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Book Reviews

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BIJDRAGE TOT DE GESCHIEDENIS VAN HET INTERNATIONAL PRIVAAT—EN STRAFRECHT IN FRANKRIJK EN DE NEDERLANDEN. By Mr. E. M. Meijers, Professor at the University of Leiden. Haarlem, H. D. Tjeenk Willink en Zoon, 1914.

To Joseph Story goes the credit of having introduced to American and to English law that field which he, following Ulric Huber, denominated the conflict of laws. It should not, however, be forgotten that behind Story lay at least six centuries of continental criticism upon which he drew for his materials. And it should be of peculiar interest to those trained in the Common Law to have pointed out the extent to which this most controversial of subjects was from the outset influenced by the practice of the courts. In the present monograph, originally written in celebration of the seventy years jubilee of the dean of Dutch legal historians, Professor S. J. Fockema Andreae, Professor Meijers has contributed an important chapter in this development, which loses none of its interest by the fact that it is based primarily upon the decisions of French and Flemish feudal courts during the thirteenth and fourteenth centuries.

It will be recalled that the classical description of ultramontane law in the period preceding Bartolus insists upon its predominant localism. As Westlake states, "The limits of application of a law might depend on those of the lawgiver's authority, but that authority was regarded as being over territory rather than over persons." The supremacy of the local law, as summarized for France, by the *brocard, "toutes les coutumes sont réelles,"* is ascribed to the general and jealous independence of small feudal principalities And, according to the traditional view, it was only when the post-glossators, the greatest of whom was Bartolus, commenced under the influence of ideas imbibed at the font of Romanism to compromise the strict application of the *lex fori* with the necessities of commerce and the principle of nationality, that a science, properly so-called, of the conflict of laws could be evolved.

In drawing attention to the insufficiency of this thesis, Professor Meijers has rendered a valuable service to the early history of private international law and at the same time thrown a much needed light upon some obscure legal pages of the thirteenth and fourteenth centuries. As the author pointedly remarks, the sovereignty of the feudal lord need not in every case result in an exclusive enforcement of the *lex fori*: indeed, in France as distinguished from the Netherlands, questions of feudal law were notoriously decided pursuant to the *lex loci rei sitae,* the law of the *fief servant* being recognized in the court of the *fief dominant.* Nor does the theory outlined above take account of the influence which the great feudal courts, the Parliament of Paris, the Exchequer of Normandy, and the Council of Flanders, each dealing with cases often involving the laws of diverse jurisdictions, exercised

in the formulation of the customary law in a time before the vogue of the Italian school.

Not the least commendable feature of the study before us is that the larger portion is given over to an examination of the available records of decisions rendered in these three courts during the thirteenth and fourteenth centuries. The result is anything but encouraging to the theory that the reality of customs in France had its origin in a separatist enforcement of the *lex fori*. Except in the case of procedure which, conformably to modern ideas, was regulated by the *usus fori*, the ruling conception would instead appear to have been that of a community of legal systems which within its scope recognized the validity of foreign competence and foreign judgment. Thus, a principle underlying the criminal law was the right of the accused, save in special jurisdictions and in special cases, to be tried by his personal judge: the rule was rendered effective through the coöperation of the courts in delivering the accused to the appropriate tribunal. Again, cases involving contracts were not decided typically according to the *lex fori*, but rather according to the system of law which the whole tenor of the agreement indicated. So too, such of the law of persons and of the family as had not been absorbed by the Canon law, was determined by the allegiance and not the forum. And in those branches of law of the land which were peculiarly affected by the feudal régime, the law of immovables, of inheritance, of dower and dowry, the principle of reality was recognized from the earliest times for which records are available; the *consuetudo terrae* prevailed over the *lex fori*, in case the two diverged. Throughout, the reciprocal recognition and enforcement of judgments rendered in a competent court was the practice.

Whence, then, did the *consuetudo terrae*, the reality of customs, derive? The assumed absolute sovereignty of the feudal unit, jealous of its jurisdiction, is obviously an inadequate explanation. The origin of the principle is attributed by Professor Meijers to the wide extension of feudal tenures, free and unfree, and the eventual attachment of the conditions under which they were granted in the feudal contract to the holdings themselves. The result was a customary law applying to the estates within certain districts. And, despite its obvious advantages, the law of the landlord's court gave way to the law of the district largely for reasons of a political nature. Upon the reversion of large feudal holdings to the crown in the thirteenth century, it was to the royal interest to preserve the local law rather than that of the extinguished feudal court: the existence of a confusing system of jurisdictional *enclaves* and the common severance of fief and justice almost necessitated the simple recognition of the *lex terrae;* and finally, in several celebrated disputes as to succession in the fourteenth century, precedents were established, largely for reasons of state, in favor of the law of the servient estate. (See pp. 68, 69.) That the *consuetudo terrae* was finally able to dominate the entire law of the land is explained by the fact that the wide extension of the feudal system of tenures left scarcely no land untouched. Whereas, in the case of moveables, to which the feudal rules were hardly applicable, the law of the place of residence or of citizenship maintained the ground.

These conclusions are rather strikingly affirmed by the situation in the Netherlands. There the absence of an effective central authority and the decay of the smaller jurisdictions permitted the emergence of independent local units, each following its own legal devices. The consequence was largely to prevent the growth of any general coöperation between the courts of the different cities and districts and to encourage an almost universal preference for the *lex fori*. Characteristically, in cases involving immoveables, this led to the adoption of the *lex loci rei sitae* where it coincided with the *lex fori*, but in the law of inheritance, which in France was decided by the *consuetudo terrae*, the law of the place in which the deceased was a resident or citizen obtained, irrespective of the location of his holdings.

In short, the legal unity fostered in France by the feudal régime, made for the recognition of a non-personal territorial law of the land, whilst in the Netherlands the comparative impotence of such feudal organization as existed, permitted a rampant separatism in which the *lex fori* flourished. Hence, one surmises, the later divergence between Dumoulin and Huber.

The latter pages of the monograph summarize the views touching upon the conflict of customs, which are given by the contemporary French civilians, Jacobus de Ravanis, Petrus de Bella Pertica, Gulielmus de Cuneo, Petrus Jacobi, and Johannes Faber. All follow more or less faithfully the practice of the courts, although Petrus de Bella Pertica and Gulielmus de Cuneo attempt to limit the principle of reality by introducing the famous distinction between *statuta realia* and *statuta personalia*. The inference is suggestive; the striking parallelism of the teachings of the commentators upon the Corpus with the prevailing practice leads to the not unjustifiable suspicion that perhaps the jurisprudence rendered in the courts warped the views of the civilians quite as much as their exposition of legal principles influenced the course of justice. The possibility is not without its significance to the history of private international law, for at least three of the masters of Bartolus, to whom he was largely indebted, drew in turn upon their French contemporaries.

A valuable appendix makes available the texts in which these five writers treat of the conflict of laws, as well as the more significant decisions of the Exchequer of Normandy, the Parlement of Paris, and the Council of Flanders.

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AMERICAN LAW OF CHARTER PARTIES AND OCEAN BILLS OF LADING, by Wharton Poor of the New York Bar. Albany, Matthew Bender & Company, 1920, pp. x, 273.

In these days of prolix legal compilations, buried in avalances of undigested citations, this is indeed a rare book. In five short chapters and 146 small pages the author confines his discussion. He adds appendices on the Harter Act, Federal Bill of Lading Act, Time Charter, Rate Charter, for grain, coal, and sailing vessel, and Bill of Lading. The plan of the work is as simple as the fulfillment is brief. He follows "clause by clause the well

known documents in everyday use by shipping men,—time charters, rate charters, ocean bills of lading, including that most important statute, the Harter Act." He cites a few English cases, but for the most part is able to confine citations to cases from the Federal Reporter or Federal Cases, with an occasional decision from the United States Supreme Court.

The author is fortunate in having a very narrow field to cover, in a subject in which all cases are tried before the Federal courts. He has made a very convenient handbook, containing a condensed statement of the leading problems involved in ocean shipping. The admiralty lawyer will, doubtless, be glad to have such a book on American law.

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