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Conflict Rule and Characterization of Question

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1. *Introduction*

It is with diffidence that I venture to add a further article to what I have already written[1] on the topic of the conflict of laws which in continental Europe is called *qualification*,[2] and which some writers in English call *classification*, but for which, I sub-

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[1] Essays on the Conflict of Laws (1947), chapters 3, 4, 5, 6, 8. The Essays being out of print (1950), I give the following references to the original articles upon which the chapters in question were based: Characterization in the Conflict of Laws (1937), 53 L. Q. Rev. 235, 537; Conflict of Laws: Examples of Characterization (1937), 15 Can. Bar Rev. 215; Renvoi, Characterization and Acquired Rights (1939), 17 Can. Bar Rev. 369; Renvoi and the Law of the Domicile (1941), 19 Can. Bar Rev. 311, at pp. 334 ff.

[2] The problem, discussed by Kahn in 1891, was independently discussed in 1897 by Bartin, who described it as the problem of *qualifications*. The word *qualification* has since been transliterated from French into various European languages, but would appear to be unsuitable for use in English, because the English word *qualification* has several meanings different from that of the French word.

mit, the word *characterization* is a more suitable equivalent in English.[3]

So much has been written on the topic by many authors in many countries[4] that it might seem that nothing useful remains to be said, but every writer who discusses the topic has his own particular method of expounding his views, and significant differences of views continue to be expressed. Some of these differences resolve themselves into differences of opinion as to what it is that is characterized, and one purpose of the present article is to clarify this point by beginning with an analysis of a conflict rule[5] and then proceeding[6] to a discussion of characterization as one of the essential stages in the subsequent operation of a conflict rule.[7]

2. *Structure and Analysis of a Conflict Rule*

A conflict rule of the law of the forum, as distinguished from a domestic or local rule of the law of the forum, is usually expressed in the form of an abstract proposition that a given matter[8] is "governed" by the "law" of a particular country which is ascertained in the manner indicated in the rule.

It is submitted that a helpful approach to the discussion of the problem of characterization consists in the prior analysis and discussion of the structure of a conflict rule. The reason why this is so is that one fundamental phase of characterization as regards which there is so much difference of opinion is the formulation of an accurate theory as to what is the subject of characterization (that is, what it is that is characterized) and the formulation of that theory depends in turn on the formulation of an accurate theory as to what is the subject of a conflict rule (that is, what it is that is "governed" by the "law" of a particular country ascertained as indicated in the conflict rule).

[3] First suggested in my Law of Mortgages (2nd ed. 1931) 734; cf. [1932] 4 D.L.R. 1, at p. 9. "Characterization" is the term used by various writers in English from Robertson, Characterization in the Conflict of Laws (1940) to Dicey, Conflict of Laws (6th ed. 1949).

[4] Writing in (1937), 53 L.Q. Rev. 235, 537, I discussed such material published in continental Europe as was available to me at that time, and the article was reproduced in 1947 in chapters 3, 4 and 5 of my Essays on the Conflict of Laws substantially in its original form without my attempting to bring references to European material up to date or to render them more complete. In the present article I have used and cited some other books and articles published in continental Europe, so far as they are available to me and so far as they are relevant to the particular purpose of the article.

[5] In § 2, *infra*.

[6] In § 3, *infra*.

[7] There are, it is submitted, three essential stages, namely, (1) characterization of the question, (2) selection of the proper law, and (3) application of the proper law. See § 3, *infra*.

[8] I have deliberately used a neutral or ambiguous word so as not to prejudge the subsequent discussion as to what is the subject of a conflict rule.

Examples of conflict rules[9] taken from English (or Ontario) conflict of laws are as follows:

(1) The formalities of celebration of a marriage are governed by the law of the place of celebration.

(2) Capacity to marry, and generally other matters of intrinsic validity of a marriage, are governed by the law of the domicile of each of the parties immediately before the celebration of the marriage.

(3) Succession to movables on death (as distinguished from administration) is governed by the law of the last domicile of the deceased person.

(4) Succession to land is governed by the law of the situs of the land.

(5) The effect of marriage upon the property in movables and the rights of the parties in respect of movables are governed by the law of the domicile of the husband at the time of the marriage.

(6) The transfer *inter vivos* of a thing, whether land or movable, is governed by the law of the situs of the thing.

(7) As a general rule the formal validity of a contract is governed by the law of the place of contracting.

(8) The reference to any foreign law is limited to the substantive rules of that law (including rules as to either the formal or the intrinsic validity of a transaction), and procedure is governed by the domestic rules of the law of the forum.

Propositions of this kind are "shorthand", or extremely concise, but convenient, conventional modes of stating certain principles of the conflict of laws. They may be analysed, or broken into their three constituent elements, so that each conflict rule states in effect that (a) as regards a particular kind of legal question (capacity to marry, formalities of marriage, succession to movables, succession to land, transfer of things *inter vivos*, or as the case may be), (b) a particular local element in the factual situation (domicile of a person at a particular time, the situs of a thing, the place of the doing of an act, or as the case may be), is the connecting factor, that is, the factor which connects the factual situation with a particular country, leading to (c) the conclusion that resort should be had to the law of that country as the proper law to be applied to the factual situation for the purpose of obtaining a definitive answer to the particular legal question.

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[9] While these rules are substantially accurate as general rules, they may be subject to exceptions and modifications which do not require discussion for the present purpose.

On the basis of the foregoing analysis of a conflict rule the subject of the rule is legal, not factual. It is not, however, a legal relation, because whether a legal relation arises from the factual situation cannot be known until after the law of a particular country has been selected as the proper law and applied to the factual situation.[10] The subject of the conflict rule is a legal question or problem arising from the factual situation or from some element or elements of that situation. For example, capacity to marry is not a relation, legal or factual, but is merely one legal question arising as a partial aspect of the broader question whether a valid marriage has been celebrated between the parties, that is, whether the legal relation of the husband and wife has been created. Similarly the sufficiency of the formalities of celebration of a marriage is another legal question arising as another partial aspect of the broader question.

Again, for example, succession to movables is a legal question arising on the death of the owner of movables, and to the extent that the question is one of the law of succession as distinguished from the law of status it must be answered by reference to the proper law of succession to movables, that is, the law of the last domicile of the deceased owner. The scope of the law of succession includes the definition of the classes of persons entitled to take an intestacy, and the definition of child, and provisions as to the share or shares to which a child or children is or are entitled, and, if there is a will, the validity of the will, and limitations on the disposing power of the testator as regards the share or shares of a child or children, and the definition of child in the will.[11]

Formerly, when I attempted to describe a conflict rule,[12] I specified a "given kind of question" or "the question in issue" as the subject of the rule, but it did not occur to me precisely to state that the question which is the subject of the rule is a *legal* question. The legal nature of the question was, however, implicit in my description of characterization as being the definition of the *juridical* nature of the question upon which a court's adjudication is required,[13] and in my later statement that the question to be characterized must be a legal question.[14] I do not intend to

[10] This has often been pointed out: cf. Lewald, citing Von Bar (footnote 16, *infra*), my Essays on the Conflict of Laws (1947) 44, citing Rabel; (1937), 53 L. Q. Rev. 235, at p. 244.

[11] See my Legitimacy or Legitimation and Succession in the Conflict of Laws (1949), 27 Can. Bar Rev. 1163, especially at p. 1170.

[12] E.g., in my Essays on the Conflict of Laws (1947) 7, 9.

[13] *Op. cit.*, pp. 36, 94, reproducing my Characterization in the Conflict of Laws (1937), 53 L. Q. Rev. 235, at pp. 236, 556.

[14] *Op. cit.*, p. 162, reproducing my Renvoi, Characterization and Acquired Rights (1939), 17 Can. Bar Rev. 369, at p. 374, quoted by Lewald, Règles

suggest, however, that it is logically permissible to argue backwards from the subject of characterization to the subject of a conflict rule. On the contrary, my present submission is that we may and should argue forwards from the structure of a conflict rule to the discussion of what it is that is characterized.

Having independently reached the conclusion that it is worthwhile to lay stress on the proposition that the subject of a conflict rule is neither a legal relation nor a factual relation, but is a legal question arising from the factual situation, I state that conclusion with more confidence because it has been already stated so clearly and emphatically by Hans Lewald.[15] What he says is so apposite to my present purpose that I quote the relevant passage textually as follows:

> Quels sont donc les rapports dont s'occupent les règles de conflit? Vu qu'en droit international privé il n'y a rien qui ne soit controversé, l'objet du rattachement n'est pas défini par tous les auteurs de la même manière. Il n'y a à peu près qu'une seule chose qui soit certaine, c'est qu'il s'agit de situations de droit privé qui se trouvent en contact avec plusieurs législations, de sorte qu'il faut choisir celle qui doit les régir. C'est la tâche des règles de conflit de nous indiquer l'ordre juridique selon lequel la question de droit soulevée par une situation de ce genre doit être décidée. Nous ne considérerons dons pas comme objet proprement dit de la règle de droit international privé le rapport juridique, étant donné que la question de savoir si une situation de fait constitue un rapport de droit dépend précisement de l'ordre juridique à déterminer. C'est von Bar qui, dans son ouvrage célèbre sur le droit international privé, nous a, il y a quelques dizaines d'années, mis en garde contre le danger du cercle vicieux.[16] Cependant, à mon avis, ce n'est pas non plus la situation de fait prise en elle-même qui peut, seule, être considérée comme objet de la règle de conflit, comme le prétendent certains auteurs. Selon ces derniers, la règle de conflit ne vise que le rapport de vie, pour ainsi dire juridiquement incolore, qu'elle soumet à une loi déterminée. Certes, ces rapports de vie doivent être appréciés par la loi déclarée compétente; mais il ne faut pas oublier que cette appréciation doit se faire eu égard à un certain problème de droit, résultant du rapport envisagé; autrement dit, eu égard à la question de droit précisée dans la règle de conflit. C'est cette question de droit qui ne peut être éliminée des conditions du commandement énoncé par la règle de conflit et que je considère comme l'objet proprement dit du rattachement.[17]

Générales des Conflits de Lois, Recueil des Cours, Académie de Droit International, vol. 69 (Vol. 3, 1939) 71. The point as to characterization will be discussed in § 3.

[15] Lewald, *op. cit.* (note 14, *supra*) 10, 11.

[16] *Theorie und Praxis des Internationalen Privatrechts*, 2e éd., t. 1. p. 107: "Man darf . . . nicht ausgehen von dem Begriff des Rechtsvershältnisses; dies wurde ein fehlerhafter Zirkel sein; denn um zu wissen, ob bestimmte Tatsachen ein Rechtsverhältnis darstellen oder hervorbringen, muss man dieselben an einem bestimmten Gesetze oder Rechte als der massgebenden Norm messen, d. h. zuvor *das* Recht oder Gesetz kennen, von dem sie beherrscht werden, und dies gerade kennen wir einstweilen noch nicht."

[17] Je soutiens cette thèse depuis des années dans mon enseignement, et

Although not many writers specifically state the theory that the subject of a conflict rule is a legal question, the theory is of course not novel. It seems to be sufficiently stated or implied in the analysis of a conflict rule adopted by some German writers. For example, Gutzwiller,[18] with especial tribute to Zitelmann[19] for having demonstrated the uniform structure of conflict rules and for having formulated the characteristic features of their several parts, analyses a conflict rule as consisting of (1) a factual situation (*Tatbestand*), which includes (a) a legal question (*Rechtsfrage*) and (b) an element connecting the situation with a particular country (*staatliche Beziehung*), and which furnishes the premises for (2) a legal conclusion (*Rechtsfolge*).

Gutzwiller's first example of a conflict rule shows that he means by *Rechtsfrage* what I have translated as *legal question*, a question included in or arising from the factual situation, and that the legal question is the subject of the conflict rule. His example (that the *Geschäftsfähigkeit* of a person is governed by the laws of the state to which the person belongs) presents, however, a problem in translation, and underlying the rule there exists an important latent difference between English conflict rules and the conflict rules of Germany and some other countries, quite apart from the patent difference between a German conflict rule which uses nationality as a connecting factor and an English conflict rule which uses domicile or some other factor.

The word *Geschäftsfähigkeit* has been translated into French as *capacité d'exercice* or *capacité de contracter* or *capacité d'exercice des droits*, as contrasted with *Rechtsfähigkeit* translated as *capacité de jouissance*.[20] On the other hand, in English conflict of laws, as I submit, there is no general conflict rule relating to *capacity* in either of these two meanings or aspects. Capacity must of course be distinguished from status.[21] A question of capacity cannot be characterized in the abstract as a single question governed by the law

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j'y ai fait allusion dans mon compte rendu du livre de Neuner, Der Sinn der internationalprivatrechtlichen Norm, dans Juristische Wochenschrift, 1932 p. 2253. Depuis lors, elle a été développée amplement par W. von Steiger, Die Bestimmung der Rechtsfrage im Internationalen Privatrecht, 1917, p. 7 et suiv.

[18] Internationalprivatrecht in Stammlers Das Gesamte Deutsche Recht (1930) 1539 ff.

[19] Internationales Privatrecht, vol. 1 (1897) 205 ff.

[20] Gutzwiller, *op. cit.*, p. 1542.

[21] As to the distinction between status on the one hand and capacity or the incidents of status on the other hand, see my articles Characterization in the Conflict of Laws (1937), 53 L.Q. Rev. at p. 544, (1937), 15 Can. Bar Rev. at p. 240, reproduced in my Essays on the Conflict of Laws (1947) 79. See also my subsequent article Legitimacy or Legitimation and Succession in the Conflict of Laws (1949), 27 Can. Bar Rev. at pp. 1166 ff.

which governs a person's status or by any single law. Capacity is not an independent concept which can be divorced or dissociated from the particular kind of transaction in connection with which the question of a person's capacity may arise. We must distinguish between and treat as different questions, governed possibly by different laws, capacity to marry (characterized as a question of intrinsic validity of marriage), capacity to succeed to land or movables on the owner's death (characterized as a question of succession), capacity to make a marriage contract or ante-nuptial settlement (characterized as a question of intrinsic validity of either contract or conveyance), capacity to make a commercial contract (characterized as a question of intrinsic validity of contract), and so on.[22]

In my own analysis of a conflict rule already stated I have suggested the subdivision of the rule into three parts, (a), (b) and (c). In effect the analysis is in accord with Gutzwiller's analysis, but the latter analysis is logical and useful in its grouping of (a) and (b) in one part of the rule so as to state more emphatically that these two elements of the rule constitute together the premises for the legal conclusion stated in (c). For my present purpose Gutzwiller's analysis also supports the view advocated by Lewald and by me that the subject of a conflict rule is a legal question.

Rabel, in his *Conflict of Laws*,[23] emphasizes the importance of "full awareness" of the two parts of which a conflict rule is necessarily composed, and says that "the first part of the rule defines its object, that is, certain operative facts,[24] the legal consequences of which are determined in the second part. From another point of view the first part raises, and the second part answers, a legal question." He does not, in any precise terms, analyse or define the contents of the first part of a conflict rule, and for my present purpose it is interesting to consider what he says in an earlier article in his discussion of the problem of characterization.[25] In his discussion of the subject of a conflict rule, after pointing out that the

[22] See my Immovables in the Conflict of Laws (1942), 20 Can. Bar Rev. 123, at p. 126, reproduced in my Essays on the Conflict of Laws (1947) 546.

[23] Conflict of Laws: A Comparative Study, vol. 1 (1945) 42.

[24] German *Tatbestand*, translated by Lea Meriggi (1933), 28 Revue de Droit International Privé 205, into Latin: *substratum* (subject matter); Italian *presupposto* (premise).

[25] Le Problème de la Qualification (1933), 28 Revue de Droit International Privé 1 — cited below simply as Revue (1933). This article reproduces in French the ideas developed by the same author in German in 5 Zeitschrift für Ausländisches und Internationales Privatrecht (1931) 241. I have not had the opportunity of consulting the original article. See also an Italian version of the same article in 2 Rivista Italiana di Diritto Internazionale Private e Processuale (1932) 97.

point of departure cannot be a legal relation, and that like any other rule of law a conflict rule operates on facts of life or a social relation, nevertheless admits the necessity of basing conflict rules on notions more or less impressed with a legal character. Hence a conflict rule designates a factual situation expressed in legal language, or designates a group of facts under the name of a legal relation, without prejudging the existence of a legal relation, and a legal question is the subject of a conflict rule in the sense that the rule states a legal question to be decided by the law selected in accordance with the rule.[26]

Rabel's theory as to the subject of a conflict rule may be compared with that of Ago.[27] According to Ago, the subject of a conflict rule is a particular category of facts and relations, or a particular type of factual relations, or relations of actual life, as distinguished from legal relations, but in order to indicate the particular category or type of facts and relations to which the rule relates the rule uses a technico-legal expression, such as "legal personal relations between spouses", "rights to movable and immovable things", "intestate and testamentary succession". These technico-legal expressions are borrowed from the national system of private law, but are used merely as a means of describing the category or type of relation to which normally certain provisions of the national law would apply, but to which, in the particular circumstances, by virtue of a conflict rule of the national law, the provisions of some other law are applicable.[28]

It is submitted that Rabel and Ago adopt an ingeniously devious way of giving a legal complexion to the subject of a conflict rule without abandoning their view that the subject is purely factual, and that it is preferable to recognize frankly that the subject of a conflict rule is a legal question arising from the factual situation, in the sense that the scope of one conflict rule as distinguished from that of another conflict rule is defined by reference to the particular legal question specified in the rule, although of course, when the law of a particular country has been selected, the selected law will be applicable to the factual situation.

As compared with the view that the subject of a conflict rule is a legal question arising from the factual situation, and the view that the subject of a conflict rule is a group of facts or factual

[26] Revue (1933) 5-8.

[27] My references are to Ago, Règles Générales des Conflits de Lois, in Recueil des Cours de l'Académie de Droit International, vol. 58 (vol. 4, 1936) 342, and Lezioni di Diritto Internazionale Privato (1939, reprinted 1948). The author's Teoria del Diritto Internationale Privato (1934) is not available to me.

[28] 58 Recueil 313 ff.; Lezioni 53 ff.

relations designated by a concept expressed in legal terms, some authors have stated the view that the subject of a conflict rule is a group of rules of law designated by a succinct legal expression.

For example, Lepaulle[29] suggests that the whole of the contents of all systems of private law, including those of foreign countries as well as the system of law of the forum, should be grouped in a relatively small number[30] of categories of legal rules, each category being the subject of a separate conflict rule, and therefore being a category of rules relating to a matter or matters which are susceptible of being governed by a single law. A conflict rule therefore consists of two parts, namely, (1) a category of legal rules, that is, a legal concept which Lepaulle calls a *notion rattachée* or *notion de groupement*, and (2) a connecting factor, which he calls a *notion de rattachement*. While it is desirable that the *notions rattachées* constituting the subjects of various conflict rules should not be based solely on the concepts of the domestic law of the forum, it is nevertheless the law of the forum which must define the meaning of the terms used in its conflict rules. Many of Lepaulle's categories of legal rules or *notions rattachées* are in effect equivalent to what I have called legal questions.

It might seem hypercritical to find fault with Lepaulle's expression *notion rattachée* if it were not for the fact that the expression is itself the occasion for his unjustifiably accusing Rabel of confusing the contents of a conflict rule with the application of the rule.[31] The expression suggests that what is connected (*rattaché*) is a legal concept, whereas, as it appears to me, both authors are really in agreement in saying that a conflict rule uses a legal concept (that is, as I would say, a legal concept is the subject of the rule), and that the conflict rule leads to the selection of the law of a given country which is to be applied to the factual situation. Rabel is therefore right in saying that what is connected is factual, not legal. If Lepaulle had said *notion juridique* instead of *notion rattachée*, an element of ambiguity in his exposition would be removed and the foundation for his criticism of Rabel would disappear.

Raape[32] is a leading advocate of the view that the subject of a

[29] Droit International Privé (1948) 115 ff.

[30] About 35 to 40. Lepaulle gives a provisional or tentative list of 37 to serve as the basis for his discussion.

[31] Lepaulle, *op. cit.*, p. 115, footnote (1).

[32] Internationales Privatrecht, in vol. 6 of Staudingers Kommentar zum Bürgerlichen Gesetzbuch und dem Einführungsgesetz (1931) 15; Les Rapports Juridiques entre Parents et Enfants comme point de départ d'une explication d'anciens et de nouveaux problèmes fondamentaux du droit international privé. Recueil des Cours, Académie de Droit International, vol. 50 (vol. 4, 1934) 479.

conflict rule is a group of domestic rules of law designated by a general expression borrowed from the system of private law of the forum, which he calls in French a *notion collective* or *notion de groupe* or *notion de système* (in German *Materien* — or *Systembegriff*), and which a legislator uses frequently, almost regularly, in formulating conflict rules. Since it is not practicable or desirable to state a separate conflict rule corresponding with every separate legal rule, the legislator combines domestic rules of law into groups and provides a conflict rule for each group.[33]

Hence arises the problem of *delimitation*,[34] which Raape[35] says has nothing to do with the problem of *qualification* (characterization). The former is the process of defining the scope of one conflict rule of the forum compared with that of another conflict rule of the forum, especially the meaning of the concept which is the subject of each rule. This definition of the scope of the conflict rules of the forum is a matter to be decided in accordance with the law of the forum.[36] On the other hand the problem of qualification is a process of subsumption, that is, the problem whether a given rule of law falls within the scope of a given conflict rule of the forum.[37] Raape says that the problem of qualification implies the comparison between concepts of conflict rules of the forum with the concepts of other systems and does not arise from the interpretation of conflict rules of the forum *inter se*.

It is important to note, however, that the definition of the scope of conflict rules in accordance with the law of the forum does not mean that the definition should be based solely on the strictly domestic or local concepts of the law of the forum. Conflict rules are of course the expression of the policy of the law of the forum for the purpose of the conflict of laws and must be interpreted in such a way as to carry out that purpose. They must be interpreted *sub specie orbis* — from a cosmopolitan or world-wide point of view — that is, in such a way as to render the conflict rules susceptible of application to foreign rules of law, which may be based on concepts that do not coincide exactly with the domestic or local concepts of the law of the forum.[38] The impor-

[33] Cf. Lepaulle, *op. cit.*, p. 117 on this point.

[34] The word is used in an entirely different sense by Robertson, Characterization in the Conflict of Laws (1940) 9 ff., 17, 19, 118 ff.

[35] *Op. cit.*, 50 Recueil 517, citing Rabel (*supra*, footnote 25) at p. 253 of his original article in German, corresponding with pp. 17-18 of Revue (1933) and p. 113 of 2 Rivista Italiana.

[36] Raape, *op. cit.*, 50 Recueil 406, 477, 518; Deutsches Internationales Privatrecht, vol. 1 (1938) 67: *Das Problem der Abgrenzung*.

[37] To be discussed in § 3.

[38] Cf. Raape, I.P.R. (1931) 19, 1 D.I.P.R. (1938) 71; Maury, Règles Générales des Conflits de Lois, 57 Recueil des Cours, Académie de Droit

tance of this principle will become clearer in the subsequent discussion of the problem of characterization.

Balladore Pallieri,[39] referring to the existence of many doubts in current doctrine respecting problems of qualification, attributes these doubts to the failure to distinguish between two wholly distinct questions, namely, (1) what is the meaning of the categories specified in conflict rules, and (2) whether a given relation comes within one of these categories. As regards the first question, in accordance with the prevailing Italian doctrine, he says that the meaning of the legal categories specified in conflict rules is wholly derived from the *lex fori*, subject to one difference of detail, namely, that in the interpretation of the terms used in a conflict rule the system of private international law retains its normal freedom and performs its normal purpose, and consequently may disregard the fact that a given rule of law is stated in a particular part of the domestic system of law. For example, article 1313 of the old Italian civil code occurs in a chapter entitled Proof, but must be regarded in the conflict of laws as a provision relating to form of acts.[40] As regards the second question, the author dissents from the prevailing doctrine, as will be seen later.

3. *A Conflict Rule in Operation: Characterization*

I pass now from the analysis of a conflict rule to the operation of the rule. As I have elsewhere suggested,[41] a court's inquiry in a particular case is divisible into three stages:

(1) the characterization of the question;
(2) the selection of the proper law; and
(3) the application of the proper law.

Firstly, a court must characterize the legal question involved in the particular factual situation. This proposition may be expressed here in slightly expanded form by way of introduction to the subsequent detailed discussion. Whenever, by virtue of a conflict rule of the law of the forum, it is contended that a given

International (vol. 3, 1936) 496-504; Lewald, Règles Générales des Conflits de Lois, 69 *ibid.* (vol. 3, 1939) 77; Dicey, Conflict of Laws (6th ed. 1949) 71, quoting Beckett: conflict rules "must be such, and must be applied in such a manner, as to render them suitable for appreciating the character of rules and institutions of all legal systems".

[39] Diritto Internationale Privato (2nd ed. 1950) 65 ff.

[40] As regards a similar point with regard to article 1341 of the French Civil Code, see my Essays on the Conflict of Laws (1947) 65, 66, reproducing an earlier article (1937), 15 Can. Bar Rev. 224.

[41] Essays on the Conflict of Laws (1947) 36; cf. the earlier articles there cited, including (1937), 53 L. Q. Rev. 235, (1937), 15 Can. Bar Rev. 215. See also Dicey, Conflict of Laws (6th ed. 1949) 64.

domestic rule of law is applicable to the factual situation, what may be called a concrete legal question presents itself, that is, the question to which the rule of law relates, and the court must characterize this legal question for the purpose of deciding whether it is of the same nature as the legal question specified in the conflict rule. The domestic rule of law may be a rule of the law of the forum or it may be a rule of a foreign law. In the latter event, the court, before it can characterize the question, must ascertain the terms and meaning of the rule of law, or, under the usual Anglo-American practice, must be informed by the evidence of witnesses who are experts in the foreign law. At this stage the domestic rule of law may be called a potentially applicable rule. There may of course be another rule, or other rules, potentially applicable, as to which the same problem of characterization arises.

Secondly, the court must select the proper law. In other words, the court, by the use of the connecting factor[42] specified in a given conflict rule, selects the law of a given country as the law appropriate to the legal question specified in the conflict rule, as far as that law contains a domestic rule characterized by the court as being a rule relating to the legal question specified in the conflict rule.

Thirdly, the court must apply to the factual situation the relevant provisions of the proper law,[43] that is, a rule or rules of law relating to the legal question specified in the conflict rule.

Characterization (qualification, classification) 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? The process of reasoning may be expressed in the form of a syllogism, for example as follows:

(a) Any question of the formal validity of a marriage is governed by the law of the place of celebration (major premise).

(b) The question, or one of the questions, involved in the particular situation (including the relevant provisions of the law of the place of celebration) is a question of the formal validity of a marriage (minor premise).

(c) The question, or one of the questions involved in the par-

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[42] Suggested by me as a suitable equivalent in English of *élément de rattachement, criterio di collegamento, Anknüpfung*, etc.: (1937), 53 L.Q. Rev. 549, reproduced in Essays on the Conflict of Laws (1947) 89.

[43] It is outside the scope of the present article to discuss the ambiguities inherent in the word "law" or in the word "apply" (or in the word "governed" or the word "law" in a conflict rule which says that a given question is "governed" by the "law of a given country"). See my Essays on the Conflict of Laws (1947) 7, 8, 9, with references especially to Cook, The Logical and Legal Bases of the Conflict of Laws (1942) *passim*.

ticular situation is governed by the law of the place of celebration (conclusion).

The question specified in the major premise (a) is a legal question. The phrasing of the minor premise (b) is intended to present in the concrete the question stated in the abstract in (a). A question of formal validity can arise in a particular case only by reason of the potential application of some provision of the law of the place of celebration — no other law being relevant to this question — and the characterization of the question in (b) must include an examination of the provisions of that law for the purpose of ascertaining whether they relate to the formal validity of the marriage, so to involve a question of formal validity in the particular case, subsumed under the major premise (a). To the extent that a question of formal validity is involved in (b), the selection of the proper law is stated in the conclusion (c). The question to be definitively answered is, in effect, whether all the imperative or essential requirements of the law of the place of celebration relating to formalities have been complied with.

Obviously the subject of the conflict rule (a) must be of the same nature as the subject of characterization (b), in order that the latter may be subsumed under the former. If the former is factual, the latter must be factual, if the former is legal the latter must be legal. My own theory being that the subject of a conflict rule is a legal question,[44] it follows that in my view the subject of characterization is a legal question.[45] Lewald, who emphatically states the view that the subject of a conflict rule is a legal question,[46] also, consistently, states that the subject of characterization is a legal question,[47] and describes characterization as the individualization of the legal question.

As one of the notably controversial features of the discussion of characterization relates to the problem whether characterization should be based upon the concepts of the law of the forum, or upon the concepts of the proper law, or upon concepts derived from the study of comparative law, I venture to restate briefly

[44] See § 1, *supra*, with especial reference to my examples of conflict rules.

[45] Cf. my Essays on the Conflict of Laws (1947) 36, 94, reproducing (1937), 53 L. Q. Rev. 236, 556. Rheinstein, in a review of my Essays (1948), 15 U. of Chicago L. Rev. 481, expresses his approval of my view on the latter point.

[46] *Op. cit.* (footnote 14, *supra*).

[47] *Op. cit.*, 69 Recueil 71: adding in a footnote that impliedly he says the characterization may include the "vital relation" as well as the legal effect contemplated by the conflict rule, and quoting a passage from an article of mine (1939), 17 Can. Bar Rev. 374, subsequently reproduced in my Essays on the Conflict of Laws (1947) 162, to the effect that the question to be characterized must be a legal question and that there is no real distinction between the characterization of the question and the characterization of rules of law.

a theory which might be called a *via media* between characterization by the *lex fori* and characterization by the *lex causae*.[48]

Let us suppose, for example, that a court in X has to decide whether an alleged marriage, celebrated in Y between parties domiciled in Z, is valid or not.[49] If X is England, there is no available conflict rule relating to the validity of marriage as a single question, but there are at least two conflict rules which may be applicable, namely, (1) that the formal validity of the marriage is governed by the law of the place of celebration, and (2) that the intrinsic validity of the marriage (including the capacity of the parties to marry each other or to marry at all) is governed by the law of the domicile of the parties.[50]

Inasmuch as, *ex hypothesi*, the purpose of the characterization of the question is to enable the court to select the proper law, and the characterization must therefore precede the selection, and the law of either Y or Z may be the proper law, according as the question may be characterized, how may the court proceed without offending the susceptibilities of those who are distressed about putting the cart before the horse? It being premised that a decision in favour of the validity of the marriage must be based on the marriage being both formally and intrinsically valid, and that the marriage is not valid if it is void or voidable either by the law governing formal validity or by the law governing intrinsic

[48] See my Essays on the Conflict of Laws (1947) 47, 101, 107, 161-162, 185-186, reproducing earlier articles, (1937), 53 L.Q. Rev. 246, (1941), 19 Can. Bar Rev. 340, (1939), 17 Can. Bar Rev. 373-375, 396-397. See also Dicey, Conflict of Laws (6th ed. 1949) 70.

[49] It is perhaps worth observing once and for all that a problem of the conflict of laws may not reach the stage of litigation, but may be settled pursuant to professional advice without recourse to any court. Even in that event the advice given to a prospective party to an action in X, must be based on the prediction of what a court of X would decide in case of actual litigation, and therefore the discussion in the text is based on the supposition that an action has been brought in X. In one respect the problem to be solved may be simplified in the case of actual litigation, because the legal question to which the court must give a definitive answer may be narrowly defined by the pleadings, that is, it may be limited specifically to a question of the formal validity of the marriage, or to a question of capacity or other question of intrinsic validity, as the case may be, and therefore the court will not be obliged to consult, even provisionally, any foreign law except the single law which may be the proper law relating to the single question defined by the pleadings.

[50] For the purpose of the present discussion the conflict rule relating to capacity to marry is sufficiently stated in the text. For a more exact statement, including possible exceptions, see Dicey, Conflict of Laws (6th ed. 1949), rules 168 and 169, and comments at pp. 760 ff., 780 ff. See at pp. 762, 763, the discussion and rejection of the view advocated by Cheshire, Private International Law (3rd ed. 1947) 277, that the governing law should be that of the intended matrimonial home, which is *prima facie* the domicile of the husband at the time of the marriage, but which may be some other country if the requisite intention to settle there is proved to have existed at the time of the marriage, and to have been followed by residence in that country.

validity, my suggestion is that the court should engage in a process of provisional or tentative characterization before finally selecting the proper law. It should look before it leaps, and be informed of the content of each of the two laws which may be the proper law. As regards formalities of celebration the court should examine the provisions of the law of the place of celebration (*Y*), in their context in that law, in order to ascertain whether those provisions relate to formalities of celebration and may therefore affect the formal validity of the marriage, disregarding provisions of the law of *Y* relating to intrinsic validity of marriage. As regards intrinsic validity, the court should, similarly, examine the provisions of the law of *Z*, the law of the domicile of the parties, in order to ascertain whether those provisions relate to intrinsic validity, disregarding provisions of the law of *Z* relating to formal validity.

Having consulted each of the two laws, those of *Y* and *Z*, which are potentially applicable as regards two different aspects of the validity of the marriage, the court of *X* is now in a position to characterize the question, or each of the questions, involved in the factual situation. It may decide that there is a question of formal validity under the law of *Y* (the *lex loci celebrationis*) within the meaning of the conflict rule of the law of the forum relating to formalities of celebration, and proceed to the final selection of the law of *Y* as the proper law, and to the application of that law to the factual situation. Alternatively, the court of *X* may decide that there is a question of intrinsic validity under the law of *Z* (the *lex domicilii*) within the meaning of the conflict rule of the law of the forum relating to intrinsic validity, and proceed to the final selection of the law of *Z* as the proper law, and to the application of that law to the factual situation. Furthermore, the court of *X* may find that there are two different questions under the laws of *Y* and *Z* respectively. There would seem to be no logical or practical objection to cumulative references to two different laws as regards two different aspects of the validity of the marriage.[51] To be valid the marriage must comply with both laws, that is to say, the court of *X* must decide that the marriage is void or voidable if the law of *Y* says that it is void or voidable as regards formalities, and must decide that the marriage is void or voidable

[51] Cheatham, American Theories of Conflict of Laws: Their Role and Utility (1945), 58 Harv. L. Rev. 361, at p. 386, notes the flexibility of the local law theory in that it permits of recourse to the laws of two or more countries if two or more questions are involved; but as Cavers, The Two "Local Law" Theories (1950), 63 Harv. L. Rev. 822, at p. 830, observes, this flexibility is a virtue of the local law theory in Cook's formulation of that theory, but not in Judge Hand's formulation: cf. footnote 122, *infra*.

if the law of *Z* says that it is void or voidable as regards matters of intrinsic validity; and the court in *X* can decide that the marriage is valid only if it is valid both as regards one aspect by the law of *Y* and as regards another aspect by the law of *Z*.

The possibility of cumulative references to two different laws as regards two different questions relating to the validity of a marriage might be illustrated by the case of requirements in different laws of parental consent to the marriage of a minor, these requirements, differently expressed in different contexts, being susceptible of being construed as relating to different questions; but, in order to avoid too long a disgression at this point in the general discussion of characterization, requirements of this kind will be discussed later.

As a general rule, when the proper law governing a particular question has been selected by the use of the particular connecting factor specified in a conflict rule, the proper law should be applied to the factual situation divested of the place elements which have given rise to a problem of the conflict of laws, so that, if the selected proper law is that of a foreign country, the factual situation to which the proper law is to be applied is to be regarded as a purely domestic situation in that country. The proposition just stated is subject, however, to the possible effect of the doctrine of the *renvoi*, which, in my view, should be used only as a justifiable expedient in exceptional cases.[52] The topic is not within the scope of the present article.

At this point, as a matter of courtesy, it seems right that I should mention that Giuliano, in his courteous and ample review of my *Essays on the Conflict of Laws*,[53] has expressed his dissent from my theory that the subject of characterization is a legal question and that a factual situation can give rise to a legal question before the proper law is selected and therefore before any legal relation is created by the application to the factual situation of the rules of some ascertained system of law. It will be observed that I have attempted, in the exposition of my theory in the present article, to meet Giuliano's criticism. I submit that there is no inconsistency between saying that a legal relation cannot arise until rules of law of a selected legal system are applied, and saying that in the meantime the factual situation can give rise to a legal question.

(To be continued)

[52] See my Essays on the Conflict of Laws (1947) 176 ff., 208 ff., reproducing *Renvoi*, Characterization and Acquired Rights (1939), 17 Can. Bar Rev,. 388 and *Renvoi* and the Law of the Domicile (1941), 19 Can. Bar Rev. 329.

[53] 25 Annuario di Diritto Comparato e di Studi Legislativi (1948) 69, at pp. 82 ff.