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SOURCES OF COMMERCIAL LAW IN THE DUTCH REPUBLIC AND KINGDOM

1. Introduction

In his *Quaestiones Juris Publici* I.21, Bijnkershoek states at the beginning: *In regnis et reipublicis, quae commerciis exercendis student, contractu assecurationis nullus hodie est frequentior, excepta emptione venditione, locatione conductione*. 'In kingdoms and republics which are keen on exercising trade, there is with the exception of sale and hire no contract more in use than that of insurance.'[1] After giving a historical outline of how this contract was developed, he deals with the question of whether one may insure enemies' cargo.That is understandable in the context of the *Quaestiones Juris Publici*, which are mainly on war and the legal complications for belligerents (including letters of marque and reprisal), but one wonders how the legal construction was. In his *Quaestiones Juris Privati*, published posthumously in 1744, the entire fourth part is dedicated to problems of insurance law.[2] Thus Bijnkershoek identifies three contracts as being specific for commerce: sale, hire (and contracting), and insurance. He distinguishes these within the context of the general body of private law, and he was no exception in this respect.

2. Sources of Commercial Law up to 1809

A commercial law separate from private law by being applicable to a special group, founded on a special body of rules, and applied by special courts, did not come into existence in the Northern Netherlands until 1811. But there were regulations specific for commerce,[3] particular contracts important for commerce (as Bijnkershoek states), some legal works focusing on commercial themes, jurisprudence dealing particularly with commerce, and even some courts dealing with mostly commercial activities. For the period up to 1809, W.F.

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[1] Cornelii van Bynkershoek, *Quaestionum Juris Publici libri duo* (Leiden, 1737), 152–153.
[2] Bynkershoek, *Quaestionum*, 517–744.
[3] Every town and province had its own laws and bylaws, and the States-General did too. These were published, often in a collection, such as 'placaatboeken.' In the *Groot Placaet-boeck, vervattende de placaaten [...] van de [...] Staaten Generaal [...] en de Staten van Holland en Westvriesland; mitsgaders van de [...] Staten van Zeeland*, 9 vols. (Leiden, Amsterdam, 1658–1796), with a *Repertorium* (Amsterdam, 1797), one finds the regulations for the Republic and its commercially most important provinces of Holland and Zeeland. Some regulations may be found on the website *Regelgeving in de Nederlanden* (http://www.geneaknowhow.net/regel/nederlanden.htm).

Lichtenauer has given an excellent survey of all these, written in a lively style.[4] For the nineteenth century, from 1809 onwards, Van Oven's study is fine but focuses primarily on the science of commercial law.[5] Lichtenauer, on the other hand, first offers a general survey of the law (Ch. II), then a description of the legal science and foreign influences (Ch. III), followed by an inventory of sources of commercial law (Ch. IV: scholarly literature, literature of practice, jurisprudence, register books, formularies, orations, statutes, treaties, and customs), and finally the '*jus singulare*' of commerce (Ch. V). The list of literature p. 215–236 provides the reader with what is likely a complete survey of writings on or connected with commercial law.[6]

There is no pressing need to redo the work of Lichtenauer, and since his work is written in Dutch, I shall relate the essence of his study as regards sources. Under the authors of general works, Grotius figures highly (p. 85–104). The subjects Lichtenauer deals with for Grotius are: interest; bottomry; intermediaries; bills of exchange, assignments, commercial paper; commercial sale; maritime law (i.e., transportation etc., except average); company law;

[4] Wilhelm F. Lichtenauer, *Geschiedenis van de wetenschap van het handelsrecht in Nederland tot 1809* (Amsterdam: Noord-Hollandsche Uitgevers, 1956). The author relates the wish of the Dutch Association of Lawyers in 1883 to relinquish the differentiation between private and commercial law, and remarks that if the views of Molengraaff held (that commercial law was non-existent before the introduction of the Code of Commerce in 1811), his work would resemble a charcoal drawing of a negro by night. But Lichtenauer rejects this view as being unrealistic. With the new codification of private law in the second half of the twentieth century, the Code of Commerce was to be abolished and commercial law incorporated in the new Civil Code. Yet Lichtenauer was right: commerce retains a special place, with all of book 8 dedicated to transportation and means of transport, while some international treaties rule commerce still; book 9, on intellectual property – a new but very important subject for commerce – will not be discussed at all due to the many international regulations which rule this subject. Thus this will stay outside of the Civil Code. W.F. Lichtenauer (1900–1987) studied law at Leiden from 1918 till 1922, and defended his doctoral thesis in 1932, entitled *De vernietigende verjaring en aanverwante rechtsfiguren beschouwd naar wezen, begrenzing en onderlinge verhouding*, under the supervision of Prof. E. M. Meijers. He was an erudite and very energetic man, employed first in the Chamber of Commerce of Rotterdam 1922–1951 (lastly as General Secretary, but remaining a member until 1961), CEO of a transport enterprise 1951–1956, General President of the important Scheepvaart Vereniging Zuid 1956–1961 (and in these functions he was important for the rebuilding of Rotterdam after the war), i.a. Member of the First Chamber of Parliament 1956–1961, and Member of the Raad van State 1961–1973. He was also a keen historian and participated in many cultural and social institutions. "Obituaries: R.A.D. Renting, 'Lichtenauer, Wilhelm Franz (1900–1987)'," in *Biografisch Woordenboek van Nederland*, http://resources.huygens.knaw.nl/bwn1880-2000/lemmata/bwn4/lichten [12-11-2013], also one in *Jaarboek van de Maatschappij der Nederlandse Letterkunde* (1988), 168–176.

[5] A. van Oven, *Geschiednis van de wetenschap van het handelsrecht in Nederland in de 19e eeuw* (Amsterdam: Noord-Hollandsche, 1968). Van Oven gives short scholarly biographies of twelve important scholars, before turning to commercial law arranged according to subject. There is no survey of sources, courts, jurisprudence, nor a separate list of publications. It is more in line with the setup of the series, of course.

[6] Lichtenauer took the trouble to peruse not just publications by professors and practitioners, but also all dissertations at Dutch universities. A researcher can now avail himself of the bibliographies of Dutch authors insofar as they were a professor at a Dutch university for at least five years (see note 42). It is possible that some works may still turn up, through this channel, but which was unknown to Lichtenauer. Yet these bibliographies do not cover dissertations unless the author became a professor at a Dutch university for at least five years, or a practitioner who published more. Thus Lichtenauer's survey remains indispensable, the more so since he has valued the publications.

insurance law; average; insolvency (although summarily). Other authors of note are S. à Groenewegen van der Made,[7] S. van Leeuwen,[8] and J. Munniks (maritime law).[9] Authors on the same level as Grotius are C. van Bijnkershoek (p. 109–110, insurance law),[10] D.G. van der Keessel (p. 113–115),[11] and J. van der Linden (p. 116–117).[12] For monographs Lichtenauer mentions Weytsen (p. 120–121, maritime law),[13] Van Glins (p. 122–123, on the ordinance of Philip II of 1563 on maritime law),[14] Heineccius-Reitz (p. 125, bills of exchange),[15] Roccus-Feitama (p. 126, insurance),[16] and Banck-Wegern (p. 127, insolvency).[17] Of the dissertations Lichtenauer mentions, *inter alia*,[18] A. Brouwer on bills of

[7] Simon à Groenewegen van der Made, *Tractatus de Legibus Abrogatis et inusitatis in Hollandia vicinisque regionibus* (Leiden, 1649). Where necessary and possible, bibliographical data have been updated in the following with the help of the bibliography of Dutch authors who were not connected to a Dutch university (see note 42).

[8] Simon van Leeuwen, *Het Rooms-Hollands-regt* (Leiden, Rotterdam, 1664); many reprints.

[9] Johannes Munniks, *Handleiding tot de hedendaagsche Rechtsgeleerdheid, der Vereenigde Nederlanden, naar de order van het Romeinsche recht* (Amsterdam, 1776).

[10] Lichtenauer based himself on Bynkershoek, *Quaestiones*, and the first three volumes of Bijnkershoek's *Observationes Tumultuariae* (see note 35).

[11] Dionysius G. van der Keessel, *Praelectiones iuris hodierni ad Grotii Introductionem ad jurisprudentiam Hollandicam* (Amsterdam: Balkema, 1961–1975); Dionysius G. van der Keessel, *Theses selectae juris Hollandici et Zeelandici* (Leiden, 1800). Lichtenauer still had to consult the manuscript for the *Praelectiones*.

[12] Joannes van der Linden, *Regtsgeleerd, practicaal en koopmans handboek, ten dienste van regters, practizijns, kooplieden en allen die een algemeen overzicht van regtskennis verlangen* (Amsterdam: Allart, 1806). Van der Linden also published translations of Pothier's *Traité des Obligations*, *Traité du contrat de société*, and *Traité du contrat de change*: all important for commerce. He also made a good translation of the Code Civil when this law book was imposed upon the Dutch in 1811.

[13] Q. Weytsen, *Een tractaet van avarien, dat is ghemeene contributie vande koopmanschappen ende goederen inden schepe bevonden om te helpen dragen 't verlies van eenighe kooplieden ofte schippers goeden, gewillichlijck gebeurt, om lijf, schip ende goet te salveeren* (Haarlem, 1631; the reprints of 1651 and later contain additions by S. van Leeuwen); Latin edition, with additions by M. de Vicq: *Tractatus de avariis, id est communi contributione mercium rerumque in navi repertarum ad sarciendum damnum bonis mercatorum sive nautarum quorundam ultro illatum, eum in finem ut vita, navis ac reliqua bona salva evadant ... denuo perlustratus atque allegatione legum, jureconsultorum, edictorum, placitorum, ordinationum, statutorum etc., una cum necessariis quibusdam observationibus confirmatus et ditatus per D. Simonem a Leeuwen ... Latina vero toga indutus atque amplissima dote observationum adauctus, studio atque opera Matthaei de Vicq J.U.D.* (Amsterdam, 1672).

[14] Taco van Glins, *Aenmerckingen Ende Bedenckingen over de Zee-rechten, uyt het Placcaet van Koninck Philips uytgegeven den lesten Octobris 1563* (Amsterdam, 1727).

[15] *Grondbeginselen van het wisselrecht, in't Latyn saamgesteld door ... J.G. Heineccius naar de zevende uitgaaf vertaald, en met de noodige aanmerkingen verrykt en opgehelderd, door Karel Koenraad Reitz ...; waarachter gevoegd zyn eene verhandeling over de feilen en gebreken in den wisselhandel, door de heeren Heineccius en Lochau; ; eene boekzaal van het wisselrecht, door den heer Eisenhart; ; een aanhangsel van eenige wisselwetten ..*, 2nd ed. (Middelburg, 1774).

[16] Francesco Rocci, *De Navibus et Naulo Item de assecurationibus Notabilia Editio nova (A. Westerveen)* (Amsterdam, 1708), translation: *Franciscus Roccus ... deszelfs Merkwaardige aanmerkingen, vervat in twee tractaaten ... uyt het Latyn en Italiaans, als mede het reglement der assurantien en haveryen van de stad Hamburg, uyt het Hoogduyts vertaalt ... door Mr. Johan Feitama* (Amsterdam, 1741).

[17] Daniel Wegern, *De Bancciruptoribus Dissertatio, editio auctior* (Franeker, 1650). It is ascribed to L. Banck, his promoter; but Feenstra does not express himself on this point in the bibliography of Franeker professors (see note 42), 15.

[18] Lichtenauer does not provide us with the number of dissertations at the five Dutch universities he perused. That number is not inconsiderable. On page 134 he mentions that he found some 200 dissertations which he suspected were on commercial law, of which some 160 indeed dealt with this subject. This suggests that he perused catalogues, and more than these 200. The exact number of dissertations submitted at the Dutch

exchange;[19] J. van Ghesel, M. den Beer and E.F. Harckenroth on insurance;[20] D. van Goens on monopolies of publishers;[21] P.G. Donker and C. Pruimers on market law;[22] eight dissertations on jettison;[23] H. Tollius on average;[24] W.C. Boey on shipwrecking;[25] A. Sandra, on insolvency;[26] and also P. Stellingwerff and C. J. Vaillant.[27]

In the category of monographs Phoonsen on the law of bills of exchange (‘*wissels*,’ ‘*wisselbrieven’*) figures highly. His “Wissel-Stijl” became an authority.[28] Another authority was Verwer with his book on maritime law (particularly on average and bottomry).[29]

There existed, in the first instance, courts which dealt with subjects which were specific for commerce: the ’Camere van Asseurantie’ (Insurance Chamber) in Amsterdam since January 1598, also competent for average cases since Dec. 1598, and the ‘Commissarissen voor zeezaken’ (Commissioners for Sea Cases) since 1641; similarly there was a college of Commissioners for Sea Cases in Rotterdam since 1604, which also sat on insurance cases. Dordrecht had a court, the ‘Waterschepenen,’ later ‘Watergeregt’ (Aldermen’s Water Bench).[30] Archives exist from these courts,[31] but unfortunately little is known about arbitration, which was, however, practiced.[32]

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universities during the Republic is not yet known (a list is being made) but certainly exceeded by far the number of 200. In view of his personality and scholarly training it is likely that Lichtenauer did check more than 200, but how much more remains open.

[19] Arnold Brouwer, *De litterarum cambialium acceptatione* (Groningen: J. J. Homkes et H. Eekhoff, 1804).

[20] Jacobus van Ghesel, *De assecuratione* (Leiden, 1727); M. den Beer, *De assecurationibus* (Utrecht, 1729); Eilardus F. Harckenroth, *De assecuratione, et Bodemeria* (Utrecht, 1756).

[21] D. van Goens, *De Monopoliis* (Utrecht, 1743).

[22] P. G. Donker, *Tractatus Juris Belgici de Jure Nundinarum* (Leiden, 1752); C. Pruimers, *De nundinis, earumque jure ex institutis romanorum, et patriis* (Groningen, 1774) (law of the province of Overijssel).

[23] By H. van der Hoop, P. van der Schelling, Th. Beckeringh, H.M. Barels, W.E. van Brakel, F. Wolff, C. Wagee Schuman, W. A. Alting Lamoral van Geusau, see Lichtenauer, *Geschiedenis*, 132–133.

[24] H. Tollius, *De contributione, juxta legem Rhodiam de jactu facienda* (Harderwijk, 1770).

[25] W. C. Boey, *De Jure circa naufragas* (Leiden, 1761).

[26] A. Sandra, *De Pacto debitoris obaerati cum majore parte cum creditoribus, ex jure romano ac zelandico* (Leiden, 1777).

[27] C. Stellingwerff, *De Jure Navium* (Franeker, 1750); C. J. Vaillant, *De usufructu navium* (Leiden, 1802).

[28] J. Phoonsen, *Wissel-Stijl tot Amsterdam* (Amsterdam, 1676), many reprints and translations into German and French; see Lichtenauer, *Geschiedenis*, 136–138.

[29] Adriaen Verwer, *Nederlants see-rechten, averyen en bodemeryen, begrepen in de gemeene costuimen vander see, de placcaten van keiser Karel den vijfden 1551 en koning Filips den II 1563,’t tractaet van Mr. Quintyn Weitsen van de Nederlantsche avaryen ende daerenboven in eene verhandelinge nopende het recht der Hollantsche bodemeryen, verklaert met aenteikeningen, ook met keurige bijlagen en 't laetste nieuw-gemaekt ...* (Amsterdam, 1711).

[30] Lichtenauer, *Geschiedenis*, 142.

[31] Lichtenauer, *Geschiedenis*, 143–145.

[32] Lichtenauer, *Geschiedenis*, 145–146.

Regarding collections of judgments, which also contain commercial cases of course , a description of published and unpublished collections has been made by Meijers in 1918 and not much has been added to the list;[33] but several have been published (Loenius-Boel, Z. Huber, Schomaker, Schrassert; *Utrechtse Consultatiën*, *Hollandse Consultatiën*).[34] Among them are the famous Observationes of Bijnkershoek and Pauw, an indispensable source of judgments of the Supreme Court of Holland and Zeeland for the period of 1704–1787.[35] In their summaries the two usually mention the decisions in first and second instance, which are also important of course: but the parties did not decide to take the long and costly route all the way to the Supreme Court in all cases case, and so deviating views on a lower level may have been more common than we would be led to believe, as we shall see, and consequently were more important for daily life. It would be good to make a comparison between, for example, the Schepenbank of Amsterdam or Rotterdam and the Hoge Raad to find the number of cases in which a party appealed. A number of cases deal with commerce.[36] Two collections are particularly focused on commerce: Barels' *Advijsen* of 1781, and the '*Verzameling van Casus Positiën*' (Collection of cases) of 1793/4.[37]

Due to the constitution of the Dutch Republic (a loose confederation of seven provinces and one land, each again consisting of autonomous and semi-autonomous jurisdictions; and of

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[33] E. M. Meijers, "Uitgegeven en onuitgegeven rechtspraak van den Hoogen Raad en van het Hof van Holland, Zeeland en Westfriesland," *Tijdschrift voor Rechtsgeschiedenis* 1 (1918), 400–421. Reprint in *Études d'histoire du droit*, tome 2 (Leyde: Universitaire Pers Leiden, 1973), 3–20.

[34] See Lichtenauer, *Geschiedenis*, 146–148.

[35] Pieter Ockers: Helene C. Gall (ed.), *Regtsgeleerde decisien, Aan de raadsheer Pieter Ockers toegeschreven aantekeningen betreffende uitspraken van het Hof (1656–1669) en de Hoge Raad (1669–1678) van Holland, Zeeland en West-Friesland* (Amsterdam: Cabeljauwpers, 2002) with the review by A.J.B. Sirks, "De Decisiën van Pieter Ockers (1628–1678)," in *Tijdschrift voor Rechtsgeschiedenis* 71 (2003), 197–210; Bijnkershoek and Pauw: E.M. Meijers, A.S. de Blécourt and H.D.J. Bodenstein, *Cornelii van Bijnkershoek Observationes Tumultuariae*, I 1704–1714 (Haarlem [1923–]1926); iidem, with T.J. Dorhout Mees, F.J.de Jong, B.M. Telders, II 1714–1724 (Haarlem 1934); E.M. Meijers, A.S. de Blécourt, F.J. de Jong, K.N. Korteweg, G.J. ter Kuile, W.S. van Spengler, B.M. Telders, III 1724–1735 (Haarlem 1946); E.M. Meijers, H.F.W.D. Fischer, M.S. van Oosten, IV 1735–1743 (Haarlem 1962); H.F.W.D. Fischer, W.L.de Koning-Bey, L.E. van Holk, H.W. van Soest, *Wilhelmi Pauw Observationes Tumultuariae Novae* I 1743–1755 (Haarlem 1964); R. Feenstra, W.L.de Koning-Bey, L.E. van Holk, H.W. van Soest, II 1756–1770 (Haarlem 1967); *idem*., III 1771–1788 (Haarlem 1971).

[36] Indices to the *Observationes* provide first of all the said published volumes (note 35), and further: *Index in Observationes tumultuarias Cornelii van Bijnkershoek et Wilhelmi Pauw, naar het handschrift uitgegeven door A.J.B. Sirks* ('s-Gravenhage 2005) (the index made and used by Bijnkershoek and Paum themselves); M.S. van Oosten, *Systematisch Compendium der Observationes Tumultuariae van Cornelis van Bijnkershoek* (Haarlem, 1962); P. van Warmelo, *Registers op die Observationes tumultuariae van Cornelis van Bijnkershoek en van Willem Pauw*, s.d., s.l.

[37] J.M. Barels, *Advysen over den koophandel en zeevaert* (Amsterdam, 1781); *Verzameling van Casus Positiën, voorstellingen en declaratiën betrrekkelijk tot voorvallende omstandigheden in den koophandel, van tijd tot tijd binnen deeze stad beoordeeld en ondertekend*, 2 vols. (Amsterdam, 1793,1794); see Lichtenauer, *Geschiedenis*, 148–149.

two conquered parts, governed by the States-General) there existed a multitude of statutes, laws, bylaws etc. on commerce, each having force in a specific area. It is impossible to mention all here. On a general level, several *ordonnances* of Charles V and Philip II created some unity, such as the placates of these two rulers on insurance,[38] or the placates of the latter on average.[39] There were initiatives to codify, but nothing came of these. Customary maritime law as comprised in the Rules of Antwerp or Wisby was received in practice or used as inspiration.[40]

Lichtenauer's study has not been surpassed, but some recent works have provided much more information on specific subjects. The two works of J.P. Van Niekerk on the history of insurance law contain references to all legislation, judgements and authors who wrote on insurance in the Dutch Republic (and contrary to the suggestion in title, present day Belgium is not included). In this way one has a very wide survey of this specific part of commercial law and thus by way of this access to other parts of commercial law.[41] As regards specific works on sale or hire (and contracting), the bibliographies of professors at Dutch universities in the period 1585–1815, all published, may provide information, although the final volume on authors not attached to a Dutch university is yet to come.[42] Regarding other specific areas, Christiaan Brom's Frankfurter dissertation of 2007 gives a fine survey of the scholarly points of view combined with the line followed by the Supreme Court in matters of sale (the Court

[38] See *Groot placaetboeck, vervattende de placaten van de Staten Generael ende van de Staten van Holland en West-Vrieslandt ...*, vol. 1 ('sGraven-hage, 1658), 387ff.
[39] Ordonnance of 1563, see preceding note.
[40] Lichtenauer, *Geschiedenis*, 153. For example, *Rechten ende costumen van Antwerpen. Met verscheyde aenteyckeninge, verrijckt door C. Gabri*, was published in 1639 in Amsterdam.
[41] J.P. van Niekerk, *An Introduction to and some perspectives on the sources and development of Roman-Dutch insurance law with appendices containing the more important Roman-Dutch insurance legislation* (DPhil., University of South Africa, Department of Mercantile Law, Pretoria, 1988) and voluminous and complete J.P. van Niekerk, *The development of the principles of insurance law in the Netherlands from 1500 to 1800* (Johannesburg: Juta, 1998). See further F. Stevens, "The contribution of Antwerp to the development of marine insurance in the 16th century," in Marc Huybrechts (ed.), *Marine insurance at the turn of the Millennium*, vol. 2 (Antwerpen: Intersentia, 2000), 15–20.
[42] Margreet Ahsmann and Robert Feenstra with the cooperation of R. Starink, *Bibliografie van hoogleraren in de rechten aan de Leidse Universiteit* (Amsterdam: Noord-Holland, 1984). Additions (and corrections) to be found in volumes II, III and IV, see notes 2–4.; Margreet Ahsmann with the cooperation of Robert Feenstra and C.H.J. Jansen, *Bibliografie van hoogleraren in de rechten aan de Utrechtse Universiteit* (Amsterdam: North-Holland, 1993). On pages 33–52 and 171–184 additions to vol. I (Leiden). Additions to vol. II to be found in volumes III and IV; Robert Feenstra with the cooperation of Margreet Ahsmann and Theo Veen, *Bibliografie van hoogleraren in de rechten aan de Franeker Universiteit* (Amsterdam: Koninklijke Nederlandse Akademie van Wetenschappen, 2003). On pages XXIV–XXXIV additions to vol. I (Leiden) and II (Utrecht). Additions to vol. III to be found in vol. IV.; B.S. Hempenius-van Dijk, with the cooperation of R. Feenstra, J.H.A. Lokin and A.L. Hempenius, *Bibliografie van hoogleraren in de rechten aan de universiteiten van Groningen en Harderwijk tot 1811* (Amsterdam: Koninklijke Nederlandse Akademie van Wetenschappen, 2013). On pages XXX–XXXVII additions to volumes I (Leiden), II (Utrecht) and III (Franeker).

was conservative, in agreement with theory).[43] Punt's Leiden dissertation of 2010 deals with the company law of Holland as treated in the jurisprudence of the same Supreme Court.[44] More study would be desirable, for example a study on the practice of contracting out army supplies, combined with research into the social and financial background of the contractors. The Dutch Republic had a large standing army and its supply must have been of commercial importance.[45] Likewise, a study of the law of insolvency (*cessio bonorum*) would be useful; there is enough jurisprudence on this, as there is on bills of exchange, cession and bottomry.[46]

3. Judgments as a Source

As already indicated above, judgments were also formative for the law of commerce. Although they were, until the beginning of the nineteenth century, promulgated without motivation, the published collections of judgments did contain the views of the court and in this way shaped commercial law too. But the way a court reached a decision in the 17th and 18th century differed from later periods and we often see concurring or diverging views within the court, and sometimes also what appears to be a contradiction in the judgments of the same court. To illustrate and explain this, I shall discuss two cases of insurance law, of which Van Niekerk wrote that it was difficult to reconcile the decisions of the Supreme Court. They show us the restrictions of using judgments as sources, and the restrictions of literature. These are *Observationes Tumultuariae* 909 of 1712 and 1290 of 1716, and both, in reworked form, were included in Bijnkershoek's *Quaestiones Juris Privati* of 1744 in 4.5 and 4.6.

The first case concerned the voyage of a ship with a cargo of coal from Newcastle to St. Malo and then to Rotterdam. The cargo was not of great value but nevertheless had been insured in Rotterdam for 2000 guilders, which covered the expected ('imagined') profit. The Rotterdam law on insurance forbade this and therefore the insurer, Isaac Rodrigues Mendes, waived the

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[43] Christian Brom, *Urteilsbegründungen im 'Hoge Raad van Holland, Zeeland en West-Friesland' am Beispiel des Kaufrechts im Zeitraum 1704–1787* (Frankfurt am Main: P. Lang, 2007).

[44] Hendrik M. Punt, *Het vennootschapsrecht van Holland: het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland* (Deventer: Kluwer, 2010).

[45] On the 'Staatse Leger' see Olaf van Nimwegen, *De subsistentie van het leger: logistiek en strategie van het Geallieerde en met name het Staatse leger tijdens de Spaanse Successieoorlog in de Nederlanden en het Heilige Roomse Rijk (1701–1712)* (Amsterdam: De Bataafsche Leeuw, 1995).

[46] Van Oosten (note 36) has a chapter on the law of insolvency as dealt with in the jurisprudence of the Supreme Court (§§83–88), and three paragraphs on the other three subjects mentioned (§§56, 57, 58). The indices of the published volumes of the *Observationes* are also extensive.

law (*ius renunciaverat*). The insured party, Adriaen van Nimmegen, had to get a passport, because of the war with France (this was the Spanish Succession war, in which the UK and the Republic fought against France) and he was provided with one for free sailing from Scotland to France and back. During the trip the ship was taken by privateers from Dunkirk and sold, with the cargo. Van Nimmegen claimed the sum of 2000 guilders from Rodrigues Mendes' heirs . The heirs protested. Insuring expected profit was forbidden by the Sea Laws of Philip II and the law of Rotterdam, and agreements against these were invalid by these laws *ipso iure*. The purpose of these laws was to prevent fraud, and that insured parties were indemnified for their loss, rather than to make a profit which would be impossible to estimate anyway. For this, one has to resort to a guarantee. Van Nimwegen argued that custom could set aside statutes, and that it was a frequent use to insure expected profit and that the estimate was to be(?) paid out.

The majority of the judges were of the opinion that the waiver was valid and that an insurer who went back on his word acted in bad faith, which was unacceptable. The minority thought otherwise. Though merchants often concluded such agreements, it did not yet imply a custom. For that, a judgment was required, and moreover, a custom could create law, but could not abrogate an express law. A judge could not set aside an express statute.

The passport had been insufficient, since the ship had not sailed from Scotland. The seizure of it had therefore been legitimate. Bijnkershoek thought that this also proved Van Nimmegen's fraudulent intent. But again a majority of judges considered it sufficient that it had happened on the route from Scotland to St. Malo.

The second case, four years later, again concerned the voyage of a ship, this time from Amsterdam to Norway, and from there to Cadiz. After it had left Larkol in Norway, it got into a storm, ran into another ship and was wrecked, but did not sink. The Amsterdam insurers ordered the captain and owners of the ship to collect the ship and sell the remains, while they accepted to compensate the loss. Cited before the court to pay on the basis of this letter and not on basis of the insurance contract, the insurers raised all kinds of futile objections, which were accepted by the Insurance Chamber and the Schepenbank in Amsterdam, but were all rejected by the Court of Holland and the Supreme Court. But one point was raised which troubled the Supreme Court. It was evident that the insurance contract was applicable. The law of 1563 related to cargo. The statute of 1570 forbade the insuring of

a ship for more than 2/3 of her value. That was understandable if the owners also managed the ship; otherwise the managers had grounds to be insured for the full value. According to Bijnkershoek, since hardly any ship owner exercises the management, it is understandable that the new Rotterdam insurance statute simply allows the insuring of a ship. Here Amsterdam had still the old rule, the ship had been insured for a sum, estimated at the time of the insurance as over 2/3 of its value. Some judges argued therefore that the excess was not valid, and the clause was void in as far as it exceeded the statute. Others argued that commercial custom had set this prohibition aside, and that often a clause was added stating that if something went against a statute, parties renounced the statutory rule. Besides, the Amsterdam judges used to disregard this stipulation. Bijnkershoek reiterated the arguments against these views: the custom had not been properly established, the statute was clear, and declared such agreements void. This time there was a majority for this and the judgement of the Court was confirmed with 4 against 3, and the compensation for the ship was reduced to 2/3 of the estimated value.

According to Van Niekerk these judgments are difficult to reconcile on principle.[47] He took into consideration the fact that decisions were taken by majority vote. Yet it pays to consider also the individual opinions of the judges. It appears that in the first case, eight judges were sitting (the ninth, Keetlaer, was absent). Five judges accepted the custom, and three rejected it. In the time between the two cases, four years, two judges had died. Of the two who had died, one who had rejected the custom was replaced by somebody who wavered; the place of the other judge had not yet been filled. The judge absent in 1712 was also against accepting the custom. In the second case, 7 judges sat, the president being absent. He had accepted the custom. Had all judges kept to their opinion, the decision would have been in favour of the custom again in 1716, but one judge had changed his mind. We do not know why De Roovere did this, but perhaps it was due to the the fact that the prohibition was abolished in Rotterdam. In any case, we see that in the way the Supreme Court reached its decision, as in cases where there was no great majority, the outcome could depend very much on incidental issues such as illness. One has to bear that in mind when evaluating court decisions. The judges themselves did not rashly change their view, regardless of the way it was founded.

[47] van Niekerk, *The development*, vol. 1, 267.

There is another aspect to this. The entire discussion was not about whether insurance contracts could comprise *lucrum cessans* or cover the full value of a ship, which is something that might be expected. According to Stracca,[48] Santerna and Scaccia,[49] that was possible. Santerna distinguished finely between different formulations in the contract. If the insurer promised to guarantee the safety of the goods upon arrival in the harbour of destination, the price of the goods there was to be taken. If the owner rather focused on the loss as such, then apparently he did not consider the *lucrum cessans*.[50] But this approach was not favoured in Holland: we do not see this interpretation raised. Due to the fact that the statute of Philip II and the local statutes of Amsterdam and Rotterdam declared agreements which were contrary to their rules void, the discussion was reduced to the question of whether a custom could set aside express statutory law. No recourse had to be taken to the literature on the point. There, the thinking went further, as Van der Keessel's discourse on insurance shows.[51]

It is not my aim to redo the work of Van Niekerk. His works deal extensively and in a detailed manner with points of insurance law. But I hope that the two cases demonstrate the way the courts worked and that discussing the opinion of the Court is not such an easy task. As regards commerce, the fact that Bijnkershoek considered regarding the insurance of his times, that is, the first half of the eighteenth century, as the most important contract in commerce after sale and hire, reveals a great deal. If it were indeed so important, it also

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[48] Benvenuti Stracchae, *De Assicurationibus Tractatus* (Venice, 1569), Glossa sexta, 9.

[49] Sigismundi Scacciae, *Tractatus de commerciis et cambio* (Cologne, 1620), 30, or his *Tractatus de commerciis et cambio* (Cologne, 1670), 169–170. Scaccia rather gives a survey of Stracca and Santerna.

[50] Petrus Santerna, *Tractatus perutilis et quotidianus, de Assecurationibus et Sponsionibus Mercatorum* (Antwerp, 1554), Tertia pars, 40, 41 states it clearly: [40] *Qualiter autem fiat existimatio praedictarum mercium in casu adventus periculi, an debeat haberi respectus ad tempus infortunii et naufragii, vel ad tempus emptionis, quando dominus eas emit, vel ad tempus, quo potuerant vendi si navis salva ad portum fuerat, et videbatur quod ad tempus infortunii per l. ii § Sed in his D. ad l. Rho. item quia ut supra alias dixi iste contractus assecurationis est conditionalis, et per consequens debet inspici tempus conditionis periculi not. in l. quotiens in die, de verbo. obliga. et l. si Calendis, de re iudica. Breviter puto dicendum, quod aut quis promittit salutem mercium in certo loco [41] ut puta Ulisbonae, et tunc eius loci existimatio inspicienda est. l. fin. D. de triti. cond. aut non promisit dare merces salvas in certo loco, sed tantum aestimationem vel valorem mercium in casu periculi, scilicet si navis periret, ut fieri solet. Etiam inspici debet tempus obligationis, et sic prout tunc valebant debet fieri estimation l. fundum Cornelianum D. de nova. cum concor. Ratio est, quia tunc aestimatio debetur iure obligationis, et sic videtur permitti id quod tunc valebant, ut ibi declarant. Gl. Item ille qui procurat in adventu periculi aestimationem rerum suarum, videtur magis providere damnum, ne patiatur in amissionererum, non autem considerat lucrum: et per consequens venit illud, in quo tunc damnum sentire potest quando stipulator, et non venit lucrum, ad hoc facit bonus tex. In l. ii § portio autem D. ad l. Rho. De iac. non ob. l. 2 § Sed in his allegata, quia ibi aestimatio debetur loco rei, ut probatur, eadem l. i par. sed in iis, quia fit exoneratio collationis, si res iactae apparuerint, et ideo non immerito consideratur tempus iacti, et non tempus emptae, sed quando vendi possunt, nec obstat h. l. quotiens, quia licet iste contractus*.

[51] D.G. van der Keessel, *Praelectiones iuris hodierni ad Grotii Introductionem ad jurisprudentiam Hollandicam*, vol. V (Amsterdam: Balkema, 1961–1975), 122ff; D.G. van der Keessel, *Theses selectae juris Hollandici et Zeelandici* (Leiden, 1800), §717, nr. 10.

meant that the financial trade was very important. Without sufficient capital insurance, it is difficult to practice. Insurers need to spread the risks and to have sufficient buffers.

4. Commerce in the Second Half of the Eighteenth Century and the Move to Codification in 1809

Notwithstanding Bijnkershoek's words, commerce and industry experienced a gradual decline in the second half of the eighteenth century, due to several causes. One was that Dutch trade had profited in the 17th century from the weak economic situations of England and France. Once these countries began to protect their own markets by import duties, and encouraged their own industries, this changed. It implied a relative decline of the Dutch share in European trade. In the middle of the eighteenth century requests were sent to the States-General for support by way of prohibitions, to protect their own industries too. The Prince of Orange submitted a plan for economic reforms in 1751.[52] The main causes for the economic decline were seen in the high import and export duties. The remedy suggested was to alleviate these for those goods, necessary for the inland industries.[53] The plan was never realised, as the confederalistic structure of the Republic obstructed any implementation. Though the VOC had still a monopoly on the East India trade, the revenues from this source dwindled too, and the company came into severe financial difficulties. Its servants still made huge gains, which were transferred to the Netherlands, leading to immense private fortunes. It is no wonder that one trade flourished in the Netherlands: the banking industry. It became a banking centre, which during the Batavian Republic and the Kingdom of Holland served as a transfer table for European financial affairs.[54]

In 1795 the stadholder was chased away and the Republic of the Seven United Provinces became the Batavian Republic. Although there was much discussion about whether this should be a unitary or more decentralised state, there was unanimity that there should be an end to the particularistic fragmentation and that general statutes should govern all. Further,

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[52] See Hendrik C. Diferee, *Studiën over de Geschiedenis van den Nederlandschen Handel* (Amsterdam: Akkeringa, 1908), 9–46: I. Een onuitgevoerde maatregel tot herstel van den Koophandel in de achttiende eeuw.
[53] See also Adam Smith, see O.I.M. Ydema, "Op zoek naar draagkracht. Belastingen vóór, tijdens en na de tijd van Lodewijk Napoleon," in J. Hallebeek and A.J.B. Sirks (eds.), *Nederland in Franse schaduw: Recht en bestuur in het Koninkrijk Holland (1806–1810)* (Hilversum: Verloren, 2006), 101–123, 102.
[54] This and the following is drawn from A.J.B. Sirks, "De gevolgen van de inlijving van Nederland bij het Franse Keizerrrijk in 1810 voor handel en nijverheid," in A.M.J.V. Berkvens, J. Hallebeek and A.J.B. Sirks (eds.), *Het Franse Nederland: de inlijving 1810–1813. De juridische en bestuurlijke gevolgen van de 'Réunion' met Frankrijk* (Hilversum: Verloren, 2012), 297–314.

the Batavian government wanted to stimulate the economy. The Constitution of 1789 indeed contained several sections to this end,[55] as did the later Constitution of 1805.[56] It stipulated freedom of traffic, and consequently tolls were abolished as far as possible and substituted by import duties.

It is not so easy to check all regulations and measures issued in the period of the Batavian Republic (1795–1806), the Kingdom of Holland (1806–1810) and the French occupation (1810–1813). There is, first of all, Luttenberg's register of statutes, decrees etc. for 1796–1813, which in each case refers to the source.[57] Then there are collections of legislation, with registers, up to the end of the Napoleonic kingdom.[58] Other collections are more manageable,

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[55] Sections 47, 48 and 49 formulated the intention to mitigate the worst poverty and its consequences (beggary, foundlings), and sections 50 till 55 to stimulate trade and industry. All, however, had still to be worked out and implemented.

[56] *Staatsregeling 1805*, sections 65 and 67: departmental[unless it is a non-English term in which case italic? [Jonathan: Italics are to be used on the original work, methinks]) and local taxes may not obstruct transit, import or export of products.

[57] G. Luttenberg, *Register der wetten en besluiten betrekkelijk het openbaar bestuur in de Nederlanden sedert den jare 1796 tot 1813* (Zwolle, 1834; 2nd rev. and extend. edition Zwolle: Doijer, 1843–1851; available in Google Books). Luttenberg has arranged the statutes and decrees according to subject, and within these titles chronologically, with reference to the source. The source, again, is yet to be found.

[58] J.A. de Chalmot, *Verzameling van placaaten, resolutien en andere authentyke stukken. Betrekking hebbende tot de gewigtige gebeurtenissen sedert den maand September MDCCXCIII bevoorens en vervolgens, in het gemeenebest der Vereenigde Nederlanden voorgevallen*, 50 vols. (Kampen, 1787–1793); J.A. de Chalmot, *Nieuwe verzameling van placaaten, resolutien en andere authentyke stukken. Betrekking hebbende tot de gewigtige gebeurtenissen sedert MDCCXCIII in het gemeenebest der Vereenigde Nederlanden voorgevallen*, 2 vols. (Kampen, 1793–1794). Registers on these: J.A. de Chalmot, *Verzameling van placaaten, resolutien en andere authentyke stukken enz. betrekking hebbende tot de gewigtige gebeurtenissen, in de maand september MDCCLXXXVII en vervolgens, in het gemeenebest der Vereenigde Nederlanden voorgevallen. Algemeen register*, vols. 1–9 (Kampen, 1789); J.A. de Chalmot, *Tweeledige registers over de vyftig deelen van de Verzameling van placaaten, resolutien en andere authentyke stukken enz. betrekking hebbende tot de gewigtige gebeurtenissen, in de maand september MDCCLXXXVII alvoorens en vervolgens, in het gemeenebest der Vereenigde Nederlanden voorgevallen*, 6 vols. (Kampen 1794), on vols. 1–50. This series of publications covers the period 1787–1794, that is, the prelude to the Batavian Revolution of 1795. For the period after this, I found regarding the province of Friesland: *Verzaameling van placaaten, proclamatien, notificatien, door het Committé Revolutionair, de Provisioneele en volgende Representanten, aanvang nemende met het laatste Placaat der Geremoveerde Staats-Leden, zijnde het begin der revolutie*; *dus van den 7 februari 1795 tot den 23 juni 1796 ingesloten*, vol. 1 (Franeker, 1796; subsequent 13 volumes over 1796–1810, Franeker 1796–1810). Vol. 1–2 issued by the Committé revolutionair; v. 3–10, by the Departementaal bestuur van Friesland; v. 11–14, by Zijne Majesteit den koning van Holland, ministers van rijk, land- drost- ambt van Friesland. This collection includes the legislation of the (unitary) Republic and the Kingdom of Holland in as far applicable (also) to Friesland. For the province of Limburg, already annexed in 1795 as the French department of Basse-Meuse: Hendrik A. Kamphuis, *De invoering van wetgeving in het Franse departement Nedermaas gedurende het eerste Directoire: inleiding en regestenlijst van afgekondigde rechtsvoorschriften 1 oktober 1795–19 maart 1797* (Ph.D., Rijksuniversiteit Limburg, Maastricht, 1995). Also: *Recueil des lois et actes généraux du gouvernement, en vigueur dans le royaume des Pays-Bas, et publiés depuis le 10 juillet 1794; avec une notice des principales lois publiés pendant la réunion des diverses parties du royauyme à la France et des changemens survenus dals cette partie de la législation, et un supplément, en forme de dictionnaire alphabétique, dans lequel toutes les dispositions des lois, décrets et arrêtés relatifs à chaque matière, sont indiqués avec orde et succintement analysées*, Ser. 1, vol. 1 – Ser. 3, vol. 20 (Bruxelles, 1819–1830). A *Dictionnaire raisonné des matières comprises dans le Recueil des lois (première série)* was published in Brussels, 1824. Further, in 1827 a *Table chronologique* on the first twelve volumes of the Ser. 3 was published in Brussels.

but are not complete, both for the period 1798–1810[59] and for 1810–1813.[60] However, since they provide easy access to the texts, they can have advantages over Luttenberg, or can supplement his work. Because many special local and provincial regulations were to be substituted by national regulations, because the government wanted to stimulate trade and industry, and because many revolutionaries wished to reform society, we find amongst the issued legislation of state and provinces much which is of importance for commerce. The same is true for the moment of annexation: again many rules of an administrative nature, now from France, applied to trade and industry. This is not the place to give examples, as they can be found in the sources mentioned and in literature.[61] Of the several collections of jurisprudence, a general register exists.[62]

These regulations supplanted many which had existed before in matters of commercial importance. One main difference now of course was that they imposed uniform rules where previously provincial and local rules had reigned. An example of such a general regulation, this particular one introduced with the annexation, is the imperial decree of 15 August 1810, which dealt with the release of harmful fumes from workshops.[63] First, one now needed a license to set up such a shop. Three classes were distinguished: workshops which had to be kept far away from homes; workshops which did not have to be that far away yet required

[59] For the period 1795–1798 there is no collection available. For the period Jan. 22, 1798–July 10, 1810 (the end of the Kingdom of Holland and the annexation by France) there is J. van de Poll, *Verzameling van vaderlandsche wetten en besluiten, uitgevaardigd sedert 22 Januarij 1798 tot 10 Julij 1810, in zooverre zij ook, sedert de invoering der nieuwe wetgeving in Nederland, middelijk of onmiddellijk van toepassing zijn* (Amsterdam, 1840). It is a very useful collection, also because Van de Poll adds a summary to certain subjects of the previous abolished regulations and the vicissitudes of the regulation after July 10, 1810. However, Van de Poll only included regulations still applicable after the French occupation was shaken off in 1813. What was introduced and abolished between 1798 and 1810 found no place, unless included in a summary.

[60] The French legislation became applicable upon the annexation in one fell swoop, and is neatly collected in L. Rondonneau, *Collection des lois françaises, constitutionnelles, administratives, judiciaires, commerciales, militaires et religieuses, actuellement en vigueur dans l'empire, et déclarées par les décrets des 8 novembre 1810, 6 janvier et 19 avril 1811, exécutoires dans les départemens de la Hollande, et autres réunis à la France depuis 1810: mises en ordre et conférées entre elles avec une table chronologique à chaque volume et une table générale alphabétique et analytique des matières à la fin du dernier volume*, 6 vols. (Paris: Ange Clo, 1811). Of course the sovereign prince William began at once in 1813 with introducing new regulations, so that after some time a mixture of old French law and new Dutch law existed. This led to a collection of French law, still applicable in 1839: J. Fortuijn, *Verzameling van wetten, besluiten en andere regtsbronnen van Franschen oorsprong, in zooverre deze, ook sedert de invoering der nieuwe wetgeving, in Nederland van toepassing zijn*, 3 vols. (Amsterdam: J. Müller, 1839). Again it is possible that French law was introduced after 19 April 1811 and was abolished before 1839, but this is not recorded here.

[61] See A.J.B. Sirks, "De gevolgen van de inlijving van Nederland," 297–314, with examples of the changes in commerce, during and after the French annexation.

[62] L.Th. Grave van Nassau la Leck, *Algemeen beredeneerd register op alle de voornaamste rechtsgeleerde advysen, consultatien, avertissementen, decisien, observatien en sententien* (Utrecht, 1778); after this followed J. Van der Linden, *Verzameling van merkwaardige gewijsden der gerechtshoven in Holland* (Leiden, 1803).

[63] Rondonneau, *Collection des lois françaises*, 2:297–302.

special precautions to prevent harm; and workshops which could stay where they were, but remained under supervision. This must have led in several cases to higher costs for the entrepreneur.

The Constitution of 1798 had expressed a desire for the codification of the civil laws ('burgerlijke wetten') in its section 28 . The place of commercial law in the system was not clear. The Cras committee, charged with codifying these, included for example the rules on insurance and average in the code of private law, but others proposed a separate draft for sea law and insurance (the draft of Walraven).[64] Between 1801 and 1804 no work was done at all. Louis Napoleon (king from 1806 till 1810) in 1808 charged Joannes van der Linden with drafting a new civil code.[65] And although in his *Rechtsgeleerd Practicaal* this jurist had proposed that commercial law should be dealt with separately, in his draft of a civil code he integrated commercial law under obligations. His draft, however, became superfluous upon Napoleon's introduction of his civil and other codes, including *the Code de commerce*, in force since 1807. Under pressure from his brother to introduce this code Louis Napoleon had change his course. He had to cede to his brother's wish, but at the same time wanted to adapt these codes to Holland. He had just appointed a new committee (Committee Van Gennep) which had to formulate the commercial law in the context of the civil code. The committee now proposed to make a separate commercial code, and accordingly their charge was changed. The committee, consisting of A. van Gennep, M.S. Asser and J. van der Linden, submitted their draft of a '*Wetboek van Koophandel voor het Koningrijk Holland*' on 8 June 1809.[66] Introduction was probably planned after the introduction of the adaptation of the Code Napoleon, the '*Wetboek Napoleon ingerigt voor het Koningrijk Holland*' on 1 May 1809. But by 1 July 1810 Louis was forced to abdicate and on 9 July 1810 Holland was annexed. On 1 January and 1 March 1811 the French legislation came into force. Until that moment all *ancien régime* regulations had retained force if they had not been abolished. The

[64] For the draft of Walraven, see Carel van Nievelt, *Bronnen van de Nederlandse codificatie van het zee- en assurantierecht, 1798–1822* (Leiden: New Rhine Publishers, 1978), XIX–XLVII.

[65] For Joannes van de Linden (1756–1835) see R. Feenstra, "Joannes van der Linden," in M. Stolleis (ed.), *Juristen: Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert* (München: Beck, 2001), 390–391; for his draft: J. Th. de Smidt (ed.), Joannes van der Linden, *Ontwerp Burgerlijk Wetboek 1807–1808* (Amsterdam, 1967); company law, law of bills of exchange, maritime law (insurance, average, bottomry and shipping) are treated of in resp. titles 8, 10 and 11 of the third book, On Personal Rights ('Van de Personele Reghten, of Regten tot eene Zaak'); for his draft of commercial law, based on the draft of Walraven, see Nievelt, *Bronnen van de Nederlandse codificatie*, XLVIII–LVI.

[66] *Het eerste ontwerp van een Nederlandsch Wetboek van Koophandel, zamengesteld op last van Koning Lodewijk Napoleon door A. van Gennep, M.S. Asser en J. van der Linden*. Op nieuw uitgegeven met eene voorrede van Mr. T.M.C. Asser (Amsterdam, 1866).

annexation, however, meant a real breach with the past. With it came the *Code de commerce*, be it with the addition of an authenticated translation; and with it came also the division between citizens and merchants, and the separate tribunals for commerce (until then the judicial system of the *ancien régime* had continued).[67]

This meant a serious setback. The French Code was mainly based on the royal *Ordonnance Savary* of 1673. Criticism arose at once. The structure was not scholarly based, it lacked general principles, it lacked a logical structure, and it did not show much progress since the Code Savary. It did not take account of the economic changes since 1673, the industrial revolution, as was apparent from its scant treatment of anonymous companies. It is significant that it did not inspire any foreign code, contrary to the civil code.[68] Worst of all, the banking industry, insurance, shipping, transportation of passengers, shipwrecking, etc: none of these subjects were dealt with in the *Code de Commerce*.[69] These were subjects of utmost importance for Holland and had been, unsurprisingly, dealt with excellently in the Dutch drafts. The *Code de commerce* did not provide the Dutch economy with the instruments it needed to recover and develop. In view of the draft of 1809 one would expect that after the French were gone, this draft would have become law in or after 1815; but the political changes obstructed the introduction of a new code every time. The union with the Southern Netherlands in 1815 which made creating a code necessary, also acceptable for the Southerners. This code was ready in 1830, but due to the separation of Belgium in the same year it became outdated. Consequently a new commercial code did not come into existence before 1838, partly inspired by the draft of 1809 to remedy the gaps mentioned.[70] In the period following the Code, a discussion arose about whether commercial law should remain a

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[67] The French *Code de Commerce* had gained force of law on 10 resp. September 11, 1807 and was published on 20 resp. September 21, 1807. See for this R.J.Q. Klomp, *Opkomst en ondergang van het Handelsrecht* (Nijmegen: Ars Aequi Libri, 1998), 5–14. Dutch edition: *Wetboek van den Koophandel voor het Fransche rijk, vertaald door J. van der Linden* (Amsterdam, 1808).

[68] The criticism, pronounced in Belgium on the occasion of the bicentenary of this code, is basically that no account was made of the economic changes since the seventeenth century; for example, anonymous companies still needed authorisation by the public authorities. See P. van Ommeslaghe, "Rapport introductief," in Jean-Pierre Buyle et al. (eds.), *Bicentenaire du Code de commerce: Tweehonderd jaar Wetboek van Koophandel* (Brussel: Larcier, 2007), 12–13.

[69] As Asser wrote, *Het eerste ontwerp van een Nederlandsch Wetboek van Koophandel, zamengesteld op last van Koning Lodewijk Napoleon door A. van Gennep, M.S. Asser en J. van der Linden. Op nieuw uitgegeven met eene voorrede van Mr. T.M.C. Asser, vi–vii: 'De kassierderij, benevens het kassiers- en ander handelspapier, de assignatiën, de algemeene regelen van het verzekerings-contract, de brand-, landbouw- en levensverzekering, de reederijen, de passagiers op buitenlandsche zeereizen, de leer der schipbreuken, strandingen en zeevonden, de schepen en vaartuigen die de rivieren en binnenwateren bevaren, dat alles was in het Fransche wetboek in het geheel niet behandeld*' and a number of other subjects were very poorly treated.

[70] *Wetboek van Koophandel* ('s Gravenhage, 1838).

separate area or fuse with private law. What was the value of keeping commercial law apart? It culminated in two pieces of advice for the yearly meeting of the Association of Dutch Jurists (‘*Nederlandsche Juristenvereeniging*’) in 1883, in which the two authors, A.F.K. Hartogh and W.P.L.A. Moolengraaff, argued for removing the distinction. After that, the general opinion was that this should be the line to follow. In 1934–35 the division between citizens and merchants, and with it the special commercial courts, was abolished. In 1947 the Parliament ordered the recodification of private law, with the inclusion of commercial law in the new Civil Code. Despite this wish, the new Dutch Civil Code does not comprise all commercial law. A part of it, maritime law, is still in the Code of commerce; the idea of including intellectual property in the new Civil Code in a Book 9 has been relinquished, since this subject is often ruled by international treaties, as are other parts of commercial law. As regards jurisprudence, publication of this and thus of judgments on commercial law since 1813 came into being only hesitatingly. Some journals were founded whose editors planned to discuss cases judged; in practice it hardly happened. Only the *Bijdragen tot Regtsgeleerdheid en Wetgeving*, published 1826 till 1838, was particularly active.[71] A systematic collection and publication did not start until W.Y. van Hamelsfeld, judge in the Supreme Court (‘*Hoog Gerechtshof*’), began his ‘*Verzameling van gewijsden van het Hoog Gerechtshof te ’s-Gravenhage*’ in 1826.[72] The promulgation of the civil code in 1838 led to a flood of journals, of which two specialised in jurisprudence: the *Weekblad van het Regt* and the *Nederlandsche Regtspraak*. From 1913 onwards the *Nederlands(ch)e Jurisprudentie* appeared, which became the foremost journal of jurisprudence. Next to these the collection of judgments of the Supreme Court, initiated by J. van den Honert Thz., must certainly be mentioned. The judgments were divided into six categories, one of which included commercial law.[73]

As to the science of commercial law since 1809, Van Oven has mentioned that for the period after the promulgation of the Commercial Code of 1838 there were a number of scholars who influenced the views on commercial law: J. van der Linden, J.D. Meijer, A.C. Holtius, J. van

[71] See for a survey of journals W. Zwalve and C. Jansen, *Publiciteit van Jurisprudentie* (Deventer: Kluwer, 2013), 180–225.
[72] Willem Y. van Hamelsveld and Petrus van Hamelsveld, *Verzameling van gewijsden van het Hoog Gerechtshof te’s-Gravenhage*, 6 vols., judgments from 1823 onwards (Delft: J. Allart, 1826–1834); 2nd series: W.Y. van Hamelsveld and P. Simons, *Nederlandsche Pandecten, of Verzameling van gewijsden van het Hoog Gerechtshof te ’s-Gravenhage*, 10 vols., judgments from 1814 onwards (Delft, 1827–1844).
[73] J. van den Honert Thz., *Verzameling van arresten van en Hoogen Raad der Nederlanden, Burgerlijk regt, regt van koophandel en burgerlijke regtsvordering*, 68 vols. (Amsterdam, 1839, 1840–1902).

Hall, A. de Pinto, G. Diephuis, J.G. Kist, G.J. Hingst, J.A. Levy, T.M.C. Asser, W.P.L.A. Molengraaff, and some others. It was rare for them to be specialists in commercial law, and their sphere of action was usually private law. Further, Van Oven notes, for the second half of the nineteenth century, a shift from a legal historical to a dogmatical approach for commercial law. He presents in his study an thorough description and analysis of various themes of commercial law.[74]

[74] A. van Oven, *Geschiedenis van het handelsrecht in de 19e eeuw* (Amsterdam: Noord-Hollandsche, 1968).