CHARACTERIZATION AND POLICY IN THE CONFLICT OF LAWS.

In this consideration of the nature and aims of characterization in the conflict of laws it is proposed to begin with Falconbridge's article, entitled *Conflict Rule and Characterization of Question.*[1] This is proposed because, in the respectful view of the present writer, Falconbridge has by a lucid and rigorous analysis revealed what actually takes place in the process of characterization, and the nature of the process must be well understood prior to any consideration of its aims.

Falconbridge first examines the structure of a rule of the conflict of laws, and concludes that the subject of a conflict rule is not a factual situation but 'a legal question arising from the factual situation'.[2] For example, in the English conflict rule that the effect of marriage upon the rights of the parties in respect of movable property is governed by the law of the domicile of the husband at the time of the marriage, there is, in the first place, a notional factual situation — marriage. Some would say that in this case there is a notional situation of mixed law and fact, or even of pure law; but at bottom the situation is purely factual; persons have performed certain acts to which the law normally assigns a complex of legal consequences comprising a marriage in the legal sense. This ultimate situation of fact may raise a variety of legal questions: whether a valid marriage has resulted (including both 'formal' and 'intrinsic' validity), the consequent proprietary relations of the spouses, their contractual and testamentary capacity, etc. Thus, in the second place, a conflict rule isolates one of these legal questions raised by the factual situation; in the rule under consideration it is the question of the legal consequences of the marriage relating to movable property which is so isolated. It is this legal question which is the subject of the conflict rule, and the third component of the rule is the identification of a place element in the factual situation as the connecting factor, by which the system of law which is to determine the legal question is ascertained.

In his analysis of the process of characterization, which follows that of the structure of a conflict rule, Falconbridge suggests that what is characterized is 'the legal question involved in the particular factual situation' before the court, and accordingly that characterization

> 'is essentially a problem of subsumption. Is the concrete question involved in the particular situation subsumed under the abstract question specified in the conflict rule?'[3]

Both the subject of the conflict rule and the subject of characterization are, on this view, legal questions.

Falconbridge adopts a *via media* between characterization by the *lex fori* and characterization by the *lex causae.* Although the purpose of characterization is the determination of the legal question raised by the factual situation before

1. (1952) 30 *Canadian Bar Review* 103, 264. Previous articles by Falconbridge in the *Law Quarterly Review* and *Canadian Bar Review* on the question of characterization were the basis of several chapters in his *Essays on the Conflict of Laws* (1947, 2nd ed. 1954).
2. 30 *Can. Bar. Rev.,* at p. 110.
3. 30 *Can. Bar Rev.,* at pp. 113-114.

the court, and its subsumption under one or other conflict rule of the forum, Falconbridge considers that this process must take place in the light of the relevant rules of law of any potentially applicable legal systems. Thus if a court in X has to decide whether an alleged marriage, celebrated in Y between parties domiciled in Z, is valid or not, it should inform itself of the rules of Y relating to formalities, and the rules of Z relating to intrinsic validity, before attempting to characterize the legal question raised by the factual situation as one of formal or intrinsic validity. The necessity for reference to any potentially applicable domestic rule of law is expressed by Falconbridge as follows:[4]

> 'The purpose of characterization is to determine whether the legal question *to which a given rule relates* is subsumed under the legal question specified in a given conflict rule, and consequently whether the rule of law is applicable to the factual situation.'

This approach requires that the court should, in the first place, determine the legal question raised by the concrete factual situation by reference to any potentially applicable legal system. In the hypothetical case given above, the court would have to enquire whether the concrete situation raised a question of formal validity under the law of Y, and whether it raised a question of intrinsic validity under the law of Z. This part of the process of characterization therefore requires an *interpretation* of the relevant rules of law of Y and of Z,[5] for the only potentially applicable rules of Y are those relating to formalities, and the only potentially applicable rules of Z are those relating to intrinsic validity.

In the final stage of the process of characterization in Falconbridge's analysis, the court seeks to discover whether the legal question, which has been determined by reference to a potentially applicable legal system, can be subsumed under the legal question in a conflict rule of the forum. In the words of Falconbridge:[6]

> 'The court, being informed of the nature of a provision of the foreign law, must now decide a different problem, namely . . . whether that provision relates to a legal question that is subsumed under the legal question specified in the conflict rule.'

This, maintains Falconbridge, is a matter for the law of the forum, but he emphasizes that the conflict rules of the forum should be construed '*sub specie orbis*, that is, from a cosmopolitan or world-wide point of view, so as to be susceptible of application to foreign domestic rules.'[7] As, moreover, the court is not obliged to accept the characterization of a foreign rule by the legal system to which it belongs, it follows that this ultimate process of subsumption is not a mechanical one.

It is submitted that the two stages of characterization described by Falconbridge may conveniently and realistically be regarded as a single process. Falconbridge envisages a preliminary and tentative examination of the potentially applicable foreign rule, and a subsequent 'problem of subsumption'

4. 30 *Can. Bar Rev.*, at p. 280. My italics.
5. That is to say, the determination of the 'nature, scope and purpose' of these rules in their context in the foreign systems: 30 *Can. Bar Rev.*, at p. 265.
6. 30 *Can. Bar Rev.*, at. p. 265.
7. 30 *Can. Bar. Rev.*, at p. 281.

of the legal question to which it relates under the conflict rule of the forum. This distinction may aid exposition, but is unlikely to be observed by a court actually engaged in the process of characterization. It is the investigation of the foreign rule which, it is submitted, should be made from a 'world-wide point of view', and it is the court itself which must characterize the foreign rule. In doing so it will, of course, give the fullest attention to the 'nature, scope and purpose' of the foreign rule in its context of foreign law.

In a recent valuable article,[8] Bland contends

> 'that in practice, the courts in a case involving a problem in conflict of laws are concerned with classification in one sense only, and that, ultimately, this resolves itself into the problem of selection and interpretation of a rule of English or foreign law.'[9]

Bland's thesis is that there is not normally any problem of selection of a conflict rule to govern the case. Facts are legally neutral, and there is no value in discussing what is the 'correct' legal category to which the facts before the court must be assigned in a conflict of laws case. One or more conflict rules are immediately recognized as applicable, and each conflict rule refers to those rules of the indicated legal system which are, within the meaning of the conflict rule, rules relating to a particular legal question, e.g., capacity to marry. The only question which remains is that of investigation of any legal system indicated by a conflict rule and the selection and interpretation of the rules of that system which relate to the legal question which is the subject of the conflict rule.

It does not appear to the present writer that Bland's analysis is, in the result, very different from that of Falconbridge. Falconbridge's view that characterization requires, in the first place, the determination of the legal question raised by the factual situation before the court, does not in truth offend against the proposition that facts are in themselves legally neutral, for Falconbridge emphasizes that the determination of the legal question must take place only after a preliminary investigation of any potentially applicable legal systems. If the two stages of characterization described by Falconbridge are, as suggested above, combined into one, as it is submitted they may be without doing violence to his analysis, then it appears that for Falconbridge also the problem is essentially one of the selection and interpretation of a rule of English or foreign law.

Once it is established that characterization is nothing more than a matter of the selection and interpretation of rules of domestic law, many of the difficulties which have been supposed to attend the process of characterization vanish. Illustrations from English case law are given by Bland; it may be illuminating to consider some South African cases in which a 'problem of characterization' has been said to arise.

In the *Annual Survey of South African Law,* 1953, at page 281, it is said in reference to the case of *Powell v. Powell:*[10] 'The issue . . . was one of characterization. Is the validity or invalidity of donations between spouses one of the proprietary consequences of marriage or is it not?' The matrimonial

8. *Classification Re-Classified: 6 International and Comparative Law Quarterly,* 10.
9. *Loc. cit.*
10. 1953 (4) S.A. 380 (W).

domicile of the parties was English, but the husband's donation to his wife was made in South Africa at a time when the domicile of the parties was South African. It would appear that in this situation there are two possibly relevant conflict rules:

1. that the court must apply those rules of the law of the matrimonial domicile which relate to the proprietary consequences of marriage; and
2. that the court must apply those rules of the law of the domicile of the parties at the time the gift was made which relate to the personal consequences of marriage.[11]

As there is no rule of English law which invalidates a donation between spouses, the problem is solely one of the characterization, or interpretation, of the South African rule prohibiting such donations, with the object of determining whether this rule relates to the personal consequences of marriage; or, otherwise stated, whether it is to be applied in every case to spouses who are domiciled in South Africa at the date of the gift. In the absence of authority,[12] this question clearly necessitates an investigation of the policy of this rule of South African law.

This, in substance, was the approach of the Court in *Powell v. Powell.* LUDORF, A. J., as he then was, considered the purpose of the prohibition against donations, and came to the conclusion that, whatever the reasons for its introduction may have been, 'its retention in modern law is for the protection of creditors.'[13] The learned Judge concluded that the rule 'is a local rule which prohibits donations between husband and wife while they are domiciled in South Africa.'[14]

In *Anderson v. The Master,*[15] the matrimonial domicile of the spouses was Scotland. Subsequently they acquired a domicile in South Africa, which was still their domicile at the date of the husband's death. The will left nothing to the wife, who contended, in an application for a declaration of rights, that her proprietary rights to the testator's estate fell to be determined by the law of Scotland, and that by the *jus relictae* of that law she was entitled to one-third of the estate. The Court held that the applicant's contention that her proprietary rights were governed by the law of Scotland was correct, and granted an order restraining the Master from treating the estate account as final, so as to give the applicant the opportunity of furnishing proof of her rights under Scottish law.

Criticism of this decision is expressed in the *Annual Survey of South African Law,* 1949, page 320. In making this order, it is there said:

11. A third conflict rule, which invokes the rules of the *lex loci contractus* relating to capacity to enter into an ordinary commercial contract, was also canvassed in the judgment, but it is submitted that the South African rule prohibiting donations between spouses cannot be placed in this category of rules. In the result the South African rule would appear to have been applied *qua lex domicilii* and not *qua lex loci contractus.* (See the judgment at 384).

12. Cf. however the note on *Powell v. Powell* by Professor Ellison Kahn in (1954) 71 *S.A. Law Journal,* 10.

13. At p. 383.

14. At p. 384.

15. 1949 (4) S.A. 660 (E).

> 'the Court, albeit unconsciously, characterised the widow's claim as a matter of matrimonial law and not of the law of succession. It is respectfully submitted that, whether or not such characterisation is correct, the Court in fact failed to appreciate that there was a problem of characterisation, the solution whereof was by no means as simple as the judgment would lead one to believe. It is obvious that unless and until the nature of the widow's claim has been characterised either as a matter of matrimonial law or as a matter of the law of succession no answer to the question of what law governs can properly be given.'

It is submitted that this problem disappears entirely if the approach outlined above is adopted. Once again there are two relevant conflict rules:

1. that the court must apply those rules of the law of the matrimonial domicile which relate to proprietary consequences of marriage (or which confer 'proprietary rights' as a result of marriage);
2. that the court must apply those rules of the *lex ultimi domicilii* of the *de cujus* which relate to the intrinsic validity of a will.

Under the *lex ultimi domicilii* in the present case, which is South African law, there is of course no question of any restriction upon the testator's freedom of testation. But the testamentary power of the testator cannot affect property in which, at the date of his death, his wife possessed proprietary rights. The court's enquiry must therefore be directed to the nature and extent of the rights conferred upon the wife by the law of the matrimonial domicile, to determine whether these are proprietary rights. It is readily admitted that some vagueness attaches to the term 'proprietary rights'.[16] It is well that this is so for terms of art in Private International Law have need of the flexibility which will enable them to be applied to a variety of legal systems. Determination of the question whether the rights conferred upon the wife by the law of the matrimonial domicile are to be characterized by the court as proprietary rights requires, it is submitted, that the relevant rules of the matrimonial domicile should be interpreted in their context. The purpose of these rules must be considered, and the extent to which they entrench the wife's right to a portion of the estate. In particular it must be enquired whether, under the law of the matrimonial domicile, the wife's right is defeated by a subsequent change in the domicile of the spouses.

It would appear that in *Anderson v. The Master* the Court did in fact approach the question in this manner. Having held that the applicant was entitled to a declaration that her proprietary rights acquired upon marriage were governed by the law of Scotland, REYNOLDS, J.,[17] proceeded:[18]

> 'It, however, must be clearly understood that this declaration applies only to rights which by the laws of Scotland as existing in 1923 [the date of the marriage] she acquired as rights in such fashion that that law recognises them as proprietary rights acquired by her on marriage and not affected according to that law by a change of the testator's domicile away from Scotland.'

That is to say, the law of Scotland must be *interpreted.* The present writer would venture, with respect, some criticism of this passage in so far as it may suggest

16. The term used by the learned editor of Dicey is 'vested rights' (Dicey, *Conflict of Laws,* 6th d., 797). This is not suitable for our law, for, as Dicey points out, 'there can be no vested right in hypothetical future acquisitions', whereas in our system the law of the matrimonial domicile is permitted to control the proprietary relations of the spouses throughout their married life, notwithstanding any subsequent change of domicile.

17. With whom JENNETT, J., concurred.

that the characterization of the Scottish rules relating to the *jus relictae* is to be determined solely upon an inspection of Scottish law. As has been suggested above, characterization must be made by the court, and even if it is established that Scottish law maintains the widow's *jus relictae* in spite of subsequent change of domicile,[19] it remains for the court to determine whether the *jus relictae* is a 'proprietary right'. The characterization of the right should be made in a policy-conscious manner, for the ultimate question is whether the *jus relictae* is a right which good policy requires should be recognized by the court of the forum irrespective of the change in the domicile of the parties.[20]

In *Pitluk v. Gavendo,*[21] W, a feme sole, had executed a will in the Transvaal while domiciled there. Subsequently she married H, who was domiciled in Southern Rhodesia. W died soon after, the parties being still domiciled in Southern Rhodesia. W's estate consisted entirely of movables. H applied for a declaratory order that W's will was null and void by reason of sec. 7 of Act 14 of 1929 (S.R.), which provides, so far as relevant, that a will executed by any person prior to marriage shall become null and void on marriage, unless the will is properly endorsed by the testator that it is desired that it shall remain of force and effect. The Court held that as the property rights of a married woman are regulated by the law of the matrimonial domicile, the Southern Rhodesian statute fell to apply and the will was null and void.

In a note on this case in the *South African Law Journal* entitled *A Lost Opportunity,*[22] Professor Ellison Kahn expresses the view that the judgment 'skirts around the first stage of the inquiry in a conflict of laws case, namely, how the issue is to be characterized; and amounts to a *petitio principii*'. On this view the primary question is whether the 'issue' should be allocated to matrimonial or to testamentary law; if it is allocated to testamentary law, the law to be applied is, on one view, the *lex ultimi domicilii;* on another, the *lex domicilii* at the time of the revoking act.[23]

The difficulties of this case arise, it is submitted, not from a problem of characterization but from the absence of an appropriate rule of South African Private International Law. Cheshire has pointed out that English Private International Law is still in a formative stage,[24] and although our own courts have a wealth of continental speculation from which to draw, there can be no doubt that many gaps remain in our system also. Thus there appears to be no clear rule of South African Private International Law which deals with the revocation of a will by marriage.[25] The problem therefore is not, it is submitted,

18. At p. 668.

19. Which apparently it does not: see vol. 1 of the series *The British Commonwealth: The Development of its Laws and Constitutions (Scotland and the Channel Islands),* p. 939, note 1.

20. This is not of course to require that the actual rules of a foreign legal system must conform to the policies which underlie rules of the *lex fori.*

21. 1955 (2) S.A. 573 (T).

22. (1955) 72 *S.A.L.J.,* 227.

23. Professor Ellison Kahn adds that if the issue had been characterized as relating to testamentary law that would not necessarily have led to a different result in the present case: *loc. cit.,* p. 229.

24. *Private International Law,* (5th ed.), 43-44.

25. See the article *Choice of Law in Succession in the South African Conflict of Laws* by Professor Ellison Kahn, in (1957) 74 *S.A.L.J.,* at pp. 55 *et seq.*

one of characterizing the 'issue' as one of matrimonial law or of testamentary law,[26] but of creating a conflict rule for this situation where none existed before. It was this necessity which, it is respectfully submitted, was shirked in *Pitluk v. Gavendo.*

Considerations of policy are of primary importance in the development of any incomplete body of law. Historically such considerations have always played their part in legal development, although often in the guises of syllogism, analogy, the 'intention of the legislature' and the like. It may be that the law would be better served by an avowed recognition of the needs of the community (in the branch of law under consideration, an international community), and the necessity for law to respond to these needs. In *Pitluk v. Gavendo* the law which was applied by the Court — the law of the matrimonial domicile — may well have been the most appropriate law, but the process of reasoning which led to its application involved, it is respectfully submitted, an essentially artificial element — namely, the question whether the revocation of a will by marriage is a matter which 'belongs' to matrimonial law. The real issue before the Court was whether this is a matter which a sound legal policy requires to be determined by the law of the matrimonial domicile.

It would appear that an assessment of policies is particularly necessary in two quite distinct situations, both of which have at times been said to raise 'problems of characterization'. There are those cases, like *Pitluk v. Gavendo,* in which a quasi-legislative act is demanded in that a rule must be formulated where none had previously existed. Secondly there are those cases, like *Powell v. Powell* and *Anderson v. The Master,* in which the court must examine a domestic rule of South African or foreign law, and determine the question of its applicability upon a consideration both of the nature and purpose of the rule — the specific policies underlying the rule — and of the broader factors of policy involved in conflict of laws cases (the need, in the interests of justice, to recognize 'vested' rights, legitimate expectations, the expressed intentions of the parties, the relevant social and legal context of 'foreign' juristic acts, etc.). If the characterization of rules of law in conflict of laws cases is accompanied by a conscious assessment of these policies, we may hope to achieve a sound and flexible system of Private International Law, and to escape the ill effects of a 'jurisprudence of conceptions'.[27]

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26. It may further be pointed out that characterization of the 'issue' as one of testamentary law would not of itself solve the problem whether the law to be applied should be that of the testator's last domicile, or that of his domicile immediately before the marriage, or that of his domicile immediately after the marriage. See Ellison Kahn, *loc. cit.,* note 22 *supra,* at. p. 229. A selection based upon policy considerations cannot be avoided.

27. Cf. Stone, *The Province and Function of Law,* 140-141.