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Transitional Justice in Consultations of Hendrik van Kinschot (1541–1608)
Learned Legal Practices on Wars, Loans and Credit[1]

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Abstract
This article presents three consultations by Hendrik van Kinschot (Kinschotius, 1541-1608), a lawyer from the Southern Netherlands who acted as an advocatus *at the Council of Brabant. All three* responsa *deal with questions of loans and credit after a period of war and rebellion.* Responsum *55 concerns a forced loan that had been accorded by the chapter of Saint Gudula in Brussels to the Calvinist-led magistrate in February 1580. After 1585, the chapter of Saint Gudula asked repayment. Questions on the liability of the new magistrate for contracts of its rebellious predecessors are raised and solved by our Brabantian jurist.* Responsa *6 and 47 interpret restitution clauses in two peace treaties, namely the Pacification of Ghent (1576) and the Capitulation of Antwerp (1585). Especially the issue was raised whether the promised restitution also included claims against the fisc (*nomina*) that had been terminated through confusion (*confusio*). All three consultations offer a good example of learned legal practice. Kinschot skilfully applies the framework of the* ius commune *to the local situation, taking into account particular law.*

Keywords
Henricus Kinschotius, *Consilia*, Peace treaties, Finance, Low Countries

1. Introduction

In current-day Flanders, the 16th century is commonly known as the Golden Age of Antwerp, which would be followed by the Golden Age of Amsterdam in the 17th century. This is, of course, a reference to the central economic position of those cities in the respective time periods. However, in practice, the second half of the 16th century was all but a Golden Age. It was a time of continuous conflict and war. Religious unrest because of the Reformation, but also political conflicts between the Habsburg rulers on the one hand and the local nobility and city elites on the other hand were intertwined and tore the Low Countries apart.[2] As of the late 1570s, the Calvinists had managed to obtain power in Brussels, Ghent, Antwerp and Bruges, four major cities of the Southern Low Countries. By 1585, however, their *momentum* had passed. The Spanish army led by Alexander Farnese recaptured the cities after long sieges. Capitulation treaties were

[1] I would like to thank prof. dr. Wim Decock for his remarks, as well as prof. dr. Eddy Put for his invaluable reference to the archive of the capitular church of Saint-Michael and Saint-Gudula.

[2] For a (very) general overview, see: Darby, G., "Narrative of Events", *The Origins and Development of the Dutch Revolt* (G. Darby, ed.), London/New York, 2001, pp. 8-28; Blom, J.C.H., and Lamberts, E., *Geschiedenis van de Nederlanden*, Amsterdam, 1994, pp. 146-158. On the economic situation in Antwerp, see also the brief overview by: Van der Wee, H., and Materné, J., "De Antwerpse wereldmarkt tijdens de 16de en 17de eeuw", *Antwerpen, verhaal van een metropool. 16de-17de eeuw* (J. Van der Stock, ed.), Antwerpen, 1993, pp. 19-31.

entered into.[3] Waging war is a costly affair. Both sides had levied taxes and entered into all kinds of credit agreements. Therefore, after the war, questions of loans and credit had to be dealt with by the courts. This article will present three such cases.

In the early modern period, various sources of law co-existed. Learned literature of the *ius commune* (treatises, commentaries, glosses on both civil and canon law), royal and local ordinances, customary law and even moral theological opinions: they all built an enormous network of authorities on the basis of which solutions for practical cases could be found. A clear-cut hierarchy of norms was lacking.[4] A study of the *consilia* literature creates a better understanding of the relationship between those legal sources. *Consilia* (or *responsa*) were legal opinions in concrete cases, mostly written by university professors.[5] This kind of literature was widely known throughout the medieval and early modern universities. In the Low Countries as well, as of the foundation of the university of Leuven in 1425, law professors and other learned lawyers were invited to write consultations. Although the authors themselves did not always intend to publish their *responsa*, regularly their successors thought it wise to do so anyway.[6] Many volumes of *consilia* were indeed circulating around Europe. Consequently, this literature of learned legal practice became a source of law itself, frequently cited by later *consiliatores*. Thus, the three consultations discussed in this paper will refer to several other *consilia*, for instance by Petrus Philippus Corneus (1420-1492), Alexander de Imola (1424-1477) and Philippus Decius (1454-1535).

This article focuses on three consultations by Hendrik van Kinschot, all related to loans and credit after a period of rebellion and war. First, a short biography of the author and some information on his consultations will be provided. Secondly, *consilium* 55 on the repayment of a loan by the post-war magistrate and rectors of the city of Brussels will be considered. Afterwards, a question on the interpretation of Article 5 of the Antwerp capitulation treaty will be answered on the basis of Kinschot's 47th consultation. This consultation is largely similar to the 6th consultation on restitution after the Pacification of Ghent. Finally, some concluding remarks will be offered.

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[3] After those capitulations, approximately 200.000 'heretics' and 'rebels' left the Southern Low Countries and fled to England, Germany and the Seven United Provinces. See: Blom and Lamberts, *Geschiedenis van de Nederlanden*, pp. 157-158.

[4] For a good overview of the interplay of those sources in Netherlandish consultations concerning trade relationships, see: Wijffels, A., "Business Relations between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature", *From lex mercatoria to commercial law* [Comparative Studies in Continental and Anglo-American Legal History] (V. Piergiovanni, ed.), Berlin, 2005, pp. 255-290.

[5] For a case study on *consilia* in the early modern period, albeit within the German framework, see: Falk, U., *Consilia. Studien zur Praxis der Rechtsgutachten in der frühen Neuzeit*, Frankfurt am Main, 2006. This type of literature would even have dominated the legal culture of the *ius commune* until the eve of the natural law codifications: Wieacker, F., *Privatrechtsgeschichte der Neuzeit: unter besonderer Berücksichtigung der deutschen Entwicklung*, Göttingen, 1967, p. 85. A list of relevant volumes of *consilia* in the Low Countries can still be found in: Wagner, U., "Niederlande", *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, II, Gesetzgebung und Rechtsprechung (H. Coing, ed.), München, 1976, pp. 1399-1430.

[6] The discussion on the scientific value and the usefulness of the publication of consultations led to quite harsh debates. Well-known is the discussion between Andrea Alciato (1492-1550) and Tiberio Deciani (1509-1582). For an overview of this discussion, see: Rossi, G., "Teoria e prassi nel maturo diritto comune: la giurisprudenza consulente nel pensiero di Tiberio Deciani", *Tiberio Deciani (1509-1592) alle origini del pensiero giuridico moderno* (M. Cavina, ed.), Udine, 2004, pp. 281-313; Rowan, S., "Ist die Veröffentlichung von Konsilien Vertrauensbruch? Eine Diskussion innerhalb des Juristenstandes im ersten Jahrhundert des Druckwesens", *Festschrift für Wilhelm Brauneder zum 65. Geburtstag. Rechtsgeschichte mit internationaler Perspektive* (G. Kohl, C. Neschwara and T. Simon, eds.), Wien, 2008, pp. 559-567.

2. Hendrik van Kinschot (1541-1608) and his *Responsa*

Hendrik van Kinschot was born in Turnhout in 1541. His parents were Ambrosius van Kinschot, a ducal quaestor, and Anna Gevaerts. Hendrik studied law in Leuven and Paris. At the age of 25, he graduated.[7] He received practical training as a lawyer by his uncle Johannes Gevaerts, an *advocatus* at the Council of Brabant. Hendrik became *advocatus* at the Council of Brabant himself and exercised this function for more than 40 years. He died in September 1608 and has been buried in the church of Saint-Gudula in Brussels.

Hendrik had two children from his marriage to Margareta Duglassia, also called de Schott. Margareta was a daughter of Franciscus Duglassia, lord of Bautershem. Hendrik's son Franciscus (1577-1651) would become lord of Clercamp, Rivieren, Jette and Ganshoren. He was a treasurer of the King in the Low Countries and later became councilor of State, as well as chancellor of Brabant. Hendrik's daughter Anna was married to Hieronymus de Gaule, chancellor of Gelderland.[8] Several other family members had important functions within the legal system as well. Pieter Roose (1586-1673), the president of the Secret Council and of the Council of State from 1632 to 1654, was a son of Hendrik's sister Marie Kinschot.[9] Another secret councilor, Charles d'Hovyne (1596-1671), was married to Maria de Gaule, a granddaughter of Hendrik van Kinschot.[10]

During his career, Hendrik wrote several consultations on different topics of (mainly) civil law. After his death, those consultations were kept by his son, Franciscus van Kinschot. With Franciscus' permission, some of his consultations have been edited by Valerius Andreas (1588-1655).[11] In 1653, Johannes Mommartius made a second edition in Brussels. Mommartius added some *responsa* by Hendrik's son Franciscus, which had not been included in the *editio princeps*. According to the first editor Valerius Andreas, Hendrik's consultations have been written for diverse supreme tribunals and excel because of their reliability, practical insight and sincerity. Very often – Andreas declares in his preface – they have decisively influenced the outcome of the case.[12] Kinschot's consultations contain a lot of references to the *ius commune*

[7] He publicly defended some positions regarding D. 45.1.72, *Stipulationes non dividuntur*.

[8] This biography is based on: Andreas, V., *Bibliotheca Belgica: de Belgis vita scriptisque claris praemissa topographica Belgii totius seu Germaniae inferioris descriptione*, Leuven, 1643 (anastatic reprint: Nieuwkoop, B. De Graaf, 1973), f° 357-358.

[9] See for a short biography of Pieter Roose: Vermeir, R., "Pieter (Pierre) Roose", http://www.dutchrevolt.leiden.edu/dutch/personen/R/Pages/roose.aspx (last consultation: 15 April 2016).

[10] Taken from Valerius Andreas' preface, dedicated to Pieter Roose, *in fine*.

[11] Kinschotius, H., *Responsa sive consilia iuris. Item de rescriptis gratiae a supremo senatu Brabantiae nomine Ducis concedi solitis, tractatus VII*, Leuven, 1633. In a remark *Ad lectorem* Valerius Andreas states that Franciscus had given him the full freedom to choose the relevant consultations and to add summaries: *adeoque permisit, ut arbitratu meo ea disponerem, recenserem, Summariis atque Indicibus auctiora praelo ac luci darem.*

[12] Valerius Andreas' preface to the 1633 edition of the consultations of Henricus Kinschotius was dedicated to Pieter Roose (1586-1673), president of the Secret Council and counselor of state. The preface states: *Responsa, inquam, sive Consilia juris offero, quae varia ille apud diversa et suprema scripsit tribunalia: qua fide, dexteritate, ac synceritate apud plerosque recens hodieque memoria est, et ipse plerumque litis docuit eventus. Pervulgatum est, quam jugi ille meditatione caussarum ac negotiorum circumstantias, varietates, effectus, expenderet, praximque cum theoria conferendo solam legalem profiteretur aequitatem.* In the first edition of 1633, the preface was also directed to Ferdinandus de Boisschot, Guilielmus de Steenhuys, Gerardus Corselius, Henricus de Vicq, Maillardus de Vuldere, Petrus de Semerpont, Claudius de Humyn, Joannes de Gaverelles, Joannes Fannius en Hieronymus de Gaule.

literature, including both references to authors of the *mos italicus* and the *mos gallicus*.[13] They also include discussions on peace treaties, ordinances and local statutes.

Andrea Alciato (1492-1550) distinguished three kinds of legal argumentations used in *consilia*.[14] The first category – according to Alciato typical of the 14th century – was summarized under the key term *subtilitates*. In this system, the counsellor used creative analogical reasoning to create new law based on the fragments of the Roman-canonical tradition. The second category, common to Alciato's contemporaries, could be described as the method of *maior copia*. It consisted of the collection of as many authorities as possible in order to try to describe one's own position as the *communis opinio*. The last category was characterized by *brevitas*, as the counsellor searched for the *ratio legis* and the principles of law. Alciato attributed this method to the old Roman jurists, as well as to the first glossators and early commentators, but it would particularly flourish again in the *mos gallicus*, the so-called French manner of teaching law. In the light of this categorization, Kinschot's method should be ascribed to the *maior copia*-theory. He tried – to the extent possible – to gather as many authorities as possible in order to corroborate his arguments.

Apart from the consultations, Hendrik wrote seven treatises on petitions for pardon, which focused among others on the status of the *ius scriptum* within the duchy of Brabant, as well as on the function and authority of the Council of Brabant.[15]

3. Repayment of a loan by the city of Brussels after change of power

3.1 Introduction

Hendrik van Kinschot's 55th *responsum* concerns a case that was pending in the Council of Brabant. On 5 February 1580, in a time Calvinist rebels were leading the city, the chapter of Saint-Gudula had been forced to grant a loan to the city of Brussels.[16] After the reconquest of that city by Alexander Farnese in March 1585, the

[13] Only in the two first consultations of Kinschotius' volume, reference is already made to the following 33 authors: Cynus of Pistoia (1270-1336), Bartolus de Saxoferrato (1313-1357), Baldus de Ubaldis (1327-1400), Oldradus de Ponte (d. 1335), Johannes Calderinus (14th century), Antonius de Butrio (1338-1408), Raphael Cumanus (d. 1427), Paulus Castrensis (d. 1441), Johannes Antonius Masuerius (ca. 1370-1450), Abbas Panormitanus (1386-1445), Guido Papa (1402-1487), Ludovicus Romanus (1409-1439), Nellus de Sancto Geminiano (fl. 1420), Vitalis de Cambanis (fl. 1435-1454), Alexander de Imola (1424-1477), Petrus Philippus Corneus (d. 1492), Nicolaus Salicetus (d. 1493) Jason de Mayno (1435-1519), Philippus Decius (1454-1535), Nicolaus Everardus/Everaerts (1462-1532), Boërius (1469-1539), Aegidius Bossius (1487-1546), Petrus Rebuffus (1487-1557), Andreas Tiraquellus (1488-1558), Carolus Molinaeus (1500-1566), Marcus Antonius Natta (1500-1599), Aimone Cravetta (1504-1569), Jean Papon (1505-1590), Ferdinandus Vasquius (1512-1569), Diego Covarruvias y Leyva (1512-1577), Julius Clarus (1525-1575), Jean Bodin (1530-1596) and Jacobus Menochius (1532-1607).

[14] These categories are described in: Cavina, M., "Consilia: il modello di Andrea Alciato. Tipologie formali e argomentative fra mos italicus e mos gallicus", *Clio@Themis. Revue électronique d'histoire du droit* 8 (2015), nr. 7.

[15] Those seven treatises can be found in: Kinschotius, H., *De rescriptis gratiae a supremo Brabantiae senatu nomine Ducis concedi solitis tractatus VII*, Leuven, apud Ioannem Oliverium et Corn. Coenestenium, 1633: *I. An Brabantia sit patria Iuris scripti, et quo modo a Iurisdictione Imperiali per Bullam auream sit exempta. II. De praestantia et auctoritate Senatus Brabantiae. III. De Remissionibus homicidiorum, cum Explicatione Constitutionis Caroli V. an. MDXLI. IV. De solutionum induciis. V. De securitate corporis. VI. De legitimationibus. VII. De licentia testandi aut aliter disponendi de Feudis.*

[16] Henne, A., and Wauters, A., *Histoire de la ville de Bruxelles*, t. 1, Bruxelles, Libriarie encyclopédique de Périchon, 1845, p. 524 mentions similar forced loans by abbeys and convents in the same period: *Le 5 février [1580], le magistrat se conformant aux opinions émises par le large conseil et les nations, le 29 avril et le 4*

new Catholic magistrate refused to pay back that loan. On 11 February 1588, the chapter of Saint-Gudula therefore claimed repayment with the Council of Brabant against the mayor, aldermen and city council of Brussels. The chapter of Saint-Gudula asked Hendrik van Kinschot to write a consultation to support its claims.[17] Even though the printed edition did not mention any other signatories, the original hand-written version of Kinschot's *responsum* additionally contains the signatures of three other advocates at the Council of Brabant.[18] The consultation dates from 20 August 1589.[19]

The post-war rectors of the city of Brussels had argued that they were not bound by that loan agreement. They claimed that the Calvinists who illegitimately formed the magistrate at the time of the rebellion, had not used the money lent to the advantage of the city, but only for military purposes, and thus to further their rebellious cause. The post-war rectors could not – at least that is what they argued - be held responsible for the rebels' reprehensible behaviour.[20]

Kinschot knew that this was a particularly sensitive topic, which could possibly be harmful to public peace. Nevertheless, he stresses that the chapter of Saint-Gudula should not become the victim thereof and should be allowed to defend its right.[21] He

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juillet de l'année précédente, résolut d'emprunter 12.000 florins du Rhin sur les abbayes et les couvents. Les obligations de cet emprunt, conclu pour le terme de deux ans, furent signées le 5 avril suivant. Similar actions were taken in the following years. It is certain, for instance, that in order to finance the Calvinist preachers, the Brussels magistrate decided on 11 May 1582 to sell annuities on ecclesiastical goods. See: Marnef, G., "Het protestantisme te Brussel onder de 'calvinistische Republiek', ca. 1577-1585", *Etat et Religion aux XVe et XVIe siècles / Staat en Religie in de 15e en 16e eeuw* [Handelingen van het colloquium te Brussel van 9 tot 12 oktober 1984] (W.P. Blockmans and H. Van Nuffel, eds.), Brussels, 1986, pp. 236-237.

[17] The question was whether the Catholic city of Brussels was bound by the loan agreement entered into by the (Calvinist-led) magistrate in 1580 and therefore, whether it had to repay the loan to the chapter of Saint-Gudula. See: Kinschotius, H., *Responsa sive consilia juris*, Brussels, Johannes Mommartii, 1653, resp. 55, f°153, *pr.*: *An videlicet ii, qui mense Februario anno Domini MDLXXX publica Magistratus, aliorumque membrorum, fuere usi functione, mutui tunc temporis recepti atque extorti cautione Capitulo tradita, potuerint eamdem civitatem ad praefati mutui restitutionem adstringere.*

[18] The three other signatories were Mathijs Fabri, Mathijs Craesbeke and Franchois Van der Doncq. Fabri was registered as *advocatus* on 16 August 1585. Mathijs Craesbeke – whose son would also become an *advocatus* – and Van der Doncq both became *advocatus* at the Council of Brabant on 20 August 1585. See: Nauwelaers, J., *Histoire des avocats au souverain Conseil de Brabant*, t. II, Bruxelles, 1947, pp. 19-20.

[19] The original consultation, as well as another hand-written copy thereof, can be found in the Belgian State Archives in Brussels (Anderlecht), Old archive of the capitular church of Saint-Michael and Saint-Gudula (*Oud archief van de kapittelkerk van Sint-Michiel en Sint-Goedele*), nr. 1807. Unfortunately, the documents inside that folder have not been classified. The original consultation mentions on its closing page: *Motiuum iuris pro d. decano et capitulo ecclesie collegiate dive Gudule oppidi Bruxellensis, actoribus seu, impetrantibus, contra magistratum seu rectores eiusdem oppidi Bruxellensis reos et citatos.* The hand-written copy states on its closing page: *20. Aug. 1589 Copie. Motiuum iuris pro d. decano et capitulo Bruxellensi impetrantibus contra magistratum Bruxellense citatum.*

[20] BSA-Anderlecht, Old archive Saint-Gudula, nr. 1807 also contains a copy of the conclusions by the counterparty, with the following title: *Copie. Memorien voer de borgmeesteren scepenen ende Raidt deser stadt van Bruessele gedaighde tegen den deken ende andere vanden capitulen van Sinter Goedelen kercke binnen der selven stadt impetranten.* At nr. II, the Calvinist leaders were called 'usurpators': *Welcke regeringhe duerende deze troublen ende rebellie feytelyck is geusurpeert geweest tegen d'oudt hercommen ende gebruyck (…).* At nr. III, it is stated that the fortification of the city walls was meant to suppress the Catholic religion and to hold off the legitimate prince: *(…) dat die voirsz. fortificatie wordde gedaen tot verdruckinghen ende optirpatie vande catholycke religie ende tot uuytweeringhe vanden Prince vanden Landen (…).* At nr. XI, the defendants clearly state not to be bound: *Sulcx dat de tegenwordighe regeerders der voirsz. stadt oft het corpus derselver voer egheene schulden en zyn convenibel dewelcke zouden moghen ghecontracteert zyn ten tyde vanden ghepasseerde troublen alswanneer dairthenteyt wordden gheusurpeert byde ghene die hen voer hoofden vande selve troublen hadden opgheworpen (…).*

[21] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°153, *pr.*: *Cuius investigatio licet in pace publica, rebus omnibus pacatis, et reconciliatione a Principe obtenta, odiosa videri possit, ea tamen dicto*

develops three main arguments. First, the old magistrate itself had caused the rebellion. Second, a change of members of the magistrate and city council does not entail a change of the city as a whole. Third, the city has to fulfil its private law obligations. Then, our *consiliator* addresses two counterarguments: (i) the city did not profit from the loan agreement and (ii) a mandate to commit a delict cannot be presumed. Furthermore, Kinschot develops two subsidiary arguments: (i) the chapter of Saint-Gudula acted out of fear and (ii) the post-war city of Brussels continues to levy taxes created during the rebellion. Finally, he discusses some judicial precedents that had been invoked by the counterparty. In what follows, all those arguments will be developed.

3.2 Delict of the city at the origin of the rebellion

First of all, Kinschot pleads for a thorough investigation of the origin of the rebellion. It must be investigated whether those who had served in the magistrate on appointment of the Crown or in another legitimate fashion before 1580 and before the time of this loan agreement, had not laid the foundations for the rebellion themselves; and whether they in fact should not be called the original rebels (*originarii rebelles*).[22] He is convinced that the city of Brussels is indeed responsible for that rebellion.

By a decree published in 1576, the States of Brabant and the States-General had taken arms against the King and after the short armistice of the First Union of Brussels with Don Juan of Austria (9 January 1577) the war became even more ferocious.[23] The city of Brussels had – by means of its publicly appointed delegates – both in the States-General and in the States of Brabant always agreed upon all kinds of extraordinary taxes to support the war, and had paid all of them. The city had appointed new prefects of the guardians (*burgerwacht*) and taken many similar actions. Those measures had harmed the common good.[24] Although this is not mentioned in Kinschot's consultation, historical literature has further shown that the old (Catholic) magistrate already applied the measures against heretics very leniently as well.[25]

Capitulo imputanda non est, postquam necessaria juris sui defensione huc adigatur, ut pro praecipuo huius argumenti capite praemittere oporteat.

[22] *Ibid.*, nr. 1: *Spectandum igitur hic est, an ii, qui ex Principis alioque delectu legitimo, religione adhuc integra, ante annum 1580 mutuique indicti tempus, tamquam membra huius civitatis, publico munere functi sunt, vera subsecutae rebellionis non injecerint fundamenta, aut satius originarii rebelles dici possunt.*

[23] *Ibid.*, nr. 1: *Et certe ingenue, quisquis est, confiteatur oportet* (sic!)*, ab anno 1576, publicato* [original version: *publice*] *non modo Brabantiae, sed et Ordinum Generalium decreto, contra Regem arma adsumpta, et aliquantisper composito per D. Joann. Austriacum negotio, ea denuo majori, quam antea, ferocitate arrepta fuisse.* Probably, as far as this first decree is concerned, reference is made to the Pacification of Ghent of 8 November 1576. For an overview on that topic, see i.a.: X., *Opstand en Pacificatie in de Lage Landen. Bijdrage tot de studie van de Pacificatie van Gent* [Verslagboek van het Tweedaags Colloquium bij de vierhonderdste verjaring van de Pacificatie van Gent], Gent, 1976. The original consultation as well as a hand-written copy thereof (BSA-Anderlecht, Old archive St. Gudula, nr. 1807) refer to the year 1566 instead of 1576, which probably was a writing failure corrected by the editor.

[24] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°153, nr. 1: *In confesso enim apud omnes est, civitatem hanc per suos, ad hoc publice deputatos, tam in Ordinum Generalium, quam Brabantiae coetu confessum ab eo tempore habuisse continuum, omniaque civitatis membra frequentissime ad collectarum, belli sustinendi causa, indictionem convocata fuisse, iis consensisse, satisfecisse, Praefectos excubiarum constituisse, et innumera ejus generis acta, si dicere fas est, perpetrasse. Hinc plebis exorta est auctoritas, et tristis atque infelix Reipublicae status subsecutus est.* On the strengthening of the *burgerwacht*, see: Marnef, G., "Het protestantisme te Brussel onder de 'calvinistische Republiek', ca. 1577-1585", pp. 260-261.

[25] Guido Marnef refers, for example, to a complaint by the *drossaard* of Brabant in 1572 that the local government did not apply those rules: Marnef, G., "Het protestantisme te Brussel onder de 'calvinistische

If an *universitas* or a city after common consultation acts wrongfully, its act should be considered a delict by the city itself. The imputability of a delict *convocato consilio* to the *universitas* or city as such, was a common argument in the *ius commune*. Kinschot founded his claim on several learned authors, like Bartolus de Saxoferrato (1313-1357)[26], Petrus Philippus Corneus[27], Julius Clarus (1525-1575)[28] and Andreas Gaill (1526-1587)[29]. Whereas some discussion existed on whether imputability of a delict to a city required a formal convocation, a delict committed after common consultation was according to the *communis opinio* always imputed to the city. Incidentally, a similar reasoning was also applied to the Church: a preceding consultation was one of the exceptions to the canonical *regula iuris* that a delict of a prelate should not harm the Church.[30]

Republiek', ca. 1577-1585", pp. 236-237. On p. 243, Marnef adds that in 1578 the aldermen did not react to a complaint by some Catholic noblemen in order to uphold the Pacification of Ghent and to reject the "Religionsvrede" as it had been proposed by the Prince of Orange. On 18 September 1578, a 'religionsvrede' was agreed upon between the magistrate, the calvinists and archduke Matthias in Antwerp. The *Brede Raad* and the 9 Nations had not been consulted.

[26] Bartolus de Saxoferrato, *In secundam Digesti Novi partem commentarius*, Turino, 1577, ad D. 48.19.16.10, *§ Nonnumquam*, nr. 9, f° 200v: *veritas est ista, quod tunc videtur facere universitas, quando deliberato, proposito, et consilio hoc facit, alias non dicitur facere universitas, sed dicuntur facere singuli.*

[27] Corneus, P. Ph., *Consilia*, Venezia, 1582, vol. 4, cons. 224, f° 209r-212r, especially nr. 4. In this consultation, the Perugian jurist Corneus, also known as Pier Filippo della Corgna argued that even without common consultation, an action by all or the majority of the citizens, should be considered an act of the city: *quod etiam si non praecessit deliberatio, tenetur universitas eo ipso quod omnes de universitate, vel maior pars fecit: quia in dubio nomine universitatis fecisse intelliguntur.* For a biography of Corneus, see: Maturantius, F., "Vita Petri Philippi Cornei Perusini", *Virorum qui superiori nostroque seculo eruditione et doctrina illustres atque memorabiles fuerunt Vitae iamprimum in hoc Volumine collectae* (J. Fichard, ed.), Frankfurt am Main, Christian Egenolph, 1536, f°76v-79v.

[28] The reference in the printed edition of Kinschot's consultation is incomplete. The original version correctly refers to: Clarius, J., *Opera omnia quae quidem hactenus per auctorem in lucem edita sunt*, Frankfurt am Main, 1576, *Liber quintus receptarum sententiarum, quaestio* 16, nr. 8, f°132. Contrary to Corneus, Julius Clarus seems to have required a prior consultation: *Sed si omnes de collegio, vel universitate, non praevia consilii deliberatione committerent aliquod delictum, tunc non punitur ipsa universitas, sive collegium, sed illi, qui deliquerunt tamquam singuli.*

[29] Gaill, A., *De pace publica et eius violatoribus, atque proscriptis sive bannitis imperii*, Köln, Johannes Gymnicus, 1586, Liber 2, cap. 9, f°251-264. This chapter deals with the ban on a city (*communitas sive universitas*) as a whole. In nr. 4, Gaill states that this preceding convocation of the citizens is necessary: *Sed ut delictum a communitate, vel civitate commissum esse dicatur, necesse est, quod convocata universitate, vel convocatis civibus per sonitum campanae, tubae, vel alium modum consuetum, deliberate, consulto, et communicato consilio delictum perpetratum, paxque publica violata sit: non enim sufficit totam civium multitudinem, etiam explicato et levato vexillo vim publicam inferre, aut homicidium committere, nisi convocationis solennitas praecesserit, et unanimi consensu, atque in forma universitatis arma sumpserint, alias non ut universitas, sed ut singuli fecisse dicuntur.* He makes reference to D. 3.4.2, *Si municipes* (Ulpianus, 8 ad edictum); D. 3.4.3, *Nulli* (Ulpianus, 9 ad edictum) and D. 3.4.7, *Sicut municipum* (Ulpianus, 10 ad edictum), as well as to D. 43.24.15.2, *§ Si in sepulchro* (Ulpianus, 71 ad edictum) (especially to the words *communi consilio*). Also some comments of Bartolus and Abbas Panormitanus are referred to.

[30] The *regula iuris* concerned can be found in the last title of the *Liber Sextus* of Boniface VIII (1298) as *regula* 76: *Delictum personae non debet redundare in detrimentum Ecclesiae*. The liability of the *universitas* or *ecclesia* in case of a preceding consultation had already been mentioned earlier by the 12th-century decretists, like Rufinus *ad* C.16 q.6. See: Rufinus von Bologna (Magister Rufinus), *Summa Decretorum* (H. Singer, ed.), Aalen, Scientia Verlag, 1963, p. 366. An early commentary by Dinus de Mugello (1253 – ca. 1303) on *regula* 76 and the *Glossa ordinaria* by Giovanni d'Andrea (ca. 1270 – 1348) on the same rule of law also mention that exception. See: Dinus Mugellanus, *Tractatus super regulis iuris in Sexto*, Paris, Iehan Petit, 1508, *ad regulam* 76; X., *Sextus Liber Decretalium cum epitomis, divisionibus, et glossa ordinaria Domini Ioannis Andreae …*, Lyon, apud Hugonem a Porta, et Antonium Vincentium, 1559, *ad regulam* 76, p. 455. It became the common argument to explain the *lex Iubemus nullam* (C. 1.2.10), which seemingly contradicted this *regula iuris*. In C. 1.2.10, a ship of a church was confiscated due to tax evasion.

3.3 Continuity of a city

Let us now consider the second main argument, where our counsellors address the issue whether the defendant in this case is the same city as the one at the time of the rebellion and the conclusion of the loan agreement. The defendants had indeed pointed at the succession of members of the magistrate and other officials.[31] However, such a succession does not constitute a new college or *universitas*. An *universitas* remains one and the same, even though part of or even all of its members have changed.

This doctrine of the continuity of the *universitas* – even if no members were left – was already present in the ordinary gloss and in the commentaries of Bartolus and Baldus. Jacques de Révigny (d. 1296), Bartolus' teacher, had linked this theory to a *hereditas iacens*, an abandoned inheritance.[32] Kinschot does not refer to that theory. As corroboration of his statement, he refers instead to several other passages in the Digest. Famous is Ulpian's paragraph *In decurionibus*, according to which an *universitas* even retains its status, if there is only one member left.[33] In Alfenus' *lex Proponebatur* it is added that even if all judges in a procedure are changed in the course of the procedure, it still remains the same process; and even if after 100 years all citizens of a certain city have been replaced, the city still remains the same.[34] Kinschot further refers to a consultation by the aforementioned Corneus, who uses the same Roman law fragments.[35]

Even if all rebels had died, the theory of two different cities would not hold, as Kinschot deduces from a passage at the end of Nellus a Sancto Geminiano's treatise on bans.[36] In that passage, Nellus, a 15th-century lawyer from Florence, discusses whether a ban against a city can still be enforced after the death of all citizens that had lived at the time the ban was pronounced. It is true – Nellus stated with reference to Bartolus[37] –

[31] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°153, nr. 2: *Cuius si qua diversitatis ratio allegari possit, desumenda foret ex succedanea personarum, magistratu alioque publico munere fungentium, mutatione.* See nr. XI of the defendants' joinder in folder nr. 1807 (BSA-Anderlecht, Old archive Saint-Gudula).

[32] For the development of this theory, see: Mehr, R., *Societas und universitas. Römischrechtliche Institute im Unternehmensgesellschaftsrecht vor 1800* [Forschungen zur Neueren Privatrechtsgeschichte], Köln/Weimar/Wien, Böhlau, 2008, pp. 216-221. Jacques de Révigny referred to D. 46.1.22, *Mortuo* (Florentinus, 8 institutionum) and to D. 41.1.34, *Hereditas* (Ulpianus, 7 disputationum).

[33] D. 3.4.7.2, *§ In decurionibus* (Ulpianus, 10 ad edictum): *In decurionibus vel aliis universitatibus nihil refert, utrum omnes idem maneant an pars maneat vel omnes immutati sint. Sed si universitas ad unum redit, magis admittitur posse eum convenire et conveniri, cum ius omnium in unum recciderit et stet nomen universitatis.*

[34] D. 5.1.76, *Proponebatur* (Alfenus, 6 digestorum). Alfenus makes a comparison with the continuous change of our own human bodies: *Quod si quis putaret partibus commutatis aliam rem fieri, fore ut ex eius ratione nos ipsi non idem essemus qui abhinc anno fuissemus, propterea quod, ut philosophi dicerent, ex quibus particulis minimis constiteremus, hae cottidie ex nostro corpore cederent aliaeque extrinsecus in earum locum accederent. Quapropter cuius rei species eadem consisteret, rem quoque eandem esse existimari.*

[35] Corneus, P. Ph., *Consilia*, Venezia, 1582, vol. 3, cons. 22, num. 11, f°41r-43v. On the basis of the same passages in the Digest (D. 3.4.7.2 and D. 5.1.76), Corneus states (nr. 11): *ipsa autem communitas semper fuit una et eadem, licet homines ipsius quotidie renoventur.* This consultation concerned an annuity promised by a city (either Teramo or Terni: *civitas Interannensis*) to a diocese many years before the dispute on the payment thereof arose.

[36] Nellus a Sancto Geminiano, *Tractatus insignis de Bannitis*, Lyon, haeredes Iacobi Giuntae, 1550, *Tempus* 3, Pars 2, *quaestio* 16, f°173r-v.

[37] In this case, Kinschot just copies the authorities cited by Nellus. He refers to: Bartolus de Saxoferrato, *In secundam Digesti Novi partem commentaria*, Turino, 1577 *ad* D. 50.1.27.2, *§ Celsus* (not *§ Domicilium*, as is inaccurately stated by Kinschot), f° 233v. This passage discusses whether a *civitas* can lose its rights, when all

that when every member of an *universitas* has died, the *universitas* comes to an end. However, he argued with reference to fragments from the Roman jurists Ulpian[38] and Alfenus[39] that this theory is only valid, if those members have died before at least one of them had been replaced.[40] As mentioned earlier, according to the theory of the *hereditas iacens*, some learned lawyers – like Jacques de Révigny – thought that even if no members of an *universitas* were left, it could still revive.[41]

Whatever the solution in case no members were left, a city is always marked by a continuous succession of citizens. As some of the members of the Brussels magistrate had already been replaced before all the old members had died, the *universitas* of Brussels had clearly remained one and the same. Indeed, Kinschot's position is in accordance with historical research: the evolution towards a so-called Calvinist Republic of Brussels went slowly. On 24 June 1579, a new magistrate was elected, but that magistrate still mainly consisted of Catholics. At the same time, however, the moderate Calvinist Olivier van den Tympel (1540-1603) was nominated governor of Brussels and led the powerful War Council (*Oorlogsraad*).[42] Between 1580 and 1585, the Calvinist influence on the Brussels magistrate became even stronger.[43]

It does not make any difference either, if between the beginning of the rebellion and the reconciliation with the prince, an intermediate magistrate had been created illegitimately and without the consent of the Crown.[44] Although this magistrate might have lacked authority, its acts should still be imputed to the *universitas* that had given the occasion to start the rebellion. Those who have been appointed at the magistrate by the prince, do not suddenly constitute a new *universitas* once they start a rebellion. Otherwise, any rebellion of a city would be a *contradictio in terminis*. In that case, there

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citizens have left the city and have not all gone to the same place. Bartolus answers in the affirmative. Reference is also made to D. 3.4.7, *Sicut*, in which especially the aforementioned §2 (*In decurionibus*) is interesting. Bartolus, however, did state that an *universitas* could revive, once it received new members: Mehr, R., *Societas und universitas*, p. 218, especially footnote 1206 overthere.

[38] D. 7.1.68, *Vetus fuit quaestio* (Ulpianus, 17 ad Sabinum). This fragment questions whether offspring of a female slave or of cattle belonged to the *usufructuarius*. Especially D. 7.1.68.2, *§ Plane* is important for our case: *Plane si gregis vel armenti sit usus fructus legatus, debebit ex adgnatis gregem supplere, id est in locum capitum defunctorum*. According tot his paragraph, the offspring gradually replaces its ancestors.

[39] D. 5.1.76, *Proponebatur* (Alfenus, 6 digestorum). This fragment had been used before as well.

[40] Nellus a Sancto Geminiano, *Tractatus insignis de Bannitis*, f°173r: *Adverte, quia istud esset verum, si ante omnium mortem nullus alius fuisset in collegio substitutus. Tunc enim verum est, quod dissoluta est universitas per mortem omnium, et sic bannum extinctum. (…) Si autem, ut plerunque contingit, uno mortuo, alius subrogatur, et sic de singulis, licet omnes illi qui tempore banni vivebant, mortui sint, tamen eadem est universitas.*

[41] For the development of this theory, see: Mehr, R., *Societas und universitas*, pp. 216-221. Jacques de Révigny's references are to D. 46.1.22 and to D. 41.1.34.

[42] Henne, A., and Wauters, A., *Histoire de la ville de Bruxelles*, t. 1, 1845, p. 511 was very positive about Olivier Van den Tympel: *Cet officier, d'un caractère hardi et entreprenant, était tout dévoué au prince d'Orange: protestant, il favorisa de tout son pouvoir le nouveau culte, et plus d'une fois pourtant il prit les catholiques sous sa sauvegarde; soldat, il se montra d'une bravoure à toute épreuve; capitaine, il déploya, pendant toute la durée de son commandement, des talents qui, employés sur un plus vaste théâtre, l'eussent placé au rang de nos grands guerriers.*

[43] Marnef, G., "Het protestantisme te Brussel onder de 'calvinistische Republiek', ca. 1577-1585", p. 246. See for a list of magistrates: Henne, A., and Wauters, A., *Histoire de la ville de Bruxelles*, t. 2, 1845, pp. 539-540.

[44] Such an argument was made by the defendants in their aforementioned *Memorien voer den borgmeesteren…* (BSA-Anderlecht, Old archive Saint-Gudula, nr. 1807), nr. XXIX: *Maer is ter contrarien warachtich dat deselve (als nyet aenghestelt geweest zynde byden prince vanden lande die des alleen macht heeft) ende dat oyck den keuse van stadts wegen nyet en is gedaen geweest byden wettighe leden derselver stadt / gelyck dat naevolgende doudt ghebruyck by hercommen ende privilegien behoirde te geschieden (…).*

would indeed be no need for reconciliation with the prince either, as the city or its *corpus* would be seen separately from the rebels. Practice, for instance the capitulation treaty between the duke of Parma and the three members of Brussels of 10 March 1585, has shown that such a theory cannot be upheld.[45]

Additional elements make the imputability even more likely. First, in this case, both the Governor-General and the Commissioners of the Senate of Brabant would have recognized the magistrate. Moreover, even the people itself had attributed authority to the magistrate, as they continued to file petitions (*suffragia*). Kinschot, therefore, concludes that this intermediate magistrate had been recognized by all those who constituted the city.[46] He supported his claim with consultations by Philippus Decius[47], as well as by his own contemporary Jacobus Menochius (1532-1607)[48]. Both stated that the administrators of a city represent the city as such. Decius founded his argument on Bartolus' commentary as well as on the *glossa ordinaria*.[49] Even though that intermediate magistrate was not legitimate vis-à-vis the Crown, it enjoyed legitimacy from the point of view of the city or *universitas*.[50]

3.4 Private transactions in a city that is occupied by an enemy

In 1580 – Kinschot continues in his third main argument – the city of Brussels was occupied by enemies. In that case, legal procedures should not take into account the

[45] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°153, nr. 3: *Alioqui enim ipsa nunquam civitas aut universitas rebellionem committeret, etiam iis casibus, supra relatis, quibus manifesto jure decisum est, universitatem rebellionis noxam incurrisse, nec indulgentia aut reconciliatione Principis indiguisset, si civitas ipsa aut ejus corpus a rebellibus separationem admitteret.* At the signing of the capitulation treaty with the duke of Parma on 10 March 1585, the three members of the city of Brussels were respectively represented by (i) the mayors, aldermen, *receveurs* and council of the city of Brussels; (ii) the lords and citizens of the *Wijden Raedt* – sometimes also called *Brede Raad*; and (iii) the nine nations.

[46] *Ibid.*, f°154, nr. 5: *Et nihilominus semper Praefecti aut Gubernatoris generalis, Commissariorum quoque Senatus Brabantiae, pro tempore existentis, et quod magis est, populi ipsius cum assuetis suffragiis intervenit auctoritas; subsecuta denique publica fuit ejusdem Magistratus recognitio per omnes illos, qui ipsam constituunt civitatem.* As Governor-General, reference is probably made here to Archduke Matthias of Habsburg (who later became Holy Roman Emperor), but his governorship-general was never accepted by the Crown.

[47] Decius, Ph., *Consiliorum sive responsorum tomus II.*, Venezia, 1575, cons. 404, nr. 3, f°65v: *Camera Apostolica intelligitur pro officialibus, qui habent administrationem Camerae; sicut civitas intelligitur pro ancianis, et prioribus, quibus administratio civitatis committitur.* Decius repeats this comment in cons. 407, nr. 8, f°68r and adds: *et idem dicitur de concilio generali civitatis, in quo tota civitas representatur.* In cons. 528, nr. 1, f°187v, he repeats: *Quia concilium generale repraesentat totam civitatem.*

[48] The printed editions of Kinschot's consultations contained an inadequate reference to Menochius' *consilium* 124, but both hand-written versions correctly referred to Menochius, J., *Consiliorum sive responsorum liber secundus*, Frankfurt am Main, sumtibus Haeredum Andreae Wecheli et Ioan. Gymnici, 1594, *cons.* 134, f°101r., nr. 14: *Nam civitas intelligitur pro Ancianis et Prioribus, ac Decurionibus ipsius civitatis, ut inquit Bartolus (…) qui et illud subiungit, Consilium generale ipsius Civitatis repraesentare ipsam Civitatem.*

[49] Bartolus de Saxoferrato, *In secundam partem Digesti Veteris Commentaria*, Basel, 1588 ad D. 12.1.33, *Principalibus*, f° 60, nr. 3: *Quaero, An tales officiales possint accipere pecuniam mutuo pro civitate, vel dare? (…) Quidam dicunt indistincte quod sic (…) quod intellige in his, quibus committitur administratio reipublicae, ut in prioribus, antianis, et similibus. Alii vero officiales, quibus sola executio iurisdictionis committitur, hoc non possunt: ut Potestas, Capitaneus, et similes.* Here, Bartolus states that administrators of a city can receive money lent in name of the city. Reference is also made to: Accursius, *Glossa in Codicem*, Venezia, 1488 (anastatic reprint: Juris Italici Historiae Instituto Taurinensis Universitatis, ex officina Erasmiana, 1968), f°266v. ad C. 8.52.2, *Consuetudinis*. The gloss states that if the majority of the members of a *universitas* agrees upon an act, this act is considered to be done by the *universitas* itself. The gloss does not deal with the representative institutions of a city.

[50] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°154, nr. 5: *Quare licet non respectu Principis, tamen ipsius Civitatis aut universitatis intuitu legitimus debet dici Magistratus.*

law of the legitimate prince, whose interests were not at stake in this case anyway, but instead should apply the rules of civil and canon law concerning possessors or quasi-possessors.[51] This means that the citizens of Brussels were, as a matter of fact, no longer subject to the Crown, but came under the jurisdiction of the quasi-possessor of the city, namely the rebels-led magistrate.[52] Similarly, someone who does not have a right of patronage, but is a quasi-possessor of such a right, has in fact a stronger position than the owner to propose a candidate for an ecclesiastical office.[53]

This reasoning is further supported by the terms of the capitulation of the city of Brussels on 10 March 1585.[54] Art. 4[55] of that treaty stipulates that sentences, decrees, provisional measures and acts by *i.a.* the Council of Brabant, the feudal court and the Brussels magistrate during the rebellion were valid, as long as the parties in the case had been present and had not opposed the jurisdiction of those courts and provided that their right of appeal or revision was not prejudiced.[56] This is particularly important: such sentences and decrees directly concern the jurisdiction which normally pertains completely to the prince and which cannot be exercised without the prince's authority. If even those sentences have been declared valid in the terms of the capitulation, *a*

[51] *Ibid.*, f°154, nr. 6-7: *Hinc fit, quod, civitate a tyranno vel hostibus occupata, in jurisdictionis exercitio, praesertim inter praesentes, non consideretur jus legitimi Principis (cujus etiam hoc casu nihil interest) sed quod lex et canon hujusmodi exercitia possessoribus concessere (…), quemadmodum is, qui non habet jus, est tamen in quasi possessione juris patronatus, justo in jure praesentandi praevalet proprietario.*

[52] Reference is made to Bossius, A., *Tractatus varii qui omnem fere criminalem materiam excellenti doctrina complectuntur* …, Lyon, apud haeredes Iacobi Iunctae, 1566, tit. *De crimine laesae majestatis*, f°232-257, in particular f°247, nr. 82: (…) *desierant esse subditi, quia quo ad exercendam iurisdictionem de proprietate iurisdictionis non est disputandum.*

[53] Reference is again made to Bossius, A., *Tractatus varii* …, tit. *De crimine laesae majestatis*, f°247, nr. 83: *(…) si patronus habet ius et alius non, sed habet quasi possessionem iuris patronatus, quod officium praesentandi spectat possessori et non proprietario.* This example is taken from Nicolaus de Tedeschis or Abbas Panormitanus (1386-1445), *Commentaria in tertium Decretalium librum*, tomus VI, Venezia, 1617, *ad* X. 3.38.19, *Consultationibus*, f°184v-185r, especially nr. 2: *Ad validitatem praesentationis sufficit quod praesentans sit in possessione iuris praesentandi*.

[54] The capitulation treaty of Brussels (10 March 1585) has been published in: Anselmo, A., *Placcaeten, Ordonnantien, Landt-charters, Blyde Incomsten, Privilegien, ende Instructien by de Princen van dese Nederlanden, aen de Inghesetenen van Brabandt, Vlaenderen ende andere Provincien, 't sedert t' Iaer M.CC.XX.* …, Antwerp, Hendrick Aertssens, Cammerstraet inde witte Lelie, 1648, part 1, book 5, title 1, chapter 18, f°610-164: *Articles et Conditions du traicté arresté et conclu entre Monseigneur le Prince de Parme, Plaisance etc. Lieutenant, Gouverneur et Capitaine General des Pays de pardeça, au nom du Roy d' Espaigne, comme Duc de Brabant, d'une part, et la Ville de Bruxelles d'autre, le X. de Mars 1585.* I thank Bram De Ridder (FWO/KU Leuven) for this reference.

[55] Art. 4 Capitulation of Brussels: *Que pour éviter confusion, toutes procédures encommencées, et sentences rendues, par ceux qui ont tenu le Conseil en Brabant, par la Cour féodale, par le Magistrat, la Chambre d'Uccle, et autres cours subalternes, entre ceux qui ont ésté présens, et advoué leur juridiction, seront vaillables, avec les exécutions y ensuyvies, et tous autres decretz, octroiz, provisions, et actes, dependans de leur auctorité, et iurisdiction, ordinaire et accoustumée. Bien entendu que les condempnez pourront, si bon leur semble, se pourveoir par voye de révision d'appel, réformation, ou autre ordinaire, ausquels sans difficulté, seront accordées les clauses de relief, comme aussi se fera le mesme à ceux de ladicte Ville, contre les sentences rendues pardeça. Et quant à celles que l'on a rendu par deffault ou contumace, d'une part ou d'autre, contre les absens, les condempnez seront oyz, et réintégrez en leurs actions, et exceptions, du moins soubs bénéfice de relief.*

[56] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°154, nr. 7. If such a provision was not introduced in the treaty, judgments by rebel-led authorities were not valid, see: Petrus Gudelinus (1550-1619), *De iure pacis commentarius*, Köln, Johannes Busaeus, 1663, caput 8, nr. 6, f°23: *ut gesta a talibus confirmentur, expresso pacto opus est.* See also: Lesaffer, R., "An Early Treatise on Peace Treaties: Petrus Gudelinus Between Roman Law and Modern Practice", *Journal of Legal History* 23/3 (2002), p. 238.

fortiori the city of Brussels should also respect its own private contracts that do not harm any right of the superior.[57]

3.5 Response to two counterarguments

After his three main arguments, Kinschot responds to two counterarguments. First, the defendants stated that the city was only bound by that loan if the money had been used to its advantage, with reference to Ulpian's *lex Civitas*.[58] However, Kinschot refutes this argument, in case the very city or its council had received the money lent, and not an individual person claiming to be the city's representative. Indeed, a city council represents the city as a whole. In that case, Bartolus correctly stated that it did not matter whether the money was used to the benefit of the city.[59]As Jason de Mayno adds: a city can commit a delict and can also bind itself by concluding contracts.[60] Ulpian's statement in the *lex Civitas* is only relevant, if the administrator who has concluded the loan agreement, did not have any or any sufficient mandate. In the case at hand, however, the receipt and the promise of restitution of the money lent, as well as its guarantee (*cautio*), were not given only by one administrator, but by the three members of the city who represented the city as a whole. Therefore, the chapter of Saint-Gudula did not have to prove that the money was really used to the advantage of the city of Brussels. Consequently, it is useless for the defendants to invoke that the money lent was only used for the fortification of the city and for other rebellious acts. The city had the complete disposal of that money; the chapter of Saint-Gudula did not have any say in the use of that sum. Moreover, if the chapter would have dared to contradict the rebellious leaders, it would have been in great danger, as the rebels were in power at that time.[61]

A second counterargument invoked by the defendants was that a mandate for the commission of a delict could not be presumed. In support of their claim they referred to

[57] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°154, nr. 8.

[58] D. 12.1.27, *Civitas* (Ulpianus, 10 ad edictum): *Civitas mutui datione obligari potest, si ad utilitatem eius pecuniae versae sunt: alioquin ipsi soli qui contraxerunt, non civitas tenebuntur.* The defendants indeed referred to this *lex Civitas* in their first subsidiary argument, in case the Council would consider the Catholic magistrate as a successor of the Calvinist one: *Ende genomen de redenen hier voeren verhaelt waren cesserende (…) zoe en zoude het corpus vander stadt evenwel voir de leeninghe in questien nyet connen geseeght oft verstaen wordden verbonden oft verobligeert te zyn / nisi pecunie essent converse in rem et utilitatem civitatis / ut est textus in l. Civitas (…).* See for this quote: *Copie. Memorien voer de borgmeesteren* … in BSA-Anderlecht, Old archive Saint-Gudula, nr. 1807.

[59] Bartolus de Saxoferrato, *In secundam partem Digesti Veteris Commentaria*, Basel, 1588 ad D. 12.1.27, *Civitas*, f°53-54, nr. 8: *nisi ipsa universitas fuerit praesens ad mutuum recipiendum: quia tunc cessat ratio huius legis.* In principle, proof of usage in the advantage of the city is necessary, unless the *universitas* was present at the occasion of the loan agreement. As foundation of his claim, Bartolus refers to D. 4.2.9.1, *§ Animadvertendum*. He continues in nrs. 12-14. If the loan has been given to the administrator of the city in the presence of the college, no further proof is necessary. If the loan had been agreed upon with the administrator in the absence of the college, it must at least be proven that the city was in need of a loan. If the money lent had instead been given to someone who could not legitimately represent the city, usage to the advantage of the city had to be proven explicitly.

[60] Jason de Mayno, *Commentaria in secundam partem Digesti Veteris*, Venezia, 1499, ad D. 12.1.27, *Civitas*, num. 4, versic. *Secundo principaliter*: *si ipsa civitas seu consilium quod totam civitatem repraesentat contrahat mutuum quod non habet locum ista lex. Tunc enim civitas indistincte obligaretur ex mutuo et istud probat duplici fundamento. Primo quod si civitas obligatur delinquendo ergo et contrahendo, etc.*

[61] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°154, nr. 10: *Quinimo si quicquam contradixissent, in magno se omnium rebellium discrimine constituissent, quorum tunc in muniis publicis potiores partes erant.*

a fragment by the Roman jurist Paulus on the possibility to reclaim money that had been unduly paid by a mandatary.[62] As a subtle reprimand to the lawyers of the city, Kinschot stated that the defendants had probably better constructed their argument on the basis of the decretal *Cum ad sedem* of Pope Innocent III[63], as well as other fragments by Bartolus[64] and Baldus[65]. Anyway – Kinschot immediately added – our case does not concern an act by mandate at all, but a proper act of the city, as is clear from the receipt and the promise to repay the money lent by the three members. Therefore, a discussion on a possible mandate was pointless.

3.6 First subsidiary argument: forced character of the loan agreement

In principle, the aforementioned arguments should suffice. Nevertheless, subordinately, Kinschot also argued that the chapter of Saint-Gudula had entered into the loan agreement out of fear.[66] Presumably – but Kinschot does not give any details – fear might have been relevant in case the judges were inclined to requalify the loan agreement as a donation. In such a case, fear might have been a ground for nullity of that donation.[67]

Moreover, our *consiliator* was convinced that no donation had taken place. No one was presumed to act out of generosity in times of necessity.[68] In 1580, the financial situation of the chapter of Saint-Gudula was very bad. The continuous war of the last four years had destroyed many of their goods. In fact, Hendrik van Kinschot wrote, they

[62] D. 12.6.6, *Si procurator* (Paulus, 3 ad Sabinum). The defendants indeed argued at nr. VII of the aforementioned *Copie. Memorien voor de borgmeesteren* (BSA-Anderlecht, Old archive Saint-Gudula, nr. 1807) that the chapter should instead reclaim its money from the previous members of the magistrate as private persons: *Ende daeromme zoe de magistraten oft luiden regeerders vander steden hen daerinne vergheten oft hunne commissien ende eedt zyn te buyten gaende, soe zyn zy nae recht schuldich ende gehouden tselve in hunnen privaten name te verantwoirden ende daervoir schuldich inne te staen / ende nyet het corpus vander stadt daer eenich sulck exces zoude mogen gebeurt zyn Bart. ad (…) l. Si procurator (…).*

[63] X. 2.13.15, *Cum ad sedem*. In this decretal, it is stated that an *interdictum unde vi* should not be used against someone whose mandatary acted wrongfully, if this wrongful act was not part of the mandate and has not been ratified afterwards.

[64] Bartolus de Saxoferrato, *In primam partem Digesti Novi Commentaria*, Basel, 1588 ad [D. 39.4.1.5, *§ Familiae*], f°142: *(…) Quaeritur, An scholaris ex delicto famuli sui, et dominus pro delicto familiaris teneatur? Dyn. dicit, quod non regulariter (…) Sed veritas est ista, quod quando quis praeponit familiam ad officium, et ipsa deliquit circa officium sibi commissum, tunc tenetur. (…) Sed si deliquit extra id, ad quod praeponitur, non tenetur. (…) Et eodem modo dico teneri rectores terrarum de delicto familiae, quam secum ducunt. (…)* Thus, Bartolus states that if a delict is committed outside of the mandate, the principal is not bound.

[65] Baldus de Ubaldis, *Consiliorum, sive responsorum volumen primum*, Venezia, 1575, cons. 98, nr. 7/8, f°30v-31r: *Mandatum ad delictum non praesumitur, nisi probetur*. Kinschot (or the editor of his consilia) wrongly refers to cons. 98 vol. 7.

[66] For the relevant passage, see: Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°154, nr. 11: *Et propterea inquirendum non est, an metu extorta sit obligatio, sive non; cujus tamen non deficeret probatio, si eam in decisione causae requiri contingat.* Our *consiliator* does not mention why fear would have been relevant.

[67] Kinschot does not clarify whether he considered fear a relative or an absolute ground of nullity. Such was a very debated issue in the juridical and theological debates of his time. See: Decock, W., *Theologians and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500-1650)* [Legal History Library 9 – Studies in the History of Private Law 4], Leiden, 2013, pp. 216-274.

[68] D. 34.4.18, *Rem legatam* (Modestinus, 8 differentiarum), which contains the phrase "*cum nemo in necessitatibus liberalis exsistat*"; Accursius, *Glossa in Digestum Vetus*, Venezia, 1488 (anastatic reprint: Juris Italici Historiae Instituto Taurinensis Universitatis, Mario Viora, ex officina Erasmiana, 1969), f°338r ad D. 23.3.66, *Si usufructus*: *nam in necessitatibus nemo liberalis exsistat.*

should have received credit themselves instead of providing credit.[69] By giving a loan in those difficult circumstances, the canons of the chapter of Saint-Gudula had chosen the minor evil.[70] With difficulty they succeeded in collecting the money for the loan that was asked for by the rebels. Thus, they protected their ornaments, church bells and other ecclesiastical goods that were under constant threat of plundering.[71]

Although the post-war leaders of Brussels could not be held personally responsible for that behaviour, the city as a whole was liable for what had been done *qualitate qua* by its previous representatives. Hendrik Kinschot stresses again that the *universitas* or city of Brussels has not changed. The pre-rebellion magistrate had given the occasion for the rebellion, which means that an express approbation of the loan agreement after the capitulation was not necessary. To support this claim, Kinschot referred to several authors. According to the German jurist Andreas Gaill, there was no need for a declaratory sentence in cases of *ipso iure* punishments.[72] Hieronymus Gigans, also known as Girolamo Giganti (fl. 1464-1473), added that a rebellious act could be tacitly ratified by the behaviour of the citizens[73], as it could also be found in the *Decisiones* of Piemont by Octavianus Cacheranus (d. 1589)[74]. Though Kinschot also referred to Bartolus, this reference is less univocal, as the latter seemed to require an approbation without specifying that this approbation could be implicit.[75] Therefore, Kinschot and his co-signatories argued that the post-war magistrate was obliged to repay the money lent.

3.7 Second subsidiary argument: continuation of taxes by the Catholic city

A second subsidiary argument is based on Article 6 of the capitulation treaty of Brussels.[76] This article allowed the magistrate to continue the levy of taxes that had

[69] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°154, nr. 12: *Quamvis sola Capituli necessitas (…) tunc a quadriennio, propter continuos belli motus, bonorumque omnium devastationem potius subveniri, quam pecuniam aliis mutuo erogare postulabat.*

[70] D. 44.4.9, *Si procurator rei* (Paulus, 32 ad edictum), according to which *turpiter accepta pecunia iustius penes eum est qui deceptus sit quam qui decepit*; Accursius, *Glossa in Digestum Novum*, Venezia, 1488 (anastatic reprint: Juris Italici Historiae Instituto Taurinensis Universitatis, Mario Viora, ex officina Erasmiana, 1969), f°136v ad D. 44.4.9, *Si procurator rei*, v° iustius: *de duobus malis minus malum est eligendum.*

Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°155, nr. 13: *Ita praefati Domini Capitulares, ad conservanda ornamenta, campanas, et caetera Ecclesiae bona, quae rapinae quotidianae periculo, propter odium Ecclesiasticorum, tunc subjecta erant, tandem hanc undique collectam summo labore pecuniam civitati mutuo dare coacti sunt.*

[72] Gaill, *De pace, liber* 2, *caput* 3, f°201-210.

[73] Gigans, *Tractatus de crimine laesae maiestatis*, Lyon, Sebastianus Bartolomaeus Honoratus, 1557, tit. *De rebell., quaestio* 12, num. 4, f°397: *Quinimo licet delictum fieret non convocato consilio, si tamen causam successivam habeat, ut et in rebellione, et guerra, ac similibus propter tolerantiam universitatis, ac communitatis delictum, quasi tacite ratificatur.* Gigans referred in his turn to Joannes Andreae, Petrus de Ancharano, Felynus Sandaeus and Albertus Brunus, but stressed that if the city has to pay a fine, the goods of the innocent citizens are not to be confiscated.

[74] Cacheranus, O., *Decisiones Sacri Senatus Pedemontani*, Lyon, 1579, *decisio* 138, num. 9/10, f°345: *Inducta et probata rebellio in dictum Comitem, quae, cum habeat causam successivam obligat universitatem, nec requiritur congregatio consilii.*

[75] Bartolus de Saxoferrato, *In secundam Digesti Novi partem commentarius*, Turino, 1577, ad D. 48.19.16.10, *§ Nonnumquam*, nr. 9, f° 200v: *non dicatur delinquere universitas, si deliberatio non precesserit (…). Puto tamen quod posset sequi ratihabitio: quod sufficeret ad puniendum universitatem.* Earlier in the same commentary, the continuity of an *universitas* is stressed.

[76] Art. 6 Capitulation of Brussels: *Et ores que l'on désireroit, que toutes Impositions, Gabelles, et exactions levées durant ces troubles, peussent estre ostées et abolies, pour soulager le pauvre peuple, et luy donner moyen de respirer: Toutefois l'on consente, que pour payement des rentes, et autres leurs charges, et*

been introduced at the time of the rebellion to cover the war expenses. This continuation of the levy of taxes should be used to pay off the debts of the city (*pour payement des rentes, et autres leurs charges, et debtes*). Of course, the city of Brussels was not allowed any longer to pay to enemies or rebels that remained in war against the Crown.[77] According to Kinschot, those who enjoy the fruits of the rebellion, should also bear the burden and fulfill the obligations under the contracts that had been concluded during that period.[78] The defendants, however, stated that Art. 6 of the capitulation agreement only concerned debts that had been concluded by the city in a legitimate fashion.[79]

Kinschot refuted this reasoning based on several arguments. First, to support their claim of illegitimacy of the loan agreement, the defendants had only referred to the fact that it had been concluded at the time of the rebellion and that the money had been used to further the rebellious cause. Yet, rebels are allowed to enter into agreements and the chapter cannot be blamed for the use of the money, as it had no say in that matter.[80] Secondly, even though it was clear from the outset that the money would be used for the military reinforcement of the city, if the chapter would have contradicted, it would have put itself in great danger.[81] Therefore, no action should be given against the lender for the abuse by the borrower of the money lent.[82] Thirdly, the reinforcement of the city in itself should not be considered as a bad *causa* as such. It is not up to the plaintiffs to

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debtes, ils pourront continuer les moyens généraux, particuliers, et autres, ayans présentement cours, sans pour ce devoir lever nouvel octroy, pourveu toutesfois que les payemens ne se facent à ceux qui seront ennemis ou continueront la guerre contre sa Majesté, et les villes, et Provinces de son obéissance: Le tout sans préjudice des privilégiez, et iusques à ce, que autrement par sa Majesté y soit ordonné.

[77] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°155, nr. 14: *Idque eo minus, quod in conditionibus deditionis huius oppidi art. 6 eidem Magistratui publicarum impositionum et collectarum, quae tempore rebellionis ad sustinenda belli onera et progressum sunt indicta, permissa sit continuatio, quo debita contracta exsolvere possint; ita tamen, ut nulla fiat solutio hostibus aut rebellibus, in bello contra Regiam Majestatem permanentibus.*

[78] Reference is made to the *regula iuris* from the final title of the Digest: D. 50.17.10, *Secundum naturam* (Paulus 3 ad Sabinum): *Secundum naturam est commoda cuiusque rei eum sequi, quem sequentur incommoda*. See also Durand, G., *Speculum iudiciale*, Basel, 1574 (anastatic reprint: Scientia Verlag, Aalen, 1975), *pars* 4, Tit. *De feudis*, § *quomodo, quaestio* 9, nr. 22 *in fine*, f° 319: *quia res cum onere suo transit (…) et quia ad quem pertinent commoda, ad eum etc.*, with reference to the aforementioned *regula iuris*. In this passage Durand discussed whether sons of a bondsman (*homo*) were obliged to fulfill the *opera* their father owed to the feudal lord. Durand answers affirmatively. Interestingly, Kinschot did not refer to the similar canon rule of law, based on *regula* 55 of the final title *De regulis iuris* of the *Liber Sextus* by Boniface VIII (1298): *Qui sentit onus, sentire debet commodum et econtra*.

[79] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°155, nr. 14: *Pro cujus evasione nihil aliud objicitur, quam dictum deditionis sextum articulum non aliter, quam de legitimis debitis, a civitate persolvendis, intelligi.*

[80] *Ibid.*: *Nam primo, illegitimi debiti non alia per citatos ratio allegatur, quam quod tempore et in actum rebellionis mutuum datum et conversum fuerit, quod minime ejusdem potest impedire exactionem: quia praeter id, quod rebellibus contrahere interdictum non sit, et quod civitas ipsa contrahendo liberam ejus rei habuerit dispositionem, ut supra demonstratum est, in potestate Capituli non fuit, mutuum citra majus malum detrectare, aut in aliam causam conversionem ejusdem procurare*.

[81] *Ibid.*: *Deinde quamvis muniendae civitatis praetextu, qui tunc gratus et favorabilis videbatur, syngrapha ex beneplacito civitatis concepta sit, ignoratur tamen, an haec vera extorti mutui causa fuerit; cui etiam majori cum discrimine actoribus contradicere nefas fuisset.*

[82] According to Kinschot, the *lex Si quis cum sciret* from Julian is not applicable to the case at hand. See: D. 41.4.8, *Si quis cum sciret* (Iulianus, 2 ex Minicio). In the final part of this fragment, it is stated that the purchase of a slave from someone of whom it was known that he most certainly would use the money for luxurious reasons, is null and void. Maybe, Kinschot wanted to anticipate a possible counterargument by the respondents, but the aforementioned *Copie. Memorien voer den borgmeesteren* … (in BSA-Anderlecht, Old archive Saint-Gudula, nr. 1807) does not confirm its use by the defendants.

investigate what the borrower will use the money for.[83] Fourthly, if the reinforcement of the city at that time seemed to have been of malicious intent, Kinschot stressed that this argument did not count anymore after the capitulation treaty, which allowed for the continuation of the taxes which had been levied during the rebellion. This treaty only made an exception for debts to rebels and enemies.[84] All other debts had to be paid, even if they had been contracted at the time of the rebellion. That was precisely the reason for the continued levy of the taxes.[85] For the payment of older debts, the old taxes and annuities would have sufficed. Finally, the defendants argued that the capitulation treaty allows the city to only pay off the debts it wanted to pay off. Thus, the city was willing to pay back the money that had been extorted from the citizens of Brussels shortly before the capitulation. In the defendants' view, those loans had been given in order to speed up the negotiations for a capitulation of the city.[86] Kinschot considered this argument to be untrue. The magistrate and all public officers and important military men of Brussels at the time of the latter extortion, had always tried to postpone the capitulation.[87] Kinschot was convinced of another reason for this willingness to repay the latter debts: favouritism. Most of the functionaries of the magistrate after the capitulation, as well as some of their friends, had suffered from those extortions themselves and wanted to get compensation for their own losses.[88]

Therefore, the chapter of Saint-Gudula should be repaid the debt. It cannot be blamed for taking part in the rebellion at all, because the canons did not form part of the government (*corpus*) of the city of Brussels.[89] In fact, a cleric who commits a delict against his natural prince, cannot be punished for lèse-majesté anyway.[90] However, this latter argument should not be developed any further, as it is crystal-clear that the rebellion was directed both against the prince and against the clergy.

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[83] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°155, nr. 15: *Praeterea munitio civitatis per se pro mala non potest reputari causa; sed qua ratione civitas eam procurarit, actoribus investigandum non fuit.*

[84] *Ibid.*: *Denique reconciliatione obtenta, si quid in munitione mali animi fuit, id penitus abolitum et extinctum fuit: adeo quidem, ut ad persolutionem onerum, ex rebellione originem habentium, praefata collectarum et impositionum sit admissa continuatio, nullis etiam debitis exceptis, praeter ea, quae rebellibus aut hostibus debentur.*

[85] *Ibid.*, nr. 16: *Alioqui nulla hujus continuationis ratio fuisset, cum praecipuum civitatis aes alienum suam ex rebellione originem habeat, cujus loco et onera tunc indicta tolerantur.*

[86] Kinschot and his co-signatories refer to nr. XXXI of the *Copie. Memorien voor den borgmeesteren …* (GSA-Anderlecht, Old archive Saint-Gudula, nr. 1807), which states that those payments were meant to dispel the heretic soldiers out of the city and to reinstate obedience to the King: *(…) want segghen daertegens de voirsz. gedaighde (…) dat tselve huevelgeldt wordde opgebracht onlancx voerden date vander reductie deser stadt / om de heretycken soldaten ende andere uuyter stadt te cryghene / ende deselve stadt te moghen brengen onder de ghehoirsaemheyt ende ghebiedt van zynen Maiesteit.*

[87] *Ibid.*: *Quod quam sit a veritate alienum, cuilibet notum est, quia Magistratus et alii, tunc publica auctoritate pollentes, et praesidiarii milites, qui hujus extorsionis auctores erant, nihil magis, quam urbis deditionem, protrahere conabantur.*

[88] *Ibid.*: *Alia igitur hujus solutae pecuniae est ratio, videlicet, quod plerique ex Magistratu, post deditionem urbis, eodem extorsionis passivae morbo laborarint, unde communiter sibi aut amicis solutionem extortae pecuniae procurarunt.*

[89] Kinschot founds this claim on Baldus de Ubaldis, *In primam Digesti Veteris partem Commentaria*, Venezia, 1577, ad [D. 1.3.32, *De quibus*], f°21v-25v; Baldus de Ubaldis, *In Primum, Secundum et Tertium Cod. Lib. Commentaria*, Venezia, 1599 ad [C. 1.3, *De episcopis et clericis*, authentica *Statuimus*], f°49v. The last fragment is about the *privilegia* of the clergy. The exact relevance is not very clear.

[90] First, Kinschot refers to Bossius, A., *Tractatus varii …*, tit. *De crimine laesae majestatis*, f°232-257, especially f°247, nr. 86: *Clericus non committit hoc crimen contra dominum suum laicum, quia non est ei subditus*. He also refers to: Julius CLARUS, *Opera omnia*, *Sententiarum liber* 5, *§ Laesae majestatis*, num. 7, f°67: *revera post clericatum non possint vere dici subditi ipsius Principis, non possunt dici contra eum committere crimen laesae maiestatis.*

3.8 Discussion of precedents

As it is still the case today, also in the 16th century, it was common to invoke precedents. Thus, the city of Brussels had referred to two recent sentences, rendered by the Council of Brabant. In the final part of the consultation, our counsellors deal with those recent cases.

The first sentence invoked by the defendants had been rendered on 9 September 1586 against the heirs of Willem De Smet and to the advantage of the city of Brussels. De Smet had been the financial administrator (*rentmeester*) in charge of the fortification of Brussels under Calvinist rule. On 3 August 1583, he had given account of his administration to the magistrate of Brussels. As his expenses had exceeded his income, the Calvinist magistrate had promised to repay the difference. Moreover, in April 1578, in a successful attempt to attract a loan from the church wardens of Molenbeek to finance the fortification of the city, De Smet and his colleague Jheronimus Vanden Eynde[91] had also signed a personal bond of 600 guilders to those wardens.[92] De Smet's heirs had claimed repayment by the city or at least conversion of their personal debt vis-à-vis the church wardens of Molenbeek into a debt of the new administrators of the city so that Hendrik's heirs themselves would no longer be liable. The church wardens of Molenbeek opposed such a conversion, whereupon the new Calvinist administrators decided to confiscate the personal bond, to destroy it and to give it back to De Smet's heirs. Nevertheless, after the Catholic reconquest in 1585, the church wardens of Molenbeek filed a claim against De Smet's heirs on the basis of an authentic copy of the destroyed bond; the heirs asked the city administrators to intervene. The Council of Brabant rejected the latter request. The Catholic magistrate of Brussels was under no obligation to pay the debt which its Calvinist predecessors had promised to De Smet. The magistrate of Brussels uses this sentence against the chapter of Saint-Gudula.[93]

Kinschot and his co-signatories, however, clearly distinguish both cases. First, Kinschot stresses that Willem De Smet was one of the most prominent rectors of the city during the rebellion and that he had taken the decision of fortification.[94] That decision had been prompted by malicious intent. Such an intent could – by way of an

[91] Jérôme or Jheronimus Van den Eynde was a deputy of the States-General, see: X., *Seconde partie du catalogue des livres et manuscrits rares et précieux, de la bibliothèque de feu M.r. Pierre-Philippe-Constant Lammens, dont la Vente aura lieu à Gand, le 21 Octobre 1839* …, Gent, 1839, where mention is made on p. 419 of an *Instruction pour M.rs de Marnix, Seigneur de Sainte Aldegonde, Bernard de Mérode, Jérome van den Eynde, Jan van Wercke, de Bloyer, Cornelis van der Straten, etc., députés des états-généraux vers ceux de Gand.*

[92] A copy of the extended sentence by the Council of Brabant in this case can also be found in folder nr. 1807 (BSA-Anderlecht, Old archive of Saint-Gudula), with as title on the closing page: *Copie. Vonnisse inden Rade van Brabant gegeven voor die heeren rentmeesteren der stadt van Bruessele rescribenten / tegen / d'erffgenaemen van wylen Willem de Smet supplianten / ix[a] Septembris 1586*. According to the narrative part of that sentence, in 1578 the construction of city walls had become urgent in light of the rebels' defeat in the battle of Gembloux in January 1578. See f°3: *(…) om te helpen den noot vander selven fortifficatie / die alsdoen mits der neerlaghe van Gemblours zeer was dringende (…).*

[93] The aforementioned *Copie. Memorien voor den borgmeesteren* (in BSA-Anderlecht, Old archive of Saint-Gudula, nr. 1807) argues at nr. XXV that the heirs of Willem De Smet had used similar arguments to those that have been put forward by the chapter of Saint-Gudula, but in vain: *Ende daeromme (…) dat de voirsz. erfgenaemen De Smets (…) hen mette selve allegatien hebben willen behelpen daermede impetranten in desen hen soecken ter behelpen (…) zoe en is daeroppe by den hove evenwel gheen regard genomen / maer zyn dyen nyettegenstaende als voere gecondempneert.*

[94] In Henne, A., and Wauters, A., *Histoire de la ville de Bruxelles*, t. 1, 1845, he was not attributed such a central role. Willem De Smet became member of the magistrate in 1579 (see t. 2, p. 539).

exception – be invoked against the perpetrator himself. The chapter of Saint-Gudula on the contrary, had never been part of the government of the city, nor had it anything to do with the rebellion. Therefore, the canons could not be blamed for the city's actions.[95] Secondly, Willem De Smet had used violence and fear to ensure the payment of his claim. Upon his request, the Calvinist administrators had confiscated and destroyed the bond which contained proof of De Smet's debt. Such violence was unacceptable. Therefore, the Council of Brabant had decided that the church wardens should still get a repayment of the money lent by the heirs of Willem De Smet.[96] The chapter of Saint-Gudula, which had decided to conclude the loan agreement out of fear for a greater evil, had not used any violence. Moreover, all three members of the city had agreed to the loan.[97]

The second sentence concerns a case against Marck Decochy. On 15 July 1577, Decochy had lent a sum of 5.200 guilders to Gaspar Schetz, the tresurer-general of King Philip II, who had promised to repay that sum within one year. However, in February 1578 Willem de Smet, at that time mayor of Brussels, had asked the money from Schetz, as it was needed for the fortification of the city. At that occasion, the mayor, aldermen and city council of Brussels had promised indemnities to Schetz in case Decochy would claim restitution of the money lent. After the reconquest of the city by Farnese, Decochy had asked the heirs of Willem De Smet for restitution of the money. The latter, however, had refused to pay. That is why Decochy decided on 26 August 1585 to file a claim with the Council of Brabant against the city of Brussels. On 27 July 1586, a final attempt for reconciliation failed. On 29 November 1586, the Council of Brabant finally rejected Decochy's claim and condemned him to the costs of the procedure.[98] However, Kinschot argued that this sentence was not all comparable to the case at hand. Decochy had not granted any loan to the city, nor had the city provided for any guarantee as to the repayment. The city had only promised a compensation to Decochy's debtor, Gaspar Schetz, if a new claim against Gaspar would have been filed.[99]

3.9 Two final arguments

Like private persons, also cities are bound by debts contracted at the time of a rebellion, as Kinschot deduces from Roman law fragments of Gaius[100] and Ulpian[101], as

[95] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°156, nr. 18.

[96] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°156, nr. 18: *sed eandem syngrapham per civitatis quaestores sibi restitui curarunt, in fraudem aedituorum, qui nihilominus in hoc Senatu sententiam de mutui restitutione obtinuerunt.* Indeed, on 9 September 1586 the Council of Brabant declared inadmissible (*nyet ontfanckbaer*) the request by the heirs of Willem De Smet for intervention of the administrators (*rentmeesteren*) of the city of Brussels.

[97] This argument was repeated in nr. XIIII of another joinder by the chapter of Saint-Gudula, written by Henricus Loets, and found in the aforementioned folder nr. 1807 (BSA-Anderlecht, Old archive Saint-Gudula), with the following title: *Copie. Memorien voor die deken ende capitulen van Sinter Goedelen kercke in Bruessele impetranten tegen die borgermeesteren scepenen ende Raidt vander stadt van Bruessele gedaighde. 1589.*

[98] The aforementioned folder nr. 1807 (BSA-Anderlecht, Old archive Saint-Gudula) contains a copy of this sentence, with the following title on its closing page: *Vonnisse tusschen Marck Decochy commissaris ordinaris van zynen Majesteit suppliant ten eenre / ende die stadt van Bruessele met derffgenaemen wylen Willems De Smet rescribenten, inden Rade van Brabant geweesen opten xxix^{en} Novembris anno xv^{c} lxxxvi.*

[99] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°156, nr. 18.

[100] D. 50.16.16, *Eum qui vectigal* (Gaius, 3 ad edictum provinciale).

[101] D. 50.16.17, *Inter publica* (Ulpianus, 10 ad edictum).

well as from a passage by Hieronymus Gigans[102]. Regularly, cities use the law on private persons: this would not be fair, if they would not be bound by private debts themselves.[103]

Finally, the defendants referred to many other debts which had been contracted during the rebellion and which would make it impossible for the city to repay the money lent by the chapter of Saint-Gudula. Kinschot stresses, however, that most other debts were not founded on a guarantee by the three members of the city (*tria civitatis membra*).[104] Moreover, most of the debts contracted by the magistrate were not preceded by a common consultation. Other debts were contracted by private persons and could not be considered debts of the city.[105] It was clear that there would not be that many real creditors of the city for debts contracted during the rebellion with the consent of all members. Those claims would certainly not exceed the income on the basis of the continuation of the taxes, as allowed by the capitulation treaty.

3.10 Conclusion

Although Kinschot's well-written consultation argued that the chapter of Saint Gudula should get full repayment of the money which it had lent to the Calvinist-led city of Brussels, the Council of Brabant was not yet fully convinced. At the end of October 1589, it rendered an interlocutory sentence, asking both parties to clarify certain additional points (*poincten van officie*). Apparently however, long discussions on those elements followed. It seems as if the Council has not rendered any definitive sentence at all. Only on 8 January 1597 was the case finally solved in a settlement (*accordt*) between both parties.[106]

4. Restitution of annuities and the interpretation of peace treaties

4.1 Introduction

[102] Gigans, *Tractatus de crimine laesae maiestatis, liber* 3, tit. *De rebellibus, quaestio* 10, f°394-395. It describes whether cities that have been occupied by tyrants should be called rebels. Gigans answers this question affirmatively if the majority of the citizens have supported this change of power. In that case, the cities lose their rights, in accordance with the same laws that are applicable to individuals: *Et in istis quo ad amissionem eorum iurium idem servatur quod in privato.*

[103] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°156, nr. 19: *Regulariter civitates jure privatorum utuntur: quod non fieret, si non aeque, ut privati, suis adstringerentur debitis.*

[104] According to the preface to the Capitulation of Brussels, the three members of the city were respectively represented by (i) the mayors, aldermen, *receveurs* and council of the city of Brussels; (ii) the lords and citizens of the *Wijden Raedt*; and (iii) the nine nations.

[105] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 55, f°156, nr. 18: *Unde non est, quod aliorum debitorum, tempore rebellionis contractorum, objectio scrupulum injiciat, quia illa longe a praesenti debito diversa sunt, tum propter defectum cautionis trium civitatis membrorum, tum quod multa alia in hac civitate per solum Magistratum, non convocato ejusdem Consilio, deinde per privatos et alios tumultuarie et seditiose gesta et acta sunt, in damnum absentium, et aliorum, quae a civitate aut ejus corpore facta dici nequeunt.*

[106] The folder nr. 1807 (BSA-Anderlecht, Old archive Saint-Gudula) contains an untitled document with the introductory words *saterdag ix[a] octobris xv[c]xcii*. This document contains a postscriptum which refers to a settlement of 8 January 1597: *Hiernae opten VIII[a] January 1597 heeft de stadt van Bruessele metten capitulen seker accordt gemaect ende voluntarie gepasseert inden Rade van Brabant opten voorsz. VIII[en] January / aengaende den vrydom vanden wyn der clerge competerende / waermede dit proces uuyt ende te nyet is / blyckende byden selven accordt daeraf Fierens copie heeft.* It seems, therefore, as if the conflict had been solved together with another one regarding tax exemption for wine.

On 17 August 1585, after a long siege of the city, Antwerp capitulated. A capitulation treaty was concluded between Alexander Farnese on the one hand and the city of Antwerp on the other hand. The duke of Parma was the stadholder, governor and captain-general of the Spanish Low Countries and acted on behalf of King Philip II in his capacity of duke of Brabant.[107] In the preface to the treaty, it is stated that after long negotiations, both parties have reached an agreement and that the King has given his consent.[108] In Art. 5 of the capitulation[109], the duke of Parma promised to give back all confiscated goods, even the alienated ones, wherever they were situated.[110] Moreover, the article expressly referred to the claims and titles for claims (*actien ende crediten die noch in wesen sijn*) that the Catholic majesty had not yet disposed off (*ende daer van zijne Majesteit niet gedisponeert en heeft*).

A doubt arose concerning the interpretation of this article. Kinschot was asked to write a consultation on the matter, which was later published as *responsum* 47. Did this promise also include those debts the King was bound by before the rebellion, either as *debitor personalis*, or as *debitor hypothecarius* by reason of an *antichresis* or an annuity?[111] The first subquestion – regarding the fisc as *debitor personalis* – seems however to have been neglected in the consultation.[112] Though Kinschotius did not think of it as a difficult case – or did not want to present it as such -, he recognized that

[107] The capitulation treaty has been published in Dutch: Vervliet, D. (ed.), *Articulen, ende Conditien vanden Tractate, aengegaen ende ghesloten tusschen de Hoocheyt vanden Prince van Parma, Plaisance, etc. Stadthoudere, Gouverneur ende Capiteyn Generael vanden landen van herwaerts overe, inden name vande Coninclijcke Maiesteyt van Spaengien, als Hertoge van Brabant, ende Merckgrave des heylichs Rijcx ter eenre, ende de stadt van Antwerpen ter ander syden*, Antwerpen, 1585.

[108] *Ibidem*: *Sijnde ter weder zijden voorghevallen diversche swaricheden / hebben hun de voors. Ghedeputeerde inden naem als boven / eyndelijcken gecontenteert mette puncten ende articulen die sijne Hoocheyt inden name van sijner Majesteit hun goedertierlijc heeft gheconsenteert ende gheaccordeert inder vueghen ende manieren hier na volgende …*

[109] Art. 7 of the capitulation treaty contained a similar provision to the advantage of the King and the clergy: *Dat reciproquelijc de Coninck wederomme sal treden in zijne demeynen / goederen / rechten ende actien / soo oock comen sullen in heure goederen / actien ende crediten / alle Prelaten / Collegien / Cappittelen / Cloosters / Gods ende Gasthuysen / Gheestelijcke plaetsen / ende generaelijck alle persoonen Geestelijck ende Weerlijck / publicque oft privaet / gevolcht hebbende de partye van zijne Maiesteyt / oft vertrocken geweest zijnde in neutrale Landen …*

[110] Art. 5: *Dat alle de voors. Borgeren / present ende absent / ende boven dien de Inwoonderen aldaer gheweest hebbende voor de reconciiatie vanden Provincien van Arthoys / Henegouwe / etc. wederow treden selen volcomelijck ende vredelijck / tsedert den dach van dit Tractaet inde possessie ende ghebruyck van alle henne goederen / tsij leenen / erffven / eyghen / ende allodiale goederen oft andere / in wat plaetsen onder de ghehoorsaemheyt van syner Majesteit de selve ghelegen zijn / midtsgaders van het Capitael van hunne Rent-brieven / beseth / oft onbeseth. Nietteghenstaende alle aenslaginghen / confiscatien / vercoopingen / oft alienatien / ghedaen ter contrarien / ende sonder dat hen van noode sy eenighe hantlichtinghe oft andere provisien te verwerven / dan dit teghenwoordich tractaet. Ende tselffde sal oock wesen vande actien ende crediten die noch in wesen sijn / ende daer van zijne Majesteit niet gedisponeert en heeft. Wel-verstaende dat de absente / die sullen willen genieten van deffect van dit voors. tractaet / sullen moeten vertrecken vuyt svyants landen binnen drye Maenden naer de publicatien van dien / waer-inne oock begrepen zelen zijn alle buyten ende Dorp-luyden van Brabandt die ter oorsaecken van dese orloghe ende om de versekertheyt van hunne persoonen inde voors. stadt gheweken zijn.* As rebels were not considered *hostes iusti*, they could only obtain restitution if such an express provision of restitution had been agreed upon: Lesaffer, "An Early Treatise on Peace Treaties", p. 235.

[111] The question, here, is about the rights of annuities or *antichresis* on certain goods, not necessarily about the fruits that have been received during the confiscation. Although Jason de Mayno thought that all fruits should be given back, Alciatus and later Gudelinus were of the contrary opinion. Restitution clauses normally only relate to the goods themselves: Gudelinus, P., *De iure pacis commentarius*, caput 5, nr. 10, f°16.

[112] This can be deduced from the examples Kinschot uses to found his claim of *confusio*.

it had very important consequences.[113] Let us not forget that the Spanish Crown – before the take-over by the Calvinists – had forced burghers and churches to grant loans or credit, often in the form of the sale of annuities and in return for some securities. Could the Antwerp creditors, after the capitulation of their city, enforce their rights on those securities, *i.e.* their *hypothecae* and *antichreseis* on the public domain?[114]

It must be noted from the outset that *responsum* 47 is largely inspired by an earlier consultation on restitution after the Pacification of Ghent of 8 November 1576.[115] Such substantial copying from earlier consultations on similar topics was not unusual among *consiliatores*.[116] Kinschot's earlier 6th *responsum* concerned a probably non-secured claim by Antonius Stralem against the King, which had been subject to *confusio* after the confiscation of Antonius' goods, since the contractual claim upon the King had now been transferred to the King himself.

In those consultations, Kinschot develops one main argument through a three-step approach. In both cases, Kinschot first proves that even though a Roman law *confusio* terminates a debt, such a debt can revive if the *causa* for the *confusio* disappears. In a second step, he establishes that the restitution promised by the peace treaty takes away the *causa* for the *confusio*. Finally, he declares this restitution to be applicable to annuities and *antichreseis* as well, irrespective of their qualification as immovables or movables.

4.2 Revival of a debt after *confusio*

As a result of the confiscation, both the claim and the obligation following from the same transaction were united in the same person, namely the fisc. This is known in Roman law as *confusio*, since the original debtor now became the creditor of his own debt. *Confusio* is one of the traditional ways of termination of a debt.[117] It seems, *prima facie*, as if a successive general restitution of goods cannot revive an extinguished

[113] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 47, f°137, nr. 1: *Non tam difficilis, quam magni momenti est quaestio, nobis ex conditionibus deditionis opidi Antverpiensis proposita, videlicet, an restitutione omnium bonorum, etiam alienatorum, quocumque loco sita sint, nec non actionum et nominum, de quibus Majestas Catholica non disposuit, restituta quoque censeantur credita, quorum eadem Majestas ante rebellionem, secutamque confiscationem, debitor erat personalis tantum aut etiam hypothecarius per antichresin vel constitutionem annui reditus?*

[114] Based on the printed consultation, it is unclear before which court this case was pending: given Henricus Kinschotius' position as an advocatus at the Council of Brabant, it is likely that, similar to the previous one on the Brussels' loan, also this case was dealt with by that institution.

[115] This first consultation has been published as well, as *responsum* 6 in the same volume: Kinschotius, *Responsa sive consilia juris*, 1653, resp. 6, f°45-47. In that case too, the confiscation had been revoked by the Pacification of Ghent. Consequently, the original claim revived. For more information on the Pacification of Ghent, see *e.g.*: Baelde, M., and van Peteghem, P., "De Pacificatie van Gent (1576)", *Opstand en Pacificatie in de Lage Landen. Bijdrage tot de studie van de Pacificatie van Gent*, Gent, vzw Pacifikatie van Gent, 1976, pp. 1-62. The complete text of the Pacification can be found in: X., "De tekst van de Pacificatie van Gent met begeleidende documenten", *Opstand en Pacificatie in de Lage Landen. Bijdrage tot de studie van de Pacificatie van Gent*, Gent, 1976, pp. 351-365.

[116] See, for another example: *consilium* 45 and the *additio* to the same consultation of Joannes Wamesius, *Responsorum sive consiliorum ad ius forumque civile pertinentium centuria quarta*, Leuven, apud viduam Henrici Hastenii, 1632, f°142-153. The *additio* mainly consists of literal repetitions of the earlier consultation.

[117] D. 46.3.95.2, *§ Aditio* (Papinianus, 28 quaestionum): *Aditio hereditatis nonnumquam iure confundit obligationem, veluti si creditor debitoris vel contra debitor creditoris adierit hereditatem.* Afterwards, the fragment discusses some other consequences of inheritance on debts. Furthermore, Kinschot refers to D. 46.1.47, *Si debitori* (Papinianus 9 quaestionum)

debt.[118] Nevertheless, Kinschot stresses that the contrary solution is the only right one. If, for instance, the *causa* for the extinction of the debt has disappeared, or sometimes even if some other just cause exists, an extinguished debt can revive.[119]

Kinschot gave six examples from literature. (i) In case a creditor acceeds to the inheritance of his debtor, *confusio* takes place. Nevertheless, after the sale of the inheritance, the creditor regains his old claim, which he can now file against the buyer of the inheritance.[120] This example is further explained in a consultation by Corneus.[121] (ii) Secondly, if a commutable (*commutabilis*) acquisition of a certain immovable good is resolved, a right of servitude or of mortgage revives.[122] (iii) Thirdly, if the fisc is a successor of both a creditor and a debtor, an *actio hypothecaria* does not come to an end by reason of *confusio*, as such a succession was commutable. For this claim, Kinschot refers to Antonius Negusantius' treatise on pledges and mortgages[123], as well as to some fragments from the Digest.[124] It is remarkable that those arguments are all based on real securities, not on personal ones. (iv) Fourth, after a rescission of a contract or after a *restitutio in integrum* has been obtained, the original action is given back.[125] (v) Fifth, a

[118] D. 46.3.98.8, *§ Aream* (Paulus, 15 quaestionum); D. 45.1.83.5, *§ Sacram* (Paulus, 72 ad edictum).

[119] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 47, f°137, nr. 3: *Verum, eo non obstante, aliud de jure respondendum esse, certo existimamus, quia multis modis resuscitatur debitum semel extinctum, cessante videlicet ratione extinctionis, aut casu speciali, vel justa aliqua causa concurrente.* This, he derives from: Accursius, *Glossa in Digestum Novum*, ad D. 46.3.98.8, § *Aream*, v° *in perpetuum*: *(…) quod actio extincta etc. (…) nisi subsit iusta causa ex qua aequitas subvenit: ut in praedictis specialibus: quod in idem recidit. Accursius.*

[120] Reference is made to D. 18.4.2.18, *§ Cum quis* (Ulpianus, 49 ad Sabinum).

[121] Corneus, P. Ph., *Consilia*, vol. 3, cons. 14, f°28v-30v. This consultation deals with the sale of an inheritance. It first discusses whether the buyer of the inheritance could vindicate a piece of land that had previously formed part of the inheritance, but that had been alienated before the sales agreement. Corneus answered negatively: only the price of that good formed part of the inheritance. Afterwards, he deals with the question whether the *cedens* could file actions which he had before he inherited. According to Corneus, the action can indeed be filed: *Quoniam de natura actus est, quod quando conceditur haereditas, censeatur actum, quod onus solvendi spectet ad eum, cui haereditas ipsa conceditur, [C. 4.39.1 et C. 4.39.2]. Et non solum quod debet aliis, sed et quod debet ipsi haeredi concedenti, vel – ut aptius loquar – id quod debebatur antequam actio esset confusa, [D. 18.4.2.18, § Cum quis].*

[122] D. 44.2.30.1, *§ Latinus largus* (Paulus, 14 *Quaestionum*). Especially interesting is the end of that passage: (…) *In proposita autem quaestione magis me illud movet, numquid pignoris ius extinctum sit dominio adquisito: neque enim potest pignus perseverare domino constituto creditore.* In his commentary on this fragment, Bartolus adds that a pledge (*pignus*) is indeed dissolved, if property had been acquired perfectly and irrevokably: *Vera solutio est quando res efficitur perfecte et irrevocabiliter accipientis, tunc pignus extinguitur; secus si irrevocabiliter* (sic!)*: quia acquisitio dominii non debet nocere creditori, nec pignus extinguitur.* Consequently, in case of a revocable acquisition, the pledge is not extinguished.

[123] Negosantius, A., *Tractatus de pignoribus et hypothecis*, Köln, Constantinus Münich, 1656, *pars* 5, *membrum* 1, nr. 49, f°408-409: *licet in actione personali ita sit, in hypothecaria est secus: quia licet creditor succedat debitori hypotheca non confunditur.* An *actio personalis* is subject to *confusio* in such a case, but an *actio hypothecaria* is not. To found his claim Negosantius refers to Baldus de Ubaldis, *In vii. viii. ix. x. et xi. Codicis libros Commentaria*, Venezia, 1586 ad [C. 7.72.7, *Si uxor tua*], f°120, nr. 2: *Quaero pone, habebam obligatum reum inopem, et fideiussores divites, successi reo, et non feci inventarium, et sic confusa est actio contra reum: nunquid fideiussores sunt liberati? Et videtur quod sic, quia confusum est principale, ergo accessorium. In contrarium videtur, quod licet reus eximatur ab obligatione, tamen remanet obligatio fideiussoris. Ista quaestio non habet dubium, quia confunditur obligatio fideiussoris, licet secus esset in hypothecaria.*

[124] D. 36.1.61, *Debitor* (Paulus, 4 quaestionum); D. 46.3.38.5, *§ Qui pro te* (Africanus, 7 quaestionum); C. 2.3.7, *Debitori* (Imperator Antoninus); D. 44.2.30.1, *§ Latinus largus* (Paulus, 14 quaestionum). Reference is also made to Tiraquellus, A., *Commentaria in utroque retractu et municipali et conventionali*, Venezia, 1562, lign. §1 in verbis, Ou autres choses gl. 7 nrs. 61-71, f° 33r-34r. The question is treated here, whether a *retractus* can be invoked in case an *usufructuarius* receives the ownership of this good.

[125] Reference is made to commentaries on D. 31.66.1, *§ Duorum* (Papinianus, 17 *Quaestionum*). In his commentary on this fragment, Baldus writes that an extinguished debt can revive, if ordered by the praetor or if

personal surety who is liberated from fear, is again bound by the former obligation.[126] (vi) Finally, if a woman who had terminated someone else's obligation by way of *novatio*, invokes the benefice of the *senatusconsultum Velleianum*, the claim against the first debtor revives.[127] Therefore, the cause of the obligation (*causa obligationis*) should always be taken into account: if the *causa* falls away, the confused or terminated obligation revives.[128]

4.3 Amnesty leads to disappearance of the *causa* for the confiscation

Articles 1[129], 2[130] and 5 of the capitulation of Antwerp stipulate that the Crown accepted all Antwerp citizens and inhabitants as good vasals and subjects. Those articles ensure a general and perpetual amnesty and liberation for everything which had happened in the past, which was very common in 16th-century peace treaties.[131] They state as well that all goods will be returned, even the alienated ones. In the Pacification of Ghent, restitution was also agreed upon, even though the alienated goods were not fully included in that treaty.[132]

According to Kinschot, this means that in both cases the *causa* for the confiscation had fallen away.[133] Our *consiliator* compares this situation to the so-called *ius postliminii*, the restauration of citizenship, property and rights to a Roman citizen

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equity requires it. See: Baldus de Ubaldis, *In primam et secundam Infortiati partem Commentaria*, Venezia, 1599, f°153.

[126] D. 4.2.10, *Illud verum* (Gaius, 4 ad edictum provinciale).

[127] In *responsum* 47, reference is made to: "l. Similiter C. Ad S.C. Velleian.", but that is clearly a mistake by the editor. The similar passage in *responsum* 6 refers instead to "l. Si mulier 16 D. Ad S.C. Vellejan.", which is equivalent to D. 16.1.16, *Si mulier* (Iulianus, 4 ad Urseium Ferocem), *in fine*: *quia totam obligationem senatus improbat et a praetore restituitur prior debitor creditori.*

[128] Reference is made to Bartolus de Saxoferrato, *In primam Digesti Veteris partem Commentaria*, Turino, 1577 ad D. 2.14.32, *Quod dictum*, f°89r.: *Cessante ratione legis, cessat ipsa lex (…).* Thus, in the early modern period, *causa* had become synonymous for *ratio*. In the Middle Ages, *causa* did not confer a causal link. See: Waelkens, L., "La cause de D. 44,4,2,3", *Tijdschrift voor Rechtsgeschiedenis* 75 (2007), pp. 199-212.

[129] Art. 1 Capitulation of Antwerp: *(…) Soo eest dat sijne Hoocheyt oock inden name der selver / niet tegenstaende alle voorleden saecken / de voorghenoemde van Antwerpen wederomme ontfangt / ende wilt tracteren in alle soeticheyt ende Vaderlijcke goedertierenheyt / als goede vassalen ende ondersaten. (…)*

[130] Art. 2 Capitulation of Antwerp: *Ende om wech te nemen ende weiren alle oorsaecken van mistrouwicheyt ende dissidentie / soo accordeert sijne voors. Hoocheyt een eeuwich ende generael Pardon ende vergetinghe van allen ende eenyeghelijcken vande voors. Borgeren ende inwoonderen / aldaer iegenwoordich / oft buyten der voors. Stadt wesende / mitsgaders allen dengenen die hun aldaer nu zijn houdende / int generael ende int particulier sonder eenige exceptie / hoedanich die soude mogen wesen / van alle d'excessen / misbruycken / ongeregeltheden / misdaden Crimen laesae majestatis, ende andere by hunlieden gheduerende dese troublen gecommitteert / hoe groot / swaer / ende van wat qualiteyt de selve zijn / ofte ghehouden soude moghen worden sonder eenighe uut te steken oft t'excipieren / waer van de gedenckenisse vuyt ende te niete gedaen sal blyven / als van saecken die noyt gheschiet en zijn / sonder dat sy des halven oyt ondersocht / geinquieteert oft ghereprocheert sullen moghen worden / in wat manieren oft om wat oorsaecken dattet sy. (…)*

[131] Lesaffer, "An Early Treatise on Peace Treaties", p. 233.

[132] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 6, f°47, nr. 16: *Et quamvis haec plenissima restitutio ex pace Gandensi non absolute censeatur facta, respectu bonorum in tertium alienatorum, propter satisfactionem horum, reservatam Commissariis utrimque deputandis (…).* This is a reference to the procedure of articles 18 and 19 of the Pacification of Ghent.

[133] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 47, f°137, nr. 8: *Atqui cum primo, secundo, et quinto articulis praefatae deditionis omnes cives et incolae Antverpienses ex parte suae Majestatis recepti sint, tamquam boni vasalli et subjecti, cum generali et perpetua rerum omnium praeteritarum, quantumvis enormium, oblivione et remissione, bonorumque omnium, etiam alienatorum, restitutione, certum est, causam confusionis rediisse ad non causam.*

who returned after he had been taken prisoner of war.[134] A similar comparison to the *ius postliminii* was made by the aforementioned jurist Girolamo Giganti in his treatise on lèse-majesté. A convicted criminal lost his feudal right of primogeniture. He got a son after this conviction. If the convicted person later received princely pardon, his right of primogeniture revived. His eldest son – although he had never been entitled to the feudal succession before – became his feudal heir. Just like in case of the *ius postliminii*, a restitution also implies the restitution of whomever has been harmed by the original condemnation.[135]

4.4 Protection of third parties

In the learned literature, some discussion existed as to whether goods that had been alienated by the fisc to a third party could be recuperated on the occasion of a general restitution of goods.[136] This question was only relevant for *responsum* 47 on the capitulation of Antwerp. In *responsum* 6 on the Pacification of Ghent, this question did not have to be raised, as no third party was involved.

Doubt only existed, if after the confiscation a third party had acquired a legitimate contractual right, not if that third party immediately profited from the confiscation itself. In the latter case, the third party forfeited his right anyway.[137] Baldus explains this issue very clearly in his commentary to the *lex In quaestione* by way of the following distinction: if a third party derives his right immediately from the act which is rescinded because of the restitution, that party loses his right; if, however, a third party derives his right from a separate act, he does not lose it.[138]

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[134] Lesaffer, "An Early Treatise on Peace Treaties", p. 234; Waelkens, L., *Amne adverso. Roman Legal Heritage in European Culture*, Leuven, 2015, p. 198. For a general overview of the *ius postliminii* as far as the property of goods was concerned, with references to both civil and canon law, see *e.g.*: Rainer, M., "Zum *ius postliminii* an Sachen im Register Innozenz' III", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 103 (1986), pp. 460-468.

[135] Gigans, *Tractatus de crimine laesae maiestatis, quaestio* 22, f°298-301, in particular f°300, nrs. 4-6. Gigans is of the opinion that after restitution the oldest son, as well as the oldest grandson have the right to feudal succession. First, an act of restitution makes the original act invalid, as if it had never taken place (*actus restitutus pro non facto habetur*). Secondly, a restitution should be compared with the fiction of the *ius postliminii* (*restitutio aequiparatur fictioni postliminii, et trahitur retro, et perinde habetur ac si nunquam felonia commissa fuisset*). Therefore, after such a pardon, the father/oldest son is considered never to have been condemned; therefore, his son/oldest grandson will receive it (*operabitur ergo restitutio facta patri per principem, quod sit ac si pater nunquam damnatus fuisset; sed si nunquam pater damnatus fuisset, utique filius esset caput feudi*). In nr. 7, Gigans adds: *quia restituto principaliter damnato restituitur is qui in consequentiam eius damnatus fuit*). Giganti himself refers to D. 28.3.6.12, *§ Quatenus* (Ulpianus, 10 ad Sabinum), where it is stated that a last will of a prisoner of war is convalidated after his return. Further references include: Angelus and Joannes de Imola at D. 28.5.49, *Si alienum, § In extraneis* and C. 9.51.1*in fine*.

[136] This discussion can be found in learned literature *ad* C. 9.51.13, *In quaestione* (Imperator Constantinus).

[137] Kinschot deduced this from: C. 9.51.13, *In quaestione*; D. 37.14.21, *Sive patronus* (Hermogenianus, 3 iuris epitomarum) and D. 28.2.29.5, *§ et quid si tantum* (Scabinus, 6 quaestionum).

[138] Baldus de Ubaldis, *In vii., viii., ix., x. et xi. Codicis libros commentaria*, Venezia, 1586 *ad* C. 9.51.13, *In quaestione*, f° 230v., nr. 5: *Tertio opponitur sic, restitutio non porrigitur ad illa, quae sunt tertio acquisita, ut D. ad munic. De rescript. lib. vi. (…) Ratio, quia concessio Principis plenam interpretationem recipit, quantum ad iura ipsius principis, sed non quantum de iure privati, ut l. ii § si quis a principe, ne quid in loco publico et extra, de auth. et usu pal. c. confirmatus. Ad praedicta est oppositio per ea, quae leguntur, et notantur ff. de lib. et posth. l. Gallus, § et quid si tamen. Solutio: quaedam sunt, quae tertio acquiruntur, ut illius actus, qui postea rescinditur per restitutionem, et tunc restitutio bene trahitur ad ista iura illi tertio acquisita. Et ratio, quia per restitutionem causa acquisitionis illius redit ad non causam, ita loquitur lex nostra. Quidam sunt,*

Baldus added a second distinction, which was not mentioned by Kinschot. He distinguished between restitution by way of grace and restitution that is imposed by the written law. In the first case, the third party was safe; in the second case, restitution also implied that the third party lost his right.[139] Although a peace treaty is not normally considered to be part of the written law, it is not enacted by grace either. That might explain Kinschot's silence on this point.

More importantly, however, in the capitulation of Antwerp, the prince himself had expressly ordered that even goods that had been alienated by the fisc in the course of private transactions, should be returned. This measure was not taken to protect certain private interests, but to secure the public peace.[140] According to Kinschot, such a reason of public peace should lead to a very broad interpretation of the term 'restitution'.[141] If a third party has been enriched by reason of this alienation, an action is also accorded against him to the extent of this enrichment. Therefore, a third party can certainly not benefit from a mere *confusio*, as – as far as that is concerned – the third party only can found his claim on this confiscation, which was a blameworthy one. That confiscation has been nullified because of the reconciliation.

4.5 No specific protection for the fisc

The fisc has no stronger position in order to uphold the *confusio* which temporarily terminated the prince's debts.[142] Neither can the fisc claim any rights based on its status as heir during the confiscation. Indeed, the fisc is sometimes called a *successor*, as by reason of the confiscation the fisc receives all goods, including all

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quae non acquiruntur immediate ex illa causa, sed ex novo negotio, super quo non fit restitutio, et tunc ad illam restitutionem non porrigitur, quia non reducit restitutio causam immediatam illius acquisitionis ad non causam, et ita loquuntur contraria, ubi probatur ista distinctio, et ista distinctio est casus l. nostrae. Thus, some state that a restitution should not harm third parties who had acquired those goods. A concession of the prince should get a broad interpretation against the prince, but not against a private party. However, the *§ Quid si tamen* seems to contradict this principle. To solve this paradox, Baldus makes the aforementioned distinction.

[139] Subsequently, Baldus solves an additional counterargument by making a new distinction between restitution by way of grace and restitution required by written law. In the first case, the third party was safe; in the second case, restitution also implied the third party's loss of his right. Baldus de Ubaldis, *In vii., viii., ix., x. et xi. Codicis libros commentaria*, Venezia, 1586 *ad* C. 9.51.13, *In quaestione*, f° 230v., nr. 5: *Sed contra hoc opp. de l. in causae, ff. de min. et in l. non est novum de act. emp., ubi restitutio extendit se in praeiudicium tertii habentis causam ab eo cuius ius rescinditur. Solutio: autem loquimur in restitutione, quae procedit ex mera liberalitate, et de gratia, et loquitur l. nostra, aut de restitutione, quae procedit per viam iuris scripti, quae est necessaria, et tunc loquuntur iura contraria. Ratio differentiae est ista, quia restitutio quae procedit per viam iuris scripti, inhaeret a primordio, ita quod ius transferentis ab initio non fuerit liberum, unde merito potest rescindi, arg. ff. de pig. l. lex vestigali, sed restitutio per viam gratie nunquam fit retro, et ideo ius transferendi retro fuit liberum, et ideo est revocabile arg. ff. de pig. l. si superatus, et in l. si a te, § Iul. de excep. rei iud. et facit l. i ff. de rebus eor. in ratione lite rei.*

[140] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 47, f°138, nr. 10: *Quod maxime in nostro casu dicendum est, cum etiam bona in privatis contractibus fisci alienata restitui jusserit Princeps, idque non in gratiam privatorum, sed propter pacem publicam.*

[141] Kinschot refers to: Baldus de Ubaldis, *Lectura super usibus feudorum: Commentum super Pace Constantiae*, Pavia, Prothasius Bozolus, 1490, *§ hoc quod nos*, nrs. 2 et 3, f° 93v-95r; Nellus a Sancto Geminiano, *Tractatus insignis de Bannitis*, Tempus 3, Pars 1, f°154v-164v.

[142] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 47, f°138, nr. 11: *Minus autem locupletari debet ex sola confusione, quia ad ejusdem confirmationem nullum ex contractu tertii praejudicium objicitur, sed unicus odiosae confiscationis praetextus, qua per dictam reconciliationem sublata, nihil apud fiscum plus juris reliquum est, quo praefatam confusionem tueri possit.*

activa and *passiva*.[143] However, the fisc is not a real heir.[144] If the confiscation has come to an end, there is no longer any foundation to uphold the *confusio*.[145] The end of a confiscation is not only negative news for the fisc; it also ends the fisc's liability for the *passiva* which it had temporarily taken over.[146]

4.6 Applicability of the previous reasoning on annuities and *antichreseis*

The rules on *confusio* were applicable to personal actions, and therefore certainly also to secured debts, related to an annuity or an *antichresis*. Kinschot uses two main arguments for this extensive interpretation. First, the capitulation treaty itself referred especially to annuities (*mitsgaders van hunne rentbrieven, beset oft onbeset*). Secondly, in Antwerp and in the duchy of Brabant as a whole, annuities and *antichreseis* that have been recognized or constituted on the public domain, are considered immovables.[147] They are therefore subject to the same rules as Brabantian feuds. Just like patrimonial feuds – the restitution of which is expressly promised in the capitulation –, such an *antichresis* should also be discharged by the prince after the capitulation.[148] As the

[143] Reference is made to: Bossius, A., *Tractatus varii …*, tit. *De publicatione bonorum*, f°498 e.v., in particular f°503-504, nr. 11-13. In nr. 11, Bossius explains that a fisc has to fulfil the hereditary obligations, although he is not a real heir (*tamen in fisco res est clara, quod tenetur eo, quia bona in eum pervenerunt ad onera haereditaria, licet etiam non sit haeres*). This obligation to fulfill the obligations linked to an asset is true for everyone who receives all goods because of a legal provision (*non solum in fiscum, imo in quemlibet alium in quem perveniunt omnia bona ex dispositione legis transeunt debita, et credita*). It should be stressed that the fisc is not a real heir, but takes the place of an heir (*non tamen fiscus est haeres proprie, sed habetur loco haeredis*). Bossius refers, among others, to Joannes de Platea. He added, by way of explanation, that a fisc is a successor in the goods, more than in the person (*quod non est haeres proprie, quia succedit potius bonis quam personae quando bona confiscantur*).

[144] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 47, f°138, nr. 11: *Deficit enim qualitas veri haeredis, quia hanc etiam durante confiscatione non habuit.*

[145] Similarly, a separation of goods also terminates the *confusio* of an action against the heir, even to the disadvantage of the fisc. See: D. 42.6.1, *Sciendum*.

[146] C. 9.51.3, *Si debitor* (Imperator Alexander Severus). Reference is also made to: Bossius, A., *Tractatus varii…*, tit. *De proclamate, quod fit bonis publicatis*, nrs. 14-16, f°541-543: *Adverte tamen quia fiscus quando bona publicantur, solus tenetur liberato debitore. (…) nihil amplius negotii habet cum creditoribus suis, nisi restitueretur ad bona, quia tunc etiam restitueretur ad obligationes passivas. (…) Quando quis restituitur, etiam tenetur primis creditoribus: quia actio non fuit extincta, imo erat viva, sed penes fiscum; igitur restitutis bonis, etiam actio passiva restituitur.*

[147] According to another *consiliator*, Johannes Wamesius, annuities that had been constituted upon a piece of land were indeed to be considered immovables, even if the act of constitution of the annuity contained a bearer clause, see: Wamesius, J., *Responsorum sive consiliorum ad ius forumque civile pertinentium centuria tertia*, Leuven, apud viduam Henrici Hastenii, 1631, f°303-304. Paul van Christijnen mentions two judgments of 4 October 1593 and 18 March 1597 in which the Great Council of Malines had confirmed the immovable status of annuities to which a *hypotheca* was linked, see: Christinaeus, P., *Practicarum quaestionum rerumque in supremis Belgarum curiis actarum et observatarum decisiones*, vol. 1, Antwerpen, ex officina Hieronymi Verdussii, 1626, *decisio* 213, f°372, nr. 2. In Frisia, however, annuities were sometimes considered as a third category, neither movable nor immovable, see: Joannes a Sande, *Decisiones frisicae sive rerum in suprema Frisiorum curia iudicatarum libri 5*, Leeuwarden, Johannes Jansonius, 1639, liber 4, tit. 4, def. 6, f°390: *At inspecta propria ipsorum natura, annui reditus nec mobiles nec immobiles sunt; sed, ut alia jura et actiones tertiam bonorum speciem a bonis mobilibus et immobilibus differentem constituunt.* An impressive overview of the medieval and early modern *ius commune* literature on this topic, can be found in: Andreas Tyraquellus, *Commentariorum de utroque retractu, municipali et conventionali quinta editio*, Venezia, apud Cominum de Tridino Montisferrati, 1572, tit. *De retraict lignagier*, §1, glo. 6 *Rentes, Annui reditus*, f°22r-23v.

[148] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 47, f°138, nr. 15: *adeo ut bona per antichresin oppignorata sequantur in familiae erciscundae judicio communem feudorum in Brabantia naturam; et pro talibus a Principe debeant relevari, non secus quam feuda patrimonialia, quorum restitutio expressim permissa est, et proinde eadem in antichreseos, quae aliorum feudorum, restitutione est ratio.*

promise of restitution expressly included the alienated immovable goods as well, also the right of *antichresis* should be given back, even if the fisc would have alienated those goods.

4.7 Subsidiary argument: officers of the fisc are no third parties

As was common in consultations, Kinschot immediately added a subsidiary argument, in case the right of *antichresis* would not be considered an immovable good by the court, but nothing more than a title to a claim, a *nomen*. This was a relevant distinction, as the terms of the capitulation regarding such claims were less far-reaching: restitution of *nomina* was only due if the prince had not yet alienated them.[149]

However, even so, Kinschot was convinced that the claims in question should still be returned, as no disposal by the prince or by the fisc concerning those *antichreseis* was proven. It is true that the prince or the fisc had ordered officers to take hold of those domains, but such an order and the consequent administration did not create a new situation. The administrators were just officers or mandataries. Their administration was in fact just the prince's or the fisc's one. They were not considered third parties and were not entitled to any special protection whatsoever.[150]

4.8 Kinschot's conclusion

On the basis of all those arguments, Kinschot was convinced that the judges – if they decide in an objective and integer fashion – should hold that those personal and hypothecary actions, as well as the *antichreseis* were included in the prince's promise of restitution. Every other interpretation would go against the wording of the capitulation. Therefore, the Antwerp citizens and inhabitants should be able to enforce their claims which stem from the credit agreements they concluded earlier with the Crown. As was customary in 16th-century consultations, however, Kinschot did finish with the formula *meliori judicio semper salvo*.[151]

5. Conclusion

[149] *Ibid.*, f°139, nr. 15: *Quinimo licet admittamus, absque ulla tamen confessione, hanc antichresin censeri personalem, atque ita reputari inter actiones et nomina, quorum restitutio ita demum facta est, si in esse sunt, et de quibus Princeps non disposuit.*

[150] Kinschotius, *Responsa sive consilia juris*, 1653, resp. 47, f°139, nr. 15: *Quae facta dici non potest eo solo, quod Princeps sive fiscus durante confiscatione jusserit haec dominia oppignorata apprehendi per antiquos suos Officiales, qui talia dominia ante confiscationem administrare solebant: hoc enim jussu aut administratione inde subsequenti nihil innovatum aut alii jus acquisitum est, cum tales administratores Principis, sive ejus fisci, sint nudi officiales aut mandatarii, sive confiscationis ministri: et propterea eorum administratio non aliter censeri debet, quam si Princeps aut fiscus propriis quodammodo, si id fieri posset, manibus, sine mutatione personae, bona administrassent, et sic in eodem semper statu permansissent: quia haec administratio immediate processit ex sola confiscatione, non autem ex contractu Principis vel fisci, quo mediante jus tertio foret acquisitum, quod solum attendi deberet ex rationibus supra allegatis.*

[151] *Ibid.*: *Ex quibus, si integre et omni semota affectione judicandum sit, praefata bonorum restitutione dictas actiones personales et hypothecarias, atque ipsas antichreseis comprehensas esse, et aliud contra Principis verborumque tractatus praesumptam synceritatem vix ullo juris fundamento sustineri posse, intrepide respondendum putamus, meliori judicio semper salvo.*

In turbulent times, Hendrik van Kinschot stood up for the rule of law: despite the sensitiveness of the case, he chose to take up the defence of the chapter of Saint-Gudula against the new magistrate and rectors of Brussels. He defended the rights of the Antwerp burghers vis-à-vis the Crown. In doing so, he clearly showed his affinity with the framework of the *ius commune*, using many authorities including older *consilia*- and *decisiones*-literature. At the same time, he took into account earlier case law on the matter, as well as several peace treaties. His consultations prove his understanding of the political and military circumstances in which those contracts had been concluded.

Within the printed *consilia*-literature of the Southern Low Countries, Hendrik van Kinschot (as well as his son Franciscus) was somewhat of an exception. Most other published consultations had been written by law professors, like Jean de Waismes (Wamesius, 1524-1590), Elbrecht de Leeuw (Leoninus, 1519/1520-1598) and Frans Van der Zypen (Zypaeus, 1580-1650). Kinschot was a learned lawyer, but not an academic. He was a learned legal practitioner, an *advocatus* at the Council of Brabant.[152] He was frequently asked for his legal opinion, which allowed him sometimes to copy passages of earlier consultations, as discussed.

By their posthumous publication, his consultations became sources of law themselves, authorities within the system of the *ius commune*. The second edition in 1653 was a sign that a publication of his *consilia* was still thought to be useful. Even though no references to these three particular consultations were found, some later authors, like Simon van Groenewegen van der Made (1613-1652) and Willem Schorer (1717-1800), did refer to Kinschot's work.[153] However, admittedly his work was less popular than those of his aforementioned colleagues who had been active at the universities.

As a final positive note, let us refer again to the preface of editor Valerius Andreas to the 1633 edition. He described Hendrik van Kinschot neither as a mere scholar, nor as a mere pragmatist, but as a true jurist![154] Indeed, the study of Kinschot's consultations is most certainly worth the effort.

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[152] According to Valerius Andreas' preface to the 1633 edition, Kinschot's experience was, however, also sought after by parties that litigated before other supreme courts.

[153] *E.g.*: Grotius, H., Van Groenewegen van der Made, S., and Schorrer, W., *Inleiding tot de Hollandsche Rechtsgeleerdheid*, Middelburg, by Pieter Gillissen, 1767, f°83. See also: Dondorp, H., "Decreeing Specific Performance: A (Roman-)Dutch Legacy", *Fundamina* 16 (2010), p. 45, footnote 34. Some of Kinschot's treatises have been of importance as well, see for instance: Feenstra, R., "Over de oorsprong van twee omstreden paragrafen uit de *Inleidinge* van Hugo de Groot (III.33.2 en III.34.2)", *Acta Juridica* 1958, p. 36.

[154] Valerius Andreas' preface: *[Henricus Kinschotius] munus (…) expleret, non meri Doctoris scholastici, non meri pragmatici, sed veri, ut dixi, Iurisconsulti.*

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Motiuum iuris pro d. decano et capitulo ecclesie collegiate dive Gudule oppidi Bruxellensis, actoribus seu, impetrantibus, contra magistratum seu rectores eiusdem oppidi Bruxellensis reos et citatos.
20. Aug. 1589 Copie. Motiuum iuris pro d. decano et capitulo Bruxellensi impetrantibus contra magistratum Bruxellense citatum.
Copie. Memorien voer de borgmeesteren scepenen ende Raidt deser stadt van Bruessele gedaighde tegen den deken ende andere vanden capitulen van Sinter Goedelen kercke binnen der selven stadt impetranten.
Copie. Vonnisse inden Rade van Brabant gegeven voor die heeren rentmeesteren der stadt van Bruessele rescribenten / tegen / d'erffgenaemen van wylen Willem de Smet supplianten / ix[a] Septembris 1586.
Copie. Vonnisse tusschen Marck Decochy commissaris ordinaris van zynen Majesteit suppliant ten eenre / ende die stadt van Bruessele met derffgenaemen wylen Willems De Smet rescribenten, inden Rade van Brabant geweesen opten xxix[en] Novembris anno xv[c] lxxxvi.
Copie. Memorien voor die deken ende capitulen van Sinter Goedelen kercke in Bruessele impetranten tegen die borgermeesteren scepenen ende Raidt vander stadt van Bruessele gedaighde. 1589.
Untitled documents with the following introductory words: *Saterdag ix[a] Octobris xvcxcii.*

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