TREATISE ON ROMAN LAWS ABROGATED AND NOT IN FORCE IN HOLLAND & NEIGHBORING COUNTRIES. PART I. INSTITUTES

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Treatise on Roman Laws Abrogated and Not in Force in Holland & Neighboring Countries. Part I. Institutes by Simon A. Groenewegen van der Made

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SIMON A. GROENEWEGEN VAN DER MADE

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Trieste

TREATISE

ON

ROMAN LAWS

ABROGATED AND NOT IN FORCE

IN

HOLLAND & NEIGHBOURING COUNTRIES

BY

SIMON À GROENEWEGEN
VAN DER MADE

PART I. INSTITUTES.

TRANSLATED BY

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TRANSLATOR'S PREFACE.

It has been thought wise to translate most of Groenewegen's Comments in full for the use of students, who in studying Justinian's Institutes, will find them of great value. It will also enable them to understand what portions of the Institutes, not commented upon by Groenewegen, may be taken to have remained law in his day and in large measure to be law at the present moment. The greatest changes in his day, as in ours, have been in the law of Persons. The law of Things and Obligations has remained very largely as it was in 1649. Where abrogations have occurred by Cape Statute I have referred to the fact in Notes; and the rules laid down by the Supreme Court for the decision of the question, whether in any given case, a rule of Roman-Dutch law may be taken to have now fallen into desuetude, or never to have been introduced here, will be found treated there as well. Where necessary I have given short translations of the Institutes in inverted commas to show the subject matter of a section.

V. S.

Chambers,
September, 1908.

PART I.

INSTITUTES OF JUSTINIAN.

ERRATUM.

For "punishable" in the first line of note [a] page 133, read "recognised".

"We have accorded to them (the Institutes) all the force of our Constitutions."

SUMMARY.

1. Authority of Civil Law everywhere great, but not everywhere the same.
2. In France it is not observed, except in so far as it is founded on reason.
3. It has the force of law in Belgium.
4. Especially in Frisia.
5-14. But this subject to exception in many ways.
15. Wherefore in many places what the law is to-day difficult to say.
16. In doubt recourse to be had to observances of neighbouring countries.
17. Custom so far as it alters the Civil Law more readily followed to its logical conclusion to-day.
18. Author's aim in present treatise.

Here, opportunely for us, arises the necessary and most practical question, as to what force these Institutes and indeed the whole Roman Civil law have to-day.[a] It is known that amongst most nations the civil law obtains,

so much so that even the Turks use the Greek code of Justinian. In some places, however, it has greater and in others less authority. In France it has no force nor is it observed except in so far as it is found to be reasonable; hence the judges there do not take an oath of office that they will observe the civil law. But in Belgium the Roman law receives much greater authority, for as it is full of sound reason and equity, it was at first quoted in cases as an illustration of what was just and equitable and then at length became accepted as law itself, and now regularly obtains the force of law in our midst.[1] Hence the States in framing laws often refer to the Roman law as to a common and well established law; as for example in the Placaat of 1 April, 1580, on the law of Succession *ab intestato* (art. 14). Hence the judges take an oath of office to uphold the Roman laws.[2] But above all others the Frisians adhere most strictly to that law.[3]

This rule however, that the Roman civil law has the force of law in Belgium, ceases to apply in many ways. (1) In those cases in which it has been superseded by the Edicts of the sovereign or of the States.[4] For although the Towns may have the right of making laws,[b] they have not the power of overriding the common law: because as far as that is concerned they are regarded as being in the position of private individuals.[5] (2) The rule does not hold in those cases in which the Roman law has been departed from by special custom.[6] The authority of the Roman laws is not indeed small with us, but nevertheless they are not of such force as to override use or custom.[7] (3) The result is the same if it is not the law itself, but the reason for the law which is removed by statute or custom, and ceases to exist. Again, the scope of these limitations upon the Roman law, is extended in

[1] Grot. Introd. 1.2.26: Merula prax. civ. l. 1. tit. 4. c. 1. in fin.: Christin Vol. I. decis 343: Goris. advers. tract. 4. de differ. jur. sec. 1.: Nic. Burgund. ad cons. Flandr. prolog. 2.5: Vide Bugn. dict. l. 2. sec. 11.

[2] Merula prax. civ. lib. 4. tit. 6. c. 2 n. 1.

[3] Sande l. 2. tit. 2. defin. 2. & 7. in fin.

[4] D.D. allegati l. 28. sed et posteriores D. de l.l. arg. l.12. pacta novissima C. de pact.

[5] D. 50.16.16.

[6] D. D. supra allegati: Consultat. J. C. Batav. part 1. cons. 47 in vers. soo dat alle l. 32. de quib. & l. 1. seqq. D. de l. 1.

As is shown in l. 2 Feud. tit. 1. de feud. cognit. c. 1. in verb. legum.

many ways. (1) When the statute or custom altering the common law, applies to corollaries, as when one thing leads logically to another.[1] (2) When several rules depend upon one principle, and the principle is departed from, all the rules depending upon it are considered to have been affected thereby.[2] (3) A statute of this kind altering the common law and dealing with one of several correlated things, is extended to the others.[3] (4) It is also extended to those things which are of the nature of the matter dealt with.[4] (5) And to cases which in common parlance, or by an extensive meaning of the term used, are covered by the case expressly dealt with.[5] (6) When two matters are equally treated by some ancient law, and a statute or custom intervenes and deals with the one, it is extended to the other.[6] (7) The result is the same when the reason for the change is expressed in the custom or in the enactment, or if not expressed, is understood.[7] (8) And as a rule, when in regard to a *casus omissus* in the custom, not a similar, but the same reason for it appears: because then it is not considered to be matter for an extensive interpretation, but the case itself is covered by the reason for the custom.[8] And in this way the rule also applies in regard to penalties.[9]

But it must be remarked that the extensive interpretation is more readily applied when the reason is given in the statute or custom, than when it is omitted: because we are not able to give the true reason for all the laws enacted by our ancestors or adopted by popular usage.[10] And hence as it is often doubtful, on what reason or

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[1] Rocchus Curtius de consuetud. Sec. 4. n. 16.: Cravet. de antiquit. tempor. pt. 4. arg. 1. n. 67.: Tusch. tom. 3. concl, 664. n. 37. lit. E.

[2] Tusch. dict. concl. 664. n. 45.

[3] Arg. l. ult. C. de Indict. viduitt. ollend. Roch. dict. sec. 4. n. 18. Cravett. dict. part 4. n. 71. cum seqq.

[4] Cravett. dict. part. 4. n. 70.

[5] Cravett. dict. part. 4. arg. 1. n. 80. cum seqq. Curt. dict. sec. 4. n. 12.: Tusch. dict. concl. 664. n. 57.

[6] Curt. dict, sec. 4. n. 14.: Cravett. dict. part 4. n. 98. cum seqq.: Tusch. dict. concl. 664. n. 48.

[7] Cravett. dict. part 4. in princ. n. 86 cum seqq.

[8] Roch. Curt. dict. sec. 4. n 23. in vers. ultimo: Tusch. dict. concl. 664. n. 77. cum seqq.

[9] Gloss. in cap. 1. verb. Italic. de tempor. ordin. in 6 vide Tusch. dict. concl. 664. n. 48. cum seqq.

[10] l. 20. non omnium D. de L. L.

whether on one reason alone, a Custom or Statute is founded, we ought to have recourse to natural reason, and consider on what grounds a wise man would have been moved to make such a law. But in an investigation of this kind there is often too soon a difference of opinion among the judges, and among advocates and conductors of lawsuits contention arises, because of the natural aptitude of man for disagreement.[1] Hence it is that our usages are often obscure, so that in cases of ambiguity of that kind, recourse should be had to the customs of neighbouring places.[2] But this is not to be forgotten, that a custom altering the Roman law can nowadays be much more readily, than in the times of the Romans, followed to its logical consequence, and be applied to similar cases: because the civil law, given to the Roman people a thousand years ago and more, and by our people adopted only *in genere*, contains in detail many things which suited the Roman State better than they do ours, and which on that account, the greater simplicity of our manners often rejects: so that a statute or custom of to-day departing from the Roman law is not on that account vicious or oppressive, but is often contrary to the law and yet at the same time founded on the law, and for that reason obtains, in the opinion of all the Doctors, also in similar cases.[3] All these matters are to be taken as the hinge upon which this Treatise turns, for from these principles can be gathered broadly, what laws are to-day abrogated or fallen into desuetude or to be considered as such: what, from that point, I have by labour and perseverance been able to add in detail and as to particular laws, as far as modern practice is concerned, I have endeavoured in this Treatise to show.

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[1] As is shown in D. 4.8.17.

[2] Arg. l. 32. de quibus and ibi D.D. in D. de l. l.: consultat. J. C. Batav. part 1. cons. 185. quaest. 1. in fin. Grot. Introd. 2.45.8.: Christin vol. 2. decis. 26. n. 12.

[3] Arg. l. 14 quod vers junct. l. praeced & l.39. quod non ratione D. de l. l.: Cravet. de antiq. tempor. part. 4. in princ. n. 75.76: Goris advers. tract. 4. de differ. jur. sec. 1. n. 2.

NOTES.

[a] Groenewegen's work deals with the abrogation of Roman law in the Netherlands, up to the middle of the 17th Century. The supersession of further portions of that law to the present day, as they affect this Colony, must be sought for in the Roman-Dutch writers after his time, and in the statutes, customs and judicial decisions of this Colony since 1806. In *Seaville* vs. *Colley* (9 Juta 39) the Supreme Court of the Cape Colony enunciated the following principles upon the subject. DE VILLIERS, C.J. said (p. 44): "As to the statutes enacted by the Legislature of this Colony since 1806, I should have great difficulty in holding that disuse for any length of time would be sufficient to abrogate them. They were duly promulgated at the time when they were enacted, and have all been published in authentic form. If such a statute is no longer required the Legislature, which must be presumed to be acquainted with the body of its own statute laws, is at hand to enact the repeal. But the body of laws introduced from Holland, the Statutes of India and the local statutes passed before 1806, stand on a different footing. They are not all to be found in any code or authentic document to which easy reference can be made, and it is often only through a judicial decision upon a disputed question of law, that the Legislature becomes aware of the existence of a particular law. The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this Colony, at the date of the British occupation in 1806, may be briefly stated. The presumption is that every one of these laws, if not repealed by the local Legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law, which is inconsistent with South African usages. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well-established but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to matters of frequent