of Lieroort in East Friesland, they continued to occupy it on the pretext that the Spaniards would invade it and use it against them. They were clearly in the wrong, and acted contrary to the advice of Prince Maurice of Orange, who was otherwise not friendly to East Friesland. The counselors of State also objected in 1621, and have since then repeatedly registered their disapproval, as Aitzema relates. There are men who call themselves lawyers that have lent their approval to such unjust acts, and I would that Grotius were not in this number. I can tolerate it in men like Zouche, who only copied the opinion from Grotius, and Buddeus. To prove their point they cite other examples of similar brigandage, as if there were any benefit in a precedent which only solved one problem by creating another. And what they say about the common practice of angary is not at all analogous to the present case, for ships while in the waters of another sovereign are in a measure subject to that sovereign, and may be taken according to a generally accepted custom, by which states and powers may be bridled. But to invade and occupy others' dominions, cities, and fortresses is everywhere considered a wrong.

II. The King of Spain gave a domain as pledge for money which he had borrowed from one who was friendly to the King as well as to the States-General. The States-General took possession of the domain during war, and the counselors of State gave it as their opinion that the pledge was extinct. This opinion is incorrect, for the States-General took only what belonged to the King, that is the right of empire and ownership as he had possessed it. His ownership was however, partial, since the land was mortgaged, and it was therefore only a partial ownership which the States-General obtained. If the King had sold a part of it to the States-General, the mortgagor would certainly have continued to hold his pledge against the whole, that is, against the King, the vendor, and against the States-General, the purchasers, because property when sold passes with all its burdens, which remain entire for the benefit of the creditor, unless he be an enemy. Now the States-General have possession of the whole estate, and have made it state property. But we must remember that lawfully they could not take or confiscate any but the King's rights in it; the part that belonged to a friend could not with right be taken. If the pledge had also belonged to an enemy, it too might have been confiscated and the debt be cancelled.

III. It has been questioned whether or not any rights remain to those who have insured ships and cargoes or lent money thereon at maritime risk, if such ships after being captured by the enemy are later surrendered by the enemy or regained by ransom. Some counselors of state are of the opinion that, if, after a ship has fallen into the enemy's hands, it is given up by the enemy or ransomed by the owner, it has as it were ceased to exist, and if redeemed is to be considered as a new ship, so that those who lent the money or insured it suffer a total loss and have no further rights in it. This, however, seems neither equitable nor just to me, since such creditors are not held liable except for losses actually suffered, that is, only for the expenses in the saving of a ship, or for the ransom of a redeemed ship. Philip II of Spain in Article 27 of his regulations on insurance of January 20, 1570, forbids the ransoming of vessels from pirates, thereby implying that ships may be ransomed from real enemies; and his purpose, I think, was to show that the insurer was bound only to the amount of the ransom money, for otherwise there would be no point in speaking of ransom in a document treating wholly of insurance. Pomponius rightly says: 'repurchase provides the occasion of a return

of a thing captured, but does not alter the rights of postliminy'. Even the last clause of the insurance policies commonly used by merchants clearly proves that ransoming is permitted, but no less to the advantage of the insurer than to that of the owner. We understand, therefore, that the loss to be covered by the insurer is that which has perished of the ship and cargo, or what is paid by way of ransom. However, if a captured ship has been brought to port and condemned, I freely grant that thereafter we should consider a ransom as a new purchase, and this opinion is sustained by the counselors of state.

IV. The States-General had ordered their soldiers who held the citadel of Reid in the district of Juliers to obey the orders of Florence van den Boetseler, who was lord of the place. He showed this order to the commander of the citadel, and ordered the citadel to be surrendered to the Spaniards, who were approaching. The commander accordingly surrendered the place on August 30, 1621. But Maurice, Prince of Orange, was so angered by this that he punished him with death (September 14, 1621), on the ground that the order referred to civil not military matters. I doubt whether he was right in this, for since the citadel did not belong to the States-General, the order had no effect but that the right of the lord remained intact even after the soldiers had been received, and the soldiers were to defend the citadel as the lord of the place decided, lest he should be involved in the same difficulties as the Count of East Friesland at Lieroort, of whom I wrote above.

V. Alberico Gentili is of the opinion that it is permissible to continue work on fortifications while negotiations of surrender are in progress, and Zouche adopts the opinion from him. But King Ferdinand thought differently, for when he captured Reggio he hurled the French from the walls for such behavior, as Gentili relates, citing Diovio. Again, when the Spanish were besieging Bergen, and, during a truce agreed upon for the burial of the dead, continued to complete their fortifications, and from them inspected the fortifications of the town, the Dutch complained that this behavior was contrary to the usages of war, and that the truce was broken. However, in 1664 at Bylerschans both sides acted on the opinion that a truce did not preclude the building and completion of fortifications. However it is best, when a truce has been agreed upon, to suspend all warlike operations, for this seems to be the purpose of the truce, and if we continue operations in any way, a clear definition can hardly be given.

VI. When the bishop of Münster in 1665 and 1666 occupied, plundered, and devastated some districts of Overyssel, and the French troops who came to help the Dutch acted with little less moderation, the province appealed to the States-General for full indemnity for the damage, but the state counselors responded that no indemnity ought to be given 'except allowance for their taxes and contributions proportioned to the time that the districts had been in the possession of the enemy'; the rest ought to be imputed to fate, and considered as one of those calamities of war that those must bear on whom they happen to fall. Later the same counselors changed their opinion somewhat, and conceded that the state ought also to take into account certain other expenses, especially the indemnities that had to be raised to save their towns from being burned, and the Estates of Holland acted in accordance with this second opinion on February 22, 1667. But, in my opinion, this latter decision was incorrect, for though I grant that those cities of Overyssel were saved from destruction by the payment of the exactions, it is not fair to charge this to the other provinces which were in no danger of being devastated. To take an analogous case, no well-informed lawyer would hold that the whole fleet ought to contribute, if one ship has to have recourse to jettison to save herself.

VII. Since any one province may lawfully wage war for its own account, it may lawfully make peace on its own account. It may also enter into alliances concerning matters in which it has independent jurisdiction. There is no doubt that such rights existed in the earlier days of our state, for in those days the individual states made wars and concluded peace. There is such a treaty, signed on July 1, 1463, by Utrecht, Muiden, and Weesp. Grotius has other examples in the first chapter of the Apologeticus, and the Estates of Holland many more in their pamphlet on the exclusion of the Prince of Orange. The tenth article of the Union of Utrecht provides that no provinces, cities, or parts of the Union shall enter into any alliance with any of the neighboring powers without the consent of the other provinces of the Union, but the pamphlet of the Estates of Holland, just cited, explains correctly how this clause is to be interpreted. The Estates of Holland again on July 17,, decreed that there should be a new consideration with the provinces of Zealand and Utrecht regarding the proposed enlargement or re-constitution of the Union then existing. And on, September 21, 1662, the delegates of Holland and Zealand agreed not to permit the States-General to take any action concerning the command of the military service without the consent of all the provinces. There are indeed very many agreements made between separate provinces or between one province and neighboring cities or sovereigns, and there is no question of their legality provided they concern questions that are in the jurisdiction of the contracting parties. On this topic consult also the twenty-third and twenty-fourth chapters above, and the fourth chapter of the second book.

VIII. The question has arisen whether, if a safe-conduct is granted to an enemy to come into our country, he may be sued here by his creditors. The lower court and the Court of Holland decided in 1588 that this could be done, and the Supreme Court agreed on an appealed case on September 18, 1590. This seems to me correct, for the safe-conduct is given to him qua enemy, that is, to protect him from hostile attacks; and neutrals may be sued for debt. But we must add, that if an enemy may be sued, it is not just for us to prevent him from employing our courts against us, as I have argued at length in the seventh chapter.

IX. A safe-conduct issued in time of war is given for the sole purpose of permitting the bearer to pass safely into the hostile country and remain there. Hence I am surprised that lawyers have raised the question whether the bearer of a safe-conduct can lawfully be arrested in his own country. The question was discussed in the case of the Marquis of Messarano, who had received a safe-conduct from the Spanish government permitting him to go from his castle to Venice, but before he set out his castle was captured by the Spaniards and he was taken prisoner. The question was whether the safe-conduct exempted him from having to pay a ransom. Belli, who himself sat as judge in the case, did not venture to give a decision, as he relates, and Zouche as usual reaches no decision. Menochius would differentiate whether or not the Marquis was then ready for the journey; for if he was, the safe-conduct ought to protect him, otherwise not. The doubts of Belli and Zouche seem to me as foolish as the decision of Menochius. When the lands and castle of the Marquis were invaded he was lawfully made a prisoner, because he had received a safe-conduct for the enemy's territory, not for his own, nor had he bargained for a peace or truce, but merely for a passage through the Milanese country on his way to Venice. Whatever therefore was not within the stipulations, was subject to the rules of war.

X. As it is unjust to compel a sovereign to make war against his will, so it is unjust to force peace upon him. When France was at war with Spain, and we were afraid of her growing power, and the English feared that her greatness might shut off the sunlight from England, the Kings of England and

Sweden and the States-General drew up an alliance on January 23, 1668, agreeing that Spain should be asked to accept certain specified conditions of peace, and if after her acceptance the French King still continued the war, they would intervene with force and compel the Kings to make peace. On another occasion when it did not seem advantageous to Europe that the King of Sweden should have possession of Denmark, the English, French, and the States-General on May 21, 1659, compelled the King of Sweden to make peace with Denmark; and thus the King of Denmark was rescued from the jaws of death whither he had blundered by exciting the wrath of a stronger neighbor.

The pretext for such acts of injustice is usually a 'desire to conserve the peace', as it has been the pretext for even greater wrongs which have been fashionable for some years past, seeing that sovereigns have banded together to dispose of the dominions and powers of other sovereigns at pleasure, and as freely as if these were their own. Such wrongs spring from that which we call 'reasons of state'. If nations will yield to this beast, and permit themselves to appropriate others' property, it will soon be useless to argue further about the principles of international law.

END OF BOOK ONE

BOOK 2
Miscellaneous Subjects

CHAPTER 1

The Government of the Counts in the United Provinces Did Not Terminate till July 26, 1581

IN Tacitus, it is reported that Claudius Civilis, in order to incite the Batavians against the Romans, said: 'No account need be rendered for victory.' If this be true in the case of victory, it is surely more so in the case of a change of government, for considerations of a prosperous peace and of the tranquility of nations demand that no reckoning be required. I shall not discuss, therefore, by what right the rule of the Counts was brought to an end; at any rate it is certain that it came to an end on July 26, 1581; for on that day the States-General of the United Provinces declared that the rule of Philip II, King of Spain, had ipso jure (to quote the very phrase) terminated. It is not entirely clear what the phrase *ipso jure* means, whether, as seems likely, the States-General thought that the King had forfeited his power *ipso facto*, that is to say, at the very moment when he abused his privileges. For this is the opinion of jurists about kingdoms that are conferred under the conditions which apparently were involved in the terms of the oath that Philip took before the Estates on October 25, 1555. But in that case, it follows that all laws, regulations, constitutions, and prerogatives given by Philip II, not only after that date but also before, are null and void, since the States-General complained in their edict that he had broken their laws through several decades. And yet we employ without any scruple various laws and regulations passed and bestowed by Philip during those decades, laws that would be void under the above-mentioned interpretation. To establish some certainty once and for all, as behooves us in so serious a matter, it must be said that the legitimate rule of Philip over the United Provinces came to an end in the year 1581, and, in short, on the 26th day of July. And this we must conclude not only because this very decree of the year 1581 abrogated his power for the future only (voortaan, henceforth, is the word used), but also because he was held to be the legitimate Count, and all settlements were made and confirmed in the name of Philip as ruler, as appears from the decisions of the Court of Holland rendered November 5, 1579, May 21, and October 19, 1580, from the coins with the emblems of Philip II issued shortly before in the United Provinces, from prayers then publicly expressed for his safety, and from laws, as I just said, not only carried by Philip as legitimate Count, but also openly acknowledged and accepted. So then the phrase ipso jure used by the States-General seems to signify (if, as one may doubt, it actually means anything) only that the abjuration was final in every way.

What I have said is not disproved by the fact that the Estates had waged wars with the Spaniards before, since up to that time they spared the Count. It is one thing to abrogate the rule of the prince, a different thing to wage war with his regents, even though appointed by him, as is proved by many instances of civil wars under the Spanish kings. In 1547 and again in 1647 it is well known that the Neapolitans, while remaining loyal to the Spanish kings, took up arms against their regents, by whom they complained that they were oppressed even as the Dutch by their governors; and they even appealed for aid to the French, the enemies of Spain. And of the same nature at first was the revolution of Messina in 1675, and of Palermo before.

This very question regarding the date when Philip's power came to an end was discussed with great spirit between the House of Orange and Amsterdam in 1689, when the question was raised concerning a privilege that Philip II had granted to Amsterdam on February 3, 1581. The people of Amsterdam supported the grant, the Prince of Orange opposed it. In my opinion, Amsterdam was in the right. A certain pamphlet of an anonymous writer published in support of Orange in 1690

concerning this matter has come into my hands, in which the following arguments are brought against this grant. That the rule of Philip was ended by the Union of Utrecht in 1579 is evident, he thinks, from the laws that the Estates passed in 1579 and 1580; and hence it is that the Estates of Holland stated openly in issuing the 'judicial Formulary of towns and country' on April 1, 1580, that they spoke with the Count's authority: 'The Knights, Nobles, and Cities of Holland representing the States and the Count's authority of this land.' The anonymous writer might have added another act of the same Estates passed the same day (April 1, 1580), which prescribed the so-called political regulations, also the 'enlarged Formulary of the Court of Holland', dated December 22, 1579, and also the formulary of the lower courts, drawn up the same day. For in all of these the abrogated title is applied to the Estates with the exception of the phrase 'Count's authority'. The anonymous writer goes on to say that not only did the Estates pass laws, but these same Estates of Holland in section I of the above-mentioned 'enlarged Formulary' repealed section 8 of the judicial formulary which Charles V gave to the Court of Holland on August 22, 1531. Finally he says that the last law passed by the Count was on February 21, 1564, and that there is none extant after that date.

These circumstances impress the author of that book, but not me. The royal power of Philip II was no more abrogated by the Union of Utrecht than by the Pacification of Ghent. And yet it did not occur to the author to claim that it was ended by the latter, though it did to Conring. The latter is, however, wrong, for the contrary view is proved by both of those treaties as well as by many others which I shall not now pursue. Entirely correct is the statement which the counselors of the Estates of Holland made in a response to the Estates of Friesland on June 27, 1663: 'That the authority of the King of Spain was still acknowledged by the Union, at least he was assumed to be Duke, Count, and Lord of these Provinces, since it was clear that this King was first declared deposed by all the provinces of the Union in the year 1581, for even by the 5th article of the Union the Estates of the provinces were still called "the Estates of his Royal Majesty".' There is your answer, if you hold that war was declared against Spain by either one of those Unions. The Estates were in fact allowed by section 15 of the laws of Mary of Burgundy (March 14, 1476) both to meet in consultation within the provinces and to hold united meetings with other provinces, and that without any restricting clause. John of Bavaria, however, had made a similar grant to Dordrecht on June 20, 1418, containing an additional clause (14) providing that they should not take any measures against their Count. And perhaps on the basis of this grant it would be possible to defend the decision of the Court of Holland, rendered in 1482, whereby it condemned to death a governor and a magistrate of Dordrecht on the ground that they had voted to appeal to the cities for the expulsion of foreign troops from Holland. Hugo Grotius, and others who simply copy him, attack and abuse this decision of the court as being grossly unjust, particularly on the ground that it was unconstitutional for foreign troops to be stationed in Holland. But I do not know the basis and argument for the statement.

Besides, the author above mentioned appealed to the laws of the Estates. But the Estates had the authority to legislate in the time of the Counts, as numerous instances prove. Even from the last counts there are constitutions, and among them the edict that Philip II gave on March 2, 1557, in which his subjects are requested to obey the laws passed by the Estates. Now concerning the fact that the Estates of Holland say in the preface of the 'Judicial Formulary for towns and country' (April 1, 1580) that they speak with the Count's authority, I would understand this, if, as I think, it refers to the person of the Count, to mean that they represent the Count himself, then absent, though in power; since authority had frequently been given to legislate in his name. Nowadays they say only

that they represent the Estates of the county of Holland, which is entirely accurate. A certain commentator of Dutch wit has busied himself to little purpose with those phrases of the edict. In his opinion also the Estates might have abrogated an old law of the Count's, recognizing his veto in case this displeased the Count. But here, in section I of the aforementioned enlarged formulary of 1579, there is not even an abrogation; it is merely interpretation, and the right to interpret is not denied either jurist or judge by any one. When the same disputant finally says that the laws of Philip were received only up to February 21, 1564, he is absurd, and has already been refuted in the aforesaid. Presently, when I speak of other later laws of Philip, his errors will become even more apparent. The facetious fellow was not acquainted with any of the laws of Philip except those which occur in the miscellaneous collection which bears the title taken from the first in the book De Instructie van den Hove van Holland. In that collection the last law of Philip is the edict issued February 21, 1564, forbidding bondsmen to make a compromise before the pledges are secured. That was also the extent of the knowledge of the anonymous writer.

In a word, then, the authority of the Count ceased in the United Provinces after July 26, 1581; but the Estates of Holland had already abjured Philip on April 19 of that year, freeing the vassals and public officers from their oath to him and binding them to fidelity to the Estates, according to their decree of that date. However, in certain places, loyalty was still accorded Philip as Count after the abjuration of the Estates, and in Zealand there were magistrates pledged to the King of Spain even after 1581, of which fact the Estates of Holland decreed on April 9, 1582, that the Estates of Zealand should be warned.

Even public interest demands that the argument which I have presented should be considered valid. For what was decided at Rome about the edicts of Barbarius Philippus when he was held to be the lawful praetor should all the more apply to princes, even though they have usurped power illegally, as I shall show more fully below. Almost up to the time of the abjuration, all acts were passed in the name of King Philip. Should we then say that all these edicts and decrees are null? I should not. For instance, the governor and the Court of Holland issued an edict concerning shipwreck, made, according to the signature, 'before the king on the motion of the Governor'.

Though the Duke of Alva had in 1568 pronounced Orange a traitor in his absence, yet Orange remained publicly loyal to the King, as Count of Holland, taking the position that all the wrongful acts of the Duke were committed without the King's knowledge. In about the same manner the grant of a charter founding the Academy of Leyden was made on January 6, 1574 with the insertion of the name of Philip II, and the following phrase: 'by advice of our beloved cousin. Knight by Our Command, William, Prince of Orange'. William was as dear to the King as was the city of Leyden to which, as every one knows, the honor of having an Academy was given because it had so bravely resisted the Duke of Alva. Yet Orange himself in the preface of the Academic Charter speaks .of the King himself as 'The King of Spain, our gracious Lord'. The King is still 'gracious and merciful', although in the very grant of that year Orange calls the Duke of Alva and all of his party enemies: 'the enemies of Holland and Zealand'. In the same way, and in the name of Philip alone, Orange confiscated for state use the ecclesiastical properties of Holland and Zealand by the edict of April 17,, which was no less amusing than when, on December 7, 1577, he again, in the name of Philip, issued an edict that John of Austria and his party were to be considered public enemies.

But there are well nigh numberless edicts between the banishment of Orange and 1581 issued in the

name of Philip, and in most of these are found the words occurring in the grant to the Academy of Leyden: 'with the advice of our beloved Cousin, the Prince of Orange'. Must we hold that all of these are null and void, especially after the Unions of Ghent and of Utrecht? If we did, many things would be invalidated, the force of which neither Orange nor Count Rennenberg nor the Estates ever questioned. It was only on this condition that Orange, on May 3, 1579, and Count Rennenberg, on June 11, 1579, signed the Union of Utrecht, 'as considering that in this act the sovereignty and the authority of overlordship of the archduke were not curtailed or diminished'. By the word 'sovereignty' I understand Count Philip, the King of Spain; by the 'authority' of the archduke, I understand that the governor, Matthias, is meant; for, in giving his approval, Count Rennenberg calls Orange the 'Lieutenant-General of the Archduke Matthias, Governor-General of the Netherlands'.

From the above, it is evident that when the question arose of the right to make a testament depending upon the grants of Zealand which Philip II had bestowed on June 17, 1580, the correct response was given, namely, 'it is generally understood that testaments made by virtue of the grants obtained from the King of Spain as Count of Holland after the Pacification of Ghent, but before the Estates abjured him shall have the authority of deeds legally and properly drawn'. And at the same time it is apparent that the above-mentioned grant to Amsterdam dating February 3, 1581, which is here under discussion, must be considered as entirely valid. From the same arguments it is clear that the doubt is wholly misplaced which certain foreign writers have expressed about the authority of the academy of Leyden, as though it were not founded by the sovereign. But after the Peace of Münster it is utterly futile to entertain such doubts, as some have done.

CHAPTER 2

No One Is Responsible to the State for Counsel Given in Good Faith, Nor Can Any One Be Justly Punished for Obeying the Commands of the Sovereign

THERE are upstart politicians who propose to punish the giver of counsel according to the consequences of the advice, but they are worthy, surely, of all condemnation. Among these is the author of Political Disquisitions, whether it be Boxhorn or some one else, for the author has chosen to hide his identity. In his Case XIV he approves of the unjust decision of the Arcadians who condemned to death the men who advised helping the Thebans against Alexander the Great. This, he says, was bad counsel, and penalty should be exacted not only for treachery, but also for indiscretion. In saying the latter, he is judging from consequences; and whatever the case, no man is under bond to provide anything in the expression of his opinions but integrity of purpose. What may be rashness in one, may be courage in another, and those who judge from consequences confuse virtues and vices. Furthermore, if you consider the advice rash, why do you adopt it? Surely those who follow foolhardy counsel are no more prudent than those who give it. The Arcadians who advised sending aid to the Thebans were not proved to be acting with intent to deceive, and that was enough. In all cases, political as well as private, the rule of Ulpian ought to obtain: 'There is no responsibility for counsel given in good faith.' And that holds true when the counsel given does not benefit the man to whom it is given, as Gains correctly adds. If any one in difficulties desires advice, there are many who can give it, but not one who can vouch for the results; and if you require that, there will not be many who will aid you with counsel.

According to this, if any one gives advice in matters of state, and he does it in good faith, not only is he not held responsible in case of non-success, but he must also be reimbursed by the state for such loss as he may sustain from his own advice. Accordingly, in the treaty that was made in 1351 in behalf of William of Bavaria, it was expressly stipulated, that if any of these cities or any of their inhabitants sustained any loss on account of any acts or any counsel given on behalf of the Count, this should be shared by all. The Estates of Holland also, on July 19 and August 3, 1663, after declaring by way of preface that the expression of opinion on the part of the Estates regarding political matters ought to be entirely unrestricted, proceeded to decree that if any member of the assembly of the Holland Estates or any of their counselors or any minister of the Estates, or if any widow or child or heir of any of these sustained through violence or semblance of legal action any injury whatever, whether to body, reputation, or goods, on account of advice given in defense of the state, or on account of any decree passed regarding any matter whatsoever, or on account of the execution of such decrees passed at the instance of any one whatsoever, the Estates should reimburse such person or persons fully, as if the injury had been done to the members of the Estates. And this should be done without reference to the individual who had sustained the loss, 'and so that no lapse of time or prescribed period of years shall deprive them of their right to institute suit and prosecute claims which they may have in consequence thereof. By these words unlimited right of action for recovery is manifestly given, as, for instance, in the case of charges of treason; for in such cases the Greek jurists and most of the Latin agree that there are not statutes of limitation.

I approve of the decree as equitable, for it is quite true that such . action is not taken by those alone who propose it, but rather by the whole body through its individual members. However, I do not equally approve of the special clause that the Estates added to the decree, affirming that it applied

only to the future, and that no action for past deeds could be based upon it. Indeed this clause is added at the end of the decree not as issued in the regular volume of edicts and decrees, but as it appears in De Resolutien van Consideratie ten tyde van de Wit, and in Aitzema. I say I do not approve of it, because the decree, whatever may be its force, does not introduce a new measure but contains a right common to all law, as I shall explain more fully, presently.

Furthermore, the decree is correct in saying that he must also be reimbursed who sustains a loss through the execution of the commands of the Estates. Nothing could be more true than that one who obeys the orders of his sovereign, is not only not to be punished, but is also to be reimbursed for losses sustained because of those orders. In every agency this rule obtains, according to well-known decrees of the Roman law which I need not cite. Accordingly, when, in 1667, discussion arose again about this matter in the Estates of Holland, a resolution to the same effect was drawn up and sent by the Estates on December 15 to the Supreme Court of Holland for a decision; and both sections of the court responded in the same terms in 1668, with excellent judgement, according to my opinion. He is therefore a miserable jurist who eagerly approves of the decision in the following case: Magnus, the Count of the Treasury under Julian, was ordered by the latter to burn the temple of the Beristi, which he did; but presently, under Jovian, he was condemned to restore the temple at his own expense. Indeed it is a worthless judge who decides cases according to consequences: what pleased Julian might displease Jovian; but considerations of law require that a man obey the commands of the sovereign in power. The Count burned the temple, but it was Julian who commanded it to be done. Even according to barbaric law the mandate of the sovereign exculpates. He who slays at the command of the king, slays with impunity, according to the Capitularies of Charlemagne, chapter CCXV. 'For', it says, 'the law and the sovereign's command slay him, and the agent cannot refuse. But the prince and his successors shall defend him and his offspring lest he perish for the deed or suffer harm.' To use the semblance of political authority for the purpose of fraud, or to allow one's self to be tricked by it, is indeed impious.

The arguments which are brought against Magnus, the Count of the Treasury, have no validity in my judgement. If you hold that from the very nature of the offense it is not permissible to burn a temple, I disagree. I hold that it may be done because the property belongs to the prince, and there is no one else who has greater power over state affairs. Now if it be a case in which the defendant has advised the prince to destroy his own property, it becomes a question, I think, of whether he advised the prince with fraudulent intent or in good faith. And, further, the heir is not in every case permitted to bring suit of recovery against A because he advised the testator to bestow a gift upon B. For though 'give' and 'lose' are almost synonymous, the defendant may hold that he gave the advice in good faith, since there is often more profit than loss in a gift. But this depends upon circumstances. If, furthermore, you hold that the authority of the prince is not to be valued so highly that you must obey it to the point of burning a temple, you are again wrong. You permit homicide in self-defense, why then should you hesitate to destroy the temple of your sovereign when he commands it? He spoke truly who said, 'The anger of the prince is an augury of death,' and in Tacitus, Curtius Montanus expresses the opinion that 'we must accept the plea in .defense of those who prefer the destruction of others to the imperilling of their own lives'. Furthermore, we cannot accept the objection raised by our 'political disputant' who holds that when the acts of a prince are rescinded, the very mandate in question is also rescinded, so that the defendant has no longer any ground for protection, since, as agent, he acted according to a commission which then existed to his protection, but now no longer exists. But surely the defendant committed no wrong after the

rescinding of the acts, and it would be most inequitable to enter it against him that he was not a prophet. I know, of course, that a commission is no ground for excuse in criminal acts, and that there can be no agency except in legal affairs, but that applies only to private law. When the sovereign is the principal, nothing can be considered illegal, even though the act otherwise fall into that category, otherwise the idea of sovereignty could not exist. If a sovereign declares a war and issues orders to levy troops and collect arms, supplies, and other such things, shall they who have these matters in charge first deliberate whether the war is just or not, and shall they obey if they decide it just, and disobey if they decide it unjust? In such a case, as you see, sovereign power would be shattered, and the sovereign could no longer give his commands, but would have to spend his time in disputes with his subjects.

From the aforesaid, it results that the acts and judgements in Holland, pronounced against Barneveldt, Hoogerbeets, and Grotius, in 1618 and 1619, rest on the sole principle that a judge is assumed to administer justice even when his decision is unjust. If you examine all the charges that were brought against them, you will find that they were condemned solely and simply because of advice they gave the state and the magistrates, or because they executed the orders imposed upon them by the Estates and the magistrates, and that too in entire good faith. They therefore each of them had the right to bring suit for breach of contract against their principals to recover losses which they had sustained, in so far as restitution could be made. As for Barneveldt, restitution was impossible, since he had been condemned to death, but Grotius had prudently provided against the storm. Being syndic, and therefore the agent of the magistrate of Rotterdam, he had supplied himself with a warrant of indemnity given by the magistrate. In accordance with his bond, the magistrate of Rotterdam was ordered by the Court of Holland on November 3, 1651, in a suit of restitution, to pay the widow of Grotius the annual salary of syndic due up to the time when he had accepted a post elsewhere. And the Supreme Court, as I find in its records, not only approved of this decision on December 21, 1652, but also ordered the magistrate to make restitution for all losses which Grotius had sustained in the performance of his official duties. To be sure, on December 6, 1662, the heirs of Grotius renounced claim to the awards, and to inheritance of the properties of Grotius and his wife, and to all other attached privileges. The Estates of Holland recognized this renunciation by the act of December 9, 1662; but this was not done gratis the heirs did not renounce their claims for naught. Aitzema has told how the Estates made subventions to the heirs, and there the reader may get his facts. Aitzema also writes that aid was bestowed upon the heirs of Barneveldt, but I have searched in vain for confirmation of this statement. Indeed, when the heirs of Hoogerbeets petitioned the Estates of Holland either to submit their case to trial or allow them to carry it to court, it was decreed on December 20, 1663, that three annual payments of 16 Carolines each should be made to the three descendants of Hoogerbeets. The Estates added, however, that they made this decree because the city of Leyden had made a special promise of indemnity to Hoogerbeets, and also that this decree should in nowise be recognized as prejudicial to the validity of the decisions rendered in 1618 and 1619, since it was in the interest of public peace that those decisions should remain valid. It might have been better to have rescinded those decisions, and thus publicly revoke a public wrong, since there is no good ground for the Estates' preferring to base their equitable edict upon that promise of indemnity rather than upon the common law; for even without pledge of indemnity agents must be kept secure from damage in performing their commissions, a fact that no jurist questions.

CHAPTER 3

On the Right of Legation

AMONG writers on public law it is usually agreed that only a sovereign power has a right to send ambassadors. In usual practice, at any rate, independent princes and peoples send ambassadors to other princes and peoples who are likewise independent, and the rights of envoys among these are well established; but they are not to the same degree, when subjects, for instance, or rebels, send envoys to their princes. When the rebellion against Spain arose in the Netherlands, Margaret of Parma and the States-General sent two Belgian nobles, John of Montigny and John, Marquis of Bergen, to King Philip in Spain in 1566. Since it did not suit his purposes to send them back to the Netherlands, the King retained them in Spain, just as later in 1634 the Duke of Aerschot was retained, though he also had been sent as envoy. The two former, in fact, were not only prevented from returning, but were put to death at the King's orders by means of the sword or poison, according to common report, and the edict issued by the Estates on July 26, 1581, which abrogated the authority of the king as Count. The people of the Netherlands charged that the King by this act had violated the sanctity of envoys, and even the States-General in the decree just mentioned asserted that this deed violated 'all common rights always held inviolate even by the most cruel and tyrannical princes'. And for that reason they mention this as one of the reasons of the abjuration.

But Wicquefort in his L'Ambassadeur, correctly observes that though this deed of Philip's was not deserving of praise, it was not to be considered as unjust and outrageous, as those held it to be who judged solely from partisan motives. For those two nobles could not correctly appeal to the rights of envoys if one chose, as did Philip, to observe strict legal form, rather than the dictates of equity. Envoys are saved from being answerable to the authority of the prince to whom they are sent solely in order that they shall not have to change their status while in the service, and become subjects to another master while representing the interests of their own, who may even be an enemy of this other. And this consideration could not at all obtain in the case of those provincial quasi-envoys, for they continued to be subjects of Philip, as they were before the embassy, and they represented only Margaret, a subject of Philip, or the Netherlands, equally subject to Philip, unless indeed they were actually rebels as Philip held. They were therefore detained in Spain so that they would not escape into France, as they were attempting to do, and thence to the Netherlands, to stir up a rebellion. Since, however, they had come in good faith and with the consent of Margaret, they should in all fairness have been saved from death. Nevertheless, even Grotius holds that subjects and rebels have not the right of legation, and Zouche follows him. And this holds true unless the prince disregards the status of the subject or rebel and consents to treat with them as with a foreign and independent people, as is defined in section I of the Truce of April 9, 1609, between Spain and the States-General, according to which the King treated with the states as with an independent people.

In order that the embassies on both sides shall be able to stand on legal ground completely, it is necessary that both shall represent independent sovereigns; for if only one is independent, his envoys alone have full legal standing; the others are considered messengers if sent to a foreign sovereign, and subjects if sent to their own; so that the sovereign can enforce the laws against them as against his other subjects. When the Batavians revolted against Rome and sent an envoy with letters to Petilius Cerialis, the latter, without responding, since they did not have the right of legation, sent the envoy to Rome, doubtless so that he might be punished if he were found guilty of treason. And when Pisa, in 1327, refused to admit Louis of Bavaria into the city, he arrested the

envoys sent out to prevent his entry, as Burgundius tells.

When a state is torn by civil wars, the question is, in my opinion, which faction retains the governmental functions; if one part has them wholly as they were, and this part does not need the consent of the other to perform the duties of government, this alone has the right of legation, and the representatives of this part are fully competen-t to act as envoys. The envoys whom Vitellius sent to Vespasian, according to Tacitus, are to be judged as having this right. And so Tacitus correctly adds about these envoys, 'unless they had been protected by a guard provided by the general, this civil madness would have violated before the very walls of the city the rights of envoys held sacred even by foreign peoples'. For it is indisputable that Vitellius and the senate, by whom the envoys were sent, were not subjects of Vespasian, but were the sovereign power until they were conquered. It would have been far different if Vespasian had sent envoys to Vitellius, for they could not, by any standard of law, have claimed the privileges of envoys; they would have been messengers of rebels and nothing else.

Those, however, who require that a ruler must be an independent sovereign in order to send envoys, do not customarily distinguish whether he holds his sovereignty by just title, or whether he has acquired it unjustly, and, in fact, such a distinction would be impossible. It is sufficient for those who receive the embassy that he is in possession of sovereignty. Paschal rightly says: 'Very few kingdoms and empires can be mentioned whose origin rests upon the free vote of the people as in the case of Deioces, the first ruler of the Medes. Violence has brought forth more empires than has election'; and again: 'Factional strife and violence are usually the foundation of empires.' In the same strain is the statement of Carneades in Lactantius, 'If all nations which had gained great empire, yea, even the Romans who have won possession of the whole world, should decide to become just, that is, to restore what did not belong to them, they would all have to return to dwelling in huts.' In political matters, at any rate, it is expedient that possession be nine points of the law. Otherwise, we would be compelled to examine into the origins of all states to find whether or not they were based upon justice, and then ultimately to decide whether or not they had the right of legation. This, however, would be utterly futile, and would provide an excellent excuse for disturbing the peace of nations.

However, I should not like to make the unqualified assertion, as some do, that no one but an independent sovereign may send envoys, for that would put an end to provincial, municipal, and other similar embassies, which are, and always have been, numerous. I would rather say that all have the right of legation concerning matters that lie under their authority, but that the legal status of such envoys varies with the position of the prince who employs them, and the honors bestowed upon them vary accordingly. If the prince who sends them is independent, they are accorded full rights of envoys; if the prince is not independent, the position of the envoys is left to the decision of the prince to whom they have been sent. But this does not wholly destroy the right of legation, if the prince who sends them has authority in the matters concerned. Sometimes envoys of the conquered cities of Brabant, on presenting their so-called credentials, have been given audience by the States-General. Envoys of a military court have attempted the same, but in December, 1645, these, as well as military prefects of cities, and also the magistrates of the subdued cities of Brabant and Flanders, were ordered not to send envoys to the States-General, but to present their requests in writing. Deputies of the Estates of Gelderland send envoys, according to section 38 of their constitution, also the Dutch East India Company, as well as the French East India Company,

according to section 27 of its charter, dated May 31, 1664; and, in fact, who does not?

I know that when Elizabeth, Queen of England, had seized the moneys sent by the King of Spain to the Duke of Alva in 1569, she refused to treat with Alva's envoys on the ground that they were not sent by a prince. But the Queen clearly shows by this act, that she would rather avail herself of a trivial technicality than render each man his due. Zouche adds to this the instance of the two envoys sent to Philip, King of Spain, by the nobles of Genoa, who, however, were not received because the opposing faction in Genoa protested. But in this case Philip could refuse, not on the ground that their principals were subjects, but rather on the ground that when a state is divided by civil war, a part of the state is not competent to take political action, unless, as I said above, complete authority rests with that part. For. unless those parts which are authorized to consult and act together do so unite in action, everything is void that may be done by either severally. On this principle, according to section I of the Settlement of the Estates of Holland, everything was rescinded that had been done at the time of confusion (April 8, 1654) by the two factions of Overyssel, when both factions claimed, each to the detriment of the other, to be representing the estates of the province. Grotius makes a distinction in this matter based upon the relative size of the factions and would consider whether the two are almost equal. But this principle will hardly form a basis for a definition, nor does it seem to me to be applicable here. It is wholly a question of where the legal authority lies. And the illustration that Grotius cites regarding the envoys of Vitellius is not to the point, since, as I have remarked, the governmental functions of Rome were then in the hands of Vitellius and the senate. Wicquefort is therefore correct in rejecting this distinction of Grotius, or rather, correct in restricting it to matters which each faction has to discuss, that is to say, matters in which each faction has authority to act.

CHAPTER 4

Whether Individual States of the United Provinces Can Send or Receive Ambassadors

THE Achaean League, formed from seven states, resembled in many respects our state of the United Provinces. In an oration entitled Achaica, Jacques Godefroy cites the following among the laws of the Achaean League, 'It shall not be lawful for any state of the League acting alone to send ambassadors to a foreign power', and he thinks that so long as that law was observed, united action was always loyally taken, but when it was broken, the state too was disrupted. That the allied states in the Achaean League did not severally possess the right of sending ambassadors, was a consequence of the facts that the sovereignty over all parts of the league in all matters lay in the common Council, and that an embassy is not considered legitimate unless it comes from the sovereign power. But it would not be correct to apply this argument to the seven members of the United Provinces, whose individual states have retained their sovereignty except in some matters without which the Union could not be arranged. It is a rule and indeed entirely correct, asserted time and again by Holland before the other provinces, that each province is independent except in so far as it renounced this right in the articles of the Union. It is, to be sure, provided by section 10 of the Union of Utrecht that no province, city, or part should make a compact with neighboring princes except with the consent of the other members of the Union; but this must be understood to apply wholly to those matters that pertain to the common cause of the Union for in so far as they have renounced their rights not, however, to matters which the individual provinces have reserved wholly to themselves. What is true of compacts is also true of ambassadors; both are on the same plane.

Ulrich Huber, therefore, speaks in ignorance when he says that the independent peoples of the Dutch Republic have the right to send ambassadors. Indeed, the states severally have the right to send ambassadors and do generally act accordingly, since the matters concerned are matters that pertain to the common interest of all the provinces. But the particular point in question is whether the states severally have the right to send ambassadors on matters of their individual concern. In my opinion, this whole question depends upon the articles of the Union. If the right of action lies with the individual province, surely the province may separately enter into compacts with foreign princes in the matter, and may legally send ambassadors to them regarding this same matter; but if, as is usually the case, the matter concerns the States-General and the common good of the United Provinces, it is another matter, for the States-General alone preside over the common welfare.

This question was discussed with great vigor in 1654. On May 4 of that year, the Estates of Holland, in order to obtain peace, promised England on their own accord that they would not confer any powers on land or sea upon the posterity of William II, and that they would not in that body vote that the States-General should confer any such power. Against this agreement the Estates of Zealand, Friesland, and Groningen cried themselves hoarse, and published various pamphlets on the matter. The Estates of Holland responded with a complete volume. Now there are, we see, two parts to the Act of Seclusion issued against the posterity of William II. The first part excludes them from the offices that Holland might confer, the second, from those that the States-General could give, that is, in so far as concerned the vote of Holland. In support of both parts of the Act, the Estates of Holland took great pains to show that what they had promised England was entirely within their power, and that they, as well as the other provinces, had the right in matters that concerned themselves both to

send ambassadors and to make agreements; and in Part 1, chapter 5, of their response they cited very many instances by which, in their opinion, the proof was furnished that the provinces severally had employed that right even immediately after the Union of Utrecht. Now I shall not discuss whether all the instances cited there are apposite to the case or whether they can be made to support and agree with the above-cited tenth article of the Union; for we must admit that when the Republic was being formed many things were done hastily and not according to legal form. Yet I am convinced that the Act of May 4, 1654, does quite support and agree with the aforementioned tenth article; for both of the promises given to England depend in fact solely upon the powers of Holland. No one has any doubt about the first part of the Act, nor need one hesitate about the second part, for there the Estates of Holland pledged nothing but their own vote, and no one denies that the several provinces are free to vote as they please in the general assembly.

However, although the aforesaid Act of May 4, 1654, thus considered seems legally correct, the second part of it is not sufficiently considerate of the allied provinces. This distinction, which, as I have said before, is often applicable in other matters, must be observed here also; for, to speak frankly on a question of liberty, it is an inconsiderate and unfriendly act to deliberate without consulting or informing one's allies concerning matters pertaining to the Union and to pledge one's vote to another power. With this very objection the Estates of Friesland reproached Holland in a decree of June 24, 1654; but when it added that the Act was a manifest infringement of the Union, I do not agree. The Estates of Holland answered in the aforesaid response that they were at liberty to vote as they chose, which is entirely true; but, as I have said, the considerations of fraternity which somehow exist in a Union hardly allow that one member should pledge its vote without consulting the others. Even the several political divisions of Holland possess the freedom of suffrage, yet the nobles and cities are so far forbidden to promise their vote in matters concerning the state, that they may not receive envoys on matters which are discussed before the Assembly of Holland. In the very preceding year, 1653, August 2, the Assembly of Holland decreed that if the States-General or the individual provinces should send delegates to the nobles or cities of Holland 'concerning matters that pertain to the common welfare, or that have any bearing thereupon', the nobles and cities should not give audience to them but should at once refer them to the Assembly of Holland; and this, as is immediately specified, for the purpose that it should be possible to discuss and express one's opinion freely in the assembly. In the above-mentioned decree the Assembly says that it has explained this opinion more fully in a special book which it issued in 1651 in answer to a pamphlet entitled *Redenen en motiven die syne Hoogheid den Heere Prince van Orange bewogen hebben*, etc. In that special book the Assembly is wholly occupied in proving not only that legations of that kind are illegal, but also that they destroy the rights of the several provinces, and particularly the freedom of speech in the sessions of the Assembly.

But I would not dare to admit this so freely unless the law intervened. Those who have the right to send ambassadors also have the right to receive them. This is true, however, only with the understanding that the right of receiving, as that of sending, depends upon the right of taking action in the matter concerned. Therefore, as I have said, the several provinces publicly send and receive ambassadors concerning matters that are under their jurisdiction and power, but not concerning matters that pertain to the Union. In fact its laws do not allow the several provinces apart to hear the ambassadors, qua ambassadors, who are to speak on questions of common interest. In the same way the several parts of any given province cannot, according to legal form, receive ambassadors on matters that are to be acted upon by the assemblies of said province. But the aforesaid does not

prohibit the ambassadors who are sent to the States-General, or some of them, from conversing about state matters with single provinces, or even parts of provinces. For the suffrage of the several provinces, as well as of the several parts of a province, is free, and those who converse with the ambassadors about their vote, discuss a matter which is quite within their own jurisdiction. I should prefer that they did not pledge themselves, simply as a matter of propriety, which ought to be observed among allies, but if they choose to do so, there is no reason why they cannot. Surely they may converse about public matters in private, and they may listen to discussions through which they may come to the council chamber better informed. Nay, they may even, if they choose, promise their vote, as is everywhere done in the conferring of officers, and that too without harm to any one. If you deny this, defend if you can Holland's aforementioned Act of May 4, 1654.

I grant that ambassadors may speak in private, I do not grant that they may speak in public except to those whom the matter concerns. But this matter has been interpreted and observed in different ways in the United Provinces. In 1587, the assembly of Friesland expressed disapproval of the embassy sent by Count Leicester to the several parts of the state of Friesland as being unconstitutional and calculated to foment discord. Amsterdam likewise, in 1639, dismissed unheard the envoys of the States-General; and in the same year offered an explanation for this act to the Assembly of Holland. Again when Holland did not wish to support as many soldiers as the other provinces decided upon, the States-General and the Estates of Gelderland, against the opposition of Holland, sent envoys to the cities of Holland on June 5 and 6, 1650. These were received by some of the cities, but refused an audience by others. When Amsterdam refused to admit into the Council of the city William II, who, as Stadholder of Holland, came with the envoys, William issued a protest on June 30, 1650, in answer to which Amsterdam defended its course at length before the Estates of Holland; and the delegates chosen by the assembly to investigate the case decided that embassies of that nature should not be received by the magistrates. And this was also the decision of the States-General, elaborately discussed in that special volume mentioned above, in which they publicly attacked the pamphlet of William the year after its issue.

But these things were done before 1653. On August 2 of that year, as I have mentioned elsewhere, by a special Act, disapproval was expressed against the sending of envoys by the States-General or the several states to the separate cities of Holland, on the ground that such action was detrimental to a free expression of opinion in the assemblies. But whether this liberty of suffrage, so much discussed, is in accord with the decree of the very same States-General, whereby, in the following year of 1654, they pledged their vote to England, let those decide who exercise their suffrage without restraint.

Now, up to this time there had been no stipulation made concerning ambassadors of foreign powers, but this came presently. When, in 1662, a magistrate of Dordrecht had granted audience to an envoy of the Spanish king who came to discuss terms of a defensive alliance, the Assembly of Holland, by an Act dated September 28, 1662, extended the act of August 2, 1654, to cover such cases. After expressing disapproval of the conduct of Dordrecht, it decreed that nobles and cities 'may not grant audience to any envoys concerning matters that touch the common welfare of the land or that may in any way affect this, and matters the discussion of which belongs to the assembly of the sovereign States-General'. Such envoys they should at once send to the States-General 'so that no prejudicial action should be taken beforehand'. That the Assembly has jurisdiction over such matters is true according to section I of the by-laws that the Assembly of Holland drew up for its sessions on

February 19, 1585, but it is no less true that such matters are acted upon before the magistrates of cities in so far as they have the right of voting upon them.

Moreover, this Act of September 28, 1662, must be interpreted as referring to public audiences granted to envoys, for these are not allowed even to the several provinces if it be a question concerning the whole commonwealth. But we may not suppose that the individual nobles and magistrates of cities or those who are sent as delegates to assemblies, are forbidden by that decree to listen in private capacity to envoys of foreign powers or to converse with them on matters of the common weal. This is not prohibited by any law, nor can it be without prejudice to national dignity. However, they must guard secrecy, speak with discretion on matters not within their delegated powers, and observe the rules of decorum usual in associated action. As a case in point, I recall how the magistrates of Amsterdam, whose delegates met the envoy of the French king on state matters, were for that reason accused of treason, and their papers were seized and sealed at his home at The Hague. But the letter sent by the people of Amsterdam to the cities of Holland on February 19, 1684, and to the States of Holland on March 8 of the same year prove how illegal this act was. William III was at that time threatening the liberties of Holland. He himself brought the charge against Amsterdam, as on another occasion he accused other magistrates on the same charge and procured their punishment by means of his influence. Forsooth it was *lese majeste* against the house of Orange if any man dared breathe a word against his acquiring absolute power in the state, for he left as much power to the magistrates as Caesar left to his colleague Bibulus. God forbid! In the time of the free republic, it was always permitted without prejudice to converse in private with the envoys of foreign powers in behalf of the common weal, and it still is permissible.

CHAPTER 5

Who May Be Sent as Ambassadors

JUST as some have not the right of legation, so there are some who have not the right to serve as ambassadors, for as Grotius truly says, 'The Law of Nations does not prescribe that all ambassadors are to be admitted, but they are not to be excluded without cause.' He lays down three possible reasons for rejection: one, because of him who sends, a second, because of him who is sent, and a third, because of the matter for which he is sent. We are here dealing with the second class of cases, and it was for reasons of this kind that Lysimachus rejected Theodorus the Atheist, as Grotius, quoting Diogenes Laertius, narrates. But just as powers usually endeavor to choose men who will prove agreeable to the princes to whom they are sent, thinking it profitable to themselves, so the recipients usually accept whosoever comes, even men lacking in worth and dignity, assuming this course to be advantageous. And this they do, not only to avoid offending the princes who sent them, but also in order that the dignities and influence of the ambassador may not obstruct business. However, a prince will not receive men of low degree if he supposes that such have been sent by way of insult.

At this point I find that the question is raised whether the customs and laws of envoys apply to an exile if he be sent as ambassador; that is to say an exile who is sent to the very prince that banished him, and upon whom penalty of death or otherwise has been pronounced if he attempts to return within a certain period, or at all. The prince may of course restore his exile when he has served his sentence, and he may use an exile of a foreign power in his own service, and in either case he may employ them as ambassadors, examples of which are at hand in Paschal. But we are rather discussing those who return as ambassadors to the prince by whom they have been proscribed with a penalty fixed against their return. Old jurists seem to attribute the rights and privileges of envoys even to exiles of this class, as I gather from Bertachinus, and this opinion a certain Coke defends according to Zouche. But my stomach is too weak to digest such a mess, nor could Alberico Gentili, nor Zouche accept this view. It is at least agreed among those who have written on embassies that a prince is not obliged to receive any and every ambassador. Now what juster course could there be for rejecting an ambassador than if one were sent who, once a subject, had perhaps committed a treasonable act? What greater insult than to send a man who had been proscribed for a criminal act against the prince or his subjects? Shall such a man sit in the presence of his prince, and discuss with him and his council affairs of greatest moment to both states? Be more discreet, and do not impose a law so unfair upon another prince in his own domain. So then, the prince will keep an exile of this kind out of his boundaries, or if one has entered, he will order him to depart as soon as possible. He will hardly apply to him the penalty set against his return, for considerations of honor and good faith which should abound between princes would hardly permit. I would, in fact, disapprove of this on the ground that it is still an unsettled matter among jurists, and that in cases of uncertainty no harsh action should be taken against a non-subject. However, I should not venture to condemn a prince who chose to exert his rights to the full. The Romans in fact deservedly were praised for clemency by Tacitus for sparing the envoy Segimundus, who had formerly deserted to the enemy. Here is a case of a clash between justice and equity.

A man who had been in the service of the East India Company, and while in India, had been condemned to have his tongue pierced, fled to England. He was sent hither by the King of England to settle some disputes that had arisen between the King and the East India Company. As soon as

he reached The Hague in 1636 he was imprisoned at the request of the Company, but was soon released. This was indeed at a time when the King was already much offended, and it was of some importance to the republic that he should not be more so. In our own day, 1697, an ambassador of the King of England to France acted with more prudence, for before he went to France he gained the permission of the French King to take in his train certain men who had left France for religious reasons. Had he not asked and obtained permission, the French King might perhaps have treated them as returned exiles.

There is also the question whether it is right and legal to employ women as ambassadors. Zouche treats this question in his De Jure Feciali, giving the opinion of Kirchner who denies, and of Paschal who affirms that they may, and he also cites the reasons of both. He, as is his custom, makes no explicit rule. Indeed, what he applies to this question from the Roman law is of little value, for instance, that women have not the right to plead in the courts, and that those who have not the right to plead cannot perform the services of envoys, and the more general rule that women are prohibited all civil and public offices. For after all the Roman emperors made decisions at pleasure for their own subjects, but these do not apply to others. As regards this matter, I have proved with sufficient fullness in my *Liber Singularis De Foro Legatorum*, Chapter 6, that whatever is extant in the Roman law concerning provincial and municipal envoys which are the only ones discussed there cannot rightly be applied to envoys that various independent princes employ at present. For the status of these does not depend upon the civil law, but solely upon the law of nations. Accordingly also, other decrees of the Roman law that prohibit women or others from public offices have no bearing upon these. For example, according to Ulpian no one at Rome was eligible for public office before his twenty-fifth year of age. But who would today prohibit a prince from employing a minor as ambassador? The considerations of the Roman law do not always obtain here; if all women were admitted to the bar, we would often have lawyers like Caia Afrania, but a prince will take good care not to employ such as ambassadors.

As in every argument arising from the law of nations, so here, reason and custom present different aspects. Surely reason does not prohibit women from serving as envoys, for you will find in them the qualifications that are demanded by law for envoys. I do not, to be sure, like Plato, consider women the equals of men in all respects, for I know that men and women have certain qualities peculiar to each, certain common to both. One would not with good success have women bear arms, for there is not to be found in women as often as in men the invincible courage that provides the greatest protection in time of war. The peculiar qualities of women are tenderness, mercy, pity, virtues which even in a most successful war are oftentimes dangerous. Men are peculiarly qualified for the application of vigor and force. However, on embassies one does not apply force, but rather intelligence, diligence, alertness, threats, and flattery, of which women are capable, sometimes even to greater degree than men. Learning is, to be sure, a special honor of men, but who requires this of ambassadors? In days past, as well as at present, men have served as ambassadors who have not been skilled in the use of Latin, the vernacular of scholars, who have not taken part in political affairs or anything else than war or perhaps amusements. Tell me pray in what respects men are superior to women in the very qualities that are required in an ambassador? Intelligence and diligence and the other qualities that I have just mentioned are shared in common by both men and women.

It would be a mistake to think that men alone possess wisdom. Plutarch writes that among the Celts

women took part in the councils of war and peace; and this, as one might expect, was true among the Germans also, for Tacitus says that the Germans 'scorned not the counsels and soothsayings of their women'. Connan praises the many excellent counsels given and deeds performed by women in political matters.. But I shall not say more lest I encourage the vanity of women, a failing to which they are usually prone; I ask rather, since you permit persons in private station to act through whatsoever agents they choose, by what right you would deny princes this privilege? You will say that it is unseemly for women to serve as ambassadors and thus to mingle in the society of men. To be sure, but I ask whether it is more seemly for women to rule kingdoms, and, if you permit this, as many nations do, why should you not also permit a woman to serve as ambassador to a queen? It is hardly a reasonable rule, therefore, to exclude women from serving as ambassadors.

But if considerations of reason do not hinder women from serving, perhaps custom does, for the law of nations must also be considered from the point of view of usage. However, it does not. I shall not repeat the instances which Paschal has collected on this point, which fully prove that among the Greeks and Romans, surely civilized peoples, the right of embassy was granted to women. I shall rather add that the mothers of the Argives who fell at Thebes went to Thebes with Adrastus as envoys to secure the burial of their children, as Euripides relates. And if Amazons ever existed, what envoys are we to suppose that they sent? Since this was lawful in days past without endangering the modesty of the sex, I can think of no reason why it should not be permitted now. I even recall that in 1700 the King of Denmark appointed a woman, a widow of Amsterdam, and her son to act in his interests at Amsterdam, under the title of 'agents', usually applied to envoys of minor rank. But there is no reason why a practice should not obtain among envoys of greater dignity which obtains among lesser ones. It is evident that women do not frequently serve as ambassadors, and just as evident that this was true in former days. But whether it be or has been a more or less frequent practice, the rights of the prince do not prohibit it, and so his will is even in this matter the supreme law.

CHAPTER 6

The Business and Procedure of Ambassadors at Public Audiences, Formerly and at Present

I DO not wish to describe the ceremonies with which ambassadors were formerly or are now received, nor those that are observed when envoys are met in state before or at their arrival, or when public audience is accorded them. It is clear that a degree of honor is accorded them in proportion to the dignities of the prince who sends them, or the station of the ambassador himself; for in arranging the ceremonies it matters not a little what is the rank of the ambassador. And so before he is publicly received he must present his credentials, as they are called; and this is even ordained by the decree of the States-General of August 19, 1658. Many authorities have written extensively regarding these honors, but since the several princes do not observe the same practices, nay even change them, and often even disregard them because of the expense, I do not wish to waste good time in recounting such trifles. There are also various acts of the States-General in existence regarding this matter, which I shall also pass over; even though I know that trifles of this kind are accounted so important among ambassadors that he is reckoned the better and the more skilled who is the more practiced in them. But omitting these things of little moment, it is of more importance to know whether formerly or now serious matters have been discussed in the public audiences, and what these matters are. By the Gabinian Law it was ordained among the Romans that 'from the first of February till the first of March the senate should daily give audience to ambassadors'. The consuls usually introduced to the senate the ambassadors, who then presented their commissions, and they were then questioned by the senators who were skilled at interrogating about the matters that were presented and were to be acted upon by the senate. Presently when the ambassadors had been asked to withdraw, the senate deliberated and took its vote, and then when the ambassadors had been admitted again, the Princeps Senatus presented to them the decision of the senate in the senate's name. The procedure of all this as described with citation of supporting testimony by Zamoscius [Jan Zamoyski] in De Senatu Ronano and in Graevius. And although the ambassadors received their response so quickly, I do not find in any of the Roman authorities that any of the matters that they presented were ever disclosed before the audience of the senate was held. Among the Achaeans there was a different rule, namely that no audience should be granted ambassadors unless they first presented in writing the matter which was to be discussed by the council, and I find in Polybius, Excerptae Legationes, and in Jacques Godefroy that they firmly enforced this law even against the Roman ambassadors. It was doubtless considered dangerous to expose men unprepared and often untrained to the speeches of the ambassadors and thus offer occasion for proposals detrimental to the state. But according to present-day custom, none of the matters that the ambassador is to present or request are submitted beforehand, nor in fact is there any reason why they should be, because it is not the custom to answer the ambassadors immediately. At the public audiences before the prince or council of state nothing of moment is nowadays transacted. What you hear there from ambassadors is usually of this order: His Majesty or His Serenity, or His Highness my Lord has done me the honor to send me to Your Majesty, Serenity, Highness, to make known how fortunate is your friend, that he has married, or that a son or a daughter is born to him, so that Your Majesty, Serenity, Highness, may partake in his joy; or that his wife or a child has died, so that Your Majesty, Serenity, Highness, may share in his grief, and trifles of that order, matters already worn out in the gossip of the street and of such little worth that they furnish the topic of conversation to all the world. The response is usually of the same quality as the ambassador's speech, nor is anything else treated in these so important audiences, and so finally the whole purpose of the embassy is

accomplished. If, however, something of grave importance is .to be treated, the ambassador usually presents his written memorial, as it is called, and, this is submitted to the ministers of state or others delegated by the state for this purpose, who discuss the matter in full with the ambassadors, and after much bargaining and many delays, finally separate without accomplishing anything, or come to an agreement with the ambassadors and so report to the prince.

There is also a question as to the place where these discussions and this bargaining shall take place. According to the Act of the States-General on ceremony, passed November 26, 1639, and another similar Act of the same body dated February 7, 1657, the deliberations with ambassadors of foreign powers are held in a public place if the ambassadors have some proposal to offer, but if the States-General are offering the proposal, it shall be done at the abode of the ambassadors. However, the Act of February 7, 1657, adds that the ambassadors of France, Spain, England, and Denmark have the privilege accorded them of having the business transacted at their abode, even though they offer the proposals. I also know that in 1684 action was taken at the abode of the Swedish ambassador, but this was because of illness. Even those ambassadors who, so to speak, have the privilege of convoking sessions at home usually, by way of showing respect, meet the delegates of the States-General in a public place, unless a question of precedence arises with the ambassadors of other powers who are to participate at the deliberations. Furthermore, not all ambassadors of whatsoever rank go to meet the delegates of the States-General, but I do not always find it defined which do so and in what circumstances, nor which ones are obliged to present their pleas in writing.

Since, as I have remarked, nothing of importance is nowadays transacted with ambassadors at those first meetings, but everything is a question of customary ceremony, you will understand that public audiences of that kind require no knowledge or diligence either on the part of the ambassadors or of those who receive them. Hence it comes that such ceremonies are now celebrated before any and everybody, without distinction of sex or age, for the ambassadors speak before men, women, boys and girls, and even infants wailing in their cradles. Formerly those gatherings were of a different nature. When Nero was presiding at an audience granted the ambassadors of Armenia, and it was feared that Agrippina, the mother of the emperor, would ascend the tribunal, the Romans were struck with dread of the impending disgrace as though they would suffer the extreme of dishonor; but Seneca, under pretense of honoring her, artfully balked the inopportune aspirations of the woman, as Tacitus reports. The fear of the Romans was indeed justified since the ambitious woman had ascended the tribunal on a previous occasion according to Tacitus. Therefore, as Tacitus relates, Nero wrote among other things to the senate after the murder of his mother, that Agrippina had aspired to a share of the imperial power, had aimed to disgrace .the senate and the people, and that he had with great effort succeeded in preventing her 'from responding to the envoys of foreign nations'. But these indeed were the practices of the Romans, who, as is evident, considered it the depth of disgrace for ambassadors sent to men to be given audience by women. But now that the virtues of a great spirit are almost everywhere extinct, men permit women, not content to exercise great power among themselves, to all but seize royal power openly. When, in 1644, audience was granted by the King of England to the ambassador of the States-General, the King's wife sat with her husband to receive the embassy. Besides, it is a custom, even in nations that do not grant royal power to women, for the wife of the king to accord a separate audience to the ambassadors, where she is often requested to use her influence with her husband in favor of the cause in question. And these commendations have their weight, nay, often settle the whole matter, especially with those princes that, while they rule their subjects, are in turn ruled by their wives.

However, there is some purpose in these audiences before the king's wife. But I fail to see any reason why ambassadors even at present should present themselves before the royal sons and daughters, perhaps not more than two or three years old. And yet, before these they make a speech, whether about nuts and fruits, or some other trifle, I am not well informed. It is well known, however, that ambassadors are often greeted and dismissed by the meaningless prattle of infants. Even the Roman emperors permitted their sons to be present at the audience of ambassadors, as Claudian shows. The purpose of this was to accustom them to political administration, and to permit them to see the solemn ceremonies with which ambassadors were received. I do not recall reading that the ambassadors ever addressed them or sought their favor. Moreover, though such practices bring dishonor even to the princes, they have now so entered into the body of the law that it is considered wellnigh a crime to omit them. In my own day, the ambassador of Leopold, the German Emperor, was accorded an audience on a set day by Louis XIV, King of France. When, however, he had remarked on the day before that he did not intend to ask the children of the King for an audience at the Dauphin's palace, he was also refused audience before the King, and that too although quite recently the French ambassador to Leopold had not asked for an audience before Charles of Austria, the son of Leopold. However, the ambassador of the Emperor was compelled to yield the point, and when on December 1, 1699, he secured his first audience before the King, he paid his respects to the King's sons also. I understood, however, that an agreement was later made that Charles of Austria should be accorded the same honor, so that the French ambassador should request an audience with him as well.

CHAPTER 7

Whether an Act of an Ambassador Is Valid When Contrary to His Secret Instructions

IT would be a mistake to suppose that an ambassador is anything but an agent of his prince. Envoys were formerly called 'procurators', which, in fact, they are, and their commissions, which now are called 'volmagten', plenipotentiary, were formerly called 'procuration' among the Dutch. This was, in fact, the title of the commission given by the States-General to their ambassadors who were sent to make a treaty of peace with Spain on March 22, 1646. If, therefore, we apply the laws of agency, not only has the prince the right to bring action against his ambassador for abusing his powers as ambassador, but the commissioning prince is not even bound if the agent exceeds his commission. However, no one will rightly judge in these matters who has not learned the nature of the instructions usually given. When an ambassador is sent upon important business, he usually carries his commission in two parts, one which he presents to the prince to whom he is sent, and which now is usually called 'credentials' or 'investment of full powers', another called 'instructions', which he does not present. The first is public, being communicated to those with whom he deals, and it seldom contains anything but the assignment of power to act. The second, which is not communicated but kept secret, contains the principal points to be discussed and the mode in which the ambassador is to endeavor to gain those points. This second might be called the form of procedure. The validity of the ambassador's act is to be measured by the scope of both of these documents. The first part follows a standing formula both here and in foreign nations, and reads to the effect that what is transacted with these ambassadors will be valid even as if it were transacted with the prince in person, and the prince will consider it binding in every respect. There is no standing formula for the second part, for it depends upon the various circumstances of the different cases, and a different one is given in each case.

Hence the question is properly raised whether the ambassador's action, taken in accord with the public and general instructions, is valid if it be contradictory to his secret instructions. Gentili thinks it valid, otherwise the prince with whom he is negotiating may be deceived. Even Grotius seems to be of the same opinion. He says, On the Law of War and Peace, 'In a general agency it may happen that the person appointed binds us while acting contrary to our will as signified to him alone. For here there are two distinct acts of will: one by which we bind ourselves to hold valid whatever he does in this kind of business; the other in which we put him under an obligation to us not to act except according to our directions, known to him and not to others.' This he repeats in Book 3, Chapter 22, 4, 1, and illustrates with an example of an action against an agent. Moreover, in the preceding passage he adds: 'This is to be noted in those things which ambassadors promise for Icings in virtue of their written powers, when they go beyond their secret instructions.' He wishes, therefore, to consider valid what has been done with an envoy even contrary to secret instructions, preserving, however, for the prince the right of action against the envoy for abuse of his powers. Zouche is content to repeat what Gentili and Grotius say, but adds no opinion of his own; nor does it matter, for it would not be of great worth. My own opinion is as follows.

I do not choose to follow the authorities of former time, for I do not consider that their decisions are in every respect true according to the Law of Nations that obtains today. In acting contrary to instructions an ambassador does wrong, and therefore does not bind his principal, for the principal is not bound except by his consent, and that obviously does not exist if contrary instructions or none at all have been given. I will agree with those authorities only if the public instructions given were

of a special nature, describing fully the terms of action, for if action is taken accordingly under these conditions, the prince is voluntarily bound. Then obviously it will not profit him if he later gives secret instructions contrary to the public ones, for his feigned consent is expressed in the public ones, and a feigned consent has the force of a real one as Ulpian shows by a neat example. It is not to be presumed that any one gives two sets of instructions mutually contradictory; if he does, he commits fraud and pays the penalty. But it seldom occurs that the public commission is special and full, more seldom that the secret instructions contradict the public ones, it is most unusual that the ambassador rejects the secret ones given later and follows the previously given public ones.

But to pass over these rare cases which, according to line 6 of De Legibus, legislators generally disregard, we usually have an ambassador supported by a general public commission, and by one that is special and private. Whatever be the powers, even the fullest, bestowed by the public and general instructions, the ambassador, in my opinion, does not bind his prince if he exceeds the special and private ones. It is clear even from Roman law that general instructions do not always empower the agent to act freely and at will, but they convey certain exceptions according to the intentions of the principal, as in the case treated by Paulus, who says: 'And so if the principal does not ratify the compromise, he is not debarred from exercising his original right of action.' I would say that the very same holds true of the ambassador, for however general the public commission may be, because it is general, it refers in the intentions of the principal to the special, private commission, so that to this extent there is a tacit exception to the public commission. You will say, perhaps, that this exception must be made public in order to be valid, as is prescribed under the law of agency. But the case of the envoy is different from that of the agent. He who appoints an agent is bound by the very appointment if a contract is made in business over which the agent is appointed, but he who sends an ambassador is not bound unless the ambassador in good faith follows the instructions which the prince has given or will give later. According to present customs of nations those general commissions usually confer, as I have said, nothing but authority of action, but by no means authority to act at will contrary to the private instructions of the prince. There is a tacit understanding in all appointments of envoys that they shall diligently follow such instructions, and hence it is perhaps that those who dispatch envoys usually insert among the public instructions the statement that the person sent is suitable, skilled, upright, and trustworthy, as though on this condition the authority had been given him of making contracts and treaties rightly and properly, and by that I mean simply in accordance with instructions. Those who exceed their instructions are not upright and trustworthy, and if they do so one might perhaps say with justice that they have by law forfeited their position as ambassadors. To this may be referred the paragraph of the decree of August 10, 1651, by which the States-General ordained that if an envoy accepted a gift, he thereby forfeited all his dignities and privileges. In that case he is no longer an envoy, since it is presumed that his loyalty is corrupted by the gift.

To go a step farther, it would be correct to hold that nothing done with envoys under the general instructions is valid nowadays unless ratified by the prince. It may be valid as to form, but practically it has no force without the added authority of ratification. Bodin has proved that even in certain other instances general instructions have no force without ratification. That this is true in the case of embassies is sufficiently proved by the frequent promises of ratification that are inserted among the general instructions. Nor does any prince consider it entirely safe to transact business with an envoy unless the acts have been confirmed by the principals on both sides. Thus it is always permissible to rescind action, if anything has been inserted contrary to, or exceeding, the purpose of the contracting parties. And yet Wicquefort holds that such confirmation is by no means

necessary, saying, 'As the Civil Laws compel the private person to ratify what his agent has done by virtue of his commission, so the Law of Nations compels the prince to ratify what his minister has done by virtue of his commission, above all if the power committed is full and absolute without any condition that limits or qualifies it.' And presently he rebukes some princes who did not wish to ratify the treaties and compacts entered into by their envoys. We must, however, carefully distinguish between international customs which were formerly in vogue and those that now exist, for the most important part of the Law of Nations depends upon customary practice. Among the Romans the Senate and people ratified the treaties which consuls, without instructions to make agreements or treaties, entered into with foreign nations, as is found in Polybius, and in the Excerptae Legationes from Polybius. This, I say, was when there were no instructions about making compacts and treaties. But when there were such instructions, as when the senate decreed 'that Scipio should make peace with Carthage on whatever terms seemed best to him', there was no need of confirmation, and I do not find that the Romans made use of it on that occasion, or at any other time when the case was of the same nature.

However, former practices do not now hold, for the customs of nations constantly change. After the practice arose of ratifying treaties, it has come to be a wellnigh universal custom not to consider treaties and pacts made by ambassadors valid unless the princes whom they represented confirmed the acts. Wicquefort himself recognized ratification as necessary in the following words: 'The powers, be they ever so full and unrestricted, always bear some relation to the secret orders bestowed, which may be changed, as they often are, according to the turns and changes of affairs.' However, if the envoy makes compacts and treaties strictly in accordance with the public instructions, if these be particular, or in accordance with the private ones, which are always particular, I would not deny that it is the duty of the upright prince to approve of these, and that if he does not, he stands guilty of breach of faith and exposes his envoy to scorn. If, however, the envoy has exceeded instructions, or matters have been inserted in the compacts or treaties on which there were no instructions, the prince has full right to defer confirmation and even to refuse it. According to this rule I would condemn or approve of the instances of refused confirmation of which Wicquefort speaks so fully. In particular cases which he there reviews, I should not like to pronounce judgement, for they involve many facts that lie beyond the range of my knowledge, and perhaps also of his. However, nations are right in requiring ratification, for, as I have said, the public instructions seldom cover particulars, and the envoy guards the private ones in his strong box, so that those with whom he treats can hardly know anything about them.

From what I have said above we can judge of a case which brought the King of Sweden into a dispute with the States-General in 1667. On account of a previous suit the Swedish ambassador secured an indemnity of 1400 imperials from the States-General, and so acknowledged satisfaction of all claims, also renounced claim to certain places in Guinea, and to all further right of navigating those waters. When later in the same year the matter was discussed again between the States-General and other envoys of the Swedish King, the latter refused to acknowledge the previous agreement on the ground that the former envoy had not followed the secret instructions of the King. To this the States-General answered, that that was not their affair and that the King had ground for action against his envoy for abuse of ambassadorial powers. They said that they had made a contract with an envoy authorized by general instructions of the King, and that it was not their duty to ferret out his secret instructions. However, since the King had not ratified the treaty made by his envoy, his contention was favored on the score of equity. And yet the States-General prevailed according to section 5 of the Treaty between the King of Sweden and the States-General, July 28, 1667.

CHAPTER 8

Whether Ambassadors May Receive Gifts; and Related Subjects

FROM the title of the chapter, you see that we are not discussing the gifts that one prince sends to another to win his goodwill. These have always been permissible, and at all times such giving has been a common practice among nations, and especially in the East. What we are now concerned with is whether ambassadors may accept gifts. Indeed, the histories give abundant testimony that in former days gifts were bestowed upon envoys upon their arrival, during their sojourn, and at their departure, and accepted these without prejudice to their good name. Aelian tells about gifts received by envoys coming to the Persians, and other authors cite other examples.

Among the Romans, who particularly encouraged integrity among their people and accordingly forbade their governors and proconsuls to accept gifts, I find no law forbidding envoys to accept them. To be sure, I find that gifts were often refused by them, as one might well expect from the offspring of a manly stock, but I have sought in vain for a law forbidding them. The Roman envoys who had been sent to King Ptolemy 'delivered to the public treasury the gifts that they had individually received from the king, and that too before they submitted their message to the senate. They decided, it would seem, that no reward ought to be derived by the individual from public service, except commendation for efficiency in the performance of his duties.' This behavior of the envoys is recorded by Valerius Maximus. Valerius goes on to tell what the senate and people did in return: 'The gifts that they had delivered to the treasury were returned to the envoys by a vote of the senate and by permission of the popular assembly, and the quaestors immediately distributed these to the individual envoys.' Here is an example of generous behavior on both sides, but you will not find mention of any law prohibiting the acceptance of gifts. In fact, if such a law had existed Valerius could hardly have reported this deed as an example of magnanimity. I know of course that the Lex Julia on Extortion also applied to a man who accepted money as an envoy. But this law applied only to the one who in collusion accepted a bribe for the commission or omission of some act by virtue of his office. It did not apply to the man not charged with fraud, or to one who in customary manner received what was customarily given. Nor among the Greeks, except at Corinth, do I know of any law which forbade envoys to accept gifts from a prince (*nomos ouk eia dora lambanein para Dunastou probeuontas*) according to Plutarch *Regum et Imperatorum Apophthegmata, sub voc. Dionusiou tou presbuterou.*

As there was no consensus of opinion among nations of former days as to what gifts envoys might accept and retain, so there is none today. However, among most nations it is now the practice that envoys may accept gifts upon their departure. These vary with the dignity of the prince or his envoy, or in proportion to the services rendered, or if for some other reason the envoys have enjoyed greater or less favor with the prince to whom they have been sent. This custom has become so usual, that the Venetians show indignation if their envoy returns home without a gift. They even wished to force the Duke of Savoy by an agreement to send the gift which he had not bestowed upon their envoy at his departure; see Wicquefort.

The law which the States-General passed August 10, 1651, is quite different, being like the Corinthian law. They decreed, namely, that no envoy of the States-General should in any manner accept any gift whatever, under penalty of disgrace and whatsoever added punishment might be deemed fitting. Furthermore, breach of the law should ipso facto entail forfeiture of his office and

rights to all offices in the future. Wicquefort harshly inveighs against this decree on the ground that gifts when bestowed are usually presented when the envoys are departing, and that envoys can hardly commit an act of collusion or betray the interests of their prince at their departure, when all the business has been transacted. But his argument does not appeal to me, for it is self-evident that envoys while in office may perform their duty with greater or lesser degree of loyalty with a view to the nature of the gift that might be bestowed. Now, if the gifts in question be only of the kind that are customary among certain others, I freely grant that it may seem a rude and strict rule to refuse the gifts, and that is an insult to the integrity of the prince who offers them. And for that reason the question was discussed by the States-General in 1660 of somewhat altering the phraseology of the decree of August 10, 1651, preserving its intentions, however, as well as the form of the oath required by the decree. In this matter the Estates of Holland decided on October 9, 1660, that their vote at the States-General should be adverse to any change whatsoever. And yet another decree of the States-General (of which I shall speak presently), dated 1675, shows that release from the provisions of the decree of 1651 had frequently been granted. There were special privileges which certain influential and popular envoys had enjoyed, but which others had not. Some had even accepted what the law forbade, as for instance, the ambassador of the States-General to Moscow, who, in 1666, on taking leave of the emperor, accepted various gifts though he had not been granted a special, dispensation. However, in order to meet the objection that the law was strict and rude, and also in order to curtail the grants of privilege and the illegal behavior of some envoys, the decree of August 10, 1651, was somewhat modified in 1675. In fact, on April 29, 1675, the States-General decreed that their envoys might receive the gifts that are customarily given to other envoys in transit by the princes through whose domain they pass, or the gifts bestowed by princes upon departing envoys after their mission has been completed, provided upon their home return they showed these gifts to the assembly of the United Provinces. Concerning all other gifts the decree of August 10, 1651, was confirmed, with the clause that in the future no special favor of release from the oath provided in the decree should be granted. Even the Venetian envoys, upon their return show their gifts to the senate, which, according to Wicquefort, gravely deliberates whether these shall be returned to the envoys, or, as sometimes happens, shall be converted to public use. In our land, however, they are displayed as a mere formality, and I think there is no instance on record where they have not been returned to the envoys presently.

What is forbidden the envoys is also in my opinion forbidden their suite. Consequently these have no right to accept gifts that are forbidden the envoys. For I think I have established in my *Liber Singularis De Foro Legatorum*, Chapter 15, that they are to be considered as bound by the same laws as the envoys. Indeed by the Lex Julia, on Extortion, not only judges but also their attendants were bound. And though the members of the suite are not specifically mentioned in the above-cited decrees of August 10, 1651, and April 29, 1675, there can be no doubt that they are included in the meaning of the law. In other cases it is generally agreed that the prohibition of accepting gifts on the part of public servants extends also over their. attendants. And that is true not only in Roman law, as we have seen, but also in our own. This indeed is obvious from the edict of the Estates of Holland, dated March 24, 1644, in which members of both courts are forbidden to accept gifts. There is indeed good reason for this, since the members of the suite can also commit acts of collusion, they can urge those whom they serve to betray a case, and they can share their gifts with them; in short, it would be difficult to enumerate all the opportunities of iniquity that are possible. The officials of an embassy, therefore, may not receive gifts that are denied envoys.

However, the envoys of the States-General thought differently when they took leave from the French King on May 27, 1662. While they refused to accept the gifts proffered by the King because of the rigorous decree of August 10, 1651, they allowed their attendants to accept what the King gave. And another envoy of the States-General did likewise, June 1, 1678.

There is an old complaint often made that the greed for money and gifts alone is checked by law while other forms of the evil are not. But the provision against the offer of bribes in order to corrupt judges was extended to cover proffers of dignities and offices which are not conferred by the Colleges, in a decision of the Court of Holland, in section 15 of the by-laws drawn up to regulate its procedure (1670), but not confirmed by the Estates of Holland. If the rest of those by-laws had been as acceptable to the Estates, they would have been confirmed long ago, for it matters little whether you corrupt public servants with a bribe of money or one of office. And no upright person would deny that in the prohibition of gifts, envoys are also prohibited to accept office from the prince to whom they are sent. The fate of Hermolaus Barbaras is a case in point. When, as ambassador of the Republic of Venice to the Pope, he accepted the patriarchate of Aquileia without consulting the senate, it resulted in his ruin, as Joannes Pierius Valerianus reports in De Litteratorum Infelicitate, and after him Vossius, in De Historicis Latinis and Thomas Pope Blount in his Hermolaus Barbarus.

There is an instance of the same class of the year 1660. To a son of one of the envoys sent by the States-General to the King of England the King had offered a grant of 140 or 150 florins. When his father heard of this he wrote to the Estates of Holland, asking them to indicate whether his son could retain this without infraction of the decree of August 10, 1651, and if not, requesting that they would excuse him from further service as envoy, saying that he meanwhile would abstain from service until a decision was reached. In answer the Estates of Holland in a vote of December 9, 1660, decreed that since the son had won the favor of the King even before the father became an envoy, the grant was apparently made to the son without reference to the position of the father; furthermore, since the father had stated in his letter to the Estates that the grant had been made without his knowledge, the act was not contrary to the decree of August 10, 1651, and accordingly the Estates would urge the States-General to take the same action. But the Estates of Friesland, a people of strict manners, voted against this proposal, February 15, 1661, evidently considering that this grant was contrary to the decree of August 10, 1651. Now if the grant was made with a view to influencing the father, I think this decision entirely correct, even in nations where the father does not ipso facto exercise ownership over his son's acquisitions, as provided for by Roman law. But if it was given solely out of affection for the son, the decision would be different according to Papinian, and thus a just decision would depend upon a circumstance connected with a man's secret purpose. It would certainly be an easy matter to frustrate the Acts of August 10, 1651 and April 29, 1675, if we yielded too easily to the excuses for grants of this kind, for any number of them might be invented and the true motive can readily be concealed.

The laws and conditions applicable to the acceptance of gifts on the part of envoys ought also to apply to those who are especially delegated by us to treat at home with envoys of foreign powers. The States-General seemed to think differently on October 7, 1636, to judge from their Act of that date. However, they regained their senses, for on February 2, 1651, they decreed that such delegates should take oath that neither before, nor pending, nor after deliberations, should they accept any gift in whatever form, and that if one were offered they should in all good faith make this known to the

States-General at once, under penalty of disgrace and whatever other punishment might be deemed fitting.

The earlier authorities used to discuss with much warmth whether envoys might retain their gifts or must transfer them to the treasury of the prince they represented. They usually decided the case according to the nature of the gift, for, they say, if a lion is given it belongs to the prince, but if a garment for Aelian writes that garments are customarily given they award it to the envoy. If any one desires to take part in such discussions he may consult Bertachinus, Repertorium. Nowadays envoys generally retain the gifts they receive, unless there is a law prohibiting it. At Venice, as I have said, the senate discusses the matter in every case; and the States-General do also, but as the Venetians usually, so we regularly, permit the envoys to keep their presents. This is indeed done in accordance with the intentions of the donor, for the circumstances make evident that the gifts are not meant for others, as also the manner of bestowing them, since they are proffered as a reward for good service at the time when the envoy is taking leave of the prince with whom he has just performed that service.

I have no objection if the gifts are bestowed upon the envoys, and if they do not exceed reasonable proportions. But if they are bestowed upon the members of the council delegated to represent the sovereign prince or people, there is some doubt whether these delegates can retain them. Yet when the emperor of Moscow in 1663 sent a present of Siberian furs to the States-General, the delegates of the States-General did not hesitate to retain the gift, and accordingly by an Act of May 12, 1663, they divided up the present among themselves. Again, when Peter, another emperor of Moscow, sent a similar gift of furs to the same body, as we can recall, they accepted the gift, and in October, 1697, divided them up among themselves. Finally, when the Tripolitan prince recently sent seven Arabian steeds to the States-General, they decreed on March 18, 1735, that these should be allotted severally to the seven delegates of the provinces. Yet, despite these decrees, I am not sure that it was done according to law; for what is given to the States-General is given to the sovereign, and, therefore, not to the particular persons who for the time being represent the sovereign. Various persons perform this function at various times, so that we may not assume that the personal regards of a prince offering gifts in any way attach to definite persons usually unknown to himself. What is given to the sovereign is not conceived of as given to the person, as Gaius shows, for when a prince dies before a legacy falls due, it is awarded to his successor. Perhaps you will disapprove of this act of the States-General if you recall that the gifts they bestow come from the public treasury. It certainly is not entirely just to accept gifts for private use and to give them out of the public treasury with reference to one and the same office, nor does it conform to the rule of law. 'Do not avail yourself of an advantage of an act if you fear to accept the disadvantages thereof,' is a rule even of the Law of Nations, and not only a phrase of Ulpian. Would you tolerate an agent who charged to you the cost of the gifts he made while he retained for himself the returns which he received at the cost of your money? It would be very generous of you, if you did. And the question need not disturb you as to what might have been done with those gifts to the States-General had they not been distributed to the individual delegates. I could satisfy your concern by suggesting various methods of disposing of them. But let me rather ask whether it would be a greater disgrace for the state to have sold them than for the individuals to do so. Indeed, some of the delegates of the States-General sold those Arabian steeds immediately, using the proceeds for themselves; being informed, I suppose, that the barbarians of Africa at once sell without any feeling of dishonoring the state, whatever gifts they receive from us. Every one decides according to his own judgement about his own property, whether he has acquired it by way of a gift, or by any other method.

CHAPTER 9

Precedence among Ambassadors, and Between an Inferior Prince Who Is Present in Person and the Ambassador of a Superior Prince Who Is Absent

AMBASSADORS of the same title are accorded among themselves the same relative honor as the princes have who sent them; but the question of precedence between the princes themselves is by no means settled. This matter has caused contention for centuries, but since there is no judge competent to decide between the princes, and they are not accustomed to refer the question of dignity to outside arbitration, we are more uncertain than ever. Nor have we been well informed by the many writers who, in and out of season, have written abundantly on the subject of 'rules of precedence' that obtain between princes and men of various other ranks. Examine them all and you will find that in present circumstances it is far from evident that one ought to undertake to settle the controversy about precedence. If, however, you desire to know what others who have busied themselves in the matter have thought and said, you will find a long list of authorities in the preface of Jacques Godefroy's De Jure Praecedentiae, to which may be added, Christophorus Varsevicius with passages from his De Legato, Carlo Paschal (xxxviii and xxxix), Wicquefort, Zouche, De Jure Feciali, and many others. But since the authority of no man is valid in this matter, and since princes who have to deal with the question of precedence of other princes and their envoys do not give any general rules, do not expect me to lay down a definitive regulation. Nor could I if I would, even though I repeated all the rules that Jacques Godefroy gave in his Diatriba de Jure Praecedentiae. Indeed I am very much in doubt whether this subject can be limited and explained by set rules. One prince will appeal to the greater age of his nation or of his family, another to the greater extent of his. empire, another to superior forces, another to the more dignified title that he bears, and so on. But if you refuse to recognize custom and the rules that grow out of it for even this creates the law of nations give me, if you can, other rules on which nations agree, or if they do not, give me some authority from which I can derive such rules.

After the abdication of Charles V, contention often arose between the Icings of France and of Spain regarding the right of precedence, and it was long continued on the part of both with much spirit. Wicquefort has narrated in full the behavior of the envoys of both at Venice, at the Council of Trent, and at Rome. I need not repeat these tales, but I assure you that the obstinacy of both sides in guarding their rights of precedence often resulted in deeds of insanity. At The Hague on August 11, 1657, the envoy of the King of France came in his carriage of state drawn by two horses; opposite came the Spanish envoy in his carriage of state drawn by six horses. They met on the Voorhout at six o'clock in the evening. Neither would turn aside. There was commotion, then all but a battle. The French drew swords and pistols, but some Dutch dignitaries who happened to be near intervened and truce was arranged. Then there were negotiations till nine o'clock, with soldiers standing guard. For the men who intervened had called these from the palace where they usually keep watch. But not even then would either one turn back or give way. Finally they opened the wall on the Voorhout for the Spanish envoy, and so by keeping to the right side where he was, he passed on out by the French envoy.

Later there was another encounter, with fatal results, between other envoys of these two kings; and the French think that this furnished the occasion for ending the dispute regarding precedence. When on October 10, 1661, there was a public reception given the Swedish envoy at London, and the carriages of state of the French and Spanish envoys were engaged to participate in the ceremony,

a dispute arose between the French and Spanish present as to which should have foremost place; nay, they even fell to blows, which resulted in death to many on both sides, until the Spaniards won. The King of France, in great anger, threatened Spain with war. The Spanish King, who was very eager at this time to preserve peace with France, sent an envoy to the French King to appease him. At any rate the envoy made known that the King had recalled the ambassador who had been at London, and he affirmed besides, that his King had decided that for the future his own envoys should refrain from participating in ceremonies in which French envoys had a share. When he made this affirmation in the presence of envoys of many other princes (March 24, 1662), the King of France interpreted this as meaning that the Spanish King had thus yielded precedence to him, for he told the envoys present: 'You have heard the declaration that the ambassador of Spain has made. I beg you to write it to your masters, so that they may know that the Catholic King has ordered all his ambassadors to recognize the precedence of mine on all occasions.' But Wicquefort rightly observes that this interpretation does not follow from the Spanish King's statement; and that other princes have not so interpreted it is amply proved by the fact that the Spanish ambassador still precedes the French one at the court of the German emperor, as in former days. Indeed the Spanish King did no more than Philip II did at Trent, when he ordered his envoy to return home before the arrival of the French envoy, as is told by Paulus Sarpius. The command of the Spanish King to his envoys doubtless meant only that in their public acts they should take care in every way that no opportunity for serious disturbance arose. Amelot de la Houssaye in his Memoires (sub Ambassadors) has shown by a few instances what commotion has been raised about the place of honor at other places also by the envoys of these and other princes. But not only among the greater monarchs, but also among the lesser ones, men cry themselves hoarse with rage about this right of precedence, and this is particularly true of the Italian princes. If you wish to participate in these riots, Wicquefort will more than satisfy you. I desire no part except as peace-maker, and since no method occurs to me for laying the storm safely, I would speak my decision as peace-maker only so far as to forbid violence, and command each prince to order his own affairs. But the less the power of the prince, the greater his madness in this matter: to think that lofty minds should so rage over trifles! There is the same contention between the envoys, their agents, as between the principals. Two envoys of Italian princes happened to meet at Prague; since neither would make way for the other they stood the whole day on a bridge exposed to the ridicule of everybody, as Zouche relates from Varsevicius. Others have made themselves ludicrous on other occasions, but this I will omit.

I find that the question is raised, whether the envoy of a superior prince who is absent should take precedence over an inferior prince who is present. Paschal thinks the envoy in that case precedes, since the envoy is honored as the prince who sends him, and so the prince of lower rank must yield to the envoy of the greater when they meet in a foreign country. However, in his own country, the prince of lower rank takes precedence over the envoy of a superior sent to him, this being due to his holding sovereignty there. About this last point there is no doubt, but even in a foreign country I should give precedence to the prince even of inferior rank, provided he be an independent sovereign, over the envoy of a superior prince; and with this agree Jacques Godefroy and many others cited in his Notes. Wicquefort has the same opinion, though he is otherwise a vigorous defender of the rights of envoys. And I know no one among the writers who disagrees except Paschal. Envoys themselves have contradicted this view, and hence arose the quarrel between the Duke of Holstein and the ambassador of England on April 13, 1664. Another ambassador of England and this was even more offensive tried to take equal rank with the States-General in the presence of that body, drawing forth the just indignation of its members. Contentions have often arisen between the House of

Orange and the ambassadors of France on the matter of precedence. But there is good reason why the envoy, whatever be his rank, should give precedence to the prince who is present, for the prince is an independent sovereign. Hence it is that electors take precedence over envoys of absent princes according to the Golden Bull, XXV, of Charles IV; and in the assembly of Nuremberg in 1542, Ferdinand of Austria, as we are told, ranked above the envoys of Emperor Charles V. Even the prince of Neuburg was given rank over the envoy of Brandenburg in 1629. In fact, if you consider the envoy as an agent, which is possible and desirable, what noble, not to speak of princes, would give precedence to an agent perhaps of meanest station, simply because he has accepted from a prince of greater or less dignity a commission to carry on his business or his quarrels for him? Again, if you compare an ambassadorial commission to a lease or contract for work, who would deem the subordinate worthy of the same honor as the master? Let us then have no more invidious comparisons of princes and envoys, for it would not be possible for you to contend that any subordinate represents his master less than does an envoy the prince by whom he is sent. The dignity of the master secures a higher position to his subordinates in their society, but between one master and the servant of another, be that other even a greater, there can surely be no talk of comparisons.

If there be a regular college of sovereigns, the representative of one that is absent will hold the rank that the absent one would have if he were present. According to this principle, the Estates of the several provinces would have the same position if present at the sessions of the States-General as their delegates have among the other delegates; thus the delegates of Gelderland would rank above the Estates of Holland if they were present at the sessions of the States-General. So also, if the whole magisterial body of any city should desire, as they well may, to be present at the session of the Estates of Holland, they would occupy the same rank among the delegates in general as their delegates now do. Those who were sent as delegates to a body enjoy there the prerogatives of those who delegate them, and this, if I mistake not, is supported by reason, since confusion is thus prevented, as well. as by custom the world over. But when an agent is sent to foreign parts commissioned to do certain things as best he can, I do not comprehend how he, a subject at home, can precede in dignity and rank other princes who are independent sovereigns.

But men have gone even further in their folly. There are even those who think that the official instruments of envoys should be held in the same relative honor as the envoys. In 1697, when the treaty between the states of the Grand Alliance and France was being discussed, the carriage of state which had conveyed Count Straatman, the ambassador of the German emperor, to Ryswick was returning empty to The Hague, and met the envoys of the States-General who were going to Ryswick. The driver refused to make way, as I beheld with my own eyes. The envoys sent a message to the Count requesting that he order the carriage out of the way, which he did at once. Yet there are some who hold that he yielded out of benevolence rather than from a respect for rights. It is strange indeed that they do not believe that greater honor is even due the shoes of a prince's envoy than a prince himself, if the latter is of lower rank.

CHAPTER 10
On the Observance of Public Agreements and Whether There Are Any Tacit Exceptions

CIVIL law guards the contracts of individuals, considerations of honor, those of princes. If you destroy good faith, you destroy all intercourse between princes, for intercourse depends expressly upon treaties; you even destroy international law, which has its origin in tacitly accepted and presupposed agreements founded upon reason and usage. That treaties must be kept in good faith lest you destroy all this is readily granted, even by those who have learned nothing but treachery and all but frustrate the rules of good faith by numberless exceptions. Whether, however, a public agreement is always and everywhere to be kept inviolate is a very difficult question. Justin says about the ancient Parthians: 'No reliance can be placed upon their words and promises unless these are advantageous to them,' and Seneca makes the general statement about the human race: 'Hardly anywhere is good faith found when its observance is inexpedient.' The master of iniquity in his Principe teaches that treachery is lawful for princes, saying that any and every method of securing the safety of the state is honorable provided only it makes a pretense at being honorable. But that doctrine, long since exploded, has been superseded by another, somewhat more respectable but perhaps no more just. This latter doctrine holds that the saving clause, rebus sic stantibus, lies in every compact, and accordingly compacts can be broken: (l) if a new condition has arisen suitable for reopening discussion; (2) if circumstances have come to such a pass that one cannot take action; (3) if the reasons that promoted the alliance have ceased to exist; (4) if the needs of the state or expedience demand a different course. Christian Otho of Boekelen, who writes more learnedly and elegantly than you would expect of one so young, has published a Diatribe on these Tacit exceptions in public compacts. But though you employ all the restrictions with which Boekelen circumscribes these exceptions, you would hardly save yourself from Machiavelianism, if you would slink off to these dens of treachery with the itching soul of a prince.

Particularly that last exception which permits the breach of oath in case of the state's needs and advantages, what else is it but the thing they call ratio status, a monster of many heads which almost no prince resists? And what are the three former exceptions but cloaks of treachery? He who employs any one of them will presently conclude that he can break his treaties if the observance of them under changed conditions may do harm to the state, and he who thinks thus, is treading upon treacherous ashes that hide the fires beneath. If you once grant so much, there is no case whatsoever for which you may not break your pledge with impunity. But, you will say, I made the agreement for the very reason that under the conditions of the state the agreement was advantageous, while now when circumstances are altered the compact is inexpedient and so the reasons for making it have vanished, consequently it cannot be considered that I have given my consent. Furthermore, whatever a prince agrees to, he signs for the good of his state, and binds himself with this in view, but if disadvantage comes from it, he is not bound, because to that he has not actually consented and without consent there is no obligation.

This argument may be subtle, but it does not accord with facts, and in that manner you can rescind any act whatsoever, on whatever occasion you choose. There is no such thing as a compact without consent, or consent without reasons for consenting; there is no change of will without a reason that was not applied at the time when you chose differently. By your argument no promise binds unless the results are advantageous, and if war is profitable you will reject the peace you have made. In this

way a man who buys goods will repudiate the purchase if the price of them should go down, since he would change his mind with the change of price. Thus the result would be that a pledge which is binding according to all law would have no value whatsoever either in public or in private affairs.

Between the several independent nations there is no legal compulsion since the laws do not apply to international affairs, and the sole source of compulsion lies in the law. But the dictates of good faith and expediency require that international agreements should be observed, and to these must be attributed as much force as to the strongest pledge. In fact no pledge has more force than one that rests wholly upon greatness of soul. This first of all personal qualities is a particular adornment in a prince, and if it be absent, his state must fall into confusion. What prince will make a compact with a prince whose word is notoriously worth no more than a Carthaginian pledge? What will be the value of his agreements about trade, and aid in war, and the exchange of prisoners? In general these agreements are valid even between enemies, but it will be a small matter to break your word given to an enemy, if you may even break the pledge given to a friend.

If you are so capricious, you will probably break every pledge in ordinary social intercourse, for if I say that in daily life one must observe one's pledge because the law commands it, you will presently ask why one must obey the law, and you will ask for a definite demonstration of this proposition. If I say that each man must be given his own, because he -is the master and is so considered by the state, I suppose you will ask why he is so considered, and you will inquire into the origin of property. You say that nature did not give such and such a piece of land to A more than to B; and if A has taken possession of it you will insist that since he has taken possession of what was common property, he could not legally deprive B of his share without some action on B's part. Finally, perhaps you would acknowledge that as long as A holds possession of the land conformably to natural laws, B has no right to take it, since A has as good standing before the law as B, and other things being equal, possession is itself a point in his favor, since also the existing status should not be disturbed, except for a better cause, and since, accordingly, the cause of the defendant and of the plaintiff being on a par, no alterations should be made. But if you do not even concede this point but demand a division, then surely there is hardly a fixed point left in any case of ownership, or obligation, or finally any case that rests upon considerations of justice.

We must therefore attack the question with blunter weapons. When law has prescribed certain methods of acquiring ownership, we must observe these since no state can subsist without laws, and very expediency, the mother, I might say, of justice and equity, commands us to observe the laws. Even expediency obliges the several princes to keep their word, even though there are no laws between them, for you cannot conceive of empires without sovereigns, nor of sovereigns without compacts, nor of compacts without good faith. One must promise because one approves of the terms, and one must observe the terms because one has promised. But you will say, the observance of the terms often entails detriment and even destruction for the state. Granted, even on these terms it will perhaps be profitable to keep one's word. The courage of the citizens and kind good fortune may possibly restore the fallen state, but honor is like the breath of life, when once it is gone, it never returns. In political as well as in civil cases the words of Cicero hold very true: 'Nothing is more effective in binding the state together than the sense of honor.' In my opinion, therefore, a promise must be kept even when its observance is not expedient to the state, nay even when it is dangerous. This is my opinion, and it is also that of Cyriacus Lentulus in Augustus, where he vigorously defends the view with arguments and especially with examples.

Yet I would not reject all tacit exceptions, for there are some which all nations approve of; as, for instance, if I promise aid to an ally in case he is attacked, I need not furnish the aid if the prince himself has unjustly provided cause for the attack an exception which I have treated in Book 1, Chapter 9. I say I would not reject all exceptions, but neither would I admit all exceptions and qualifications of treaties that Grotius admits with captious concern, and from which Boekelen (in the above-cited Diatribe) draws most of his adornment of tacit exceptions. Nor would I adopt those of some other writers who though apparently more scrupulous are no less dishonorable. For while they hold that political agreements are inviolable, they admit that such can readily be frustrated by cleverness if they are harmful to the state. The author of the Political Disquisitions [Boxhorn] holds this opinion, but since he cannot support it by arguments, he does so only by instances of crimes.

I know that there are also other authorities in public law who tread the same path, but if we followed these leaders, all princes would soon understand how easy it is not only to deceive but also to be deceived. We must carefully beware lest this happen, and exclude all those excuses by which unprincipled rulers hide their perfidy. The ancient Romans knew well that there was a difference between the debtor 'who had wasted borrowed moneys in pleasures and in gambling and the one who had lost it with his own through fire or theft or some other misfortune'. Yet Seneca says: 'They recognize no exceptions, so that men may know that above all else good faith must be observed'; adding: 'for it was better that the just excuse of a few should not be recognized than that some exception should lie open for all to attempt'. In the case of state treaties also the situation is such that it would be better to recognize no exceptions than so to increase their number that men would all but destroy the rule which demands the observance of good faith.

What then shall we say? Perhaps one or two exceptions may be allowed. It would surely be just if the question of my keeping the promise were submitted to the prince to whom I gave the promise, as in the kind of case I just mentioned, and discussed more fully in Book 1, Chapter 9. Perhaps, however, you will say that this is actually not an exception, but an interpretation of treaties common in all usage. I care little what you call it; if you call it an exception, I will add another, namely that a prince is not bound beyond his capacity to perform the act promised, and the question of his capacity should be referred to the decision of a third prince who is to be a man of principle. Just as we give the favor of considering the competence (as it is called) of the individual who 'has lost others' property with his own in some misfortune' as Seneca says so would we grant this the more readily to princes if they act in good faith. A prince who is unable through circumstances to keep his promise should not have to submit to force or compulsion, for since force cannot be applied to him except by warfare, what would it profit to attack a prince with an armed force in order to compel him to give what he cannot give?

If, despite this fact, you use compulsion, you have undertaken a war in an unjust cause. But the question whether the prince can or cannot keep his agreement, or whether it is due to another prince that he cannot, I would not leave to the arbitrament of the two princes involved, since judges may not sit upon their own cases; but I would refer it to neutrals. In former days public matters were often referred to the arbitration of other nations, as you may find in the passage of Grotius which I cited above.

I have roughly sketched my opinion on a subject that has caused more than one war. If I had desired to elaborate this with care and to contend with the opinions of others, I should have to write a book,

especially if I added a history of how princes formerly dealt in this matter and how they still act. Such is the degradation of the human race that 'there is hardly one who scruples to break his word and violate his pledge provided he finds it expedient to do so'. Such are the words of Buddeus in if I may cite *Elementa Philosophiae Practicae*. You think perhaps that he refers to the ordinary rabble and not to strutting princes, hear then what he says of these: 'It is a crime for a man in private station to violate his bond, while in princes and rulers it is a requirement of prudence to break treaties.' Horresco referens, but I could give a thousand instances in proof that this is wholly true. But since I am treating all these subjects with reference to the state of the United Provinces, it is pertinent to note how it stands upon this question.

I recall a case in point: in 1595 the States-General admonished Elizabeth, the Queen of England, that she should observe the terms of the treaty made in 1585 if she wished to consider her own good name. The woman made the most absurd answer, saying that 'the contracts of princes rested only upon a pledge, and they were not binding if they resulted in detriment to the state', and other things of the same kind. The incident is told in Camden's History of Queen Elizabeth, and after him, in almost the same words, by Boekelen in the above-cited work. Zouche also has the story. The request of the States-General was entirely honorable and conformable to scrupulous conduct, but you will find the Estates of Holland no less conscientious; for when a book appeared, entitled Aanwysing der Heilsame Politicque gronden en Maximen van de Republicq van Holland en West-Friesland, which maintained that state agreements should be observed only when it was advantageous to do so, the Estates, by an edict dated May 28, 1669, condemned the book. They there declared openly that the doctrine that a pledge was binding only when expedient was dangerous, abominable, and execrable, and that this state which took the greatest pride in the strict observance of treaties had always and still abhorred this view. These were certainly excellent words and it were well if our deeds always conformed to them. I had intended, by running through all the epochs of our history, to examine in a special chapter the question whether the state had always acted on this principle. I began with the treaty in which, at the beginning of the republic, Elizabeth of England and the States-General agreed among other things that the ambassador of the Queen should always have a seat at the State Council a question which the above-cited Political Disquisitions discusses and I leave it to the reader whether he is right or wrong. I had intended, as I say, to continue from that treaty up to the recent treaty of February 20, 1732, according to which the Emperor of the Germans and the States-General agreed to furnish each other aid, and I may add that the bitter discussion raised about the observance of this treaty has not reached any definite conclusions. But it will be wiser to omit all this. I shall only add, that, in general, nations are usually so constituted that while you cannot charge them with flagrant treachery, you will not readily find in them striking examples of magnanimity.

CHAPTER 11
Whether Foreigners Should Be Kept from Offices of State

BY foreigners I mean not those who still live in foreign countries under some other sovereign, for no one would invite such to participate in offices of state in another country, but those persons of foreign origin who have come to our country and transferred hither their goods and interests. I shall discuss the reasons and the laws that bear upon the question whether such persons may hold offices of honor among us. So far as reason is concerned, if they are sufficiently versed in the language, the laws and customs, and in all the affairs of the state to which they have migrated, I do not see why they should be kept from administrative offices. Yet many legal authorities would prohibit this, though for reasons that do not appeal to me. They say that a greater love for the state is to be presupposed in a native, less in a foreigner. But who can make an adverse presupposition regarding a man who has come to our state with his family, his fortunes and all, and whose entire welfare depends upon the welfare of the state? A man will hardly take wrong action in affairs of state when with the destruction of the state his goods and fortunes would also be destroyed. But you may say that reason and law both invite men of superior wealth and dignity to offices of state. Granted, but it may be that the foreigner has these very endowments to a greater degree than the native. And, if he has, I would certainly prefer the wealthy foreigner of high rank to the less wealthy native of lower rank. And the native has no cause for complaint if he is surpassed in official honors by one who surpasses him in riches and in personal qualities. I grant that a man ought to know the state if he is to administer state affairs properly; but foreigners are often deemed better trained in this kind of knowledge than natives, for the latter, it is thought, imbibe this information with their mother's milk, and forgo the diligent application necessary in the acquisition of political knowledge. I would require nothing but that he who serves as magistrate, 'be he Trojan or Tyrian', shall be a man of integrity, diligence, and skill. But in states which explicitly exclude foreigners from all offices, it is by no means true that those natives are chosen who are in every respect suitable. Indeed, this is so far from being the case that if we were to make our choice with reference to the offices bestowed upon these we should rather have to consider seriously the offices that are taken away from them on the ground of their incapacity. To such an extent have considerations of the rank of parents and relatives and of political influence displaced all other influences for good government.

However, I would not admit foreigners to office without discrimination, but I would reasonably exclude those by whom there was reason to fear that the safety of the state might be endangered. And this fear might particularly arise when one nation was threatening the liberties of the other, and was attempting to seize power by means of the offices of that state. It was for this reason that in 1400 the people of Treves, who had recognized the good offices of France, decreed nevertheless that the French and other foreigners should not be admitted to political positions in the city, for they feared that their liberty was being endangered. And, if we wish to be truthful, this was why Holland and Zealand secured various special acts from the Counts prohibiting foreigners to hold political offices; for the princes of Burgundy and of Austria had begun to rule arbitrarily in Holland and Zealand, and were placing Burgundians and Austrians in office in order to rule the more easily. These provinces in fact entertained no fears from other foreigners whom. they might deservedly promote to office, but it was decided to prohibit all foreigners through these special acts, because they would offend these princes from whom they requested these acts if they excluded only the Burgundians and Austrians. So also the decree of the people of Treves, of which I just spoke, was put in general terms in order to avoid offense, although, as a matter of fact, it had reference only to

the French.

Now, that the cause which I have given was the sole reason for obtaining those acts against foreigners is already proved by the history of those times. To this I attribute the clause by which Mary of Burgundy forbade foreigners the higher offices including the schoutet, by section 4 of the laws which she gave Holland and Zealand on March 14, 1476. To this I also attribute various other privileges of earlier date, which Merula has enumerated. But besides these general provisions there were and still exist certain special acts which magistrates of cities obtained for themselves, thinking thereby to promote their liberties the more. According to these there are some cities where not even all citizens of Holland and Zealand are admitted to the office of magistrate or burgomaster, but only those who are born in the city in question, as Pliny says of the cities of Bithynia, or in a certain district, or those who have secured citizenship by marriage or by a term of residence. And there are other kinds of special privileges extorted from the Counts by prayers or money whereby foreigners are in every way excluded.

Those acts had a purpose at the time when they were granted, but now they have none, although Holland and Zealand still enforce them. For there is no fear of foreigners now: the Burgundians and Austrians and Spaniards are not plotting against the state. Nor would many foreigners gain admission to office even though the laws of exclusion were abolished, since now that the Counts have been removed the citizens of Holland and Zealand have the power in their own hands. And even if several were admitted we would not need to fear them, since there is now no foreign prince who forces them upon the state to his own interests or employs them in revolutionary service. And even if they were admitted indiscriminately, they would not all be from the same country, so that the fear of those days that they might conspire in favor of some one prince would now vanish. For the governors, like the Counts of a former time, threatened the liberties of the state and even employed foreigners in these machinations, and such was their influence that they were often opposed in vain by the laws of the land.

Furthermore, I do by no means approve of that part of the decree whereby the people of Treves removed the French from the offices which they held at the time of the decree. An office may rightly be denied by statute, but an office once obtained cannot justly be taken away without some accusation. Trajan, in his rescript to Pliny, took the more generous ground in behalf of the public welfare, that he should not eject the foreigners from the senate of the Bithynian state, even though they had been appointed illegally. So also Charles V, in the grant given to Holland on May 7, 1555, ordained that those then in office should not be removed, while, as I shall presently explain, he forbade foreigners of certain classes to hold offices of state in Holland. Holland also dealt more generously, for when in 1658 the Estates decided that the syndics, secretaries, and other officials which the cities employed at the assemblies of the Estates, should not be foreigners, they nevertheless affirmed that the foreigners then holding any of these offices might retain them (Section 7 of the decree of the Estates of Holland, dated May 14, 1658). In passing, it is deserving of note that this decree refers only to the 'syndics, secretaries, and officials of the cities', to quote the very words of section I; but what of the syndic and one or more secretaries and other officials of the Estates? There surely is as valid a reason, if not more valid, for excluding foreigners from these offices. But as I said, there is no reason; for Barneveldt surely did not perform the services of syndic less well than any one else.

However, general exclusion acts which applied to all foreigners later fell out of favor even with the people of Holland; the stricter parts were modified and the principle of retaliation was adopted. At the request of the Estates of Holland, Charles V decreed, on May 7, 1555, that no one born outside of Holland in any country where Hollanders are excluded and no one born outside of the Netherlands or unable to use the Dutch language should be admitted to any political office in Holland, except he be governor or Knight of the Golden Fleece. This act Philip II, King of Spain, confirmed on December 17, 1556. You see then that foreigners are excluded, but on the principle of retaliation, that all Netherlanders are admitted in the Netherlands, and that Austrians and Spaniards, who were then feared, are still excluded with all other foreigners, so that Netherlanders alone are admitted. Moreover, however sound the reason that would exclude foreigners only in so far as they are dangerous, it is not unjust to exclude men on the grounds of foreign birth who come from nations where our citizens are excluded from office by law or national custom. This principle is preserved by the decree of the Estates of Holland of April 19, 1631, and by many others that I found in turning over the decrees of the Estates. Grotius also has something to say on this matter, and Groenewegen, but the latter is careless and does not cite his authorities.

Consequently, foreigners from countries where Hollanders are not excluded are admitted to office in Holland. This you may consider the law, with two exceptions. Firstly, we must make an exception of the syndics and secretaries whom the magistrates of the cities take to the assemblies of the Estates, for these, if foreigners, are excluded by the above-mentioned decree of 1658; and it makes no difference where they are born, or whether or no in their land of birth Hollanders are excluded from office. The second exception grows out of the various privileges of cities which I mentioned in brief above. These privileges the Estates have not the authority to abolish, even as the Counts could net. Considering then that these grants exclude from the office of magistrate or burgomaster all men not born inside of a certain district of Holland or in the city in question, it surely follows that a foreigner is excluded though born in a country where Hollanders are not excluded. For that general law, based upon the principle of retaliation, which the Estates of Holland passed later could not abrogate the former privileges of the cities, a fact supported both by reason and by a statement in Justinian.

What are we to say of those for whom the Estates of Holland cancel the disabilities attaching to foreign birth, giving them documents called letters of naturalization? Hollanders write that these documents in their simple form give nothing but the privileges of a mere subject, so that the foreigners thereby become subject to our laws and gain the right to trade, but that they do not admit him to offices unless a statement to that effect is specially inserted. Documents of this kind are very frequently given, but cui bono? as Cassius would say. They seem to me of little value if we consider the laws that I have just mentioned. If these documents in their simple form grant nothing but the position of subject and the right to trade, surely any and every foreigner or stranger gains these when he is received as a citizen by the magistrate of the city in which he has taken up his abode. And the magistrates of the various cities constantly receive any stranger or foreigner in this fashion. For this, therefore, there is no need of a special grant by the Estates. If the document is given conceding the right to hold office it will be of value for that purpose, but foreigners can attain to those even without these documents, provided they were born in a country where our citizens are not excluded from office. And if you say that the special privileges of certain cities exclude those not born there, or in a certain specified district, I grant that too, but these papers of naturalization cannot bestow greater rights upon foreigners than are given Hollanders not born within the specified places. The charters

of the cities therefore that exclude Hollanders also exclude foreigners, since it is not the purpose nor is it within the competence of the Estates to disregard the charters of the cities by the grant of naturalization papers. If I understand the matter, those papers in their simple form give nothing at all which the magistrates cannot give; if, however, they are granted with a concession to hold office, they are of use under two different circumstances: firstly, they may admit to office foreigners who are born in countries where our citizens are excluded from office, since the Estates can allow exceptions to their own laws; secondly, syndics and secretaries, who are excluded from their offices by this decree of 1658 because of their status as foreigners, may retain their offices by securing one of these documents. I have not been able to find whether they are of any further service in procuring office, but I have noticed that more often than not there is no real reason for asking for these diplomas, and it is wrong to grant as a favor what is provided for by law. I have at hand many instances that I could cite by way of proof, but the matter is hardly worth the effort.

CHAPTER 12

Whether Magisterial and Judicial Power Can Be Delegated

IT is a question of public law whether, and if so to what extent, a magistrate or a judge can delegate to another the power or jurisdiction that has been given to him. It is agreed that in Roman law the magistrate's power (imperium) of life and death, which was called merum, could not be transferred, while judicial power (jurisdictio) and the power attached to it, which is called mixtum, could be delegated. Papinian, in the passage cited, gives the reason for this difference when he says that the powers that have been conferred specially by a statute or by a senatus consultum or an imperial enactment (as is the case in merum imperium), are not transferred if the officer delegates his jurisdiction; but those powers can be delegated which derive to the magistrates by right of their office. But you will say that even jurisdiction which belongs to the magistrate derives ultimately from some statute and its scope is defined by law, and so you will demand a reason for the reason. If I say that merum imperium deals with matters of greater moment while mixtum imperium deals with less important affairs, I shall not be using the words of Papinian. However, we are not here concerned with this question, nor with the question why the Romans, in disagreement with most nations, decided that jurisdiction could be delegated. Perhaps it was because of the great burden of work which the urban and provincial magistrates were overwhelmed, or because of sickness, or other serious peril, that prevented them from performing their official duties, or indolence, which they could gratify by this rule, or lack of training, the consequences of which could be avoided by delegating their jurisdiction to one more skilled. One might perhaps not be far wrong if one assumed such causes as the origin of the practice of delegating jurisdiction, and if one explained in this way why Roman magistrates appointed arbitrators and assistant judges. However, appeal was granted from the decision of the arbitrator or the delegated judge, as I have fully explained in Observations Juris Romani.

Coming now to the point, I consider it fully established if we examine our own laws that all magistrates and judges, whether appointed by the sovereign or by those to whom the sovereign has given the right of choice, perform their official duties in person and that they themselves conduct the trial and pronounce judgement in both criminal and civil cases in accordance with the terms of the oath which they have taken. Indeed, the *Edictum de Criminibus*, section 8 (July 5, 1570), of Philip II, permits no office or magistracy to be delegated; and that is the law which we now follow, as I shall presently show by examples covering both fields of jurisdiction.

What then is the meaning of the opinion of Gudelinus which Groenewegen repeats? His words are: 'For today the power of imposing capital punishment does not belong to the imperium merum, but is a part of the ordinary judicial power, and it passes with the delegation of jurisdiction, and is exercised by the deputy even as the other judicial powers.' But if Groenewegen had continued the passage from Gudelinus, it would soon have become apparent that he was referring to lords of manors or others who appoint judges in the name of the prince. However, his interpretation will not hold even if he refers to those, for those lords, according to the terms of investiture, 'have authority not to judge but only to appoint judges, and they do not appear to delegate power but rather, acting in the place of the prince, to appoint judges,' as Groenewegen himself rightly observes. Those lords neither act as judges nor possess the authority to judge, and when we speak of 'delegating jurisdiction' we refer to one who himself exercises jurisdiction if he wishes, and can, if he does not wish to exercise it, delegate to another power that he actually has. It is wholly incorrect, therefore,

to say that any one today can delegate jurisdiction, that is, that any one can appoint another to pronounce judgement in his place, which he himself would have done had he not appointed a substitute.

All magistrates and judges are at present quasi-deputies in the matter of judicial power; the sovereign or he who acts for the sovereign is quasi-principal. As it is evident that a man cannot delegate jurisdiction to another which has been delegated to him, so magistrates and judges cannot delegate their powers, for they were chosen in view of certain qualities of integrity and diligence to perform the services in person. And to speak first of criminal cases, clearly those who judge under oath in these cases cannot delegate their powers to men not under oath. In fact, not even the official prosecutors of whatever title, whose only duty is to proceed against the criminal, are allowed to delegate their office. These prosecutors are commanded to have their abode in the district where they are appointed to watch over the rights of the sovereign, and they are forbidden to substitute deputies or officers called 'stadholders'. This is the general order of Philip II in section 8 of the above-cited Edictum de Criminibus of 1570. And this also held true in former days, for John I says in section 40 of the Leges which he gave to Holland and Friesland in 1299: 'In our free districts where we have appointed district-superintendents, these officials appointed by us may not appoint any one under themselves.'

Accordingly, in answer to a request by a magistrate of Heusden, the Estates of Holland decreed on July 17, 1662, that no one should hold the office of bailiff, castellan, or dike-keeper in Heusden who did not have his fixed abode at Heusden so that he could perform his official duties in person. I know that the effect of this prohibition has often been annulled through favoritism and that it still is, sometimes openly by the grant of exemptions, sometimes secretly by mere connivance; but I do not remember ever having read that judges in criminal cases have employed substitutes or have secured special dispensations bestowing such a privilege.

I think the same is to be said of civil cases or cases involving money. Accordingly, when the local judges were ordered to try the cases discussed in section 33 of the edict of the Estates of Holland, dated December 20, 1595 (regarding the turf), and when these officers delegated their jurisdiction to the bailiffs (schepenen), the response was correctly given that the bailiffs could not try these cases, and that the sovereign alone could appoint judges, and bestow, increase, or diminish judicial powers: no one, therefore, can delegate to another the jurisdiction bestowed upon him in the Roman manner of delegating it. To speak accurately, no one today exercises jurisdiction that belongs to himself; those who exercise it employ the power bestowed by the sovereign, and accordingly cannot rightly delegate to another what is not their own. Furthermore, he who chooses a magistrate or judge is supposed to choose a man of whose experience, industry, and probity he is or ought to be certain, a man who can 'adorn the province he has obtained'. But if he delegates his power to another who may be much inferior he deceives his too trustful sovereign and shows little regard for the common welfare; not to mention that it is one thing for an officer under oath to perform his own duties as all men under oath do, and quite a different thing for a man not under oath to do the work in the way that deputies act who are not sworn. Accordingly when in the districts that the Netherlands had obtained from Spain the custom had grown up of allowing the delegation of authority, the States-General in 1645 decreed that every official, political, military, and ecclesiastical, should perform his own official duties, unless he secured exemption for some special reason. And although this decree has been enforced with laxity and still is with regard to political offices, I have not

discovered any exemptions for those who have been appointed to judicial positions.

Indeed, if judges in Holland and Zealand were permitted to delegate to another the authority given to them, this ought particularly to be allowed the judges of the court which holds sessions at The Hague in the name of Holland, Zealand, and Friesland. But so far is this from being permitted, that Count Leicester on July 28, 1586, by special edict ordained that if there were one or more vacancies in the Supreme Court, this court could call upon one or more judges, not wherever they chose but from the court of Holland. This ordinance, by the way, Groenewegen incorrectly attributes to the Estates of Holland. Moreover, when in our state the magistrates of the larger cities appoint minor justices called commissarissen to have charge of less important cases, as, for instance, those touching maritime affairs, or matrimony, cases however which would otherwise fall under the jurisdiction of the schepen, you must not conclude that this is an example of delegated jurisdiction. It is not, for you will find that magistrates have usually requested authority from Estates to do this; the magistrates of Amsterdam certainly requested it on July 17, 1612, as well as at other times. But what if the request was superfluous, as the magistrate of Amsterdam held on the occasion just mentioned, saying that they already possessed the authority to appoint minor justices of this kind? I grant this, and I am not ignorant of this view. But this is true simply because all magistrates of all cities derive from the Estates their authority to appoint judges, whether the higher ones called schepenen, or the lower ones called commissarissen, according to the needs of their cities. Its correctness is not based on the ground that magistrates can delegate to others the jurisdiction delegated to themselves, even though the magistrates of Amsterdam made this contention on July 17, 1612. They were clearly in the wrong, for the magistrates cannot be said to delegate their jurisdiction to others since neither they nor any officer attached to them exercise the functions of judges. Then also it is evident that those lower justices are not the deputies of the schepen from the fact that they exercise their own authority, not that of the schepen, since appeals from the decision of those lower justices are carried to the schepen and not to those who are above the schepen, as would be the case if the jurisdiction were delegated. This point I have made clear in my *Observationes Juris Romani*.

You may hold that the following case also involved the question of delegated jurisdiction. When a suit regarding a trust fund of large amount was pending before the schepenen of Amsterdam, these, in order to rid themselves of the burdens of a long and very difficult trial, decreed by an interlocutory decision rendered on February 1, 1729, that the case should be tried before three deputies appointed by them for this purpose, and that after these three had heard the arguments and examined the documentary evidence, they should refer their decision in writing to the schepenen. On hearing of this, party A, in a petition to the schefenen, complained that this procedure did not conform to the court regulations which the city of Amsterdam had adopted on April 27, 1656; for, he said, according to section 8 of Chapter 6, the only cases that were submitted to arbiters were those in which there was a question of rendering accounts, and these were submitted only for the sake of attempting to reach a compromise, and if this did not succeed, the schefenen tried even such cases. Furthermore, he held, the above-mentioned section 8 required that cases involving a point of law, as in the present instance, should be plead before the schefenen. He accordingly requested that this be adhered to, or at least that after the case had been tried before the three deputies, it should not be considered closed until it had been plead again and the documentary evidence read again before the judges who had been chosen and sworn for this office. The schefenen indignantly rejected this petition. Then party A attempted to appeal from the interlocutory decision to the Court of Holland,

but a writ of appeal was denied him April 7, 1729. After this he asked the supreme court for a writ of appeal, which the schefenen, in a letter dated May 6, 1729, asked the Court not to grant, for they held that their interlocutory decision rested wholly upon matters within their own jurisdiction, and that neither court had the authority to interpose in this matter. When the judges of the Supreme Court had heard the full arguments of both sides, as well as a presentation of the judicial customs in vogue at Amsterdam, without rendering a solemn decision from the bench, they all however made known their opinion in the following terms: though judges, conscious of their limitations, have a right in the foremost city of Holland, as well as in towns and rural districts, to consult men of special knowledge, yet they have the right only on the understanding that the parties to the suit shall be heard in full by the very judges who are chosen and sworn for this office, and that each of the parties concerned may employ attorneys and defend his case, for this is the practice in Holland and everywhere. Accordingly, it was their opinion that the case under discussion should be tried before the schefenen as the above-mentioned section 8 required, and not before men who acted as assessors, for this savoured of delegated jurisdiction, a thing which had become obsolete in law and usage. Furthermore, if permission were now granted to the schefenen of Amsterdam, then it would be permissible for all judges in Holland to transfer their cases to arbiters, and order these to hear the cases and re-submit the decisions back to the judges, and this obviously would serve to cloak ignorance and indolence.

It is apparent, therefore, that the Supreme Court was inclined to grant the writ of appeal, and this fact I made known, with the court's permission, to the syndic of Amsterdam, who had consulted me in the matter. However, when Party B of the suit, a certain woman, was informed of the attitude of the judges of the Supreme Court, she renounced the privileges of the aforesaid interlocutory decision, whereupon the writ of appeal was also denied, on September 22, 1729. I have given the details of this case so that it might not be erroneously used as a precedent by any one in the future.

It is clear then that our laws and customs are opposed to the delegation of jurisdiction. But I shall not say whether it might not be better for an official to delegate jurisdiction than to exercise it if he be no more fit for his office than the proverbial ass is fit to play the lyre, if, for instance, he is totally ignorant and indolent; for probity is not the only quality required in the judge, though there are men who claim to think so. The judges of the lower grades may, and do, consult men of superior training, but what of the judges in the higher courts? These consider it a disgrace not only to consult their betters, but even to follow the decisions of their predecessors. The sovereign alone, who generally appoints these judges, can take thought in this matter and save the state from detriment.

CHAPTER 13
Whether Individual Members Can Be Sued For, and Be Made to Pay, the Debt of a Corporation

SENECA rightly argues that the individual members of a corporation are responsible only for their proportionate share of the debts of the corporation. The whole debt, therefore, cannot be exacted from an individual member, and so, conversely, individual members of a corporation cannot exact what is due the corporation. If you would rather have these two points from a jurist than from a philosopher, here are the words of Ulpian: 'What is owed to the corporation is not owed to the individual members, and what the corporation owes the individual members do not owe.' Whatever the corporation has lent or borrowed, the loan or debt attaches to the corporation itself; and since it is practically difficult to prosecute or sue the individual members for their proportionate share, action at law is not permitted to any except the one designated by law; and this is the syndic of the corporation through whom everything shall be transacted and done that needs to be done in the general behalf. This person represents the treasury of the company, and he exacts whatever is due the treasury, and if the treasury owes anything action is brought against him, for it would be harsh and covetous to exact from the individual members a debt incurred by the whole community.

According to these principles the Court of Holland in the decision rendered against the citizens of Enkhuizen on November 19, 1441, expressly stipulated that judgement should not be exacted upon the individual citizens and inhabitants of Enkhuizen who were not officially concerned. And in his edict of October 12, 1464, Philip of Burgundy, in action against the cities of Northern Holland, suspended the writ that had been ordered into execution against the citizens of Enkhuizen, and he ordered all the citizens to be summoned together so that the money due might be exacted from all pro rata. Philip II of Spain, also in section 11 of the edict which he issued in behalf of Elanders on January 12, 1586, forbade individual peasants to be sued for the whole debt of the whole community, but conceded that each could be sued for his proportion, or to quote the very words: 'whatever the lot, quota or portion of each should amount to'; a decision which, by the way, I approve only when there is no community treasury. Again, when the admiralty board of Northern Holland was brought to trial before the Supreme Court and was sentenced to pay a fine, one of the board, a judge, was arrested and detained till he should satisfy the judgement, but in 1659 he was dismissed. This, too, is a case which was bitterly discussed afterwards. I recall also that the burgomaster of Harderwijk was arrested because of a debt of his city, but he was released and the plaintiff sustained defeat by a decision of the Supreme Court on June 30, 1730, while I was presiding. This decision was rendered partly on the basis of the above-quoted passage from the Digest, partly on other grounds. Now all these examples prove that what the corporation owes, the individual members do not owe. But this is also wholly true that what the individual members owe is not a debt of the corporation and it cannot be exacted from the corporation. Private funds satisfy private debts, the public chest, the public debt. Much less is a corporation responsible for delinquencies on the part of a member. Accordingly the counselors of the States-General responded correctly to the States-General on July 22, 1666, that the court of Brabant erred in seizing the goods of a monastery because of the damage done on the part of one of its monks.

Now though these things are so and rest upon law, I fear that they have not obtained at all times and all places. I do not here have reference to the class of cases where the individual is arrested and held for the debt of the community by means of reprisals, for since there is no occasion for reprisals

unless justice has been denied, this type does not concern us here. I speak rather of the instances where test cases are brought against the corporation, for even in this way individuals are forced to pay the debts of corporations. If this is done to save the state it may perhaps be defended-. But if the safety of the state is not at stake it is wholly wrong. The Estates of Holland were entirely concerned for the public welfare when in the well-known decree of March 31, 1588, on the exaction of tribute, they openly decreed that for the unpaid taxes of cities, rural districts, and colleges, individual members and inhabitants of those places should be sued and compelled to pay the taxes. The same reasons were effective when on July 16, 1657, by a decree of the same body action at law was granted even against communities for the unpaid taxes of individuals. For by that decree magistrates of rural districts were ordered to pay into the state treasury, according to a list made for the purpose, the amount of the mill-tax on property which the inhabitants owed. And this procedure is still in vogue in collecting the one and the one-half per cent. taxes, although the magistrates are not held to be at fault in the collection. But this holds true, I say, in public cases and in favor of the state treasury; and if there be any injustice in such procedure, the injustice to individuals is counterbalanced by the benefits accruing to the community. Even by the Roman law similar considerations held good in such cases according to the Code. But even under different circumstances it has frequently occurred that private individuals have been held and condemned to pay the debts of a state, so that at times attempts have been made to forestall the injustice of this procedure by obtaining special writs of exemption; as for instance when Philip of Burgundy granted a special dispensation of this land to the citizens of Dordrecht in 1424, giving them 'full exemption from arrest for debts of the city for the period of four years.

According to the evil custom mentioned above, when the man who had lent money to the city of Brunswick was not repaid, the States-General on November 9, 1640, decreed that the creditor might seize the goods of the citizens of Brunswick wherever found; a decree which Aitzema reports and rightly condemns. Even the Court of Holland in our own day arrested a monk from a monastery near Ghent on account of a debt of the monastery and detained him in custody at The Hague, condemning him to pay what the monastery owed. But this is a decision which I should not like to adopt, although I am aware that very many interpreters of the law are so lacking in wisdom as to accept it. Peckius is one, and there are others. But I could find more authorities who contradict, if I were not nauseated by the offal of the learned interpreters who merely affirm or deny the point in question without offering any solid basis of legal argument.

But the jurists who have acquired some wisdom from legal arguments still think the above-mentioned rule should be followed and that individual members do not owe what the corporation owes. But there are those who add the exception: 'unless the corporation binds itself and its members explicitly'. I agree if the sovereign makes this contract by right of eminent domain which he exercises over his subjects and their property. I dissent if this contract is made without the consent of the sovereign by magistrates of cities or officials of any other corporation, for they are not competent in law to bind for the whole sum individual members of cities or corporations and their property contrary to law, unless therefore they secure a special dispensation from the sovereign permitting this, or the consent of every individual member, we shall still stand by the above-cited line 7, section 1. As I have said, I consider that the sovereign's authority extends to this point, and I think no one has expressed any doubt that it does. And so the Estates of the United Provinces, acting on instructions from the several provinces or securing subsequent ratification for the act, rightly bound themselves by section 23 of the Union of Utrecht (January 23, 1579), agreeing that

if the Estates of any province incurred any liability to the Union, the subjects of the Estates in question and their goods any and everywhere might be seized and levied upon in satisfaction of the claim. Presently on July 13, 1579, a special constitution was made by certain governors and most of the provinces of the United Netherlands in which the same clause was adopted to cover cases where the Estates did not pay in the contributions which they had promised. The Hollanders, in their response to Leicester (par. 4), dated October 4, 1587, said that this provision had been enforced against them the year before. Again the counselors of the States-General in a letter to that body dated December 14, 1716, told with many details how this provision had often been enforced in other provinces up to the year 1639.

It would have been excellent for the state if the counselors had not ceased to exact contributions according to that constitution after 1639, and if the Estates of the several provinces had not opposed such exactions, for it was their duty not to oppose when they had pledged their word to pay. But the practice came to an end that year, and with great detriment to the state. When the Estates of Holland observed the harm done they decreed on May 2, 1663, that the States-General should take measures to bring back into enforcement the above-mentioned section 23 of the Union of Utrecht and the constitution of July 13, 1579. But since most of the provinces are in arrears, I suppose that the States-General, not to mention the several provinces, will not succeed in this. It would have been much better to enforce the clause in question and the constitution outright than to request a new sanction of them; for it is not clear that this right which the state constantly employed on the basis of a mutual compact was ever abrogated, a right, which, to be truthful, the state must employ for its own salvation. So long a time had not passed since 1639 that they need have assumed the constitution in question abolished by disuse. But the desire to enforce the law would have profited little if the Estates of the several provinces disregarded their pledges and opposed it; and the more they were in arrears the more they would oppose the measure. They had due cause for fear that the Estates themselves and their individual delegates to the States-General might be levied upon to satisfy the debts of their provinces. And so none of the Estates would hear of having the subjects of the provinces levied upon, in fact they protected the subjects of other provinces, lest if those were called upon to pay, something similar would happen to them and theirs.

And furthermore, what authority should exact the dues from the Estates in arrears? You say the counselors of the States-General who have charge of the state treasury and the exaction of the contributions to which the Estates have agreed. But these do not possess executive power in the several provinces, nor any jurisdiction, nor any military authority without permission of the Estates. So wherever you turn, if the Estates oppose, the exaction of contributions is very difficult if not impossible, unless the several Estates, in accordance with the constitution of July 13, 1579, concede the authority to the counselors of the States-General. But now that this constitution has foolishly been allowed to become a dead letter, for reasons that I have mentioned, and now that the debts owed by the several provinces to the common treasury are greater than ever this cession of authority is hardly to be expected despite our hopes. Regarding the right to exact the contributions authorized by the Estates there are three excellent letters, long but by no means verbose, written by the counselors of the States-General to that body, bearing the dates December 14, 1716, January 18, and January 27, 1717. There is also extant a proposed new tax regulation drawn up on April 12, 1721, by the delegates of the States-General and their counselors, and submitted to the several provinces on the same day. And though this regulation, while sufficiently just, was drawn up so as to be acceptable to the Estates, it has not yet been possible to secure its adoption. We have accordingly

made no progress in the matter as yet.

Meanwhile, it is true that the Estates of the several provinces pledge their subjects and their goods to the whole amount for the common debt of their own province. And this is wholly correct since the Estates have, or at least claim to have, sovereignty as regards taxes. Indeed, no one would deny that the sovereign is endowed with this right, unless he is wholly ignorant of the meaning of the word sovereignty. But what is permitted a sovereign will not at once be permitted the chief officials of any and every corporation, as for instance the magistrates of cities; and yet in commenting upon the above-cited passage from the Code, Busius remarks that judging from practice he had responded that the magistrate had this power; and this is also the opinion of another jurist. Even the judges of Leyden on September 1, 1578, and the Court of Holland in deciding an appeal of the case on November 5, 1579, condemned a man to pay the full amount of the city's debt, using the argument that the magistrate had contracted the obligation in the name of the city. The same court rendered a similar decision in 1588, and even the Supreme Court did so in an appealed case on September 18, 1590. But I consider these responses and decisions erroneous, because the magistrate cannot rightly *suo jure* bind his fellow-citizens and their private property; and this is also the opinion of others officially expressed. I say *suo jure* advisedly, for it would be another matter if the sovereign conceded this authority to him since in that case the act of pledging would be considered as deriving from the sovereign. It would also be another matter if the citizens gathering for this purpose would consent to the pledge, for in this way a sponsio of the city is made, and by this sponsio the individuals are bound. And this is the very point that the jurists explain clearly in the passage just cited.

CHAPTER 14
Whether Cities May Build, Repair, Extend, and Fortify Their Walls Without the Consent of the Sovereign

THE Roman law is so far from permitting cities to build walls without the permission of the emperor that this authority cannot even be given by the governor of a province without the emperor's concession, as Modestinus holds. He makes the same statement about other public works, though this is to be understood as relating to work undertaken at public expense, for otherwise it is permitted under certain restrictions. The same regulations hold for the moenia as for other opera publica, so that the two terms are used quite synonymously by various authors according to Salmasius's commentary (on Scriptores Historiae Augustae, Commodus, xvii). Accordingly Tacitus writes that a temple to Augustus, in the colony of Tarraco, was not built until special permission was obtained, and Pliny records that the people of Prusa were authorized by Trajan to build a new bath. The same principle obtained in Holland in former times. Philip of Burgundy gave permission to Westwoude to build a court-house on November 29, 1444, as he did to the people of Sybekarspel and Bennebroek on September 27, 1462. There also exists a grant of Philip II of Spain, dated November 4, 1557, permitting the people of Alkmaar to build a new house of weights. There are also various grants from the courts of Holland permitting the construction of new churches, which I need not enumerate.

These rules apply to the construction of new works; as for repairing buildings already constructed no one would make bold to doubt that this was permissible without the consent of the sovereign. It is particularly the concern of magistrates to repair, strengthen, and in every possible manner take good care of the temples and walls falling into ruin. So formerly the Roman aediles kept public buildings in repair, and so do other magistrates of whatsoever title in other places, as every one knows. Indeed sound reason requires that this should be the concern of the magistrates, however if you desire authority, the emperors, after affirming that new public works should not be constructed without their permission, state explicitly 'but we give full permission to all to rebuild (instaurandi) those that are now said to have fallen into ruin'. You might, however, think that Ulpian contradicts this when he says: 'It is not permissible to repair (reficere) the walls of a municipal town without the authority of the emperor or the governor.' Now this passage has a difficulty not usually noticed (since it apparently contradicts the preceding passage) and I have sought in vain for a commentator who would give a satisfactory explanation. Why should it not be permitted to repair walls falling into ruin without having authorization from the emperor or the governor? I do not think that the expression muris or muris municipalibus contains anything that requires a peculiar interpretation. But I would interpret the expression muros reficere of this passage as meaning to reconstruct walls which have for some reason been torn down. Thus it would be permissible indeed to repair (katartizein) falling walls, but not to build anew (ananioun) destroyed walls without authorization from the emperor or governor. This word ananeosis is found in the Basilica and among the scholia and means instauratio. Suppose then that the walls have been destroyed by order of the emperor whether by agreement with some other prince as is often required in treaties between neighboring provinces, or by right of victory, as were the walls of Jerusalem, or by way of punishment exacted from rebels, then it will not be permissible to build the walls again (ananioun) without a grant from the emperor or the governor. This is the interpretation I give to reficere in the passage cited from Ulpian, and only in this way is the passage intelligible. An illustration from more recent history is provided by Alkmaar in North Holland. This city, because of a rebellion, was condemned by Philip

of Burgundy to be deprived of its gates or fortifications. When, however, it was threatened with an invasion, the Court of Holland on July 8, 1445, granted permission to the magistrates in the name of the same Philip to enclose the city with gates and fortifications, though the penalty still remained in the form that these should be torn down at command. Now what was said about the governor in the above-cited passage from Ulpian, may be applied to this incident when the Court of Holland which also claims to perform the offices of a governor gave this permission to Alkmaar in case there was fear of a hostile invasion; for otherwise the governor would be exceeding his authority as I inferred from the previously-quoted passage. Again, the sentence of Philip of Burgundy pronounced against Alkmaar when in rebellion apparently explains why in the edict of Charles V, dated October 11, 1531, and another of January 18, 1549 (section 12), the directions applying to fortified cities are extended explicitly as applying to The Hague and Alkmaar also, and why Alkmaar is mentioned after The Hague. The inference is that The Hague and Alkmaar do not exercise the full rights of cities suo jure, but by special privilege and on good behavior. Since I have not discovered that the sentence of Philip has been revoked, it may be that Alkmaar still has not full legal rights. But I have found that Alkmaar no less than the other cities of Holland does in fact exercise the full rights of a city.

Magistrates have not the authority to extend the walls of a city or town without permission of the sovereign, and Dutch jurists write that the principle is observed in Holland. There are apparently two reasons for this. In the first place, we could not well extend the walls without taking possession of lands of individuals dwelling near the walls, and this would far exceed the authority of magistrates. Secondly, if the walls were extended the old fortifications would be enclosed in the city and new ones would have to be built in case of attack by an enemy or by brigands, and all this would deeply concern the sovereign and him alone. Accordingly a grant from the sovereign is required for such work, and it is evident from the public charters that the magistrates of various cities of Holland have petitioned for and obtained such grants. Thus, in 1386, Albert of Bavaria authorized the people of Amsterdam in case of need to 'enlarge the city and build out the walls of it a hundred rods outward'. Accordingly it is provided by the statutes of Amsterdam that 'whatever buildings and freeholds the council of the city desires to have for the needs of the city or of the church the council of the city shall have upon decision of the court'. Amsterdam also obtained some more recent grants for this purpose from the Estates of Holland: one on May 10, 1594, another on August 7, 1600, the latter being a grant in general terms without specification of limits. Albert of Bavaria also made a grant to Leyden on June 15, 1386, permitting the city to take possession of private property outside the city in order to include it within the fortifications, and the Estates of Holland made one on May 6, 1611, in general terms giving permission to enlarge the city. Accordingly the same provision is found in the Statutes of Leyden that occurred in those of Amsterdam which I just quoted, and in fact in almost the same words. The Estates of Holland also gave the same permission to the magistrates of Alkmaar on March 17, 1598, so that section 44 of the Charters of Alkmaar also has the very same provision just mentioned. Again Albert of Bavaria, who gave the above-mentioned concessions to Amsterdam and Leyden, granted one also to Weesp in 1401 giving the city the liberty to extend its boundaries fifty rods. However, when the people of Haarlem enlarged their city in 1671 I find no mention of any grant.

There does not seem to be a general agreement anywhere, as to whether it is lawful to make strongholds and to fortify cities without consulting and gaining permission from the sovereign. In the criminal charge on which the Prince of Orange was summoned before the tribunal of the Duke

of Alva on January 19, 1567, one of the charges was that he had advised Count Brederode to fortify Vianen. Orange in his Apologia issued in 1568, answered that in the Netherlands it had always been permissible for lords to fortify their lands, and that there were many instances in proof of this. Regarding Vianen I can make no definite statement, for this was said to have an independent title then and until Holland obtained it; but what Orange says about the whole of the Netherlands is perhaps to be referred to former times when Holland was divided into a number of independent little states; for these carried on war on their own behalf and fortified themselves against invading neighbors. But after these small states coalesced and came under the dominion of one prince, I would hardly dare attribute to magistrates and lords the authority of fortifying cities and other places without the consent of the prince; for then they might even fortify them against the prince. This surely is not legal, and the sovereign alone can decide in the matter. Furthermore, fortifications can hardly be made without the occupation of private property and the sovereign alone has the right to do this, unless, as I said above, the magistrates secure the rights by special grant from the sovereign.

Hence it is, I think, that among the Romans it was not lawful in the provinces to build walls except about one's own estate, and that even in this case private individuals could not possess a stronghold, but only those who had secured a special grant. Hence also, magistrates often obtained from the emperors by petition or by purchase the privilege of fortifying their cities. The Jews at least 'built walls in times of peace with a view to war by purchasing the right through the venality of the officials in the time of the Claudii', according to Tacitus. It was on this principle too that Louis IV of Bavaria in 1322 gave a special privilege to Godefrid, Count of Chiny, as reward for good services to build a stronghold within the confines of his empire. The English King, Stephen, also permitted the nobles of England by way of a special grant to build strongholds, which they afterwards used against the King; in consequence of which Henry II acted with more caution and destroyed the strongholds that Stephen had allowed to be built. In agreement with the above is the grant that William of Bavaria on May 15, 1355, bestowed upon Dordrecht in these terms: 'That no one within our land of South Holland shall make strongholds or build forts more than two foot-measures thick, and unless it be on the border of our land and according to our will and for our needs.' Very similar to this are the above-mentioned provisions of the Code, because it permits private estates to be walled but does not permit strongholds to be made for private use.

Since, however, the extension and fortification of cities often require the occupation of private property, as I have said, this right of appropriating with a provision for equitable arbitration as to price, is often inserted in the grants given to magistrates; and such is the case in the charter given to Leyden on June 15, 1386, and in the one given to Amsterdam on May 10, 1594, both of which I mentioned above. Now if the cities which are represented in the assemblies of the Estates require a special grant for such work, you can judge for yourself concerning the cities that are not so represented. And yet there are often animated discussions even about the rights of fortifying these; but it would take too long to repeat the arguments.

CHAPTER 15

On Eminent Domain and the Payment for Property Appropriated under the Right of Eminent Domain

THAT authority by which the sovereign stands out above his subjects jurists call the right of. eminent or pre-eminent domain, following Grotius who first defined it in On the Law of War and Peace. I agree, however, with Thomasius in his comments on Huber's De Jure Civitatis, who thinks that it would be more correct to call it imperium eminens than dominium eminens, for whatever be this right that rulers exercise it derives from their sovereign authority. And so when Seneca spoke of this right he employed the word potestas, saying 'Kings have potestas over all things, proprietas applies to individuals'. Now this eminent authority extends to the person and the goods of the subjects, and all would readily acknowledge that if it were destroyed, no state could survive. Through this power war is declared, peace made, treaties signed, taxes and duties levied, subjects and their property pledged in part or in whole, and even the property of individuals appropriated if the sovereign see fit. That the sovereign has this authority no man of sense questions, the whole subject of dispute concerns the definition of its control. If you have in mind a ruler who permits himself .to act according to his whims the discussion is to no purpose, but I have reference to one who is concerned for the public welfare, and could give reason if need be for his decisions and commands. The just ruler limits his own authority, and does not fear .to hear the judgement of others regarding its limitations. However, before you may define these limits you must review the different classes of eminent domain, discuss each, and pronounce judgement cautiously. Whether Jacobus Andreas Crusius, the Syndic of Minden, accomplished this with his *Tractatus Historicus-Politicus-Juridicus de Prae minenti Dominio Principis et Reipublicae in subditos, eorum bona ac jus quaesitum*. I should rather have you discover from reading the book than from words of mine. The treatise is found among his Opuscula varia published at Minden in 1668. If I were to submit to examination all he says I would exceed the limits I have set myself, and at the same time would have the labor of cleansing the Augean stables.

I have decided to discuss only the cases where the sovereign by right of eminent domain takes from his subjects an acquired right whether in things movable or immovable or in action. All authorities agree that the sovereign may do this, but they do not equally agree as to the occasion when it is lawful. Pufendorf, when speaking of this right of the ruler, expresses the opinion that 'there is no occasion for exercising the right of eminent domain unless the state's necessity requires it'. However, he does not demand that this be the last degree of necessity. Grotius is satisfied merely with utility, saying that in order to deprive subjects of an acquired right 'by the power of eminent domain, there is required in the first place public utility, and next that if possible compensation at the common expense be made to him who has lost what was his'. And presently in section 8, 'the rights of subjects are liable to this right of eminent domain so far as public utility demands'. It is indeed very true that rulers have and still do exercise this right everywhere, both on the ground of necessity and of utility. And further, utility so merges into necessity that they are not easily distinguished; indeed what one calls utility another will call necessity. I would not prohibit the ruler from using this right on either ground, nor do I know any one who would. However, since it incurs so much ill will to deprive men of an acquired right the ruler should ever remember: 'Not only what is permissible, but also what is seemly.'

He should also recall the moderation of Augustus who 'narrowed the plans of his forum, not daring

to dispossess the owners of the neighboring houses' according to Suetonius. Let him also remember the moderation of the Roman senate which, finding the state bankrupt, sold the public lands rather than refuse prompt payment to the creditors on the portions due. Finally, let him keep in mind that the right of eminent domain must be exercised with prudence not rashly abused, and it is an abuse of the right to use compulsion under it without adequate grounds or to take more than public necessity or utility absolutely requires. But if he appropriates upon adequate grounds, he will do so with the least possible harm to his subjects and upon payment of the price from the common treasury. He who convinces himself that he can act differently is a bandit rather than a prince.

What I have said about adequate grounds might need fuller explanation, if it were not already understood that it has reference entirely to necessity or public utility. If, as Grotius says, this right may be exercised on the ground of public utility, this is all the more true of public necessity, for the safety of the people is the supreme law. Public roads are surely necessary since intercourse and commerce are impossible without them. And if the public highway is destroyed by a flood of water from a stream or the fall of a building, the nearest landowner must afford a passage, according to Javolenus's extracts from Cassius. As much is taken from the land of the neighboring owner as the road requires, and this public necessity demands.

But how far do the claims of public utility extend? Doubtless the decision of this question lies with the ruler, nevertheless we ask for a definition upon the supposition that the ruler is a man of correct principles. I do not care to mention the numberless types of public utility that one may chance to meet, and to take up each for consideration. It will suffice to note a few about which all are agreed, and from these you may infer the rest. The right of eminent domain can especially be exercised in taking possession of property without which public works, markets, and it may be, churches, cannot be built. As a consequence private individuals, even against their wishes, are compelled to sell their abodes for works of this kind. If Augustus did not desire to exercise this right, that is wholly due to his own moderation. There is no state that does not need public works, and if it is legal to take possession of houses of individuals in order to construct these, it will be all the more permissible to tear down houses of individuals, take possession of land and remove obstructions in order to dig canals through the fields for the use of shipping, and to extend or fortify the walls of towns and cities. Consequently not only does the sovereign have the right to exercise this authority, but he may concede this right by special grants to magistrates of towns and cities as is shown by the instances which I cited in the preceding chapter. I am not concerned whether you base this procedure upon necessity or public utility, for I freely grant the right to the sovereign upon either ground; others may quibble about it if they enjoy shuffling with words: as I said, about the matter itself there is no disagreement. Surely we build walls not only when an enemy is approaching, but even in the midst of peace and with equal right at either time. That this be done in times of peace is even required by considerations of public safety, for walls hastily built when the enemy is approaching seldom suffice to withstand the attack.

But as there is a diversity of circumstances so there is a diversity of opinions. What seems necessary to one may not even seem useful to another. Suppose that the liberty of the sovereign is in danger unless he exercises the right of eminent domain, and suppose it fits his purpose to exercise it but not the purpose of others. In Zealand recently this question was discussed with great warmth, and it has not yet been settled between the several provinces of the Netherlands. The Estates of Zealand by an act of November 17, 1732, took possession of certain feudal rights belonging to the inheritance of

William III of Orange which he had at Veere and Flushing. The Estates feared apparently that the heir of William's heir might, if he were a vassal, encroach upon the liberties of the state by exercising that feudal right. The heir opposed this action, and refused to accept the price which the Estates were prepared to pay to him for his abolished rights; and the money was accordingly placed in safe keeping. Meanwhile Zealand has possession, but what will be the outcome let him say who is a prophet. Holland and some of the provinces supported Zealand; others again have complained profusely about the injustices of Zealand and bitter pamphlets have been written in support of both contentions. Considerations of prudence urge one not to discuss here, whether or not the grounds for exercising the right of occupation were adequate in this case, nor would space allow me to say all that the subject requires.

He who would with me postulate the principle that necessity or public utility is requisite for the exercise of eminent domain will exclude all other cases without exception. Or would you hold that the subject is not only obliged to give up his property for these two reasons, but also to gratify the pleasure and delights of the public and even for the adornment of public places? I should not think so, nor did the Roman senate in the case of M. Licinius Crassus, who did not wish an aqueduct being built by the praetors to be brought through his lands when it was said to serve no other purposes than those of pleasure and adornment. The author of the Political Disquisitions has given the arguments on both sides of the question as well as the decree of the senate. The Roman senate decided in the negative, but William I of Orange took the opposite view in the Charter issued in the name of Philip II of Spain for the founding of the Leyden Academy (January 6, 1574). In this document he authorized the magistrates of Leyden at any time to destroy and occupy private houses and other public and private property upon payment of the price to the private owners, not only for the buildings of the Academy, but also for ornamental purposes and for pleasure-grounds for the students, to quote the exact words: 'In every way useful for the adornment of the same and for the recreation of the students, provided that they are bound .to repay the individual owners or possessors of the private houses at the rating decided upon by the aldermen.' The kind of knowledge of public law here displayed, I would not employ, nor did the Roman senate in the case of Crassus, nor would Augustus, i who, to repeat, did not dare to dispossess owners of their homes in a case where the cause was much more reasonable.

Furthermore, for whatever cause property or claims of private persons be occupied or destroyed for public purposes, it is equitable and just as Grotius says in the passage cited, that the owners be reimbursed from the public treasury. Thus Tiberius made a subvention to the senator Aurelius Pius who complained that this house was weakened by the construction of the public highway and the aqueduct. And in the above-cited passage from the Code, in case houses were destroyed for public works, it is defined up to what point the magistrates are authorized to estimate damages, with a provision that if a greater sum is required the valuation shall be in the hands of the emperor. In fact in almost all the grants and charters mentioned in the preceding chapter, a clause is inserted providing that if a magistrate takes possession of private buildings or grounds for public need or use, the value of these shall be paid to the owners at the estimation of the court or some trustworthy arbitrator; it appears distinctly in the charter of William I, which I mention by way of example.

I should say the same if suburban houses are burned or torn down to prevent the approach of an enemy, and that also is the decision of the court of Friesland dated May 17, 1611. It is incorrect to contradict this decision by reference to the Digest, for that passage says only that the Lex Aquilia

fails to apply unless the damage is done wrongfully, and this is reasonable since the Lex Aquilia is a penal law. Accordingly the Lex Aquilia does not apply when private property is destroyed for the public welfare, but an action at law in factum for the value of the goods destroyed is not precluded.

Therefore, I do not in general approve of another decision of the same court of Friesland dated December 20, 1623, which denied the owners reimbursement for a suburban orchard that was cut down to prevent the enemy from hiding there; since the same reasons that argued in favor of repayment for the burned house support repayments for the orchard that was cut down. In one respect the decision of 1623 may perhaps be considered just, namely, because the orchard in question belonged to a man who deserted to the enemy. I know well that Peckius without mention of this special reason agreed with the court, and that in another case also his decision conformed with the above-cited sentence of the court of Friesland. I know also that Crusius approved of this sentence on the ground that it was illegal to build houses and plant orchards outside of the walls, and therefore the persons in question sustained the loss they had deserved by their own fault. But I know of no law which in general terms forbids the building of houses outside the walls; for the passage in the Code, to which I notice they refer, is concerned with parapetasia, that is, with sheds that are built up against public buildings as Jacques Godefroy correctly explained under cited title of the Theodosian Code. It was forbidden to erect such sheds for fear of fire and for other reasons which you may read there if you desire.

If there is any law which forbids building near the city, and men do so in disregard of the law, the buildings may at any time be destroyed not only without reimbursement for the value, but even with imposition of the penalty provided for the infraction of the law, as is distinctly provided by the statutes of Leyden. And when the people of Alkmaar petitioned for a prohibition against the erection of buildings within 200 perches of the fortifications, and permission to tear down what was built within that distance, Charles V on September 15, 1528, decided that no buildings should be erected within 100 perches, but that those already erected might remain. Again William I of Orange on October 26, 1573, decided that no buildings should be erected within 600 perches of the walls of Alkmaar, and that if any were so erected despite the law they might be torn down by the magistrates at pleasure. If the destruction of the buildings devolved to the decision of the magistrates, the special prescription in this case would be of no value, even as we find that such prescriptions have no value in similar cases. In fact, buildings near the walls are often allowed with the stipulation that the builders are obliged to destroy them at their own expense as soon as the magistrate commands it; a provision which occurs in a grant made to Amsterdam by Philip II in 1556, and this agrees entirely with the ancient statutes of Amsterdam, dated April 22, 1399 and March 31, 1401. In the same class is the charter of Schoonhoven granted March 14, 1549, according to which the owners of trees near the water-mills were reimbursed for the value of the trees to be cut down, but if they planted any afterwards they would be compelled to clear them away at their own expense and in addition pay a fine imposed for breach of the law.

Such are the principles in these special cases. But why should we not lay down a general principle that all loss sustained by private citizens for common necessity or utility should be shared by all and should be paid for from the public treasury? This is indeed the official opinion expressed in the Nederlandsch Advis-boek. But when in 1672 the dikes were cut and the water was let out to check the enemy, the author of that opinion expressed the fear that the Estates could not make good all the damage to the fields; for, he said, when land is occupied for fortifications, the owner is not

reimbursed for the value of it. Now this decision is correct in substance, but the reason given, is not. He had good ground for his fear that the losses due to the water could not be made good, and that not only because the Estates did not have enough money in the treasury to pay for the damage done, but also because the damage was apparently in the nature of ordinary damage caused by war, just as though that very ground had been chosen for the battle-field, or for the position of the camp, or something else of that nature. Losses sustained in the misfortunes of war all subjects must suffer with equanimity, and there is never any restitution made for it. But what the author of the above-cited opinion says, namely, that the value of lands used for fortifications is not refunded, this may indeed be true in the heat of warfare while 'arms impose silence upon the laws' or when fortifications are being built in haste, but I have not yet found this to be true at the time when permanent walls are being built. The laws which I have cited in this and the preceding chapters as well as the usage of this and other nations contradict this view. The Spaniards certainly, when in 1667 they occupied some lands near Brussels for fortifications, announced that each man would receive from the public treasury the amount of his losses. I recall that the French issued a similar decree at Strasburg in 1699; and there are an abundance of examples of this procedure everywhere.

CHAPTER 16
As the Sovereign Alone Can Condone Crime, So it Seems That He Alone in the State's Behalf Can Promise Immunity from Prosecution for Criminal Offences

IT is in the interest of general morality that no criminal offenses should be condoned, but considerations of public utility have often disregarded this because perhaps of some deserving action or for other reason; and even the Roman people, otherwise 'a loyal follower in true virtue's train' did not too captiously scorn this consideration. But, after them, almost all nations have most basely abused this practice. Indeed in the Netherlands long ago the free practice of granting exemptions became so common as to endanger the very state. It arose from the fact that very many exercised the privilege, as Philip II of Spain observed when he inveighed against it in his Edictum de Criminibus, sections 15, 20 and 24 (July 5, 1570). The fact that so many possessed the right I attribute to the fact that the Netherlands, and even Holland, were formerly divided into various little states and dominions many of which were independent. But after these came into the hands of one sovereign, it seemed that he alone should exercise the authority that is above the law and belongs to the rights of the sovereign. Accordingly Philip II, in sections 20 and 24 of the above-mentioned decree, laid down the general law that no one should have the power to condone crimes but the court and the Governor-General and the person to whom special concession was made.

But from the time when the full sovereignty of Holland and Zealand devolved upon the Estates of these provinces, the authority to bestow these exemptions and to issue grants for the purpose has resided with the Estates, and so the Estates of both provinces agreed in a compact dated July 11, 1674. I have not here space in which to inquire whether (and if so, how) the Estates formerly shared this right with the princes of the House of Orange or with the governors of the respective provinces, and whether the governors exercised the right in accordance with their commissions. I shall content myself with the reminder that now since the governor's office is discontinued, there is no power besides the provincial Estates (in Holland and Zealand) authorized to grant an exemption from punishment for any offense. Accordingly magistrates seem to be in. error who, though they possess only the authority to dispense justice imprudently, raise themselves at times into the position of princes. For of this nature was the act of a magistrate who is said to have changed the decree of capital punishment and condemned the prisoner merely to service in the galleys; since he who appoints a milder punishment than the laws demand gives exemption for crimes, which only the sovereign has the right to do. And in the same class I place the act of a magistrate of Groningen, who in 1662 offered amnesty and remitted the penalty of some who had participated in a riot; since a grant of amnesty can come only from the sovereign. Accordingly the judges delegated by the Estates of Groningen and the Ommelands disregarded the amnesty in 1663 as not coming from the sovereign authority.

Shall we, moreover, say that a magistrate exceeds his authority if he promises immunity to confederates and accomplices in a crime in order perchance to ferret out the criminals? I find in writings both within and outside of Holland that he does not exceed his authority. And when jurists have thus preceded with their opinions, judges of both higher and lower courts have readily followed, arrogating this power to themselves everywhere. Indeed, when a great riot arose at Enkhuizen against the state, the Court of Holland, on October 22, 1653, promised in an edict, that if any one gave information about certain individuals, he should have a reward of 20 florins and also

immunity in case he had participated in the riot. Again, when a certain prisoner had escaped from custody by the aid of some others, the same court, on March 19, 1660, decreed that a certain sum of money would be paid the man who disclosed the prisoner and also immunity in case he was an accomplice. Even in my day (November, 1695), in the case of a slanderous pamphlet, the same court promised the confederates and accomplices immunity besides other rewards; indeed there are well-nigh numberless edicts of the same sort issued by this court. And the magistrates of cities have also followed this example. The magistrates of Amsterdam on August 16, 1650, promised a reward in money to any one who would reveal the author or printer of a scandalous pamphlet that had been published in Amsterdam; and immunity was offered the printer if he would reveal the author within a week. Even the magistrate of The Hague apparently included a promise of immunity in an edict against some murderers issued October 21, 1699. I say 'apparently', for he promised that the name of the informer would be concealed even though he was an accomplice; and evidently the name of a man cannot be concealed if he is to be punished by way of an example. Other instances of the same kind the public newspapers will supply daily.

Yet I doubt whether these acts can be defended either on the ground of legality or of reason. I indeed have learned that every exemption from the consequences of crime, be it for whatsoever cause, ought to derive from the sovereign. He, and he alone, can give such exemptions whether from any cause or none at all. A magistrate cannot grant such favors, not even if the proposed recipient has saved his country. As for the judge, his office lies wholly in pronouncing judgement, and his duty is performed solely by the application of the laws to which he has sworn allegiance. Therefore the Estates of Holland on September 27, 1668, decreed that no judge should in the future insert in his decision the phrase 'preferring mercy to the rigorous insistence upon justice'; and Mornac, in his comment upon a passage in the Digest, notes with condemnation that a similar practice is in vogue in France. I am aware that the author of the Authentica, Hodie C. de Judic. has laid down a certain difference in the observance of the laws between judges of lower and higher courts, but it has long been noticed by others that the Authenticum is a conglomeration wholly devoid of authority. Among us certainly all judges, even those of the two branches of the Court of Holland, are bound to observe the laws in accordance with the oath which is required in order to secure this. Accordingly, when the question arose about the Supreme Court and the Court of Holland, Hugo Grotius correctly responded that they had no authority except to acquit or convict, but that the Estates exercising a higher authority could employ any other remedy that was more conducive to public tranquility. He who promises and gives immunity abrogates the laws which order him to punish criminals. Now, the judge gives this exemption for a reason, and if he may give it because of information about the crime, why can he not give it for any other reason? The judge has indeed the power to promise a reward for evidence, but this should be a pecuniary reward or one which it does not lie outside of his jurisdiction to bestow. The sovereign alone can give exemption in case of a crime, and that from whatsoever cause may influence him; the magistrate cannot, on any ground whatsoever, unless he acts upon the authority of the sovereign. And if he is wise he will ask for this, and he will doubtless obtain it readily if it is for the purpose of searching out criminals.

But if there is a law already in existence which promises immunity to accomplices and confederates because of the difficulty of securing evidence, the magistrate will not even need a special authorization from the sovereign, and in that case I have no objection if he publicly invites informers by the promise of immunity, since those who might give evidence may be ignorant of the law. Section 6 of the edict of the Holland Estates, dated March 19, 1614, gives immunity on the charge

of theft to the man who reveals the thief. I should readily grant, therefore, that the magistrate may publicly announce this offer of immunity which rests upon law, and in addition offer pecuniary rewards for evidence. In two decrees of the Estates of Holland issued on November 28, 1733, and July 1, 1735, against various libellous pamphlets in which not only private citizens but especially distinguished men in high places were bitterly attacked, a pecuniary reward of 20 florins in the first, 40 florins in the second, was offered to those who would reveal the authors and printers of the pamphlets, and at the same time immunity was offered if the informer was a confederate in the crime. I do not know why the Estates contented themselves with the passage of the decree without publicly announcing it, for it is not apparent how the populace should know about rewards without a public announcement. But this I know, that after this authorization the magistrates had the authority to promise publicly what had been decreed privately by the Estates. However, I do not find that any edicts on this matter were drawn up and issued by the magistrates. Nor did the Court of Holland publish any edict, probably because the Estates entrusted the execution of the affair to the advocate of the Treasury and. to the other public prosecutors in Holland who do not possess the authority to issue edicts. In fact this authority rests only with the court and the magistrates, and the execution of the above-mentioned decree was not imposed upon them.

If the authorization from the sovereign giving force to the immunity does not precede or follow by way of confirmation, or if the immunity does not derive from law, I consider the immunity invalid whether promised by either court or by magistrates of cities. In this matter I would have the following instance serve as a precedent. When an atrocious crime had been perpetrated at Amsterdam of a nature not known before in these regions, the magistrate of Amsterdam, without any previous action on the part of the Estates, promised by edict a pecuniary reward to any one who would give evidence about the criminal, and also promised immunity in case the witness was a confederate of the criminal. But the magistrate, fearing that this latter promise was invalid as not coming from the sovereign power, approached the Estates of Holland with a petition that the Estates should confirm the promise with sovereign authority. Then the Estates, in a decree on March 3, 1661, acting in the capacity of sovereign confirmed the decree, saying that there had been danger in delay, and that at the time of the decree the Estates were not assembled. In this way they clearly demonstrated that whatever right there was to make such a decree belonged to themselves alone. I remember also that the magistrate of Amsterdam issued a decree in February 1696 promising a reward of 60 florins to any one who would reveal the instigators of a riot that had recently disturbed Amsterdam, adding that he would make every effort to secure immunity for the informer in case he was one of the guilty. You see what was the opinion of the magistrates of Amsterdam in 1661 and 1696, that it was different from, and perchance better than, that which appeared in 1650, of which I spoke above. In fact there is no doubt that it was better since the Estates themselves expressed their approval of the later opinion in their decree of March 3, 1661.

Consequently some other magistrates came to show more prudence later. The magistrate of The Hague in 1724 certainly acted far differently from the one of 1699 mentioned above, for when there was need of exemplary action because of the great number of robbers, he petitioned the Estates of Holland that besides offering pecuniary rewards he might be empowered to promise immunity to the accomplices and confederates of the criminals that were then so numerous. This petition was granted by the Estates in a decree issued March 15, 1724, and they added that the Court of Holland might also promise this indemnity in the name of the Estates. Thus we cannot assume that either court can do this *suo jure*. The admiralty board of Amsterdam also petitioned the Estates in the

following year (1725) that the magistrate of Amsterdam should be authorized to promise immunity to those who had attempted to set fire to the public works provided any of the guilty turned state's evidence; and this was granted by the decree of January 28, 1725. And when certain men had threatened to slay some tax collectors at Kennemerland, and the counselors of the Estates of Holland, the latter body not being in session, permitted the bailiff of that place to promise immunity to any of the accomplices who would offer information, the Estates on a decree issued on May 14, 1727, ratified the promise. Furthermore on July 22, 1729, the same estates authorized Rotterdam and the bailiff of Schieland to promise immunity to any accomplice who gave information regarding the robbers and the criminals who had wrecked houses and destroyed gardens in Schieland, and they furthermore decreed that the Court of Holland should be consulted as to whether it would not be expedient, in the case of similar offenses, to give the same authority to all magistrates for the territory under their jurisdiction. The Court responded on August 12, 1729, but I have not been able to learn from the records of the Estates what the response was, or whether any subsequent action was taken. However, these examples prove clearly enough how very much the magistrates err who, on their own authority, promise the immunity which they are not empowered to grant.

CHAPTER 17

Judges Cannot Designate a Place of Exile Beyond the Territory under Their Own Jurisdiction; Except When Authorized by the Sovereign

NOT only in the promise of indemnity do judges often exceed the well-known limits of their jurisdiction, as I have just shown, but much more frequently in the imposition of exile, as I shall now prove. It would indeed be desirable if the practice of banishing criminals were entirely abolished everywhere, for in truth there is no reasonable argument in support of it. There is some reason in forbidding a man to dwell in a certain place when perchance there is cause to fear that he may create a revolution by means of his influence exerted through friends or relatives in that region; for under those conditions it is better that he should be in some other place. But it is wholly unreasonable that while I expel criminals from my territory to prevent them from committing offenses there, I nevertheless permit them to commit crimes in another's territory. I banish a criminal from my domain, who accordingly goes to the jurisdiction of a neighboring prince or judge, for he must dwell somewhere while he lives, being a citizen of the world; and in turn the neighboring prince or judge drives some criminal out of his realm who, accordingly, comes to dwell in mine. So both expel their criminals and receive as many in return. And perhaps when I banish one I receive three from the neighboring territory, which is larger than mine. The practice then is useless and contrary to the dictates of kinship, which exists by nature between all races, if indeed the same deeds are considered criminal by both states alike. It were better to confine such criminals in workhouses than to impose them upon others because we fear them.

But since the practice is in vogue, the question is raised whether a judge may impose a sentence of exile merely outside the limits of his own judicial district, or also outside the boundaries of the state in which he lives. Many who bear the name of jurist believe that the judge may banish beyond the confines of the whole state; and many Dutch authorities have supported this view; a striking example of 'Dutch wit'. But not only jurists, even judges hold this opinion. When a certain man had wounded another so that he subsequently died of the wound, the judges of The Hague (June 24, 1679) banished the criminal, then absent in contempt of court, from the whole of Holland, and condemned him to death in case he returned. Likewise the judges of the Academic court of Leyden in 1679 imposed among other things the penalty of exile upon a student, banishing him not only from the University but also from the whole of Holland. However, it is apparent that jurisdiction exercised beyond the territory subject to the court is of no value, and the same is true of sentences like the above-mentioned. Do you think that you will be obeyed beyond the jurisdiction of your court? Paulus does not. But even if you are not heeded by the magistrates in the foreign territory from which you have excluded the criminal, perhaps you suppose that the criminal will be sure to obey. But here you will be deceived; the magistrate of a different jurisdiction will ridicule you because you have extended your authority when it has no force. But why discuss the question of reasonableness when we have the support of legal authority? It is a rule of Roman law approved by a rescript of the imperial brothers, Aurelius and Verus: 'It is lawful to banish from the province which one governs, but not from another,' unless, as is added there, the Emperor decides differently. And this exception I shall presently discuss more fully. In fact this very rule obtains in the Netherlands, as Philip II, King of Spain, clearly shows in section 63 of his Edictum de Criminibus issued July 5, 1570.

The Hollanders who disagree produce the delightful argument that a judge who exiles a criminal gives judgement in the name and with the authority of the Estates, and since the Estates have

jurisdiction over the whole of Holland, the judges also may legally banish from the whole of Holland. A subtle argument indeed that does full justice to their acumen! They are indeed right in holding that judges dispense law in the name of the Estates; but if a judge gives a judgement that applies to the territory of another judge he will certainly meet his defeat. Jurisdiction derives from the Estates, but to each judge only in the territory over which he is assigned, and not beyond. And, since this is acknowledged in other respects, why do they talk nonsense about the question of exile? Let them prove if they can that a larger authority is granted to judges in Holland in the matter of exile than in certain other cases. In Milan a man who has been banished from one city is considered as banished from the whole Duchy, as Julius Clarus states in Book V, section final., qu. 71, n. 11, but they have never proved this to be true in Holland. Indeed they cite some laws in support of themselves, but I shall presently pass these in review to show that they are to be considered exceptional rather than regular.

Just as among the Romans certain officials, as for instance the Governors of Syria and of Dacia, had the authority to impose a sentence of exile which was valid beyond the limits of their own province, so here the privilege has long been given to some magistrates of banishing and deporting criminals even beyond the boundaries of their own jurisdiction; a privilege that is sometimes of general application covering all cases, sometimes specially given to apply in case of more flagrant or repeated crimes. But the following citations will abundantly prove that such powers derive from a special authorization of the sovereign. Philip of Burgundy in his warrant of September 14, 1447, empowered the judges of Hoorn 'in the judgement of this special case for three years to banish out of Holland and Friesland the rebels who were there at that time'. And Charles the Bold, in a privilege granted to Enkhuizen on September 2, 1462, and on the same day to Hoorn and to Grootebroek, authorized them to banish certain men dwelling there 'not only out of the cities of their jurisdiction but also out of the East-bailiwick of West-Friesland'. But these are temporary grants applying only to the criminals there under discussion. There are, however, general and perpetual grants giving to some magistrates the authority to banish criminals of any kind beyond the limits of their own jurisdiction. There is on record a grant to Leyden by Albert of Bavaria, dated 1343, according to which, it is said, criminals whom they banish from their own city, whether for a time or for .life, shall also be forbidden entrance to the whole dominion of the Count. Now if this is authentic, the grant of Philip of Burgundy dated July 14, 1434, would seem to be useless, a grant by which he permitted these same magistrates to exclude criminals not only from their own territory, but also from the whole of Rynland and from the territory of The Hague. And this latter grant Charles V confirmed on July 19, 1541. I say these would be useless, for it is expedient to extend and enlarge privileges, but it is not lawful to restrict them except by way of punishment; however, on the main point, namely, that such powers derive from the sovereign, there is total agreement. As for Amsterdam, I have made these observations. When formerly their territory was very limited, Albert of Bavaria in 1387 authorized them to enlarge it by a hundred perches. Then Maximilian and Philip on February 6, 1488, permitted them 'as a special favor' (to quote the words) to exclude criminals 1, perches outside the city, in this way adding 10 perches to the previous grant. Finally, Amsterdam petitioned the Emperor Charles V for authorization to banish criminals three miles from the city, but they were given a privilege extending only to one mile, and that 'by special favor' as again the grant of Charles V specifies (February 6, 15441). Whether similar grants exist in other cities of Holland, I do not know, nor is it of great importance.

I warn you also not to suppose, as some do, that these grants are to be understood as applying only

to those whom we properly call interdicti, and that they are interdicti of the class that magistrates or burgomasters of cities (not judges) send out of Holland or out of some other territory without prejudice to the persons' status so that they should not create any uprising. This could hardly be the case, for the privileges above-mentioned speak only of criminals who are solely within the jurisdiction of the judges, and not of burgomasters or magistrates. Furthermore, the writs that I have seen are concerned with exile, in the proper sense of the word, 'van bannen, ballingen, en bannissementen' which surely differ from what we call interdictio. This interdict of burgomasters and magistrates is a civil coercion, so to speak, applied through fear or suspicion of possible offense rather than criminal punishment applied because of some offense committed. If you will examine those privileges of cities, you will be amazed that these trivial pettifoggers could be so foolish as to attempt to support this opinion already shattered, namely, that judges have the full authority of banishing criminals and excluding them from the whole of Holland.

The rule is, therefore, that no one can impose exile upon any individual in a district outside his own jurisdiction, and that rule Philip II in the cited section 63 of his Edictum de Criminibus affirmed for provincial as well as inferior judges. Above we have noted some exceptions due to special grants; other laws will supply some more, especially in the case of more heinous and repeated crimes. For instance in the case of high treason and of heresy, certain judges who have jurisdiction in such cases can banish the criminal from the whole of the Netherlands that was under the Spanish King, if he is absent in contempt of court; a privilege that Philip II himself bestowed in the above-cited section 63. He also added that if any law authorized the penalty of exile from the whole of the Netherlands for any crime all judges who possess authority to impose capital punishment may also exclude criminals from the whole of the Netherlands. And this is correct, since the banishment is valid, not because of the judge's power, but from the general authority of the law. By constant usage it is acknowledged that the authority of the judge in imposing exile is a concomitant of the authority of the law in assigning the place of exile; which is as evident as the judge's right to promise immunity if this right derives from law, as I have argued in the preceding chapter.

What I have said so far relates to the time of the Counts. From the time that the Estates obtained full sovereignty in Holland, these have also authorized magistrates and judges in some cases either to exclude men from the whole of Holland because of disturbances, or to deport them beyond Holland because of some criminal offense. There is extant a decree of the Estates of Holland made April 17, 1585, and frequently repeated thereafter, according to which those who were excluded from any city by its magistrate were also forbidden to dwell anywhere within Holland. But this I understand as meaning that the interdict applied to a case which pertained to the whole of Holland, as for instance to the fear of the Spaniards, which in those days flamed up not only in any one city but throughout the whole of the Netherlands. But in this matter special notice must be made of the edicts of the Estates of Holland against 'robbers, vagabonds and beggars of sound body' issued on December 16, 1595, March 19, 1614, March 4, 1630, and May 12, 1649. In sections 17, 8, and 18 of those edicts a special concession is made to all judges who have jurisdiction in capital cases to deport criminals of the class just mentioned and exclude them from the whole of Holland. I say 'a special concession' lest, as some witless persons have concluded from the phrasing of these sections, you also think this is a general right exercised in certain cases in Holland. But that view is refuted by the final clause which is explicitly added to those sections, saying 'we hereby specially authorize the judges in this matter, without, however, establishing this as a precedent for the future'. Thus we are to understand that it has reference to an exception and not to a rule. Moreover, since the Estates of Zealand

inserted the same clause in the edicts which they made against 'robbers, vagabonds, and beggars of sound body' (July 19, 1607; September 16 and 17, 1614) we understand that the same law holds in Zealand as in Holland, namely, that in banishing, the judge cannot make a decision applying beyond his own territory except by special authorization of the Estates. Finally, the Estates of Holland in an edict against sodomy issued July 31, 1730, authorized all judges possessing criminal jurisdiction to exclude from the whole of Holland all those who were absent because of suspicion of this crime, and who, when called to court, did not satisfactorily explain their absence. To be sure they do not say that this provision applies specially to this crime and under the circumstances that I have mentioned, but the facts themselves sufficiently prove this.

We must also consider as an exception section 3 of the charter of Rynland, according to which the bailiffs of Rynland 'in ancient possession' of a right to banish murderers and other offenders beyond the boundaries of Holland. I have not discovered whether or not this rests upon a special grant; unless perchance that section means that the judges of Rynland are accustomed to insert in the formulas of their decisions banishments of that kind beyond Holland without denning whether it is done according to law or not. When, however, sections 10 and 17, title IV of the charter of Middelburg, hold that the judges of that place can exile certain criminals not only beyond Zealand but also beyond Holland and Friesland, this power is to be referred to the grant of William of Bavaria dated May 31, 1355, which is also observed by others. When such grants do not exist the authorization of the sovereign must be obtained if it is desired to extend the application of banishment beyond the ordinary jurisdiction of the court. Accordingly 'the judges of Utrecht on May 12, 1682, deported a person beyond the jurisdiction of Utrecht, but only after the Estates of Utrecht on April 15, 1682, had given the judges permission to do this. You may learn more fully from my discussion in Chapter 25, section 2, by what right, if any, the Court of Holland deports criminals outside the jurisdiction of Utrecht, and the Court of Utrecht beyond Holland.

CHAPTER 18
Whether the Several Provinces Possess Sovereign Rights in Religious Affairs Now as Formerly

SINCE as Ulpian says the subject of public law also includes sacred matters, it follows that the charge of sacred rites devolves upon the one who has the supreme political power in the state. I know that whole volumes have been devoted to both sides of this question, some in behalf of the sovereign, others favoring the church, nay even that some divide sovereignty between Jove and Caesar. But their arguments have applied to a religion already established. However, in establishing a religion it is correct and expedient that he who possesses supreme power in political matters should also be the master in sacred matters.

When the Estates of the United Provinces were discussing the question of forming a state, and opinions differed as regards religion, the agreement expressed in section 1 of the Union of Utrecht (January 29, 1579) did not seem to suffice, namely, that it would be neither right nor legal for one province to interfere in the affairs of any other province. They accordingly added explicitly in section 13 of the Union, that each province was independent and sovereign in religious matters and each had the right to decide as it should deem best. In this section 13 it is affirmed that Holland and Zealand should preserve the religion they had agreed upon (a reference to the agreement made between them April 25, 1576, to preserve the religion called Evangelical), but the other provinces should further decide in religious matters according to their own desires. And as if even this did not sufficiently guard the religious independence of the several provinces, there was presently added an interpretative clause to the aforesaid section 13 (on February 1, 15792) in which it is expressly stipulated: 'The intention is not that one province or city shall concern itself with the behavior of another on points of religion.' From this it is clear how blind is the man who wrote that, according to the Union of Utrecht, the several provinces could not decide for themselves even in religious matters, but all the United Provinces must act together with equal votes.

That this religious liberty existed completely unmolested in the hands of the several provinces until 1618 and 1619, Grotius in his *Apologeticus II*, has proved from the records so absolutely that it is difficult to understand how the judges delegated by the States-General in 1619 dared give the decision which they did. In this decision by which they condemned Barneveldt and this same Grotius and others to death or life imprisonment, they asserted as the principal count in the condemnation, the fact that these men believed and publicly professed this doctrine. And yet this is the very doctrine which the interpretative clause of February 1, 1579, stated so boldly, which the Estates of Holland had openly confirmed a little while before (August 5, 16171), and which had been constantly observed as an accepted principle up to that time. I find indeed in section 11 of the articles discussed between the provinces on May 21, 1587, the suggestion made that the Federated Estates should deliberate whether, now that all the provinces had accepted the Evangelical religion, a change should be made illegal except with the unanimous consent of the federated provinces. I find also a vote of the Estates of Holland, dated June 14, 1583, urging the passage of a law that the Evangelical religion which was then generally accepted, should be the only one accorded defense, and that no other religion should be publicly accepted in the provinces then in the Union. But neither I nor Grotius found any general law or agreement between all the provinces on this matter. And since no such law was passed Grotius rightly concludes that the above-cited decree of June 14, 1583, was not binding upon the Hollanders since the vote of the other provinces is lacking. Yet I suppose

this is the very decree out of which a foreign writer of our history invented the idea that in 1585 it was unanimously agreed by the provinces that no religion but the Evangelical should be publicly taught in the United Provinces. Moreover, even though a law or general agreement of this land existed, it would certainly have reference only to the defense of the Evangelical religion and the exclusion of the Roman. And so this law would not be of service to those who in destroying Arminianism in 1619 struck off so many 'heads of the tallest poppies'. Indeed both Arminianism and Calvinism belong to the Evangelical religion, and both were at that time equally received, as Grotius demonstrated in Chapter 3 of his Apologeticus, and the Estates of Holland showed in the decree of August 5, 1617.

It is more important to know how far, if at all, the individual provinces have lost their sovereign rights in religious matters which were so sacredly preserved for them by the Union of Utrecht. The ecclesiastics have indeed attempted to secure legislation whereby only one religion, and that Calvinism, should be taught and admitted to all the provinces, but I have not been able to find any law or general agreement between the Estates of the United Provinces on this matter before 1651. As soon as Calvinism became powerful through general acceptance the ecclesiastical laws of the pontiffs were abrogated, nor was the authority of the ancient councils any more enduring; but into the place of these, nothing succeeded that had public validity. It was only proper that among the Calvinists, who were now uppermost, the laws of the old church should give way, since they opposed the Roman religion, which rested upon ancient doctrine and the decrees of the universal church, with almost one sole argument, namely, that no authority whatever lay in the decisions of men. Accordingly in section 7 of the Dutch confession of faith, where it deals with the Councils and the old customs of the church, we read: 'All men are by nature liars, and lighter than vanity itself.' But when they met realities even the Calvinists understood that religion was so constituted that it could not be established without the decrees of men, so they labored with laws and church canons. The Dutch confession of faith was produced, then the Palatine Catechism, but not even these were publicly approved by all the provinces until after 1651. Then very many canons of synods were produced, and in Holland ecclesiastical laws, written partly by laymen, partly by church officials. But it profits little to review all of these; there has been a verbose and protracted discussion which is not yet ended about their validity. It is sufficient for our purposes to note that none of these have been officially accepted by all the Estates of the United Provinces, or adopted as the norm of faith for the subjects to follow.

At length after the two synods of Dordrecht, one in 1574, the second in 1578, there followed a third in 1618 and 1619 which approved of the Dutch Confession and the Palatine Catechism which I mentioned and, condemning Arminianism, established the pure dogmas of Calvinism. But not even all the decrees of this synod were at once accepted and approved by all the provinces. In fact the Estates of Friesland not only rejected the ecclesiastical laws there laid down but decreed on July 10, 1622, that any man who attempted to impose them should be considered a disturber of the public peace. At last, however, in 1651, times became more favorable for the Calvinists. At any rate it is related in section 2 of the pamphlet which is called De nadere unie, that it was agreed among the federated Estates that each province should defend Calvinism according to the articles adopted at Dordrecht in 1619. But this later 'Treaty', which purported to have originated at The Hague on August 21, 1651, and was published in 1651 and 1652, has absolutely no legal authority. It is, in my opinion, a mere conglomerate made by some unknown person from the motions adopted by the separate provinces in the extraordinary assemblies of the States-General. I am indeed amazed at the

audacity of the author who tried to deceive readers in a case of such recent occurrence. The 'Treaty' is supposed to contain thirty-three sections, according to the inventive author, but no treaty of this kind exists in the records of the States-General. At any rate I have searched in vain for it, as have others who ought to be able to find it. I have found that all of those thirty-three sections were copied, some accurately, some not, from the decisions that I mentioned of the separate provinces, some of which were not adopted by all. The dubious character of that pamphlet has been suspected even by another, and yet the knavish author has now for a long time deceived even men well versed in political affairs.

We may therefore dismiss this pamphlet. However, it will be worth while to examine from the official sources the very decisions of the Estates in order to learn what was actually decided in this very important matter; for here it was in my opinion that the power of the several provinces in religious matters was first weakened. The Estates of Holland in the Epistle, dated 1650, in which they summoned the Estates of the several provinces to an extraordinary assembly, and in the proposal of subjects for discussion, openly stated that they would defend the so-called 'Reformed' religion as it had been established at Dordrecht. The Estates of Gelderland, in section 23 of the proposals which they made in the assembly on January 20, 1651, say that they have agreed that the reformed religion, as received and elucidated at Dordrecht in 1619, should be observed in all the United Provinces, in subject lands, and among the allies (geassocieerde Landen), and that it should be defended by public authority (met magt van't Land). The Estates of Zealand adopted the same motion on January 22, 1651, those of Utrecht, without recording day and year, those of Friesland on January 27, 165l, and those of Groningen on the same day, January 27, 165l. Then, at the initiative of the Hollanders, this motion was passed in that extraordinary assembly of the States-General on January 27, 165l; but the clause was added almost in the very words in which it was put by the men of Utrecht, that this defense should be exercised in each province by the Estates of said province (elks in den haren), and in the domain of the States-General by that body. You will perhaps understand why they added the words 'each in its own', if you recall that there were men still living who had not forgotten the events of 1618 and 1619.

One would think that the religious question was thus finally settled, though a certain author holds that the Estates on January 27, 1651, only stated without promising that they would defend Calvinism. But this is mere quibbling. I should add that the author in question also offers another consideration which he explains, but which I omit because I find nothing about it in the records of the Estates. Be this as it may, I am convinced, and I think others also will be, that the federated States had no other intention than to consider this decree of January 27, 1651, as a mutual promise made by each to the others to defend Calvinism; for it would be nothing at all if not that.

But even though the federated Estates made the mutual promise that they would protect Calvinism, there is another question, namely, whether any one province has the legal or moral right to interfere in the case of another, and to consider and decide if another province is rightly or wrongly protecting Calvinism; and if it decides adversely, whether the other provinces can use armed forces in compelling the loyal observance of the pledge. At present I think we must decide that the jurisdiction in religious matters lies wholly with each several province, not with the other provinces, and that the decree must be considered what is called a lex imperfecta or a sponsio among friends whose force depends not upon legal action, but wholly upon the loyal observance of a duty assumed by men of principle. When the Estates say 'each in its own' they clearly imply that they by no means desire

the interference of the States-General or any other province in the defense of religion. Nor is it possible to say that the decree contemplated any kind of gradation of provinces, so that while each provincial assembly was to defend religion in its province, the more loyal defenders should have preference over the Estates of the other provinces; and, further, if some Estates neglected this duty or (to put it as some prefer) failed to defend Calvinism, their place should be taken by the Estates of other provinces. That this could not have been the intention of the Estates is proved by the fact that Friesland, Overyssel, Groningen and Zutphen, and again, Overyssel acting independently on February 7, 1651, affirmed that the decree of January 27, 1651, did not seem to them sufficient. They called for more definite measures with which to meet the obstruction of provinces that failed to observe the decree loyally, for they held that the promises of the Estates to observe the decree would not suffice unless some coercion was possible in case of non-compliance. However, I do not find that any statute was passed in this matter. Indeed, such a measure would be useless since no one province or group of provinces has jurisdiction over another or over a group of others, and each province would exert great care not to permit an agreement which would allow the exercise of force against itself. It would also provide a wide field for disturbances if the different provinces disagreed about the methods of defense to be adopted.

This then should be our conclusion: the defense of Calvinism is promised by that decree of January 27, 1651, but there is no penalty attached for failure to observe the promise; the promise ought to be kept since men of principle ought to act honorably, but coercion cannot be applied in case of failure to observe it; there is no definition of methods of defense, and these are left to the decision of the individual province. Accordingly I should not dare to say, as one author does, that the various provinces remained wholly independent in religious matters after this decree as they were before: I would rather say that they remained independent in so far as they did not surrender any of that independence in the seven chapters of that decree. And I am not sure that any of this independence has been surrendered in any later agreement, or that any subsequent act has been adopted by the federated states that has further weakened the rights of the individual provinces. The Estates of Groningen indeed proposed on October 9, 1663, that for the greater protection of Calvinism they desired a decree that all who were sent to the college of the States-General should take an oath that they would defend Calvinism, but the States-General did not pass the decree. Indeed the delegates of the Holland Estates to this college take an oath that they will defend Calvinism as it now is, but only as concerns the jurisdiction of the States-General; for they explicitly add to the oath that they will not permit the States-General to pass any religious measures with reference to the separate provinces. The words of the oath are: 'Without in the least assuming to myself any authority in matters of religion over or within any of the associated provinces, or even permitting such a thing to be undertaken in any province or part thereof in the name of the States-General.' I have not even found that any power in religious matters has been given to the States-General by all the provinces, although I have found that they have very often been approached by the church officials when the Estates of the several provinces have not satisfied these officials. The Estates of Holland on September 25, 1670, even decreed that the deputies of the synods in Holland should not make such requests. It is true, indeed, that the States-General once passed some measures concerning religion in the United Provinces, but it is no less true as the Estates of Holland affirm in sections 132-5 of the decree of March 17, 1637 (on the right to use military force) that these things are not established except by the consent of all the provinces, and that they are not valid in a province whose Estates have not assented.

CHAPTER 19

The Estates of Holland on March 13, 1663, Acted Within Their Full Rights in Authorizing in the Churches a New Form of Prayer in Behalf of Themselves and Other Officials

AFTER the discussion of the preceding chapter there will be little or no difficulty in explaining and answering a question which has for some years thoroughly disturbed both church and state in a most unexpected manner. On December 9, 1662, a new form of prayer was proposed to the Estates of Holland, according to which ministers of the church should offer prayers first in behalf of the Estates of Holland as being the sovereign power in Holland, then in behalf of the rest of the Estates of the United Provinces, then in behalf of the States-General and their counselors, and finally in behalf of the counselors of the Holland Estates and the higher and lower magistrates. This new form the Estates adopted on March 13, 1663, and ordered observed in a letter issued to the magistrates of Holland dated March 21, 1663; and when sufficient regard was not shown this order by the magistrates, another letter was sent to the same magistrates on April 27, 1663. If you raise the question whether the Estates of Holland have the legal right to draw up and impose such a form upon the magistrates, you will cease to doubt if you agree with me on the question of states' rights. In my view the Estates of the several provinces have remained independent and sovereign in church matters as they were according to the Union of Utrecht, with the exception that the decree demanding the defense of Calvinism has been added, as I have shown above, and with this accordingly the decrees of the Synod of Dordrecht are also included. But one must bear in mind that in those decrees there is no stipulation as to what form or order shall be observed in praying for the Estates and the magistrates.

The subject itself does not require any fuller statement; but some writers have been so unprincipled or so ignorant in discussing it that we must treat the matter more fully. What the Estates of Holland and their counselors have said in their own behalf, and what an anonymous author has written for the Estates in one compact volume, I shall not repeat. I am content to remind the reader that the whole controversy can be settled finally by that one argument which I mentioned above, and that other alleged proofs are not concerned with this question, or if they are they can be refuted by other reasons than have been employed.

Now, as soon as the new formula appeared, it met very many opponents. The ministers of Holland as a rule opposed it in secret, those outside of Holland opposed it openly. For instance, the Synod of Sneek on June 16, 1663, decreed to instruct its delegates (called correspondenten) to the synods of South Holland and of North Holland to exert themselves in every way at those synods in creating opposition to the new formula. They based this decree on the plea that a different formula had long been in usage and that the Synod of Dordrecht had approved of this older one. If the first plea is valid I fear the priests of the Pope, whose rites we rejected, despite the fact that they had been established by long usage. The second reason is manifestly false since, as I have said, that synod did not prescribe a formula of prayer in behalf of magistrates; and in fact that matter had nothing to do with the cause of Calvinism. Accordingly, when the Holland Estates heard of the decree of the elders, they decreed on July 17, 1663, that the Frisian delegates should not be admitted to the synods of Holland unless they first took an oath that they would make no proposal on the matter.

However, the Estates of Friesland also opposed this formula of Holland in a decree on May 23,

1663. In this document they offered the same reasons that the Synod of Sneek had done, adding some others as well. But I will pass over these since they were fully answered by the counselors of the Holland Estates on June 27, 1663, and by the delegates of the Estates sent to the States-General. But I cannot pass over the fact that the Frisians, in their decree, not only appealed to the old formula of prayer though none had ever received the approval of either secular or ecclesiastical authority but also, curiously enough, derived this from the Union of Utrecht, although this Union left all religious questions to the sole arbitrament of the several provinces, as I have shown in the preceding chapter.

When the Frisians argue in their decree that in the new formula the first prayer is uttered for the Estates of Holland as being the supreme power in Holland, and the second for the States-General, despite the fact that the States-General have the right of precedence and possess the functions of the prince, or sovereign, I wish that the Frisians had never let the words be spoken. As if indeed any power were greater than or took precedence over the sovereign power within its domain! And that is the Assembly of Estates of each province. The States-General take precedence only in matters which, according to the Articles of the Union, concern the common welfare of the United Provinces, as for instance when there are dealings with foreign princes or their envoys. But they yield precedence to the Estates of the several provinces in those things which concern the individual provinces, as is the case with the question of form and order to be observed in praying for magistrates. But this doctrine slipped out not only in the decree of the Frisians, but also in those of other provinces, as you shall presently hear. If it had been uttered in former days perhaps a man of strong organs could have digested it; for there was a time when some would have it that the States-General stood next to Jove in all the provinces; there was a time when a man who defended the authority of the Estates of Holland was condemned for treason on this very count, as though he had committed *lese majeste* against the States-General. But such things happened in 1619, when the state was shattered with factional strife. However, the Estates of each of the provinces, not to say all individuals, presently regained their senses; in fact they changed their minds that very year. For they knew well that agents cannot be greater than their principals, and the States-General, with but few exceptions, act only at the mandate of the Estates which they represent. It was, therefore, with utter impudence that most of the provinces turned to an old discarded doctrine in 1663, when all men of any wisdom had already sloughed off the old folly. In Chapter 25, section 8, I shall discuss the question of precedence in, the case where the States-General and the Estates of Holland meet to do honor to a foreign prince coming to Holland.

To return to the point, the discussion about the new form of prayer was carried on between the Hollanders and Zealanders, but whether it actually came to blows I cannot learn from the decrees of the Holland Estates dated August 3 and September 20, 1663. That they took to arms on both sides I find reliably confirmed by the records of the Zealand Estates dated September 22, November 3, and 13, 1663. From these records I also learn that the Zealanders, like the Frisians, were especially angered by the fact that the first place in the new formula was given to the Estates of Holland, not to the States-General. And this was also the reason why Gelderland, Utrecht, Overyssel, and Groningen opposed the new formula. However, the Estates of Holland answered these provinces as they did Friesland in an extended epistle dated October 4, 1663, which apparently broke the opposition of all the provinces.

But church officials, both those of Holland and of the other provinces, were not yet able to settle into

tranquility. Those of Holland, having too little to do, quibbled and argued that the new formula was but a prelude to a change of the decree passed at the Synod of Dordrecht. And though they were not able to prove this by any logical argument, since the Synod had not discussed any form of prayer, yet the Estates of Holland, in a decree dated September 18, 1663, and in the above-mentioned letter of October 4, 1663, solemnly affirmed that they had never for a moment considered a change of matters of creed; that in fact they were prepared to employ the state's power in the defense of Calvinism as it was established at the Synod of Dordrecht, and as received into usage from that time. But the pledge of the Estates was apparently not sufficient to quell the disturbances which continued to create dread both in Holland and in the other provinces. Accordingly, on March 14, 1664, the Estates of Holland issued another decree by which inspectors (commissarissen politicq) were sent in the name of the Estates to the synods of South Holland and of North Holland, to make careful inquiry whether there were any Hollanders or any delegates from any other province who intended to offer any proposals against that formula or against any other decree of the Holland Estates. If any man was suspected of such intentions, the inspectors were instructed to keep him away from the synods unless he gave a pledge that he would not make such a proposal; and in general the inspectors were to take care that no proposals were made in the synods against the formula or any other decree of the Estates of Holland.

Not even then did the matter rest. Very many were angry because no mention was made of William of Orange in the new formula, though he was a mere child and of private station in Holland, but since, as others have shown, there was no legal right for complaint on this score, they merely grumbled in private, not daring to come out in the open. At any rate, this argument did not find expression in the public records and decrees either of the state or of the church. However, as things are prone to strike the deeper roots the more they are concealed, this silence on the part of the Estates and disregard of the House of Orange 'rankled deep in the soul', especially of the ministers of the church, many of whom favored Orange more than did the Estates. And though, as the Estates rightly observed, in the decree of July 17, 1663, it was the duties of the ministers, according to the canons of the Synod of Dordrecht, to teach the subjects the reverence and obedience due the magistrates, and to set an example in this matter to the rest, such was the stubbornness of some of them that, even after the public men had long ceased to criticize, these continued for three full years to oppose the Estates of Holland. This fact is apparent from the decree of the Estates dated October 7, 1666, which provided that any minister who did not employ the new formula should have his name reported to the Estates by the magistrates of the district in question, so that his stipend might be withheld as long as the Estates should see fit. In this way finally, the ministers, who are no less concerned with their larder and no less dependent upon money than other mortals, all adopted a better course. When not much later William of Orange, the third of the name, secured the reins of government, the formula was somewhat changed, but after his death it was restored to its old form, and is now being used without any objection by the ministers in Holland. At any rate they do not maliciously disregard it so far as I know. However, when pressed for time or through negligence, they often omitted it in their service after the Lord's prayer, and this was noticed by the counselors of the Estates of Holland, and I, who was then an elder in the church at The Hague, was consulted about the matter by the secretary of the counselors. I reminded the ministers of The Hague of their duty in a friendly manner. They gave me abundant assurance that they had not neglected the prayer wilfully, nor would they, since no course was left them but to win the good name of obedient servants; in the future they would take care not to forget the formula, as in fact they even now seldom omit it.

CHAPTER 20

The Meaning of Section 4 of The Peace of Münster, Dated January 30, 1648

IT would be a long story to set forth the condition of the Catholics in the United Provinces from the beginning of the state up to the present time. I have not even the desire to mention the decisions and decrees that were passed in the dominion of the States-General and in the several provinces against the ecclesiastics who do deference to the Pope. It is sufficient to our purposes to bear in mind that while lay-adherents of the Pope have always had the right to dwell unmolested in the United Provinces, the clericals have not had that right and did not even before the Peace of Münster. Indeed the States-General, by the edicts of February 26, 1622, September 8, 1629, and August 30, 1641, imposed a fine of 600 florins upon any Jesuit found in the United Provinces. All other Roman ecclesiastics were simply banished from the state with the exception of those who had lived here before 1622. And these were required to report their names to the magistrates of their districts within a week and to obey the laws of the States-General.

These edicts were proper for the time of the Spanish war when they were made, but I question whether the edict is equally justifiable which the States-General issued on April 14, 1649, after the Peace of Münster, whereby those former edicts, whose contents I have given, were repeated and ordered to be observed. Or rather, I question whether those harsh edicts ought not to be moderated and qualified in their application to ecclesiastics who are here from the empire of the King of Spain, since Belgium which was Spanish when the decrees were made is now Austrian. The question is raised because of section 4 of the Peace of Münster (January 30, 1648) which, like section 4 of the Truce of April 9, 1609, binds the King of Spain and the States-General to permit subjects and inhabitants of both countries without regard to person to migrate to the country of the other, and to dwell, carry on business, and trade there. The words in the Dutch version are: 'The subjects and inhabitants of the dominions of the aforesaid King and States-General shall and may come and remain in the country the one of the other, and there carry on their trade and commerce in entire safety by sea, by other waters, and by land.'

Indeed several of the United Provinces apparently thought that the harsh decrees above mentioned could not be adhered to without a breach of this treaty of peace, and that this section 4 of the Peace was therefore favorable to the ecclesiastics of the Pope. The Estates of Gelderland, Holland, Friesland, and Groningen proposed in the extraordinary assemblies of the States-General, held in 1650 and 1651, soon after that peace was made, that the edicts of the States-General limiting the right of ecclesiastics to enter the country should be enforced. However, they added the explicit proviso: 'So far as this can be done without infringing the terms of the Peace,' having reference, I doubt not, to the Peace of Münster. Accordingly, the States-General passed this decree together with the provisory clause on January 27, 165l. Since, however, the clause lacked definiteness it was proposed in the same assembly, in April 1651, that a clear statement of the matter should be formulated in the light of what had been done and said at the time of the Truce. However, I find a statement that this was not formulated, and that the whole matter was referred to the regular meeting of the States-General. And since nothing more definite has been adopted since, that decree of January 27, 1651, has tacitly been accepted as the final word.

The question has therefore not yet been cleared up; but in order to do it the Zealanders approached the matter from a different point of view at the above-mentioned assembly on January 22, 165l. They

offered the interpretation that, despite section 4, all ecclesiastics of the papal faith are excluded, and others cannot be admitted for the very reason that they are subjects of the Pope at Rome, and not of the King of Spain, even though they came from Spanish territory. They added that the envoys of the King had solemnly affirmed this very fact at the time when the treaty was being made, and further that the Estates had decreed in their deliberations before the peace that the Edicts against the Roman priests would have validity despite everything. The delegates of the synods then adopted these two arguments in the petition which they presented at this same assembly. Now, the first argument has no force in my judgement. Ecclesiastics are certainly subjects and they are so considered in all Catholic states. But even if you insist that qua priests they are not subjects of the King because of the jurisdiction of the church, you surely will not deny that those who have come to us from Spanish territory are inhabitants of the King's state; and the Peace speaks of subjects and inhabitants (ondersaten en inwoonderen). Though I have searched with care, I have not discovered that the King's envoys affirmed anything else, nor that the Estates decreed at the preliminary discussions that those harsh edicts would be enforced even after the peace. Accordingly, I have nothing to say about those two arguments, nor did the Estates of Gelderland, Holland, Friesland, and Groningen have anything to say about them, nor even the Estates of Overyssel afterward, though they were even more bitter against the papal priests. And yet those arguments could hardly have escaped the notice of all of these, especially in a case of such recent occurrence. This one thing I have found, that before they sent their envoys to the peace conference the Estates made the simple decree that they would defend the purer faith which had been received by the state; but it is one thing to defend a faith, another to enforce those harsh edicts. And furthermore I cannot see what advantage there would be in the fact that the King's envoys may have prattled some such thing, or that the Estates may have passed a decree. The only question to raise is what was agreed upon in the treaty itself; for if a question arises between the two powers, it must be settled upon the basis of stipulations in the treaty.

I once thought that this section 4 must be understood as referring only to subjects and inhabitants who engaged in commerce, since the final clause which I have quoted says: 'And these carry on their trade and commerce.' But fidelity to truth rejects that interpretation, since that added clause about commerce is inserted simply because subjects of one prince usually frequent the country of another for this very purpose. It is not the intention of the clause to prevent the subject of one sovereign from entering the country of another in order perhaps to live at leisure or engage in philosophic pursuits or spend his days freed from anxieties of business. I therefore abandon this interpretation, especially since another occurs to me which is, if I mistake not, more correct. After the reformed faith was publicly received, the papal priesthood fell in a way under a legal ban in these regions, so that a penalty was attached to being a clerical; a fine was imposed upon some, foreign ones were excluded from the United Provinces, as I have said, and even native ones under certain conditions. Such was law and custom even before the Peace of Münster. But criminals may not by any means come to another's country where they are regarded as criminals, however much foreigners may dwell in another's country according to the meaning of the aforesaid section 4. That clause was made to end the war between the King and the States-General so that all hostility might cease between the subjects of the two, as is there explicitly stated, but not so that the prosecution of crimes should cease, for the public laws pursue these even aside from the concerns of war. Accordingly this section 4 cannot benefit the clericals even though they are subjects of the King of Spain since they were excluded even before the peace, namely as clericals, not as subjects of the Spanish King. Indeed, that law excluded all papal clericals of all countries even of those with whom we were at peace.

Wherefore it is evident that before the clericals can be admitted, as the subjects of the Spanish King have been, some new treaty is required admitting those who were excluded by the law that had no reference to the Spanish war. And no such treaty exists. Suppose the case of a man who has been banished and deported from the United Provinces on account of some crime and not on account of war, and suppose that he has gone to the territory of the King of Spain and dwelt there for some time as subject or inhabitant. Now, if such a man desired to return hither, do you think that this section 4 would gain him admittance into the United Provinces? I hardly think so. An example will make the matter clearer. The Spanish, with irreverent piety, have banished all Jews from their country with manifest harm to their empire; and in other countries as well the Jews have been mistreated. But the Dutch, a commercial people, have acted differently, for here the Jews who are very useful to a state engaged in commerce, have been so kindly received that they have enjoyed the same legal rights and privileges as the other subjects and inhabitants of Holland. My question is whether a Jew going from Holland, the foster-parent of Jews, to Spain is at liberty to dwell there after the adoption of that section 4. Believe me, he cannot, for as Jew he was excluded from Spain long before the adoption of section 4, and that section gains no favors for the excluded.

However, though this interpretation of section 4 that I have just given seems to be entirely correct, yet I doubt whether the Estates of Holland can avail themselves of it. For when the Spaniards had ill-treated some Dutch Jews and the latter complained about the matter to the Estates of Holland, these decreed, on July 12, 1657, that the Jews in question should be considered as subjects and inhabitants of the United Provinces, and ought therefore to enjoy the same rights and privileges as derived to other subjects and inhabitants of the Republic from the peace with Spain, or from the Marine Treaty, or from every other agreement made with other kings, states, princes, estates or cities. And they added further a mandate, that their delegates to the college of the States-General should in this and all other instances undertake to defend the Jews according to this decree. Nor may you suppose that this decree had reference merely to the property and not to the person of the Jews; for in matters of property there has never been any cause for fear from the Spaniards. Indeed in 1650, seven years before this decree, the envoy of the Spanish King had affirmed before the States-General, that Jews of the Netherlands could lawfully conduct their business in Spain through agents, and their property would be accorded the same protection as that of other subjects of the United Provinces provided they did not themselves come to Spain.

We must, therefore, give further consideration to the justice of that decree of July 12, 1657. But while we consider, we may bear in mind that other Estates of the Netherlands have never passed a similar decree, so that we are at liberty to employ them in the service of applying my interpretation of this section 4. Admitting this point, we see that the States-General had the right, on April 14, 1649, to restore those harsh decrees against an unlimited influx of papal clericals into this region, and that the later confirmations of the same rested upon full legal authority. The most recent edict of the Estates of Holland on the matter was issued on September 21, 1730. But this and other matters relating to the subject I omit, satisfied if I have shown that this section 4 need not have disturbed most of the Estates of the Provinces as if it contradicted the right to exclude the clericals who came hither from Spanish territory.

CHAPTER 21
To Whose Ships Respect Must Be Shown, and on What Occasion, Whether Damage Sustained on Account of Failure to Show Respect Should Be Averaged as in the Case of Jettison

IN order that the occasion for war may be avoided we must also consider to whose ships respect is due and when. The whole problem practically depends upon the question of who holds dominion of the sea; for if any sea is under the dominion and rule of a sovereign, he has the right to impose the laws there, and others are obliged to obey the laws because they are subjects there. Accordingly, if any sovereign commands that respect be shown his ships and strongholds on seas that belong to him it must be shown; if, however, he gives such a command on seas that are not his, he can be disregarded with impunity. On the subject of the dominion of the sea I have expressed my opinion in a special volume entitled Dissertatio de Dominio Maris, published in 1703. And I have not yet altered my opinion. Those who opposed my views afterwards I answered in the second edition of the pamphlet, published among my Opera minora which appeared at Leyden in 1730. In that pamphlet I made a distinction between the sea that is near land and the outer sea, mare exterum; to the former I assigned as much as could be controlled from land, as for instance by the range of a cannon; what the sovereign cannot thus control from land I called the outer sea. I assigned the proximate sea to the dominion of the sovereign who ruled the land, whereas I denied all sovereignty over the outer sea, except in so far as it is occupied and held in possession in the intention of a master, for I held that as soon as he gave up possession his sovereignty over it also ceased. Hence I drew the conclusion that at present. no outer sea is under the dominion of any sovereign since none of it is in possession of any. If I am correct in the arguments I there presented, especially in Chapters II-IV, the consequence is that he who rules the proximate sea also has the right to demand that salutes be given there and to command how they shall be given.

Accordingly, the Estates of Holland had a full right to decree as they did on May 16, 1670, that the fort of Kronenburg in the straits of the Baltic belonging to the Danish King should be saluted according to the wishes of the King, and the States-General properly decreed on January 3, 1671, that commanders of their vessels should give a salute in the marginal sea within the range of the cannon (binnen of onder't canon van de Forten) according to the desires of the sovereign of that coast; and it must be left to the decision of that sovereign whether he desired to answer the salute, for, as was added, the prince is sovereign in his own dominion, and foreigners are subjects there. This being true, Philip II, the King of the Spains, was not right when in section 23, Title I, of the Leges Nauticae (October 31, 1563), he forbade his ships to lower the flag bearing the arms of the Spanish King for the sake of saluting in the harbors of a foreign power. Nor can we approve the refusal of a French ship in 1671 to salute a Genoese fort past which it was sailing. These cases apply to the proximate sea.

But in the outer sea, which belongs to the sovereignty of no prince, no one has the right to demand homage from others or to exact salutes for his ships. And in so far as the above-mentioned section 2 3, Title I, of the Leges Nauticae apply to the outer seas it is in my opinion entirely correct. There are certain signs of respect that one may honorably render, though it would be dishonorable to exact them. As, for instance, a man may use his own discretion in showing or refusing to show respect for one of greater dignity whom he chances to meet in public; and similarly a ship meeting in the outer sea another ship of a greater power, be the ships of any rank whatsoever, may give or withhold a

salute. Accordingly the judge of the higher court in France, reversing the decision of the lower court, correctly acquitted and dismissed the ship of Hamburg which had failed to lower its sails to a royal French ship in the Spanish waters.

And yet because of the great injustice of sovereigns, it is not always possible to secure these rights. Indeed, the rulers who lay claim to sovereignty over some sea, as the French do over the Mediterranean, the English over the British Sea, the Venetians over the Adriatic, the Genoese over the Ligurian, desire their sovereignty to be respected and are ready to take up arms if reverence is not shown. I shall not give instances of this, for we are overwhelmed with the abundance of them. I think I have shown in my Dissertatio de Dominio Maris that those nations which I have mentioned have no legal rights over any other nations on the seas which they claim, and that, therefore, they have no right to demand that special respect be shown their ships by the ships of other countries in those waters. But this they can obtain by means of treaties, that what they have no right to otherwise, they secure through the fear and cowardice of others. Accordingly, one nation may by treaty owe to another what it does not otherwise owe, as Zentgravius correctly observes in the matter of salutes. In this way, according to section 13 of the peace between England and the United Provinces, dated April 5, 1654, it was agreed that whatever ships of the United Provinces met a royal war-vessel in the British Sea should lower its top-wimple and top-sail, according to ancient usage, to quote the phrase. I shall give the passage since the meaning of the words will come up for discussion presently: 'That the ships and vessels of the United Provinces, both war-vessels and others, which may meet a war-vessel of this state (England) in the British Sea shall lower the flag of the top-mast, and the top-sail, even as it was always customary in former times.' And these same words are repeated in section 10 of the treaty between the King of England and the States-General dated September 14, 1602, and again in section 19 of the treaty of the same powers dated July 31, 1667.

With reference to this agreement, the question has been raised whether even the whole fleet of the United Provinces was bound to show respect to any one royal vessel of England of whatsoever class. This question was warmly discussed and fought over in 1671 and 1672. When the fleet of the Netherlands was stationed near the Dutch coast in August 1671, Charles II of England sent to it one of his pleasure vessels, a yacht, which was, however, armed with cannon as such vessels often are. Presently the royal yacht demanded a salute from the Dutch admiral, according to the treaty. And when the admiral failed to comply the English vessel fired upon his ship. Charles, already angry at the Netherlands, seized the occasion to declare war in March, 1672; for he mentions this affair as the principal count in his public charges, and indeed the other alleged causes were most trivial. In a voluminous decree the States-General refuted the whole list of charges, saying with reference to the above-cited sections 13, 10, and 19, that these seemed not to apply in a case involving the whole fleet of the Netherlands. Now this point I question. Would the sections be irrelevant because there were several Dutch ships and only one royal ship? But these clauses speak of ships of the United Provinces, using the plural; and presently they speak of one royal ship. Likewise it does not matter whether our ships were or were not war-vessels since this point is explicitly made in the clauses in question. We must conclude, therefore, that neither the number nor the nature of the vessels exempted them from the duty of giving the salute.

But the point I would have noticed is that those war-vessels constituted the whole navy, and the complete navy may, as it commonly is, be compared to strongholds, forts, and ports, to which strangers do and should give the first salute. I add that the fleet at anchor apparently has possession

of that part of the sea where it is stationed, in so far as and as long as it is stationed there. If it has possession, that part of the sea is then under the sovereignty of the power holding .possession, according to the arguments presented in Chapters IV and V of my De Dominio Maris. And the first salute is always and everywhere rendered a sovereign in his own territory. Furthermore, it is recorded that the Dutch fleet was then stationed close to the shore near Zealand, and therefore not in the British Sea, if we may trust the letter which the syndic of the Estates of Holland wrote on September 22, 1671, about the affair to the ambassador of the States-General who was then in England. If it was not in the British Sea the treaty does not apply. If the fleet was stationed near the land, we may hold that the admiral was right in not lowering the flag and the top-sail, since the proximate sea is considered by common usage of nations to be under the same sovereignty as the land, as I have more fully shown in Chapter 2 of De Dominio Maris, and over that land, namely Zealand, the King of England has never claimed any rights nor has any one conceded any to him. I know that in my own day an English ship once attacked a ship of Zealand near the port of Flushing because it did not salute. But since the ship in question was at anchor there, and accordingly within the dominion of the Estates of Zealand, the attack was manifestly most unjust. To all the above we may add the consideration that at most the clauses in question (sections 13, 10, and 19) require only that our ships must salute an English ship of war in the British Sea. But I am by no means convinced that a pleasure yacht can be considered a war-vessel. At any rate the craft we call yachts are of no service in naval battles so far as I have read or heard.

But however you interpret the treaties it certainly was unjust to declare war on the grounds of that case, especially since the States-General not only repudiated the behavior of the fleet, but also affirmed to the king's envoy who had come to discuss the incident that the whole fleet would in the future lower flags and sails even to one royal ship if the King desired it. The Estates in fact were exceedingly unwilling to be dragged into this war by the King, and the more judicious men of England ridiculed the fact that this incident should be offered as a pretext for war. When peace was again restored every cause for dispute was removed, for in section 4 of the treaty signed between the two states on February 19, 1674, it was agreed that however many ships of the Netherlands, whether singly or in groups, whether war-vessels or others, should meet even a single English vessel which bore the royal jack or flag, they should lower and remove the top-sail and the top-wimple of the main-mast, and this should be done on the whole of the sea that lies between Cape Finisterre and the North (the central point, namely, Stadland, Norway). And in section 4 the Estates affirm that they recognize this right as due the king. They were doubtless satisfied to enjoy the use and the benefits of the sea, giving way readily to the ambition of others when it did not involve loss to themselves.

I will take this occasion to discuss the question whether the loss should be averaged as in the case of jettison when a ship sustains damages from an attack due to refusal to pay respects to another. Weitsen records that this rule was sustained in 1545 when a warship of the French king did great damage to a Zealand ship because it did not lower its flag; and it was supported on the ground that the loss was considered as sustained in behalf of the ship's safety and its cargo. The rule was accordingly laid down, he says, in section 28 of the Leges Nauticae of Charles V, dated July 19, 1551. But I do not agree with this opinion, for the loss should not be averaged unless it is sustained in behalf of all concerned, and when there is immediate peril to the ship and cargo, and very urgent need is pressing. Doubtless the Zealand ship and its cargo would have been equally or more safe if it had lowered its flag in deference to the French, as it was by fighting with them. Perhaps you will

say that it had to resist the French for the prestige of our state, and that it could not rightly lower the flag since this act would disgrace the state. But that argument would be valid in proving that the aggressor is not responsible for damage to those who sustained loss in the attack provided the attack was justifiable: it is not valid in proving that others must contribute to a man's loss when he fought not for them but for the prestige of the sovereign. The commander of the warship is right in demanding respect due his sovereign from the treaties or other reasons, and he is guilty of treachery or some other crime if he does not exact it. But the captain of a merchant ship either owes or does not owe the respect; if he owes it and fails to render it, surely he alone is responsible for the loss sustained. And I think that he alone is just as responsible if he fights rather than show his respects, even though they are not due. His duty is not to fight for the honor of his sovereign but for the safety of his ship and cargo. It were better to lower the flag than expose his ship and cargo to the danger of attack-; for how does it concern the owners of the vessel and cargo, whose interests he is directed to protect, whether he renders or denies homage? And why should they bear the loss entailed solely by the obstinacy of the captain?

The loss need not therefore be averaged unless there be a law stipulating this, or a penalty be decreed for showing respect in such cases. For instance, section 28, title I, of the Leges Nauticae of Philip II (October 31, 1563) says, that if any one acts contrary to the ordinances of the preceding sections his ship shall be seized and confiscated. Now, if there were a penal law of the same kind which prohibited captains to lower flags or sails to any ships of other nations, and it stipulated that ships and cargo were to be confiscated in case this were done, then it would be possible to defend the contention that the loss should be averaged which was sustained through refusal of homage; for in that case we must consider that the captain had fought for the preservation of both ship and cargo. What Weitsen adds, namely that his opinion was adopted in the stipulation contained in section 28 of the Leges Nauticae of Charles V, is not true. This clause merely stipulates that losses sustained in the defense of a ship against pirates and enemies shall be averaged, a clause which is also repeated in section 2, title IV, of the Leges Nauticae of Philip II, as well as inserted in the Frisian laws. But the ground for this is quite different, for a battle with pirates or enemies is always fought in behalf of the safety of both ship and cargo.

CHAPTER 22

Miscellaneous Questions about Taxes, Revenues, and Tax Collectors

QUESTIONS of taxes and revenues particularly concern those who govern a state, for experience would teach us even though Tacitus had not said that 'nations cannot be kept at peace without armies, armies cannot exist without pay, pay cannot be furnished without tribute'. Though it is difficult to distinguish in meaning between the words tributum and vectigal, yet for the sake of attempting a definition we call by the word tributum (tax) the returns that are collected on account of property owned or acquired or levied on the person, while we apply the word vectigal (revenue) to returns that are collected on account of imports, exports, and fungibles that we buy. This is the distinction that Tacitus employs between tributa and portoria or vectigalia.

It is an ancient complaint that contributions are exceedingly burdensome in the Netherlands and especially in Holland. Some think that this is a misfortune common to republics that are governed by many; for these administrators convince themselves that the more numerous they are, the larger must be the revenues to support them like so many princes, as it were. But I am not now concerned with the question whether subjects of despots are more fortunate in this respect. This is at least true that whatever has ever been taxed for revenue in any other nation is taxed here, and one would not be far wrong if one granted that our taxes are even greater. At Rome a tax was imposed upon celibacy in order to encourage an increase in population; in Holland and Zealand there is even a tax on marriage; indeed here we may not even die with impunity. There is even a different form of greed which in some places exacts a revenue from the dead, for the churches demand an offering for the bodies that are carried past them for burial elsewhere. Peckius inveighs against this practice calling it wholly illegal. One might suppose from the Digest that the practice was in vogue among the Romans, for the expenses of the funeral are mentioned si qua vectigalia sunt (if there be any rent). But since there is no other authority for it and none exists so far as I know there is good reason for assuming a more generous attitude among the Romans for their dead; and we may refer these vectigalia to the dues exacted on account of the horses, ships, men, and whatever else is in the funeral train proceeding to another place. For on this score tribute could doubtless be exacted as readily as if they were going elsewhere for any other purpose. Furthermore, the readings in the passage vary; however, I am not now concerned with this matter. In the Netherlands at any rate the practice cannot be approved, for here prayers are not said for the dead in the churches past which the body is carried; in fact according to the Calvinistic faith they may not be said for the dead and that would seem to be the origin of the practice, as others have already observed. But the Calvinists have long been guilty of pursuing the profits that the papal priests secured by their services, although they do not perform the same services. I also would put an end to this greedy practice by applying section 39 of the so-called Politicque Ordonnantie which the Estates of Holland issued on April 1, 1580. For this privilege, such as it is, which the churches exercise may be treated as a kind of jurisdiction. And it should be curbed all the more because of the ease with which the priests can make their exaction, for no one will permit the funeral train to be detained in order not to pay the toll. This practice is not unlike the deed of brigandage that Suetonius relates of the people of Pollentia.

We know from Roman law that an itemized list of properties is made in census-taking. But in Holland and in some other places this practice is not looked upon with approval. We have a decree of the Estates of Holland (January 22, 1675) which on account of hard times then prevailing,

required that the one-half per cent. tax be paid even on property owned in foreign lands; and yet this very decree prohibited the requirement of a description of the property. The Court of Holland likewise forbade this with a threat of penalty in the Mandate of October 21, 1677, when a certain man was charged with having given false census returns. In this decree of January 22, 1675, the Estates hold that, in view of conditions existing in these regions, it is wrong to exact a description of property, and accordingly the state must rely upon the oath of the taxpayer; and yet burgomasters of cities and counselors of the Estates are ordered to inform themselves as well as they can about the property holdings of each individual, and to undertake to prosecute for the public account those who make false declarations. This practice of relying upon the oath is not unlike the ancient custom of the Germans which Machiavelli lauds as a striking illustration of true integrity. He there says that the Germans in place of tribute pay a one per cent. or two per cent. tax upon their property, and that when they have taken oath that they would pay the due amount, they do so without any investigation of accounts or compulsion. But even more honorable was the behavior of some Hollanders of the early days of the republic, for I have heard that when the taxes were being collected without any definite system, very many of them complained that less was being exacted than should be, and they accordingly offered and paid a greater sum to the state.

As Machiavelli attributed the behavior of the Germans to their love of liberty, so it is very true in the Netherlands that those who were most devoted to the cause of liberty were the most ready and willing to pay even the heaviest taxes, knowing well, as they did, that a good man does not surrender liberty except with the breath of life, so that it is a small matter to give a part of one's property in its defense. Public property is immune from tax; and though the mints of Holland formerly paid taxes, the Estates decreed on February 25, 1667, that the mints should not be liable to tax since they belonged to the Estates. The question, however, has been raised whether the public property belonging to the States-General should also be exempt from taxes in the several provinces. When the admiralty board of Rotterdam had built an arsenal at Hellevoetsluis, and asked the Estates of Holland on March 19, 1658, that this be exempt from taxes in Holland, then and for the future, the Estates refused the request on April 1, 1658. On the same day they decreed that all the arsenals of the States-General were and would remain subject to taxation. However, this hardly agrees with the later decree of August 5, 1667; for at that time when the Estates of Holland had levied a tax upon carriages, yachts, and similar properties, and the collector who had engaged to farm this tax decided also to collect on the properties of this kind at Rotterdam which belonged to the States-General and their college, the counselors of the States-General wrote (July 21, 1667) to the Estates of Holland asking them to interfere, 'since the yachts and other vessels belonging to these, were not the property of any individual inhabitant of the state but were absolutely the property of the state'. The Estates of Holland decided accordingly on August 5, 1667, giving as reason, 'since the aforesaid yachts are not pleasure vessels nor the property of private persons, but on the contrary are all used in the service of the whole state'. Are we to conclude then, that the arsenals of the States-General which pay taxes to Holland according to the decree of April 1, 1658, are private property, or that they were not built for the purposes of the whole state? It is evident that the two decrees are inconsistent. From a purely legal point of view the earlier decree can be defended since the sovereign can rightly impose taxes on all property within his domain. But we should consider whether it is a friendly act to impose taxes to our own advantage upon property of a confederate state when more than half of that property belongs to us and when the confederation could not exist without the use of that property. This is a consideration that can very frequently be urged when we are taking things that pertain to transportation and to war.

At Rome taxes and revenues were collected not only for the Emperor but also for certain cities. As Suetonius relates, Tiberius deprived many cities of their right to these, but Alexander Severus restored them again for the support of their factories, according to Lampridius. And Ammianus Marcellinus relates that the right of taxing was in general restored to the cities by Julian. In Holland revenues are collected not only by the Estates but also by certain cities, the latter of course on the basis of special grants. For as among the Romans no one but the Emperor could impose a tribute, so also Charles V decreed on July 6, 1515l and again on September 8, 1518, that no city or township in Holland should impose a new revenue tax on wine, beer, or any other thing, or change the old tax, without the special permission of the Count. In fact the later Counts so merged all revenues in their own hands that not even the Estates seem to have imposed any new taxes or revenues without special permission, even though the tax was payable to the Count. Examples of this kind of grant are the concessions which Charles V gave to the Estates of Holland on January 5, 1543 and April 16, 1543.

Jurists discuss the question whether it is lawful for cities and townships to impose taxes and dues upon the citizens and inhabitants for the sake of paying off debts, building or repairing public buildings, and for other necessary disbursements. The question must be answered with reference to the form of the government in each case. In ancient times in Holland even the meaner lords of domains seem to have done so, whence arose the frequent practice of the inhabitants to agree upon terms with the lords so that the exactions should be limited. This right is even now exercised in various ways. For instance, those who have charge of the construction and the repair of the dikes still levy certain tolls for this purpose, and various lords of no high station impose them almost without pretext. However, since the power and influence of the Counts became all important, it was not lawful to levy such taxes and tolls without a grant from them especially after the above-mentioned edicts of Charles V, dated 1515 and 1518. Accordingly, when the Lord of Brederode attended the coronation of Charles V at Aachen and, to defray the expenses of the journey, levied a tax upon the people of Bodegraven, these refused, insisting that no one had the right to levy tributes in Holland without permission of the Counts, and they were sustained by the Court of Holland on February 25, 1524. Again the bailiffs and others formerly exacted moneys in the form of taxes and tolls, not alleging any law but merely usage, and they successfully maintained the custom because individuals did not find it convenient to carry cases to court when often only a small sum was involved. But this form of robbery was restricted by the Estates of Holland by means of section 39 of De Politicque Ordonnantie passed April 1, 1580. And yet even today there are an abundance of offenses of this nature.

At Rome a release from a part of the pledged amount in a contract was allowed in case of unforeseen disasters, and this also obtained in contracts of revenue-collectors. At any rate Ulpian enumerates certain conditions in which the tax is remitted or lowered, and I read in Polybius that the Roman Senate remitted a part of the contracted sum to the tax collectors on account of disasters. This remission in whole or in part is particularly appropriate if the loss which the tax farmer sustains results from some act of the party letting the contract, as for instance if he exempts certain people from tax after the contract has been made, or prohibits the importation or exportation of goods that are liable to duty, or forbids the use of articles which produce revenue. This for instance is said to be the reason why Pope Innocent XII could not carry through his sumptuary laws in 1694, since theologians and jurists expressed the opinion that the Pope would be bound to reimburse the tax farmers for the losses they would suffer.

However, we are rather concerned with the law of Holland in the matter. Now the counselors of the Estates of Holland are not able to make any remissions to tax farmers according to section 11 of their ordinance adopted October 4, 1670, not, to be sure, because no remissions are allowed, but because the counselors are "not empowered to give any. In section 16 of the ordinance which the Estates of Holland gave their college on February 19, 1585, the statement is made that the Estates alone can consider cases of remission of moneys which the tax farmers owe the state. Hence it is apparent that remission was then possible if the Estates considered that the reasons justified it. And no grounds could be more just than if, as I said, the Estate themselves had done something which entailed losses to the tax farmers after the contract had been made. I therefore am surprised, that according to sections 33 and 35 of the Formulary of public revenues, no remissions are allowed the tax farmers in Holland if the export is prohibited of merchandise or other things upon which a duty is levied, or if exemption from taxes is granted some individuals after the contract has been let. The only ground for remission, according to the section in question, is the occupation by the enemy of places whose revenues are due the tax farmers, and this exemption is estimated in proportion to the time of occupancy. For this same cause the States-General in 1640 and 1668 decided to remit to the Estates of the several provinces the amount of damage these had sustained in the loss of revenues during the time certain parts of the provinces had been occupied and devastated by the enemy. This ground is of course wholly just; but no less just are the two reasons which I have mentioned. The States-General finally adopted one of the two reasons in section 23 of the most recent revenue-ordinance passed March 11, 1723. That is, they allow remissions in case the importation of certain goods is prohibited (the case of exports ought to be treated on the same grounds), but the other reason, which involves cases of personal exemption from taxes, they do not mention. However, they accept three new reasons for remission, namely inundations, great conflagrations, and plagues. Apparently, therefore, all other possible reasons are excluded.

We must accordingly reject a statement made by some authorities that tax contractors in Holland have the same rights of remission as the contractors dealing in other affairs. Hitherto not even the plague has been considered a justification for remission but only of a deferring of payment, as appears in Casus XLIII, of the Political Disquisitions. The counselors of Holland and those of the Netherlands have given the general advice that if the Estates cause damage to the tax collectors by new decrees they ought to make good the losses, and this is the correct position in my opinion. In this whole matter, if we would follow the Roman law which places public contractors on the same legal basis as others, it would be better than, as at present, to reject arbitrarily certain reasons there accepted, and fail to admit others that are equally worthy or even more so. The reasons enumerated in sections 15, 25, and 95 of the ordinance which the Estates of Holland imposed upon their treasury officials on March 12, 1593, agree on the whole with Roman law.

CHAPTER 23

Whether the States-general Have the Right to Interfere in the Affairs of the Several Provinces

SINCE the several provinces are independent sovereign states they exercise the powers that are normally inherent in sovereignty unless they have surrendered their right. And they have indeed surrendered their rights in certain questions in so far as this was necessary for the formation of the Union of Utrecht of January 23, 1579. In Book 1, Chapter 23, I have discussed the question of how far, if at all, they have surrendered this right with reference to war; in Book 1, Chapter 24, I have discussed the same question with reference to reprisals; in Chapter 4, of this book, with reference to sending and receiving envoys; and in Chapter 18 of this book, with reference to religion. But what if disputes arise between various provinces regarding rights and privileges that belong to the several provinces, and what if they arise between magistrates or cities or other members of any given province? Now, it is explicitly provided by the first section of the Union of Utrecht that all such disputes shall be settled by the regular courts or by arbitration or by friendly compromise; and this clause is specially added 'the other lands or provinces, cities or members thereof, shall not have to interfere therein (so long as the two parties duly submit to this) unless it be desired that they intercede for the sake of peace'. In some questions which, as I have just said, concerned the establishment of the Union and without a settlement of which the state apparently could not be preserved, another method, of composing differences is prescribed in sections 9, 16, and 23 of this Union, but I shall discuss these sections more fully in the next chapter. Meanwhile the rule in all ordinary cases is clearly this: the States-General have not the right to interfere in the disputes of the several provinces excepting only when the parties do not submit to a judicial settlement. And this one exception is wholly reasonable, for if the parties should refuse to submit to settlement in court, they obviously would resort to arms to their mutual destruction, and in this way they would become useless for the defense of the Union; and it was necessary to guard against this contingency in every possible way.

Such are the provisions of the Union of Utrecht. But even before this Union it was generally agreed that the States-General should not undertake to pronounce judgement in matters that concerned the several provinces. Accordingly, the following provision was included in section 23 of the treaty between Amsterdam and the Prince of Orange on February 5, 1578: though the officials of Amsterdam had promised to answer their accusers before the States-General and the counselors of that body regarding the administration of their city, the Estates of Holland had decided that men dwelling within Holland could not be prosecuted outside of the province for acts committed within the province, since such procedure would infringe the privileges of the province and the articles of the Treaty of Ghent; accordingly the Prince of Orange and the Estates of Holland agreed that the prosecution in question should be suspended until the States-General should decide about the jurisdiction of the court of Malines.

Moreover, that first section of the Union of Utrecht does not now apply to disputes between the city and the land (Ommeland) of Groningen, though it applied formerly. The Ommeland subscribed to the treaty, and the city was a part of the Union (as I think I have proved in I. xvi) even though it did not sign the articles. Then, when the Spaniards held possession of the city of Groningen, it fell out of the Union; but when the Prince of Orange recovered it, the city returned to the Union, according to section 2 of the articles of surrender (July 23, 1594). However, as I have observed in Book 1, Chapter 16, the city did not return with full rights, since section 5 of the articles mentioned stipulates

'that the disputes that have arisen and such as may arise between the city of Groningen and the Ommeland shall be within the jurisdiction of the States-General or their delegates'. In these disputes Groningen submitted to the jurisdiction of the States-General, either according to the terms of surrender or by a special promise to arbitrate; the Ommeland submitted only by special promise, which they gave to save themselves from continuous clashes with a difficult adversary. At any rate, the States-General or their delegates have frequently acted as judges between Groningen and the Ommeland according to the articles cited, as for instance on January 21, 1597, March 8, 1599, and April 10, 1600, and again on August 18 and December 4, 1610, and July 3, 1615. To be sure Groningen insisted on March 3, 1677 that the above-cited section 5 applied only to disputes which existed in 1594, but the Ommeland denied this, and the States-General supported their denial in the decree of August 3, 1677. This decision was correct, for section 5 explicitly provides for disputes that may subsequently arise. However, this section 5 refers only to disputes (whether existing or subsequent) between Groningen and the Ommeland. Hence it apparently cannot be extended to cover other disputes. Accordingly, if the people of Groningen or the people of the Ommeland should have some internal disputes, the States-General clearly -have no jurisdiction in the matter except it be by a new agreement made for the special case. Since the people of the Ommeland have frequently broken into riots, and still do so, the States-General have often settled their disputes according to a special agreement previously made. But if there were no such special agreement (and this must be diligently observed in every instance) the jurisdiction of the States-General would cease and the rule would apply which the above-cited section I of the Union of Utrecht prescribes for all provinces.

But what of the case in which the States-General or their delegates once pronounced judgement against some citizens of Utrecht? A letter of March 17, 1610 refers to this decision, and apparently also the edicts of the counselors of the States-General dated May 31, 1610, and the edicts of the States-General issued on August 15, 1612. You may think the decision illegally made since, according to the above-cited section 1, disputes of the several provinces or parts of provinces shall be referred to the ordinary courts or to arbitration unless the disputants come to terms. However, the decision was entirely legal, but not because the case furnished ground for the exception contained in section 1, namely that the States-General are excluded from interference unless the disputants refuse to submit to legal settlement in fact, I do not know whether the disputants did or did not agree. But I consider the decision legal because it was authorized by the Estates of Utrecht. In order, therefore, that this case may not serve as an incorrect precedent in other cases we must bear in mind that the decisions rendered in 1611 by the delegates of the States-General against certain citizens of Utrecht charged with rioting were 'authorized by the Estates of Utrecht and by the court of the city of Utrecht', as I have learned from the preface of the edict dated August 15, 1612. Accordingly the States-General had jurisdiction in this case which they would otherwise not have had.

On April 8, 1654 there was a serious quarrel among the Estates of Overyssel which agitated the whole province. The Estates of Holland then decreed (September 18, 1654) that if the delegates of Overyssel at the meeting of the States-General consented, a motion should be offered before the States-General ordering the soldiers stationed in Overyssel not to obey either faction. If, however, the delegates of Overyssel would not consent, the Estates of Holland (so they decreed) would order the Dutch soldiers stationed in Overyssel not to obey either faction so long as the riots continued, but thereafter to return to their allegiance to the Estates of Overyssel according to their oath. However, when the proposal was offered before the States-General the delegates of Overyssel refused their consent and the States-General accordingly failed to pass the motion. Finally, when various attempts had been Vainly made to reach a compromise on the questions at dispute the

Estates of Overyssel pledged that they would adhere to the decision of the question to be made by certain arbitrators in the name of the Estates of Holland, and their decision was rendered on August 20, 1657. The whole matter is fully related in the decree of the Holland Estates dated September 21, 1657, and I also have mentioned it in a different connection in Chapter 3 of this book.

With the exception, therefore, of the disputes between Groningen and the Ommeland the States-General have never so far as I know rendered any decision in disputes arising in the provinces except as arbitrators upon the agreement of the disputants or upon delegation of jurisdiction, that is to say, upon authorization of the Estates themselves. To be sure, they have often attempted to allay disturbances here and there, even to the extent of sending their deputies for the purpose, but they have definitely abstained from acting as judges when a compromise could not be reached. When in 1668 a heated controversy arose among the nobles of Friesland over some matter of local concern, and the delegates of the States-General happened to be present about some other affair, the defeated faction complained bitterly before the delegates of the injustice they had suffered. The delegates forwarded their complaints to the States-General on February 24 and 25, 1668. When this became known, deputies of the Estates of Friesland also dispatched letters to the States-General on February 29, 1668, earnestly begging the States-General not to interfere in a matter which did not concern them, and saying that the Estates (where the dispute arose) had already pronounced judgement in the case and that they alone had jurisdiction in the matter. The States-General were induced by this letter not to assume any illegal jurisdiction.

However, although I can think of no instance where the States-General have pronounced judgement between disputants of one and the same province, unless by special agreement or upon delegation of jurisdiction, yet they have the right to do so if the disputants refuse judicial settlement as they often have done. In the histories there are instances of disturbances in fact some have arisen in my day which have become so serious in some provinces that factions have seized arms and shed blood, and almost complete anarchy has resulted. Not to mention former examples, in 1702 and the years following the death of William III, Gelderland and Zealand were so torn by factional strife that laws and court decisions were totally disregarded. When the defeated faction appealed to the decision of a neutral judge, the stronger faction interposed its influence and secured the suspension or abolition of the decision. And yet, not even under such conditions, did the States-General or the Estates of any province interpose their influence except by way of effecting a compromise, never by way of a compulsory judgement. And the only thing that prevented them from interfering was, if I mistake not, the fear of each several province that the States-General might later employ the right of interference in it if they once asserted the right in any other; and it was equally important to all the provinces that the practice should never arise.

But, you ask, have the States-General never used the right which section I of the Union of Utrecht bestows in exceptional cases? You may remember as I well do the years 1618 and 1619, when delegated judges of the States-General pronounced judgement over the lives and goods of those who then governed the State of Holland. But you must by no means suppose that that case falls under the above-mentioned exception provided by section 1. That exception reads 'unless the disputants submit to a legal decision'. But the men then tried were so far from refusing a decision in their own courts that when they were dragged by the neck before the delegated judges, they appealed and clamored for a right to be tried in their own court, and its decision they neither refused nor feared. If you ask then by what right the delegated judges of the States-General tried this case, ask some better lawyer than me, for I cannot say.

CHAPTER 24
Regarding Methods of Reconciling Provinces When They Disagree

IF any controversy arises between the provinces that are federated, the question of how they are to be reconciled deserves examination. This problem is indeed very intricate but it is most important to solve it, lest the republic which can grow only through united action should some day be destroyed by discord. I shall now discuss methods of reconciling provinces which disagree, firstly .in accordance with the articles of Utrecht, then according to measures that have been adopted since that Union; then after considering these we must decide whether sufficient provision has been made for this matter which is so essential. The provision contained in the first section of the Union must apparently be extended to cover cases of discordant provinces, for it says: 'That the questions which any of the above-mentioned provinces, members, or cities of the Union have, or may in the future have, one with the other, concerning the particular or special privileges, liberties, exemptions, rights, statutes, laudable and established customs, usages, and other just claims of their people, such questions shall be decided by ordinary process of law, by arbitrators, or by friendly agreement.' And yet it is true that there is no judge, much less a judge of our ordinary court, that is competent to act in cases between discordant provinces, which are all independent. And so it would seem in such cases that when a compromise has been tried they must at once resort to arbitration. And, furthermore, it follows that if the discordant provinces are prepared to accept the decision of arbitrators the States-General have no part in such cases. Such is the general statement made in section 1. However, in section 9 of the same Union, after a clause specifying that no decision can be made regarding questions of truce, peace, war, and revenue without the unanimous consent of all the provinces, there is a general provision in case the provinces fail to agree upon any of these questions: 'That the difference shall for the time being (by provisie) be referred and submitted to the stadholders of the above-mentioned United Provinces now in office (nu ter tyd wesende), who shall examine the difference in question between the disputants or pronounce judgement thereupon according as they shall deem equitable.' And if the stadholders also disagree, arbitrators shall be called in, according to this same section 9. Again in section 16 of the same Articles of Union if any dispute arises which has reference to a single province the duty of settlement shall lie with all the other provinces; if, however, the dispute has reference to all the provinces, the stadholders shall arbitrate the matter according to section 9. Finally, according to section 21 of the Articles of Union, if any doubt arises as to the meaning of any part of the articles, all the federated provinces, each voting as a unit, shall interpret the articles, but if they disagree, the stadholders shall assume the role of arbitrators as above.

Can any one be expected to create order out of such confusion? From section 1, we might suppose that all controversies between disagreeing provinces must be referred to arbitrators, while according to section 16 either the remaining provinces are to decide or (according to the distinctions laid down in the section) the stadholders, and that certainly without reference to arbitrators. Or can it be that section 1 refers to specific rights of each several province, while section 16 refers to the common rights of the Union? But section 16 does not make any distinction; and if we adopt this interpretation, section 16 would say the same as section 21, for this latter section has reference to questions that concern the interpretation of the Articles of Union. And furthermore, the sanctioning clause of section 21 differs from that of section 16. Again, according to section 9 certain cases of more serious import are left to the judgement of the stadholders 'then in office', but only 'for the time being'. What then if the stadholders are dead? What if there are none or only one? Not a word is said

regarding such contingencies. The same criticism may be raised regarding sections 16 and 24, where stadholders are mentioned. And in section 9 arbitrators are called in if the stadholders do not agree, but it does not say whether or in what manner it shall be possible to adhere to their decisions.

In fact these matters are so obscure and so far from being consistent that in 1651 the federated provinces took up the question in earnest regarding the interpretation of all the clauses, and at the same time they labored upon a new method of reconciling discordant provinces. The Frisians, in their proposal to the extra session of the States-General on January 27, 1651, offered a new interpretation of section 9. The clause which referred certain cases by provisie to the arbitration of the stadholders, then in office, they interpreted as including all subsequent stadholders also; their specific proposal being that the words by provisie meant 'that their decision should be executed provisionally', and the words *nu ter tyd wesend*e referred not to the stadholders but to the phrase 'the United Provinces'. This erroneous interpretation was correctly refuted by the Hollanders in the proposal which they made at the same session in February, 1651. If the meaning of that section 9 was not apparent on the surface, it could be understood from the constitution drawn up on July 13, 1579,! soon after the Union of Utrecht, by John of Nassau, George Lalaing, Gelderland, Zutphen, Holland, Zealand,. Utrecht, Ommeland, and even Friesland. This document contains among other things a provision that if questions should arise about the exaction of revenues from subjects of any province 'the question shall for the time being (by provisie) be subject to the decision of the stadholders of the provinces now holding office (*nu ter tyde zynde*), in the manner specified by a closer union regarding other differences that may arise between these provinces'. With reference to the arbitration of stadholders this clause clearly makes the same provision as the above-mentioned section 9; but it cannot by any means be interpreted in the way that the Frisians interpreted section 9. However, although this article of the Union does not seem to me to be obscure, yet I think I have shown with respect to the sections that I have discussed that the various parts are of doubtful meaning and even contradictory.

They were therefore entirely justified in 1651 in discussing other methods of reconciling discordant provinces. In fact a new method became all the more necessary when some of the provinces lost their stadholders, by whose influence the Union was protected, and I may add that they were not very eager to have other stadholders. It were well if they had not only discussed the matter but also reached a conclusion, which would have been very helpful not to say essential. But though no conclusion was reached, it is of great interest to know what the several provinces proposed in this important matter. As I have not the space nor inclination to give the proposals of each, I shall simply cite the passages from which the information can be drawn. Gelderland presented its proposal at the special session of the States-General on January 20, 1651, Holland on July 26, 1651, Zealand on January 22, 1651, Utrecht (proposal undated), Friesland on July 20, 1651 and again on July 22, 1651, and again thereafter, Overyssel on February 7, 1651, and Groningen on July 20, 1651.

Holland, moreover, desired that its proposed method of reconciliation should not apply to questions of contributions (buyten materie van Consenten), though it should apply to all other controversies. Gelderland, Zealand, Utrecht, and Overyssel, though adopting the proposed method of Holland, in other respects refused to adopt the exception (August 19, 1651). But the Hollanders refused then as before to withdraw their exception, though they were earnestly urged to do so. However, on May 2, 1663, the Estates of Holland decreed that an effort should be made before the States-General to have their formula accepted even without the exception regarding contributions, provided it be only

for a term of six years. But since Friesland and Groningen had not given their consent to the formula in 1651, and the limitation of six years now proposed by Holland did not meet the approval of the other provinces, nothing came of the affair even in 1663.

Indeed the Hollanders had good reason to urge the exception which I have mentioned, for they knew well that liberty of consent in the matter of contributing revenues was the strongest possible protection of freedom; for war and peace and other matters of the greatest moment depended upon revenues, and even soldiers, as they knew, could conspire to the overthrow of their sovereign if their pay was withheld. For this very reason, in the pamphlet (mentioned in Chapter 4) which the Estates of Holland issued against the House of Orange in 1651, they explain fully by way of defense that even in the days of the dukes and counts each province freely made its own decisions regarding revenues, and had the power to refuse contributions year by year, at will, and without any offer of explanation. And when the States-General decreed on August 18, 1650, that if any question arose between the provinces regarding the disbanding of the troops the matter should be referred to the decision of the stadholders, the members from Holland, Zealand, Friesland, Overyssel, and Groningen added the note: 'Without prejudice to our rights in this matter of contributions.' They knew well that the stadholders would try in vain to retain the troops if the Estates did not furnish revenues for their pay. That note, furthermore, signifies a belief among those six provinces that when the stadholders had died who held office at the time of the Union of Utrecht, the above-mentioned section 9 of the Union lost its validity, for according to that section the question of revenues had been left to the decision of the stadholders. Apparently, therefore, the Frisians did not hold the same interpretation of that clause in 1650 as they did on January 27, 1651. The opinion of the delegates of Groningen is also clearly revealed by another incident. Apparently because they were convinced that the clause referring to arbitration in that ninth section was now void, they requested, in their proposal at the special session of the States-General on January 27, 1651, that the clause in the section which referred to the stadholders then living should be adopted as applicable to all subsequent stadholders.

Even the delegates of the States-General proposed a formula of conciliation which the members from Gelderland, Zealand, Utrecht, and Overyssel approved 'subject to the approval of their principals'. The members of Holland are said to have accepted it without proviso. However, since this formula contained no exception regarding contributions, a thing to which the Hollanders clung tenaciously until 1663, as I have said, I prefer to rest this statement upon the authority of the writer who made it. And even if the Hollanders had accepted this formula, they would have been alone in doing so, seeing that the consent of the other provinces was not secured, nor was it subsequently secured so far as I know. Consequently neither that proposal nor any offered by any other province ever received unanimous approval or acceptance.

But even if some formula existed, perfect in all respects and approved by all the federated provinces, it would surely concern itself only with composing differences that arise out of the common articles of Union, namely, when there is a question regarding what aid should be given one's confederates. In fact the Hollanders inserted an explicit clause in section I of their proposal saying that it had reference only to such questions. And the Frisians did likewise in their last proposal; though the proposed formulas of the other provinces generally had a wider application because of faulty composition. But in matters concerning the separate provinces the Estates of each have sole authority, the States-General have none unless the parts of the province or the magistrates of some

one province disagree and refuse to submit to the authority of the court. This is the only exception.

We therefore still lack a formula of conciliation approved of and accepted by the votes of all of the federated provinces. It would indeed be better to have one of some kind than none at all. The one offered by Holland is preferable to the others, and if it were amended here and there we should not scorn to accept it. The counselors of the States-General carefully explained the need of a new formula in their letters addressed to the States-General on December 14, 1716, January 18 and 27, 1717. There is also extant a new formula of the same kind, fuller and more correct than former ones, composed by the delegates of both bodies and bearing date of April 12, 1721. Although this was sent on the same day to the Estates of all the provinces, nothing has yet been accomplished and perhaps nothing will ever be. As matters now stand we have reverted to the articles of the Union, and yet to a condition far worse than existed at the founding of the republic; for at that time the stadholders had some share in reconciling factions in matters of serious import, now they have none and would not have even if the power of the stadholders had not been destroyed in most of the provinces, as is the case. So long as there were stadholders, the personal influence of these in the later times often effected as much as the actual power of the earlier ones, and thus the confusion of sections 9, 16, and 21 of the Union of Utrecht was somehow disentangled. But when the stadholders have been removed or reduced to one, how shall these sections be set in order? If there is neither official authority nor personal influence that can keep obstinate and discordant allies in their proper places, there would seem to be no alternative but for each province to assume complete independence in matters pertaining to the confederation, even as each province is now independent in matters concerning itself. But we all understand how useless such a course would be and how near to ruin it would bring the state. Let us have no more of stadholders, if the state can be preserved without them. But to render this possible, let all the federated provinces adopt a new formula of conciliation which will fill the place of the official and personal powers of the stadholders. If you think this hope difficult to realize, I must express the fear that there will not always be at hand some *deus ex machina* to preserve the republic.

CHAPTER 25
Miscellaneous Questions of Minor Importance

I. GROTIUS correctly said that the rights of a people do not expire unless the nation becomes extinct. The nation, however, is not changed with a change in the form of government. The same is certainly true of a state when it is governed now by this form, now by that. Otherwise one might suppose that a state in its present form is freed from the agreements and debts contracted under a different form of government. Grotius agrees that this does not hold true in the case of debts; and the same argument that holds in the case of debts applies convincingly to agreements. However, though it had been agreed between Henry VII of England and Philip, Archduke of Austria, by section 14 of the peace of February 24, 1495, that it should be permissible both for the English and the Dutch 'to go, navigate, and to fish in safety anywhere upon the seas without any hindrance, special license, or safe conduct', the English later, begrudging the Dutch their liberty to fish, refused to abide by the treaty, their pretext being that it had been made not with the States-General but with another sovereign, namely the Archduke of Austria. This interpretation was entirely false, and yet the English frequently urged this pretext against the article in question, and time and again stirred up quarrels with the Dutch regarding fishing rights. And though many sections of the peace of 1495 have been transcribed into treaties made with the kings of England in subsequent times, that section 14 has never since been used again. Nevertheless the Dutch rightly make use of their right to fish and will continue to do so as long as there will be any respect for treaties. The King of Denmark also refused to observe the Treaty of Espierres which he had made with Emperor Charles V in behalf of the Dutch, employing, the same pretext as the English had done. This argument lacked every vestige of truth, since both of those treaties had been made solely for the sake of the subjects. Certainly Philip of Austria had not bargained for this right with a view to sailing out in person to fish; nor had Charles V provided for a lowering of merchant dues with a view to his own trading in the Baltic Straits. And yet it was impossible to uphold the Treaty of Espierres, whether because of this contention or other petty pretexts which were equally false.

II. As both courts of Holland exclude their deported criminals from the territory of Utrecht, so also the court of Utrecht excludes its exiles from the whole of Holland. Since, however, no power can exclude its exiles from the territory of a foreign power, the question arises how this practice is validated. I notice that it has been referred to the law of Charles V dated April 17, 1534, by which he had decided to unite Holland and Utrecht under one command, and indeed the act of union is there explicitly sanctioned. Since, however, the union was not consummated, the effects of the union ought also to disappear as did all the other conditions of union sanctioned by the law. It does not seem therefore quite legitimate to derive the practice in question from that law. Perhaps we might rather derive this practice from a law of Maximilian Augustus which forbade Utrecht in 1483 to receive those whom the Court of Holland condemned to exile. From that law you may perhaps explain how the Court of Holland can exclude exiles from the territory of Utrecht, but you could hardly draw from it the correct explanation for the fact that the court of Utrecht can exclude its exiles from Holland. In Rome's treaty with Antiochus it was agreed that the latter should not receive Roman exiles, according to Polybius. But since this article did not apply to both parties the Romans could certainly receive exiles banished by Antiochus. Consequently, no argument occurs to me by which to justify this right employed equally by Holland and Utrecht, except that it is the custom in vogue.

III. Princes, even as empires, do not always hold a clear title. In such cases the question arises whether the acts are valid of one who seizes the reins of government by force and deposes the legitimate ruler. Perhaps in the case of such rulers we may for the sake of the common welfare adopt the principle which the Roman law applied in observing as valid the acts of Barbarius Philippus who was praetor though a fugitive slave. In fact we may perhaps thus apply the words of the Digest: 'Much more must this right be recognized in the case of the Emperor.' It is the duty of subjects to obey and observe the command even of unjust rulers. M. Terentius rightly said to Tiberius:

'The gods have bestowed upon you the supreme jurisdiction in the state, there remains for us the glory of submission.' Similar also, though with treacherous intent, are the words of Hushai to Absalom, namely, that he is the man whom God and the people have chosen. It is politically expedient therefore that the acts and agreements of all rulers whatsoever be considered valid, with the exception of those deeds that have furnished cause for civil war and the consequent struggle over the government. According to this principle, the Cole of Theodosian does not rescind all acts of illegitimate rulers, but only those which, have been unjustly committed. And this holds true in sections 2, 3 and 5 of the chapter cited. When in section 13 he rescinds all the acts of Heraclianus, it must be noted that this general act applies peculiarly and solely to Heraclianus. I shall not discuss the question nor attempt to define whether the followers of Cromwell in England rightly defended themselves before Charles II for the then recent government; the histories at least show that their defense was ineffective in 1660.

IV. Foreigners and even learned ones sometimes betray deep ignorance in writing of our institutions. I have often observed this, and here is a striking example. Jacques Godefroy, in his Diatriba de Jure Praecedentiae, says that the place of honor is not always accorded the strongest among the United Provinces, but often those who first advocated liberation; and 'therefore', according to a note, 'Gelderland holds the place of precedence among the federated provinces of the Netherlands'. The fact which he records is true, but the reason he gives is incorrect. Even before the Counts were abjured, Gelderland held the place of honor among the provinces as it did later in the Confederation. However, it was not Gelderland, but Holland and Zealand, that raised the first standards of revolt. The sole reason why Gelderland takes precedence in the States-General is that it bore the title of duchy, which is superior to that of an earldom or baronage; and Gelderland was a duchy for many centuries while the other provinces were ruled by counts, lords, or bishops. There were quarrels between Utrecht and Friesland from the very beginning of the republic about rights of precedence according to the decree of the States-General dated April 20, 1674. In the official documents of Charles V and Philip II the Frisians have a superior position, so also immediately after the recovery of independence, as for instance in the edict whereby the authority of the counts was abrogated on July 26, 1581. However, at the sessions of the States-General, Utrecht took precedence in honor, perhaps because of the ecclesiastical form of its government. But after the domain of Utrecht had been occupied by the French and presently recovered by our forces, the Frisians again brought up the question of precedence against Utrecht. The above-mentioned decree of April 20, 1674, relates that both sides referred the question for final settlement to the stadholders of Holland and Fries-land, promising to abide by the verdict. Utrecht accordingly holds the position of honor now as before.

V. There is a question raised by public officials that deserves discussion, namely whether any rule ought to be observed when parties must meet who dispute about the right of precedence. Suppose that the parties in question must meet to deliberate about political or ecclesiastical affairs and both

are determined to insist upon the position of priority. The author of Political Disquisitions [Boxhorn], in Casus XII, rehearses various opinions of different authorities with reference to such cases. Nothing could be better and more equitable than the agreement of Utrecht and Friesland when they were discussing the question in 1674 as I just related. They decided to take the position of honor in turn and to decide by lot which should enjoy the honor first, according to the decree of April 20, 1674. There could be no more agreeable device, for all others teem with difficulties. One certainly could not approve of the method which the French and Spanish adopted at the Council of Trent after repeated quarrels regarding the matter. They decided that on each separate occasion the first arrival should take the place of honor and the later arrival should in each case attest that the incident should not serve as a prejudicial instance. This practice, as I say, can hardly be accepted, although the above-cited author approves. For there is danger that if the matter is not arranged mechanically, both parties will attempt to seize the position of honor by force of arms. And both parties might await the very time when the session is called, and thus arrive at the same time; and both may be prepared for battle. This device smells of blood and death.

VI. Zouche is not correct in his general statement that a subject may not leave his country and become the subject of another sovereign, thus changing his citizenship. He alleges as proof the case of an Englishman who in 1571 was brought back to England from which he had fled, and was condemned on a charge of treason. It is indeed entirely permissible, if there is no legal prohibition, to change one's citizenship, to cast off one's former status, and assume a new one; that is, excepting in a few nations mentioned in Chapter 22 of Book 1. Among these exceptions is England, for there they insist that a man born in England is bound to maintain his allegiance to England even if he has dwelt a long time in the domain of another sovereign. According to this doctrine the English Parliament in 1644 condemned for treason some Englishmen, as if they were still bound to England, though they had lived in Holland for a long time. Complaints were made because of this act before the Estates of Holland and then before the States-General, but no decree was passed; in fact nothing was done but to make inquiry about the laws and customs of the English. And at the beginning of the second English war when the States-General gave permission to some Scotch mercenaries to depart if they did not wish to serve in the Netherlands, some remained in the service of the States-General, ready to serve against any and every enemy, even the English. Charles II, however, issued an edict proscribing these men as traitors. But when peace was made with England the men requested the States-General to use their influence with the English King to have the edict repealed so that they might again acquire property in England by right of inheritance and by the other customary practices in vogue in England. The States-General did as requested on October 24, 1668, quite doubtful, however, whether anything could be accomplished. Again on March 13, 1688, the States-General in a voluminous decree placed themselves in opposition to this decision of the English, who, as I said, hold that every man born in England always remains a subject of the English King, wherever he may go into foreign parts. Yet if we may believe Camden, that sentence was entirely correct, for he relates that according to the ancient laws of England no subject has the right to go from the kingdom and dwell in foreign parts except men of importance and traders, and these only for justifiable causes and by special privilege granted by the king. The sovereign has a right to lay down this restriction upon his subjects; however, if he does not the subject may go with impunity.

VII. It were better that I had not used the expression 'with impunity', for though subjects may generally change their status, taking up their abode wherever they will, and almost all jurists are

agreed upon this point, yet this act sometimes entails a penalty. In section 41 of the peace between the King of Spain and the States-General (January 30, 1648) there is a clause providing that any man may change his residence from one country to the other if he pays the dues which are imposed upon those who emigrate (mits betalende de regten daar toe staande). For there are in the Netherlands, as elsewhere, certain privileges granted to some cities according to which emigrants are compelled to pay a tax on their goods, a tax which is usually called exue or issue. Since, however, such exactions are looked upon as somewhat unfriendly, states often agree not to levy such dues upon citizens changing their residence from one country to the other concerned. Furthermore, states often employ this right only by way of retaliation, exacting the same toll from citizens who are emigrating to another state that the other state imposes upon citizens who are emigrating to them. A new question arises when such dues are prohibited by agreement, as in section 19 of the treaty between the Elector of Brandenburg and the States-General, dated February 16, 1666. Here it is stipulated 'that subjects of both parties shall be and remain free and exempt during this alliance from the exaction of dues called "issue" or "decimation" which arise at the emigration of a family or the falling due of a legacy'. When such a treaty is made it is well to inquire if it annuls the rights that various cities have obtained from the Counts to exact a certain toll from emigrants, whether they have secured this right by free grant or by actual purchase. This question is difficult to answer, especially since such rights derive entirely from special grants, and neither the States-General nor the Estates of the provinces are competent to annul them. What solution can there be therefore so long as the treaty in question is respected, which of course it must be? My view is this. If the cities in question saw and approved the treaty before it was made, they tacitly renounced their special privileges to exact this toll; if they did not see and approve the treaty, the toll cannot, to be sure, be exacted from emigrants since the treaty forbids this, but the states must indemnify the cities concerned to the full extent of the loss.

VIII. When in 1660 the King of England was to be accorded a public reception in Holland, and the question was raised whether he should be received by the States-General or by the Estates of Holland or by both, the Estates of Holland affirmed in a decree dated May 24, 1660, that the States-General did not possess the right of precedence within the territory of Holland, but since some incidents had occurred that served as precedents prejudicial to the rights of Holland, the matter should now be determined, and the delegates of the Estates of Holland would alone receive the King; furthermore, it should be noted that the States-General had given their consent to this. However, it may be that something might also be said for the States-General. For when we have dealings with foreign rulers or their envoys, although the business is transacted in Holland, it always concerns the whole republic, not merely a part, as Holland is. I know that the Estates of Holland, in the letter sent to all the magistrates on March 21, 1663, gave this reason for the new formula of prayer which was issued on March 13, 1663, namely that the old formula was absurd in expressing the first petition for the States-General, thus according the place of honor to them and not to Holland. That was correct, for in prayers we deal with the Supreme Deity, whose favor should first be sought for the sovereign, and the subjects ought to know who the sovereign is. However, when we express our good will to a visiting foreign ruler the whole republic should do it, and therefore the place of honor should be held by those who represent the whole republic without reference to the province where the act takes place. It would perhaps have been better if the Hollanders had refrained from an individual expression of congratulations, and had left the matter wholly to the States-General. When the envoys of foreign rulers come to The Hague, Holland permits them to be received publicly by the delegates of the States-General alone, though it is within Holland. And the same custom should in my opinion be observed in the case of rulers. As regards the above-mentioned formula of prayer,

I have discussed it fully in Chapter 19 of this book, and there may be found some other observations that concern this matter.

IX. Jurists discuss the question whether titles of nobility conferred by foreign rulers are of advantage in our state. We have an edict of John of Bavaria dated April 27, 1422, according to which men who had secured a title of nobility from the King of the Holy Roman Empire were forbidden to enjoy the immunities of nobles, 'since', it says, 'the Icing may bestow titles of nobility, but he cannot override the opposing judgement of the Count of Holland'. The Estates of Holland also decreed on December 11, 1666, issuing the edict on the same day, that titles bestowed by foreign rulers should have no value in Holland as concerning the game laws or any other privileges. It is entirely reasonable that 'diplomatic nobles', as we call those whose title is based solely upon a diploma, should carefully be distinguished from our own nobles, and that they should not be admitted to public office or to any other dignities which are at the disposal of our own nobles. If they were admitted, these men, who secure paper titles from foreign princes and often strut about with them to their own disgrace, would not be buying vain promises and folly as they now generally do. However, I should not approve of the action of Elizabeth the Queen of England who prohibited the use of such titles, when the King of France had bestowed them upon two Englishmen, and the Emperor of Germany had given one to another Englishman as distinction for valor. Why should they not use those titles, since one may do so without involving the judgement of others? Indeed I wonder that the Queen did not express the opinion that a doctor of science recognized by the title in some foreign country could not be a doctor in England. In Holland to be sure an attempt was made in 1656 to forbid the acceptance and use of titles bestowed by foreign rulers unless the permission of the Estates was first secured, but no decree was passed. Indeed, we have now so great an abundance 'of counts and barons among us that we are overwhelmed with them, and yet we bear with this game of wanton fortune with entire equanimity. For what is it to us even if these people are *terrae filii*? The actual nobles born in foreign parts who have taken up residence in Holland are, moreover, very different from these 'diplomatic nobles' just spoken of. These in fact have sometimes, though not always, the same rights as our own nobility. The privilege of repurchasing their properties, which the Estates of Holland gave to the nobles of Holland on February 9, 1593, they also gave to foreign nobles who had their goods and their families in Holland.

X. For the general question whether a citizen must be indemnified by the magistrate for damage to his house done by a mob, one of the counselors answers in the affirmative. I do not object to this if there is a law like that of some oriental nations, which provides that damage falling upon one citizen through robbery must be borne by the community. However, other counselors give more prudent advice saying that the magistrate is responsible only when he has not prevented the violence, though he might have done so. But whether or not the magistrate can prevent such incidents is a question which is sometimes difficult to decide. However, this question is not concerned with those who suffer violence because they have incurred the hatred of the mob while performing their duties in accordance with the laws and decisions of the court. For such men are always to be indemnified, whether or not the magistrate failed in his duty. In 1690 the house of a bailiff of Rotterdam was destroyed, and I shall not determine whether it was through fault of his own, or whether because he had done his duty in office. This I dare affirm that the magistrate of the city left no stone unturned in his effort to quiet the disturbance by better means, but to no purpose. The magistrate was therefore not treacherous nor at fault in any other way. And yet in this instance the bailiff was indemnified by means of a tax levied upon the citizens by the magistrate, as if the bailiff had incurred the hatred

by the performance of his official duties. When in 1696 the house was destroyed of a man of Amsterdam who had suggested a new form of taxation (indeed he boasted that it was new, though in fact it was in vogue elsewhere), the man in question summoned the magistrate of Amsterdam before the schepenen, demanding indemnity for the loss. He there lost his case, but upon appealing to the Court of Holland he won it. The case was again appealed to the Supreme Court of Holland, which on January 12, 1708, rejected the decision of the lower court and confirmed the judgement of the schefenen of Amsterdam. I was a member of the Supreme Court when this case was tried, and I know that the court was not influenced in their decision by the fact that after the destruction the man had been granted for life the annual premium which is bestowed for remarkable discoveries. They were influenced by the fact that no charge of negligence could be brought against the magistrate of Amsterdam in his efforts to quell the riot; and even Grotius agrees that the magistrate cannot be held liable except in case of blame. In fact, as I have just said, it is a very difficult matter to prove the magistrate at fault, since one cannot readily say what is the best possible course when the 'beast of many heads' is raging. It is sometimes expedient to set a troop of armed soldiers upon the mob, but sometimes you expose the rest of the state to the greatest danger by that method. Machiavelli shows by examples that the Romans, the most prudent of men, did not always resort to force of arms in settling riots, but often employed praiseworthy craft; and Lipsius also prescribes milder methods at first. This matter must be trusted to the prudence of each magistrate, for it is his duty to decide according to the circumstances how the state entrusted to his care shall suffer the least damage.

END OF BOOK TWO