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THE COMITY DOCTRINE†

*Hessel E. Yntema**

INTRODUCTION

*Kurt H. Nadelmann***

Hessel Yntema's Essay on the Comity Doctrine, published in a *Festschrift* in Europe, deals with the origin and the meaning—or meanings—of a doctrine which has had a truly extraordinary impact on American conflicts law. For this reason and because of the stature of the author, the Essay is entitled to a special place in our literature on the Conflict of Laws. The *Michigan Law Review* has decided, as a memorial to the great Michigan Scholar,¹ to reprint the Essay so that it may be more easily accessible.

Written for other purposes, the Essay does not discuss the place which the comity doctrine has occupied in American conflicts law. At the suggestion of the Editors, a short account of the historic travels of the comity doctrine is given as an introduction to the "domestication" of the Yntema Essay.

I

The Yntema Essay traces the origins of the comity doctrine to the writings of a group of Dutch jurists which appeared in the latter part of the seventeenth century. At that time, Scottish youth normally completed their academic education at the great universities in the Netherlands, so that the teachings of the Dutch jurists were known in Scotland. Eventually their works passed into the Scottish law libraries. The Reports of Scottish Decisions indicate that the Scottish Bar used the works of the Voets and Huber in their argu-

† Reprinted with permission from 2 VOM DEUTSCHEN ZUM EUROPÄISCHEN RECHT, FESTSCHRIFT FÜR HANS DÖLLE 65 (von Caemmerer, Nikisch, and Zweigert eds., 1962).—Ed.

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1. On Hessel E. Yntema (1891—1966), see *Memorial Resolution by Law School Faculty*, 64 MICH. L. REV. 977 (1966). A biography and list of publications are found in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW—LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 533, 535-44 (Nadelmann, von Mehren, and Hazard eds., 1961).

ments in conflicts cases during the first part of the eighteenth century.²

The Scottish familiarity with the continental conflicts theories led to the eventual use of these theories in the courts in Westminster. Scottish appeals were heard in the House of Lords, and Scottish-trained lawyers were among the members of the Inns of Court. The comity doctrine of Huber made its entrance in the grand style. In *Robinson v. Bland*,³ argued in 1760 before Lord Mansfield, the issue was the legal status of a gambling debt won in France, valid under French law but invalid under English law. After an inconclusive argument, Lord Mansfield called attention to a distinction made between local and personal statutes.⁴ The reargument was by a new pair of lawyers. One, the Scottish-born and Scottish-trained Alexander Wedderburn—later Lord Loughborough—supported his presentation with references to Johannes Voet, Huber, Grotius, and Dumoulin.⁵ Lord Mansfield, quoting a passage in Huber's *De Conflictu Legum*, rested his decision on views held by Huber.⁶ He also espoused Huber's view that a certain general principle of conflicts law to which he referred was established *ex comitate et jure gentium*.⁷ Lord Mansfield continued to refer to Huber in conflicts cases.⁸

The comity doctrine traveled across the Atlantic later in the eighteenth century. *Robinson v. Bland* must have been known to the American Bar even before independence. The Law Reports were held in the Chambers, and many a lawyer was a member of the Inns of Court.⁹ Furthermore, a decision by Lord Mansfield was not likely to be overlooked. Judging from the available early Reports, Huber was quoted in the American courts at least from 1788.¹⁰ Indeed, references to *Robinson v. Bland*, or Huber, or both, are found in all conflicts decisions of the period.¹¹ The text of Huber's *De*

2. See Anton, *The Introduction in the English Practice of Continental Theories on the Conflict of Laws*, 5 INT'L & COMP. L.Q. 534 (1956).

3. 1 W.B.L. 234, 256, 96 Eng. Rep. 120, 141, 2 Burr. 1077, 97 Eng. Rep. 717 (K.B. 1760).

4. 1 W.B.L. 234 at 246, 96 Eng. Rep. at 134.

5. *Id.* at 257, 96 Eng. Rep. at 141.

6. *Id.* at 259, 96 Eng. Rep. at 142, 2 Burr. 1077, 97 Eng. Rep. at 718.

7. *Id.* at 256, 96 Eng. Rep. at 140.

8. See Davies, *The Influence of Huber's De Conflictu Legum on English Private International Law*, 18 BRIT. YB. INT'L L. 49, 54 (1937).

9. See AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM* 67 (1940); 2 CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 3 (1965); WARREN, *HISTORY OF THE AMERICAN BAR* 188 (1911).

10. *Camp v. Lockwood*, 1 Dall. 393, 398 (Phila. County, Pa. C.P. 1788).

11. See Nadelmann, *Some Historical Notes on the Doctrinal Sources of American Conflicts Law*, in *JUS ET LEX—FESTGABE FÜR MAX GUTZWILLER* 263, 265 (Basel, 1959).

Conflictu Legum must have been available. In a case before the Supreme Court of the United States in 1797, Alexander J. Dallas added a translation of the entire Huber sketch in a note to the report of the case.¹² With this, the comity doctrine in the Huber version became part of the American law on conflicts. In 1799, Justice Bushrod Washington opened an opinion on circuit with a recital of Huber's three maxims.¹³ Story referred to Huber in his first conflicts case on circuit in 1812.¹⁴ Chancellor Kent had done so as early as 1801,¹⁵ and, in 1820, he characterized Huber's Essay as "everywhere received as containing a doctrine of universal law."¹⁶ *Ogden v. Saunders*,¹⁷ decided in 1827, contained the first reference to Huber in a United States Supreme Court decision.¹⁸ When Story's *Commentaries on the Conflict of Laws* appeared in 1834, the author's choice of the comity doctrine as the theoretical basis for his treatment of the subject could not have come as a surprise to anyone.

Yet both the comity doctrine and Huber had already been subject to criticism. In Louisiana, the courts had to handle quite a number of conflicts cases. The local Bar relied on the distinction made by the Civilians between real statutes, which are of merely local effect, and personal statutes, which go with the person and must be recognized everywhere. In 1827, in the famous case of *Saul v. His Creditors*,¹⁹ the Louisiana Supreme Court refused to adopt the approach of the statutists. In an often-quoted opinion, Justice Porter declared that such a classification of the statutes was unmanageable, as was evidenced by the disagreements among the authors on classification, and that the attribution of binding effect to personal statutes was unacceptable. Instead, the comity doctrine was given the court's blessing.²⁰ The losing counsel in the case was Samuel Livermore, a New England lawyer who had become a prominent member of the Louisiana Bar. Using the materials collected in his brief, Livermore published a little book in 1828, *Dissertations Which Arise from the Contrariety of the Positive Laws of Different States and Nations*, the first American text on Conflicts.²¹ The text

12. *Emory v. Grenough*, 3 U.S. (3 Dall.) 368, 369 n.(a) (1797). The sketch sets forth three maxims and gives about a dozen illustrations with references to decisions.

13. *Banks v. Greenleaf*, 2 Fed. Cas. 756 (No. 959) (C.C.D. Va. 1799).

14. *Van Reimsdyk v. Kane*, 28 Fed. Cas. 1062, 1063 (No. 16871) (C.C.D.R.I. 1812).

15. *Van Scheick v. Edwards*, 2 Johns. Cas. 355, 364-66 (N.Y. 1801).

16. *Holmes v. Remsen*, 4 Johns. Ch. Rep. 460, 469 (N.Y. 1820).

17. 25 U.S. (12 Wheat.) 212 (1827).

18. *Id.* at 360 (opinion of Johnson, J.).

19. 5 Martin (N.S.) 569 (La. 1827), reprinted in 4 PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW, PRIVATE INTERNATIONAL LAW OR COMITY 809 (1879 ed.).

20. *Id.* at 596, 4 PHILLIMORE *op. cit. supra* note 19, at 820-21.

21. See De Nova, *The First American Book on Conflict of Laws*, 8 AM. J. LEGAL HIST. 136 (1964); *cf.* Nadelmann, *supra* note 11, at 269.

explained the theory of the statistists and listed the leading authorities, including Rodenburg and the two Voets.²² The prominence given the comity theory in English and American decisions was declared unmerited and Huber was described as a writer without recognized standing.²³ For Livermore, the imputation of the application of foreign law in some instances to the "comity of nations" was "grating to the ear when it proceeds from a court of justice."²⁴ The *Dissertations* received a favorable review in the *American Jurist and Law Magazine*,²⁵ and the passages containing the attack on Huber and the comity doctrine were quoted with approval.²⁶ The quotation was followed by a rationalization by the unidentified reviewer: "[F]oreign laws are respected and adopted by our courts because they do in effect, in certain cases, become for the occasion a part of our laws."²⁷ This language is reminiscent of the local law theories of the 1920's.²⁸

Joseph Story remained undisturbed by the criticisms addressed to the comity theory. The *Commentaries*, it will be remembered, start with a presentation of the three Huber maxims.²⁹ Story conceded that "for its generality, the theory leaves behind many grave questions as to its application," but he deemed the theory commendable "in point of truth as well as simplicity."³⁰ Story continued:

The true foundation on which the administration of international law must rest is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a spirit of moral necessity to do justice, in order that justice may be done to us in return.³¹

Story's espousal in the classic *Commentaries*³² of Huber's comity

22. LIVERMORE, *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS* 8 (1828).

23. *Id.* at 12-13.

24. LIVERMORE, *op. cit. supra* note 22, at 27.

25. 1 AM. JURIST 132 (1829).

26. *Id.* at 139.

27. *Id.* at 140.

28. See Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950).

29. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC* § 33, at 33 (1834) (ch. II: "General Maxims of International Jurisprudence").

30. *Id.* § 35, at 37.

31. *Id.* § 35, at 34; cf. Gutzwiller, *Le Développement Historique du Droit International Privé*, 29 HAGUE ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 291, 327, 353 (1929).

32. See Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934); Nadelmann, *Joseph Story's Contribution to American Conflicts Law—A Comment*, 5 AM. J. LEGAL HIST. 230 (1961).

doctrine as an explanation of the application of foreign law in proper cases resulted in a further spread of the comity doctrine. Acceptance of the *Commentaries* in England was immediate. A reprint was soon published in Edinburgh. On the continent, Jean Jacques Gaspar Foelix adopted Story's doctrinal approach for his *Traité de Droit International Privé*, which was first published in 1843, was printed in several editions, and was translated into both Spanish and Italian.³³ A leading authority on Savigny has stressed that the Huber-Story internationalism greatly influenced Savigny,³⁴ whose own treatise, published in 1849 and available in French in 1851, was to dominate conflicts thinking in the civil law world for a long time.

In the Netherlands, interest in the Dutch school which originated the comity doctrine in the seventeenth century did not revive until the end of the nineteenth century.³⁵ Edward Maurits Meijers, the great Dutch scholar and historian, gave proper credit to the influence of the Dutch school in his Lectures on the "History of the Basic Principles of Conflicts Law" at the Hague Academy in 1934.³⁶ Since then, Professor Kollewijn's authoritative *History of Dutch Private International Law*³⁷ has appeared, unfortunately available only in Dutch.

Of the original works, aside from Huber's sketch,³⁸ the rare tract by Paul Voet is available in reprint form.³⁹ English translations of other basic works have been added⁴⁰ to the many translations of the

33. First published in Foelix' *Revue Étrangère* beginning December, 1839; last (4th) edition, by Demangeat, in 1866; Spanish translation in 1858; Italian in 1870. On Foelix and Story see Nadelmann, *De l'Organisation et de la Juridiction des Cours de Justice, aux Etats-Unis d'Amérique*, 30 B.U.L. REV. 382-85 (1950).

34. See GUTZWILLER, DER EINFLUSS SAVIGNYS AUF DIE ENTWICKLUNG DES INTERNATIONALEN PRIVATRECHTS 110 (Freiburg, Switzerland 1923).

35. See SUIJLING, DE STATUTENTHEORIE IN NEDERLAND (Utrecht thesis 1893).

36. Meijers, *L'Histoire des Principes Fondamentaux du Droit International Privé*, 49 HAGUE ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 543, 633-72 (1934); cf. VAN APeldoorn, INLEIDING TOT DE STUDIE VAN HET NEDERLANDSCHE RECHT 232 (15th ed. 1963).

37. Kollewijn, *Geschiedenis van de Nederlandsche Wetenschap van het Internationaal Privaatrecht tot 1880*, in GESCHIEDENIS DER NEDERLANDSCHE RECHTSWETENSCHAP 1, 52-161 (Amsterdam 1937). See also Dubbink, in KOSTERS & DUBBINK, ALGEMEENE DEEL VAN HET NEDERLANDSE INTERNATIONAAL PRIVAATRECHT 35 (1962); de Winter, Book Review, 1963 RECHTSGELEERD MAGAZIJN THEMIS 557, 560.

38. Reprints of Huber's *De Conflictu Legum* are found in SAVIGNY, PRIVATE INTERNATIONAL LAW 508 (Guthrie transl. 2d ed., Edinburgh, 1880); 8 ZEITSCHRIFT FÜR INTERNATIONALES PRIVAT- UND STRAFRECHT 192 (1898) (Fr. Meili); 13 ILL. L. REV. 401 (1919) (Lorenzen); 18 BRIT. YB. INT'L L. 64 (1937) (Davies).

39. Reprint of Paul Voet's *De Statutis Eorumque Concursu* in SAVIGNY, *op. cit. supra* note 38, at 462.

40. The passage on conflicts in Huber's *Heedendaegse Rechtsgeleerthyt* may be found in 1 HUBER, THE JURISPRUDENCE OF MY TIME 11-17 (Percival Gane transl., Durban 1939). Johannes Voet's *De Statutis* may be found in 1 THE SELECTIVE VOET; BEING THE COMMENTARY ON THE PANDECTS [PARIS EDITION OF 1829] AND THE SUPPLEMENT

Huber sketch.⁴¹ All of these translations were made in South Africa, where the Roman-Dutch law is still applied. At present, the world literature dealing with the comity doctrine, the influence of which is still felt in the United States,⁴² continues to grow. Notwithstanding attacks from both the right and the left, the "comity" approach has kept its appeal in a field where doctrines are known for their poor chances of survival. Hessel Yntema's Essay is the most recent—and a particularly valuable—addition to the literature.

II

The reasons which led Hessel Yntema to his own investigation of the origin of the comity doctrine are not difficult to imagine. Critics of the theory have taken advantage of the many meanings which can be attributed to *ex comitate*, especially if it is translated as "for reasons of comity." "Comity" is ridiculed easily by both dilettante and not so dilettante opponents. Especially when he happens to be of Dutch (Frisian) descent and proud of this ancestry, a scholar of the Yntema brand does not remain insensitive to this sort of attack, which is aimed, in fact, at fundamentals.

In his first Cooley Lecture, "The Historic Bases of Private International Law,"⁴³ Hessel Yntema had made clear his stand with the "Internationalists." The new wave of territorialist argument which mounted in the 1950's added impetus to Yntema's long-held plan to examine the sources of the comity doctrine. Retirement from teaching brought more time for research. It is easily discernible from the Essay that the results of this investigation, especially the examination of the work of the "fellow-Frisian" Huber, satisfied Professor Yntema greatly.

Even before the Essay appeared in the *Festschrift*, the author took advantage of an opportunity to report to an American audience on his findings. This was in April, 1963, before the American Foreign Law Association, which had invited its Honorary Member

TO THAT WORK BY JOHANNES VAN DER LINDEN 97-120 (Percival Gane transl., Durban 1955).

41. 3 U.S. (3 Dall.) 369 (1797); 13 ILL. L. REV. 375, 401 (1919) (with analysis by Lorenzen) (reprinted in LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 136, 162 (1947)); 18 BRIT. YB. INT'L L. 49, 64 (1937) (with analysis by Davies). A translation into Portuguese appeared in Rio de Janeiro in 1959 (diligence of Dr. Haroldo Valladao).

42. The internationalist approach with a safety valve apparently has special appeal to the American mind.

43. 2 AM. J. COMP. L. 297 (1953), reprinted in *SELECTED READINGS ON CONFLICT OF LAWS* 30 (Kulp ed. 1956). See also Yntema, *Dicey: An American Comment*, 4 INT'L L.Q. 1, 4 (1951); Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 723 (1957).

to address its Annual Meeting. The second part of his paper, "Basic Issues in Conflicts Law," which later appeared in the *American Journal of Comparative Law*,⁴⁴ itself one of Professor Yntema's creations, summarizes the findings of the origins of the comity doctrine and closes with observations on the relevance of the findings for contemporary conflicts thinking. On this occasion, reproduction of his observations seems to be fitting.

[I]t may be observed that the works since 1700 which have had the widest and most lasting influence have followed the basic ideas in Huber's conception: the postulate of territorial sovereignty, extra-territorial recognition of the effects of laws on principles defined by a common law derived from practice, and the exception on the ground of prejudice to local interests. Despite this, in the current scene, various factors favor notions related to that of comity, which in the end negate the existence or even the possibility of a rule of law governing international transactions, except as defined by the municipal law of each territorial state. The conception of an international community of law, such as Story and Savigny looked to develop, has well-nigh vanished as a result of the multiplication of legal materials, to some extent codified, in each country. . . .

This trend has been accentuated, especially, in this country, by the theories that came in vogue concerning the nature of law and of judicial process. As a result of the vast extension of legislation and administrative regulation as the chief instruments of modern government, law tends to be conceived in terms of authoritative prescriptions dictated on grounds of expediency in the national interest, and it is assumed that such prescriptions, including those in the Constitution, and the interstitial customary principles, are what the Courts say they are. The logical conclusion of this pragmatic doctrine is the local law theory, that there is no law but that of the territorial sovereign. This of course is a truism, which does not answer in the specific case of conflict of laws what law should be applied. In consequence, certain palliatives are offered, some of which seem worse than the original premise: that conflicts of laws are areas of no law, which must be resolved in each instance on equitable or policy grounds by the courts; or that they should be decided by a calculus of governmental interests, a vague and perverse idea, suggesting that laws are made for bureaucracy; or most recently that, discarding experience, we should start all over again with the *lex fori* as the premise for the elaboration of new rules for the emerging world.

As this suggests, the difference between the two doctrines of conflicts law in the Netherlands in the Seventeenth Century, to which attention has been invited, is a problem of current concern. The intellectual descendants of Grotius and Huber dispute with the

44. 12 AM. J. COMP. L. 474 (1963).

spiritual progeny of Hobbes and Voet whether the customs of international trade can be a source of law, and there is a call for transnational law or general principles of justice to resolve the disputes arising in the commerce of public agencies and individuals from different countries, or in other words to revive the conception of the *ius gentium* in this area of international relations. From this viewpoint, the conceptions originally developed in the Netherlands to reconcile the needs of commerce with the principle of territorial sovereignty are of interest.⁴⁵

45. *Id.* at 482.