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# **THE FOUNDERS OF 16TH CENTURY BELGIAN REALISM IN PRIVATE INTERNATIONAL LAW DOCTRINE**

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## **THE FOUNDERS OF 16TH CENTURY BELGIAN REALISM IN PRIVATE INTERNATIONAL LAW DOCTRINE<sup>2</sup>**

This article restores to academic circulation the names of representatives of the 16th century Belgian School of Realism, who have been unjustly forgotten in modern Private International Law [PIL] doctrine—Nicolas Everhard, Pieter Peck and Johannes à Sande. These scholars are the founders of the Belgian-Dutch theory of conflicts of laws which anticipated the classic Dutch “comity” doctrine and provided the framework for the Anglo-American doctrine of the regulation of international civil relations. The theory of Belgian realism was first outlined by Everhard, Peck and Sande and was formed on the theory of statutes—the sole doctrine of PIL for 500 years. Belgian Realism is a separate direction in the theory of statutes which triggered the process of a strongly territorial concept of conflict resolution between choice of law rules of different states. However, despite their outstanding contribution to the legal practice and doctrine of their time, these scholars are not known to modern jurisprudence. The article concludes that Everhard, Peck and Sande developed the choice of law rules which are now adopted by modern legislation; moreover, their works may serve to develop international comity doctrine, which has been adopted by modern PIL.

**Key words:** Private International Law, the theory of statutes, 16th century, the Belgian-Dutch theory of conflicts of laws, Belgian Realism, Nicolas Everhard, Pieter Peck, Johannes à Sande.

**JEL Classification:** Z

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## Introduction

Modern Private International Law (PIL) distinguishes the Dutch theory of statutes mostly known as “the concept of comity”. The main apologists of this theory are Ulrich Huber, Paul and John Voet. However, the majority of scholars writing in the 19th century, mention not the Dutch, but the Belgian-Dutch theory of the conflict of law.<sup>3</sup> This specification appears to be correct, because “the classic Dutch doctrine” was finally formed only in the second half of the 17th century. The Dutch doctrine was formed on the basis of the theory of Belgian realism that appeared at the end of the 16th century within the framework of the theory of statutes<sup>4</sup>—the only PIL doctrine that has existed for 500 years. It is certainly important to keep in mind that “Belgian-Dutch” is a very relative term, because we cannot speak of either Belgium or Dutch, while speaking about the 16th century, despite of the Dutch can be spoken of as one of the provinces of the Netherlands.<sup>5</sup> It is more accurate to say the theory of Belgian realism which is reputed as the first step in the making of the classical Dutch doctrine.

The representatives of the theory of Belgian realism (Belgian-Dutch theory)—Nicolas Everhard, Pieter Peck and Johannes à Sande—are the predecessors of Nicolas Bourgundus, Paul Christianius, Peter Stokmanns, Christian Rodenbourg, whose studies became the basis for researchers of the classics of Dutch doctrine—Paul Voet, his son John Voet, and Ulrich Huber. However, the pioneers of the Belgian-Dutch theory of conflict of laws are almost unknown to modern PIL doctrine.

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<sup>3</sup> See f. e. : *Meili F.* Civil- und Handelsrecht auf Grund der Theorie, Gesetzgebung und Praxis. I Band. Zurich: Art. Institut Orell Fussli, 1902. S. 95.

<sup>4</sup> For example, Laurent F. used this term. See : *Laurent F.* Droit civil international. Bruxelles: Bruylant-Christophe & ce, 1880. T. I. P. 442.

<sup>5</sup> In 1512 the majority of Dutch lands were united in Burgundian county of the Holy Roman Empire that was ruled by the King of Spain. In 1549 all Dutch provinces became the part of Burgundian county and from that very moment the term “Seventeen United Provinces” was officially formulated. This term was widely used in the literature of the end of XVI – the beginning of XIX century. See : *Shatokhina-Mordvintseva G.A.* Istoriya Niderlandov. Moscow: Drofa, 2007. S. 111–113.

**Nicolas Everhard** (1473–1532) was born in Middelburg, Zeeland to a wealthy merchant family.<sup>6</sup> Everhard was the first chairman of the Dutch Council of State (Raad van State), the chairman of the Great Council of the Netherlands at Mechelen (Grand Conseil de Malines) and “governed [these institutions] with much success”. He is called “one of the most eminent officials”<sup>7</sup> in the Belgian literature of the 19th century. Everhard became the first Dutch lawyer whose name went down in history of the theory of statutes. His conflict views enjoyed popularity and prestige among the contemporaries, in particular, Charles Dumoulin quotes Everhard, proving the application of the law of the location of the property in family law.<sup>8</sup>

“*Topica de locis legalibus*” and “*Consilia sive Responsa*” are the main studies broaching the subject of conflicts of legal customs; both theses “were a great success and included many provisions about the conflicts of laws”.<sup>9</sup> The junior contemporary of Everhard—Pieter Peck—“has been praising him up to the skies and referring to this wise expert in common matrimonial property questions”.<sup>10</sup> *Topica* considers conflicts of legal customs in matrimonial property, while *Consilia* considers conflicts of legal customs in wills, transactions (the code of legislative rules) and inheritance. Everhard’s solutions to conflict issues are not innovative but they give us a clear understanding of the formation of the Dutch theory of statutes in the late 15th–early 16th centuries.<sup>11</sup>

Primarily Everhard was a practical man and viewed choice in legal issues in a practical manner. According to Laine, Everhard’s points of view were inspired by

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<sup>6</sup> Nicolas Everhard had 6 children – 2 daughters and 4 sons, “utterly erudite people”. His second son, Nicolas Everhard Jr., was a doctor of Law and the chairman of the Great Council of the Netherlands at Mechelen (Grand Conseil de Malines). Everhard’s youngest son was a famous Latin poet Johann Secundus. He devoted his first book (1529) to his father.

<sup>7</sup> Laine A. Introduction au droit international privé. Paris: Librairie Cotillon, 1888. T. I. P. 396.

<sup>8</sup> See: Gamillscheg F. Der Einfluss Dumoulins auf die Entwicklung des Kollisionsrechts. Tübingen: De Gruyter: Mohr, 1955. S. 152.

<sup>9</sup> Brun M.I. Ocherki istorii konfliktogo prava. Moscow: Tipografiya G. Lissnera i D. Sobko, 1915. 105 s. // SPS “Garant”.

<sup>10</sup> Laurent F. Droit civil international. P. 435.

<sup>11</sup> See: Gutzwiler Max. Geschichte des Internationalprivatrechts. Basel u. Stuttgart: Helbing & Lichtenhahn, 1977. S. 129.

Bartolo da Sassoferrato and other commentators of the *Cunctos populos* Law.<sup>12</sup> The influence of the Bartolists also appears in the general methodology of Everhard's research as it does in his usage of the dialectics and methods of the scholastic technique. His analysis of conflicts of laws of different countries was based on a typical Bartolist method of distinguishing, distinction and allocation (*distinctiones, ampliaciones, limitations*).

Everhard analysed only interlocal conflicts of laws arising from relations between different Dutch provinces. The main problem of true international conflicts of laws could not have interested the 16th century researcher, because the necessity of conflict resolution of laws of different countries arose only in the 17th century. While analysing issues of conflicts in provincial conflicts of legal customs, Everhard discourses on concepts established in the 14th century—all statutes are divided into two groups based on the subject of regulation: personal statutes which define the legal status of people and real statutes which define the legal status of entities. At the same time the historical context impeded Everhard from the acceptance of the Bartolist universalism and its sympathy to extraterritoriality of *lex personalis*. Similarly to his contemporaries in France (Jean Masuere, Bartolomeus Chassnet, Andreas Tirako), Everhard gives precedence to the principle of an absolute territoriality of conflicts of legal customs.

The legal state of affairs is beyond question: in this regard Everhard acknowledges only one general origin—"Statuta realia non egrediunt statuentis territorium"<sup>13</sup>. Any proprietary rights always correspond to the law of their location (*lex loci rei*), notwithstanding the fact that it is a matter of the manifestation of laws on separate entities that exist in different territories or the whole set of proprietary rights of a person—the origin of this right.

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<sup>12</sup> See: Laine A. Introduction au droit international privé. P. 396. *Cunctos populos* are the first words of the Constitution of Gratian, Valentinian and Theodosius "On Approval of faith in the Holy Trinity" (380) that was accompanied by the famous gloss "Quod si Bononiensis" ("About Bolognese in Modena"), which in turn commemorated the beginning of PIL study.

<sup>13</sup> Real statutes do not extend their effect beyond its territory.

While considering problems of inheritance, Everhard states that the form of a will is governed by the law of the territory where this will was drawn up. In this sense his position reflects Italian doctrine. However, he adheres strictly to the territorial rule, because any statute is primarily made to protect the interests of heirs and keep property in the family. This is, for example, the reason for the promulgation of a law that prohibits a married couple from leaving their property to each other.<sup>14</sup> If the main subject of the statute is real estate, that is quite enough to make its action strictly territorial and spread it on all people who are on the territory of this or that province.

Everhard examined the choice of the legal regulation of contractual obligations more elaborately. It is no wonder considering that interprovincial relations and international trade relations were issues of importance for the Netherlands of the 16th century. As the majority of his predecessors (Paul de Castro and Rochus Curtius) he assumes that any contract is governed by *lex loci celebrati contractus*.<sup>15</sup> The place of the contract he sees in two hypostasizes: the place where the contract is concluded (*locus conclusionis*) and the place where the contract is performed (*locus solutionis*). The application of the law of the place of conclusion is a general rule; however the law of the place of performance is the most practically competent. The envisaged consequences of a contract are governed by the place of conclusion; while unforeseen consequences are regulated by the law of the place of performance. If the place of performance of the contract is stated in the latter, *lex loci solutionis* will always be the most preferable over *lex loci celebrati contractus* in cases of any delinquency or culpable non-performance.

Analysing conflicts of laws in contractual relations, Everhard uses the method that shows how deeply Bartolists influenced him. It is in these matters Everhard continuously resorts to distinctions and divisions. His discourse on enforcement of the law of the place of performance is based on the following distinction: the

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<sup>14</sup> See: *Laurent F. Droit civil international*. P. 437.

<sup>15</sup> See: *Story Joseph. Commentaries on the Conflict of laws, foreign and domestic*. Boston: Hilliard, Gray, and Company, 1834. P. 249.

phrase *lex loci solutionis* may be understood ambiguously—by impassive statement of where the contract must be performed or by the statement of the practical performance of contract in accordance with the aim of the parties.<sup>16</sup> Everhard conclusively favours the law of the place of effective performance, especially for unforeseen consequences.

In the majority of cases Everhard defines the place of effective performance as the place of payment. The law of the place of the payment shall apply for the payment of interest. A debtor, who neglected to perform his obligations, is automatically responsible according to the law of the place where his debt is supposed to be paid. That “special place of payment” and “interest” exist there only because “interest is descended from this place”. Everhard was one of the first in the literature of conflicts of law who stated the idea that “law may have an interest”, in other words the enforcement of this or that law is aimed at the achievement of the objectives of that law, which in turn reflects the policy behind the law. In the 20th century the idea of the application of the most “interested law” was realized in the theory of the “governmental interest” by Brainerd Currie, the main ideologist of the American Choice of Law Revolution.<sup>17</sup>

**Pieter Peck** (1529–1589) was born in Zierikzee, Zeeland and died in Mechelen.<sup>18</sup> He studied civil and canon law at the University of Leuven, then defended his doctoral degree in 1553 and have been teaching at the same university since 1555, in 1562 he became a Full Professor of Roman Law. Following the academic tradition of that time he Latinised his name; he is known as Petrus Peckius in the legal literature. He became a member of the Supreme Court of the Seventeen United Provinces (which later became the Great Council of the Netherlands at Mechelen) whose chairman at the time was Nicolas Everhard Jr. Pekius’s research

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<sup>16</sup> *Story Joseph*. Commentaries on the Conflict of laws, foreign and domestic. Boston: Hilliard, Gray, and Company, 1834. P. 249.

<sup>17</sup> About The American Choice-of-Law Revolution see f. e.: *Symeonides Symeon C.* The American Choice-of-Law Revolution. Leiden – Boston: Martinus Nijhoff Publishers, 2006. 479 p.

<sup>18</sup> Pieter Peck was married to Katarina Gillis, who was a sister of a Secretary of Margaret of Parma and the Governor of Ostend. One of his sons – Petrus Peckius Jr. – also was a famous lawyer, diplomat, a member of the Great Council of the Netherlands at Mechelen (Grand Conseil de Malines) and the Chancellor of Brabant.

is a good combination of theory and practice.<sup>19</sup> One of his treatises “*De testamentis conjugum*” (Leuven, 1564) is characterized by a detailed summary of the majority of conflict questions. His whole attention was focused on problems of conflicts of laws in deeds of gifts between husband and wife.

Peckius perceived Nicolas Everhard Sr. as his teacher and followed his views in terms of Bartolo’s theory about conflicts of laws. Peckius calls Bartolo and Baldus de Ubaldus “*principles juris magistri*” and along with them Peckius “is known as an admirer of Roman law”.<sup>20</sup> However, Bartolo and his followers insisted on the real nature of prohibitive statutes, when personal statutes were generally seen permissible and having an extraterritorial character. This approach is dictated by the unconditional priority of Roman law which had already been favourable. Despite his obeisance to Roman law and Bartolo, Peckius did not admit the universalism of the first, and his respect for Bartolo did not encourage Peckius to accept the theory of permissible and prohibitive statutes (favourable and odious).

Peckius rejects the universalism of the Italian school, but he uses its methodology and criteria. The statute, according to which the will of a wife is not valid unless it is approved by her husband, is from Peckius’s standpoint favourable. This statute extends to all women, including those constituting a will abroad. He explains the favourable nature of this statute in that common (natural) law<sup>21</sup> is more powerful, than *lex loci actus*. The statute prohibiting inheritance between spouses is odious and cannot distribute its effect on property located abroad. Proving the odious nature of this statute Peckius quoted not only several decisions of the Great Council of the Netherlands at Mechelen but also opinions of the Italian school—Alexander Tartagnus and Charles Dumoulin.<sup>22</sup>

Peckius was thoroughly familiar with the research of the French followers of Bartolo—he often quotes Bartholomeus Chassne, Andreas Tirako, and Charles

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<sup>19</sup> See: *Laurent F. Droit civil international*. P. 434–435.

<sup>20</sup> *Laurent F. Droit civil international*. P. 435.

<sup>21</sup> *Gemeines (Natur) Recht*.

<sup>22</sup> See: *Gamillscheg F. Der Einfluss Dumoulins auf die Entwicklung des Kollisionsrechts*. S. 151–152.



Dumoulin in his treaty. Laine says that “Peckius is clearly familiar with the theory of d’Argantres”.<sup>23</sup> Perhaps this is true, but is also worth noting that the famous book of “the commentator of Bretton” that “revolutionized” resolution of conflicts of laws was written in 1576 and published in 1584. In the meantime, Peckius’s last tractate is dated 1582 and his research in conflict law had been written almost 20 years earlier. In this connection it is logical to assume that Peckius’s views on conflicts of legal customs formed without any influence of d’Argantres. Peckius’s concept of absolute territoriality of all legal customs formed quite independently, in view of the objective historical situation. This concept of Belgian realism reflects the legal practice of that time. In particular, Peckius asserts that the Great Council repeatedly and strictly limited the territorial effect of the prohibition of testamentary legate between husband and wife, and that these decisions were fair.<sup>24</sup>

Peckius’s views on conflict matters are deeply imbued with territorialism. For example, he is so convinced of the materialism of the statute on matrimonial property that sees no need to even mention this topic. Perhaps, his reasoning makes this impression, because he rarely mentions the status of persons or contractual relations—his whole attention is aimed at conflicts of laws about property. Every time when a proprietary question arises, Peckius refers to the statute of location of property (*lex rei sitae*). If the property is the subject of the statute, it is already enough to call this statute material (*in rem*). From the moment the question of property is raised, the statute must be considered as material even in disputes over the characteristics and conditions of a person—capacity, or age. There is no need to question the main purpose of the statute—*in personam* or *in rem*—the object is the only thing of interest. No matter whether it is the consequence of the application of the statute—the alienation or transfer of property—the statute will still be material and the legal custom of a place of location must be obeyed.<sup>25</sup>

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<sup>23</sup> Laine A. Introduction au droit international privé. P. 397.

<sup>24</sup> See: Laurent F. Droit civil international. P. 435.

<sup>25</sup> Laurent F. Droit civil international. P. 437.

**Joannes à Sande** (Johan van den Sande, Jan van Sande) was born on June 28<sup>th</sup> 1568 in Arnhem, Gelderland and died on November 17<sup>th</sup> 1638 in Leeuwarden, Friesland. He studied history at the Universities of Wittenberg and Leiden. He taught law at the University of Franeker and then became a member and the Chief Justice of the Court of Friesland. His main study, which opens the subject of conflict law, is “*Decisiones aureae sive Frisiorum curia judicatarum*” (Leuwarden, 1635). This is a broad tractate about the current law of Friesland illustrated by numerous legal practice and quotes from studies of the range of famous European lawyers. Sande’s research is one of the most significant works of the 17th century.

Joannes à Sande is the “favourite author” of Ulrich Huber, who was one of the most characteristic spokesman of the Dutch doctrine of conflict law.<sup>26</sup> Huber quotes him more often than anyone else in his famous thesis “*De Conflictu Legitum*” (1678) and also agrees with his opinion (possibly because Sande, a fellow countryman, was a lecturer in Huber’s favourite town—Franeker—at that time). Scottish students, who studied law in Dutch universities, brought Huber’s theory to the British Islands in the 17th and this theory became the basis of resolution of conflicts of laws in the British Isles. However, Huber used and developed many thoughts previously expressed in Sande’s tractate. Sande’s way of resolution of conflicts influenced Huber greatly and underlay his theory. Thus, Sande’s views were perceived by the modern Anglo-American PIL through Huber’s understanding.

In “*Decisiones aureae sive Frisiorum*” Sande quotes “Commentaries on legal customs of Bretany”<sup>27</sup> (1584), a thesis by the famous French lawyer Bertranet d’Argantres, who suggested a division of legal customs into three classes—personal, real and mixed—and defended the absolute territoriality of all legal customs. It was repeatedly stated in PIL doctrine that the theory of d’Argantres

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<sup>26</sup> See: *Mandel'shtam A.N.* Gaagskiye konferentsii o kodifikatsii mezhdunarodnogo chastnogo prava. T. I. St. Petersburg, 1900 // SPS “Garant”.

<sup>27</sup> Bertrand d’Argentré. *Commentaire des coutumes de Bretagne*. Paris, ed. 1621.

was successfully accepted in the Netherlands.<sup>28</sup> However, Sande does not mention the division of statutes into three classes and, along with his predecessors, suggests the existence of only personal and real statutes. Sande claims the imperative “all legal customs are real”, but this imperative was also stated by his fellow countrymen Nicolas Everhard and Petrus Peckius, who were not acquainted with the theory of “the commentator of Bretton”. In this connection it is logical to assert that the territorial approach to resolution of conflicts of laws in Sande’s tractate was formed without the influence of d’Argantres—the strict territorialism of “Belgian realists” complied with the requirements of the then current situation and was formed independently.

In his book Sande pays a lot of attention to the civil procedure. The jurisdiction of the court of Friesland extends over people who do not live in Friesland, if these people voluntarily (by agreement) accept the competence of this court. Thus, Sande enunciated the ability of *forum prorogatum*.<sup>29</sup> In terms of the applicable procedural law, Sande adheres to the well-known opinion of the time: any court proceeding complies with the practice of using the law of the place where a claim was brought, even regarding transactions that were settled in a different place. The main reason for this decision is the fact that the statute of limitations and the performance of a contract relates not to the essence of contract, but the time and method of hearing of the case. The lawsuit is a quasi-contract and independent transaction itself<sup>30</sup>. The execution of judgments delivered abroad will always be governed by the law of the place where this execution is sought, not where the decision was delivered. The evaluation of a claim as an independent transaction and the performance of contract as the method of the lawsuit corresponded to the expectations of the Dutch bourgeoisie of the time who were interested in the application of Dutch justice and Dutch law to their foreign transactions. Sande “in passing” notes that a contract which came into force in accordance with the law of

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<sup>28</sup> Lunts L.A. Kurs mezhdunarodnogo chastnogo prava. Moscow : Spark, 2002. P. 127.

<sup>29</sup> See: Gutzwiller Max. Geschichte des Internationalprivatrechts. S. 129.

<sup>30</sup> See: Lorenzen Ernest G. Huber’s de conflictu legum// Illinois Law Review. 1918–1919. V. 13. P. 233.

the place of its formation, also extends its effect to property located in another country.<sup>31</sup>

From Sande's point of view, the form of legal acts is undoubtedly governed by the law of a place of the formation [of this act], i.e. the enforcement of foreign law is possible. This international rule is an exception to the general territorial rule. At the same time the realist Sande "is totally alien to the idea that a foreign *lex loci actus* might conflict with the sovereignty of a judge or a state of court".<sup>32</sup> However, he had begun to position the formal statute as an independent one, constituting the third group of the statutes. Sande was sure that a legal act which must be observed at the place of its formation shall extend its effect abroad.

In terms of solving conflicts over movables Sande adheres to the "ancient" concept—movable property is a subject of the personal law of its owners (*mobilia personam sequuntur*—a movable follows a person). He also accepted and interpreted d'Argantres's view that movables are fixed to the owner, because they are a part of his personal status. Sande explains his position by the following example: Frisian spouses remain separate owners of property, even if it is located in the Netherlands, because this is what the custom of Friesland prescribes. When Frisian spouses move from one province to another, the property, which can then go to one of them, will not be their common property, and will remain the separate property (as requires the custom of Friesland). The property, which was the common property before the move, retains the legal status that it originally had as the personal law of spouses.<sup>33</sup> The same goes to succession: if the property is located in various parts of the country, movables will be governed by the law of the domicile of a testator.

There are two basic principles in inheritance: the hereditary regime of property is determined by the law of the location of the property; the ability to inherit is

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<sup>31</sup> Gutzwiller Max. Geschichte des Internationalprivatrechts. S. 128.

<sup>32</sup> Gutzwiller Max. Geschichte des Internationalprivatrechts. S. 128.

<sup>33</sup> See: Lorenzen Ernest G. Huber's de conflictu legum. P. 208.

determined by the law of the last place of residence. At that time these two principles of succession law were strongly endorsed by the Northern Netherlands and were proved in scientific studies of Dutch authors of the time.<sup>34</sup> These connecting factors are common to both inheritance by will and intestate succession.

The figure of Joannes à Sande finishes the theory of Belgian realism and marks a move to the classical Dutch “comity” doctrine. Sande departs from the Belgian extreme realism and allows extraterritoriality—the application of foreign law at the home territory and the extension of personal law abroad. However, the strict real character of all legal customs collides with the personal statute and the extent of its effect abroad. It is necessary to explain why the legislator forbids extraterritoriality of the personal statute and allows the use of foreign law within its jurisdiction. Neither Sande nor his predecessors—the representatives of the Belgian realism—formulated this explanation. It was developed by their followers, the Dutch scholars of the second half of the 17th century Ulrich Huber, Paul and John Voet.

## **Conclusion**

Belgian and Dutch lawyers accepted the first representation of the resolving conflicts of laws from Italy and France. In 13th–14th centuries many students from the Dutch lands were trained in French and Italian universities. They brought to their homeland the “appendix” of Roman Law—the theory of statutes. In 1425, the first National University was founded in Louvain, and the theory of statutes was taught there and in Bologna, Padua and Toulouse. Since then, the Belgian-Dutch authors started developing this theory.

Based on the idea of the universality of Roman law, Belgian-Dutch lawyers initially recognized the extraterritorial effects of personal statutes. Moreover, they showed a tendency to personalize all statutes. Jacob de Cort, a lawyer from Bruges,

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<sup>34</sup> See: *Gutzwiller Max*. *Geschichte des Internationalprivatrechts*. S. 128.

at the end of the 16th century wrote that “the statute of the house of the deceased” manages the entire inheritance, even if the property is located elsewhere. In this regard, the literature mentions a "special Flemish theory—the citadel of the personalization of the law"<sup>35</sup>. This connecting factor to the law of the last domicile for the entire hereditary property was a unique element of urban law functioning in the specific field of the "Flemish community".<sup>36</sup>

However, in the Middle Ages, the mentality of the Dutch provinces had a dual character. Industry, trade and statutory legislation developed, which made it necessary to develop special rules to resolve conflicts between different customs. Politically, the Netherlands was a province of a bigger state under the authority of absent foreign princes.<sup>37</sup> Dutch cities were imbued with the spirit of extreme individualism<sup>38</sup> and demonstrated a tendency to uphold the sovereignty of their customs. All Dutch provinces had their own customs and privileges and considered them a symbol of local freedom. Provincial sovereignties received the final legal wording in the "Close Union" (January 23, 1679, Utrecht). The first words of this treaty declared that "although provinces are connected to forever remain so as if they were one, but every province and every city should retain their privileges, liberties and customs."<sup>39</sup> The aspiration of the Dutch provinces to preserve their privileges and establish their own territorial sovereignty contributed to the approval of the imperative territorial nature of all laws. Since (according to the theory of statutes) only real statutes had territorial effect, the Belgian-Dutch conflict doctrine at the beginning of the 17th century formed the principle "all statutes are real": "There is an explanation of material nature of our customs, because the material nature and the independence of a separate territory are identical concepts."<sup>40</sup>

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<sup>35</sup> See: *Ancel B. Histoire du droit international privé*. Paris: Université Panthéon-Assas (Paris II), 2008. P. 85.

<sup>36</sup> See: *Ancel B. Histoire du droit international privé*. P. 85.

<sup>37</sup> See : *Laine A. Introduction au droit international privé*. P. 398–399.

<sup>38</sup> At the end of the XIX century a Belgian scholar F. Laurent wrote that "even today a Fleming from Bruges is not sure of the fraternal ties with a Fleming from Gent." *Laurent F. Droit civil international*. P. 340.

<sup>39</sup> *Brun M.I. Ocherki istorii konfliktogo prava // SPS "Garant"*.

<sup>40</sup> *Laurent F. Droit civil international*. P. 425.

The theory of Belgian realism had been forming in the doctrine of the conflict law throughout the 16th century and formed its legislative basis in the "Perpetual Edict" adopted by Archduke Albert and Archduchess Isabella in 1611. The most acute conflicts have always arisen in the sphere of succession law, and the legislative particularism of the Dutch lands only intensified conflicts between the personal statute of a testator and the statute of the location of property if the inherited property was situated in the different provinces. The Perpetual Edict, as a result of the work of Belgian-Dutch lawyers, completely eliminated the "personalization" of laws<sup>41</sup> and secured their material nature: "As soon as the place of residence of a testator and the location of its assets are governed by legal customs and provisions of the latter are different in terms of inheritance, we rule to govern the legal properties of the mentioned property, the possibility to dispose of it, a proper age and notary form by the proper legal custom and customs of a place of location of this property" (art. 13).<sup>42</sup> The Edict that was created exclusively under the influence of Belgian realism was the complete expression of the trend to put the place of the property at the forefront.<sup>43</sup>

Article 13 of the Edict required the compliance of legal custom of the place of location (*lex rei sitae*) of property in relation to age, i.e. legal capacity, in respect of the legal properties of the property, the right to inherit it and the form of will. By "notary form" the Edict means the rules of the notarial acts, with the aim to ensure the free and accurate expression of the will of a testator (the presence of a notary, the required number of witnesses, the formal requirements for a text of a will). The Edict presupposed that the notarial acts prescribed by the personal statute of a testator, will be different from the actions prescribed by the statute of the location of his property, and that is why the Edict made a choice in favour of the latter. This absolute materiality of legal customs contradicted well-established and widely recognized general principles of law, but especially the principle of "the place

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<sup>41</sup> See: *Ancel B. Histoire du droit international privé*. P. 85.

<sup>42</sup> Cited: *Laurent F. Droit civil international*. P. 433.

<sup>43</sup> See: *Brun M.I. Ocherki istorii konfliktного prava // SPS "Garant"*.

governs an act” (*locus regit actum*), under which the form of expression of a legal act does not depend either on the statute of domicile (*lex domicilii*), or on the statute of the location of the property (*lex rei sitae*), but it is governed by the law of the place where the act was drawn up.

The approach of the Perpetual Edict automatically ruled out any extraterritorial effect of laws or the application of foreign law. It did not comply with the requirements of any objective reality, nor the expectations of the Dutch provinces which were interested in the recognition of the subjective rights legally acquired in their territory having the same effect abroad. Claiming the maxim of “all legal customs are real” the representatives of the Belgian-Dutch school of PIL are not seen as "legal chauvinists", all of them recognized the extraterritorial nature of the personal statute which does not affect property issues, moreover, they favoured the application of the law of the place where an act was committed to the form of legal transactions (including wills). In addition, municipal and provincial courts frequently turned to foreign laws, as maritime trade required a permanent relationship with overseas countries.<sup>44</sup> At the insistence of the Belgian Bar in 1634 the Privy Council of the Belgian Provinces, issued an Edict, containing the "authentic interpretation" of the Perpetual Edict, and, in fact, commemorated its factual abolition in the sense that the requirements of the law of location of movables do not apply to the form of wills.<sup>45</sup>

The reason for the actual abolition of the Perpetual Edict in conformity with the form of the will was a specific case. Don Jerome del Posse drew up a will in Brussels in 1619, in the presence of a notary and two witnesses from Milan, where he himself was born and where his property was located. The will was disputed on the basis of Art. 13, which requires compliance with the notary form, which is adopted in the location of the property: according to the Statute of Milan to become valid a will requires the presence of seven witnesses. The plaintiff argued

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<sup>44</sup> *Arminjon P.* Précis de Droit international privé. Paris: Dallaz, 1925. P. 40.

<sup>45</sup> *Lorenzen Ernest G.* Huber's de conflictu legume. P. 206.



that the interpretation of the Perpetual Edict, given by the Senate of Milan, was wrong and solicited its "authentic interpretation". The 1634 Edict stated: "The provisions of article 13 cannot anyhow be attributed to the order that is applicable to the formation of will, constitutes full proof of its validity and is intended to preserve the true will of a testator; it extend its effect solely to notary actions, clarifies the matter of testamentary disposition, since without the first the latter is impossible".<sup>46</sup> The order applicable to the formation of wills meant the age requirements of a testator and the elements of the will. The form of the will must comply with legal customs of the place where it was drawn up or the requirements of the Edict itself; the will of a testator in the matter of issues of ownership and disposal of foreign real estate could have been legalized in Belgium in the form prescribed by the local law.<sup>47</sup>

In fact, the 1634 Edict summarized the doctrine of Belgian realism, which can be reduced to the following postulates:

- the statutes are divided into two classes—personal and real;
- statutes are valid only on the territory of the legislator which published them; these statutes are mandatory on this territory for both nationals and foreigners;
- personal statutes determine the status of a person without prejudice to property;
- personal statutes relating exclusively to non-property rights can follow a person abroad;
- movables are attached to a person and follows his statute;
- the real character belongs to all statutes which in one way or another relate to property (and property here means only real estate);
- real statutes are absolute imperatives on their territory, they determine the fate of any property situated there, even if it belongs to foreigners;

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<sup>46</sup> Cited : *Laurent F.* Droit civil international. P. 433.

<sup>47</sup> See : *Laine A.* Introduction au droit international privé. P. 400–401.

- the form of legal acts is governed by the law of the place of its commitment.

None of the representatives of the theory of Belgian realism—neither Nicolas Everhard, nor Pieter Pekius, nor Joannes à Sande—made any attempt to create a general theory to resolve conflicts of laws. Being both academics and practitioners, they treated conflicts of laws solely from the practical side. These scholars speculated in the mainstream of already established theory of two classes of statutes, asserting that the reality of all legal customs was the general maxim. The application of foreign law can only take place in cases dealing with personal statute, if these questions are not in any way connected to property. Belgian realists subordinate to the territorial nature of general legal views of the time what was “inclined to vigilantly monitor the absolute value of the local law”.<sup>48</sup>

However, one can argue that Everhard, Peckius and Sande did not play a positive role in the development of PIL doctrine. They conceived of a choice of legal rules that was perceived by the current legislation; their research gave rise to the classical Dutch doctrine of “comity” which still constitutes the basis for the Anglo-American theory of conflicts of law. Their names are undeservedly forgotten, there has to be no gaps in the history of PIL and the research of all representatives of the theory of statutes—the only doctrine of conflict law in 500 years—are potential subjects for further study and reframing.

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<sup>48</sup> *Nol'de B.E.* Ocherk mezhdunarodnogo chastnogo prava / List F. Mezhdunarodnoye pravo. St. Petersburg, 1912 // SPS “Garant”.

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