IV. The Scope of the Reference "Law of Country X"

In the first place, if country X is the country of the forum, then, as Professor Cook points out, the reference to the "law of the country X" can only mean the domestic law of the forum. Speaking of the rule that the lex situs governs the determination of proprietary interests in land, he says:

The rule that the 'law' of the situs is to be applied furnishes no guide whatever to a court of the situs unless it is first assumed that the word 'law' in the rule means in such a case the purely 'domestic' rule of the situs, and not its conflicts rule . . . .

Obviously to tell the court of the situs to apply its own 'conflict of laws rule' to a case which is for it a problem in the conflict of laws is to tell it precisely nothing. On the other hand, to tell it to decide a problem in the conflict of laws in the same way it would decide an otherwise similar but for it purely domestic case does furnish the court at the situs with a basis for reaching a decision.44

The problem becomes more difficult where there is a reference to the law of a foreign country by the conflicts rule of the forum on some juridical aspect of the facts. In the example given earlier concerning the validity of a marriage, the reference directed on the aspect of formality was to the law of France, the country which was the place of the ceremony. There are three possible meanings for the phrase "law of France" in this situation.

(A) Law of France might mean only the French rules selected and classified as formal in steps 2 and 3 of the process of solution just described in Part III, that is, the French domestic rules which were appropriate to the facts and which were classified as formal by English jurisprudence. Certainly this would be the

* The first three parts of this article appeared at pages 3 and following of the January 1951 issue (1951), 29 Can. Bar Rev. 3.

logical view, for it was in part at least because of the possibility of the application of these very rules that our facts in one aspect raised the juridical question of formality, which in turn caused them to be finally referred to the "law of France" in this respect. This seems to be Dr. Cheshire's basic position regarding what he calls "primary classification", though he might not agree with all the reasons here given for taking the same view. He says in part: "It is illogical that a selective rule concerned with a given situation should be abandoned in favour of a foreign rule of selection concerned with the same situation. If this is to be done, then rules for the choice of law become to a large extent meaningless. . . . A rule of selection which selects another rule of selection is no doubt possible, but to attribute this character to a rule for the choice of law is scarcely sensible."45 Thus to allow a purely domestic scope to this reference is the logical conclusion of the four necessary steps of characterization or classification given earlier. This has the advantage of promoting some degree of certainty and predictability, virtues too often absent from private international law. Nevertheless, there is neither constitutional nor legal compulsion to be logical if there should be other overbearing considerations which require the sacrifice of logic (for example, the effectiveness of execution processes regarding land). Hence we find that there are two more possible definitions of the scope of the reference to foreign law.

(B) Law of France might mean the application of all domestic rules which the French deem formal by French jurisprudence in their own classification of their own rules. Alternatively, this type of reference may be accurately described as requiring an English judge to do what a French court would do on these actual facts, devoid of all place elements foreign to France, that is, on the assumption that all significant place elements so far as French private international law is concerned are domestic to France. The solution here would differ from that under (A) if the French have a different definition of formality from that in English private international law. This, it is submitted, is the only proper sense in which we can speak of secondary classification. It is a possible procedure, though illogical and highly impracticable as a legal technique.

(C) Finally law of France might mean a reference to the total body of French law, including French private international law as well as French domestic law. To give this scope to the reference would require the English court to do exactly as the appropriate

45 Cheshire: Private International Law, p. 94.
French court would do on all the facts, including any place elements therein foreign to France by French private international law. In effect, this is a decision to start the process of legal solution all over again from the very beginning, but this time proceeding entirely under French law. The results of so doing would be as follows:

(1) If there are in the facts no place elements foreign to France by French private international law, then this case is indistinguishable from (B) and of course, like (B), involves “secondary” classification.

(2) If there are in the facts place elements foreign to France by French private international law, then they must be given their effect according to that law, and whatever further references they involve must be followed. This necessarily means employing the French system for primary classification of the juridical questions implicit in the facts as a first step, according to French private international law categories and concepts. Such a process of course becomes most complex, and it is at this point and only at this point that the possibility of a renvoi problem arises. Even then it is just a possibility and not a certainty.

The foregoing then are the three possible meanings of the final and effective reference to the “law of country X”, X being a country other than that of the court concerned. The last of these, involving as it does the possibility of a renvoi situation, requires further examination. The standard example of a renvoi situation is the following: A British subject dies domiciled in France, in the English sense, leaving moveable property situate in England. The English court arrives at the classification “intestate succession” and is thus referred by the English conflicts rule on that question to the law of the domicile of the deceased at death, on these facts the law of France. Our present assumption is that the scope of this reference includes French private international law. Now it appears that the French also classify the matter as “intestate succession” but that their conflicts rule on that subject refers the French court to the law of the country of which the deceased was a national at death (the lex patriae), which in these facts is the law of England. If this French reference to England is likewise a fully comprehensive one, the first named English conflict rule comes into operation again and once more there is a reference directed to the law of France. Thus we become involved in a logically insoluble and legally sterile oscillation of references, and it follows that this vicious circle can only be broken on some illogical principle.
The possible solutions suggested, notably by Dr. Falconbridge, include the following. (i) English private international law might consider that the reference back to it by French private international law means a reference to English domestic law only, and the dispositive rules thereof accordingly would be applied to effect a solution. This is known as "accepting the renvoi", and is illogical in that the English law would consider its reference "law of France" to include French private international law, but the return French reference "law of England" as excluding English private international law. (ii) On the other hand, English private international law might affirm the full implications of its comprehensive reference and give effect to whatever solution French private international law contains for a renvoi situation. Since such a comprehensive reference does involve the decision to start again with the process of legal solution from the beginning, this time under French principles, there is an appearance of logic in deeming the reference to include the French private international law solution for a renvoi situation. This is the position the English courts have taken.46

Two further points however need notice regarding this complete abandonment of the renvoi problem to French law. First, the French conflictual theory may be that when French private international law says "law of England" it means domestic English law only, and does not include English private international law. In that event, the reference back is to English domestic law and the oscillation of references, which strictly speaking constitutes the renvoi problem, is never really set up. Secondly, to take the other extreme, the French conflictual theory may be that a French reference to "law of England" means all of English law including English private international law and the English solution for the renvoi problem. The oscillation of references will then continue and no selection of dispositive law will be effected. The trouble, then, with adopting the foreign principle for breaking the renvoi circle is that it is no solution at all if the foreign private international law concerned takes the same position. In other words, the English theory for the solution of renvoi problems is futile unless theories inconsistent with it are in vogue abroad. This rather affronts the reasoning faculty, for as Dr. Falconbridge remarks, "two different theories cannot both be right, though they may both be wrong".47

More detail is necessary on just how it is that a renvoi situa-

47 Falconbridge: Conflict of Laws, p. 189.
tion arises. When the reference to foreign law is comprehensive, it includes the foreign principles for the choice of law, and hence a conflict of conflict rules is possible. Such a conflict may, on appropriate facts, lead to a *renvoi* situation. We are interested then in the kinds of differences there can be between conflictual rules for the choice of law. Obviously, they can differ in respect of any of the concepts they contain, so that their categories of facts (place elements) may differ, or their categories of dispositive laws may differ. Taking the difference in connecting factors first, we find that such differences may be obvious or hidden. An example of an obvious difference occurs in the standard instance of *renvoi* given earlier, in which both French and English conflictual rules agreed on the meaning of "intestate succession" as a juridical question, but the English referred it to the law of the domicile of the deceased while the French referred it to the law of his nationality, so that on the assumed facts a *renvoi* situation arose. Likewise, there may be a hidden difference in connecting factors which would have the same effect on appropriate facts. For instance, both England and New York State agree that divorce is governed by the law of the domicile, but they define domicile somewhat differently, so that it is possible for a man in certain circumstances to be domiciled in England in the New York sense and in New York in the English sense. If the question raised by given facts is classified by both as one of divorce, then a *renvoi* situation will arise. We must then discern any difference in the substantial definition and meaning of the rules of different countries and not allow ourselves to be misled by superficial verbal identities.

Another caution is also necessary. A *renvoi* situation is not inevitable whenever the conflictual rules of two countries relevant to the same facts are at variance, indeed it is likely to be rather unusual. Some students of the subject fail to realize this, and thus exaggerate the importance of *renvoi*. For instance, in the example given earlier about intestate succession, the English conflicts rule referred this question to "domicile" whereas the French rule referred it to "nationality". If the deceased had been a French national (in the French sense) as well as a French domiciled person (in the English sense), then of course no renvoi situation would arise, though the respective rules are still just as different as before. For their different reasons, on these altered facts, they both now indicate French law as decisive. Thus no *renvoi* situation is possible unless all the following conditions are fulfilled: (i) the reference to the foreign law must be a fully comprehensive
one; (ii) the connecting factors of the conflictual rules of the two countries relevant to the facts must be substantially different; and (iii) the facts must be such that the variance between the relevant rules means an oscillation of references between these two countries.

Now comes the very difficult question of a conflict between the categories for the classification or characterization of laws in the choice of law rules of two countries, which of course can only arise by virtue of a comprehensive reference to foreign law. Dr. Falconbridge, to whom students of this subject are so deeply indebted, describes the situation this way:

In the first stage there may be a latent conflict arising from the fact that although the conflict rules of two countries are on their face the same in that they use the same connecting factor in the same sense, nevertheless they may be different in effect because the nominally identical question to which the rules relate is characterized in one way in one country and in another way in the other country, as for example, if the conflict rules of both countries say that capacity to marry is governed by the lex domicilii, and that formalities of solemnization of marriage are governed by the lex loci celebrationis, but a requirement as to parental consent to the marriage of a minor is characterized in one country as a matter of capacity to marry (or some other aspect of intrinsic validity of marriage or essential feature of family law), and in the other country is characterized as a matter of formalities of solemnization of marriage. \(^{48}\)

As stated earlier, the present writer denies the possibility of a renvoi situation at the "first stage" referred to, that of the original steps of classification whereby the nature of the juridical question raised by concrete facts is precisely defined. To reiterate, this is because (i) only dispositive rules of law can give concrete facts a legal character so that they are capable of raising a juridical question in the first place, and (ii) the juridical questions emerge by classification of the dispositive laws selected as relevant to the concrete facts, and it is clearly impossible to use two different systems of such classification simultaneously at this point for this single initial purpose. Hence when England is the forum, there must be resort to English categories of laws only. Thus, any attempt at "secondary classification", or renvoi, at this initial stage is impossible. To hope for coherent results from a simultaneous use of two different systems of classification of laws in defining for the first time the juridical questions implicit in concrete facts is comparable to expecting a clear image to appear on a photographic plate which has been double-exposed to two different scenes.

\(^{48}\) Ibid., p. 160.
However, after the classification of the question is complete, and a final comprehensive reference has been directed to a foreign law in some respect, is it possible to have a manageable renvoi situation due to a conflict of English and foreign categories of laws? At first sight, some coherent use of the foreign categories may seem plausible. The present submission is that nevertheless there are such contradictions involved that no logically consistent procedure capable of producing predictable results is possible to guide us in affording the different foreign categories priority over the English. If we take it that England and France are the two countries involved in the case about marriage laws just described by Falconbridge, we find that the English and the French draw a different line as a matter of definition between “rules of form” and “rules of capacity”, and the dispositive rule (whether French or English) about parental consent is “form” for the English but “capacity” for the French. Because this dispositive rule is relevant to the facts, English private international law finds that in one aspect these facts raise a problem of form, and, in that aspect, let us assume that the English refer the question to France as the place of the ceremony. Since this reference to France is on the formal part of the juridical questions raised by the facts in the English sense of “form”, how can we sensibly shift to the French definition of “form”, and treat the reference now as meaning “the formal part of the juridical questions raised by the facts in the French sense of ‘form’”? Such a procedure might be feasible if all aspects of the juridical questions raised by the facts were to be referred to French law, but when the English say “form” in our sense is for France but “capacity” in our sense is reserved for English law, it is hopelessly contradictory to allow the French to alter the English line between “form” and “capacity”.

In other words, if the portion of the problem the English deem formal is referred to French law, how can that portion then be enlarged or diminished by applying the different French test of what is to be deemed the formal phase of the problem? No doubt this sort of thing can be attempted, but only confusion will result. A procedure the effects of which are haphazard and unpredictable is, to put it mildly, the negation of important elements of the whole idea of law. The only sensible thing then for an English court is to stay with its own categories of laws.

Having carried the analysis to this point, we can now attempt to dispose of what is called “secondary classification”. Rabel’s succinct description of it is as follows: “characterization by the lex fori for choice of law — characterization by the foreign law
Classification in Private International Law

Once chosen. Secondary classification then is only a problem where the English and foreign private international law categories of dispositive laws differ. It represents an attempt to devise principles whereby the foreign categories are to be given priority over the English in certain matters, and it is significant that its advocates have failed to agree on what these matters are. At bottom "secondary classification" is precisely the problem just considered under renvoi, a conflict of characterizations of the juridical question, so the objections given in that respect are all applicable. Secondary classification is simply not a practical legal technique. There is no way of dealing consistently and intelligibly with a conflict of classifications of the juridical questions raised by a given set of concrete facts. A court must stay with one system of classification (its own) to carry out this process of dividing the problem into several phases for purposes of selecting dispositive laws for each phase.

Is there then nothing to be said for the comprehensive reference to foreign law — the reference which includes the foreign private international law and would give its provisions some effect? How is it that there seem to be plausible cases on renvoi in the law reports? What is the explanation of them? If these cases, the latest of which is Re Duke of Wellington Estate, are examined carefully, it will be seen that all are instances where the variation between the different national choice of law rules concerned was in the definition of the significant place elements (connecting factors) only. These conflictual rules were all in harmony on their respective classifications of the juridical question raised by the facts concerned, or at least were assumed to be by the English judges. When, for example, the French and English agree on what is "divorce", it is possible to shift from the English connecting factor for the question to the different French one with reasonably predictable results. It is submitted that this is the only respect in which the comprehensive reference to foreign law represents a feasible legal procedure. Further, shifting to a different foreign connecting factor for the same question due to a comprehensive reference does not mean that a renvoi oscillation will inevitably be set up, as the case of Armytage v. The Attorney-

51 [1947] Ch. 506, [1948] Ch. 118.
52 Re Annesley, [1926] Ch. 692; Re Ross, [1930] 1 Ch. 377; Re Askew, [1930] 2 Ch. 259; Re O'Keefe, [1940] Ch. 124; Re Duke of Wellington, [1947] Ch. 506, [1948] Ch. 118.
General illustrates. As was explained earlier, a renvoi situation is quite unusual even though the connecting factors differ, so that the uncertainty thereby introduced may be risked if there are good reasons of policy for an English court to strive as far as practical to do what a foreign court would do. Further, a reference to foreign private international law when there is uniformity of the categories of laws clearly cannot involve any problem of "secondary classification". Given this degree of harmony then, the comprehensive reference by England to foreign law is a feasible legal technique. It then involves only a shift to the different foreign connecting factor for the legal question arising from given facts, the English and foreign private international laws being in agreement on the definition of that question. This is probably the secret of the success of the comprehensive reference concerning "ownership of land", as most legal systems will agree on what is a question of the ownership of land (immoveables) arising out of particular facts. Unfortunately, the case law on immoveables is too complex for examination here.

The truth is then that there is simply a limit to the extent to which practical national legal procedures can be devised for taking account of foreign laws in dealing with international facts. The comprehensive reference may be useful, but only if employed where the variation between the national conflictual rules concerned is confined to their respective connecting factors. As was said, this appears to be the situation in the few cases in the law reports which deal with the matter. Still, the most consistent procedure, that which best lends itself to predictable results, is the one which takes the English reference to a foreign country's laws to be a reference to the foreign domestic law only, in the sense explained at the beginning of this section. Our precedents are at present divided on which type of reference is to prevail.

Very little has been said of policy in the foregoing analysis of the legal techniques or procedures involved in private international law. This is not because the writer is unaware that the purpose of laws is to implement socially desirable policies and accepted principles of justice. The point is that legal procedures which are to a high degree logical and consistent are essential if laws are to be productive of reasonably predictable results on future facts, otherwise such laws have little utility for the implementing of policies of any kind. The attempt here, then, has been to mark out the limits of legal technique within which a

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national legal system operates in devising indicative rules taking some account of the content of foreign laws when dealing with international facts. Thus it is hoped that the extent to which it is possible to implement policy by law in this respect has been somewhat clarified. For instance, in many situations there is simply no national legal procedure whereby an English court can be sure of doing exactly as a foreign court would do on given facts, no matter how desirable this might be as a matter of policy. Also, this analysis may serve to show that some decisions are made in private international law under the influence of what the lawyers and judges concerned believe to be certain logical compulsions, when in fact no such compulsions exist and straight considerations of policy should be frankly assessed as the governing factors in framing or choosing the indicative rules to be used.

The policy decisions which concern private international law are of two kinds, which might be designated the ordinary and the extraordinary. Given a novel situation having factual connection with two or more countries, the legally significant connecting factor for the juridical question raised has to be chosen or compounded from these factual points of contact by the judge confronted with the need to formulate a new indicative rule. In effect he should ask himself which of the countries concerned has the most important interest in the result — which country is most closely concerned with the result. Then the factual connecting factor which will consistently point to this particular country in such matters should be selected as the legally significant one, and thus a judge-made rule to that effect would emerge as a new precedent. For instance, Dr. Chesire argues that the policy behind the choice of "the intended matrimonial home" as the legally significant connecting factor for "capacity to marry" is simply that that country is the one most closely concerned with the substantive marital standards to which the man and woman concerned should conform. Hence it is sensible and just to frame the choice of law rule so that it will impose the laws of that country upon them. The "proper law of the contract" doctrine of England and the Commonwealth countries is (on its objective side) an even more apt illustration. This then is the ordinary type of policy decision which lies behind the formulation of an indicative rule of private international law and which such rules embody and express once authoritatively formulated, whether by a judge or a legislature.

This ordinary indicative type of policy decision has to be distinguished from the substantive policy considerations which
govern the formulation of national dispositive laws themselves by judges or legislatures. For England, for example, monogamy is deemed desirable and right in marital relations, and hence English domestic laws permit only monogamy. By contrast, in India, polygamy is regarded as proper and certain domestic Indian laws are to that effect. However, in framing a choice of law rule for an international marital situation touching both England and India, ordinarily the policy issue is not whether monogamy is right and polygamy is wrong or vice versa, rather it is simply the question which country has the most important interest in the marital standards of the people concerned, *whatever may be the substantive matrimonial policy expressed in that country’s domestic laws*. Every time foreign laws differ from English ones on a given matter and nevertheless are given effect in England in a particular case, English substantive policy embodied in English domestic laws is to that extent displaced by the foreign substantive policy embodied in the foreign domestic laws. To effect this result in appropriate circumstances is the purpose of private international law. The only alternative is the intolerant and parochial one that “Whoso comes to Rome must do as Romans do”.

Even so, tolerance cannot be unlimited and thus we find that as an extraordinary matter of ultimate reservations substantive policy considerations do enter directly into some choice of law problems. “Public policy” as usually conceived in this regard defines certain fundamentals implicit in our substantive laws and legal institutions and forbids the adoption by operation of our choice of law rules of any foreign laws which would work results repugnant to these basic concepts. The problem arises because our indicative rules, when they refer us to the laws of a foreign country, refer us to those laws *whatever they may be at the material time*. In this way they rather call for a step in the dark. What ultimate public policy requires us to do is to look before we leap, and we are restrained from “taking off” if the results would be too unpalatable. For example, where Russia was the intended matrimonial home, England would have no objection to giving effect to a Russian rule that persons under 20 years are incapable of marriage though the English age of capacity is lower. But it might be very different with the recent Soviet decree that Russians are incapable of marrying any foreign nationals. This would likely be deemed a basically repugnant type of discrimination.

It is not the ultimate or extraordinary public policy here that is an “unruly horse”, rather the unruly horse is the uncertainty of substantive result implicit in our indicative rules, because they
require us prima facie to adopt the laws of a foreign country at the material time whatever their effect might be. The public policy reservation on the operation of these rules then is not the unruly horse but the check-rein on the beast. It is worth noting that there is a close analogy here with the extraordinary doctrine of "public policy" which obtains in the English domestic law of contract. Our law of contract permits people, prima facie, to make (in the terms of a contract) what rules of law for themselves they please, provided the nature of their promises meets certain conditions easy to satisfy. Here again it is realized that there is uncertainty regarding the use to which such wide rights might be put, and hence we find ultimate reservations defining terms to which contracting parties cannot submit themselves in spite of having satisfied the ordinary rules of agreement. Certain restraints upon freedom of trade and occupation furnish well-known examples. Thus it is freedom of contract that is the unruly horse and once again "public policy" is the check-rein.

Finally, it is asserted that a general uniformity of result in different countries in a given international case is the really basic object or policy of our system of private international law, the result to be accepted everywhere presumably being that prescribed by the domestic laws of the country most closely concerned. This problem is the subject of the last section of this essay.

V. The Theories of the Nature of Private International Law: Conclusions

We come finally to the two main opposing theories of the constitutional nature and source of the rules of private international law, and their significance in regard to the principles developed in the earlier sections of this article. These two theories are known as the "vested rights" theory and the "local rights" theory. Professor Beale has stated the "vested rights" theory as follows: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere." Accordingly it is admitted that the operation of national laws is territorial in scope but it is said that rights, once vested by the appropriate law, can in effect walk abroad with their owners and must necessarily be accorded recognition by other territorial legal systems. Thus Dr. Schmitthoff, a modern advocate of this theory, speaks of "the

distinction between foreign law which is not entitled to enforcement in the English jurisdiction, and rights created by that foreign law, which generally are protected by the English courts". So, not only are rules of private international law necessary to define the various legal aspects of concrete facts and to assign them to their appropriate territorial legal systems, but this theory goes further and necessarily presumes that there are universal and uniform tests valid for all national legal systems whereby this task of definition and allocation can be implemented. This must be so if one country is under compulsion to recognize rights "created" or "vested" by another. Such principles, if they existed, would need to take one of two forms: they might be part of a genuine international law binding all countries, or they might be embodied in universally valid principles of legal logic the consistency of which was compelling enough to control the content of the various national systems of private international law. This latter view is really a natural law conception. However, either way, the basic postulate of the pure "vested rights" theory is that conflictual choice of law rules are part of a super-national system which is uniform for all countries and binding on all countries.

In contrast to this we have what has been called the "local rights" theory, brilliantly advocated by Professor W. W. Cook and accepted by Dr. Cheshire. It is to the effect that a legal right is completely the creature of a particular national dispositive legal system, and thus the right as such cannot exist in any legal sense outside the territory where the legal system that creates and maintains it is operative. Accordingly this theory asserts that the only rights which exist and are enforceable in England are rights created by English law. But, when confronted with facts having foreign features, the private international branch of English law frequently does accord some significance to relevant foreign principles of law to the extent that it is consistent with English ideas of policy, convenience and justice so to do. Thus, where a set of facts has certain connections with France, English private international law, on some legal aspect of the facts which it defines, may operate so as to create an English right as closely equivalent as possible to that which the French law would confer in France on the same facts. This does not mean that French rights as such cross the channel with their

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68 Cheshire: Private International Law, p. 54.
owners and must then be accorded recognition in England. Neither does this theory postulate super-national and uniform conflictual choice of law rules. Rather, the "local rights" theory asserts that each national state controls for itself the content of its own private international law. Hence, conflictual rules of the various national states will often differ, and uniformity in this respect, when it does occur, is in a sense accidental and not a matter of legal or logical necessity. For purposes of this article, as was stated earlier, the validity of the "local rights" theory has been accepted, because on the whole it more accurately describes the constitutional and legal truths of the world of mutually exclusive national territorial states in which we live.

These two theories are significant in important respects for our purposes here. If the "vested rights" theory were correct, then each country would have the same conflictual choice of law rules; in effect there would be uniformity of national conflictual rules, so that they would embody identical categories of laws and significant place elements. This would mean that the problems of the "comprehensive reference", "secondary classification" and the renvoi situation would be quite unknown. There can obviously be no conflict between uniform private international law rules, and only such a conflict can raise the aforementioned questions. To be specific, if France and England both refer "forms of marriage" to the "country of celebration" and both mean the same thing by these phrases, then if the place of celebration is England, the English domestic law of form must be applied, and if the place of celebration is France then French domestic law must be applied, regardless of which country's courts are hearing the case. It is not correct then to assert that the "vested rights" theory requires "secondary classification" and renvoi. Any consistent "vested rights" theorist should be most painfully surprised at these problems occurring. Thus it is natural for these theorists to speak of an English court being required to do exactly as a foreign court would do in some matters, for if their basic postulate were valid this could be accomplished simply by taking the four steps of classification described earlier in Part III. Probably the real reason why dilemmas like "secondary classification" occur in the cases and books on this subject is that some lawyers, judges and legal writers try to proceed on the basic postulate of the "vested rights" theory in a world which conforms much more to the different assumptions of the "local rights" theory.

All the same, one thing is apparent from the foregoing, and that is the value of uniformity of national conflictual choice of
law rules, regardless of the way in which it comes about, for as was said, this would eliminate completely the dilemmas occasioned by a comprehensive reference to foreign law. Fortunately, for historical reasons, we do find a good deal of such uniformity, especially that which obtains in varying degrees among common law jurisdictions like the provinces of Canada other than Quebec, England herself and most of the states of the United States. Local legislatures then should think twice before they destroy this uniformity by unilateral action, for by so doing they may create worse problems than those they are attempting to solve. Thus perhaps we should not dismiss the "vested rights" theory too summarily, for to some extent we do have the uniformity of conflictual rules which that theory postulates, though not for the reasons it suggests.

The "vested rights" theory also has a measure of validity as an expression of hope for the merging of national rules for the conflict of laws into a true international law of private rights. To a large extent such a system would have to be content with uniform conflictual choice of law rules which all countries would be required to observe, and which would necessarily operate in the manner described in Parts II and III of this article. Uniformity of the national dispositive rules of law themselves would of course finally resolve all conflictual problems, but these different local laws are so deeply rooted in the traditions of their respective peoples that the amount of uniformity attainable regarding them seems very limited indeed. For the most part, then, uniformity of the indicative rules of private international law seems the best practical goal. It is clear that this would require two things: (a) the formulation of uniform categories for the classification of dispositive laws, so that each country would define the juridical questions arising from a given concrete fact-situation in the same way, and (b) the acceptance of the same connecting factors as legally significant for the types of juridical questions thus determined.

So far as classification is concerned, this task should prove feasible for, as was stated earlier, there is no one system of classification of laws which can lay claim to supreme "natural" validity. Rather, a great many systems are logically possible and the choice of which to use is a matter of policy for the purpose in hand. Thus it should be feasible deliberately to devise and agree upon a uniform classification of dispositive laws. While comparative law studies would no doubt afford great assistance in such a task, it should be noted that deliberate formulation and agreement are
necessary. A “natural” uniform classification system will not emerge simply if and because a sufficient number of lawyers, judges and jurists immerse themselves in comparative studies, as some writers assume. Yet such a fallacious belief does persist, for the distinguished editor of the latest edition of Dicey’s work seems to think that uniformity will automatically result if the process of characterization is “performed in accordance with the dictates of common sense”.

What is “common sense” is no more obvious than what is “natural”.

Likewise, the choice or definition of the legally significant connecting factor for a given juridical question requires a deliberate policy decision on the relative importance of the factual points of contact which obtain between persons and territorial states in relation to the juridical matter concerned. For example, one would conclude that, in formulating the rule that the essential validity of a marriage is to be referred to the law of the intended matrimonial home, English judges tacitly at least were guided by the following principles: (i) in a matrimonial situation with international features it is desirable as a matter of policy that the man and woman concerned should enjoy the same legal status in the different countries involved; (ii) the country most closely concerned as a matter of social interest is that in which the man and woman are to make their permanent home; (iii) therefore the dispositive law which should determine the essential validity of their alleged marriage for England, and indeed in the English view for all countries, is that of the state which is their intended matrimonial home. Hence there was the formulation of the judge-made rule to this effect. Thus the establishment of uniform national conflictual rules would require, basically, international agreement on such considerations of purposes and policy in all important matters. It must be remembered also that some limit on the operation of the extraordinary public policy reservation discussed earlier would have to be set, in addition to the establishment of uniform choice of law rules, in a suitable international convention. There have already been striking examples of this type of co-operation in Continental Europe, Scandinavia and Latin America, but little has been done in this way between the common

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61 Dr. Cheshire’s view of the rule is here accepted (essential validity being almost entirely a matter of capacity of the parties). The English Court of Appeal prefers Cheshire’s view. See De Reneville v. De Reneville, [1948] 1 All E.R. 56, at p. 61.
law countries. Perhaps the main task is to seek uniformity of private international law principles between the common law countries following the English tradition, on the one hand, and the civil law countries, on the other. Such a task should have a peculiar interest for Canadians.

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A Lesson from Medicine

In order to indicate a perspective on the question quickly, I point to our brethren in the medical profession. I do so without intent to draw invidious comparisons or to imply that there are no major differences or to suggest that anyone is to blame because lawyers are not held in the same high esteem which the doctors enjoy. I can only mention one aspect of a large problem, namely, that medicine rests on science and is itself, to a substantial degree, a science, whereas the practice of the law does not even pretend to rest on organized empirical knowledge. For three centuries science has received the supreme accolade of Western culture, and medicine participates in that prestige. Nor is it merely a matter of public esteem. The reputation is deserved because the doctors are contributing to our knowledge of health in many important ways. The conquest of disease by scientific methods is universally appreciated as are preventive medicine and the efforts of doctors to educate the public. The clinic and the laboratory and the scientific medical publications are established and highly regarded.

The doctors have developed a class of specialists who are laboratory researchers and clinicians. I propose a similar development in law. National and state laboratories of factual and legal research could investigate many problems with a view to increasing our knowledge of the legal institution in all its ramifications. The regular publication of the results in bar and other law journals and the occasional giving of wide publicity to certain discoveries would give the public and the lawyers themselves a broader conception of the functions of the Bar and improve the handling of legal problems whether they be ordinary county issues or the uncertain questions of international law. Even though many lawyers remain dubious regarding the effect of scientific research on their individual practice, they ought to encourage it not only because of indirect advantages such as increased public regard but also because there is great need for scientific knowledge of law and legal institutions. (Jerome Hall: The Challenge of Jurisprudence (1951), 37 A.B.A.J. 23)