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Urkunden und Forschungen zum Internationalen Recht

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(1) Klagbarkeit, Prozessanspruch und Beweis im Licht des internationalen Rechts, zugleich ein Beitrag zur Lehre von der Qualifikation. By Magdalene Schoch. Bernhard Tauchnitz, Leipzig, 1934. Pp. xvi, 160.

(2) Der briefliche und telegraphische Vertrag im vergleichenden und internationalen Privatrecht, unter Beruecksichtigung des deutschen, englischen, franzoesischen und italienischen Rechts. By Ernst Achenbach. Bernhard Tauchnitz, Leipzig, 1934. Pp. vi, 98.

(1) Recent continental writers on the conflict of laws are paying much attention to the so-called problem of "qualification", or, as Dean Falconbridge has recently labelled it, "characterization." Now, it has also made its entrance into English and American literature,[1] and it has even found a place in the Restatement.[2] The problem arises "when the question as to which one of several laws is applicable to a certain situation depends upon the answer to the prior question of how this situation is legally characterized, and when, in addition, this prior question is answered differently by the legal systems involved." [3] American conflict of laws provides, *e. g.*, that succession of immovables upon death is governed by the law of the situs. Which law determines what is "succession upon death" or what is an "immovable?" The heated debates concern the question whether the answer to these preliminary problems should be sought in the legal system of the forum or in the law which (hypothetically) applies to the situation according to the conflict rules of the forum. To express it more concretely: In our example, are the questions whether the case at hand deals with "succession upon death" and whether a certain object is an "immovable" to be answered by applying the categories of American law or of the foreign law of the situs? Several other problems are frequently confused with this main problem at the expense of clearness and comprehensibility. Lea Meriggi has given an extensive survey of the various doctrines held by the multitude of authors who have applied their sagacity and learning to the topic.[4] There are almost as many doctrines as authors. Most of them seek a solution by pure logical reasoning, with the result that they become involved in inextricable circles and frequently arrive at resignation.[5] The first escape out of the walls of supposed logical necessities was made by Professor Ernst Rabel of Berlin,[6] who was followed by Dr. George Melchior [7] and Professor Robert Neuner of Prague, Czechoslovakia.[8]

1. Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247; Falconbridge, *Conflict of Laws as to Nullity and Divorce* (1932) 4 DOMINION L. REP. 1; Beckett, *The Question of Classification ("Qualification") in Private International Law* (1934) 15 BRITISH YEAR BOOK OF INTERNATIONAL LAW 46.

2. RESTATEMENT, CONFLICT OF LAWS (1934) § 7 (a): "In all cases where as a preliminary to determining the choice of law it is necessary to determine the quality and character of legal ideas, these are determined by the forum according to its law."

3. Definition by Martin Wolff, INTERNATIONALES PRIVATRECHT 35.

4. Meriggi, *Saggio critico sulle qualificazioni* (Italia 1932) 2 RIVISTA ITALIANA DI DIRITTO INTERNAZIONALE PRIVATO E DI DIRITTO INTERNAZIONALE PROCESSUALE CIVILE 189; abbreviated French version in (1933) 28 REVUE DE DROIT INTERNATIONAL PRIVÉ (REV. DARRAS) 201.

5. So did especially the "fathers" of the doctrine, Franz Kahn in Germany and René Bartin in France.

6. Rabel, *Das Problem der Qualifikation* (Deutschland 1931) 5 ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT 261; French version in (1933) 28 REVUE DARRAS 1; Italian version in (1932) 2 RIVISTA ITALIANA 97.

7. MELCHIOR, DIE GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS (1932) 109.

The present book of Professor Magdalene Schoch of the University of Hamburg attempts a similar escape. She is concerned with one particular problem of characterization only, *viz.*, the distinction between "substantive law" and "procedure", between "right" and "remedy." [9] Her first proposition is that, regardless of how the problem of qualification may be answered with respect to the characterization of the various branches and concepts of substantive law, the preliminary question of whether a certain problem belongs to the spheres of "substantive law" or "procedure" can only be answered by the lex fori. She proves this thesis by a "logical" and a practical argument. I do not understand her "logical" argument. It would not be very convincing anyhow to a reviewer who does not believe in the legally binding force of "logical" reasoning. However, her practical argument appears to be conclusive. Her idea is that it is the very purpose of the distinction between substantive law and procedure to restrict the application of foreign law in a domestic court to those topics where such application appears possible and desirable to the domestic law-giver (whosoever he may be, a legislature, the courts, legal science, or somebody else); that the law of the forum applies to problems of procedure because "the form of proceeding is so closely connected with the organization of the courts, the system of appeal courts, and the basic principles underlying the various national systems of civil procedure, that it is impossible to change the procedure with its subject-matter." [10] Those topics which the domestic lawgiver regards as so essential that they must always be governed by his own law, can properly be determined by nobody but himself, "least of all by a foreign law." This seems to be the practical argument underlying all of Dr. Schoch's discussions, although she does not state it as a general proposition anywhere.

Upon this basis she takes up various particular problems, the characterization of which as "substantive law" or "procedure" appears dubious, *viz.*, the problems of the unenforceable right, the action for future performance, the declaratory judgment, the choice of remedy, the limitation of actions, the denial of action to querulous litigants, the maxim, *de minimis non curat lex,* and, finally, the various problems of the law of evidence and estoppel. All these problems are attacked in a matter-of-fact approach. The author is interested in finding out how these various topics are characterized in the principal legal systems, *viz.*, in Germany, France, Italy, England, and the Scandinavian countries. Her long work in the fields of foreign and comparative law predestined her to such a method. She is thoroughly familiar not only with the competent literature and the decisions of the countries she takes into consideration but also with the spirit of their legal systems.

The survey yields the result of showing wide divergencies among the various legal systems. The field of procedure is most narrowly restricted in France, most widely enlarged in England. To explain the latter phenomenon, Dr. Schoch makes some fine, pertinent observations. She points at the strong self-confidence

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8. NEUNER, VOM SINN DER INTERNATIONALPRIVATRECHTLICHEN NORM (1932). As to the doctrines of Rabel and Neuner, see Rheinstein, *Comparative Law and Conflict of Laws in Germany* (1935) 2 U. OF CHI. L. REV. 232, 261.

9. As to recent American discussions of this problem, see W. W. Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 YALE L. J. 333; McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933; GOODRICH, CONFLICT OF LAWS (1927) 159; 3 BEALE, CONFLICT OF LAWS (1935) 1599; Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311; Note (1918) 18 COL. L. REV. 354; Note (1930) 39 YALE L. J. 901; Note (1931) 31 COL. L. REV. 158, 885; Note (1933) 43 YALE L. J. 323; Note (1933) 47 HARV. L. REV. 315.

10. See NEUNER, VOM SINN DER INTERNATIONALPRIVATRECHTLICHEN NORM 117.

of English judges, at their conviction that English law is the "right" law and that, therefore, it should have as wide a sphere of application as possible. She also hints at the idea, still powerful in England, that any application of foreign law is a "comity", and that a person suing in an English court "must take the law as he finds it." [11] The survey also shows how dubious the characterization of many topics still is, especially in Germany. The author undertakes to give directions to the German courts as to how they should characterize each topic. In several respects, she goes beyond Professor Neuner who undertook the last similar attempt before her. Professor Neuner, *e. g.*, believed that it was so extremely difficult to find the adequate characterization of certain problems of evidence (*i. e.*, to find out whether they refer to the "right" or to the "remedy") that he resignedly left the decision to the courts as individual cases should arise. Professor Schoch believes that it is the duty of the legal scholar, and that it is also possible for him even in this difficult field, to direct the courts by helping them to proceed from more or less unconscious feeling around to a process of conscious reasoning. She carries out this conviction successfully. Her own suggestions are all well-reasoned and apparently sound.

Yet, she does not extricate herself completely from the sphere of unconscious groping because she fails to make it clear to herself and to the reader by what criteria substantive law and procedure ought to be distinguished. The distinction between substantive law and procedure can be made for several purposes. It can be based upon a belief that there are categories and ideas in the world which are given by "nature", which can be recognized and defined by the human intellect, and which are coordinated in an eternal system of harmony. It is legitimate within the framework of such a Platonic-Scholastic belief to inquire into the "nature of things" and to "find" the eternal definitions which are given by the "thing in itself." This philosophical belief is the foundation for the endeavours of the medieval commentators and many of their successors to find "absolute" definitions of legal concepts and "the" legal system in which they are all united in perfect harmony, as a constituent part of the harmonious, universal system of the world as it presented itself to the Scholastic theologist-philosophers.[12]

He who does not share this philosophical belief or who, although accepting it in general, does not think that it necessarily determines the nature of such concepts as substantive law and procedure or of other technical legal concepts, must regard all endeavours to find out the "true" distinction between law and procedure as futile. He can conceive of such a distinction only as being made for certain practical purposes, either for separating the task of the professor of civil procedure from that of other colleagues on the faculty; or for certain definite legal purposes. It can be made in a federal state for the purpose of demarcating the legislative jurisdiction of the states from that of the union. In Switzerland, *e. g.*, legislation in the field of substantive private law belongs to the federal power, while procedure is left to the states. The distinction may also be made for defining the field of those laws which legitimately may have retroactive force (remedy) from those which may not (right). Likewise, it may be used to demarcate the spheres of court and jury; or for some other purpose. In Germany, *e. g.*, an appellant to the Supreme Court need not specifically allege errors of substantive law made by the inferior court. It suffices for him to complain that the inferior court has misapplied the substantive law, whereupon the Supreme Court will inquire on its own motion into what particular errors were made. On the other

11. Lord Tenderden in De la Vega v. Vianna, 1 B. & Ad. 284, 288 (K. B. 1830).

12. *Cf.* Rudolf Littauer, *Case Law and Systematic Law* (1935) 2 SOCIAL RESEARCH 481, 491.

hand, errors as to procedure will not be taken up by the Supreme Court unless specifically complained of by the appellant.

As to each of these different purposes, the line of demarcation between substantive law and procedure may be, and is actually, drawn differently; in each case it is determined by the particular purpose. If the distinction is made for the purpose of determining whether a court shall apply its own law (of procedure) or a foreign (substantive) law to a certain question, the distinction is necessarily influenced by the policies which are decisive for the exclusion of the foreign law from its application by the domestic court. This exclusion is based upon considerations which are identical, by and large, among the several countries. In details, however, indeed, in rather important details, the policies of the countries differ. These policies can alone be decisive as to whether a certain topic should be regarded here as procedural, there as substantive law.[13] These policies guide the courts. They go to the basic ideals and principles of the various legal systems, and for this reason they are largely subconscious. They belong to the background of the atmosphere in which courts and judges do their work. The legal scholar who wishes to direct the courts must bring to light these policies. This is, indeed, the line of thought generally followed by Professor Schoch. Frequently, however, she refers to distinctions between substantive law and procedure made for other purposes without inquiring whether or not the policies underlying a distinction made for one purpose apply as well to the distinction made for the particular purpose of the conflict of laws. Sometimes the reader even finds passages which sound as if a distinction of absolute, eternal validity were sought.[14] This is not Professor Schoch's intention. Yet, it gives some of her discussions a methodically hybrid appearance, although it does not seriously affect the substance of her very sound reasoning.

Thus, her book is a valuable contribution, a real step forward towards the solution of a number of very delicate problems of the German conflict of laws, and it will be suggestive to foreign readers as well, both for its methodological aspects and for its keen, accurate observation and comparison of widely differing legal systems.

(2) Doctor Achenbach's book deals with a problem which, strangely enough, seems never to have arisen in an American or English court,[15] *viz.*, the problem of which law determines whether or not an exchange of letters or telegrams containing an offer and an acceptance has resulted in the conclusion of a contract, the laws in question differing in their provisions as to the moment when a binding contract is concluded. Such problems may arise in a variety of situations.

Under English law, *e. g.*, a contract is usually held to be complete when the offeree has mailed the letter containing his acceptance, even if this letter never reaches the offeror.[16] Under the law of Germany, however, a contract is not complete before the offeree's acceptance has reached the offeror.[17] What happens

13. A full, detailed exposition of these methodological aspects will be found in Professor W. W. Cook's brilliant article, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 YALE L. J. 333; see also Charles E. Clark, *The Cause of Action* (1934) 82 U. OF PA. L. REV. 354, 356; *cf.* Note (1933) 47 HARV. L. REV. 315.

14. Thus, *e. g.* (at 37), when she criticizes an opinion of the French scholar, Professor Niboyet, as follows: "It suffices to show the political motive in order to exclude Professor Niboyet's opinion from the sphere of legal science"; or when she says of a certain argument that "it appeals more to the practical mind than to dogmatic reasoning" (at 116); or when she states that "the true character of a norm must be definite and certain."

15. There is one case mentioned in Professor Beale's treatise. This case, however, is from Quebec. Renfrew Flour Mills v. Sanschagrin, 45 Rapports Judiciaires 29 (Banc du Roi, 1928).

16. Household Fire Ins. Co. v. Grant, 4 Ex. D. 216 (1879).

17. GERMAN CIVIL CODE § 130.

if *A* in England makes an offer to *B* in Germany, and the letter containing *B's* acceptance is lost in the mails? Or another instance: Under German law, an offer cannot be revoked within a reasonable period unless the offeror has made it clear that he reserved in himself the power to revoke,[18] while under English law, an offer may be revoked by the offeror at any time before it is accepted by the offeree. What is the situation if an offer made by *A* in Germany to *B* in England is revoked by the German offeror, but nevertheless it is accepted by the English offeree within the period within which this offer could be accepted under German law? Or vice versa? Or, a third case: *A* in Germany makes an offer to *B* in Italy, which is accepted by *B*, who dies before his acceptance reaches *A*. There would be a valid contract under German law,[19] but not under Italian law.

Which law determines whether or not there is a valid contract in these and similar situations?

An English or an American court would probably apply the *lex loci contractus* to all these problems, *i. e.*, the law of the place where the last act necessary to make a contract binding under domestic English or American law was done.[20] Similar views are held, as Dr. Achenbach shows, in France and Italy. This solution is not acceptable to German courts. The "place of contracting" is regarded as depending too much on purely accidental circumstances as being able to determine the "proper" law of the contract and its validity. Ever since Savigny, the German conflict of laws has been based upon the idea that each "legal relation" should be governed by the law of that country with which it has the most intimate intrinsic connection, where it has, as Savigny expressed it, its "centre of gravitation." The "place of contracting" may be a third place, different from the place of residence of either party, *e. g.*, if they met in some third country, and, though furnishing a rather definite criterion, it is generally rejected by German courts and writers.

Almost every possible solution has been suggested to solve our problem. The German courts seem to be inclined to follow their general tendency of applying the law which the parties have stipulated themselves, or which they would have stipulated had they thought of the possibility of any doubt arising. The application of this principle to the problem of whether or not a contract has been concluded, has frequently been criticized as illogical. It is contended that there cannot be a stipulation as to the law applicable unless there is a binding agreement in which this stipulation is contained. Dr. Achenbach is aware that such an argument of logical inconsistency is not absolutely convincing. His principal argument, frequently propounded elsewhere, is of a more practical nature, *viz.*, that express stipulations as to the law applicable are extremely rare, that the "hypothetical" stipulation is a mere fiction, and that the decision is not predictable.

His own suggestion for a solution of the problem is as follows: Ordinarily, a contract is concluded at the moment when there would be a valid contract according to the laws of the residence (or business place) of *both* parties. As an exception, a contract is binding upon both parties when it would be binding by the municipal law rules of one party alone, and when the exclusion of its binding

18. *Id.* § 145.

19. *Id.* § 153.

20. *Cf.* RESTATEMENT, CONFLICT OF LAWS (1934) §§ 311 *ff.* Analogously the Quebec court, in the case mentioned above, held the case to be governed by the law of the place where, under the municipal law of Quebec, a contract is held to be concluded, *i. e.*, the place of the offeror.

effect through the law of the other party is not caused by the desire to protect the latter.

This proposition may appear more complicated than it actually is, and it appears to lead to reasonable results. In the first of the illustrations mentioned above (English offeror, German offeree; acceptance lost in the mails), the contract would be binding because section 130 of the German Civil Code is intended to protect the interests of an offeror. Its underlying policy is the idea that an offeror shall not be bound by a contract before he has had an opportunity to learn of the offeree's acceptance. Why should an English offeror be protected by such a provision when his own law does not hold such protection necessary?

In the second instance (correspondence between Germany and England; offer revoked before the expiration of the period within which an offer is irrevocable under German law), the binding force depends on which party is the offeror. The power to revoke an offer until accepted is established by the English law in the interest of the offeror. Since a German offeror is making his offer with a view to the law of Germany which does not want to protect him in such a way, Dr. Achenbach sees no reason why he should not be bound because the offeree happens to be English. It may be asked, however, whether the English party would regard the agreement binding in such a situation. In the third case (offeror in Germany, offeree in Italy; offeree dies before his acceptance has reached the offeror), no contract would have been concluded. The German rule, under which the contract would be binding, is intended to protect the interests of an offeror who, when he receives the offeree's acceptance, has no knowledge of the latter's death. The Italian rule, however, which prevents the contract from becoming binding, is established in the interest of the heirs of an offeree who, in our case, happens to be Italian.

The book, though it does not deal with a problem of immediate importance in the American conflict of laws, may be read as a fit introduction to the problems and methods of present-day German conflict of laws, especially to show how fruitful a method can be which does not undertake to establish conflict rules *in abstracto* but which deals quite specifically with conflicts between the laws of some particular countries.

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ROGER B. TANEY. By Carl Brent Swisher. The Macmillan Company, New York, 1935. Pp. x, 608. Price: $5.00.

Born during the darkest hours of the Revolution, a leading figure of the United States Bank controversy in the 'thirties, spokesman of the ill-fated *Dred Scott* decision,[1] and dying near the close of a Civil War that destroyed the rich and vital culture of which he was a product, Roger B. Taney remained condemned for two generations without a hearing. This excellent biography, long overdue, is the first sustained attempt to evaluate his eminent services. His actions and premises, persistently misinterpreted from a preconceived bias even by leading historians, are here re-examined in the light of historical records. It is a new figure indeed which emerges.

We find a man who was reared and remained a Catholic, yet married a Protestant, lived with her in domestic happiness for forty-nine years, permitted five

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1. Scott v. Sandford, 19 How. 393 (U. S. 1856).