BOOK REVIEWS

Deutsches Internationales Privatrecht, unter besonderer Beruecksichtigung des österreichischen und schweizerischen Rechts. By Arthur Nussbaum. Tübingen: F. C. B. Mohr, 1932.

The increasingly complicated international political situation in the world cannot alter the phenomenon that the globe is shrinking as a result of the improved means of communication and transportation. The boundaries of states, even though their governments may not recognize each other, do not hinder the establishment of legal relations of all varieties between their respective citizens. Commerce has become more and more internationalized. Economic and social interdependence of members of different nations and races is a striking feature of modern civilization, and the law cannot ignore it. Consequently the attention which is, and has to be, paid to the so-called conflict of laws is continuously growing. The literature relating to Anglo-American doctrine has very recently been enriched by Beale's great work[1] and Cheshire's excellent treatise;[2] moreover, a number of articles concerning the fundamental problems in this branch of law have appeared.[3] In other countries likewise new and valuable treatises dealing with this field have been written in the last few years[4] and cannot be overlooked by any student of conflicts of laws.

In Germany, 1930, 1931 and 1932 particularly were years of plenty in the literature of conflict of laws. In this comparatively short period, five new works, regarded with special interest by international scholars,[5] were published, viz., the Commentaries of

[1] Beale, A Treatise on the Conflict of Laws, 3 vols. New York, 1935.

[2] Cheshire, Private International Law, Oxford, 1935.

[3] *Cf.* for instance, Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173 (1933); Beckett, The Question of Qualification (Classification) in Private International Law, 15 British Year Book of International Law 46 (1934); Cook, Substance and Procedure in the Conflict of Laws, 42 Yale L. J. 333 (1932); Cook, Tort Liability and the Conflict of Laws, 35 Col. L. Rev. 202 (1935); Lorenzen and Heilmann, The Restatement of the Conflict of Laws, 83 U. Pa. L. Rev. 555 (1935); Yntema, The Enforcement of Foreign Judgments in Anglo-American Law, 33 Mich. L. Rev. 1129 (1935); Mendelssohn-Bartholdy, Delimitation of Right and Remedy in Cases of Conflict of Laws, 16 British Year Book of International Law 20 (1935); see also Stumberg, Foreign Created Rights, 8 Tex. L. Rev. 173 (1930), and Gutteridge, Le conflit des lois de compétence judiciaire dans les actions personnelles, 44 Recueil des Cours, Acad. de Droit Intern. 115 (1933).

[4] Particularly noteworthy are: De Bustamente, Derecho Internacional Privado (Havana 1931), Cavaglieri, Lezioni di diritto internazionale privato (Naples 1934), Ago, Teoria del diritto internazionale privato (Padua 1934), Pacchioni, Diritto internazionale privato (Padua 1935), Paredes, Teoria general del derecho civil internacional (Quito 1934) (vols. 2, 3): Cock, Tratado del Derecho Internacional Privado (Medellin 1935), and the posthumous publication of Fedozzi, Trattato di diritto internazionale, Il diritto internazionale privato, of which the reviewer has seen only the proofs.

[5] *Cf.* for instance, Ago, I principii generali del diritto internazionale privato nella più recente

Raape and the treatises of Gutzwiller, Lewald, Melchior[6] and Nussbaum. This last author, now a visiting member of the law faculty of Columbia University, was formerly one of the outstanding professors of the University of Berlin, known for the force of his analysis and the lucidity of his thought as well as for his "realistic" method, which tends to eliminate all a priori speculations, and to scrutinize legal affairs as they really happen (the so-called *Rechtstaatsachenforschung*).

Nussbaum's book is, so far as the German literature is concerned, the only modern presentation of the whole field of private international law. Both substantive and adjective law are dealt with. This is an especially noteworthy fact, for, while Anglo-American writers always go into the international aspects of the problems of procedural law and do so almost as a matter of course, the continental writers, particularly in Italy and Germany[7] usually[8] neglect the procedural side of conflicts. Notable exceptions are the Swiss writer Meili[9] and the recently deceased Italian scholar Fedozzi, who in 1905 published a celebrated book on the international law of civil procedure,[10] to which Professor Nussbaum unfortunately has paid no attention. The procedural part of his work includes also the highly intricate subject of bankruptcy. As far as *substantive* private law is concerned, the broad scope of its treatment by the author is impressive. All the important types of transactions of private law are discussed with respect to the bearing that international private law has upon them. In the chapter on the law of contracts, for instance, not only are the general principles explained, but the different kinds of commercial dealings, as sales, insurance, broker contracts and bills of exchange, are also carefully analyzed so far as they are affected by the rules of private international law. This likewise is a remarkable fact and a specific feature of the treatise, although the reviewer has some doubt, as to whether the arrangement of Nussbaum's work is very adequate with respect to his placing of the commercial contracts. The author tries to justify this arrangement by reference to Anglo-American law. To be sure, in England and the United States the law merchant is now considered to be a part of the common law.[11] But this has not always been so.[12] The law merchant

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dottrina germanica, 26 Riv. di dir. int. 197 (1934), Rheinstein, Comparative Law and Conflict of Laws in Germany, 2 Univ. Chi. L. Rev. 232 (1935).

[6] Raape, Internationales Privatrecht, in Staudinger's Kommentar (Munich 1931), Gutzwiller, Internationalprivatrecht (Berlin 1930), Lewald, Das Deutsche Internationale Privatrecht (Leipzig 1931), Melchior, Die Grundlagen des Deutschen Internationalen Privatrechts (Berlin, Leipzig 1932).

[7] The French writers usually pay attention to the procedural part of conflict problems. In South-America, Valle Ibarlucea published in 1902 a separate treatise on Derecho Processal Internacional (Buenos Aires).

[8] In the great work of von Bar and in Cavaglieri's Lezioni (1929) at page 242 ff., the international law of civil procedure is treated.

[9] Meili, Das internationale Zivilprozessrecht (Zurich 1906).

[10] Fedozzi, Il diritto processuale civile internazionale (Bologna 1905).

[11] The recent short treatise on Commercial Law by Hulvey (1930), for instance, would be considered merely a description of the general private law of the United States from the continental point of view.

[12] *Cf.* especially Sanborn, Origins of the Early English Maritime and Commercial Law (1930); see also Kerr, The Origin and Development of the Law Merchant, 15 Va. L. Rev. 350 (1929).

was sharply separated from the common law for many centuries and regarded as an international body of law.[13] Lord Coke, in a later period, recognized it to be a "part of the laws of this realm";[14] however, he still kept it distinct from the common law.[15] But as part of the law of the land it gradually became enforced by the common law courts, and in this way the law merchant and the customs of merchants became part of the common law of England. Lord Mansfield was the judge who accomplished the complete incorporation of commercial law.[16] However, this is not what happened in continental Europe. There commercial law is still considered to be a separate body of rules,[17] and in Italy, for instance, it is even today not entirely settled, how far the general principles of private law may be applied to commercial transactions,[18] although in other countries, for instance in Spain[18a] and Germany, a supplementary application of the general rules of private law is allowed. Therefore, in spite of the author's justification of his arrangement, the reviewer believes it would have been more adequate to treat commercial international law as a particular branch of private international law, coherent in itself, especially since Germany has a separate commercial code.

This very large field is covered by Nussbaum with continuous and careful attention to the decisions of the courts of Germany, Switzerland and Austria. The leading principles, at least, of the law of other countries, too, are taken into consideration, especially those of France, England and the United States, with reference principally to the books of Dicey and Goodrich. This is a real merit of the book; for only on the basis of a comparative study of foreign laws is it possible even to perceive—to say nothing of solving —the problems of private international law. It is, therefore, to be regretted that Nussbaum has not given any attention to the very elaborate and interesting modern Italian doctrines in this field, especially the general theories, such as the nature of the rules of conflict, the formal or material incorporation of the foreign rules, renvoi and qualifications.

Nussbaum calls his work "international private law" and not "conflict of laws," using the term which is generally employed by continental writers and by far predomi-

[13] "It was really Law and was really International" Carter, A History of English Courts 159 (London 1935).

[14] Co. Litt. 182a (Hargrave & Butler's ed. 1794).

[15] Co. Litt. 11b mentions the *lex mercatoria* in his enumeration of the laws within the realm as a special law alongside the common law of England and other kinds of law. He did not say it was part of the *common law* of England. Holdsworth (History of English Law, v. 5, p. 145 (1924))does not observe this difference. Also Cowell in his "Interpreter" (edition written in 1607, published in 1637) stated that "the Law Merchant is a privilege or special law differing from the common law of England and proper to Merchants." However Finch in his Law (published in Law French in 1613, translated in 1627), bk. 11, c. 1 already states that the customs of merchants throughout the realm are common law.

[16] 5 Holdsworth, History of English Law 147 (1924).

[17] The criterion for the distinction differs in the various countries. Some have chosen as the basic concept the "commercial transaction" (objective system), some depart from the transaction of merchants (subjective system), some combine both (mixed system).

[18] There are tendencies, sponsored by Prof. Vivante, for the creation of an uniform private law. But the general attitude of legal writers (for instance, Pacchioni, La Lumia) favours the "medieval system" (Kerr, *id.* 356) of bipartition.

[18a] *Cf.* 84 Revista General de Legislación y Jurisprudencia 155, note of Menendez-Pidal.

nant in England,[19] in contrast to the American usage. Incidentally, however, it may be mentioned that the expression "private international law" is of Anglo-American origin. The word "international" was created by Jeremy Bentham in 1789, i.e., in his Principles of Morals and Legislation, and penetrated quickly into the European languages. "It has now taken root in the English language" wrote Wheaton in 1836 in his Elements of International Law,[20] "and is familiarly used in discussions." From the English literature the word was taken over into the general terminology everywhere. The compound term international private law was coined by Story, when he published his famous Commentaries on the Conflict of Laws[21] in 1834 and it was subsequently adopted by the writers in that field. The first continental author to use it was Foelix in 1838, in his article "Du conflit des lois de différentes nations ou du droit international."[22] He was followed by the German Schaeffner in 1841. In the next year Count Portalis proposed the phrase "droit civil international" in a report to the Académie des Sciences morales et politiques[23] relating to a book written by the Italian Rocco in 1837.[24] Finally in 1843 Foelix published his celebrated treatise, "Le droit international privé," and it is his title that legal writers in general adopted; even the Anglo-American writers[25] now credit the invention to Foelix rather than to the real father, Story.

As to the *nature* of private international law, Nussbaum takes the nationalistic, or rather, as the author claims, positivistic point of view, i.e., that it is a part of municipal law and not international law, an opinion which prevails also in Anglo-American law.[26] He recognizes only a very few rules of international law which impose duties on the states in this matter, a doctrine that is in harmony with the Anglo-American view.[27]

[19] The name "private international law" is used by Westlake, Lord Phillimore (Commentaries, vol. 4), Foote, Nelson, Cheshire, and Beckett. Dicey and the Canadian writer Johnson prefer "conflict of laws."

[20] Wheaton, Elements of International Law 36 (1836) note. Manning also approved Bentham's creation in his Commentaries in 1839.

[21] Commentaries on the Conflict of Laws § 9 (1834). See Nussbaum, Deutsches Internationales Privatrecht 15, note 9, Pillet-Niboyet, Manuel de droit international privé 30 (1924).

[22] 7 Revue Étrangère et Française de Législation 81, 342, 608, 169, 962, at p. 96. This article,—overlooked by all authors who have dealt with the history of the name, such as Zitelman, Mendelssohn-Bartholdy, Nussbaum, and Weiss,—is the very first continental publication to use Story's term in the Latin form *ius gentium privatum.*

[23] Séances et travaux de l'Académie des Sciences morales et politiques 449 (1842). Holtzendorff-Rivier, in Introduction au droit des gens 57 (Paris 1884) note 1, cites a dissertation of Portalis of the year 1803, but this is apparently a misprint.

[24] Rocco, called the book first Dell' uso e autorità delle leggi del Regno delle due Sicilie, and only in later editions "diritto civile internazionale."

[25] *Cf.* 1 Beale, Conflict of Laws 13; Cheshire, Private International Law 20; Wheaton, Elements 112 (1855).

[26] See for instance Westlake, Private International Law (Bentwich's ed. London 1922); Wharton, Conflict of Laws 2, 6 (3d ed. Parmele 1905); Harrison, On Jurisprudence and the Conflict of Laws 104 (Oxford 1919); Beckett, What is Private International Law, 7 British Year Book of International Law 73; Beale *id.*, 52; Cheshire *id.*, 14 (*semble*); *contra*, among modern writers, Stowell, International Law 299 (1931).

[27] *Cf.* Beckett *id.* at 94. This opinion is shared in Germany by Melchior and in Italy by Ago.

The rules of conflict, for Nussbaum, are rules of *private* law; and he opposes the theory of Zitelman, which was very recently adopted by the Italian writer Ago, that the rules of conflict have constitutional character. However Nussbaum attributes to the rules of conflict a specific nature by considering them as "rules of collision" (*Kollisionsnorm*)[28] and not as "material" rules (*Sachnorm*) as are the common rules of private law. In other words, he distinguishes between ordinary rules which determine rights and duties, the "material" rules (*Sachnormen*) in continental terminology, and rules of private international law which supposedly do not have this character and determine only what rule of law is to be applied (law application rules, *Rechtsanwendungsnormen*). I venture to think that this distinction, although the predominant one, is a fallacy. The rule of municipal law providing for the application of a foreign rule, is in itself a "material" rule, although of an incomplete, or rather abbreviated, character.[29] What is the part that the foreign rule plays? Is it effective *as such* before the municipal court? This question would have to be answered in the affirmative, if Cheshire's opinion were right, that private international law "fixes the area of the law's authority."[30] Nussbaum has not treated this problem; but it is a fundamental one. In other words, it is the question as to whether the reference to foreign law by the domestic rule of conflicts incorporates, and "naturalizes" the foreign rule of law, or whether it gives effect to the foreign rule as such. In Italy, this problem, which has been discussed first by Zitelman and H. Triepel,[31] has been very thoroughly investigated and the question as to whether the reference to foreign law has the effect of a real incorporation (*rinvio recettizio*) or not (*rinvio non recettizio*) is considered to be of the highest importance.[32] In American doctrine, the theory of real incorporation seems to prevail. Justice Holmes has said: "When a case is said to be governed by foreign law that is only a short way for saying, that for this purpose, the sovereign power takes up a rule from without and makes it part of its own rules."[33] Similarly Wharton says: "For when a foreign law binds in a particular case, then it becomes part of our common law,"[34] and

[28] Deutsches Internationales Privatrecht 3.

[29] A similar view has been taken very recently by Rundstein, La théorie normative et la structure du droit international, 9 Revue International de la Théorie du Droit 255, 257, 258, 267 (1935), where he points out that the rules of conflict have a "material content" and "caractère substantiel"; also Rheinstein, 1. c. p. 263 seems to share this view.

[30] Cheshire *id.* at 7.

[31] H. Triepel, Völkerrecht und Landesrecht (1899). He was the first author to investigate the problem of the "rules of reference" effecting and not effecting an incorporation of rules of a foreign law from a general point of view.

[32] To be mentioned are Anzilotti, Corso di diritto internazionale 57 (Rome 1925); Balladore Pallieri, Il concetto di rinvio formale e il problema del diritto internazionale privato, Riv. di diritto civile 473 (1929); Diena, La funzione delle norme del diritto internazionale privato e il compito dell' autorità giudiziaria, Riv. ital. di dir. intern. privato e dir. proc. 329 (1932); Ghirardini, La communità internazionale e il suo diritto, Riv. di dir. intern. 3 (1919); and Sull' interpretazione del diritto internazionale privato, *ibid.*, 289; Marinoni, L'universalità dell' ordine giuridico statale e la concezione del diritto internazionale privato, Riv. di dir. publ. 225 (1916); Marinoni, Della natura giuridica del diritto internazionale privato, Riv. di dir. intern. (1913); Ottolenghi, Sulla funzione e sulla efficacia del diritto internazionale privato (Turin 1913); *cf.* also the treatises of Pacchioni and Ago and the above-cited article of Rundstein.

[33] In The Western Maid, 257 U.S. 419 (1921). This same theory is adopted by Vice Chancellor Turner in Caldwell v. Vanvlissingen, 9 Hare 425 (1851).

[34] Wharton, Conflict of Laws 6; similarly Stowell, International Law.

recently Cook has insistently advocated this conception.[35] The foreign rule as such has no other effect than to determine the content of the municipal rule. Therefore, *in itself* it has not the significance of a *legal* rule for the courts of the *lex fori*. This is sometimes expressed in the form that the foreign rule is only a fact in the transaction.[36] This point of view may be material to the question whether higher courts are bound by the ascertainment of the lower courts relating to foreign law. The judicial practice differs in the several countries. The question is also important for the interpretation of foreign statutes.[37] The problem of the significance and bearing of foreign acts and rules is one of the most fundamental and crucial ones in private international law, and to my mind it is necessary to work out some leading principles here: some jurisprudence is necessary in this field even for a strict "realist" or positivist.[38]

A clear conception of the significance and function of the rules of international private law is above all necessary, in my opinion, if we wish to reduce the three famous and fundamental problems of private international law to their real meaning and scope and to solve them: the problem of public policy (*ordre public*), the problem of renvoi (remission) and the problem of qualification. Nussbaum deals with these crucial points in the first book of his work, in which he discusses, further, the problem of interpretation of the rules of conflict, evasion of law (called often[39] fraud upon the law or fraud à la loi) which is important especially with respect to divorce law,[40] the questions of reciprocity, of protection of vested rights, of localization of rights, of formalities of legal transactions and of judicial notice and proof of foreign law.

In the chapter concerning the renvoi Nussbaum avoids giving a detailed theoretical analysis of the problem. He contents himself with pointing out the attitude of the courts by means of copious reference to judicial practice. He seems, in contrast to the German *Reichsgericht*, not to be in favor of the general acceptance of the renvoi doctrine and to uphold its application only in the cases under § 27 of the Introductory Statute to the German Civil Code and *"in consimili casu."* Nussbaum follows thus the modern trend of thought in private international law in his attitude toward the renvoi doctrine. Although this doctrine has recently found an ardent defender in the Belgian professor Philonenko,[41] the continental writers generally[42] are not very fond of this

[35] Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale L. J. 457 (1924) and Tort Liability and the Conflict of Laws, 35 Col. L. Rev. 202 (1935); see also Stumberg, Foreign Created Rights, 8 Tex. L. Rev. 173 (1930), note 2.

[36] So for instance 1 Beale, Conflict of Laws 53; in Italy this opinion has been developed by Cammerata, in Il significato e la funzione del facto nell' esperienza giuridica (1929).

[37] *Cf.* Albright, 13 N. C. L. Rev. 497 (1935) and Carbonnier, Loi étrangère et jurisprudence étrangère, 62 Journ. du Dr. Intern. 473 (1935).

[38] *Cf.* Harrison, On Jurisprudence and the Conflict of Laws 147, "Theory cannot precede law, but without theory, law would ever remain a chaos, having neither fixity nor authority."

[39] *Cf.* Lorenzen, The French Rules of the Conflict of Laws, 36 Yale L. J. 731, 737 (1927).

[40] *Cf.* 2 Beale, Conflict of Laws, 678 and 681, and 1 Vernier, American Family Laws 209 (1931). 23 Col. L. R. 82 (1923): Syllabus in Ross v. Bryant, 90 Okla. 300, 217 Pac. 364 (1923). The question of evasion is of importance in taxation law also, *cf.* 92 A. L. R. 1073 (1934). A general theory, however, does seem not to have been developed in American law in contrast to the civil law.

[41] Philonenko, La Théorie du renvoi en droit comparé (Paris 1935).

[42] *Cf.* Pacchioni, Diritto Internazionale Privato 147; Cavaglieri, Lezioni di Diritto Inter-

"irrepressible shuttlecock" as an American writer has called it.[43] The courts on the continent also begin more and more to abandon the theory of renvoi, even in France, where the famous affaire Forgo gave rise to this much discussed question.[44] Thus the Cour de Paris has lately declined to follow the renvoi doctrine in the case of the époux Stewart and Niorthe (March 1, 1933)[45] influenced by the remarks of the deputy-attorney general which were supported by a long list of modern judicial authorities. The Court de Cassation, however, is still a partisan of the renvoi.[46] Nussbaum offers a convincing criticism of the English practice which accepts the renvoi although in a formulation which differs from that on the continent,[47] whereas in the United States the doctrine of renvoi is generally repudiated. I believe Nussbaum's refusal to share the general acceptance of the renvoi is quite sound. But he should perhaps have pointed out the basic fallacy of the contrary opinion, from the very nature of the rules of conflict. The chief argument of the defenders of the renvoi is that by failure to give attention to the renvoi contained in foreign law, this law would be applied by the judge of the *lex fori*, where it has declared itself as *not* controlling the legal relations.[48] But the foreign law is not applied *ex proprio vigore* but as part of the *lex fori*. Thus the problem of renvoi is nothing else but a problem of interpretation of the rules of conflict. The ambit of the foreign law as such, as binding by its own force, is immaterial and the reference to it is only a remainder of the antiquated and naturalistic conception of auto-limitation of a legal system by its rules of conflict. Reduced to a problem of interpretation of the internal rules the leading point of view is practical expediency and some consistency.

As to the problem of qualifications or classifications, also, a greater stress on its fundamental aspects would have been desirable. This question has in recent years drawn the attention of Anglo-American writers also, after Lorenzen presented it in an admirable article published in 1920.[49] Dicey, Beckett, Falconbridge, Cheshire and

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nazionale Privato 66. (He states that the Italian practice generally declines to recognize the renvoi, whereas Philonenko alleges the contrary.) Pillet-Niboyet, Manuel de Droit International Privé 386; Bartin, Principes de Droit International Privé 200 (Paris 1930); 1 Arminjon, Précis de Droit International Privé 127 (1925); both the latter however want to make certain exceptions.

[43] Radin, 21 Calif. L. Rev. 300 (1932); Buzzati, an Italian writer, similarly called the renvoi "lawn tennis" of private international law.

[44] *Cf.* Cheshire, Private International Law, 51 L. Q. R. 76 (1935) and in his treatise, Private International Law 133.

[45] 62 Journ. du Dr. Intern. 68 (1935) with note of Perroud.

[46] In Guez v. Ben Attar, 62 Journ. du Dr. Intern. 88 (1935).

[47] *Cf.* Cheshire, Private International Law 133, and his critique, similar to Nussbaum's, *id.* at 141. With respect to the recent renvoi doctrine in Anglo-American law see further Falconbridge, Contract and Conveyance in the Conflict of Laws, 81 U. Pa. L. Rev. 661, 681 (1933), Conflict of Laws as to Nullity and Divorce, 4 D. L. R. 44 (1932), Renvoi and Succession to Movables, 1 D. L. R. 1, 11 (1932) and Beale, Conflict of Laws 55. The most complete survey of the Anglo-American doctrine is written by Grassetti, La dottrina del rinvio in diritto internazionale privato e la "common law" anglo-americana, 26 Riv. di dir. int. 3, 233, 350 (1934).

[48] *Cf.* the remarks of the deputy attorney general in the case of Stewart and Niorthe, 62 Journ. du Dr. Intern. 68 (1935).

[49] Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col. L. Rev. 247 (1920); see also his Cases on the Conflict of Laws 60 (1932), note.

Beale[50] have dealt with it; the English translation of an article of the Italian Professor Meriggi has appeared[51] and very recently Mendelssohn-Bartholdy[52] has again drawn the question into the discussion of the English speaking world.

The problem is based on the fact that legal institutions and legal concepts have different character in the various legal system. If, accordingly, one legal system refers to another with respect to the effect of a legal transaction, institution or situation, which system shall determine the characteristic features of the transaction, institution or situation, the *lex fori* or the foreign law referred to? While in a primary stage of the elaboration of the qualification doctrine such problems were found only in the field of private law, it is now observed that the question has a much more fundamental character.[53]

The qualification problem may arise either from a rule contained in the body of internal (municipal) law or from a provision in an international treaty;[54] it may arise either (1) within the realm of substantive private law, and there either from an ordinary rule or a rule of conflict,[55] or (2) within the realm of procedure or in the zone between procedural and substantive law;[56] moreover, the general question as to whether a certain legal relation belongs to one or to the other of the two great principal branches of law (i.e., public or private law) is a qualification problem of cardinal importance. This latter point is generally neglected.[57] It may be, however, decisive: a legal relation which has public character is not actionable before many continental courts. A British consul in Italy maintained a cemetery for British subjects. He dismissed the administrator of this cemetery. The employee brought a suit against him. In Italy a foreign state is subjected to Italian jurisdiction only in private transactions. Which law quali-

[50] Dicey, Conflict of Laws 46 (5th ed. 1932); Beckett, The Question of Qualification (Classification) in Private International Law, 15 British Year Book of International Law 46 (1934); Falconbridge, Conflict of Laws as to Nullity and Divorce, 4 D. L. R. 1, 9 (1932); Cheshire, Private International Law 9; 1 Beale, Conflict of Laws 55. *Cf.* further the remarks of the reviewer in 23 Calif. L. Rev. 547 (1935).

[51] Meriggi, Conflicts of Law—A Theoretical Approach, 14 B. U. L. Rev. 319 (1934). The original was printed in Riv. ital. di diritto internazionale privato e processuale 189 (1932).

[52] Mendelssohn-Bartholdy, Delimitation of Right and Remedy in the Cases of Conflict of Laws, 16 British Year Book of International Law 20 (1935); *cf.* also his remarks in 51 L. Q. R. 535 (1935).

[53] The fundamental character has been pointed out first by Fedozzi in his lectures, De l'efficacité extra-territoriale des lois et des actes de droit public, Recueil des Cours, Acad. de Droit Intern. v. 1, 146 (1929).

[54] See Nussbaum, Deutsches Internationales Privatrecht 51; Niboyet, Le problème des qualifications sur le terrain des traités diplomatiques, 2 Rev. Crit. de Droit Intern. 1 (1935); and Philonenko, 61 Journ. du Dr. Intern. 408 (1934).

[55] These cases were the ones first discussed by Bartin, Kahn and others.

[56] This problem has nowadays drawn the attention of legal writers. *Cf.* McClintock, Distinguishing Substance and Procedure in the Conflict of Laws, 78 U. Pa. L. Rev. 933 (1930); Cook, Substance and Procedure in the Conflict of Laws, 42 Yale L. J. 333 (1933); Ailes, Limitation of Actions and the Conflict of Laws, 31 Mich. L. R. 474 (1933); Yntema, The Enforcement of Foreign Judgments in Anglo-American Law, 33 Mich. L. Rev. 1129, 1140 (1935); Mendelssohn-Bartholdy, Delimitation of Right and Remedy in Cases of Conflict of Laws, 16 British Year Book of International Law 20 (1935); Beale, Conflict of Laws 1599, 1600, 1601.

[57] Not by Mendelssohn-Bartholdy and Fedozzi.

fies the legal character of the relation? The court[58] held that the *lex fori* is the *lex qualificationis*, and that the legal relation according to Italian law must be considered public in character, and the claim therefore was not actionable. This is right: the question of actionability of a legal relation has to be determined according to the *lex fori*, and if the actionability is dependent on the distinction between public and private law the *lex fori* controls this classification.

The question also as to whether an issue involves right or remedy, substance or procedure, must in general be qualified in this way. This is the universal opinion[59] and Nussbaum agrees with it.

But what is the situation within the realm of procedural law? It is usually said that in matters of procedural law the *lex fori* determines the classification. That is generally true.[60] But the problem becomes complicated and doubtful when we come to the most important matter, to the effect and enforcement of foreign judgments. Here is perhaps one of the weaker points of Nussbaum's work.

A judgment has, generally speaking, two different effects, that of being the basis of an execution and that of having binding force upon the parties with respect to the issue decided upon. This is generally recognized.[61] Therefore two different problems arise, that of the recognition and that of the enforcement of foreign judgments. They are of different nature, but often practically connected. That can easily be seen by the fact that on the one hand many states recognize only such judgments as *res judicata* which can be enforced, and that on the other hand many make the enforcement dependent upon recognition. To the first group Italy, France and Belgium belong, where a foreign judgment has no effect at all, unless it is subjected to a certain procedure (*delibazione, exequatur*);[62] to the second belong Germany, Greece and Roumania where the

[58] Little v. Riccio, Corte d'Appello, Naples, 26 Riv. di dir. intern. 110 (1934). The same view has been taken also with respect to the public character of the legal relation between employees and the commercial representatives of the U.S.S.R. Cassaz. d. Regno, Jan. 18, 1933. Rappr. del U. S. S. R. v. Karmann, 25 Riv. di dir. int. 240 (1933), Court of Geneva Feb. 17, 1930, Alexeff c. Delegazione della Rappr. comm. dell' Unione Sov., 23 Riv. di dir. int. 558 (1931); *cf.* note of Scerni *ibid.*, of Sereni, 24 Riv. di dir. int. 436 (1932); Cavaglieri, Ann. di dir. comparato vol. II–III, 768 (1929). The question is important also with respect to the right of foreign states to claim the fortune of citizens deceased abroad without heirs. *Cf.* Nussbaum, Deutsches Internationales Privatrecht 357.

[59] *Cf.* the writings cited in notes 56 and 57, *supra*. As to exceptions, see my remarks, 23 Calif. L. Rev. 547 (1935).

[60] For instance, a bill of exchange is executable in the country of payment, if bills of exchange are executable there without judgment, regardless of whether the possibility exists in the country, where it is emitted; *cf.* Cass. del Regno June 17, 1929, in Martinengo v. Banco Italo-Franco, 6 Annuario di dir. comp. 476, with note of Bosco; of the same opinion are Baldoni, 23 Riv. di dir. int. 548 (1931); Bosco, 21 *id.*, 279; Perassi, 22 *id.*, 115. But even if the law of the country where it was emitted would govern the executability, the qualification, whether the bill is "executable" under those provisions, would have to be made according to the *lex fori*. *Cf.* Cass. di Roma Feb. 11, 1929 11, Giurisprudenza Italiana 265 (1929).

[61] *Cf.* for instance Yntema, Enforcement of Foreign Judgments, 33 Mich. L. Rev. 1129, 1132 (1935).

[62] As to Italy, *cf.* Bosco, La sentenza straniera come titolo di un'azione di condanna e come documento probatorio prodotto in giudizio, 22 Riv. di dir. int. 245 (1930); Siotto-Pintor, Questioni relative alla cosa giudicata, 26 Rivista di dir. int. 57 (1934); Sereni, *id.*, at 420; Perassi,

foreign judgment is recognized *"de plano"* provided that certain requirements are fulfilled and where the execution is allowed only of a recognized judgment.[63] In England, where the enforcement of foreign judgments is introduced by the Foreign Judgment (Reciprocal Enforcement) Act the recognition is independent of the registration for purposes of execution.[64] The Bustamente Code likewise treats recognition and execution of foreign judgments separately (Book IV, title VI and title X).

But this diversity of conditions for the recognition and execution of foreign judgments in the different states has no bearing on the law of recognition and enforcement in a particular state, except under the rule of reciprocity. However, the problem of qualification arises in order to determine whether a foreign act is a judgment and whether it has the force of *res judicata.*

The character of an act as a judgment has to be qualified according to the law of the recognizing and enforcing court. This opinion, which follows from the rule that qualifications of a procedural kind are made by the *lex fori,* is shared by Nussbaum, by the German practice, and by Italian authorities.[65] In Roumania the opposite view seems to be held.[66]

Great difficulties, however, arise with respect to the question when and how far foreign judgments have the force of *res judicata.* Which law qualifies? The difference in the various countries is great. In England and in the United States, except in some jurisdictions, a judgment has the force of *res judicata* unless it is reversed, whether or not an appeal is pending.[67] In Germany a judgment is *res judicata* only if it is no longer attackable by any ordinary procedural remedy, i.e., appeal by the parties to the suit, including also appeals to the Supreme Court. In Italy, however, the appeal to the Supreme Court is considered to be an "extraordinary" remedy; the force of *res judicata*

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24 *id.,* 277 (1934), note 2, and decision of appellate court, 22 Riv. di dir. int. 243 (Milan 1929), and app. court *ibid.* 246 (Geneva 1929) note 1; as to France, *cf.* Lorenzen, 36 Yale L. J. 755 (1926); as to Belgium, *cf.* Cour de Bruxelles, 18 Nov. 1931 (1932), 59 Journ. du Dr. Intern. 110: "The procedure of *exequatur* constitutes the recognition as *res judicata* of a foreign judgment." In Belgium and France, however, foreign judgments relating to the "statut civil" are conclusive without *exequatur.* Trib. Anvers, 19 June 1931, 59 Journ. du Dr. Intern. 1104 (1932); Cour de Paris, March 24 1930, 59 Journ. du Dr. Intern. 668 (1932).

[63] Germany: § 328 Code of Civil Procedure; Greece: Court of Athens 1932 (1933) 60 Journ. du Dr. Intern. 1024 and note; Roumania: *Cf.* Report of Possa, 60 Journ. de Dr. Intern. 479 (1933).

[64] Foreign Judgments (Reciprocal Enforcement) Act, 23 Geo. V, c. 13 (1933); *cf.* with respect to this act Dobson, The Foreign Judgments (Reciprocal Enforcement) Act, 75 L. J. 413 (1933); Reciprocal Execution of Foreign Judgments, 175 L. T. 29, 33 (1933). Yntema, 33 Mich. L. Rev. 1129, 1159. According to Dobson, this statute extends somewhat the recognition of foreign judgments, 75 L. J. 413, 415 (1933).

[65] *Cf.* Nussbaum, at 430, and Sereni, Sull'efficacia in Italia di un proveddimento Austriaco di fallimento, 26 Riv. di dir. int. 412 (1934).

[66] *Cf.* Possa, *loc. cit.*

[67] *Cf.* for the United States, Emery v. U.S., 27 F. (2d) 992, 994 (1928); Du Pont de Nemours Co. v. Richmond Guano Co., 297 Fed. 580, 583 (1924). See also R. v. Moschzisker, Res Judicata, 38 Yale L. J. 299 (1929); 2 Freeman, Judgments 1525 (1925); comment in 32 Col. L. Rev. 1245 (1932). In California the law is different: Woodbury v. Bowman, 13 Calif. 634; People v. Beevers, 99 Calif. 286, 33 Pac. 844 (1893); Fry v. Baltimore Hotel Co., 80 Calif. App. 415, 252 Pac. 752 (1926); 15 Cal. Juris. 260 (1924). With respect to England see Bower, The Doctrine of Res Judicata 34, 100 (1924).

is, therefore, not excluded by a pending *ricorso in cassazione*.[68] Further, the *extent* of the binding force (with respect to the operative facts and the reasoning contained in the judgment) is not the same in the different states.[69] In this matter, now, there is an exception to the rule that procedural matters are controlled by the *lex fori* only. The German Code of Civil Procedure actually refers to foreign law with respect to the question as to whether a foreign judgment has the force of *res judicata*.[70] The Italian Code contains in Art. 941 a similar provision. But which concept of *res judicata* is meant by the German Code, the German or the foreign one? Nussbaum seems to be not quite consistent as to this point. He states, relying on some German decisions, that the time and the extent of the force of *res judicata* is determined by the foreign law;[71] but on the other hand he explains that a foreign judgment has the force of *res judicata* if it can no longer be attacked by any ordinary procedural remedy.[72] Consequently Nussbaum applies the German definition of *res judicata*. From this latter point of view an English judgment, although considered as *res judicata* according to the common law conception, could not be recognized in Germany as long as an appeal is still possible. It would be doubtful with respect to Italian judgments. The *ricorso in cassazione* is not an ordinary remedy according to the Italian classification. But would the foreign law (in our case the Italian) have to determine what an ordinary remedy is? I believe that, where such a problem of qualification arises, the *lex fori* is in reality the controlling law. Foreign judgments are conclusive and enforceable only, if according to the law of the place where they are recovered they possess a force and character which corresponds to the concept of *res judicata* in the *lex fori*. The foreign law establishes the effect of the judgment, but the *lex fori* qualifies it as *res judicata*. It is wrong, therefore, to give the foreign judgment a binding force to an extent different from that which a judgment under the *lex fori* possesses. If the *lex fori* contains a provision that the foreign judgment must be "irrevocable and executory"[73] the qualification problem is to a large extent eliminated. In English law a foreign judgment must be final and conclusive. But an appeal does not necessarily deprive a foreign judgment of its force as *res judicata*.[74] The English law consequently uses the concept final and conclusive in its own qualification. To be sure, in *Nouvion v. Freeman*,[75] the court held that the judgment must amount to *res judicata* in the country where it was delivered. In *Macfarlane v. Macartney* the court

[68] Cod. Proc. Civ. art. 465. *Cf.* 2 Mortara, Manuale della procedura civile 10, 12 (Turin 1921).

[69] *Cf.* Freeman, Judgments 1414; and Report of Foreign Judgments (Reciprocal Enforcement) Committee, Cmd. 4213, p. 7 n.* (London 1932).

[70] Zivilprozessordnung §723 II (only with respect to enforcement, but applied to the recognition by analogy).

[71] At 427, note 4. This rule seems to be followed in Quickstadt v. McNeill, 4 D. L. R. 427 (British Columbia 1932).

[72] At 431.

[73] This is the case in Italy: Code Civ. Proc. art. 941, and in Greece: *cf.* 61 Journ. du Dr. Intern. 1056. The court of San Marino did not permit execution of an Italian judgment, although it was executory, because it was not irrevocable, pending an appeal to the Supreme Court. (Sulla v. Brambilla, 25 Riv. di dir. int. at 104 (1933)).

[74] *Cf.* Cheshire, Private International Law 506, 508; 175 L. T. 54 (1933); Dobson, 76 L. J. 414 (1933); Scott v. Pilkinton, 2 B. & S. 11, 121 E. R. 978 (1862); *In re* Henderson. Nouvion v. Freeman, 37 Ch. D. 244, 255 (1887), and affirmed in 15 App. Cas. 1, 10 (1889). See also Foreign Judgments Act Part I, 1, subd. 3 (1933).

[75] 37 Ch. D. 244, 255 (1887) judgment of Lindley, J.

followed this rule and quoted Dicey, viz.: "the test of finality is the treatment of the judgment by the foreign tribunal as res judicata."[76] It seems to me nevertheless not correct to infer from this statement that the English Courts apply the qualification of the place where the judgment is obtained. In the *Nouvion* case the court went on to say that an appeal does not exclude the recognition of a foreign judgment;[77] that is to say it applied the English qualification. The finality of which the English courts speak corresponds to the German *Endurteil* which does not have the force of *res judicata* in the German meaning as long as an appeal is possible. I believe that the court must give attention to the effect which the foreign law attributes to a judgment and appeal, and must then under consideration of this effect compare it with its own concept of conclusiveness and finality. The final reason is here again that the rule of conflict attributes to the foreign judgment, by compliance with certain prerequisites, the value of a domestic judicial act.

The German law gives effect even to a suit pending before a foreign court, recognizing it as a bar to a domestic action. Nussbaum treats the question briefly and not in its logical place in a systematic treatment. It belongs before the recognition of foreign judgments, not after it.[78] On this point Germany is more liberal than most of the other countries,[78a] except perhaps Switzerland[79] where a conflict exists. The common law disregards the foreign suit,[80] at least speaking practically, and Italy and France[81] do so entirely.

But these considerations which relate rather to questions of method, do not change the fact that Nussbaum's work is an admirable accomplishment. Completeness of material and clearness of thought make his *Deutsches Internationales Privatrecht* of decisive importance for practitioner and student in this field. I believe I could find no more adequate judgment on Nussbaum's book than that which was once expressed by Dupin with regard to the first and classical continental treatise in the field of private international law:[82] "The work is a fine law book: the various parts are arranged with order: the doctrine is supported by the least contestable authorities and the quotations recommend themselves more by their selection than by their number. I mention this

[76] 124 L. T. R. 658, 1 Ch. 522 (1921).

[77] 37 Ch. D. 244, 255 (1887); and the distinction drawn by Lord Herschell between the *Nouvion* case and the case of an appeal pending (15 App. Cas. 1, 10) confirms the application of the English qualification.

[78] *Cf.* 3 Arminjon, Précis de Droit International Privé 253.

[78a] The Bustamente Code, adopted by the majority of the South American States, accepts the German rule (art. 394).

[79] Comp. the two decisions in 56 Journ. du Dr. Intern. 796, 797 (1929).

[80] *Cf.* Cheshire, Private International Law 553; Gutteridge, 44 Recueil des Cours, Acad. de Dr. Intern. 115, 133 (1933); Dicey, Conflict of Laws, 5th ed. 355, 364;2 Beale, Conflict of Laws 1429; Wharton, Conflict of Laws 1580, 1581, Thompson v. Shanley, 93 Mont. 235, 17 P. (2d) 1085 (1932).

[81] See with respect to Italy, Cassaz. del Regno Dec. 12, 1931, Anitua v. Treves, 24 Riv. di dir. int. 428; Cassaz. del R. July 13, 1928; Mustica v. Kehauski, 4–5 Ann. di dir. comp. 674 (1930). Sereni, 26 Riv. di dir. int. 420 (1934) and n. 2; also the draft of the new civil code contains a provision excluding the *exceptio litis aliunde pendentis*. *Cf.* Diena 7 Ann. di dir. comp. 34; Arminjon, 8 Ann. di dir. comp. 28 (1933). With respect to France see "litispendance" in De Lapradelle Niboyet, Rép. d. Dr. Intern. vol. IX. The German rule is criticised by Arminjon, Droit International Privé, vol. 3, 258.

[82] *Cf.* Dupin ainé, Report to the Académie des Sciences morales et politiques about Foelix's Traité du Droit International Privé, Séances et travaux of this Academy, v. 3, 182, 187 (1843).

purposely at a time when some of our scholars load the bottom of their pages with names and titles of a great number of foreign authors and works, which they have never read and which their reader would in vain try to procure."

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A Study of the Business of the Federal Courts. Philadelphia: American Law Institute, Publishers, 1934. Part I, pp. 153, xxxix; Part II, pp. 217, xxvii. $5.00.

In 1929 the National Commission on Law Observance and Enforcement appointed an advisory committee to investigate "the administration of law in the Federal courts, through a scientific analysis of case records, both civil and criminal, the general purpose of the study being to test the efficiency of the administration of justice in these courts."[1] After June 30, 1931, the American Law Institute, in co-operation with the Yale School of Law, assumed responsibility for the direction of the study.

In the progress report, published in 1931 and based on work begun in October, 1930, the advisory committee stated that the data being sought were in general of three kinds: (1) the statutes, laws and parties involved in each case coming before Federal courts; (2) the several procedural devices employed in the courts to expedite the trial of cases or otherwise dispose of them; and (3) the various dispositions made of the cases.

Since it was impracticable, because of financial limitations, to attempt a study of all Federal courts, only thirteen districts, out of eighty-four in the United States, representing urban, semi-urban and rural conditions, were selected. The study includes an analysis of 35,671 criminal cases in addition to 37,065 dealing with prohibition enforcement under the Eighteenth Amendment, and 9,852 civil cases. Of the civil cases 10 per cent entered the federal courts by the removal process and of these 92.6 per cent were diversity cases. The criminal cases, in general, cover a period for the fiscal years ending June 30, 1928, 1929, and 1930; while the civil cases cover a period for the fiscal year ending June 30, 1930. Eleven law schools, in addition to the Yale School of Law, assisted in the project. This plan made possible local supervision by a law school representative in each district studied.

The data secured under the first group, as pointed out in the progress report in the chapter on the aims and purposes of the study, were gathered to furnish statistics showing the distribution of the load of Federal court business by types of cases. This information, it was hoped, would throw light on the controversial issue as to whether the civil dockets of Federal courts were congested because of cases based on diversity of citizenship jurisdiction.[2]

The second type of data was intended to aid in formulating a more simplified and uniform system of practice and to aid, when combined with the data of the first group, in understanding whether the problem of congestion in the Federal courts, if it exists, is due to faulty judicial administration rather than to the number of cases of a particu-

[1] Progress Report on the Study of Federal Courts, Report no. 7, National Commission on Law Observance and Enforcement iii (1931).

[2] For references to the periodical literature on this controversy see: Limiting Jurisdiction of Federal Courts—Comment by Members of the University of Chicago Law Faculty, 31 Mich. L. Rev. 59 (1932); Yntema, Jurisdiction of the Federal Courts in Diverse Citizenship Cases, 19 A.B.A.J. 265 (1933).