A SURVEY OF THE CHARACTERIZATION PROBLEM IN THE CONFLICT OF LAWS *

PART I. PREVIOUS STATEMENTS OF THE PROBLEM IN ENGLISH

I

THE subject of characterization was introduced to Anglo-American legal literature by Professor Lorenzen in 1920.[1] Lorenzen's article begins with a statement of the renvoi problem, and continues:

> A problem of a different character, though equally fundamental, may arise, even if the rules of the conflict of laws of the countries involved are alike, because of a difference in the meaning of the concepts used. " Nationality," " domicil," " the law of the place of contracting," " the law of the place of performance," and " the law of the place where the tort was committed " are all legal concepts which may be determined in more than one way. The countries differ also on the question of what constitutes immovable and what movable property, on the meaning of " capacity," " form," " substance," " procedure," and in their definition of various other terms upon which the application of the foreign law depends. The question thus presenting itself is what law is to determine the meaning of the above terms. The problem referred to has given the greatest concern to the continental writers and is generally discussed by them under the title of " theory of qualifications."

The problem is stated as one of the determination of the meaning of terms, and a number of examples are given of terms with an

* This article, which is an abbreviated version of the first part of a book on the subject of characterization now being prepared, attempts merely to examine the contributions made by previous writers in English. I wish to make acknowledgment for much assistance from Professor Erwin N. Griswold and Dr. Magdalene Schoch.

[1] *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247. Professor Lorenzen has informed me that his views on the subject have been considerably modified since 1920, but his article is here examined as being the only statement of his views available to the public.

The terms " qualification," " classification " and " characterization " are all used by different authors to designate the same subject. While qualification is the term generally used on the continent, characterization seems preferable in English as more nearly in accord with ordinary usage.

equivocal meaning, which may be interpreted in different ways by different individuals or different systems of law. Lorenzen elaborates a number of these examples. In the case of domicil, the question may arise before a New York court whether a citizen of New York, formerly domiciled therein, has lost his New York domicil and become domiciled in France. "Should the New York courts determine the question of domicil solely with reference to their own law or should they enquire into the French law of domicil?" The importance of this question is evidenced by the fact that the definitions of domicil given in the two systems of law may differ greatly. Similarly with the question of nationality. A number of countries may claim the same person as a citizen or subject at the same time, and he may be the national of each one of them by its own municipal law. What law is to determine the nationality of the propositus for the purposes of a given case? The importance of nationality appears not only from its obvious significance, but also from the fact that many countries use it as the test for the personal law, governing such matters as status and capacity, in the conflict of laws.

To illustrate the necessity of determining the exact meaning of "the place of contracting," Lorenzen gives the following nice example. Suppose a contract made by correspondence between New York and Leningrad, the offer being made at the former place, and the acceptance mailed at the latter. Under these circumstances the law of New York says the contract is made in Russia; the law of Russia says that the place of contracting is New York. It may be that both countries agree that the law of the place of contracting governs the validity of the contract, but what is the law of the place of contracting, the law of Russia, or the law of New York?

Similar difficulty may arise with the question what is the place of performance of a contract. Again the place where a tort is committed is generally accepted as the deciding factor for the choice of law, but is by no means clear in cases where the physical act causing the harm takes place in one state and the effects resulting therefrom occur in another.

The law classifies interests in property according to whether the property is movable or immovable; and for certain purposes movable property may be regarded as immovable, or vice versa. Different rules of conflict of laws may apply to the two different

categories. What test is to be used for deciding into which category some given property is to fall?

Substance and procedure provide another pair of categories between which a court may have to decide. Common-law countries generally regard a statute of limitations as belonging to procedure. Elsewhere the limitation may be deemed to affect the substance. Suppose a contract made in France, under the law of which the action is barred, and suit brought in New York, under the law of which the action is not barred. Which law shall determine the question whether the action may be maintained?

Substance (or capacity) and form are a further series of alternatives in cases where a will is made in a manner valid by the law of the place where made, but invalid by the personal law of the testator or testators, which prohibits joint wills or holograph wills. Assuming that one state regards the matter as one of form, and the other state as going to the substance or capacity, is the forum to hold the will valid or not when its conflicts rules are that capacity is governed by the personal law, and formality by the law of the place where the will is executed? Lorenzen gives two further examples: whether the rights of a surviving widow are to be regarded as belonging to the law of succession or to the law of matrimonial property; and whether an act done in a continental country is a civil or commercial act (special rules often attaching to the latter).

The general theories advocated by various continental writers Lorenzen next explains. Bartin, whose article [2] in 1897 was the first to attract general attention, " maintains that whenever the application of the internal law of the forum or that of another country depends on the nature of a particular juridical relationship, it is the law of the forum which must decide what the nature of the relationship is." To this Bartin makes two exceptions: the determination whether property is movable or immovable should be made by the law of the situs, and the determination of the place of contracting should be made in accordance with the law that would postpone the formation of the contract longest. Generally in agreement with Bartin's conclusions, if not his method of reaching them, are Buzzatti, Diena, and Kahn. Despagnet,

[2] *De l'impossibilité d'arriver à la suppression definitive des conflits de lois* (1897) CLUNET 225.

on the other hand, is quoted as maintaining the view that "the law governing the legal relationship must control also its qualification." To pretend that one is applying the foreign law appropriate to some legal relationship, and at the same time to apply the characterization of that relationship adopted by the domestic law rather than that adopted by the appropriate foreign law, is to deny the decision that the foreign law applies. Thirdly, Lorenzen refers to the view, held in different forms by Gemma and Jitta, that solution should be sought by an application not of the law of the forum, nor of the foreign law exclusively, but of general international principles. No attempt will be made for the present to examine these views critically, because the object of this section is to review the statements of the characterization problem already made in Anglo-American literature, in order to discover just what the problem is all about, before any attempt is made to decide what to do about it.

The second half of Lorenzen's article is devoted to considering the attitude of English and American courts when they have been faced with disputed qualifications. Rules appear to have emerged in certain types of cases. Whether property is movable or immovable is determined by the law of the situs. The meaning of the term domicil has been settled to be that attributed to it by the forum. The question what is the *lex loci contractus* of a contract completed by correspondence has not come up, but Lorenzen has no doubt that the law of the forum controls. Capacity and formality are likewise said to be determined by the law of the forum, and *Ogden v. Ogden*[3] is cited in support of this proposition. Lorenzen then concludes:

> In view of the above cases it may be asserted that according to Anglo-American law the qualification of legal transactions as well as the definitions of "domicil," "the law of the place of contracting," and of the other "points of contact" are governed in general by the strictly internal law of the forum, the principal exception to the rule being that the character of property as movable or immovable is controlled by the law of the situs. This conclusion is also the only one that is consistent with the Anglo-American theory of the conflict of laws.

This last statement is supported by a considerable discussion of the Anglo-American theory of the conflict of laws, in which

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[3] [1908] P. 46.

Lorenzen rejects the territorial theory, and, finding that the foreign law is never applied except when the forum sees fit, concludes that the qualifications on which the application of the foreign law depends must similarly be determined by the law of the forum.

After one has read Lorenzen's statement of the qualifications problem, is it clear what the problem is all about? We may best answer this question by asking two further questions, and seeing if we can find the answers to them:

1. What does the judge do when he " qualifies "?
2. What is it that is " qualified "?

From Lorenzen's statement at the beginning of his article, the answers would appear to be as follows:

1. When the judge " qualifies " he determines the meaning to be given to one of the terms above discussed such as " domicil," " place of contracting," etc.
2. That which is " qualified " is the term of doubtful meaning, and after it has been qualified its correct or appropriate meaning appears.

It should be observed, however, that the way in which these questions present themselves to the court is not one of determination of the meaning of terms. The judge asks in practice not " what is the meaning of domicil? " but " was this man domiciled in state *X*? " Similarly, he asks not " what is the meaning of place of contracting? " but " what was the place where this contract was made? " (This is not to deny that the latter question may involve the former, but it is important to observe the way in which the question arises, for a reason that will appear shortly.)

Two of Lorenzen's other examples were whether the rights of the surviving widow belong to the law of succession or the law of matrimonial property, and whether the statute of limitations belongs to substance or procedure. The way in which these questions present themselves to the judge is as follows:

(a) Is the claim of this woman to be classified as arising from the rules of matrimonial property or the rules of succession?

(b) Is the rule of law that lapse of time prevents recovery a rule of substance or procedure? [4]

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[4] The exact method of asking the question is unimportant; what is important is the distinction between different types of questions.

The importance of considering how the question arises now appears. It is true that in all four cases the underlying question is one of the meaning of terms. That is, as it were, the common denominator of all of them. But the immediate problems presented in the determinations that the judge has to make are of different kinds. Thus in the case of the widow's claim on her husband's death, the question to be decided is the juridical nature of the problem presented to the court: if it is decided to fall into the category of matrimonial property then one set of conflicts rules will apply; if the category of succession is selected, then another set of conflicts rules will be available.

The two cases involving the meaning of " domicil " and " place of contracting " present a different problem: here the juridical nature of the question presented has been ascertained before " domicil " or " place of contracting " becomes relevant. Let us assume a case of succession to movables of a propositus who died in France leaving securities in New York. New York law says that succession shall be governed by the law of the domicil, and the question arises whether the decedent was domiciled in France. The determination of the juridical nature of the problem presented to the court as succession has made available the conflicts rule that succession is governed by the law of the domicil; domicil is then the " point of contact " which establishes a connection with some foreign system of law. Similarly with " the place of contracting ": the juridical nature of the problem as contract has already been determined, and the rules relating to contracts made available; but the judge still has to localize the " point of contact " which the conflicts rule designates, namely " the place of contracting."

In the case about the statute of limitations the problem is different again; here the juridical nature of the problem presented to the court has already been determined to be contract. Consequently certain conflicts rules are available for its solution, including (let us assume) that the validity of the contract and the nature of the resultant obligation are governed by the law of the place of contracting, and the procedural requirements for enforcement are governed by the law of the forum. The question whether limitation of actions relates to substance (and so is governed by the law of the place of contracting) or procedure (and so is gov-

erned by the law of the forum) therefore concerns the application of the conflicts rules already decided to be applicable.

The three classes of cases which these instances illustrate will correspond to the three stages which take place in the determination of any conflict of laws question:

I. Determination of the juridical nature of the problem presented to the court, *e.g.*, "This is a contract." When this determination has been made, then the conflicts rules appropriate to the legal category selected will be available for the solution of the problem.[5]

II. Selection of the appropriate connecting factor, *e.g.*, "This contract was made in France."

III. Delimitation of the proper law, *e.g.*, "The French law governing substance does not include limitation as a question of substance; the English law governing procedure does include limitation as a question of procedure."[6]

It now appears that what the judge does when he "qualifies" varies according to the stage at which he performs the process: at Stage I he characterizes the whole factual situation, at Stage II he characterizes certain particular facts, and at Stage III he delimits rules of law. Thus one cannot give any single answer to the question "what does the judge do when he 'qualifies'?" Lorenzen fails to explain that in his various examples the judge is called on to "qualify" quite different things. It is true that Lorenzen gives some indication of being conscious that different things are qualified on different occasions, because in one place he speaks of having to decide the "preliminary question" and in another of "the definitions of . . . points of contact." But his distinction does not embrace the rules of law which have to be "qualified" at Stage III and the distinction itself is implicit rather than express, as the passages from which it may be inferred occur fourteen pages apart[7] and are nowhere related.

[5] Strictly speaking, the determination of the juridical nature of the problem presented for solution and the choice of the conflicts rule appropriate to the category selected represent two distinct steps or stages. The latter, however, will not be discussed here, as it involves no problem of characterization.

[6] Whether this is a correct statement of the English and French law is not at present material.

[7] 20 Col. L. Rev. at 282, 268.

II

No further extensive treatment of this question appeared in the English language until Mr. Beckett's article in 1934.[8] Beckett started by pointing out that the rules of conflict of laws " involve the use of conceptions of analytical jurisprudence, *viz.*, procedure, succession, movables, immovables, capacity, form, contract, tort, etc.," and continued:

> In every case which involves a question of Private International Law the court is called on to decide whether a given state of facts, or a rule of law and the right resulting therefrom, falls into one or other of these conceptions or categories of analytical jurisprudence. It is this process — involved in every case — which I describe by the English word " classification," and which in French legal literature is described by the word " qualification."

Beckett, at the outset, has taken us one step further than Lorenzen did, by stating that what has to be " classified " or " characterized " includes both facts and rules of law; and it is clear that he appreciates that something different is involved in each case, because his discussion of " classification in practice " is subdivided according to whether what is being classified is a rule of law or not.

After stating the views of various continental writers, Beckett continues with a discussion of " classification in practice." The cases that may arise he divides into three classes:

(a) Cases not involving any characterization of a rule or institution of internal law.

(b) Classification of rules or institutions of the internal law of the forum.

(c) Classification of rules or institutions of foreign internal law.

The first class is defined as " those which do not involve the appreciation of the character of any rule of internal law, but simply the application to a given set of facts of a conception of Private International Law." Beckett gives several examples, including whether the claim arose out of a contract and whether a case should be considered one of contract or of tort. The process performed here is the same as was described above, namely the determination of the juridical nature of the problem presented for solution.

[8] *The Question of Classification (" Qualification ") in Private International Law* (1934) 15 B. Y. I. L. 46.

Beckett's first class, however, also includes determinations of domicil and of place of contracting, which, as was pointed out above, differ in their nature from determinations of the juridical nature of the problem presented for solution because the latter precede, and the former follow, the selection of the conflicts rule.

This distinction, however, is not made by Beckett. He includes in his first class of cases both the determination of the juridical nature of the problem presented for solution and the determination of the connecting factor. On his view they both come under the head of " the application to a given set of facts of a conception of Private International Law."

It was stated above that after the judge has characterized the question presented to him in a certain way (Stage I) and selected the appropriate connecting factor (Stage II), he must then delimit the proper law made applicable, deciding, *e.g.*, how much of the foreign law applies to substance, and how much of the law of the forum to procedure (Stage III). Beckett divides into two classes the cases that may arise at this third stage:

(b) Classification of rules or institutions of the internal law of the forum.

(c) Classification of rules or institutions of foreign internal law. The usefulness of this division is not very clear, as the process performed in both cases is the same, namely the application and delimitation of the law already determined to be applicable; and the method of classification is the same, namely, on Beckett's view, by principles of analytical jurisprudence.

III

In the first edition of his *Private International Law* (1935), Dr. Cheshire gave a statement of the characterization problem, adopting Beckett's term " classification," but since there is a fuller treatment in the second edition, discussion of Cheshire's views will be postponed until later. Two years after Cheshire's first edition Dean Falconbridge published an article [9] which gives what

[9] *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 235, 537. The same views are expressed in Falconbridge, *Conflict of Laws: Examples of Characterization* (1937) 15 CAN. B. REV. 215. As appears from this article, I am much indebted to Dean Falconbridge for his analysis.

is probably the best statement in English of the nature of the characterization problem. Falconbridge was the first to concern himself with the question how the disputed characterizations arise, before attempting to decide how to resolve the disputes when they have arisen. Thus he begins:

> One purpose of this article is to suggest that the Court's inquiry should, in effect, if not formally or explicitly, be divided into three stages. These stages may, for convenience, be briefly designated as Characterization, Selection, and Application — the characterization of the subject or question, the selection of the proper law, and the application of the proper law.

These three stages are substantially the same as the three stages described above as (1) the determination of the juridical nature of the problem, (2) the selection of the appropriate connecting factor, and (3) the delimitation of the proper law.[10]

Under his heading " I. Characterization of the question," Falconbridge discusses such questions as capacity and formality, substance and procedure, status and capacity, marital property and succession, succession and administration, movables and immovables. " II. Selection of the proper law: the connecting factor " discusses domicil, place of contracting, and situs of a thing. In " III. Application of the proper law," the sense in which the proper law, and its characterizations are applied is developed. While the application of his method to certain cases seems open to question,[11] the method itself is wholly praiseworthy.

Almost simultaneously with the publication of Falconbridge's views, Mr. Josef Unger published an article [12] devoted principally

[10] The only important difference to note is that Falconbridge calls the second stage "selection of the proper law," whereas I call it " selection of the connecting factor." Strictly speaking, there are again two distinct steps or stages involved here. The judge must first select or localize the connecting factor, then choose the proper law. Normally, this will involve no difficulty, but it is at this stage that the renvoi problem may arise. Thus if the connecting factor (*e.g.*, domicil) is localized in, *e.g.*, France, is the proper law the " internal law " of France, or " the whole law " of France, including the French conflicts rules? *Cf.* Griswold, *Renvoi Revisited* (1938) 51 HARV. L. REV. 1165.

[11] See p. 767, *infra*.

[12] *The Place of Classification in Private International Law* (1937) 19 BELL YARD 3.

to considering how problems of classification arise in the course of the solution of conflict of laws cases, rather than to a detailed discussion of the method of solving them once they have arisen. Unger outlines the three stages in the solution of a conflicts case, distinguishing them with slightly different terminology. Thus what Falconbridge calls " the connecting factor " Unger calls " the elements of introduction." What Falconbridge calls " the application of the proper law " Unger calls " delimitation of the portions of law applicable by virtue of the reference contained in the rules of Private International Law." Further, where Falconbridge spoke of " characterizing " both questions of fact and rules of law, and Beckett and Cheshire applied the term " classify " to both stages, Unger speaks of " characterizing " questions of fact, and " classifying " rules of law. Exceptional brevity and clarity permit Unger to convey his statement to the reader with greater ease than Falconbridge's more comprehensive treatment, but his statement is substantially similar.

Cheshire's discussion,[13] although using different terminology, makes the same distinction between the three classes of cases. Cheshire mentions first the case of selection of the connecting factor, and calls this " classification of a rule of Private International Law itself," because the selection and application of the connecting factor form part of the application of the rule of Private International Law. The characterization of the question, referred to above as Stage I, Cheshire calls " primary classification," and describes as " the allocation of the issue to its correct legal category." The third stage of application and delimitation of the proper law Cheshire calls " secondary classification," and describes as " the process by which the juridical nature of some legal rule, institution, or transaction is determined " after the proper law has been already selected. Cheshire's statement of the different treatment that must be accorded to questions of " primary classification " and " secondary classification," is probably the best that has yet been given.[14] By adaptation of Cheshire's terminology, I shall use " primary characterization " for the process

[13] PRIVATE INTERNATIONAL LAW (2d ed. 1938) 24–45.

[14] I am greatly indebted to Dr. Cheshire for the assistance of this part of his discussion, from which I have largely derived my own views.

performed at the first stage (characterization of the question presented for determination) and "secondary characterization" for the process performed at the third stage (application and delimitation of the proper law). The process of selection of the connecting factor, performed at Stage II, will be referred to in those words.

PART II. SUGGESTED METHODS OF SOLUTION

IV

Lorenzen, it will be remembered, takes the view that with two possible exceptions the law of the forum should determine disputed characterizations. In the case of domicil he quotes the authority of precedent; similarly with the determination of formality or capacity. For the exception that the nature of property as movable or immovable should be determined by the law of the situs, he is again able to quote authority. But his main argument is based on general theory. He points out that, subject to the slight and very general limitations of international law, English and American courts apply the foreign law in cases of conflict of laws not because they must when the "operative facts" occurred abroad, but because they see fit to do so in the interests of justice and social convenience. If, therefore, the application of the foreign law depends solely on the will of the forum, the characterization from which the application of the foreign law results must similarly depend on the will of the forum. On this ground, he concludes that disputed characterizations should be determined by the law of the forum.

Other reasons are given for reaching the same conclusion. It is said: "that the international theory is idealistic and not in accord with reality is obvious"; and again "the international theory of the conflict of laws rests almost wholly on fiction." The view that the disputed characterization should be determined by the foreign law governing the transaction is rejected for the reason that it is only after determining the characterization that the judge is able to decide what the foreign law governing the transaction is; consequently when the characterization determines the foreign law it would be arguing in a circle to say that the foreign law shall also

determine the characterization. By the process of elimination of the other suggested views, Lorenzen is left with his conclusion that the law of the forum must be decisive.

This reasoning, however, is less persuasive than at first appears. On the basis of precedent, it is established that domicil, in English and American law, is to be determined by the law of the forum,[15] and that the nature of property should generally be determined by the law of the situs. Whether *Ogden v. Ogden*, on the other hand, constitutes acceptable authority for the proposition that the determination of what is capacity or formality should be decided by the law of the forum is by no means so clear. It is quite true that the case was decided on the basis of such a rule; but the result of the decision was that a woman was held to be married in England to a Frenchman domiciled in France who by French law was not only not her husband but also legally married to somebody else. It is hardly necessary to say that this decision is now very generally discredited,[16] and any writer should hesitate long before fostering his view on a decision such as this.

As for Lorenzen's argument on principle: although the forum could legitimately refuse to adopt any characterization other than its own, it does not follow that it should do so. As Professor Griswold observes in connection with the renvoi: "After all, what is the conflict of laws, unless it is a science for telling a court when it should cast aside its own rule in favor of one that is preferred abroad?"[17] We must look to other considerations than the fact that the forum "always applies its own law to the case"[18] in order to decide whether that should be its purely internal law, or should include some foreign element; and if it should include some foreign element, the question still remains open whether that should include some foreign characterization. If it can be proper to adopt the foreign characterization in determining the nature of property

[15] In a renvoi situation domicil may twice be a connecting factor — first to the foreign law and then back to the local law. If the judge of the forum accepts the reference back to his own law he will by doing so apply the foreign determination of the connecting factor. *Cf.* decision of the Cour de Cassation, March 7, 1938, reported in (1938) NOUVELLE REVUE DE DROIT INTERNATIONAL PRIVÉ 143.

[16] Though not by Professor Beale. See 1 BEALE, CONFLICT OF LAWS (1935) 510.

[17] *Renvoi Revisited* (1938) 51 HARV. L. REV. 1165, 1178.

[18] Cook, *Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457, 469.

as movable or immovable (as Lorenzen admits it is), then it cannot be necessary as a matter of principle always to characterize by the law of the forum.

However, perhaps the other reasons offered by Lorenzen will amount to practical considerations for accepting his conclusions. It must be admitted that there is considerable weight in his criticism of the theory that characterization should be determined by international principles of comparative jurisprudence. He points out that it is based on a conception of the science of conflict of laws as being part of international, rather than municipal law, which is foreign to the doctrine of the common law. Further, as Cheshire observes: "Even in the pure science of law, which is presumably what the term 'jurisprudence' [used by Beckett in his statement of the international theory] is meant to describe, 'the essential general principles of professedly universal application' are not remarkable for their number." [19] It would seem, therefore, that the judge confronted with a characterization problem is likely to find little practical assistance or comfort from the international theory. But the view that characterization should be performed by the foreign law is not to be thrown out as lightly as the international theory, or as Lorenzen dismisses it. It is true, as he says, that when the characterization determines the foreign law applicable it is arguing in a circle to say that the "applicable foreign law" shall determine the characterization.[20] But that does not by any means cover all the cases given by Lorenzen or most of the other writers who have discussed this problem. It is here that the distinction between the cases that arise before the selection of the proper law and those that arise after its selection becomes so important. The argument that to characterize by the "applicable foreign law" is to argue in a circle may be appropriate to primary characterization (*i.e.*, the determination of the nature of the question presented to the court, which must precede

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[19] PRIVATE INTERNATIONAL LAW (2d ed. 1938) 28.

[20] It is worth noting, however, that when a large number of the relevant facts all occurred in one foreign jurisdiction it would be possible to adopt the foreign characterization solely on that account. This will not mean that the judge is characterizing by the foreign law because the foreign law will ultimately govern the question (in which case he would be arguing in a circle), but merely because the case has such an essential connection with the foreign law that to adopt its characterization seems, under the circumstances, the most reasonable course to follow.

the selection of the proper law); but this argument has no reference whatever to secondary characterization (*i.e.*, the delimitation of the exact scope of the proper law after it has been selected as applicable). In the latter case it is clearly not arguing in a circle to say that when the judge has already determined that some particular foreign law shall be applied to a certain transaction, such as the making of a contract, he shall thereafter determine that that same foreign law shall govern all subsequent characterizations, such as limitation of actions. This is no more than Bartin's second principle, enunciated in 1930, that whenever the law of the forum has decided that a certain foreign law is applicable to the question under consideration by reason of the application of its own rules of conflict of laws, then the judge, in applying the foreign law thus indicated, should include such subsidiary characterizations as the foreign law includes.[21] It is doubtful if Lorenzen would dispute this proposition, which may possibly be " not an exception to, but a logical deduction from " Bartin's first principle.[22] It is true that Lorenzen says that his discussion is " limited to the cases where the application of the foreign law depends upon the determination of the preliminary question "; nevertheless some of the examples which Lorenzen discusses, since they in fact arise only after the selection of the proper law has been made, fall into the class of secondary characterization and so can reasonably follow the characterization of the proper law already chosen as applicable.

But even in the cases of primary characterization, which Lorenzen says the law of the forum must determine in order to avoid arguing in a circle, can we agree with Lorenzen's interpretation of " the law of the forum "? He states that " Anglo-American law agrees in substance with the conclusion reached by Bartin and Kahn," [23] and he obviously approves of this conclusion; and he speaks himself of the " strictly internal law of the forum." This must mean that in performing primary characterizations the forum can make use only of the concepts of its internal law; that the legal

[21] (1930) 1 RECUEIL DES COURS 608. This is explained in English by Beckett in (1934) 15 B. Y. I. L. at 51–52. Lorenzen, writing in 1920, had available only Bartin's earlier statement contained in the article cited *supra* note 2.

[22] See Beckett, *loc. cit. supra* note 21.

[23] For Bartin's views see *supra* note 21. Kahn's approach is well explained by Falconbridge in 53 L. Q. REV. at 237–38.

categories available for selection when the judge is determining the nature of the problem presented to him for solution are limited to those known to the domestic law of the forum. This will mean that there will be no room in Anglo-American conflict of laws for matrimonial property (at least in England and those American states which do not recognize the institution of matrimonial property in their internal law); nor will there be any place in the French conflict of laws for trusts. Yet in both England and the United States the courts have been willing to recognize the institution of matrimonial property; [24] and a number of French cases have recognized the validity of trusts.[25] Thus it appears that a basis of primary characterization founded on the purely internal law of the forum will be too narrow for the conflict of laws, which owes its very existence to the necessity of making provision for factors and institutions not known to the internal law.

V

It was against this too narrow restriction that Beckett was protesting in his advocacy of analytical jurisprudence and comparative law as the basis of characterization. Thus he writes: " It is not classification according to the Private International Law of the forum which I am contesting — it is, of course, obvious that the court must do this — but classification on the basis of institutions and rules of the internal law of the forum." [26] Before stating this conclusion, he examines and rejects the arguments that are advanced in favor of characterization by the strictly internal law of the forum by Bartin, Arminjon, Pillet and Niboyet. The main reasons he gives for rejecting their " composite view " are the following:

(1) This theory more than any other would lead to conflicts of characterizations.

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[24] De Nicols v. Curlier, [1900] A. C. 21; see 2 BEALE, CONFLICT OF LAWS (1935) §§ 289.1–293.2.

[25] See (1911) CLUNET 134; DONNEDIEU DE VABRES, L'EVOLUTION DE LA JURISPRUDENCE FRANÇAISE EN MATIÈRE DE CONFLITS DES LOIS (1938) 68 *et seq.*, 114 *et seq.*; *cf.* Lion in (1923) CLUNET 677; LEPAULLE, TRAITÉ THÉORIQUE ET PRATIQUE DES TRUSTS (1932).

[26] (1934) 15 B. Y. I. L. at 60.

(2) Under this theory, an English court would not merely refuse to apply French law when according to French ideas it should be applied, but also would apply French law in cases where, according to French ideas, it would not be applicable at all; "in other words, applying a law which is not French or English, or indeed, the law of any country whatever."

(3) The theory that a foreign institution or rule should be characterized in the same way as a corresponding or analogous rule of the internal law of the forum leads in practice to the most arbitrary results. In support of this contention Beckett quotes the anomalous situation produced in *Ogden v. Ogden*, already referred to. It clearly does not follow from the fact that English rules relating to consent to marry are characterized as formalities by English law that French rules relating to consent to marry should be similarly characterized when material to an English conflict of laws decision.

(4) Lastly, Beckett points out that the method of characterizing by the purely internal law of the forum completely breaks down when there exists no institution of the internal law in any way corresponding to the institution of the foreign law under consideration.

The "internal law of the forum theory" being thus rejected, Beckett then rejects also the "foreign law theory" for the reasons already noticed, namely that it is arguing in a circle to characterize by the applicable foreign law when the applicability of the foreign law depends on the prior determination of the disputed characterization; and that no solution is possible when either one of two systems of foreign law may be applicable, and the choice between them depends on the characterization to be made.

Beckett therefore suggests that the proper principle is characterization on the basis of analytical jurisprudence and comparative law,[27] and he offers these reasons in support of his view:

(1) The rules of conflict of laws are rules to enable the judge to decide questions as between different systems of internal law. They must therefore be suitable for appreciating the character of rules and institutions of all legal systems. "Classification is

[27] In this he is following Rabel [(1931) ZEITSCHRIFT 241; (1933) REVUE DE DROIT INTERNATIONAL PRIVÉ 1] and Meriggi [(1932) RIVISTA ITALIANA 189; (1933) REVUE DE DROIT INTERNATIONAL PRIVÉ 201; (1934) 14 B. U. L. REV. 319].

simply an interpretation or application of the rules of Private International Law in a concrete case and the conceptions of these rules must, therefore, be conceptions of an absolutely general character." This general character, necessary for the comparison of rules of different legal systems, cannot be obtained from the internal law of any one system, but only from " analytical jurisprudence, that general science of law, based on the results of the study of comparative law . . . ."

(2) In many cases the judge must characterize his own internal law. He cannot, it is said, interpret it in terms of itself, and so must have recourse to some more general principles outside it, and these principles can only be those of general jurisprudence.

The way in which the judge should apply the principles of analytical jurisprudence is further explained as follows:

(a) Even analytical jurisprudence may have something of a national character, and consequently the judge will follow the ideas of his own country with regard to analytical jurisprudence.

(b) Where general jurisprudence for some reason can give no answer, the judge will follow the principles of his own law.

(c) The judge will follow an express direction of his own law with regard to the sphere of application of a rule of the internal law of the forum (*e.g.*, that his statute of limitations is procedural). He will not, however, regard that as a basis for analogy in deciding other cases (*e.g.*, by holding that foreign statutes of limitations are procedural), but may consider it a special rule based upon special reasons peculiar to his own country and affording little or no evidence of the proper conceptions of analytical jurisprudence.

The third part of Beckett's article, entitled " classification in practice," considers various decisions, mostly of the English courts, that have involved questions of characterization. These are divided, as was pointed out above, into three classes of cases. The first class embraces both those which are here called primary characterization and cases of selection of the connecting factor. Beckett writes: " The conclusion which I draw is that in this class of case a court must always apply the conceptions of the *lex fori* and must disregard the conceptions of foreign laws on these points." He makes an exception in cases where it is clear that one of two given foreign laws will be applicable, and they both agree

in the characterization to be adopted; then, it is said, the forum should adopt their common characterization rather than its own. Secondly, Beckett deals with " classification of the internal law of the forum." He illustrates what he considers the necessity of having regard to considerations and concepts outside those of the purely internal law of the forum, particularly in cases involving the determination that distinguishes between substance and procedure. Thirdly, he discusses " classification of rules of foreign law," in which he gives as his general principle: " In classifying rules and institutions of foreign law, full application should be given to M. Bartin's second principle that, once it is ascertained that a given foreign law applies, it must be applied *in toto* with all its relevant subsidiary classifications." But the following qualification is made: ". . . an English court . . . should, and I think would, attach great weight to the foreign classification of its own rule, but I do not think that it is bound by it if it finds it to be contrary to the general principles."

Beckett has made a considerable contribution to the search for an adequate method of solution for the characterization problem, but his demonstration of the fallacies of other views is more convincing than the assertion of his own. His examination of the " internal law of the forum theory " has admirably pointed out the difficulties which it raises and fails to solve. But after he has stated his own view in terms of analytical jurisprudence and comparative law, he then tells us that all " cases not involving any characterization of a rule or institution of internal law " must be determined by the law of the forum. His exception thus seems to include all cases of primary characterization and of selection of the connecting factor, but Beckett does not realize how large this exception is. He then goes on to say that when the foreign law has been chosen as applicable its characterization should prima facie be adopted and only be abandoned if contrary to general principles. But when the law of the forum has been chosen as applicable the characterization of general jurisprudence should prima facie be adopted and only be abandoned in face of an express provision of the law of the forum. Apparently the foreign law can be trusted to determine its own characterization, but the law of the forum cannot. No reason is given for this seemingly arbitrary discrimination, unless it be " the somewhat exuberant man-

ner in which English law has extended the field of procedure "[28] under the guise of "barring the remedy," which might well be matched by the fondness of French courts for extending the sphere of "capacity" and "status" under the guise of "personal law." Beckett's proposed solution seems to lack an appreciation of the three stages in the solution of a conflicts question noted above. Consequently the assertion of his own view is neither entirely coherent nor very definitive. On the other hand, he seems fundamentally right in emphasizing that the concepts for characterization must be provided by the conflict of laws rather than the internal law of the forum. Nevertheless, the traditional method of thought of the common-law courts in determining the concepts of conflict of laws is not in terms of analytical jurisprudence and comparative law.

VI

After drawing attention to the necessity of knowing what is being characterized, Falconbridge observes with regard to Beckett's "comparative law view":

> Characterization on the basis of comparative law would seem to require a supranational class of judges, deeply learned in comparative law, capable of dissociating problems before them from the law of the forum, and willing to adopt in conflict problems a technique which is entirely foreign to the technique applied by them to other problems. Probably some *via media* might, however, be found, somewhere between the two extremes of characterization by the *lex fori* as commonly understood and characterization on the basis of comparative law.[29]

Falconbridge then suggests his own solution which is characterization by the *lex fori* of a rule of law in its context. Referring to a French rule of consent for marriage, he says: "The characterization should, in an English court and for the purpose of English conflict of laws, be made in accordance with the concepts of English law, but the thing which has to be characterized is a requirement as to parental consent regarded in the light of its context in the French law of marriage . . . ." Elsewhere he speaks of "the

[28] CHESHIRE, PRIVATE INTERNATIONAL LAW (2d ed. 1938) 40.

[29] 53 L. Q. REV. at 245.

general rule that the question should be characterized by the *lex fori* " (in the sense as just defined). So it appears that on his view the judge must characterize by the concepts of his own law, but must only apply those concepts after taking into consideration the part which a foreign rule of law plays in its own system. This " *via media*," then, if I understand it aright, represents a compromise between the " internal law of the forum view " and the " foreign law view ": the judge must look to the context of a foreign rule of law, that is to say must take notice of the foreign characterization, but he is not bound to follow it, because the law of the forum is his principal guide.

A number of cases are discussed by Falconbridge as examples of " characterization of the subject or question." They include decisions whether the question before the court is one of matrimonial property or succession; of administration or succession; of movable or immovable property. They also include determinations whether a particular rule of law relates to formality or capacity; to substance or procedure in contract or tort. If in these cases we ask the question which we took as a criterion of a clear statement of the problem, namely " what is it that is being characterized?," the importance of which Falconbridge himself emphasizes, we get widely divergent answers. Decisions that have to be made between matrimonial property and succession, succession and administration, and movable or immovable property, are determinations of the juridical nature of the problem presented for solution. On the other hand, decisions as to whether a particular rule of law relates to formality or capacity, or to substance or procedure, are determinations of the delimitation of the proper law. The former type of determination is made before the proper law can be chosen; the latter type is made after that choice has already been made. Although Falconbridge has pointed out the distinction while talking in general terms of what the problem is all about, he seems not to observe the distinction in his detailed discussion of particular cases.

If we leave out of consideration those cases such as capacity and formality, substance and procedure, which Falconbridge discusses as primary characterizations but which seem rather to be secondary characterizations, is his treatment of the cases that are admittedly primary characterizations satisfactory? In his own

words, " the court should, in the first place, characterize, or define the juridical nature of the subject or question upon which its adjudication is required." Apart from warning of the danger of following too closely the law of the forum in determining between administration and succession, Falconbridge gives no very clear idea of what principle should be adopted. His general principle of " characterization by the *lex fori* of a rule of law in its context " will not help in these cases of primary characterization, as the court is not called on to characterize a rule of law at all, but, in Falconbridge's own words, to " define the juridical nature of the subject or question upon which its adjudication is required." Little doubt can be felt in view of the general tenor of his argument that, on his view, primary characterization must be determined by the law of the forum. At the same time he clearly does not mean by the strictly internal law of the forum, since he has stated at the outset that he is looking for some " *via media* " between the " internal law of the forum view " and the " comparative law view." In just what sense Falconbridge thinks that the *lex fori* should be applied in cases of primary characterization, where the proper law has not been selected, and so the court cannot have regard to the context of the appropriate rules of foreign law, is not entirely clear. The clue may perhaps be found in the following passage: " This characterization of the question — which may be provisional and subject to revision — lays the foundation for the consideration of the concrete provisions of the laws of various countries which are or may be applicable in the light of the characterization of the main question or different aspects of that question." [30] But the sense in which this provisional characterization is to be performed seems to require additional clarification.

In his section on " selection of the proper law " Falconbridge reaches the conclusion that characterizations of the connecting factor must be determined by the law of the forum. In this he is in agreement with the other writers and on authority he seems right. Falconbridge's discussion of his third stage (" application of the proper law ") is in general terms of the theory of conflict of laws. He espouses the " local law " view as against the " territorial theory " or " acquired rights " view; further he discusses the interrelation of characterization and the renvoi problem, and

[30] 15 CAN. B. REV. at 218.

criticizes the attitude of the Conflict of Laws Restatement. But having dealt in the first part of his article with those types of cases which, in my opinion, represent the most real problems at the third stage, Falconbridge makes no mention of them here.

VII

The main part of Unger's article is concerned with "classification" (in his meaning of the term), *i.e.*, secondary characterization. Had his article not appeared between the dates of Falconbridge's two installments, one would think that Unger was writing to show that Falconbridge's conception of the process of characterization involved in application of the proper law was too narrow. Unger makes the same point that I wish to emphasize, namely that characterizations of rules of law are performed after the proper law has been selected, and so are governed by different principles from those governing characterizations of the question presented to the court by the factual situation of the case. Thus he writes:

> If it should be found that the engagement [of a contract to marry] was entered into in France, English Private International Law would direct application of that portion of French law which deals with the formalities of a contract. Now the problem of the delimitation of that portion of French law — the problem of classification — would arise. It usually becomes acute with regard to a particular rule of the legal system concerned. The question normally is whether a given rule of either English or foreign law is to be considered as belonging to that portion of English or foreign law to which the court has been referred by its Private International Law.

The court has to delimit the French law in order to find out just how much of French law relates to formalities, and delimit English law in order to find out just how much of English law relates to procedure. Similarly with regard to parental consent for marriage Unger points out that an English court, having determined that capacity is governed by the law of the domicil, should enquire how much of the French law (if the propositus is domiciled in France) relates to capacity, and how much of the English law to formality. Whether a provision of the French Code relates to capacity can be determined only by examining the part which it plays in the French law. "To classify a rule of law it is necessary to deter-

mine the function performed by it within the system of law to which it belongs and to consider it in relation to what is described by Bartin as 'l'esprit de la règle de droit international privé.'" Unger thus seems to agree that characterization of rules of law can properly be performed only in accordance with the characterization adopted by the proper law, or *lex causae*, already chosen.

Unger also suggests some sort of a "*via media*" between the internal law of the forum and comparative law as the criterion for primary characterization, namely characterization on the basis of the analytical framework of the *lex fori*.[31] It is true that this avoids the charge of inapplicability in certain cases rightly brought against the strictly internal law of the forum; it also avoids the charge of impractical vagueness brought against analytical jurisprudence and comparative law. Whether it represents the best solution, however, remains doubtful.[32] In any case Unger has greatly helped the quest for solution of the characterization problem by the clarity of his statement, and the convincing way in which he puts the argument that "secondary characterization," or "classification" (to use his term) of rules of law must be regarded as a process of delimitation of the proper law already chosen as applicable to the case before the court.

VIII

Cheshire's method of stating the problem, as was noted above, is not materially different from, though perhaps it is less clear than that of Falconbridge and Unger. On the question of solution of the characterization problem Cheshire comes out squarely in favor of two rules:

(1) "Primary classification" must be decided by the *lex fori*.

(2) "Secondary classification" must, with one important exception, be decided by the *lex causae* (*i.e.*, the proper law applicable to the situation under consideration).

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31 ". . . only the analytical framework [of the *lex fori*] without its body of detailed provisions need be considered. Thus, a relationship may be characterized by English law as of a contractual nature or as a marriage, although (*e.g.*, for lack of consideration) it does not constitute a contract in the sense of English internal law or a marriage according to the requirements of English internal law." 36 BELL YARD at 7.

32 Does the analytical framework of English law make provision for matrimonial property?

This first rule Cheshire explains as follows:

> . . . this primary question of classification must of necessity be decided according to the *lex fori*, *i.e.*, it is the English judge alone who, by making his own analysis of the issue, must determine its true nature and assign it to its correct legal category. It is impossible to classify according to the law that is ultimately to govern the legal relationship, for until the process of classification is complete the legal relationship is unknown. If the law which is finally to regulate the matter (*i.e.*, the *lex causae*) depends upon classification, how can a classification be made according to that law? It may seem arbitrary to apply the *lex fori* exclusively, but each system of Private International Law is based upon its own indigenous system of classification, and it is no more justifiable to abandon this than it is to abandon its rules for the choice of law.[33]

The reason for the second rule is:

> once it has been established that by the Private International Law of England a foreign legal system is the appropriate law to govern the whole of a particular transaction, it is only logical to admit that the foreign law shall henceforth govern the matter in every respect. To rule otherwise is to stultify the English rules for the choice of law. If the court has already decided that English law is inapplicable, since all the facts and events concerning the matter are connected with country X, why should it discard just that one part of the law of X which comprises the rules of classification? [34]

The " one important exception " to the second rule is that no foreign classification shall be allowed to defeat an English rule of procedure. The reason for the exception is that no court can be expected to disregard one of its well-established procedural rules merely because the particular action happens to contain a foreign element. Cheshire's second rule, however, may be restated to avoid the necessity of an exception. The various aspects of a case are governed by different systems of law; *e.g.*, where suit is brought in England on an oral contract made in France and the necessity of a writing becomes relevant, there will be no one *lex causae*. The English conflicts rules refer to two systems of law: French law to govern questions of substance and English law to govern questions of procedure. The French characterization of French rules should be adopted and the English characterization of English rules. Thus, Cheshire's second rule could be expressed:

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[33] PRIVATE INTERNATIONAL LAW (2d ed. 1938) 34.

[34] *Id.* at 40.

" Secondary characterization should be decided by the proper law already chosen," understanding " proper law " to mean the proper law applicable to each separate aspect of the question.

Cheshire includes under primary classification determinations of four types: (1) succession or marital rights, (2) testamentary or matrimonial law, (3) administration or succession, and (4) capacity or formality (as in *Ogden v. Ogden* — the question of parental consent for marriage). Under secondary classification are apparently included, *inter alia*, rules requiring certain types of contracts to be in writing, rules of limitation of actions, and the classification of property into movable and immovable.[35] In this respect Cheshire has improved on Falconbridge's treatment by dealing with the requirement of contracts to be in writing, and limitation of actions as secondary rather than primary classifications. For the reasons already given it would appear that the determination whether a rule of law relates to capacity or formality should similarly be included as secondary classification. On the other hand, it seems more proper to treat the classification of property into movable and immovable as primary classification, because different rules relate to movables and immovables, and it is impossible for the judge to know which rule to apply until he has made this determination.

If we are left with the two rules that primary characterization should be governed by the *lex fori*, and secondary characterization by the proper law already chosen as applicable, and understand the latter rule in the sense explained, we have the equipment to decide all questions on a satisfactory basis. Cheshire does not expressly deal with the question whether the *lex fori* means the strictly internal law of the forum, but it would seem from his treatment that he does not mean it in that sense. The internal law of the forum being inadequate and the foreign law impracticable for primary characterization, it seems that we are led to the conclusion that this process should be performed by the conflict of laws of each country according to the concepts which it indigenously works out for itself.

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[35] Cheshire writes of the classification of property (at 44): " It would seem that, strictly speaking, here is a case of what we have called primary classification." But his arrangement would seem to indicate that he considers it secondary.

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