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## Addenda to "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws"

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ADDENDA TO "RENOI, CHARACTERIZATION,  
LOCALIZATION AND PRELIMINARY QUESTION  
IN THE CONFLICT OF LAWS"\*

JOSEPH M. CORMACK\*\*

§3. PROFESSOR LORENZEN'S ARTICLE

Another able contribution by Professor Lorenzen<sup>1</sup> upon the characterization and localization problems appears in the March issue of the Yale Law Journal,<sup>2</sup> localization being treated as "characterization of the connecting factor."<sup>3</sup> He does not favor a general statement of distinction between the primary and secondary processes, holding that, as a matter of general principle, the forum should apply its own views.<sup>4</sup> However, he adds:

"As the law of the forum is chosen in the above [characterization and localization] classes of cases for want of any other practicable rule, it should be abandoned whenever some other reasonable solution can be found. For that reason the question whether tangible property is movable or immovable should be determined on the basis of the law of the situs. Again, if the fact situation is exclusively connected with foreign states or countries, the law of the forum being interested solely as the place of trial, a common characterization placed upon it by the law of all the foreign states or countries involved should be accepted.

"To the extent that the law of the forum understands its Conflicts rules in the renvoi (*In re Amesley*) sense [of which Professor Lorenzen does not approve], the adoption of the characterization made by the foreign law would follow."<sup>5</sup>

He also states:

"It goes without saying that if the qualification problem merely involves the application of the foreign internal law, the foreign law should control."<sup>6</sup>

Professor Lorenzen feels that the forum should decide for itself to

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\*In the preceding issue of this review, 14 SOUTHERN CALIFORNIA LAW REVIEW, 221 (March, 1941).

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<sup>1</sup>Professor Ernest G. Lorenzen, Edward J. Phelps Professor of Law, Yale Law School. Professor Lorenzen's distinguished contributions in this field have been discussed in the original article.

<sup>2</sup>The Qualification, Classification, or Characterization Problem in the Conflict of Laws, 50 Yale L.Jour. 743 (1941). He discusses recent Continental literature, at p. 746.

<sup>3</sup>Lorenzen, The Qualification, Classification, or Characterization Problem in the Conflict of Laws, 50 Yale L.Jour. 743, 750 *et seq.* (1941).

<sup>4</sup>Lorenzen, The Qualification, Classification, or Characterization Problem in the Conflict of Laws, 50 Yale L.Jour. 743, 761 (1941).

<sup>5</sup>Lorenzen, The Qualification, Classification, or Characterization Problem in the Conflict of Laws, 50 Yale L.Jour. 743, 761 (1941).

<sup>6</sup>Lorenzen, The Qualification, Classification, or Characterization Problem in the Conflict of Laws, 50 Yale L.Jour. 743, 758 (1941).

what extent it should apply foreign laws which may be considered procedural, such as statutes of limitations, statutes of frauds, requirements of notices of injury, and burdens of proof; and it is upon this that his objection to recognition of secondary characterization is largely based.<sup>7</sup> I have contended that the forum must be expected to distinguish for itself between substance and procedure as a matter of primary characterization,<sup>8</sup> and have pointed out, following other writers, that the categories required for purposes of characterization will sometimes be different from those utilized in the internal law of the forum.<sup>9</sup>

The difference between Professor Lorenzen's position upon the entire subject and mine would seem to be only in method of statement. It may be assumed that he would not desire to have the forum so characterize a matter relating to property as to cause the forum to adopt a view as to the title different from that prevailing at the situs,<sup>10</sup> and that likewise he would not desire to have the forum so characterize a matter relating to status as to cause the forum to adopt a view as to status different from that prevailing at the domicile.<sup>11</sup> If so, he is only in verbal disagreement with my contention that, in dealing with such matters, the primary characterization is that the matter is one of property or of status, respectively, and that any further characterization required is secondary.<sup>12</sup>

## §2. CHOICE BETWEEN STATUS AND PROPERTY

I have suggested that the forum should yield upon primary characterization if the jurisdiction of situs or of domicile claims that the matter is one of property or of status, respectively.<sup>13</sup> In this connection I pointed out that, through the adoption of this suggestion, the forum may find itself confronted with the dilemma that the jurisdiction of situs claims that the matter is one of property, and the jurisdiction of domicile that it is one of status. I then concluded:

"In such an unusual situation it is a relatively simple matter for the forum to fall back upon its own view."<sup>14</sup>

<sup>7</sup>Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws*, 50 *Yale L.Jour.* 743, 760 (1941).

<sup>8</sup>Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 *SOUTHERN CALIFORNIA LAW REVIEW*, 221, 231, 233 & 238 (1941).

<sup>9</sup>Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 *SOUTHERN CALIFORNIA LAW REVIEW*, 221, 230 (1941).

<sup>10</sup>In the case of personal property the relevant situs will be that at the time of the transaction under consideration.

<sup>11</sup>The relevant domicile will be that at the time of the events under consideration.

<sup>12</sup>Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 *SOUTHERN CALIFORNIA LAW REVIEW*, 221, footnotes #107-115 (1941).

<sup>13</sup>Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 *SOUTHERN CALIFORNIA LAW REVIEW*, 221, 229 (1941).

<sup>14</sup>Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 *SOUTHERN CALIFORNIA LAW REVIEW*, 221, 230 (1941).

A better solution would seem to be that the view of the jurisdiction of situs should prevail. It would seem to be wise to preserve certainty as to titles to property, even though it is not possible to prevent the existence of a corresponding degree of uncertainty as to matters of status.

§13. SECONDARY CHARACTERIZATION WHEN PROPERTY MATTER  
TREATED AS THOUGH ONE OF STATUS

The secondary characterization will here also be referred on to the jurisdiction of domicile.<sup>15</sup> For example, if a question of legitimation or adoption arises in connection with the disposition of personal property at death, the jurisdiction of domicile will decide whether, under its public policy, that portion of the problems relating to the estate shall be characterized as involving the status of interested parties, therefore to be governed by the domestic law of some other jurisdiction, such as that of the domicile of the father at the time of alleged acts of legitimation.

The only primary characterization is that the matter is one of property. That primary characterization is not contradicted when the matter is treated by the jurisdiction of situs *as though* it were one of status, or when the secondary characterization is made. For clarity of thinking in dealing with the problems discussed in this article, it is indispensable, when one jurisdiction applies the law of another, to realize *why* it is doing so.

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<sup>15</sup>See original article, Cormack, Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws, 14 SOUTHERN CALIFORNIA LAW REVIEW, 221, 234 and footnote #81 (1941).