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in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Band 2

The Courts and the Development of Commercial Law

Edited by

Prof. Dr. Vito Piergiovanni

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Herausgegeben von

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Foreword

The first contribution given by the working Group "The Courts and the Development of Commercial Law" (which is a part in the wider research program "Anglo-American and Continental Legal History") evidences the difficulties connected to the historical-comparative researches between the Continental European and the Anglo-American law.

The prior problem, common to both experiences, is certainly the knowledge of sources (being these the evidence of the work of Courts or lawyers) and has the consequence of making difficult any effort to generalize.

For Continental Europe, the existence of a wide range of printed or handwritten material, produced by the Courts, emerges from the contributions collected in this volume, which deal with cases coming from Italy, Netherlands and Germany. Such material is still waiting for being considered and studied.

Also for the reconstruction of the British juridical scenario, Coquilette (whose studies are published in the third volume of the series) goes back, in addition to the printed works, also "to the Court records and the professional diaries and papers of prominent judges and practitioners", still handwritten.

The need for a more complete and deeper knowledge, offering the means for the elaboration of well based opinions, applies also to the doctrine: in fact even if the most famous works are printed, it is possible to find important contributions still in their handwritten form, and unknown, as evidenced by the study of Savelli.

For a more concrete perception of the scarcity of studies on the commercial doctrine, it should be sufficient to compare our knowledges to the list of the juridical books which are part in the library of Lord Mansfield, published by Rodgers as an addendum to his paper.

Rodgers went better in details, on single themes, about the importance of the European literary tradition on Lord Mansfield, and has identified four cathegories of works: "the continental codes and other models of commercial law, the technical treatises on the law merchant, the theoretical works of the natural lawyers, and the leading works of the continental civilians". Lord Mansfield, in his activity as judge, employs with great competence these sources aiming to create the basis of the British commercial law.

The theme of the connection between the Courts (both as institutions and as producers of judgements) and the commercial doctrine, can be certainly considered as the leading theme which connects the contributions of the volume; they differ in the subject but are all equally emblematic in perspecting, in different milieu, the different typology of the connection between the writers in commercial law and the judicial praxis. The studies by Coquilette offer a wide outline of conflicts, inside the Anglo-Saxon world, between lawyers and Courts of "civil law" and those of "common law", each one bound to manage, in a more or less monopolistic way, the professional and trial spaces opened by the development of the commercial relationships.

A less conflictual correspondence between doctrine and Courts emerges from the reconstruction of the Dutch experience on the theme of the "bill of exchange", made by Asser, and we find a more constructive and original dialectic in the judgements issued by the Admiralty Court in Hamburg, studied by Eva-Christine Frentz, or in the decisions of the Rota of Genoa, by Piergiovanni.

These are, as it is obvious, the reconstructive elements coming from different experiences which, in order to be compared, need some further element, but I guess that they do already contain very interesting suggestions.

I think, for instance, of the reconsideration or, we may even say, of the re-evaluation of the British "civilians" made by Coquillette, with results which are rather different with respect to the historiographical British tradition: a continuous dialectic with the Romanistic tradition is evidenced from this study; and, inside this more general process, the rising of a special attention by the civilians to the development of the merchant-law doctrine, evidences very good chances of comparing with continental Europe in this branch of law.

An example of the results which may derive from such comparison and a significant methodological guideline for future studies are contained in the work by Nörr, who, in a previous study, had noticed how in a first stage of evolution of the English commercial law, the Admiralty Court in charge for "relation to foreign trade", "was manned by civilians who applied the continental doctrines"[1].

The comparison of the specific elements of a juridical experience with supernational negotiable and judicial practice, typical of the evolution of the commercial law, is fundamental for trespassing the obstacles and bindings produced by the political, regional or national conditions.

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[1] *K. W. Nörr,* The European side of the English Law: a Few Comments from a Continental Historian, in Englische und kontinentale Rechtsgeschichte: ein Forschungsprojekt (vol. 1 of Comparative Studies in Continental and Anglo-American Legal History), Berlin 1985, p. 22.

It is significant, in this respect, the correspondence set by the same Nörr in the English middle age world, between the first development of the commercial law and the canonical beneficial law.

In the modern age the fight between the students of civil law and those of common law is, by itself, a significant aspect of the conflicts existing in the English society: the almost natural result, after the differences have become less marked, is found, in the XVIII century, in Lord Mansfield. He, in elaborating some principles of the English commercial law, adopts widely the continental European experience, filtered from the "civilians" and makes it effective in a period of great economic expansion and increasing political importance of Great Britain, as demonstrated by Coquilette and Rodgers.

The same evaluation on the functional aspect of the commercial law to the still expanding political reality is documented by the work by Asser on the XVIII Century Netherland and, even in different dimensions, corresponds to the XVI Century Genoa, that was going to become, through the refinement of the credit instruments, one of the most important financial centres in Europe.

The judgements of the Admiralty Court of Hamburg, for which the motto "non urbi sed orbi" corresponds to the real action of the judging organ, are even more explicit in looking for improvements to their jurisprudence even out from close juridical boundaries.

The research for new sources and the reconsideration of those already known, the connection Court - Doctrine and the functionality of the development of commercial law to the economic-political processes taking place during the Modern Age, are the themes common to all researches of this first volume of the working Group "The Courts and the Development of the Commercial Law". In a close future the study of the bank and the credit will take the Group to compare the specific experiences on the same theme.

The wish which is being expressed by the Coordinator is that this first experience of team work, important also from the human viewpoint due to the spirit of cooperation and friendship established among the components of the Group, can continue to give sound and serious scientific results.

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VITO PIERGIOVANNI

Courts and Commercial Law at the Beginning of the Modern Age

The medieval origin of commercial law is now a generally accepted fact and a starting point for studying commercial law. Similarly, at the other extreme, the French commercial code of 1807 comes at the end of a process which, even though it shows lesser internal development, nonetheless remains fundamentally coherent.

It may be useful, for this purpose, to refer to the most recent suggestions for classifications proposed by two German researchers, Pohlmann and Scherner, to schematize the history of commercial law and its study in the Middle Ages and in the Modern Age[1].

In the Middle Ages one can observe two movements of diverse origin, but which are basically convergent. On the one hand, common commercial practice was established along geographical lines extended to commercially homogenous areas (the Mediterranean, the Atlantic, Northern Europe), and essentially consisted of the relevant contracts connected to maritime trade (these practices are also compiled in widely-spread collections, such as the Book of the Consulate of Barcelona and the Rules of Visby and of Oleron). On the other hand, commercial law, which became dependent upon the requirements of a more and more powerful merchant-class, was progressively being compiled in volumes of *Statuti* within each individual State[2].

Medieval law scholars obviously could not ignore this phenomenon, which, like the feudal one[3], had considerable professional and economic potential.

The work of law scholars consisted in relating the regulation of the new mercantile practices to the long-standing categories of Roman law, but, the new emphasis on the professional rather than scientific value of the

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[1] *H. Pohlmann*, Die Quellen des Handelsrechts, in Handbuch der Quellen und Literatur der neuren europäischen Privatrechtsgeschichte, I, Mittelalter (1100 - 1500), Die gelehrten Rechte und die Gesetzgebung, ed. *H. Coing*, München 1973, pp. 801 - 802; *K.O. Scherner*, die Wissenschaft des Handelsrechts, ibidem, II/1, Neuere Zeit (1500 - 1800), Das Zeitalter des gemeinen Rechts, Wissenschaft, ed. *H. Coing*, München 1977, pp. 799 ss.

[2] *H. Pohlmann*, Die Quellen, 802.

[3] *M. Bellomo*, Società e istituzioni in Italia dal Medioevo agli inizi dell'età moderna, Catania 1982, 438 - 440.

phenomenon, is best illustrated by the *consilia*. The influences of everyday commercial activity and of maritime activity in particular, were the dynamic force which, tending to link legal theory with practice, gave rise to the attempts at incorporating the new legal practices within the wider scope of the Roman law tradition.

In this practice itself, in its dynamism, in its requirements for legal precision, requiring a quick settlement of controversial situations, and in its peculiarities, connected with a thorough evaluation of behaviour inspired by honesty and good faith, we must look for the persistence, however limited, of the presence of learned lawyers and of their contribution to its development. Justice, in the field of trade, was entrusted to Courts composed of merchants, who were familiar with customs and were mostly inclined, by an accurate and close examination of the case in point, to both search for the quickest solution, by simplifying and shortening time-limits and requirements in legal proceedings, and by using their criteria of common sense and good faith[4].

In some cases, though, a correct legal definition may have substantial effects regarding the fair conclusion of a law suit: so, there was now room for learned lawyers and we can explain the presence of some of the most important names, such as Baldo and Paolo di Castro, who were called by the judges or by the parties involved, to settle disputes or to support the claims of their respective clients. Such interventions, which made use of concepts and references taken from the Roman tradition, were the first, somewhat limited, contribution to what would in the future become the independent science of commercial law[5].

Another contribution derived from moral and theological speculations[6], which is more difficult to evaluate in its tangible effects and raises problems concerning the real influence it had on the lawyers' work: probably the greatest importance lies in the creation of an economic and commercial lexicon and in the specific reference to more and more complex cases, often with the aim of offering a means of overcoming ecclesiastical prohibition of usury.

The XVIth century brought considerable modifications to the medieval picture outlined above: a renewed interest in the theological and moral field regarding economic subjects, which grew out of the Second Scholastica, was counterbalanced by the development of the first treaties of lay commercial law.

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[4] *H. Pohlmann*, Die Quellen, 802. See *M. Ascheri*, La decisione nelle Corti giudiziarie italiane del Tre-Quattrocento e il caso della Mercanzia di Siena, in print in the Group "Law Reporting and Records" (Comparative Studies in Continental and Anglo-American Legal History).

[5] *K. O. Scherner*, Die Wissenschaft, 799.

[6] Ibid.

Some scholars, like Scherner, when discussing this topic talk about a classical period in the science of commercial law[7]: This science tends to vary along national grounds only from the second half of the XVIIth century onwards. In Italy, in particular, the scientific treatment of commercial law took place, to a considerable extent, by means of the routine procedure of Court decisions, and mostly through the famous *Rotae* of Rome, Florence, Genoa and others[8], from the XVIIth century onwards. The basic concept of this process is a kind of unity, present in commercial science at the beginning of the Modern Age, which was afterwards replaced by a disunifying process due to the rise of national peculiarities.

As for Italy, I think that this picture can be enriched by some specific elements: firstly, Italian commercial law between the XVIth and the XVIIth centuries (which is actually restricted to the works of Stracca and Scaccia) was connected with the historical and political context and was largely conditioned in its development by the environment. The second element concerns the Courts and the importance of their law-making: in my opinion, they played a basic role from the XVIth century onwards in the process of making commercial law autonomous and lay. From the outset it is necessary to examine the lawyers and the Courts more closely, pointing out that my analysis will consider three subjects; the personalities and works of both Stracca and Scaccia and the setting up of the Genoese civil Rota with its law-making. In my opinion, the reasons for a different and more detailed evaluation of the evolution of commercial science in Italy will be evident from this analysis.

The beginnings of commercial law as an independent science are traditionally connected with the names of three jurists: Benvenuto Stracca, from Ancona, who lived between 1509 and 1578, whose main work *De mercatura seu mercatore tractatus* was first published in 1553[9]; the Portuguese Pedro de Santarem (Petrus de Santerna), author of a *Tractatus de assecurationibus et sponsionibus mercatorum*, whose activity, carried out in Italy, has recently been re-examined from the chronological point of view by Domenico Maffei[10]; and, finally, the Roman lawyer Sigismondo Scaccia, who practised law between the second half of the XVIth century and the beginning of the XVIIth and who wrote a *Tractatus de commerciis et cambio*, published in Rome in 1619[11].

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[7] Ibid., 799 - 800.

[8] Ibid., 800.

[9] Infra, 14.

[10] *D. Maffei*, Il giureconsulto portoghese Pedro de Santarém, autore del primo trattato sulle assicurazioni (1488), Coimbra 1983 (Separata do número especial do Boletin da Faculdade de Direito de Coimbra – Estudes em Homenagen aos Profs. Manuel Paulo Merêa e Guilherme Braga da Cruz, 1983), 703 - 728.

[11] Infra, 16.