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The Incidental Question in Anglo-American Conflict of Laws*

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I. *Introduction*

In recent years a new problem in the conflict of laws has been discussed by various writers, a problem in some ways related to *renvoi* and characterization, and in other ways distinct from them, presenting unique features of its own. The late Dr. Martin Wolff has aptly called it the problem of the "incidental question",[1] though it is more commonly described as that of the "preliminary question". The latter phrase was used by Breslauer in his comparative work on succession in the conflict of laws,[2] and was adopted by Robertson in 1939 in his well-known book on characterization.[3] It appears that the subject was first introduced into English law by Breslauer, but the first really adequate treatment was by Robertson. The incidental question has been discussed in France ("la question préalable") by Maury,[4] and in Germany ("die Vorfrage") by Wengler[5] and Melchior.[6]

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†This article is an abbreviated and rewritten version of an essay that won the Addison Browne Prize at the Harvard Law School in 1954.

[1] Wolff, Private International Law (2nd ed., 1950) p. 206; Dicey, Conflict of Laws (6th ed., 1949) p. 73.

[2] Private International Law of Succession (1937) p. 18.

[3] Characterization in the Conflict of Laws (1940) p. 137.

[4] (1936- III) Recueil des Cours 558.

[5] Die Vorfrage im Kollisionsrecht (1934) Rabels Zeitschrift, p. 148.

[6] Die Grundlagen des Deutschen Internationalen Privatrechts (1932)

"Within the last decade a rival to qualification and renvoi in conceptualistic inquiry has arisen: the so-called 'preliminary question' ", says a recent writer on the subject.[7] This seems rather exaggerated, but the amount of previous literature on the subject, together with the paucity of cases here and on the continent which might be considered remotely connected with the problem raise the question whether or not the subject of this paper merits further analysis—a question which perhaps ought to be answered at the outset. The reasons for answering it in the affirmative are threefold. First, although, like characterization, the issue rarely is adverted to by the courts, none the less, like characterization, it involves a fundamental process which necessarily does occur in certain types of cases. Secondly, analysis of the problem raises in an almost unique way the importance of considering the purpose of each choice-of-law rule. Thirdly, the analysis of the incidental question, so far as it goes, has been either inadequate or incorrect.

II. *The Problem Considered*

When is an incidental question properly said to arise? The answer is best given by way of an illustration from Wolff.[8] Suppose a Greek national (*H*) dies intestate with a domicile in Greece leaving goods in England. The forum (*F*) is England. Under *F*'s conflicts rule the law of the domicile governs the succession. Suppose further that *W*, *H*'s wife, claims to be entitled to a share in the estate which is under the control of *F*. By what law is the existence of the marital relation to be determined? Suppose by the English law, *locus regit actum*. The parties having married in England by a civil ceremony, the marriage is valid by *F*'s conflicts rule. But by Greek law (the domicile) the law of nationality (also Greek law) determines the validity of the marriage. Since a priest was not present, as required by Greek law, the marriage was a nullity. The principal question in Wolff's illustration is one of succession. It involves the selection of the country whose system of law will provide rules governing the devolution of the estate on intestacy.

The incidental question is, Is *W* the wife of *H*? The question is so styled because it arises incidentally in a question of intestate succession. Whether or not *W* is really the wife of *H* is said to raise a "preliminary question", because she first must prove the marital

p. 245. "Discovery" of the incidental question has been attributed to Melchior by Nussbaum, *op. cit.*, *infra* footnote 7, p. 104, n. 1, and to the Italian Anzilotti by Breslauer, *op. cit.*, p. 18, n. 1.

[7] Nussbaum, Principles of Private International Law (1943) p. 104.

[8] *Op. cit.*, p. 206.

status. But it is obvious that the issue of her status cannot arise until after the selection of a domestic system whose succession laws provide that a wife may claim a share in the estate of a husband dying intestate. In other words, the selection of the *lex causae* on the principal issue must precede the "preliminary question". Thus, as Robertson puts it, "[i]t appears, then, that the question is both preliminary and subsequent, according to whether one looks to the order in which the questions must be ultimately solved, or the order in which they come up for consideration".[9]

An incidental question may arise of the "second degree". Suppose a testator dying domiciled in Scotland leaves property to the children of *X*. By the law of Scotland "children" means legitimate children. *X* married *Y* in New York, having previously been divorced in New Jersey. According to the forum, whether or not a child is legitimate depends on the validity of the marriage. The validity of the marriage depends on the validity of the previous divorce. In this case the principal question is one of succession; the validity of the marriage raises an incidental question of the first degree; the validity of the divorce is an incidental question of the second degree. Scots law and the law of the forum may differ in their choice-of-law rules governing the validity of a marriage. If they do, there is an incidental question to be solved at this stage. But they might both agree that New York law governs the marriage, but disagree on the law governing the divorce. Or New York law might select a different law to test the validity of the divorce from that selected by either the forum or Scotland. If it does, there is an incidental question to be solved of the second degree. The problem arises out of the conflict of conflict rules governing the incidental question or questions.

Another way of looking at the incidental question is by analyzing what we mean by the word "law" in a choice-of-law rule. A dispute may sometimes be said to arise over the qualitative interpretation of the word "law". Does the word "law" in a choice-of-law rule refer to the whole law, domestic and conflicts rules together, of a given state, or does it mean only the domestic law of that state? This, of course, is the famous *renvoi* dispute, a controversy which will impinge upon the problem in this paper in one or two important respects. But here the problem relates to the quantitative interpretation of the word "law". Where "law" is used in a choice-of-law rule, *how much* law is included? Is the

[9] *Op. cit.*, p. 137.

"law of the domicile" to be interpreted to mean the law on subsidiary questions as well as on the main one? Or is it restricted to mean only the rules relating to the main question in the case? Not the "type" but the "extent" of the law referred to is the problem before us now.

Dr. Morris, in his edition of *Dicey*, sets forth three requirements which must be satisfied before an incidental question can properly be said to arise:[10]

(1) the main question should, by the forum's conflict-of-laws rules, be governed by the law of a foreign country;

(2) a subsidiary question involving foreign elements should arise, which is capable of arising in its own right and has choice-of-law rules of its own available for determination; and

(3) the forum's choice-of-law rule for determination of the subsidiary question should differ from the corresponding choice-of-law rule adopted by the law of the main issue.

In discussing the correctness of Dr. Morris's statement of the problem, two questions arise. In the first place, what do we mean by the "law governing the main question"? Dr. Morris does not make this clear, but Wolff says:

> The question whether *renvoi* takes place arises *before* the judge has ascertained which law is to apply to the case before him. It forms part of the quest for the applicable law. Once the court—either by way of *renvoi* or without it—has determined which municipal law is applicable, there is no room for any further *renvoi*. There are however situations in which a question very similar to the *renvoi* problem presents itself *after* the determination of the applicable law, a question *within* the domain of interpretation of the foreign municipal law governing the case. [at p. 206]

From this passage it appears that Dr. Wolff envisages a conflict between the conflict rules of the forum and the *system of domestic* law which governs the main question. Dr. Wolff's view would seem to be that where the applicable domestic law (that of state *B*) is selected by means of a transmission forward from a state to whom a forum's conflicts rules have referred the main question (state *A*), it is the conflicts of law of state *B*, whose *domestic* law governs the main question, that must govern the incidental questions, *and not the law of the transmitting state* (A).

Thus it would appear that "the law governing the main question" is ambiguous. When Dr. Morris says that an incidental question properly arises if there is a conflict on the subsidiary

[10] *Op. cit.*, p. 74.

question between the choice-of-law rules of the forum and those of *the law governing the principal question*, it is possible to understand by the italicized phrase either the conflicts of law of the chosen domestic legal system or, in the case of forward transmission by a foreign court, the conflict-of-laws rules of the *transmitting state*.

According to Robertson an incidental question can be determined by reference to four possible laws:[11]

(1) the internal (domestic) law of the forum;
(2) the conflict-of-laws rules of the forum;
(3) the internal (domestic) law of the country governing the main question; or
(4) the conflict-of-laws rules of the country governing the main question.

It would seem however from my analysis as far as it has gone that these possibilities are exhaustive only in cases where *renvoi* is not involved or, if it is involved, where the foreign court remits to the forum, not transmits to a third country.

Where the case involves transmission by a foreign court the possibilities are more numerous. Incidental questions may be governed by:

(1) the domestic law of the forum;
(2) the conflict of laws of the forum;
(3) the domestic law of the country chosen to govern the main issue;
(4) the conflict of laws of the country chosen to govern the main issue;
(5) the domestic law of the transmitting state; or
(6) the conflict of laws of the transmitting state.

Where the incidental question is one of the second degree or more, the logically possible laws may become quite numerous and complicated. Little purpose would be served by cataloguing all the possible conflicts that may arise. It is sufficient to realize that conflicts of conflicts laws may arise between the forum and another state on issues which are incidental to an incidental issue. It is argued that *Shaw* v. *Gould*[12] is such a case. This argument will be discussed later, when the relevant cases are analyzed.

The second problem arising out of Dr. Morris's analysis concerns his third requirement that there must be a difference between *the choice-of-law rules* of the forum and of the *lex causae*. A re-

[11] *Op. cit.*, pp. 138-139.
[12] (1868), L. R. 3 H. L. 55. See Dicey, *supra* footnote 1, pp. 74-75.

finement of analysis, however, would indicate that an incidental problem can arise in many different ways. The following analysis will indicate the other possibilities. Paragraphs 4 and 5 concern cases of *renvoi*. Thus an incidental question may arise:

1. Where there is a conflict of the choice-of-law rules governing an incidental question. This is Dr. Morris's suggested case. The forum selects the *lex domicilii*. The l w governing the main question selects the *lex patriae*, and the c. untries selected are different.

2. Where the choice-of-law rules on the incidental question are the same, but the forum applies *renvoi*, the *lex causae* does not. For example, both states refer the validity of a divorce to the domicile at the time of the divorce, whose choice-of-law rule refers to the *patria*. The forum accepts the *renvoi* doctrine; the law governing the principal issue does not.

3. Where the choice-of-law rules are the same but the connecting factors are characterized differently. For example, according to the forum the domicile is France, but the domicile is Germany according to the law governing the principal issue.

4. Where the choice-of-law rules of the forum and the transmitting state are the same but the transmitting state applies, not its own choice-of-law rules, but the choice-of-law rules of the selected domestic system, which differ from that of the forum.

5. Where the choice-of-law rules of the forum and the finally selected domestic system are the same, but the transmitting state applies its own conflicts rule to the incidental question, which differs from the choice-of-law rules of the forum and the selected domestic system.

6. Where the choice-of-law rules of the forum and the country governing the main issue are the same but the characterization of the *incidental issue* (not the connecting factor) differs. For example, the main issue may relate to a surety contract. The incidental issue is the validity of the principal obligation. The forum might consider the principal obligation as arising out of tort, while the law governing the surety contract characterizes the principal debt as arising out of contract.

7. Where the choice-of-law rule of the forum and of the country governing the main issue are the same, but the *lex causæ* would in fact apply its *domestic* law to the incidental question. For example, the *situs* of the land applies domestic notions about who is legitimate, and does not apply its conflicts rule.[13]

[13] Cf. *Doe ex dem Birtwhistle* v. *Vardill* (1826), 5 B. & C. 438; (1835), 2 Cl. & Fin. 571; (1839), 7 Cl. & Fin. 895.

A more detailed analysis of some of these situations will be presented later in this paper.

III. *Analysis of the Writers*

The many legal writers who have turned their attention to the problem of the incidental question generally approach it in one of two ways. One group adheres to the view that all incidental questions should be governed by the relevant choice-of-law rule of the forum; the other considers that "the law governing the principal issue" in the case should determine what law governs the subsidiary questions. On the continent, the first view is taken by Raape,[14] while the second is advocated chiefly by Wengler[15] and Melchior.[16] In Anglo-American conflict of laws, the position that, as a general rule, the forum should govern is taken by Breslauer,[17] Morris,[18] Falconbridge[19] and Cormack.[20] The position that the law of the main issue should govern incidental questions is advocated by Robertson[21] and Wolff.[22] Welsh[23] and Mann,[24] in so far as they have considered the problem, have adopted a similar position. Nussbaum[25] would seem to support neither view, but appears more clearly to reject the second.

Not much enlightenment can be derived from older authorities. Westlake seems to have seen the problem but he has been cited in support of both sides and little conclusive as to his views can be gained from the few possibly relevant passages.[26] I am unable here to enter into an analysis of the views of all these writers. But it will be helpful towards an understanding of the problem to discuss the approach of some representative proponents of each view.

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[14] (1934-IV) Recueil des Cours, pp. 403, 485-495.

[15] *Op. cit., supra*, footnote 5.

[16] *Op. cit., supra*, footnote 6.

[17] *Op. cit.*, pp. 18 ff. Breslauer says that no general rule can be formulated but his analysis seems to favour the forum's conflicts rules in most cases.

[18] Dicey, *op. cit.*, pp. 73 ff.

[19] Conflict of Laws (1947) pp. 165 ff.

[20] Renvoi, Characterization, Localisation and Preliminary Question in the Conflict of Laws (1941), 14 So. Calif. L. Rev. 221, at pp. 243ff. Cheshire also seems to favour this view. See his Private International Law (4th ed., 1952) p.91.

[21] *Op. cit.*, pp. 135ff.

[22] *Op. cit.*, pp. 206 ff.

[23] Legitimacy in the Conflict of Laws (1947), 63 L. Q. Rev. 65, at pp. 86-87.

[24] Legitimation and Adoption in Private International Law (1941), 57 L. Q. Rev. 112, at p. 128, n. 72.

[25] *Op. cit.*, pp. 104 ff.

[26] Private International Law (7th ed., 1925) pp. 102, *231*. He has been cited in support of both by Morris (1938), 54 L. Q. Rev. 612, and by Robertson, *op. cit.*, pp. 147-148.

Breslauer, as I have said, was the first writer on Anglo-American law to discuss the problem, but his analysis in favour of the forum is not very carefully worked out. Cormack comes to the same general conclusion as Breslauer, but his analysis is more critical.[27] He treats as paramount the problem of uniformity of decision in the forum. If the forum is to apply the private international law of a foreign court, there will be no uniformity of decision on such important matters as legitimacy, marriage and divorce. Thus he says:

> If the forum is to apply the [conflicts rules of the *lex causae*] it will enter a judgment contrary to its own conceptions of justice, and different from what it would have entered if the question had been presented to it in some other form.[28]
>
> [The approach violates] the principle of integrity that a judge should apply the law to the best of his ability in accordance with the law of his own sovereignty, unless there is shown to be a sufficient reason for adopting the views of another.[29]

Since Cormack accepts the principle of the *renvoi* in questions of "status and property" only, he would consider that selection of the *lex causae* as the proper law of the incidental question is correct only when these two questions are raised in a case.

One cannot help but feel that his criticisms are unconvincing. It should be clear by now that in the conflict of laws judges apply their own law whether *renvoi* is or is not part of the law. What judges do in all cases, whether they look to the domestic or whole law of a foreign state, is to pattern the rule of the forum after a foreign rule.[30] There is no greater compromise of "sovereignty" where the *renvoi* doctrine is rejected than accepted. Can it be said that, by looking to a foreign conflicts rule for a model for the forum, the judge will enter a judgment contrary to his conception of justice? It would seem that, on the contrary, a judge looks to a foreign conflicts rule precisely because he thinks that his decision will be more in accordance with justice if he does. This much, however, is true. If a judge follows the conflicts rules of the *lex causae* on incidental questions, there may be no uniformity within the forum. A person may be legitimate for purposes of succession to a foreign estate and yet illegitimate for purposes of succession to an estate whose *situs* is the forum, and for other purposes as well. To what extent this criticism is persuasive in favour

[27] See *supra* footnote 20. [28] *Op. cit.*, p. 247.
[29] *Op. cit.*, p. 248, n. 148.
[30] See Cook, Logical and Legal Bases of the Conflict of Laws (1942) Ch. 1.

of the forum applying its own general conflicts rules, I will discuss later. But it will not do to say that if the forum follows the course of action proposed by Cormack it violates a principle of integrity. The forum always applies its own law.

Falconbridge has not examined the problem at any great length, but it would appear that his discussion supports the views of the authors already mentioned. In discussing the "application of the proper law" after the proper law has been selected, he poses a case of succession where the claimant alleges he is the legitimated son of the deceased. He states that the questions raised are (1) the validity of the marriage, (2) the legitimating effect of the marriage, and (3) the right to succeed.[31] He then submits

> that all three questions should be considered separately. If the alleged marriage is sought to be impeached on the ground of its formal or intrinsic invalidity, the matter should be decided by the proper law or laws selected by the forum, and even the legitimacy of A and his right to succeed may be governed by different laws. There would not seem to be any valid reason why the proper law governing A's right to succeed should also be the proper law governing any preliminary question.[32]

Without embarking here into the merits of his submission, it must be pointed out that Falconbridge realizes that if the forum adopts the "foreign court" theory of *renvoi* (as it is known in the English courts) the law governing the preliminary question cannot be selected by the forum but must be referred to the state whose total law governs the main issue. Dr. Falconbridge's position is that in cases involving *renvoi* the reference to foreign law must be total. This is not because greater uniformity is thus achieved, but because otherwise it is not total *renvoi*. But, in all other cases, the reference to foreign law ought to be limited to matters entirely and exclusively within the scope of that reference. If the reference is to the domicile as the connecting factor for succession, the law of succession does not necessarily determine what is procedure or substance, movable or immovable, capacity or formality. By a parity of reasoning, where *renvoi* is not involved, the domicile does *not* decide who is legitimate or illegitimate, who is single or divorced:

> . . . on each question all the provisions of the selected proper law, and *only such provisions*, are to be applied as relate to the specific question—that is, the specific aspect of the case, with regard to which the proper law has been selected. [Italics supplied]

It would seem however that Dr. Falconbridge does envisage cases

[31] *Op. cit.*, p. 165.

[32] *Op. cit.*, pp. 165-166.

where the selection of the proper law on a subsidiary question would be left to the *lex causae*. As an illustration he gives characterization of property as movable or immovable, or whether a right is proprietary or contractual—both governed by the *lex rei sitae*.[33] These examples would seem to be cases for *renvoi*. If the court does not apply *renvoi*, the analysis seems to say that each question must be determined by the forum's independent rule.

The opposite view, that the incidental question should be governed by the conflict of laws rules of the legal system governing the main issue in the case, is upheld by Drs. Wolff and Robertson. Dr. Wolff suggests that the justification for his approach lies in the fact that it helps to established a harmony of decision between the courts of the forum and foreign countries. In this respect he likens the solution to the *renvoi* doctrine.[34]

Robertson's treatment of the subject,[35] certainly the most comprehensive in Anglo-American law, is similar to that of Wolff. In considering the possibly applicable laws, he admits to the possibility of the application of *domestic* laws of the forum and of the foreign state governing the main question, but dismisses these without discussion. He also rejects the view that the forum should determine the incidental question by applying its own conflicts rules to it. The argument that this approach avoids dissonance within the forum is met by showing that English and American conflict of laws often distinguish between the existence of a status and its incidence.[36] This seems clearly right. The problem here is not whether a person is legitimate, viewed as an abstract question, but rather whether he is legitimate for purposes of the right to succeed to certain property situated in a foreign country. A negative answer will not effect the integrity of his status in the courts of the forum, any more than the case of *Doe ex dem Birtwhistle* v. *Vardill*,[37] where it was held that the claimant who was legitimate according to foreign law could not succeed as heir to English land. Similarly it would appear to be the law that the incidents of a polygamous marriage may be ignored for some purposes, for example, allowing the wife to sue for divorce or nullity, or to found an indictment for bigamy, but will be recognized for others, for example, in respect of the legitimacy of the children.[38] In the *Goods of the Duchess D'Orléans*[39] a grant of administration was denied in England on grounds of infancy under English law (the child be-

[33] *Ibid.*
[34] *Op. cit.*, pp. 208-209.
[35] *Op. cit.*, pp. 135 ff.
[36] *Op. cit.*, pp. 142-145.
[37] (1839), 7 Cl. & Fin. 895.
[38] *Baindail* v. *Baindail*, [1946] P. 122.
[39] (1859), 1 Sw. & Tr. 253.

ing under twenty-one), though majority was reached under the law of the domicile.[40]

Robertson's arguments in favour of the choice-of-law rules of the system governing the main question are along the following lines. Suppose the legal issue to be *X*'s right to succeed. In determining the result the forum looks to the law of succession (say France) and discovers that there is a French rule that a child must be legitimate before it may succeed. The legitimacy question is made relevant only because French law says it is so. French law supplies the class or category of persons who may take. The only question, then, is what people are included within the class, or "in other words, what content should be given to the general concepts" of French law.[41] Since France supplies the concepts let French law give them their content. If the forum does not follow this suggested course of action it will simply not be applying French law. The crux of Robertson's submission, then, is that the *lex causae* must be looked to because "this is the only way of respecting the determination already made that the selected proper law is to govern the question in dispute".[42] Since all secondary problems must be left to the French court, surely this would lead him to accept the *renvoi* as a general principle. But he does not seem to do so. *Renvoi*, as properly understood, we are told is the application of foreign conflicts rules to the subsidiary question, though not necessarily to the main question. There may be reason behind this approach in certain types of cases, but it would not appear to be supportable on the principle that consistent application of the proper law requires it. If we mean by "respecting our determination to apply foreign law" doing what the foreign court does, then, if the French court ignores its own conflicts rules and treats the question as purely German, we ought to apply German law. If we do not mean "doing what the foreign court is doing", we would not seem to be obligated to adopt its treatment of incidental questions.

Thus to apply the domestic law of a country to the main issue in a case, and its conflicts rules to subsidiary issues, would appear to be a peculiar doctrine indeed. Yet it is also the view apparently advocated by Wolff. For want of a better term, one may perhaps style it a "modified *renvoi*" view. Under the section entitled "Me-

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[40] See *In Goods of Meatyard*, [1903] P. 125, at p. 129.

[41] *Op. cit.*, p. 140. The arguments are taken from Melchior and Wengler.

[42] *Op. cit.*, p. 156.

thods of Solution" I will examine whether such a view is supportable in any particular types of cases. I will also examine those cases which the writers give as exceptions to the general rule.

It may thus be seen that almost all writers who have dealt with the problem, whether their analyses have been detailed or they have examined the problem only in passing, have approached it from one of two viewpoints. They have said that, as a general rule, the forum may characterize each issue independently and apply to it its own choice-of-law rules, or, as a general rule, it may follow the characterization and choice-of-law rules of the law selected to govern the main issue in the case. The approach to the incidental question has been similar to that taken in the past to *renvoi*. The word "law" in a choice-of-law rule is assumed to be capable of having a unitary characterization as to "how much" of that legal system chosen to govern the main issue in the case will be made applicable to the case as a whole.

IV. *Analysis of Cases*

There are very few cases in Anglo-American law where the problem of the solution to an incidental question has arisen. It is indicative of the difficulty involved in properly analyzing what relevant cases exist that there is no unanimity on how the decisions in them were reached. Of course an incidental issue may be present in many cases, but what has happened seldom is that a conflict has arisen between the conflicts rules of two or more states concerned on the subsidiary questions in the case. Incidental questions appear in *Re Goodman's Trust*,[43] *Re Andros*,[44] *Doe ex dem Birtwhistle* v. *Vardill*[45] and *Re Askew*[46]—to cite just a few English decisions. But in all these cases, for one reason or another, the law governing the main question was also the law of the forum, and hence the choice-of-law rule on the incidental question could have been selected by the forum, *qua* the law governing the principal issue, or by the forum, *qua lex fori*.

The reason why a conflict of laws on the incidental question would seem seldom to arise in the United States is probably best explainable by the similarity in the conflicts rules of the various states on such issues as succession, legitimacy and legitimation. But this factor cannot be used to explain the absence of a number of cases presenting the issue in England. Relevant English and con-

[43] (1881), 17 Ch. D. 266.
[44] (1883), 24 Ch. D. 637.
[45] (1839), 7 Cl. & Fin. 895.
[46] [1930] 2 Ch. 259.

tinental decisions are certainly more numerous, however, than American.

It should be pointed out by way of comparison that a conflict of characterizations of rules of limitation or of statutes of frauds is quite common.[47] The abundance of cases on this subject is probably due to mistaken conceptions of how to approach the subject. The supposed characterization of a rule or statute by the *lex causae* as procedural (a rather common event) was thought to preclude its application, however the forum might consider the rule in the light of the rôle it plays in the foreign law. Thus conflicts of qualification between the *lex causae* and the forum would not be unusual due to the lack of unanimity among the various states on whether their statutes relate to procedure or substance.

Another reason why cases posing conflicts problems on a subsidiary level are seldom found is given by Robertson.[48] He points out that in cases involving succession to movables or land the forum is usually either the domicile of the decedent or the *situs* of the land, Also, if the plaintiff claims under a settlement or trust, the forum is likely to be the seat of the trust. Since in these cases the law governing the main question is also the forum, there cannot then be a conflict of conflicts rules on any subsidiary question.

Anglo-American decisions

In England two cases are usually cited in common with the incidental question. One is the celebrated case of *Shaw* v. *Gould*,[49] and the other is *Re Stirling*.[50] In *Shaw* v. *Gould* the testator died domiciled in England leaving personal property in trust for the "children" of his grandniece, Elizabeth Hickson. In 1828, Elizabeth was induced by fraud to marry one Buxton, domiciled in England. The marriage was never consummated and she left him at once. Ten years later she became engaged to Shaw, whose domicile was also English. No divorce decree being at that time obtainable in England, friends of Elizabeth induced Buxton to go to Scotland in order to give Elizabeth a divorce. This he did, and a Scots divorce was granted, after a *forum domicilii* was established there by forty days residence. Shaw then acquired a Scots domicile and married Elizabeth in Scotland. There were three children of the marriage, all born during the life of Buxton. A rule of English law interprets "children" to mean only legitimate children. The

[47] See Robertson, *op. cit.*, pp. 248-259.
[48] *Op. cit.*, p. 148.
[49] (1868), L. R. 3 H. L. 55.
[50] [1908] 2 Ch. 344.

House of Lords found the three children to be bastards and hence not able successfully to claim the inheritance.

Dr. Morris's interpretation of this case is that it raises an incidental question of the second degree.[51] England was both the forum and the country whose law governed the main question, that is, the succession to the property. Hence no incidental question could arise of the first degree. The validity of the marriage between Shaw and Elizabeth depends, however, on the validity of the previous divorce of Elizabeth and Buxton and a second incidental question thus arises. Dr. Morris says that this was a "Scots marriage", meaning, presumably, that the selected law governing the marriage was Scottish. By the law of the forum (England) the Scots divorce was *invalid* because Buxton was then domiciled in England. By Scots law the Scots divorce was *valid* because under it Buxton was domiciled in Scotland at the appropriate time. Hence, to invalidate the divorce, the House of Lords must have applied English, not Scots, conflicts rules to the divorce. On this reasoning Morris says that the *forum* applied its own general conflicts rules on the incidental questions of the divorce and not that of the law governing the first incidental issue (the marriage). But his analysis hinges on the statement that the second marriage was a "Scots" marriage. If the proper law of the marriage was English, an incidental question of the second degree could not arise for the *lex causae* of the marriage and the *lex fori* would be the same. It would seem that the marriage was not a Scots one. Capacity to enter into a marriage is governed by the *lex domicilii* of *each* party before the marriage, according to Dr. Morris.[52] Elizabeth was domiciled in England because the divorce by English conflict of laws was invalid. Since Elizabeth had no capacity to marry by English law (being married), the marriage was void. The law governing the marriage being English, not Scots, no conflict of conflict rules could arise.

Shaw v. *Gould* is thus a curious case. In determining that Elizabeth's domicile was English and that therefore the marriage was void, the forum must first have tested the validity of the divorce. This is because what is the pre-marital domicile (the law governing the essential validity of a marriage) cannot be known until the validity of the divorce is determined. Hence the rules of the domicile (which govern the main issue) could hardly be used to deter-

[51] Dicey, *op. cit.*, p. 75.
[52] Morris, Cases on Private International Law (2nd ed., 1951) pp. 80-81; Dicey, *op. cit.*, p. 758.

mine if the divorce was valid, and therefore no conflict on an incidental question could possibly exist.

It should be said, however, that, if Dr. Cheshire's view that the intended matrimonial home governs the essential validity of a marriage is correct,[53] then an actual conflict of rules on an incidental question arose in *Shaw* v. *Gould*. (But Morris emphatically rejects Dr. Cheshire's view on the intended matrimonial home.[54]) On the assumption that Cheshire is correct, Scotland was certainly the matrimonial home, and hence the marriage was Scots. The case then involved an actual conflict of laws on a second-degree incidental question and resolved that conflict by applying the rule of the forum.

It has been said that the English decision of *Doe ex dem Birtwhistle* v. *Vardill*[55] is also favourable to the view that the law of the forum applies to all subsidiary questions.[56] It will be remembered that the House of Lords here held that where the issue was the right to succeed as heir to English realty the claimant must be not merely legitimate according to the law of his domicile but must be born in lawful wedlock, that is, "legitimate within the narrowest pale of English legitimacy". This decision may be interpreted as saying that the (English) forum may require a claimant to be legitimate according to the forum's notions of legitimacy. But the law governing the main issue was also the law of the forum. The *lex situs* here has developed a peculiar rule of succession largely influenced by domestic-law notions of legitimacy. The forum applied the rule because it was a rule of the *situs* and not because it was a rule of the forum, *qua* forum. If France were seized of the case, if it applied English law, *qua lex situs*, to the question of succession, it could not apply either its own or English conflicts rule on the question of the plaintiff's right to succeed and yet reach the result the English forum would reach. The only conclusion that can be deduced from the case is that there may be cases where a proper handling of an incidental question may require the forum to apply neither its own conflicts rules nor the general conflicts rules of the country governing the main issue, but an exceptional rule (domestic or conflicts) which the latter state would itself hold to be applicable.

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[53] *Op. cit.*, *supra* footnote 20, p. 297. See *Brook* v. *Brook* (1861), 9 H.L.C. 193, at p. 207, *per* Lord Campbell; *De Reneville* v. *De Reneville*, [1948] P. 100, at p. 114, *per* Lord Greene.

[54] Morris, *supra*, footnote 52, pp. 80-81.

[55] (1839), 7 Cl. & Fin. 895.

[56] Morris, Book Review of Breslauer (1938), 54 L. Q. Rev. 611-613.

If *Shaw* v. *Gould* is a difficult case to interpret, *Re Stirling*[57] is even more so. It would appear that this decision supports the application of the *lex successionis* to incidental questions. But no author who has dealt with the case has been clear about the true *ratio decidendi*.

The question was one of succession to Scottish land. The claimant was the child of *A* and *B*, who married in San Francisco. *A* was previously married to *C* in Scotland. *C* divorced *A* in North Dakota, where *C* was *not* domiciled at the time. At the time of the divorce and remarriage *A*, *B* and *C* were domiciled either in Scotland or British Columbia (this was undetermined by the court). Was the child of the marriage of *A* and *B* an heir male of the body, so as to be entitled to inherit Scots land (personalty in England was to devolve in the same way)?

The principal question relates to succession to Scots land. Hence Scots law applies on the main issue. The incidental question relates to legitimacy. English law, *qua lex fori*, answers the question of legitimacy by examining the validity of the marriage of *A* and *B*. Hence the validity of the divorce is also raised.

(a) Whether the forum selects Scots law or British Columbia law to apply to the effect of the divorce and the marriage, the marriage is invalid, and hence the child is a bastard. By the conflicts law of Scotland (which governs the main issue), in so far as legitimacy depends on the validity of the marriage, the child is also a bastard. Hence it is not possible, at this point, to tell whether the rule of *lex fori* or of the *lex successionis* was applied to the incidental questions.

(b) Counsel in the case argued, however, that according to Scots law a child of a *putative* marriage is legitimate. The court held that, on the facts of the case, the Scots law on putative marriages was not applicable because the parties' mistake as to the effects of the Scots law of marriage and divorce was a mistake of law not fact. Thus the one certain thing about the case appears to be that all roads led to bastardy. But the English forum did consider the Scots law on putative marriages. This leads Robertson to say that Scots law on the incidental question was applied, and he seems to be correct. (But that a child of a putative marriage is legitimate would seem to be a doctrine of Scots domestic law, as Welsh has pointed out.[58]) Since English law would appear to have no doctrine of putative marriage, the English forum could not

[57] [1908] 2 Ch. 344.
[58] (1947), 63 L. Q. Rev. 65, at p. 86, n. 5.

have examined the applicability of the doctrine to the facts of the case if it applied English law. The English court would only have asked if the marriage was valid. How the English court got to Scots law, domestic or conflicts, must have been by applying the Scots law on putative marriages *qua lex situs* of the land. Hence Robertson's citation of the case in favour of the view that the *lex successionis* governs incidental questions would appear to be justified.[59]

A dictum of Lord Greene M. R. in *Baindail* v. *Baindail*[60] also points in the direction of the *lex causae*. He suggests that whereas a Hindu woman, in view of the polygamous nature of her marriage, may not *generally* be considered a wife by the English forum, yet, when the question of her marital status arises incidentally in a case of succession on intestacy to property in England, the English forum will consider her married and her children legitimate, if the domicile of the deceased treats them in this manner. Thus this dictum supports the view that the law of succession controls the determination of incidental questions.

In American law the few cases that are in point are also inconclusive. In *Sneed* v. *Ewing*,[61] the plaintiff brought an action in Kentucky claiming property of the deceased who died domiciled

[59] *Op. cit.*, pp. 149-150. Morris is doubtful: Dicey, p. 75, n. 50. So also is Welsh (1947), 63 L. Q. Rev. 65, at p. 87, n. 7. Since the issue in the case concerned title to foreign land, it would appear that the case is one where *renvoi* should be applied, and hence the forum should treat as legitimate whomever the *situs* does (see *infra*, p. 545). In so far as the court in *Re Stirling* attempted to settle the question in accordance with Scottish rules, no objection can be made. However, if the English conflicts rule on legitimacy is not that of birth in lawful wedlock, but of domicile of origin (see *re Bischoffsheim*, [1948] Ch. 79, at p. 92; also Wolff, *op. cit.*, pp. 388-389) it is possible to argue that the Scots rule on putative marriages was examined because Scotland was the domicile of origin by *English* conflicts rules. But it is difficult to determine what was the domicile of origin, Scotland or British Columbia, and it seems to be assumed for the argument that it was British Columbia. It would appear that the Scottish doctrine of putative marriages was examined as a rule of the *lex successionis*.

[60] [1946] P. 122, at pp. 127-128. In *Dogliani* v. *Crispin* (1866), L. R. 1 H. L. 301, the plaintiff was illegitimate by both English law (the forum) and Portugese law (the *lex successionis*), so no conflict arose, but the English court allowed him to succeed as he was allowed to do, in spite of his illegitimacy, by Portugese law. Further examples are *Re Annesley*, [1926] Ch. 692, and *Re Ross*, [1930] 1 Ch. 377. These cases concern the testator's children's right to *legitima portio*. In the latter case the claimant's legitimacy did not have to be determined because the testator's domicile, Italy, selected English law as the *lex successionis*. In the *Annesley* case, French law was applied as the *lex successionis*, and the children were therefore entitled to a *legitima portio*, but they would appear to have been legitimate by both French and English law. The question was not discussed. See also *Re Trufort* (1887), 36 Ch. D. 600, where, however, the question concerned the validity of a foreign judgment.

[61] (1831), 5 J. J. Marsh. 460 (Kentucky).

in Indiana. The plaintiff was legitimate by Kentucky law (the forum) because Kentucky treats as legitimate the children of putative marriages. In Indiana the legitimacy of the child depends on the validity of the marriage. The Kentucky court held that their statute was really an inheritance and not a legitimation law and hence had no extraterritorial effect. The result is that it was clear that the claimant was illegitimate by both the Kentucky and Indiana conflict of laws and hence it made no difference which law was selected. But the forum purported to apply *Indiana* law (the *lex successionis*) to the preliminary issue. The court expressly refers to the conflict-of-laws rule in Indiana and directs the lower court to apply it. On petition for rehearing the petitioner argued that, if Indiana law applied on the question of legitimacy, the Indiana court would in fact follow Kentucky domestic law, which allowed the children of putative marriages to inherit. The argument was dismissed without opinion.

A good example of an incidental-question situation is the well-known New Hampshire decision of *Gray* v. *Gray*.[62] On the question whether or not a wife can recover for a tort committed against her by her husband in Maine the New Hampshire court applied Maine law, as the *lex loci commissi delicti*. The existence of the tort, presenting such questions as breach of duty and contributory negligence, was governed by Maine law, as the law governing the principal issue. But in the application of Maine law, the forum was required to consider a rule that prevented the wife suing her husband. This properly raised a question of "secondary" characterization. Is the rule applicable to the case or should it be ignored as dealing, not with the "tortness of the tort", but with the relations of husband and wife — a problem which might more ideally be submitted to the parties' domicile? The New Hampshire court, rightly or wrongly, applied the rule to the case and barred the action.

It is thus relevant to determine whether the plaintiff really was the wife of the defendant. Although Chief Justice Peaslee does not explicitly deal with the question, his language seems to suggest a different view from *Sneed* v. *Ewing*. He appears to apply the law of the forum to determine the existence of the status of husband and wife.[63] Of course the law of Maine, the law governing the main issue, would probably have come to the same conclusion that the plaintiff was truly the wife of the defendant. But Peaslee C.J. seems

[62] (1934), 87 N. H. 82.

[63] At p. 84.

to say that New Hampshire law governs in the particular case on the question of status before Maine law is even looked to. So far as the case goes, it seems to be an American authority which looks to the forum for determination of what law governs the incidental question.[64]

Some Continental decisions

An analysis of the continental decisions where incidental questions have arisen is beyond the scope of this article. For comparative purposes, however, I will describe two cases suggestive of the various situations which can and have arisen.[65] In a decision of the Reichsgericht of the 21st March, 1912,[66] cited by Nussbaum,[67] an Italian was divorced by a German court. The divorce was of course valid in Germany but not recognized by Italian law, the law of nationality. The divorced husband remarried. In the German court his second wife brought an action for nullity on grounds of the invalidity of the German divorce under Italian law. It was apparently thought that, capacity to marry being governed by Italian law, the validity of the divorce (an incidental question) would also be governed by Italian law. But the German court recognized the validity of its own divorce, as would be expected. The case is considered exceptional by Wolff due to the public policy of the forum.

A similar example is a decision of the French court of Morocco at Rabat.[68] The subsidiary question involved was the validity of a marriage celebrated in France. The principal question was one of succession. According to French law, the succession was governed by Greek law. But the Rabat court decided the question of the validity of the marriage by applying French conflicts rules. Robert-

[64] *Dawson* v. *Dawson* (1931), 224 Ala. 13, raised an identical problem to that in *Gray* v. *Gray*, but the language is inconclusive and it is likely that by all relevant laws the marriage would have been considered valid. In *Brown* v. *Findley* (1908), 157 Ala. 424, sometimes cited in this connection, the Alabama court refused to recognize an adoption valid by the law of the domicile but invalid by its own domestic law. The question of adoption arose incidentally to succession to land, and the *situs* was also the forum. Hence no conflict of laws on an incidental question could possibly have arisen. The case is an American illustration of *Doe* v. *Vardill* (1839), 7 Cl. & Fin. 895. Again in *Vergnani* v. *Guidotti* (1940), 308 Mass. 450, the validity of an Italian marriage was relevant incidentally to a question of succession, but because Massachusetts was both the forum and the decedent's last domicile, no conflict of conflict laws was possible.

[65] For other cases, see Robertson, *op. cit.*, p. 152.

[66] Juristische Wochenschrift (1912) p. 642.

[67] *Op. cit.*, p. 107, n. 12.

[68] Tribunal de Rabat, Dec. 28th, 1932; (1932) Clunet 992. See Robertson, *op. cit.*, p. 152, n. 60.

son explains this case as an example of the application of a rule of French public policy, which on such facts would not allow the impeachment of a marriage validly celebrated in France according to French law. That is to say, had the marriage not been French, the French court would not have been precluded from applying the *lex successionis* to test the validity of the marriage.

These two decisions illustrate well the importance of the factor of the forum's public policy. They serve as a warning against attempting to apply mechancial solutions to the extremely complex situations in which incidental questions may arise.

V. *Methods of Solution*

We finally arrive at the crucial question of this essay: How should incidental questions be decided? It should be clear by now that much of the difficulty that attaches to the problem has arisen from the attempt by writers to lay down universal rules of solution. Discovering that the universal rule of solution is not that adopted by the court, or leads to an unjust or absurd result, they create "exceptions" which, though spoiling the harmony of analysis to some extent, do not affect the general validity of the rule. The past treatment of the *renvoi* doctrine is similar in this respect. Writers such as Cheshire, Lorenzen and Falconbridge emphatically reject the *renvoi* doctrine. As a general rule, it is said, "law" in a choice-of-law rule means the domestic law of a state, not the whole law including the conflicts rules of the system. On the other hand, the *renvoi* has been generally approved by such writers as Griswold and Dicey. Courts should "look first at the 'whole law' of the other state, and undertake to dispose of the case as a foreign court would dispose of it; and if the foreign court would in its disposition apply some rule of conflict of laws the domestic court should do the same".[69] This again is only a general rule to which there are exceptions. Cook's approach, however, was to reject a general formulation. Each rule must be examined in the light of its purpose (if such be discoverable), so that the characterization of the word "law" will serve to forward that purpose in the best possible way. Choice-of-law rules must be treated individually and interpreted in such a way as best to effectuate the policy behind them.[70]

The *renvoi* dispute, as I have said, relates to the qualitative

[69] Griswold, Renvoi Revisited (1937-8), 51 Harv. L. Rev. 1165, at p. 1182.
[70] Cook, *op. cit.*, p. 251.

meaning of the word "law". The problem of the incidental question relates to the quantitative interpretation of the word "law". But "how much" law is included in the foreign reference may be no more susceptible of general formulation than "what kind" of law is meant. Here, as in *renvoi*, the individual rules require to be examined in the light of what they are meant to achieve. All mechanical solutions of the problem must fail, simply because they will not serve the function of helping to fulfil the purpose of each rule. Only individualization of each rule will bring to light what we are trying to achieve by its application.

Over and beyond this there are other important and powerful factors, such as the public policy of the forum, the desire for uniformity of decision among the various forums and the principle of *res judicata*. Desiderata of consistency and finality may also be factors in many cases. I will attempt to analyze a few of the types of examples already discussed in the light of their own particular problems without attempting to state any general formulas.

But, before the problem of dealing with subsidiary questions arises, it must first of all be determined if the facts actually do raise an incidental issue. This may be a very difficult question to determine. More than one characterization may be made in each case. More than one choice-of-law rule may be involved. But nevertheless there may not be any incidental question. For example, *X* might sue in England for nullity of marriage. His action might raise two questions, one of formal validity and one of essential validity. There are here two "main" or independent questions, each having its own conflicts rule. When matters of capacity are referred to the domicile, however, there may be a rule of the domicile that relates to capacity and says that no person previously married and not divorced one year before the second ceremony may validly contract a marriage. In this case the validity of a previous marriage will arise incidentally in the solution of one of the "main" problems in the case, the reason being that the domicile gives no answer to the question of capacity or no capacity until the effect of the previous marriage is known. Again, the essential validity of a contract may be referred to the *lex loci contractus*, or the country of closest connection. But the forum may refer *independently* all questions of performance (for example, such as relate to tender, currency) to the *lex loci solutionis*. Questions of consideration, capacity, general illegality, are referred to the proper law of the contract and it is clear *that an answer may be obtained without adjudication of or even reference to problems of*

performance by the law referred to, because matters of performance are not referred. Similarly, in the marriage illustration, questions of formality will not arise incidentally within the scope of the reference on essentials, because formalities are not included within the reference. They are initially made a subject of reference by the forum.

Whether or not an issue rises "independently" or "incidentally" may be a troublesome matter to determine. Thus, according to rule 378 of the Restatement of Conflict of Laws, the proper law of a tort is the *lex loci commissi delicti.* Matters relating to "privilege", however, are referred by rule 382 to *lex loci actus.* Cormack[71] seems to interpret these two rules as follows: *all* torts issues are referred to the *lex loci delicti.* This would include matters of duty, contributory negligence, assumption of risk, and the like. In applying the *lex loci delicti,* a rule is met which exonerates the actor from liability if he acts pursuant to a privilege. *Before the lex loci can answer the question* "tort or no tort", the defence of privilege *must* be considered. If it refers all questions of privilege to state *X* while the forum refers privilege to state *Y* (*lex loci actus*), a full-fledged incidental problem is met. The question of "privilege" arises only incidentally in the larger issue of the existence of the tort.

It is not clear, however, that this interpretation is in fact the only possible analysis of the two Restatement rules. It may be that rule 378 refers all matters such as duty, contributory negligence, consent and illegality to the *lex loci deliciti,* but *exclusive of matters relating to privilege.* All questions of duty raised by the facts are characterized as such by the forum and are excluded from the original reference. Hence it is clear that, on this interpretation, there may be two main references in such a case. The *lex loci delicti* can give a solution on the matters referred to without an incidental question of privilege arising, because privilege is not referred. Hence both the characterization of a problem as one of privilege by the *lex loci delicti* and its conflicts rules on privilege are irrelevant.

If the issue on the case relates to succession, it is clear that it may not be possible to determine if the plaintiff has a right to succeed without an incidental question arising under the *lex causae.* For example, no answer may be obtainable on the right to succeed unless an incidental question of legitimacy is solved. By the law of the forum, legitimacy may not even be a prerequisite for sharing in an estate. The issue of legitimacy may never arise

[71] *Op. cit.,* p. 246.

except for the fact that the law of the succession deems it relevant. Hence the issue is properly "incidental". That this is the approach taken by the law is beyond dispute. But of course it might be possible for the forum to make a different approach to the problem. It might divide up the legal issues involved and say that all questions pertaining to insanity, undue influence, illegality, powers of testation, *legitima portio*, and so on, relate to the last domicile of deceased. No other issues are referred. All other issues (for example, legitimacy, adoption, whether claimant forfeited his rights through ingratitude) are referred to the *lex domicilii* of the various claimants. It is evident that the problem is not treated this way by the Anglo-American courts.

If an incidental question does then arise, I have argued that in individualization lies the proper approach to solution. The doctrine of *renvoi*, however, cuts across the present problem. It is clear that if "total *renvoi*" is adopted by the forum, the foreign court whose hypothetical judgments are emulated by the forum must determine the outcome of all incidental questions. The general formulation of the total *renvoi* theory requires all the facts to be submitted, as they are, to the foreign court. At most, a variation may be made so as to consider the property concerned to be within the jurisdiction of the foreign court, if necessary in order to reach a determination in the case. Thus the decision of the foreign court is looked at on all the facts. Hence, if the foreign court transmits the case, the transmitting state, and not the ultimately selected legal system, must determine all incidental questions. If it is a case for total *renvoi*, what the ultimately selected law does with the incidental question is totally irrelevant, unless the transmitting court itself applies its rules.

In this respect, if total *renvoi* is adopted, the solution to incidental questions is made easy for the forum. The true problem is shifted to the transmitting-remitting state. This is not the place to consider the merits and demerits of the doctrine. It is sufficient to note that, if the forum adopts the "foreign court" theory in questions relating, for example, to land and status, in the interests perhaps of effectiveness of result, or uniformity of decision, the incidental question must also be controlled by that system of laws thus selected to govern the main issue in the case.

In this connection an acutely difficult problem may arise. Suppose *X* and *Y* are domiciled in New York, and there get a divorce. The divorce is regarded as valid by New York law as well as by the forum. Italy, the law of the nationality of *X* and *Y*, re-

fuses recognition since the New York grounds were not sufficient by Italian law. After the divorce, *X* and *Y* go to Italy and acquire a domicile there. *X* now marries *Z*. *X* deserts *Z* and comes to England (the forum) and after three years residence sues for nullity of the Italian marriage under the Matrimonial Causes Act of 1950. The New York divorce is valid by English law, but void by Italian law (the law governing the validity of the second marriage). According to Italian law, *X* was married at the time of the second ceremony, and hence the second marriage was invalid.

In the example just mentioned uniformity cannot satisfactorily be achieved. If the forum recognizes the New York divorce, and on that account holds *X* and *Z* to be married (the law of Italy providing no further bar), it declares a status not existing by the law of the matrimonial domicile. If it grants a nullity decree on grounds that by Italian law (the law governing the main question) the parties lacked capacity, it ignores its own general rule for recognition of foreign divorces, with the result that New York considers *X* and *Y* divorced, but the forum might still consider them married. Uniformity among the three states cannot be achieved because of the peculiar Italian rule. Hence, whether the forum adopts the conflicts rules of the matrimonial domicile or its own rule, uniformity will not be had. The best result would be to apply the same decision the matrimonial domicile would give, thus refusing to recognize the marriage of *X* and *Z*. Indeed this result is required if a total-*renvoi* theory is applied. It would not preclude a court from recognizing the validity of the divorce of *X* and *Y* if that question arises again in the forum. The court may refuse to recognize the marriage simply because of Italian law, without considering the New York divorce invalid, at least beyond the particular scope of this case.

The application of the total *renvoi* theory may lead to cases where the forum is required to ignore both its own conflicts rules and the ordinary rules of the chosen system. Such a case may arise when the question relates to a person's right to succeed as heir to land in England. See the discussion of *Doe ex dem Birtwhistle* v. *Vardill*[72] *supra* at page 537. A further example may be given. The plaintiff was recognized in writing as the son of the intestate, while the intestate was still domiciled in Norway. The intestate moves to South Dakota and acquires land there. Norway had not, at the time of recognition, or after, any recognition statute. South Dakota had then a "recognition" statute which, however, it

[72] (1839), 7 Cl. & Fin. 895.

characterizes as an inheritance statute, setting up a certain procedural requirement for recovery—that is, that the claimant must prove by writing of the natural father that he is the natural son. Therefore, South Dakota, by applying its *domestic* law, allows the claimant to recover, even though, by application of its conflicts rules, there was certainly no valid recognition. In this case the forum should ignore, as irrelevant, both its own and South Dakota's recognition rules on the conflicts of law, and follow the characterization of the matter made by the South Dakota court.[73]

The approach in cases of succession, all important in respect of the problem of this essay, is particularly difficult. So far as the English courts are concerned, they appear committed to the view of total *renvoi*.[74] Hence the decision on the incidental questions must here follow the foreign court. Although the English courts may hold to the principle that legitimacy and legitimation are matters of status, if the *lex successionis* does not treat them as such, but adopts some different principle in interpreting who is legitimate, the English court must nevertheless, if it applied *renvoi*, adopt the foreign solution. The English view that legitimation is a matter of status may thus give way if England is not the *lex successionis*.

But, if the *renvoi* theory is rejected, what ought the forum to do? Suppose the case of a German national dying domiciled in Greece, leaving movables in Massachusetts and Greece. Suppose further that Massachusetts rejects the total *renvoi* theory, and applies the domestic rules of Greece on the succession issue. Why does it do so? Uniformity of distribution, obviously, is not uppermost in the court's mind. The connecting factor of domicile is selected supposedly because of some connection, thought to exist, between the domicile and the decedent. It would seem that this "natural" connection could be explained (1) on the supposition that the testator, by identifying himself with the community of his domicile, wishes the law of his domicile to test the validity of his will or determine the devolution of his property on intestacy. So close a connection with a given country would seem to justify, in most cases, an assumption that the testator would intend his property to be distributed according to the canons of distribution with which he is most likely to be familiar, and which will govern the estates of his neighbours. (2) The connecting factor is selected on

[73] *Moen* v. *Moen* (1902), 16 S. D. 210. See also *Dogliani* v. *Crispin* (1866), L. R. 1 H. L. 301.

[74] See *Kotia* v. *Nahas*, [1941] A. C. 403; *Re Annesley*, [1926] Ch. 692; *Re Ross*, [1930] 1 Ch. 377; *Re Askew*, [1930] 2 Ch. 259.

a "modified *renvoi*" basis. Aside from the factor of uniformity of devolution, the justification for the English courts applying total *renvoi* in succession cases would seem to reside in the belief that the question is really one for the domicile to decide. The problem *belongs* to the domicile. That is the community with which the *propositus* was principally concerned at the time of his death.

But how can the rejection by the forum of the connecting factor adopted by the selected state be reconciled with this assumption? How can a forum say that the matter really belongs to Greece (the domicile) and not do as the Greeks courts do? The answer is not obvious. But Robertson seems content to reject *renvoi* on the main question, and yet consider that the whole matter really *belongs* to Greece. This must explain why he, as well as Wolff, consistently desires to leave all secondary matters to the chosen law. The argument seems to be that, so far as the forum is concerned, the *propositus* is a Greek like any other Greek. If the Greek court considers that he is German, that is either wrong or irrelevant. Hence the forum can ignore the fact that the Greek court fails to consider the issue as Greek because it is in fact doing what the Greek court *ought* to do. If the Greek court applied Greek *domestic* law on the main question, it would not for that reason ignore foreign elements in the case so far as incidental questions are concerned. As the Greek court treats the incidental question, so must the forum. There is nothing inconsistent in our ignoring what the Greek court does on the main question, and yet following it on subsidiary questions, because doing what the Greek court does on subsidiary questions in no way infringes on our determination that this is really a Greek question.

The result seems to be this. *However a Greek court would treat a case where there are no relevant foreign elements on the main question, but there are on subsidiary questions, so must the forum treat the case. By doing this we most satisfactorily effectuate our decision to treat the facts as raising a problem that belongs to the Greek community.* This might aptly be called a "modified *renvoi*" approach.

Let us assume, first, that the first rationale is correct—that the law of the domicile is applied as being most probably in accordance with the testator's wishes. It would be quite plausible to assume that the testator intends the ordinary *domestic* law of his domicile to apply to his estate on intestacy and yet not to assume that domestic law would apply to questions such as legitimacy and legitimation. If domestic law is applied to a foreign legitima-

tion, the deceased's children may be bastardized when he enters the shores of his domicile. His ordinary assumption would appear to be that his children that were legitimized outside the state would be treated as legitimate by the state, if they were found to be so by application of its *conflicts* rules to this issue. He would not intend the *domestic* rules of the domicile to apply to legitimation.[75] Certainly he would not intend the *conflicts rules of whatever happens to be the forum* to apply either. Hence, on the first rationale, the conflicts rules of the law governing the main question should be applied.

So far as cases of wills are concerned, the first rationale of the domicile rule seems particularly suitable. In so far as we say that "who are the children of *X*" is really a question of construction, children meaning legitimate children, the testator could conceivably mean legitimate by the *domestic* law of his domicile, more likely by the conflict of laws of his domicile, but on no account would he mean legitimate by the law of the forum. Thus Welsh, a strong supporter of the view that legitimacy is a question of construction, says:[76]

> where the question of legitimacy at birth . . . arises incidentally to a matter of succession, it is regarded merely as a question of construction and is therefore governed by the *lex successionis*. [p. 67]
>
> . . . the question of his legitimacy must be determined by the law governing the succession itself, *including its rules of the conflict of laws*. [p. 91; italics supplied]

It follows from these submissions that

> [o]n principle it would seem fantastic to suppose that the House of Lords would have come to the same conclusion in *Shaw* v. *Gould* if the testator had died domiciled in Scotland and if the land had been situate in Scotland instead of England: if a Scottish testator leaves movables or Scottish land to the 'children of *X*' why should he be assumed to have intended his dispositions to be construed in accordance with any law other than his own? [p. 86]

[75] It is not difficult to imagine situations where the decedent might be taken to have intended the domestic and not the conflicts rules of his domicile to apply. This would appear to be the case, for example, where the children of an intestate are illegitimate by the domicile's conflicts rules but legitimate by its domestic law. A refinement of reasoning might lead one to conclude from this that the testator should be taken to intend the more favourable of either the domestic or conflicts rules of his last domicile. But could he reasonably expect he would be treated more favourably by the domicile than any other domiciliary whose children were illegitimate by its conflicts rules? The intestate would be taken to intend the ordinary conflict rules to apply. Whatever rule is held to be generally applicable to legitimacy cases by the *lex successionis* he would expect to be applied to his own children.

[76] See (1947), 63 L. Q. Rev. 65.

For obvious reasons, if rationale two is adopted, the same result is reached. If the problem belongs to the domicile, this means we must treat it as the domicile does, which means, on this view, applying the *domestic* law of the domicile on the main issue and the *conflict of laws* of the domicile on the incidental issues. So, whether the analysis of the choice-of-law rule on succession is one that requires total *renvoi* or "modified *renvoi*", or is based on a presumed intent of the deceased, the conflicts rules of the *lex causae* will apply. This result has the further merit of being more likely to produce a uniformity, if not between the domicile and the forum, still between all the forums that may have some of the deceased's property within their boundaries. If all forums apply the domestic law of the domicile on the main issue, and its conflicts rules on the incidental, a greater uniformity will be achieved than would be if each forum applied its own conflicts rules on the subsidiary questions.

Turning from succession to tort, we may suppose a case arising under a Lord Campbell's Act type of statute. A husband (*H*) is killed by the negligence of *D* in state *Y*. *W*, the wife, sues in state *X* for loss of services. If the validity of the marriage is found to be a necessary condition for recovery, what law should govern that question?

It would seem that in this case the existence of the status is really a question for the law governing the marriage as selected by the forum *X*, not by state *Y*. The purpose behind the rule that the *lex loci delicti* governs all tort questions is obscure, at least in the opinion of the present writer. Of course if a jurisdictional, vested-rights approach is taken, this would certainly argue for total *renvoi*. It follows that the forum ought then to do what the *lex loci delicti* does on the incidental question as on all other questions. This is a possible approach but one that does not commend itself. The place of the tort might be quite fortuitous. If the parties have no real connection with the place, it cannot always be said that the facts really "belong" to the community where the tort occurred. The appropriateness of the domestic law of the *lex loci delicti* does not usually arise from the conviction that the question is really one for its courts to decide. It would not appear to go beyond the principle that acts innocent where done ought not to be made wrongful elsewhere, or the belief that people should regulate themselves according to the rules of public order of the place where they are. If two people, husband and wife, enter state *Y* on a short holiday, and while there the husband injures the

wife, it is arguable that the law of *Y* should govern the existence of the tort. But it seems outside the scope of reference of the rule to hold that the existence of the marital relation should also be determined by *Y*'s rules. Of course if *W* is not the wife of *H* according to the conflicts rules of *Y*, a third person may argue that *vis-à-vis W* his tortious act to *H* is innocent within the boundaries of that state. A refinement of reasoning might lead to this result, but it would seem that his act could hardly be said to be "innocent" or "justifiable", if it was wrongful *vis-à-vis* the husband, even recognizing the relativity of the meaning of what is "wrongful".

If the *lex loci commissi* is also the domicile of the parties concerned, different considerations apply and a different approach might well be taken. If the parties have lived in state *Y*, for example, forty years, and all facts occur there, and if *W* just happens to find the defendant in the forum, there is much to be said for allowing state *Y* to determine, according to its conflicts rules, what law governs the validity of the marriage. A conflict of conflicts rules is not likely to occur, but if *X* selects the *lex loci contractus* to govern the validity of the marriage, and *Y* the matrimonial domicile (and hence its own domestic law), the proper solution would seem to be to apply the law of *Y* on the incidental as well as the main question.

Where title questions arise incidentally in a tort action, different factors are present and considerable difficulty may be involved. Thus Robertson[77] is unwilling to fit such cases into his general scheme. He fears a case where the defendant, if the conflicts rule of *lex loci delicti* are applied, may be liable to two different plaintiffs for the same conversion. Thus if the plaintiff has title to goods by the *lex loci delicti* and not by the forum, if the forum allows an action for conversion it may not long after find itself entertaining a suit against the same defendant by the person who owns the goods according to its own law. Is the court to require the defendant to pay twice? Or will it give an action only to the owner by its own general law? The latter seems the better solution, both as being more just and as tending to promote consistency in the forum. Otherwise the court might deny the plaintiff's title one day and affirm it the next when the issue of his title arises independently. Thus it would appear to be more in accordance with the policy of the forum that the plaintiff must have title by its own law. But if the plaintiff's action is a purely *tortious* one, it is at least arguable that the de-

[77] *Op. cit.*, p. 154, following Melchior and Wengler.

fendant may set up his title under the *lex loci delicti* as a defence. If the plaintiff is suing not for compensation, however, but to regain his goods which are now in the jurisdiction of the forum, it would appear that he would win although the defendant has title under the *lex loci delicti.*

The problems that might arise relating to contract are quite similar. For instance, the principal question might relate to a surety contract, whose validity by its proper law depends upon the validity of the principal obligation.[78] If the proper law of the surety contract is, say, the domestic law of Italy, selected by force of *the intention of the parties express or implied,* the intent of the parties would presumably be to subject the principal obligation to Italian law as well. In such a case it would appear that the *domestic* rather than the conflicts law of Italy should govern the validity of the principal obligation, since it would more probably accord with the parties' intention. Most probably they would wish the more certain domestic rules of Italy to apply to both the surety and principal contracts, for this purpose treating the facts as hypothetically occurring in Italy.

On the other hand, if Westlake's and Dr. Cheshire's[79] view of the proper law be accepted, that is, that the law of closest connection governs the contract, a different conclusion may be reached. Their view presupposes some "natural connection" between the contract and the proper law. Thus Cheshire writes:

> . . . the proper law is the law of the country in which the contract is localised. Its localisation will be indicated by what may be called the grouping of its elements as reflected in its formation and in its terms. The country in which its elements are most densely grouped will represent its natural seat. [p. 203]

In a sense the selected law is the "predestinated" law of the contract. Hence it would seem that the *whole law* of the chosen system would most forward the purposes behind the selection of the connecting factor. The advocates of the doctrine of Westlake and Cheshire would certainly not agree with this submission. But their position is not unlike Beale's, who selected the *lex loci contractus* as the proper law of a contract and yet rejected the *renvoi.* The selection of the *lex loci contractus* would also seem to rest on a broad territorial "predestinated" theory, much like Dr. Cheshire's view. If these solutions of the proper law of a contract are adopted

[78] The case is posed by Wolff, *op. cit.*, pp. 207-208.
[79] Westlake, Private International Law (7th ed.) p. 302; Cheshire, *op. cit.*, pp. 201 ff.

— either that of Dr. Cheshire or the Restatement — it is submitted that the incidental questions ought to be decided according to the conflicts norms of the law governing the main question. But in view of the fact that these writers rejected the doctrine of *renvoi* it is difficult to determine how they would treat the incidental question. Cheshire seems to be of the opinion that the English courts would generally apply the law of the forum to all incidental questions.[80] Yet it would seem that their view comes close to what I have called "modified *renvoi*", and hence the conflicts rules of the system selected to govern the main question might be applied to all incidental questions as well.

A similar problem may arise in a restitution action (*condictio indebiti*) where the defence is that the money paid was in fact owing under a contract.[81] Suppose no contractual debt is found to be owing under the proper law of the restitution action. Can the unsuccessful defendant come into court and succeed against the plaintiff in the former action on grounds that the contract is valid under the forum's general rule on the proper law of the contract?

In this type of case there is lurking the very large problem of *res judicata* and the public policy of the forum. Although the forum may be quite willing to distinguish the existence of status from its incidents, or to ignore a determination already made on an issue on the ground that it is *res inter alios acta*, it may not, as between the same parties, be willing to affirm one day what it denied on another. It would seem that the sensible result is to apply the forum's rule on the validity of the contract and not that of the law governing the restitutory action. Otherwise, either the principle of *res adjudicata* will be offended or the court must deny actions that are perfectly valid when arising under its own general conflicts rules.

I have indicated earlier in this article cases where the public policy of the forum was thought to provide overriding considerations in the determination of the case.[82] Suppose the forum-domicile (England) grants two Italian nationals a divorce, which, however, is not valid by Italian law. The parties then become domiciled in Italy and each remarries in Italy. If the validity of the Italian marriage arises in the forum, can it say that the husband, being married under Italian law, lacked capacity? The forum

[80] *Op. cit.*, p. 91.

[81] This is another of Robertson's "exceptional" cases; see *op. cit.*, pp. 154-155.

[82] Cf. the decision of the Reichsgericht, March 21st, 1912, and the Tribunal de Rabat, December 28th, 1932, *supra*, pp. 541-542.

can hardly be expected to pronounce its own decree invalid. But the best approach would be for the forum to refuse to recognize the second marriage, it being a nullity by the *lex domicilii*. The divorce may be treated as valid, but the court must still recognize that the marriage was a nullity by the domicile.

Suppose the same facts, but the husband marries his second wife while both are domiciled in England. The two then move to Italy and the husband dies domiciled there. Which of the women is the true wife of the husband for purposes of succession to property in England?[83] There are three possible solutions to this difficult question. The forum might deny recovery to both wives, or it might allow the claim of the second wife only, or of the first only. In favour of the first view, it may be said that the second spouse cannot recover because she is not entitled under the *lex successionis*, and, to admit the claim of the first spouse, the forum would have to pronounce its own divorce decree invalid, even though correctly given. Drs. Morris and Wolff support the second view, that the later spouse may inherit.[84] By application of the forum's conflicts rules both the divorce and the second marriage were valid. If the public policy of the forum prevents it from pronouncing its own divorce invalid on the question of the existence of the first marriage, it would seem also to prevent the forum from treating the second marriage as invalid simply on the ground of the invalidity of its own divorce under the *lex successionis*. Hence, of these two views, the latter seems preferable. But it is not entirely clear that the forum would be wrong to favour the first spouse, who is considered the wife by Italy. Several arguments can be made in her favour. Thus it is quite clear that, if the forum applies the *renvoi* theory (as the English courts do in succession cases), it must consider the question as one entirely for the courts of the testator's domicile. The validity of the divorce arises only incidentally to a question of succession and hence, if the forum allows the claims of the first spouse, as does the domicile, it is considering its own divorce invalid only within the narrow scope of a particular action which is primarily the concern of Italy. Allowing the second wife to recover will promote a diversity in distribution, which will be even greater should other countries possessing some of the estate, untroubled by the contradiction of being required to invalidate one's own valid divorce, adopt the solution

[83] See Wolff, *op. cit.*, p. 209. He treats the case as exceptional.

[84] Book review of Wolff (1946), 62 L. Q. Rev. 88, at pp. 89-90. Wolff, *op. cit.*, p. 210, supports Morris's view. In the first edition (1945) he denied recovery to either wife (at p. 211).

of the *lex successionis*. Certainly, if the domicile is selected as connecting factor because it is assumed that the intestate intends its laws to apply to the distribution of his estate, he would be taken to know that his second wife was not his spouse by the law of his adopted home and that his former wife was entitled to recover.

VI. *Conclusion*

The foregoing analysis indicates the high degree of complexity of many of the problems. In each case the acceptance or rejection of the *renvoi*, the general purpose behind each choice-of-law rule, the factors of consistency of decision and the public policy of the forum may all be important to consider. It should be manifest from the discussion that general rules simply cannot work in the area of the incidental question. Because a good deal of the earlier analyses either avoided some of the relevant factors, or oversimplified them, the problems were conceived to admit of a unitary solution, one that would apply for most if not all types of cases. In actual fact such solutions, if followed by the courts, would be a handicap to the proper development of the law, just as over-reliance by some American courts on academic criticism of the *renvoi* doctrine led to results that have been overturned today.[85] There is really no problem of "the incidental question", but as many problems as there are cases in which incidental questions may arise. I have attempted not so much to provide solutions to all the problems discussed as to suggest methods by which reasonably satisfactory results may be achieved.

Useless Learning

A university, a great university like this, a world famous university, does not exist merely to make people competent lawyers or competent engineers or competent surgeons or whatever it may be; it exists primarily to send out through its portals men and women with civilized minds, men and women who have learned to understand and therefore to tolerate, men and women who have touched learning by the hem and have gained something from it. A man who will never understand these things may become a mechanical genius and the enemy of mankind. What we learn here was so perfectly expressed in the opening prayer: the love of learning and the good of mankind. (The Rt. Hon. Robert Menzies, Prime Minister of Australia, at a Special Convocation held at McGill University on March 11th, 1955)

[85] See *In re Tallmadge* (1919), 109 Misc. Rep. 696; *Re Schneider's Estate* (1950), 96 N. Y. S. 2d 652 (Sup. Ct.).