



COMMENTARIES  
ON THE  
CONFLICT OF LAWS,  
FOREIGN AND DOMESTIC,  
IN REGARD TO  
CONTRACTS, RIGHTS, AND REMEDIES,  
AND ESPECIALLY IN REGARD TO  
MARRIAGES, DIVORCES,  
WILLS, SUCCESSIONS,  
AND JUDGMENTS



JOSEPH STORY

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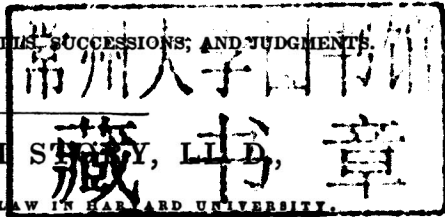
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BY JOSEPH STORY, LL.D.

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.



"Il régnera donc toujours entre les nations une contrariété perpétuelle de loix ; peut-être régnera-t-elle perpétuellement entre nous sur bien des objets. Delà la nécessité de s'instruire des règles, et des principes, qui peuvent nous conduire dans la décision des questions, que cette variété peut faire naître."

*Boullenois, Traité de la Personnalité, &c. des Loix, Préface.*

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T O T H E

HONORABLE JAMES KENT, LL. D.

SIR,

IT affords me very sincere satisfaction to have the opportunity of dedicating this work to you. It belongs to a branch of international jurisprudence, which has been long familiar to your studies, and in which you have the honor of having been the guide and instructor of the American youth. I can trace back to your early labours in expounding the civil and the foreign law the motive and encouragement of my own far more limited researches. I wish the present work to be considered as a tribute of respect to a distinguished Master from his grateful pupil.

It is now about thirty-six years since you began your judicial career on the Bench of the Supreme Court of the State of New York. In the intervening period between that time and the present, you have successively occupied the offices of Chief Justice and of Chancellor of the same State. I speak but the common voice of the Profession and the public, when I say, that in each of these stations you have brought to its duties a maturity of judgment, a depth of learning, a fidelity of purpose, and an enthusiasm for justice, which have laid the solid foundations of an imperishable fame. In the full vigor of your intellectual powers, you left the Bench only to engage in a new task, which of itself seemed to demand by its extent and magnitude a whole life of strenuous diligence. That task has been accomplished. The "Commentaries on American Law" have already acquired the reputation of a juridical Classic, and have placed their author in the first rank of the benefactors of the Profession. You have done for America, what Mr. Justice Blackstone in his invaluable Commentaries has done

for England. You have embodied the principles of our law in pages as attractive by the persuasive elegance of their style, as they are instructive by the fulness and accuracy of their learning.

You have earned the fairest title to the repose, which you now seek, and which at last seems within your reach. It is, in the noblest sense, *otium cum dignitate*. May you live many years to enjoy it! The consciousness of a life, like yours, in which have been blended at every step public spirit and private virtue, the affections, which cheer, and the taste, which adorns the domestic circle, cannot but make the recollections of the past sweet, and the hopes of the future animating.

I am, with the highest respect,

Your obliged friend,

JOSEPH STORY.

Cambridge, Massachusetts,  
January 1, 1834.

## PREFACE.

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I now submit to the indulgent consideration of the profession and the public another portion of the labours appertaining to the Dane Professorship of Law in Harvard University. The subject is one of great importance and interest ; and from the increasing intercourse between foreign States, as well as between the different States of the American Union, it is daily brought home more and more to the ordinary business and pursuits of human life. The difficulty of treating such a subject in a manner suited to its importance and interest can scarcely be exaggerated. The materials are loose and scattered, and are to be gathered from many sources, not only uninviting, but absolutely repulsive, to the mere Student of the Common Law. There exists no treatise upon it in the English language ; and not the slightest effort has been made, except by Mr. Chancellor Kent, to arrange in any general order even the more familiar maxims of the Common Law in regard to it. Until a comparatively recent period, neither the English Lawyers, nor the English Judges seem to have had their attention drawn towards it, as a great branch of international jurisprudence, which they were required to administer. And, as far as their researches appear as yet to have gone, they are less profound and satisfactory, than their admirable expositions of municipal law.

The subject has been discussed with much more fulness, learning, and ability by the foreign Jurists of continental Europe. But even among them there exists no systematical Treatise embracing all the general topics. For the most part, they have discussed it only with reference to some few branches of jurisprudence, peculiar to the civil law, or to the customary law



(almost infinitely varied) of the neighbouring States of Europe, or of the different Provinces of the same Empire. And it must be confessed, that their writings are often of so controversial a character, and abound with so many nice distinctions (not very intelligible to Jurists of the school of the Common Law) and with so many theories of doubtful utility, that it is not always easy to extract from them such principles, as may afford safe guides to the judgment. Rodenburg, Boullenois, Bouhier, and Froland have written upon it with the most clearness, compréhensiveness, and acuteness. But they rather stimulate than satisfy inquiry ; and they are far more elaborate in detecting the errors of others, than in widening and deepening the foundations of the practical doctrines of international jurisprudence. I am not aware, that the works of these eminent Jurists have been cited at the English Bar ; and I should draw the conclusion, that they are in a great measure, if not altogether, unknown to the studies of Westminster Hall. How it should happen, that, in this age, English Lawyers should be so utterly indifferent to all foreign jurisprudence, it is not easy to conceive. Many occasions are constantly occurring, in which they would derive essential assistance from it, to illustrate the questions, which are brought into contestation in all their Courts.

In consulting the foreign Jurists, I have felt great embarrassment, as well from my own imperfect knowledge of the jurisprudence, which they profess to discuss, as from the remote analogies, which it sometimes bears to the rights, titles, and remedies recognised in the Common Law. To give their opinions at large upon many topics would fill volumes ; to omit all statements whatever of their opinions would be to withhold from the reader many most important lights, to guide his own studies, and instruct his own judgment. I have adopted an intermediate course ; and have laid before the reader such portions of the opinions and reasonings of foreign Jurists, as seemed to me most useful to enable him to understand their doctrines and principles, and to assist him with the means of making more ample researches, if his leisure or his curiosity should invite him to the pursuit. Hum-

ble as this task may appear to many minds, it has been attended with a labour truly discouraging and exhausting. I dare not even now indulge the belief, that my success has been at all proportionate to my wishes or my efforts. I feel, however, cheered by the reflection (is it a vain illusion?), that other minds, of more ability, leisure, and learning, may be excited to explore the paths, which I have ventured only to point out. I beg, in conclusion, to address to the candour of the Profession my own apology in the language of Strykius;—*“Crescit disputatio nostra sub manibus; unum enim si absolveris jus, plura se offerunt considerata. At nos temporis, quod nimis breve nobis fit, rationem habentes, accuratius illa inquirere haud possumus. Hinc sufficerit, in presens sparsisse quædam saltem adhuc jura, quidque de iis statuamus, vel obiter dixisse.”* \*

JOSEPH STORY.

Cambridge, Massachusetts,  
January, 1, 1834.

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\* Strykii Disputatio 1. ch. 2. § 92. Tom. II. p. 24.

## LIST OF AUTHORS CITED.

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THE following list of some of the more important Authors, whose works have been cited, may assist the student in his researches.

D'AGUESSEAU, HENRY FRANCIS, Chancellor of France, born at Limoges, 1668, and died 1751. His works are collected and published in 13 vols. 4to.

ALEXANDER AB ALEXANDRO, a Neapolitan lawyer, born 1461, and died at Rome about the age of 62.

D'ARGENTRÉ, BERTRAND, President of the *Présidial* of Rennes, born in 1519, and died in 1590. His works are entitled *Commentarii in Patrias Britonum Leges, seu Consuetudines generales Ducatus Britanniae*.

BALDUS, UBALDUS, born about 1324, died 1400. His works are comprised in 4 vols. fol.

BARTOLO, or BARTHOLUS, born at Sasso Ferrato, in the March of Ancona, 1313, and died in his 46th year. He was called "the star and luminary of lawyers, the master of truth, the lantern of equity, the guide of the blind," &c. His works were printed at Venice, 1499, in 4 vols. fol., according to Camus; in 1599 in 10 or 11 vols. fol., according to Watt.

BOUHIER, J., President of the Parliament of Dijon, born at that place, 1673, and died 1746. His works, relating to the present subject, are published in two vols. fol., and entitled, *Les Coutumes du Duché de Bourgogne, avec les Observations du Président Bouhier*.

BOULLENOIS, LOUIS, advocate in the Parliament of Paris, born at Paris, 1680, and died 1762. There are two works by him, on the present subject; *Traité de la Personnalité et de la Réalité des Loix, Coutumes, Statuts, par forme d'Observations*, in 2 vols. 4to., and *Dissertations sur des Questions, qui naissent de la Contrariété des Loix et des Coutumes*. 4to. This last was published first, and is the original outline of the larger work, which afterwards appeared.

- BRETONNIER, BARTHOLEMEW JOSEPH, advocate of the Parliament of Paris, born at Montrotier, near Lyons, 1656, and died 1727. He is the author of a work in 2 vols. 12mo., entitled *Recueil des principales Questions de Droit qui se jugent différemment dans les différens Tribunaux du Royaume, avec des Réflexions pour concilier la Diversité de la Jurisprudence*. He also edited the works of HENRYS.
- BURGUNDUS, BURGUNDIUS, or BOURGOIGNE, NICOLAUS, jurisconsult, born at Enghien in Hainault, 1586. He is the author of a work, entitled, *Tractatus Controversiarum ad Consuetudinem Flandriæ*.
- BYNKERSHOEK, CORNELIUS VAN, born at Middlebourg, 1673, and died 1743. His works are well known.
- CASAREGIS, JOSEPH LAURENTIUS DE, born at Genoa, 1670, and died 1737. His works are entitled, *Discursus legales de Commercio*, and are published in 2, 3, and 4 vols. fol.
- CHRISTINÆUS, PAULUS, born at Malines, 1533, and died 1638. His works are, *Practicarum Quæstionum Rerumque in Supremis Belgarum Curiis actarum et Observationum Decisiones*; and *Commentarii in Leges Municipales Mechlinienses*.
- COCHIN, HENRY, advocate in Parliament, born at Paris, 1687, and died 1747. His works are collected in 6 vols. 4to.
- COQUILLE, GUI, advocate of the Parliament of Paris, born at Decise in Nivernois, 1523, and died 1603. There is a work by him, *Des Coutumes des Nivernois*.
- CUJAS, JAMES, born at Thoulouse, 1520, and died 1590. His voluminous works need not be particularly mentioned.
- DENISART, J. B., jurisconsult, born 1712, and died 1765. He published *Collection de Décisions nouvelles relatives à la Jurisprudence*.
- DOMAT, JOHN, born at Clermont in Auvergne, 1625, and died 1696. His *Civil Law in its Natural Order* is well known through the translation of Dr. Strahan.
- DUMOULIN, (in Latin, MOLINÆUS,) CHARLES, born 1500 and died 1560. What he has written upon the present subject is to be found in his Commentary on the first book of the Code, verb. *Conclusiones de Statutis*, in his 53d *Consilium*, and in his notes on *Alexander, Decius*, and *Chasseneuz*.
- DURANTON, A., Professor of Law at Paris. His works are, *Cours de Droit Français, suivant le Code civil*, in 16 vols. 8vo.
- ÉMÉRIGON, BALTAZARD MARIE, advocate of the Parliament of Aix, born about 1725 and died 1784. His *Traité des Assurances*, 2 vols. 4to. is referred to in the present Commentaries.

- ERSKINE, JOHN, Professor of Law at Edinburgh. His principal work is entitled *Institutes of the Laws of Scotland*.
- EVERHARD, NICHOLAS, born in the island of Walcheren, 1462, and died 1532. His works are *Topica Juris, sive Loci Argumentorum Legales*; and *Consilia, sive Responsa Juris*.
- FROLAND, LOUIS, advocate of the Parliament of Rouen, died 1746. His works, relating to the present subject, in two 4to. vols., are entitled, *Mémoire concernant la Nature et la Qualité des Statuts*.
- GAILL, ANDREW, born at Cologne, 1525, and died 1587. He was called the Papinian of Germany.
- GROTIUS, HUGO, born at Delft, 1583, and died 1645. His works are well known.
- HEINECCIUS, JOHANNES GOTLEIB, Professor of Philosophy and Law at Halle, born at Eisenburg, 1681, and died 1741. His works need not be particularly mentioned.
- HENRYS, CLAUDE, juriconsult, born at Montbrison, 1615, and died 1662. His works are collected in four vols. fol.
- HERTIUS, JOHANNES NICOLAUS, born near Giessen, 1651, and died 1710. His treatise, *De Collisione Legum* is to be found in his select works in two vols. 4to.
- HUBERUS, ULRICUS, a lawyer, historian, and philologer, born at Dockum, in the Dutch territories, 1635, and died 1694. His treatise *De Conflictu Legum* is to be found in his *Prælectiones Juris Civilis*, 3 vols. 4to.
- KAIMS, LORD, (HENRY HOME,) born at Kaims, in Berwickshire, 1696, and died 1782. The reader is referred to his *Principles of Equity*.
- LE BRUN, DENIS, advocate, died 1708, before the publication of his principal work, *Traité de Communautés*.
- LEEUWEN, SIMON VAN, born at Leyden, 1625, and died 1682. His work referred to, in the present Commentaries, is translated into English, with the title of *Commentaries on the Roman-Dutch Law*.
- LIVERMORE, SAMUEL, of New Orleans, died, 1833. He is the author of *Dissertations on the Contrariety of Laws*.
- MASCARDUS, JOSEPHUS, an ecclesiastic and Italian juriconsult, born at Sarzana towards the end of the 16th century, and died about 1630. He is the author of an extensive work, entitled, *De Probationibus Conclusiones*.
- MERLIN, M. (de DOUAI.) His voluminous works are entitled, *Répertoire Universel et Raisonné de Jurisprudence*; and *Questions de Droit*.

- MORNAC, ANTOINE, born near Tours, first appeared before the Parliament of Paris in 1580; and died 1620. His works are comprised in 4 vols. fol.
- PARDESSUS, J. M. *Cours de Droit Commercial*. 5 vols. 8vo. Paris. 1831.
- POTHIER, ROBERT JOSEPH, born at Orleans, 1699, and died 1772. His works need not be particularly mentioned.
- PECK, PETER, born at Zirckzee, in Zealand, 1529, and died 1589. His works are collected in one vol. fol.
- PUFFENDORF, SAMUEL, born in Upper Saxony, 1632; and died 1694. His works are well known.
- RODEMBURG, was a judge of the Supreme Court of Utrecht and flourished about the middle of the 17th century. His treatise, *De Jure quod oritur ex Statutorum vel Consuetudinum Diversitate*, is to be found at the end of Boullenois's *Traité de la Personnalité et de la Réalité des Loix*.
- STOCKMANS, PETER, born at Antwerp, 1608, and died 1671. His works are comprised in one vol. 4to.
- STRYKIUS, SAMUEL, born 1640, and died 1710. His son, JOHN SAMUEL, was born 1668, and died 1715. Their works, with those of RHETIUS, are collected in 14 vols. fol.
- VOET, PAUL, (the father,) born at Heusden, in Brabant, 1619, and died 1677. His work on the present subject is entitled, *De Statutis et eorum Concursu*.
- VOET, JOHN, son of Paul, born at Utrecht, 1647, and died 1714. His Commentary on the Pandects contains a short chapter, *de Statutis*.

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