

Conflict Rule and Characterization of Question*

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Further discussion of the problem of characterization may usefully be coupled with a statement of the analysis adopted by Raape. It being premised that in his view the subject of a conflict rule is a group of legal rules, he emphasizes, as already mentioned,⁵⁴ the distinction between delimitation (*Abgrenzung*) and qualification (classification), and says that the latter problem (*Einreihungsproblem, problème du classement*) involves, or is divisible into, three questions,⁵⁵ namely, (1) What is the nature of the rules of law specified in a conflict rule? (2) What is the nature of the given (concrete) rule of law? and (3) Is the latter of the same nature as the former? The first is merely a question of the interpretation of the conflict rule and is answered in accordance with the *lex fori*, that is, the law of which the conflict rule forms a part.⁵⁶ The second question relates to the juridical nature of the foreign rule of law, its meaning and purpose, and is to be answered by the law of which it is a part. In other words the foreign law qualifies or characterizes its own rule.⁵⁷ The third question is one of classification (*Einreihung*), that is, the question is whether the foreign rule, as characterized by the foreign law, is subsumed under the rules of law specified in the conflict rule of the forum, and is to be answered by the *lex fori*.

My own theory of characterization, although expressed in different terms is, it is respectfully submitted, substantially similar in effect to Raape's theory. In the process of provisional or tentative characterization which I have suggested, it is desir-

* The first part of this article appeared in the February 1952 issue commencing at page 103.

⁵⁴ *Op. cit.* (footnotes 32 and 36, *supra*) cited below by references respectively to 50 Recueil (1934) and DIP (1938).

⁵⁵ *Op. cit.*, DIP (1938) 68 ff.; 50 Recueil (1934) 517 ff.

⁵⁶ See statement of Raape's view in § 2.

⁵⁷ "L'Etat étranger caractérise ses règles, l'Etat du for les classe"; 50 Recueil (1934) 521.

able in my view that the concrete provision of any foreign law which may be applicable upon any particular characterization of the question should be examined by the court in the light of evidence of experts in the foreign law. The evidence of these experts will almost necessarily include the characterization of the provision of the foreign law as part of their exposition of the nature, scope and purpose of that provision in its context in the foreign law. This is substantially in accordance with Raape's view. Again, in agreement with Raape's view, the court which is applying its own conflict rules is not obliged, for the purposes of those rules, to adopt as its own the characterization of the provision of the foreign law expounded by the foreign experts. The court, being informed of the nature of a provision of the foreign law, must now decide a different problem, namely, as Raape would say, whether that provision, as characterized by the foreign experts, comes within, or is subsumed under, the group of rules of law specified in a particular conflict rule of the law of the forum, or, as I should prefer to say, whether that provision relates to a legal question that is subsumed under the legal question specified in the conflict rule.

Balladore Pallieri agrees with the prevailing view that delimitation of a conflict rule is governed by the *lex fori*,⁵⁸ but, as regards characterization (qualification), he dissents emphatically from what he says is the generally prevailing Italian view that the subject of characterization is factual and that the problem of characterization is solved by reference throughout to the *lex fori*, and he advocates the view that the subject of characterization is a legal relation and consequently that its character must be determined by the system of law of which it forms a part.⁵⁹ Consequently, for example, if an Italian court is confronted with the problem of a trust existing under a foreign Anglo-American law, a trust being unknown to Italian domestic law, the court must ascertain the character of the legal relation by reference to the foreign law. Having in this way ascertained the character of the legal relation, that is, how it is characterized in the foreign law, it remains for the court, in accordance with the concepts of the *lex fori*, to determine within what category of relations the concrete relation comes, that is, within which conflict rule of the *lex fori* the concrete relation comes.

If I have not misunderstood the learned author, his view is essentially the same as that of Raape, that is, that the ultimate

⁵⁸ *Op. cit.* (footnote 39, *supra*) 65 ff.

⁵⁹ *Ibid.*, pp. 69, 72, 73.

process of subsumption is governed by the *lex fori* after the subject has been characterized in accordance with the foreign law — a view which, as I have already submitted, is substantially similar to my own.⁶⁰ Defending himself from a hypothetical charge of *petitio principii* in so far as he advocates resort to a foreign law for the purpose of characterization before that foreign law has been selected as the proper law, Balladore Pallieri⁶¹ states his view that the process of characterization is suspended and conditional until the whole process of interpretation is completed, and this view, as it seems to me, is substantially similar to my theory of provisional or tentative examination of the provision of a foreign law that is potentially applicable, that is, which may be the proper law if the provision is characterized as one relating to the legal question specified in a given conflict rule.

A striking contrast with the theories above outlined is afforded by the theory expounded by Ago. His theory requires careful consideration at this point because, with all respect to an author who has exercised a great influence upon Italian doctrinal writing, I am unable to agree with it. As already noted,⁶² Ago's starting point⁶³ is that the subject of a conflict rule is a particular category of *facts* or a particular type of *factual* relations indicated by a technico-legal expression. He quotes with approval Anzilotti's statement that the juridical qualification of a relation means connecting the substratum of fact with the legal rule, since a legal relation is merely a factual relation converted into a legal relation by a given system of law. He himself expresses the problem of qualification (characterization) as consisting in determining the system of law, and the specific legal rules, which serve as a basis for deciding whether a given relation is or is not so qualified as to bring it within the category specified in a given conflict rule, and the point of the problem lies in the fact that the same factual relation may be qualified in such a way in one system of law as to bring it within the scope of one conflict rule, and may be qualified in such a way in another system of law as to bring it within the scope of another conflict rule.⁶⁴

Ago⁶⁵ furthermore states that the true problem of qualification

⁶⁰ Apart from the fact that in my view the subject of characterization is a legal question, not a legal relation.

⁶¹ *Op. cit.*, pp. 77, 77.

⁶² *Op. cit.* (footnote 27, *supra*). My references here will be in abbreviated form to 58 Recueil (1936) and to the author's *Lezioni*.

⁶³ Differing of course from my own and that of Raape and Balladore Pallieri.

⁶⁴ 58 Recueil 316, 317; *Lezioni* 56, 57.

⁶⁵ *Op. cit.*, 58 Recueil 316-325; *Lezioni* 55-63.

is (1) a problem of interpretation of a conflict rule for the purpose of the individualization of the rule, as distinguished from (2) the subsequent problem of interpretation of the foreign law to which the rule refers. On the basis of his statement of the true problem of qualification, it follows logically that qualification is governed by the *lex fori*, in accordance with the dominant Italian doctrine, and with that of the majority of French writers.⁶⁶ Again, logically enough, Ago considers that the failure to observe the distinction between the true problem of qualification above stated, and the subsequent problem of the interpretation of the foreign law has led other writers to the erroneous conclusion that qualification is governed by the *lex causae*.

These logical conclusions depend of course on the premises from which Ago's argument proceeds. If the interpretation of foreign law is rigidly excluded from the problem of qualification and the individualization of a conflict rule must be completed before the foreign law is consulted, the well known argument of the vicious circle may be successfully invoked to prevent qualification by any law other than the *lex fori*. In my opinion, however, Ago's statement of the true problem of qualification is too narrow. The point need not be elaborated here because I have earlier in the present article sufficiently, I think, stated my own theory of provisional or tentative examination of any potentially applicable rules of law before the final selection of the proper law.

Ago's theory may be further discussed in the light of his treatment of Wolff's example of a judge who has to apply, as rules concerning matrimonial property, foreign rules which classify in this way a right of a widow, even though this right is regarded by the domestic rules of the *lex fori* as a right of succession.⁶⁷ The example is given by Wolff in slightly different terms in German,⁶⁸ and is transformed into the terms of English conflict of laws as follows:⁶⁹

To give examples: 'The effect of marriage on the property of the spouses is governed by the law of their first matrimonial domicile.' More correctly phrased this rule would run thus: 'If two persons are married to each other the court has to apply all those rules operative at their first matrimonial domicile which according to the law there prevailing regulate the effects of marriage on the property of spouses.' . . .

Ago seems to approve of Wolff's example in the result, but

⁶⁶ See e.g., Bartin, *Principes de Droit International Privé*, vol. 1 (1930) 227 ff.; Niboyet, *Cours de Droit International Privé Français* (2nd ed. 1949) 453 ff.; Lepaulle, *op. cit.* (footnote 29, *supra*) 153 ff.

⁶⁷ *Op. cit.*, 58 Recueil 324, 325; Lezioni 62.

⁶⁸ *Internationales Privatrecht* (1933) 37; cf. Maury, *Règles Générales de Conflits de Lois*, Recueil des Cours, Académie de Droit International, vol. 57 (1936, vol. 3) 484.

⁶⁹ *Private International Law* (2nd ed. 1950) 156.

says that it is nevertheless qualification by the *lex fori* (which of course it is on the basis of Ago's conception of the true problem of qualification), whereas Wolff says that it is qualification (classification) by the *lex causae* (which of course it is on the basis of his conception of qualification). On my theory neither of them is right in the result, because I think that the forum must ultimately decide to what extent the rules of the foreign law are subsumed under the conflict rule of the forum. In this connection I venture to add some observations on Wolff's exposition of his own theory. Consistently with his example just quoted and other examples given by him, he says that it would mean "falsifying" a rule of foreign law if it were classified by the *lex fori* without regard to its classification in the foreign law,⁷⁰ the problem being regarded by him as one of the application of the foreign law after that law has been selected as the proper law in accordance with a conflict rule of the forum. In an earlier passage,⁷¹ however, he uses language which is ambiguous, to say the least. He says that "an English court examining the applicability of French rules will have to take the French classification into consideration". This language is consistent with my view that before finally selecting the foreign law potentially applicable the English court should be fully informed as to the nature and meaning of the rules of the foreign law, including their classification in the foreign law, but it is clear from the context in Wolff's book that this is not what he means. Furthermore, it is worth noting that in his exposition of his theory of classification by the *lex causae* as against classification by the *lex fori* he rejects what he calls the "middle course" followed by Robertson and Cheshire⁷² in their theory of "primary" and "secondary" characterization (classification).

As I have already stated elsewhere⁷³ my criticism of the last mentioned theory,⁷⁴ I need add nothing further here. Both that theory, and the theory of characterization by the *lex causae*, are alike inconsistent with my views already stated in the present

⁷⁰ Private International Law (2nd ed. 1950) 158. See also Lepaule, *op. cit.* (footnote 29, *supra*) 182: qualification étrangère de la notion rattachée.

⁷¹ Wolff, *op. cit.*, 135.

⁷² Robertson, *Characterization in the Conflict of Laws* (1940) 59 ff., 118 ff.; Cheshire, *Private International Law* (3rd ed. 1947) 63 ff., 72 ff.

⁷³ See my *Essays on the Conflict of Laws* (1947) 98 ff., 107, 161, reproducing, with additional observations (1939), 17 *Can. Bar Rev.* 373, (1941), 19 *Can. Bar Rev.* 334. See also Dicey, *Conflict of Laws* (6th ed. 1949) 68 ff.

⁷⁴ For my present purpose the distinction between the two theories does not require further discussion. Maury, *op. cit.* (footnote 68, *supra*) 509, 184 ff., states and discusses the distinction, which he attributes to Italian doctrine, between "qualification de compétence" and "qualification de fond", only the former being qualification, properly speaking, necessary for the interpretation of a conflict rule and the selection of the proper law.

article. As regards "primary" classification, Cheshire, accurately in my opinion, states that the subject of classification is a "juridical question", but I am unable to agree with his theory that it is only after a foreign law has been selected as the proper law that the forum is concerned with the classification of the rules of the foreign law.

Returning now to Ago, I am unable to acquiesce in his conclusions with regard to the famous case⁷⁵ of the holograph will made in France by a Netherlander who by his national law (article 992 of the Civil Code of the Netherlands, 1829) is forbidden, even in a foreign country, to make a will in any form, except the "authentic form" prescribed by that law. It is conceivable that article 992 might be characterized as a special conflict rule relating to the formal validity of a Netherlander's will, creating an exception to the general conflict rule that formalities are governed by the law of the place of making, and in that event the article would be inapplicable in a French or an Italian court. The better view would seem to be, however, that the article is a domestic rule of Netherlands law rendering a Netherlander incapable of making a valid holograph will, at home or abroad, and in that event, an Italian or a French court should apply its own conflict rules, (1) that the formal validity of a will is governed by the law of the place of making (with the result that the will is formally valid), and (2) that the testator's capacity is governed by his national law (with the result that the will is intrinsically invalid). On the other hand, Ago reaches the conclusion that the will is valid in Italy, on the ground that by the *lex fori* the validity of a holograph will, as such, is a matter of formal validity governed by the law of the place of making, and that the will is therefore valid, and, there being no ground of invalidity that is regarded by the *lex fori* as one of incapacity or intrinsic invalidity, there is no need to refer to the testator's national law, as the proper law governing capacity or other aspects of intrinsic validity. This conclusion is of course inconsistent with my own theory that an Italian (or a French) court should consult any provision of the national law that is alleged to be relevant, including its characterization in the national law, and apply any provision that in the opinion of the forum relates to capacity or intrinsic validity,

⁷⁵ The second example used by Bartin *op. cit.* (footnote 66, *supra*) 224-227. The case is discussed in my *Essays on the Conflict of Laws* (1947) 58-60, reproducing (1937), 53 L. Q. Rev. 256-258; Beckett (1934), 15 Brit. Y. B. Int. Law 73, note 1; Robertson, *Characterization in the Conflict of Laws* (1940) 235-237; Lorenzen, *Selected Articles on the Conflict of Laws* (1947) 129, 130, reproducing (1941), 50 Yale L.J. 755, at p. 756; Wolff, *Private International Law* (2nd ed. 1950) 589.

and on this basis should decide that the will is intrinsically invalid, notwithstanding that it is formally valid by the law of the place of making. Robertson⁷⁶ agrees with my conclusion, but regards the case as an example of secondary characterization after the selection of the proper law, whereas I reach the conclusion on the basis of the characterization of the question and selection of the proper law after provisional examination of the potentially applicable law. In a Quebec court the process of reasoning and the result should be the same, if the facts are varied by supposing that the Netherlander is domiciled in the Netherlands.⁷⁷ In an English or Ontario court the problem would not occur in the same form, because, apart from Lord Kingsdown's Act,⁷⁸ both intrinsic validity and formal validity of a will of movables are governed, as to movables, by the law of the domicile of the testator at the time of his death, and, as to land, by the law of its situs. De Nova⁷⁹ finds fault, not with Ago's conclusion in the specific case, but with his reasoning in so far as Ago excludes the reference to the testator's national law because by that law the provision is regarded as one relating to formalities, whereas De Nova submits that the reference is excluded because by the *lex fori* the provision is regarded as one relating to formalities, and suggests hypothetical cases in which the difference in the reasoning might lead to difference in result. It may also be observed that Ago, in accordance with his theory that the subject of qualification is factual, justifies his hypothetical reference to two different laws under two different conflict rules as relating to two different parts or phases of the factual situation, whereas to me it seems justifiable and more natural to refer to two different laws under two different conflict rules relating to two different questions arising from the same factual situation.

⁷⁶ *Op. cit.* (footnote 75, *supra*).

⁷⁷ So that there would be a reference to the law of the Netherlands as regards capacity and to the law of the place of making as regards formalities.

⁷⁸ This statute, the Wills Act, 1861, is in force in England, and has been adopted in Ontario and, with some modifications, in some of the other provinces of Canada. As regards wills of British subjects made abroad it authorizes, *inter alia*, the use of the forms of the law of the place of making, but confuses the distinction between land and movables because its provisions are applicable not only to movables, but also to all those interests in land that are classified in domestic English law as personal property. The statute has been frequently and severely criticized. My own suggested redraft was published (1946), 62 L. Q. Rev. 328, reproduced in my *Essays on the Conflict of Laws* (1947) 474. At my suggestion the subject was in 1951 brought to the attention of the Conference of Commissioners on Uniformity of Legislation in Canada, and was discussed and referred to a committee. It is hoped that in 1952 the committee will submit a revised text which the Conference may recommend for adoption by the legislatures of the provinces of Canada.

⁷⁹ In a review of Ago's *Teoria del Diritto Internazionale Privato* (1934) in (1935) 8 *Annali di Scienze Politiche*, at pp. 5-7.

Notwithstanding that I have elsewhere discussed in detail the topic of requirements of parental consent to the marriage of minors, as an example of my own theory of characterization,⁸⁰ I venture to add some supplementary observations by way of answer to criticism of my theory and my discussion of this example. These observations are written with especial reference to the criticism of Cansacchi.⁸¹ Provisions relating to parental consent to the marriage of minors and the effect of the lack of such consent on the validity of a marriage differ so widely in the domestic laws of various countries that it is neither practicable nor desirable to formulate any general conflict rule specifically directed to provisions of this kind, and, it is submitted, there is no such general conflict rule in English conflict of laws. There are, however, two conflict rules, one or other of which may be applicable in a particular situation to provisions of this kind, namely, that (1) the formalities of celebration of a marriage are governed by the law of the place of celebration, and (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.⁸²

In a particular case, if it is alleged that a marriage is void or voidable⁸³ by reason of the fact that parental consent has not been given or has been refused, and a court has to decide whether the marriage is valid, void or voidable, the court must apply any provision of the *lex loci celebrationis* that relates to formalities, and any provision of the *lex domicilii* that relates to capacity or intrinsic validity. In other words, the condition of the application of each of these potentially applicable laws is that the require-

⁸⁰ Essays on the Conflict of Laws (1947) 48 ff., reproducing Characterization in the Conflict of Laws (1937), 53 L. Q. Rev. 247 ff.

⁸¹ Originally expressed in a comment in 3 *Giurisprudenza Comparata di Diritto Internazionale Privato* (1936) 197 (Istituto di Studi Legislativi, Rome) on my discussion of *Kerr v. Kerr*, [1934] S.C.R. 72, [1934] 2 D.L.R. 369 (a case which I subsequently discussed in my Essays on the Conflict of Laws (1947) 53 ff., reproducing Characterization in the Conflict of Laws (1937), 53 L.Q. Rev. 251 ff.). By Cansacchi's courtesy I have also had the opportunity of reading the later criticism of my views contained in his *Scelta e Adattamento di Norme Straniere Richiamate* (1939) 71 ff., cited by Giuliano in his review of my Essays (footnote 53, *supra*) and by DeNova in his review of my Essays in *Rivista di Diritto Commerciale* (1948) 322, 323.

⁸² See footnotes 9 and 51, *supra*.

⁸³ For the purpose of the present discussion the relatively modern distinction drawn in domestic English law between void and voidable marriages is taken for granted, and it is not necessary to explore the process by which this distinction, unknown to the old canon law, was introduced by the interference of the common law courts, which prohibited the ecclesiastical courts from bastardizing the issue after the death of one of the parties. The complicated story is lucidly told by Jackson, *The Formation and Annulment of Marriage* (1951) 47 ff., 59 ff.

ment of parental consent therein contained relates in the one law to formalities and in the second law to capacity or intrinsic validity. Obviously, therefore, the court must examine the concrete provision of each of the two laws for the purpose of deciding whether it relates to the kind of question specified in the conflict rule which directs the court to resort to that law. In accordance with the general theory expounded earlier in the present article, the court must examine the provision of each potentially applicable law in its context in the law of which it forms a part and in the light of its characterization in that law. This does not mean that a court is bound by the foreign characterization, but means merely that the court must be informed as to the meaning of the provision in the foreign law, almost necessarily including its characterization in that law. The ultimate problem of subsumption of the foreign provision under a particular conflict rule of the law of the forum must be resolved, and the consequent final selection of the proper law made, by the court itself.⁸⁴

The general principle just stated is peculiarly applicable to requirements of parental consent to the marriage of minors, because a requirement of this kind as expressed in one way and in one context in the domestic law of one country may relate to formalities of celebration, and as expressed in another way and in another context in the domicile law of another country may relate to capacity to marry or other aspect of intrinsic validity of marriage. In other words, a requirement of parental consent in itself cannot be the subject of a conflict rule as being governed by any single law.

As regards the domestic law of England the Marriage Act of 1753, "an Act for the better preventing of clandestine marriages," commonly known as Lord Hardwicke's Act, provided that "all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same". Marriages might be celebrated after publication of banns or by licence. If a party was under twenty-one years of age, the dissent of parent or guardian openly expressed at the time of the publication of the banns, or the failure to obtain the consent of parent or guardian before the issue of a license, rendered the marriage void.

In view of the context in which these requirements of consent of parent or guardian occurred, they were held to be provisions

⁸⁴ See especially the statement of Raape's theory (footnotes 54-57, *supra*) and my observations following that statement, supplementing the exposition of my own views on earlier pages of the present article.

relating to formalities, applicable only to marriages celebrated in England, so that a marriage of minors celebrated in Scotland, formally valid by domestic Scottish law, without the consent of parent or guardian, was held to be valid in England, notwithstanding that the parties were domiciled in England and had gone to Scotland in order to evade the requirements of English law.⁸⁵

To the extent indicated the requirements of the statute of 1753 were mandatory, and the absence of consent of parent or guardian might therefore properly be described as lack of essential formalities.⁸⁶ By virtue of subsequent legislation the requirements of consent of parent or guardian have, generally speaking, ceased to be mandatory, and become directory only,⁸⁷ but obviously continue to be provisions relating to formalities. The characterization of a requirement as relating to formalities, or as relating to intrinsic validity, does not depend on its being directory or mandatory, as the case may be.

Whereas the requirements of parental consent in domestic English law occur in a context relating to formalities of celebration, in domestic French law requirements of this kind occur in a different chapter of the Civil Code from that which provides for formalities, and, as Rabel says,⁸⁸ parental consent is one of the *formes habilitantes* "understood in France to have nothing to do with formalities".

For the record I note here that various articles of the French Civil Code of which an English translation is contained in the report of *Ogden v. Ogden*⁸⁹ have been amended since the decision in that case.

Article 148 (as amended in 1927) provides in part as follows: Minors cannot contract marriage without the consent of their father and mother; in case of disagreement between father and mother, consent is implied.

⁸⁵ *Compton v. Baircroft* (1769), Buller N.P. 113, 2 Hagg. Con. 430, 443, 444; cf. Jackson, *Formation and Annulment of Marriage* (1951) 15, 16, 181.

⁸⁶ *Cf. Kenward v. Kenward*, [1951] P. 124. In *Brook v. Brook* (1861), 9 H.L.C. 193, at p. 215 Lord Campbell said that the statute of 1753 did "not touch the essentials of the contract", and the expression "essential validity" (in the sense of intrinsic validity) as contrasted with formalities occurs in later English cases. This nomenclature is adopted by Jackson, *op. cit.*, 129, 130, on the ground that it is "well settled in English law", but he admits that it is "inherently unsatisfactory". For criticism of this use of "essential validity", see my *Annulment Jurisdiction and Law: Void and Voidable Marriages* (1948), 26 Can. Bar Rev. 907, at p. 918.

⁸⁷ Various statutes and church assembly measures were revised and consolidated in the Marriage Act, 1949, of which a full account is given in Jackson, *op. cit.*, pp. 137 ff., 178 ff.

⁸⁸ *Conflict of Laws: A Comparative Study*, vol. 1 (1945) 266-268.

⁸⁹ [1908] P. 46, at p. 50. The original French text of the relevant articles is quoted in *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67, at p. 69.

(Article 152 was repealed in 1927, and article 153 in 1896.)

Article 154 (as amended in 1927) provides in part as follows: Children having reached the age of twenty-one and until the age of twenty-five years complete are obliged to prove the consent of their father and mother or of the survivor of them. In case of the consent of the father or mother the marriage shall be celebrated. In default of this consent the interested party shall cause notice of the proposed union to be given to his father and mother or the survivor of them by a notary acting without the assistance of another notary or of witnesses. If, notwithstanding this notice, the father and mother or the survivor of them refuse their consent, the marriage cannot be celebrated until fifteen days have elapsed since the notice.

In their context, neither article 148 nor article 154 relates to formalities in French law, and to characterize article 154 as relating to formalities involves relying solely on the difference of wording between the two articles and ignoring the context. The result of non-compliance with either of these articles is that the marriage is not void *ab initio*, but is annulable by a French court at the instance of certain persons and within certain time limits. The characterization of article 148 as relating to formalities, as was decided in *Ogden v. Ogden*,⁹⁰ involves ignoring both wording and context. Furthermore, if the husband was domiciled in France, the characterization of either article 148 or article 154 as relating to formalities is liable to be frustrated because an annulment of the marriage by a French court would be entitled to be recognized in England,⁹¹ so as to give effect in England to the French characterization of article 148⁹² or article 154.

In the case of a marriage celebrated in England, an English court must of course apply all the provisions of the domestic law of England (the *lex loci celebrationis*) that relate to formalities of celebration, including provisions as to participation of a minister or other authorized official, publication of banns or issue of licence, and including provisions as to parental consent. If by reason of non-compliance with any of these provisions the marriage is void, *cadit quaestio*, and there is no need for the court to consult the

⁹⁰ [1908] P. 46.

⁹¹ *Salvesen or von Lorang v. Administrator of Austrian Property*, [1927] A. C. 641, overruling *Ogden v. Ogden* on this point.

⁹² To avoid repetition as to my own criticism of *Ogden v. Ogden*, I refer again to the discussion of the case in my *Essays on the Conflict of Laws* (1947) 48 ff., reproducing *Characterization in the Conflict of Laws* (1937), 53 L.Q.Rev. 247 ff.; cf. Rabel, *op. cit.* (footnote 88, *supra*); Wolff, *Private International Law* (2nd ed. 1950) 153, 155, 158, 329. See also Jackson, *op. cit.* (footnote 86, *supra*) 182-185.

provisions of any foreign law. On the other hand, if the marriage is formally valid because there has been no failure to comply with any essential formality required by domestic English law, and if the domicile of the parties or one of them was in France immediately before the marriage, the court must next consult the law of France for the purpose of deciding whether the marriage is void or voidable by reason of non-compliance with any provisions of that law which should be characterized as provisions relating to capacity to marry or any other aspect of intrinsic validity, including, as already suggested, any requirements of parental consent in that law. If under any of these provisions of French law the marriage is void or voidable, its invalidity should be recognized in England. In these circumstances it would be unreal and undesirable for an English court to hold that the French requirements of parental consent are inapplicable as being provisions relating to formalities merely because different requirements of English law are applicable as being provisions relating to formalities.

Cansacchi⁹³ describes as "absurd" my conclusion that the result of the court's characterizing rules of law of two different systems of law differently is that both rules are applicable contemporaneously to the same human relation. The alleged absurdity is aggravated by the fact that both rules relate, so to speak, to the same aspect of marriage, that is, parental consent. Furthermore, Cansacchi suggests, absurdity of absurdities, that according to my theory a marriage may be at one time both valid and invalid.

The last point of criticism, if I have properly understood it, may be easily answered. To be valid, a marriage must be both formally valid and intrinsically valid. In English conflict of laws it frequently happens that formal validity is governed by one law, and intrinsic validity by another law, and if a marriage is invalid (void or voidable) under either of these laws, so far as it is applicable, the marriage is invalid (void or voidable) in England. There being one sufficient ground of invalidity, it is of course immaterial whether or not there exists a second ground of invalidity.⁹⁴

The other points of criticism do of course, as Cansacchi rightly indicates, involve a fundamental difference of opinion as to the problem of characterization. His view is that what is characterized is a relation, whereas my view is that what is characterized is a legal question, or in this case, two legal questions (formal va-

⁹³ *Op. cit.* (footnote 81, *supra*).

⁹⁴ Cf. the analogous treatment of the case of the holograph will made by a subject of the Netherlands: footnote 75, *supra*.

lidity and intrinsic validity), including in a concrete situation the examination of rules of law of different countries potentially applicable in order to decide whether a particular rule of law relates to a question of formal validity or to a question of intrinsic validity within the terms of one or other of two conflict rules of the law of the forum. In my view neither marriage in general, nor a requirement of parental consent, is what is to be characterized, and, with all respect, I am unable to perceive any absurdity in saying that requirements of parental consent in two different laws may be so different in nature that they may fall within the terms of different conflict rules. Furthermore, not only is our starting point different, that is, as to what it is that is characterized, but we differ fundamentally in that he emphasizes the distinction between primary characterization, for the purpose of selecting the proper law, and secondary characterization, after the proper law has been selected,⁹⁵ whereas, as I have attempted to justify earlier in the present article, my view is that an examination of the concrete provisions of all potentially applicable laws is an essential part of the process of characterization before the final selection of the proper law.

The foregoing discussion may be usefully supplemented by some observations on Lederman's article on Classification in Private International Law.⁹⁶ He expounds the theory that the subject of characterization is factual, that is, characterization is the "legal classification of facts" or of the "legal aspects of facts".⁹⁷ The theory presents some analogies with Ago's theory,⁹⁸ with which I have already expressed my respectful disagreement, as compared with the theory that the subject of characterization is a legal question arising from the factual situation. On the latter point Lederman disposes somewhat casually of Cheshire's statement that "the juridical question raised by the pleadings should be determined, i.e., classified, since rules for the choice of law vary according to the nature of the particular issue",⁹⁹ suggesting that Cheshire's mode of stating the "juridical question" is helpful only in the case of actual litigation, but overlooking the fact that a lawyer's advice before litigation must be based on the potential

⁹⁵ *Qualificazione di competenza* and *qualificazione de merito*: a distinction which Cansacchi says is a special merit of the Italian school. As to primary and secondary characterization, see footnotes 73 and 74, *supra*.

⁹⁶ (1951), 29 Can. Bar Rev. 3-33, 163-184 (the latter instalment being specifically devoted to the doctrine of the *renvoi*, but containing some remarks on conflicts of characterization).

⁹⁷ 29 Can. Bar Rev. at pp. 5, 10.

⁹⁸ Cf. footnotes 27 and 28, *supra*.

⁹⁹ Private International Law (3rd ed. 1947) 61.

questions which will or may be raised by the pleadings in potential litigation.¹⁰⁰ Lederman then suggests that "the truth is this so-called classification process in private international law is really two-fold, and requires the classification both of concrete facts and of dispositive rules of law".¹⁰¹

So far it might seem that any differences of opinion that Lederman and I entertain are of a purely academic nature, without practical importance, and furthermore when he states the first two "steps" in his proposed process of classification, leading to the assembly of a group of domestic rules of the laws of two countries which may be applicable under the conflict rules of the law of the forum, he seems to be stating, in its preliminary stages, a theory resembling my own theory of tentative or provisional examination of concrete rules of law potentially applicable preliminary to the final selection of the proper law. On the other hand, when he states and explains the third and fourth "steps" in his proposed process¹⁰² it appears that his theory and mine are substantially different and may lead to different results in their practical application. The points of difference may be briefly illustrated by reference to his treatment of requirements of parental consent to marriage in different systems of law.

By way of examples Lederman states (1) a hypothetical provision of English law that between the ages of 16 and 21 the parties "require the consent of their parents as an indispensable prerequisite to marriage," and (2) a hypothetical provision of French law that between the ages of 18 and 25 the parties need the consent of their parents, though the requirement can be dispensed with if consent is refused after three requests, one each month for three months".¹⁰³ He classifies the English provision as relating to capacity, and the French provision as relating to formalities.

It is far from my purpose to enter upon a detailed and gratuitous criticism of Lederman's theory and method of characterization. All that I am concerned with is to make my own position plain by stating briefly the points upon which his approach to the problem of characterizing his two hypothetical provisions appears to differ from my own. (a) His distinction between indispensable and dispensable requirements does not really serve as a sufficient basis for distinguishing between capacity and formali-

¹⁰⁰ See footnote 49, *supra*.

¹⁰¹ 29 Can. Bar Rev. at p. 20.

¹⁰² 29 Can. Bar Rev. at pp. 23 ff., 31-33.

¹⁰³ 29 Can. Bar Rev. at p. 30. The hypothetical French provision is in effect the same as former article 154 of the French Civil Code. As already noted (footnote 89, *supra*) the article was substantially revised in 1927.

ties, because requirements as to formalities may be indispensable, that is to say, prescribed formalities may be essential.¹⁰⁴ (b) His distinction is drawn without regard to the context in which a particular provision occurs: it ignores, in the case of the English provision, the possibility or probability that the provision is contained in a statute relating solely to formalities,¹⁰⁵ and it ignores in the case of the French provision the possibility or certainty that the provision is contained in a chapter of the Civil Code which has nothing to do with formalities.¹⁰⁶ (c) In his subsequent discussion of the doctrine of the *renvoi*¹⁰⁷ he states a different, and in my opinion unacceptable, reason for characterizing a French requirement of parental consent as relating to formalities, namely, because an English requirement expressed in different terms and in a different context has been characterized as formalities; and he reaches the conclusion, which I am unable to accept, that in the case of a marriage celebrated in England between parties domiciled in France there can be no justification for referring to French law as the law of the domicile because by English law a requirement of parental consent has already been characterized as formalities and the French must not be allowed to alter the English line between formalities and capacity.

One of the new features of the sixth edition of *Dicey's Conflict of Laws* is a review of the controversy relating to the problem of characterization, written by the general editor, Dr. J. H. C. Morris, concluding as follows:¹⁰⁸

It is submitted that the objections to (1) characterization by the domestic rules of the forum, to (2) characterization by the *lex causae*, and to (4) characterization on the basis of a distinction between primary and secondary characterization, are so numerous and weighty as to be fatal. We are therefore left with a choice between (3) characterization in accordance with analytical jurisprudence and comparative law, and (5) Falconbridge's *via media*. From the practical point of view it would appear that there is not much difference between Beckett's view that 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'; and Falconbridge's view that the forum should consider the provisions of any potentially applicable proper laws in their context before definitely selecting the proper law. The important thing is to keep the process of characterization as elastic as possible. Nor is this incon-

¹⁰⁴ See *Kenward v. Kenward* (footnote 86, *supra*).

¹⁰⁵ As already pointed out (footnote 85, *supra*) any requirements of parental consent in English law have in the past been enacted in a context which indicates that the requirements are regarded as matters of formalities.

¹⁰⁶ See footnote 88, *supra*.

¹⁰⁷ 29 Can. Bar Rev. 173, 174.

¹⁰⁸ Dicey, *Conflict of Laws* (6th ed. 1949) 70. The footnotes appended to the quoted passage are omitted here.

sistent with the point made by some writers that characterization is a matter for the conflicts rules and not the domestic rules of the forum. The illustrations adduced in support of this view seem convincing; and the reasons for drawing the line between, say, substance and procedure at one place in the domestic sphere may be different from the reasons for drawing the line at another place in the conflicts sphere. Nevertheless it would appear that the proposition that one phase of a conflict of law case must be determined in accordance with the conflict of laws rules of the forum is a singularly sterile one. It is obvious that any court must apply its own conflict of laws rules; the question under discussion is what those rules are. 'To tell a court to follow its own conflict of laws rule in determining whether a given question is one of substance or procedure, tells it absolutely nothing.'

Morris introduces some examples of characterization in English case law with the remark:¹⁰⁹ "English law is relatively rich in cases raising questions of characterization, but poor in judicial discussion of the problem". Among his examples are the following topics (which I have discussed elsewhere in some detail):

- (1) The Statute of Frauds: procedural or substantive;¹¹⁰
- (2) Presumption of survivorship: procedural or substantive;¹¹¹
- (3) Limitation of actions (prescription): procedural or substantive;¹¹²
- (4) Community of Property: contract (matrimonial property) or succession;¹¹³
- (5) Revocation of will by subsequent marriage of testator: marriage law or succession law.¹¹⁴

I should have liked to add here some observations specifically linking the discussion of each of these topics with my theory of characterization as expounded in the present article, but, as the article is already too long, I omit further observations on these topics. Similarly, I refrain from adding anything here to what I have said elsewhere¹¹⁵ on another important and interesting problem of characterization, namely, the distinction between a question of the existence of a status and a question of the capacity of a person who has that status or other incident of that status.

¹⁰⁹ Dicey, *op. cit.*, p. 71.

¹¹⁰ My Essays on the Conflict of Laws (1947) 60, amplifying earlier discussion (1937), 15 Can. Bar Rev. 223.

¹¹¹ Essays (1947) 265, reproducing (1945), 23 Can. Bar Rev. 448.

¹¹² Essays (1947) 240.

¹¹³ Essays (1947) 69, 459, reproducing (1937), 15 Can. Bar Rev. 225, (1942), 20 Can. Bar Rev. 22.

¹¹⁴ Essays (1947) 72, reproducing (1937) 15 Can. Bar Rev. 227.

¹¹⁵ Legitimacy or Legitimation and Succession in the Conflict of Laws (1949), 27 Can. Bar Rev. 1163-1200.

4. *Summary*

The views advocated in the foregoing article may be stated in outline as follows:

(1) The subject of a conflict rule is a legal question (not a legal relation or a factual relation) arising from a factual situation, and the conflict rule indicates the local element in the factual situation which is important as regards that legal question. This local element constitutes the connecting factor, that is, the element which connects the factual situation with a particular country and thus indicates that the law of that country is the proper law governing that legal question, that is, the law which should be applied to the factual situation for the purpose of affording a definitive answer to the legal question.

(2) Examples of legal questions are (a) formal validity of a marriage, (b) intrinsic validity of a marriage, (c) formal validity of a will, (d) intrinsic validity of a will, (e) intestate succession to land, (f) intestate succession to movables, (g) the existence of status as distinguished from incidents of status or capacity, etc. Any of these or other legal questions may arise in actual litigation in which the question or questions in issue may be defined by the parties and must be decided by a court, and for the sake of simplicity of statement it is assumed in the present outline that the matters in dispute have reached the stage of actual litigation. If the matters in dispute have merely reached the stage of prospective or potential litigation the advice given to the parties by their legal advisers must be based upon the prediction of what would be decided by a court if the legal question or questions were to arise in actual litigation.

(3) The subject of characterization is a legal question in the sense that, as regards any domestic rule of law (whether of the law of the forum or of a foreign law) that is potentially applicable to the factual situation, characterization is the determination of the legal question to which the rule of law relates, and consequently the determination of the legal nature, or the characterization, of the rule of law itself.

(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.

(5) Any potentially applicable domestic rule of law must be examined in its context in the law of which it forms a part, and its meaning determined.

(6) If the domestic rule is that of a foreign law, the court should be informed by experts in the foreign law as to the meaning of the rule of law in its context in the foreign law, including its characterization in that law.

(7) The ultimate problem of subsumption of the legal question to which a given domestic rule of law relates under the legal question specified in a given conflict rule must be answered in accordance with the law of the forum (including its conflict rules, and its delimitation of different conflict rules *inter se*). A conflict rule should, however, 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, and, specifically, a domestic rule of a foreign law should not be characterized in a certain way merely because a domestic rule of the law of the forum, expressed in different terms or in a different context, is characterized in that way.

5. *Caveat*

Some writers have stated that in their opinion the importance of the problem of characterization has been exaggerated, that the problem does not deserve the elaborate discussion of which it has frequently been the object, that conflicts of characterization rarely occur, and that theories of characterization are of little or no value in the solution of conflict of laws cases. It is submitted, however, that some of the criticism is based on a misapprehension of the purpose of characterization and of the relation between general theory and the solution of particular conflict cases.

Whether a court does or does not adopt a particular theory of characterization, it must in a case involving the conflict of laws follow some process of reasoning for the purpose of deciding whether a given rule of law of a given legal system comes within some conflict rule of the law of the forum. Frequently the process is simple, even obvious, but not infrequently the process is less simple, and sometimes is difficult.

Characterization is primarily a matter of method and analysis, and the utility of the conscious adoption of a correct theory of characterization is that the nature of a conflict problem arising in a particular situation is thereby rendered precise, or at least attention is directed specifically to an analysis of the situation designed to ascertain the nature of the conflict problem.

Specific consideration of the kind of question to which a potentially applicable rule of law relates ensures that adequate attention will be paid to foreign law and that adequate attention will

be paid to the construction of conflict rules of the law of the forum in the light of comparison between domestic rules of the law of the forum and domestic rules of a foreign system of law. In this way conflict rules, even if expressed in terms derived from the system of domestic law of the forum, may be construed so as to be susceptible of application to differing concepts of foreign laws and may thus be fitted to fulfil the function of conflict rules. Even if conflicts of characterization do not occur frequently, the proposed method may disclose the existence of more conflicts than some critics seem to admit, and in any event the utility of a correct theory of characterization is not limited to cases of conflicts of characterization.

The use of a correct theory of characterization may suggest the desirability of revising or supplementing existing conflict rules. This is a matter of policy for which characterization does not provide a remedy, although it may draw attention to a matter of policy. Characterization does not in itself provide a solution of conflict problems, but it does provide a background for, and an approach to, the use of conflict rules which provide a solution.

It is presupposed that there are, and must be, a set of conflict rules, presumably based on social or economic considerations, and normally they should be applied logically and consistently. If the rules appear to be defective, or new cases arise for the solution of which existing rules appear to be inappropriate, the old rules must be reconsidered or new rules devised.¹¹⁶

The view expressed as to the limited, but useful, part played in the solution of conflict problems by a correct theory of characterization may be compared with the view expressed by Yntema¹¹⁷ with regard to the part played in the solution of conflict problems by the local law theory as developed by Cook¹¹⁸ and Lorenzen.¹¹⁹ Yntema points out that the local law theory constitutes "a considerable advance in clarity of logic over the question-begging analysis of the vested rights doctrine" and provides "a technically correct and useful nomenclature for the statement of problems of the conflict of laws", but, as he says, the theory does not in itself afford a solution for conflict problems and has to be supplemented

¹¹⁶ Cf. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 43-46, reproducing an article originally published under the same title in (1924), 33 *Yale L.J.* 457.

¹¹⁷ In a review of my *Essays on the Conflict of Laws* (1947) in (1949), 27 *Can. Bar Rev.* 116.

¹¹⁸ Cook, *op. cit.* (footnote 116, *supra*) 20, 21, 45.

¹¹⁹ Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924), 33 *Yale L.J.* 736, reprinted in his *Selected Articles on the Conflict of Laws* (1947) 1.

by other considerations. In a subject like the conflict of laws "local doctrines have to be reconciled with international needs — needs the satisfaction of which requires at the very least comparative study of the policies employed under the relevant national laws in dealing with specific cases".

More recently, Cavers¹²⁰ has contrasted the local law theory as stated by Cook with that stated by Judge Learned Hand.¹²¹ Each theory asserts that a court applies only its own law, that is, the law of its own sovereign, but according to Cook the reference to a foreign law under a conflict rule is for the purpose of finding a rule of decision so that the court may apply an identical, or a similar, rule of decision, whereas according to Judge Hand the sovereign "imposes an obligation of its own as nearly homologous as possible to that arising" under the foreign law. In other words, the Hand theory requires that a *right* be found to have been created by the foreign law and that this right, when found, serve as the model for a right created by the law of the forum. As the result of a case may be affected by the adoption of one rather than the other of these two theories, Cavers suggests that Judge Hand's theory be called the "homologous right" theory in order to distinguish it from Cook's "local law" theory.¹²²

Liberty and Freedom

There is a subtle difference in the suggestions of the two synonyms, 'liberty' and 'freedom'. The first word is Latin, the second Teutonic. We may notice that of the 'Four Freedoms' demanded by President Roosevelt in the name of mankind, two are negative, being freedoms *from*, not freedoms *to*. Had he chosen the word 'liberty', he would have stumbled on reaching these desired exemptions, because the phrase 'freedom from' is idiomatic, but the phrase 'liberty from' would have been impossible. 'Liberty' thus seems to imply vital liberty, the exercise of powers and virtues native to oneself and to one's country. But freedom from want or from fear is only a condition for the steady exercise of true liberty. On the other hand it is more than a demand for liberty; for it demands insurance and protection by provident institutions, which imply the dominance of a paternal government, with artificial privileges secured by law. This would be freedom from the dangers of a free life. It shows us liberty contracting its field and bargaining for safety first. (Santayana: *Dominations and Powers, Reflections on Liberty, Society and Government*. New York: Charles Scribner's Sons, 1951)

¹²⁰ The Two "Local Law" Theories (1950), 63 Harv. L. Rev. 822.

¹²¹ In his judgment in *Guinness v. Miller* (1923), 291 Fed. 769, and in his judgments in other cases.

¹²² Attention has already been drawn (footnote 51, *supra*) to the flexibility of Cook's theory as compared with Judge Hand's theory.