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RENVOI, CHARACTERIZATION, LOCALIZATION AND PRELIMINARY QUESTION IN THE CONFLICT OF LAWS:

A Study of Problems Involved in Determining Whether or Not the Forum Should Follow its Own Choice of a Conflict-of-Laws Principle

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I. Nature of Study

The purpose of this study is to bring together within the confines of a single article a survey of the various problems which have arisen in the field of conflict of laws, both in this country and abroad, as to whether the forum

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1For convenience in future reference, each subdivision of the table of contents,
should follow its own choice of a conflict-of-laws principle, or should apply a conflict-of-laws principle selected for it by some other jurisdiction. The "forum", it should be explained, is the term used in this field to designate either the court or the jurisdiction in which litigation is pending, and where any particular case must, therefore, be decided, as distinguished from other jurisdictions having some relation to the facts of the case. Obviously, more than one jurisdiction must be involved in some manner in order to have a conflict-of-laws problem. The four topics set forth in the title will serve as a check list to remind the student of conflict of laws of the various approaches to these problems which have been developed. The topic mentioned last, the "preliminary question," is believed to be illusory, as will be seen, but needs to be brought to the attention of one who would be fully cognizant of developments of thought in the field.

To give at the outset an illustration of the nature of the problems involved, let us suppose that a court of the forum, jurisdiction A, is required to pass upon the validity of a contract executed in jurisdiction B, and to be performed in jurisdiction C. It is the conflict-of-laws rule of jurisdiction A that the validity of a contract is to be determined by the domestic law of the jurisdiction in which it is executed (in this instance, jurisdiction B), but it is the rule of jurisdiction B that all matters relating to a contract are to be determined by the law of the jurisdiction in which it is to be performed (in this instance, jurisdiction C). Shall the forum follow its own rule, and apply the domestic law of jurisdiction B to determine the validity of the contract, or shall it follow the conflict-of-laws rule of jurisdiction B, and determine the validity of the contract in accordance with the domestic law of jurisdiction C? This is one aspect of what is known as the renvoi problem. By domestic law is meant the body of principles applied by the courts of a jurisdiction when all the facts are local to, that is occurred within, that jurisdiction. An example of this is when a court there situated is passing upon a contract made within that jurisdiction and to be performed within it, all parties involved being local citizens. In the renvoi problem stated, in regard to jurisdictions A, B and C, it may be said that the American rule is for the forum to follow its own conflict-of-laws rule, and therefore apply the domestic law of jurisdiction B, the place of execution, to determine the validity of the contract. This is called rejection of the renvoi doctrine, the doctrine being that the forum should follow the conflict-of-laws rule of whatever jurisdiction is looked to by the forum as governing the problem

as set forth here and in headings throughout the article, which refers to text material without further subdivision, will be indicated by a section number.

2 See §5, infra.

3 See §6, infra.

4 See §8, infra. Later discussion in the text will develop that there is dissent from the suggestion that it is possible to state any general American rule. Cf. Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165 (1938). Exceptions to the American rule outlined in the text will be discussed in §§9-14, infra.
before it. In countries having the general rule of rejection, matters of property and status are treated as exceptions. 5

The questions which will be discussed are in a part of the law which is still in an unsettled and formative state. Cases in which courts have been conscious of the existence of such problems are very few in number, and are illustrative rather than decisive as to the state of the law. As more principles are worked out definitely in the field of conflict of laws in general, so that a judge is more often able to ascertain what are the conflict-of-laws principles of other jurisdictions, the importance of these questions will increase. As long as a judge confronted with a conflict-of-laws problem is unable to ascertain what are the relevant principles of other jurisdictions, it is obviously a purely theoretical question whether he purports to be applying the conflict-of-laws principles of those jurisdictions or of his own. Consideration of the problems discussed in this paper before there are many decisions upon them may serve as an influence toward preventing the rendition of a mass of confused and contradictory holdings.

II. CHARACTERIZATION

1. (§2) PRIMARY CHARACTERIZATION

Considerable ground-clearing, in the form of consideration of other problems, 6 will be indulged in before taking up in detail the renvoi problem given as an illustration in the preceding section. The renvoi problem, being much the most complicated in all its ramifications, as well as the most important, can advantageously be considered last. In general, the problems will be discussed in the order in which they appear chronologically in the consideration of a case.

The problem which thus arises first 7 is that of characterization, 8 also referred to as "qualification," 9 as in the Restatement 10 and generally abroad, or "classification." 11 It may be defined as the determination of the nature

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5See infra, §§9-13; see, also, supra, §14.

6Strictly speaking, these problems are special variations of the renvoi problem, using that term in the sense of any problem of use by the forum of foreign conflict-of-laws principles.


8Robertson, in his book which the present writer believes is destined to be very influential in connection with this problem, "feels that 'characterization' is, on the whole, the most appropriate term, as being more nearly used in this context in the same sense as in ordinary speech." Robertson, Characterization in the Conflict of Laws (1940), 24.

9This is the term generally employed upon the Continent. 1 Beale, Conflict of Laws (1935), 55, §72; Beale, The Conflict of Laws, 1886-1936, 50 Harv.L.Rev. 887, 890 (1937); Falconbridge, Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235, 239 (1937); Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Coll.Rev. 246, 249 (1920); Mendelssohn-Bartholdy, Delimitation of Right and Remedy in the Cases of Conflict of Law, 16 Brit.Y.B.Int.Law 20 at footnote #1 (1935).

10Restatement, Conflict of Laws (1934), §7, Comment (b).

11Becket, The Question of Classification ("Qualification") in Private Interna-

presented to the court for solution, as the first step in deciding what conflict of laws principle shall be selected to govern it. In the Restatement of Conflict of Laws it is defined as the determination of "the quality and character of legal ideas." To illustrate, if characterized as a contract case, the forum may desire to apply the law of the place where the contract was to be performed; if characterized as a tort case, the forum normally will apply the law of the place where the tort occurred. As a general principle, it seems to be universally agreed in this country, with foreign opinion largely in accord, that the forum is to perform the process of characterization in accordance with its own views—that is, the forum will not inquire whether or not the problem is similarly characterized by the jurisdiction to which the forum looks as the result of its own determination of the character of the problem. Certain suggested exceptions will be discussed later in this section.

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12While, for convenience, the discussion in the text is in the singular, it is not meant to be inferred that a case may not involve more than one problem requiring characterization. Robertson, Characterization in the Conflict of Laws (1940), 135.

13Robertson speaks of characterization as "allocation of 'the factual situation' or 'the question' to its correct legal category." Characterization in the Conflict of Laws (1940), 60. He also says: "The function of primary characterization is to put upon the facts a legal complexion, or allot them to a legal category, which will have a choice of law rule available for the disposition of the case." Ibid. 61. He likes Unger's "subsumption of facts under categories of law." Ibid. 62, citing Unger, The Place of Classification in Private International Law, 19 Bell Yard 3, 17-21 (1937).

14§7(a).


As shown by these writers, a view has been advanced abroad, by Despagnet, that characterization should be governed by the rule of the jurisdiction which the forum has selected to furnish the domestic law to govern the case before the court. How far the forum can and should do this will be discussed in the text.

It has also been suggested that characterization should be governed by a body of principles developed internationally, and not a part of the law of any country. Meriggi, ibid. 329, 348. Beckett, who also advocates this, calls it "analytical jurisprudence, a branch of legal science which is in essence purely general and theoretical, and not national." Beckett, The Question of Classification ("Qualifications") in Private International Law, 15 Brit.Y.B.Int.Law 46, 72 (1934). This seems to be a purely theoretical approach, as a principle of characterization becomes a part of the law of any nation which adopts it, and apart from such adoption can not be law anywhere. It is a truism that "international law," at least up to the present moment, is really a misnomer.

It has been suggested that this internationalist view has caused the entire subject
It is obvious that in every conflict-of-laws case the court necessarily has performed the process of what is now termed characterization. If the court has decided that a tort is to be governed by the law of the place where the tort occurred, it has, in the process, characterized the case as one of tort. Nearly always this has been done unconsciously, properly enough by the use of what Wigmore likes to call "shorthand reasoning." Only in the more difficult and borderline cases will it ever be necessary for the courts consciously to give attention to the process of characterization. Nevertheless it is through careful consideration of such processes that a great deal of the progress of legal science is achieved. The unconscious practices of the courts are synthesized into a principle, which enables the courts to do their work more clearly, and assists in the future development of the law and the avoidance of errors.

Various terms, as pointed out, have been used to describe the process now under consideration. The present writer feels that "characterization" is the one which most aptly describes the nature of the determination which is being made. It seems to be a clear and natural mode of statement, and to be in harmony with ordinary usage, to say that the process is one of de-

of characterization to be discussed, particularly upon the Continent, much more than its importance would justify, because of the feeling of the "doomed" internationalist school, "which has so long dominated continental Private International Law," that in connection with characterization there exists a last opportunity to develop general conceptions to be applied by all countries and different from the internal law of any. Nussbaum, Review of Robertson: ibid., 40 Col.L.Rev. 1461, 1469 (1940). See, further, in regard to the internationalist school, Lorenzen, ibid., 268-262.

Professors Nussbaum and Rheinstein question the value of the doctrine of characterization. The former says: "Especially with regard to characterization the question 'What price qualification' should be posited at the outset." Ibid., 1974. Professor Rheinstein feels "that more discussion is desirable . . . before qualification is admitted to an established place in the American conflict of laws." Review of Harper & Taintor: Cases and Other Materials on Judicial Technique in Conflict of Laws, 8 Brooklyn L.Rev. 253, 262 (1938). He discusses a number of cases to make his point. Ibid., 256 et seq. Professor Rheinstein would include the forum's consideration of the nature of the problem as a part of its choice of a conflict-of-laws rule. He does not suggest what should be done by the forum if it has the renvoi doctrine, and does not desire to follow its own conflict-of-laws rule, and each of the other jurisdictions considered by the forum has such a view of the nature of the problem as to cause its domestic law to be applicable (or, conversely, each of the jurisdictions holds a view of the nature of the problem making its domestic law inapplicable).

16This line of thought is well set forth in Robertson, The 'Preliminary Question' in the Conflict of Laws, 55 Law Quar.Rev. 563 (1939). Because of the fact that courts generally are not conscious that they are performing the process of characterization, it has been compared by a German writer to ultra-violet rays which are only visible at certain altitudes. Wolff, Internationales Privatrecht (1933), 40; quoted, Unger, The Place of Classification in Private International Law, 19 Bell Yard 3, 5 (1937).

17Robertson analyzes in great detail the steps necessary in the solution of a conflict-of-laws case. Characterization in the Conflict of Laws (1940), 9, 17, 283. This will be developed later in the present article. For an analysis by Dean Falconbridge, see Characterization in the Conflict of Laws, 53 Law Quar.Rev. 225, 236 (1937).

18This term was first suggested by Dean Falconbridge, of the Osgoode Hall Law School, of Toronto, who has done outstanding work in this field. Mortgages (3d ed. 1933), 734.
terminating how, from a legal standpoint, the particular problem shall be characterized. As legal principles must be classified, throughout the law, in order that they may be studied systematically, it seems relatively artificial to assign to "classification" a technical meaning in the present connection. "Qualification" is open to the objection that it suggests a connotation of placing some sort of a limitation upon a principle. Under the title "Characterization in the Conflict of Laws," Mr. A. H. Robertson, an English barrister, in some three hundred pages has given this problem more adequate consideration than has been received by any other discussed in this paper. It is to be expected that Mr. Robertson's able work will incidentally have the effect of standardizing "characterization" as the term to be used in this country.

The original process of characterization by the court of the forum, as above illustrated, is sometimes referred to as "primary." "Secondary" characterization is then used to refer to any additional process of characterization which may become necessary after the forum has decided to apply the law of another jurisdiction as the result of the primary determination. As will be developed in the following section, it may be accepted as settled that in secondary characterization the forum should follow the view of the jurisdiction selected through the primary process.

The theory of characterization was first formulated by Franz Kahn, a German, in 1891, and general attention was first directed to it by Bartin, a Frenchman, in 1897. It was introduced to Anglo-American legal thought by Professor Lorenzen, of the Yale Law School, in 1920. Bartin, thinking only of primary characterization, favored decision by the forum in accordance with its own views, reasoning that, insofar as the domestic law of any jurisdiction is applied, its sovereignty is being expanded, and that the forum could not be expected to look to other jurisdictions for conceptions of sovereignty. He felt that this was necessary in order to avoid the danger...
that other jurisdictions might deprive the forum completely of its sovereignty. Robertson properly criticizes this reasoning, upon the ground that the forum has no reason to fear loss of its sovereignty as long as it can change the situation at any time. He nevertheless reaches the same conclusion upon the basis of "practical convenience rather than logical necessity," feeling that "the difficulty of primary characterization is insoluble on logical grounds." He favors decision by the forum "simply because it is an easy, practical test in default of anything better."

The present writer feels that Robertson is correct in supporting decision by the forum upon practical grounds. The difficulties of the judge and attorneys in any case are increased whenever it becomes necessary to apply the law of another jurisdiction. This burden should not be imposed upon them unless there is some compensating advantage to be secured. At first glance it seems paradoxical and absurd to suggest that the forum may properly apply the domestic law of another jurisdiction to a case, when a court of that jurisdiction would not do so, because it would characterize the question differently, and when, if the suit had been brought in some other forum, the result would have been different, because that court would have had an alternative characterization. However, characterization is important only when there is a conflict of authority as to the nature of a problem, and, under such circumstances, it is hard to see how anything is to be gained by asking the forum to adopt the characterization of another jurisdiction. As will be seen more clearly as this study progresses, a great deal of the field of conflict of laws, from the practical standpoint of the litigant, is a gamble depending upon the forum in which the litigation is brought. In most aspects of this field, this inevitably will continue to be true as long as such conflicts of authority continue to exist. So the existence of such a gamble is not a feature to distinguish one situation in this field from most of the others.

Bartin and other writers are discussed in Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col.L.Rev. 247, 259 et seq. (1920). Consult Robertson, Characterization in the Conflict of Laws (1940), 1 et seq.

This thought will appear from time to time throughout this study, as justifying a basic presumption in favor of the forum's applying its own views. In the text, infra, at footnotes #37 and 191-193, the grounds for the existence of such a presumption will be further discussed.

Of course the plaintiff, if well advised as to the conflict-of-laws aspects of his litigation, will endeavor to manipulate the choice of a forum to his advantage, but possibilities in this regard generally do not exist.
Of course the gamble should be eliminated wherever possible, and there will be suggestions along that line in this article, and even in this section, but in the ordinary situation of the type now under consideration it is impossible to do so. By the ordinary situation is meant one where there is disagreement among jurisdictions other than the forum, or between the forum and other jurisdictions, as to which of their systems of domestic law is properly applicable. In the first case, the forum can not yield to both, and so must follow its own view. In the second, the forum could not be expected to depart from its view. Other situations will be discussed shortly.

Not only is there the practical argument that the forum should follow its own view, but it may also be suggested that, as a judge has taken an oath to administer the law to the best of his ability, there is a basic principle of integrity that he should follow his own judgment, subject to the views of his sovereignty, until he can find some good and sufficient reason for preferring the holdings of another sovereignty. This would seem to be a sufficient consideration to tip the balance of the scales of justice in a problem of this kind, when no countervailing influence can be found. This line of thought, and that in the preceding paragraph, will be relevant in connection with the discussion of other problems in this paper, in support of a general principle of presumption of adherence by the forum to its own views.

We shall now, however, consider a situation where it is possible to eliminate the gamble dependent upon which jurisdiction is the forum. If the forum holds that its own domestic law is not applicable, and the other jurisdictions whose law might possibly be applicable agree upon the characterization, it is possible for the forum reasonably to yield to their view, although contrary to its own. This seems to reach a good result in this sort of case, and it has been suggested that here there should be an exception to the rule that the forum is to follow its own view.

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33The validity of this reasoning is not affected by the number of jurisdictions involved. It would hardly be contended that the forum should abandon its own views because of an adverse majority vote of other jurisdictions.

34The number of such jurisdictions is immaterial. The forum could hardly be expected to abandon its own views because of a majority vote against it.

35It is assumed that it is the view of the forum that its domestic law is applicable. The situation where this is not the case will be discussed shortly.

36Regardless of the number of jurisdictions opposed, which would not affect the forum's sense of justice.

37"Self-effacement may be a fine moral gesture, but there is nothing to commend it if the judge who indulges in it flouts the law that it is his duty to administer." Cheshire, Private International Law (2d ed. 1938), 59.

38Beckett, The Question of Classification ("Qualification") in Private International Law, 15 Brit.Y.B.Int.Law 46, 51 (1934); Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col.L.Rev. 247, 281 (1920); Robertson, Characterization in the Conflict of Laws (1940), 76 et seq. Robertson states that the suggestion is offered "not so much as an exception to a general principle, but as a case where
It may be suggested that a further exception should be made in regard to matters of property and status. It is believed that the forum should adopt the characterization of the jurisdiction of situs or of domicile as to whether or not the problem is one of property or of status, respectively. As will be further emphasized as this study progresses, matters of property and of status stand out in the field of conflict of laws, in that there has always been universal agreement upon two basic principles of great practical importance, that matters of property are to be governed by the law of the situs, and matters of status by the law of the domicile. An exception to this statement in regard to foreign countries should be noted, in that under the civil law nationality generally is substituted for domicile. The obvious reason for agreement upon these basic principles has been the recognition of these very important matters as peculiarly subject to the control of the jurisdictions mentioned. Achievement of such control will be further accomplished insofar as the forum follows the characterization of the jurisdiction of situs or of domicile. Various writers have pointed out that logically it is impossible for the forum to look to any other jurisdiction until it has first ascertained that the nature of the problem is such as to cause it to do so, but it is not believed that this is a serious objection to the suggestion made. It is certainly feasible for the forum to make a preliminary investigation as to the view of the jurisdiction of situs or of domicile, in any matter which might be con-

39 Determination of what is the situs or the domicile will be discussed under localization, §4, infra. With most foreign countries nationality must be substituted for domicile.

40 An example of such a problem is whether a covenant not running with the land is a property or a contract matter. Dean Falconbridge has said that the forum "must accept whatever the lex rei sitae says as to the nature of the claim, including the characterization by the lex rei sitae of the claimant's interest as being proprietary or otherwise." Conflict of Laws: Examples of Characterization, 15 Can.Bar Rev. 215, 236 (1937). To the same effect: ibid., Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235 & 537, 543 (1937); ibid., Renvoi, Characterization and Acquired Rights, 17 Can.Bar Rev. 369, 378, 392 (1939).

41 "Further it would seem that the French courts have shown a disposition to accept, as a matter of personal status and capacity, rules of foreign law which were so regarded in that legal system, although, according to such evidence of the conceptions of French internal law as is to be found in French jurisprudence, these rules ought to have been regarded as falling into another category, such as the form of acts, or procedure. Vide, for instance, the famous Arrêts Levingçon, Clunet, 1905, p. 1006 [wills abroad by Dutchmen], and the Leeuwen case, Clunet, 1928, p. 707 [religious divorces of Russian Jews]." Beckett, The Question of Classification ("Qualification") in Private International Law, 15 Brit.Y.B.Int.Law 46, 54 (1934).

42 The problem of nationality vs. domicile will be discussed later in this section.

sidered one of property or of status, and it is not imposing an unreasonable burden upon the forum to ask it to do so.

There is a possibility that, through the use of this suggested exception, the forum will find itself confronted with an insoluble dilemma—where the problem must be characterized as one of property or of status, and the jurisdictions of situs and of domicile each claim that the matter is one of property and of status, respectively, or, conversely, each claims that it is not. In such an unusual situation it is a relatively simple matter for the forum to fall back upon its own view.

It has been pointed out, by those working in this field, that the categories required for purposes of characterization will sometimes be different from those utilized in the internal law of the forum. It seems clear that this is true, as the forum may have to characterize institutions or principles of foreign law unknown to the system of the forum, or to accommodate to a foreign system of law, as nearly as possible, institutions and principles

44Dean Falconbridge has suggested "that the process of characterization should be a flexible one, involving the consideration of the provisions of potentially applicable laws and the consequences of the selection of the proper law." Renvoi, Characterization and Acquired Rights, 17 Can.Bar Rev. 369, 396 (1939). Further developing the same thought: ibid., 375; ibid., Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235, 246 (1937); ibid., Conflict of Laws: Examples of Characterization, 15 Can.Bar Rev. 215, 218 (1937). Professor Cavers in general terms has emphasized that it is desirable that the forum consider the results before deciding what choice of conflict-of-laws rules to make. A Critique of the Choice-of-Law Problem, 47 Harv.L.Rev. 173, 192, 208 (1933).

45There is more to be said for the suggestion that the forum should yield to the jurisdiction of situs or of domicile when the principle operates affirmatively than when it applies negatively. If the jurisdiction of situs or of domicile holds affirmatively that the problem is one of property or of status, respectively, fora adopting the suggestion that they should yield are led to make the same holding in regard to the matter as the situs or the domicile. This seems obviously and eminently desirable in connection with these matters, which stand out by themselves in the field of conflict of laws. On the other hand, if the jurisdiction of situs or of domicile holds negatively that the matter is not one of property or of status, there may still be uncertainty, as the forum may still be able to choose one or the other of two possible views. However, if the suggestion finds favor, in most instances certainty will be increased through letting it operate negatively as well as affirmatively, and if no distinction is made the state of the law will be that much more simple. The reason why certainty can be attained in regard to matters of property or of status, though not elsewhere in the field of conflict of laws, is because of the general agreement, mentioned in the text, upon the basic principles that matters of property are to be governed by the law of the situs, and matters of status by the law of the domicile (or, abroad, nationality).

46Cf. Stumberg, Marital Property and the Conflict of Laws, 11 Tex.L.Rev. 53, 54 et seq. (1935). With most foreign countries nationality must be substituted for domicile.


48Falconbridge, Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235, 254 (1937); Robertson, Characterization in the Conflict of Laws (1940), 83.
of the forum unknown to the foreign law.\textsuperscript{49} Perhaps the best illustration of this is the divergence of the distinction between movable and immovable property, widely used abroad, from that between real and personal.\textsuperscript{59} Another good illustration consists of the different meanings attached to the conception of a "penal" law.\textsuperscript{61} The forum must consider the effect that an institution or principle of one system of law will have when introduced into a problem involving the other system.\textsuperscript{62} The courts should be conscious of the fact that, in solving problems of characterization, they are performing a distinct function in the field of conflict of laws, so that they will be "uncoerced by internal law terms and distinctions."\textsuperscript{63}

It is the purpose of this study to consider problems only from the standpoint of the question of whether the forum should follow its own conflict-of-laws view or that of another jurisdiction. It is therefore outside the scope of this paper to consider how particular questions should be characterized. It may be helpful, however, to conclude our consideration of primary characterization with the presentation of a number of examples, phrased in the form of questions.\textsuperscript{54} Included, toward the end of the list, are several involving decision whether a matter is one of substance or of procedure. It is a difficult question, upon which there is a difference of opinion, whether this is properly to be regarded as a problem of primary

\textsuperscript{49}Falconbridge, Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235, 246 (1937).

\textsuperscript{50}Cheatham, Internal Law Distinctions in the Conflict of Laws, 21 Corn.L.Qur. 570, 580 (1936); Robertson, Characterization in the Conflict of Laws (1940), 191, 195; See In re Allshouse's Estate, 13 Cal.(2d) 691, 91 Pac.(2d) 887 (1939), where property had been brought from Missouri to California.

\textsuperscript{51}Cheatham, Internal Law Distinctions in the Conflict of Laws, 21 Corn.L.Qur. 570, 571 (1936); Lorenzen, The Statute of Frauds and the Conflict of Laws, 32 Yale L.Jour. 311, 330 (1923).

\textsuperscript{52}Cheatham, Internal Law Distinctions in the Conflict of Laws, 21 Corn.L.Qur. 570, 579 (1936).

\textsuperscript{53}Cheatham, Internal Law Distinctions in the Conflict of Laws, 21 Corn.L.Qur. 570, 571 (1936). The judge of the forum should characterize "according to the manner in which the corresponding rule of his own law has been or would be classified, or, if there is no exactly corresponding rule, then according to the manner in which the one that is most nearly analogous would be classified." Cheshire, Private International Law (2d ed. 1938), 27.

\textsuperscript{54}It will be obvious from the nature of the questions that most of them may arise in cases which do not involve a problem of choice of a governing law; and, as most cases before the courts are not conflict-of-laws cases, the chances are that the characterization of such cases will first occur in dealing with purely domestic problems. Most of the characterization cases discussed by Robertson and the other writers on the subject are not conflict-of-laws cases. Such discussion in this connection is, however, proper, because, while making due allowance for the divergence between the categories necessary for characterization and those used for domestic purposes, in most instances these purely domestic cases will be decisive of the question when presented in a conflict-of-laws case. One reviewer, while not criticizing the use of domestic cases in the present connection, has referred to their presence in the discussions of characterization as supporting his thought that the subject is one of intellectual exercise rather than practical importance. Nussbaum, Review of Robertson, Characterization in the Conflict of Laws, 40 Col.L.Rev. 1461, 1468 (1940).
or of secondary characterization. This will be discussed in the following section. The suggested examples of primary characterization are as follows:

(a) Is a contractual limitation upon liability for injuries a matter of contract or of tort law?  

(b) Does a statute imposing liability for injuries upon one renting out an automobile set forth a rule of contract or of tort law?  

(c) Is a statutory requirement that a contract in behalf of a limited partnership must be executed by a certain number of partners a rule of agency, of the internal government of partnerships, or of the formalities of the execution of contracts?  

(d) Do questions in regard to the conversion of a life insurance policy relate to the creation of a new contract, or to the interpretation of the original one?  

(e) Do questions in regard to the discharge of a contract through taking a negotiable instrument relate to the creation of a new contract or to the discharge of the original one?  

(f) Is capacity to enter into a contract a matter of status or of contract?  

(g) Do the requirements as to the time and place of the performance of a contract relate to the validity or to the performance of the contract?  

(h) Is a rule imposing liability on one spouse upon a contract for necessities entered into by the other a matter of status or of contract?  

(i) Does a covenant not running with the land relate to a matter of contract or to the title to land?  

(j) Is liability for the support of a bastard penal, tortious, or alimentary?  

55Cf. Robertson, Characterization in the Conflict of Laws (1940), 182.  
58Cf. Aetna Life Ins. Co. v. Dunken, 265 U.S. 389, 45 Sup.Ct. 129, 69 L. Ed. 342 (1924); see, also, the discussion therein of the Dodge and Liebing cases.  
61Compare Restatement, Conflict of Laws (1935), §332(g), with ibid. §338(b).  
63Cf. Platner v. Vincent, 187 Cal. 443, 222 Pac. 655 (1921); Robertson, Characterization in the Conflict of Laws (1940), 217 et seq.  
64Cf. Robertson, Characterization in the Conflict of Laws (1940), 190.
(k) Is liability of officers or stockholders for the debts of a corporation penal, contractual or quasi-contractual?65

(l) Under foreign law, is an obligation of the husband to pay the costs of his wife's lawsuit a matter of matrimonial property or of family relationship?66

(m) Is the effect of divorce upon an insurance policy a matter of status or of contract?67

(n) Do questions in regard to an indemnity bond executed in one jurisdiction against liability upon an appeal bond in another relate to a matter of contract or to the internal governmental affairs of a sovereignty?68

(o) Are exemplary damages penal?69

(p) Is an exemption law a matter of status or of procedure?70

(q) Is a question relating to who may sue upon a contract a matter of contract or of procedure?71

(r) Are presumptions matters of substance or of procedure?72

(s) Is the parol evidence rule a matter of substance or of procedure?73

(t) Is the Statute of Frauds a matter of substance or of procedure?74

(u) Are rules as to damages matters of substance or of procedure?75

(v) Are statutes of limitation matters of substance or of procedure?76

(w) Is a statute providing that only a single action can be brought upon a secured debt a matter of substance or of procedure?77

(x) Is a statute providing what steps must be taken to end the redemption rights of a conditional buyer a matter of substance or of procedure?78

65No general answer to this question can be given. Cf. Robertson, Characterization in the Conflict of Laws (1940), 185.

66Cf. Robertson, Characterization in the Conflict of Laws (1940), 188.


69In the famous Loucks case it was held that this depends upon the general nature of the liability. Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198 (1918).

70Cf. 25 C.J. (1921), 13, §9.


72This should depend upon the nature of the particular presumption. Cf. Restatement, Conflict of Laws (1934), §584; Jones v. Chicago, St. P., M. & O. Ry., 80 Minn. 488, 83 N.W. 446, 49 L.R.A. 640 (1900).

73This should be considered a matter of substance. Restatement, Conflict of Laws (1934), §539.


2. (§3) SECONDARY CHARACTERIZATION

As previously indicated, "secondary" characterization is any additional characterization which may become necessary after the forum has decided, as the result of the "primary" process, to apply the law of another jurisdiction. Here the universal opinion is that the forum should not follow its own view, but rather that of the jurisdiction whose law has been selected as controlling. The reason for agreement that the forum should use the secondary characterization of the other jurisdiction, rather than its own, is to make effective the decision reached as the result of the primary characterization. Robertson says that the rule exists "because consistency requires it." The purpose of looking to the law of the other jurisdiction is to dispose of the problem as it would be disposed of there. It seems clear that this purpose would be defeated to the extent that the forum should fail to use the portion of the law of that jurisdiction which, in the judgment of that jurisdiction, relates to the problem. If sufficient reason in support of the rule that the foreign characterization should control is not manifest, it is believed that it will become so as the discussion progresses.

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80Secondary characterization has been referred to as a process of "classification." Unger, The Place of Classification in Private International Law, 19 Bell Yard 3, 16-21 (1927). Also as a matter of "sub-classifications." Mendelssohn-Bartholdy, Delimitation of Right and Remedy in the Cases of Conflict of Laws, 16 Brit.Y.B.Int.Law 20, 41 (1935).
81A question of secondary characterization... only arises after the selection of the appropriate conflicts rule and the choice of the proper law." Robertson, Characterization in the Conflict of Laws (1940), 64. To the same effect: ibid. 119.
82Robertson, Characterization in the Conflict of Laws (1940), 131.
83Assuming agreement upon the part of that jurisdiction as to primary characterization, which will generally exist.
84If the English court says substance is governed by French law, but applies the French characterization of what is substance, then it will simply not be applying the French law of substance; in the words of Beckett, it will be "applying a law which is not French or English, or indeed, the law of any country whatever." Robertson, Characterization in the Conflict of Laws (1940), 131, citing Beckett, The Question of Classification ("Qualification") in Private International Law, 15 Brit.Y. Int.Law 46, 55 (1934). The present writer feels that this is an excellent general statement, but, as mentioned previously, and as will be discussed in the text later in this section, he feels that the distinction between substance and procedure is a matter of primary characterization. To quote Robertson again: "That 'capacity by the law...
Secondary characterization, like primary, may relate to principles and institutions of the forum or of any other jurisdiction connected with the facts of the case. It is of three types:85

(1) Delimiting the problem as defined by the law of the foreign jurisdiction.86 For example, if the problem is primarily characterized as one of property, it must be ascertained what principles the foreign jurisdiction considers as included in the body of property law.

(2) Subdividing the problem in the light of the necessities of the foreign jurisdiction.87 For example, let us suppose that the forum, jurisdiction A, has primarily characterized the problem as one of the creation of a marital status between two minors domiciled in jurisdiction B, and therefore to be governed by its law.88 Without the consent of their parents, they have gone through a ceremony in jurisdiction C. Jurisdiction B applies its own domestic law to questions of capacity to marry, and that of the jurisdiction where the ceremony is performed to matters relating to the form and validity of the ceremony.89 It must be determined as a matter of secondary characterization in which category lack of consent of the parents falls.90

85Nussbaum, using "qualification" as synonymous with "characterization," has criticized the former term, particularly in connection with the secondary process, as "coordinating heterogeneous elements." Review of Robertson: Characterization in the Conflict of Laws, 40 Col.L.Rev. 1461, 1467 (1940). Rheinstein has also criticized it, upon the ground that it "has been applied . . . to a number of different problems, the clarification of which does not appear to be furthered by their being lumped together under one label." Review of Harper & Tainter: Cases and Other Materials on Judicial Technique in Conflict of Laws, 8 Brooklyn L.Rev. 253, 256 (1938). The present writer feels that the convenience of being able to treat these various types of related problems together, as is being done in the text, justifies the terminology.

Both the writers quoted have also pointed out that such a term as "qualification" or "characterization" could be used in a broader sense, and would suggest organization of facts in legal categories for any purpose, but it is believed that this is not sufficient to outweigh the advantages from the use of such terminology in the more limited technical sense here employed. Nussbaum, ibid., 1462; Rheinstein, ibid. 255.

86Secondary characterization has sometimes been denominated a process of "delimitation." Unger, The Place of Classification in Private International Law, 19 Bell Yard 3, 16 (1957). "The problem of secondary characterization is to find out just how much of the foreign and domestic law is applicable to the aspects of the case referred to each of them." Robertson, Characterization in the Conflict of Laws (1940), 118. To the same effect, ibid. 130. See also, Falconbridge, Renvoi, Characterization and Acquired Rights, 17 Can.Bar Rev. 369, 373 (1939).

87This is in addition to subdivision of the case by the forum into various problems, which will be discussed in the text.

88Including, even in this country, its conflict-of-laws principles. This constitutes application of the renvoi doctrine, normally rejected in the United States. This exception to the American rejection of that doctrine will be discussed in §9, infra. With most foreign countries nationality must be substituted for domicile.

89Application by the forum of the domestic law of this jurisdiction involves recognition of the renvoi doctrine. See §9, infra.

90For discussion, not distinguishing between primary and secondary characterization, see: Falconbridge, Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235, 247 (1937); Harper & Tainter, Cases and Other Materials on Judicial Technique in Conflict of Laws (1937), 292; 1 Johnson, Conflict of Laws (1934), 287; Robertson,
(3) Further characterizing the entire problem, in order to fit it into the domestic law of the foreign jurisdiction. For example, if the forum has characterized the problem as one of property, it may be necessary to ascertain through secondary characterization whether the property is considered real or personal in the jurisdiction of situs.\footnote{Whether this is a matter of primary or secondary characterization will be discussed in the text.}

While it will always be difficult to tell where to draw the line in distinguishing between primary and secondary characterization, it is believed that the distinction is sound,\footnote{Professor Yntema feels that its validity is open to question. Review of Robertson: Characterization in the Conflict of Laws, 4 Univ.Toronto L.Jour. 233, 234 (1941).} and that the case system will work well here, clarifying the distinction through developing illustrations as the actual problems arise. The difficulty is largely in deciding how far to subdivide a case into problems in the primary process. An excellent illustration, just referred to, is the question whether property situated in a jurisdiction other than the forum is to be treated as real or personal.\footnote{Or, under a foreign system, movable or immovable. Cheshire, Private International Law (2d ed. 1938), 409; Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col.L.Rev. 247, 255 (1920); Robertson, Characterization in the Conflict of Laws (1940), 193 et seq. A similar problem is whether property is tangible or intangible. A minority of foreign writers who contend that all characterization should be in accordance with the views of the forum, and so, of course, do not make any distinction between primary and secondary. Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col.L.Rev. 247, 255 (1920); Robertson, Characterization in the Conflict of Laws (1940), 190.} It seems to be agreed\footnote{Restatement, Conflict of Laws (1934), §208: “Whether an interest in a tangible thing is classified as real or personal property is determined by the law of the state where the thing is.” See also: Bartin, 24 Clunet 251 et seq. (1897); 2 Beale, Conflict of Laws (1935), 924, §208.1; Cheshire, Private International Law (2d ed. 1938), 44; Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col. L.Rev. 247 (1920); Robertson, Characterization in the Conflict of Laws (1940), 194, 211; Unger, The Place of Classification in Private International Law, 19 Bell Yard 3, 9 (1937).} that the forum will follow the view of the jurisdiction of situs,\footnote{Bartin, De l'Impossibilité d'Arriver à la Suppression Définitive des Conficts des Lois, 24 Journal du Droit International Privé 225, 246 (1897), Clunet 466, 720 (1897); Cheshire, Private International Law (2d ed. 1938), 44; Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col.L.Rev. 247, 268 (1920).} but it has been contended that this is an exception to the rule that primary characterization is decided in accordance with the views of the forum.\footnote{Apart from a minority of foreign writers who contend that all characterization should be in accordance with the views of the forum, and so, of course, do not make any distinction between primary and secondary. Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col.L.Rev. 247, 255 (1920); Robertson, Characterization in the Conflict of Laws (1940), 190.} This latter

\footnote{Beale, Conflict of Laws (1935), 673-674, §121.6, discusses the question of the governing law, not considering the characterization aspect. Rheinstein, Review of Harper & Taintor: ibid., 8 Brooklyn L.Rev. 253 (1938), considers that no problem of characterization is involved here. While Cheshire suggests as an illustration of primary characterization whether a requirement of parental consent to the marriage of minors is a matter of capacity to marry or of form of the marriage ceremony, it is believed that the problem is clearly one of status, and that it is simply a question whether the public policy of the jurisdiction of domicile causes it to apply its own rules on such a matter or those of the jurisdiction where the ceremony is performed. Cheshire, Private International Law (2d ed. 1938), 34.}
contention would mean that the question in primary characterization is
whether the problem involved relates to a real property matter or to one of
personal property. To the present writer it seems clear that the question
for primary characterization is whether the problem relates to a property
matter, and that it must then be decided by secondary characterization
whether the property is real or personal. A closely allied question is
whether there has been an equitable conversion of property.

"The characterization of property probably represents the most difficult
problem in the whole field of characterization." It is certainly true that
the characterization of property offers a fertile field for differences of opinion
as to where to draw the line between the primary and secondary processes.
For practical purposes this becomes unimportant if, as previously sug-
gested, the forum, as an exception to the general rule, yields upon primary
characterization whenever the jurisdiction of situs or of domicile claims that
the matter is one of property or of status, respectively. In the list of sug-
gives as his reason for holding that it is primary, that "different rules relate to
movables and immovables, and it is impossible for the judge to know which rule to
apply until he has made this determination." Characterization in the Conflict of
Laws (1940), 58. This is meaningless, as a reason here, as the whole purpose of
both primary and secondary characterization is to determine which law to apply. See
also, ibid. 54.

While he does not distinguish between primary and secondary characterization,
the reasoning of Dean Falconbridge is in harmony with the view taken in the text:
"Any question of conflict of laws relating to a thing may involve in effect two
questions, namely, the main question, whether a person has a proprietary interest,
and a subsidiary question, whether that interest is an interest in an immovable.
It being premised that the main question must be decided by the lex rei sitae, it follows
necessarily that the lex rei sitae must also govern the subsidiary question. This sub-
diary question turns on the distinction between immovables and movables, and not
upon the distinction between reality and personality or any other distinction
based upon the peculiar features of the internal land law. The distinction be-
tween reality and personality is in no case material to the selection of the
proper law, but may be material in the application of the selected proper law,
if that law is one which for domestic purposes distinguishes between reality and
personality." Falconbridge, Characterization in the Conflict of Laws, 53 Law Quar.
Rev. 235 & 537, 561 (1937). In the third sentence quoted, the learned writer is
assuming that the jurisdiction looked to is one that divides property into movable
and immovable rather than into real and personal. The position taken in the text
of the present article is clearer when such is the case, and the forum is a juris-
diction having the real-personal distinction. Dean Falconbridge, continuing, points
out that, on principle, proprietary interests in movables should be as much governed
by the lex rei sitae as those in immovables, but that the practical necessity for con-
trol by the law of the situs is not as great. Ibid. 562.

Restatement, Conflict of Laws (1934), §209: "Whether interests in land are
equitably converted into personal property by dealings with the land depends upon
the law of the state where the land is." Ibid. §210: "Whether interests in chattels or
intangible things depends upon the law which governs such dealings." Ibid. §244:
"Whether the interest of the beneficiary of a trust of land is real estate
or whether, because of a direction to sell the land, it is personal property, is deter-
mmed by the law of the state where the land is." See also, 2 Beale, Conflict of
Laws (1935), 935, §209.1. Robertson treats this under primary characterization. Char-
terization in the Conflict of Laws (1940), 197.

Robertson, Characterization in the Conflict of Laws (1940), 190. See also
ibid., further.

at footnote # 39, supra; but see, footnote # 46, same section.
gested illustrations of secondary characterization which will be given, there will be included a number considered by Robertson to be primary.

Another interesting question, as already suggested, is whether it is a matter of primary or of secondary characterization to distinguish between matters of substance and procedure. While there is much to be said theoretically for considering the distinction a matter of secondary characterization, in order to lead the forum more completely to decide the case in accordance with the law of the foreign jurisdiction, it is believed that, as a practical matter, the forum can not be expected to yield. From the standpoint of the forum, any matter considered by it to be one of procedure can not be any more than a borderline matter in applying the law of another jurisdiction, and the difficulties of the forum would be greatly increased if it were to attempt to apply any parts of a system of procedure other than its own. The Restatement, Beale, Falconbridge, and an Arkansas case, support the position here taken, while Robertson and McClintock are of the opposite opinion.

In conclusion, the following additional illustrations of secondary characterization may be suggested:

(a) Under the civil law, is the purchase of groceries for consumption by a family a civil or a commercial act, and accordingly to be governed by the Civil Code or by the Commercial Code?

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101It can hardly be assumed that there will be universal acceptance of the suggestion in the text that the forum should yield upon primary characterization in connection with property and status matters, and that therefore illustrations relating to these matters have no practical value.
102§2, at footnote #54, supra.
103If determined to be the latter, the forum follows its own system. Restatement, Conflict of Laws (1934), §§85.
104Restatement, Conflict of Laws (1934), §594: "The court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure." To the same effect, ibid., §7, Comment (b). Setting forth the line of thought reproduced in the text: 1 Beale, Conflict of Laws (1935), 55, §7.2; 3 ibid., 1399-1601, §§584.1-584.2. Accord: Falconbridge, Renvoi, Characterization and Acquired Rights, 17 Can.Bar Rev. 369, 375 (1939).
105Mcintock, Distinguishing Substance and Procedure in the Conflict of Laws, 78 Univ.Pa.L.Rev. 933 (1930); Robertson, Characterization in the Conflict of Laws (1940), 119 et seq. & 246 et seq. Cheshire feels that it is a matter of secondary characterization, but that, as an exception, the forum must follow its own view. Private International Law (2d ed. 1938), 38; discussed, Robertson, ibid., 56.
106It is assumed that the forum is a common law jurisdiction. This is prob-
(b) As to parties domiciled outside the forum, is a prohibition in a divorce decree against remarriage within a certain period penal? 107

(c) As to personal property outside the forum at the death of a decedent, is it a matter of testamentary capacity or of the formalities of the execution of wills whether a holographic will is valid? 108

(d) As to land outside the forum, is a problem relating to a widow's election between dower and her husband's will to be treated as a matter of status or of inheritance? 109

(e) As to property outside the forum, does a question as to the apparent authority to deal with the property, of an agent appointed in a third jurisdiction, relate to the law of agency or of property? 110

(f) As to personal property outside the forum at the death of a husband, and owned at marriage, are the rights of the widow to be treated as a matter of status or of property? 111

ably a better illustration of secondary characterization than any not involving a civil law country. As the distinction between civil and commercial acts pervades almost the entire law of civil law countries, this secondary characterization is almost certain to be necessary whenever a common-law court looks to the law of a civil-law country. The answer to the particular question is that, at least in Mexico, if the grocer is defendant in the litigation in the forum, the purchase is considered a commercial act, but if the purchaser is the defendant it is considered civil. Barker & Cormack, The Mercantile Act: A Study in Mexican Legal Approach, 6 Southern California Law Review, 1, 2-22 (1932). The title of the cited article is misleading, as a great deal of the material applies to the mercantile act as it exists in all civil-law countries. See also, Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Col.L. Rev. 247, 258 (1920).

The question will arise when a divorce is granted in the jurisdiction of domicile and remarriage occurs in another State. The primary characterization is that the matter is one of status, therefore to be governed by the law of the domicile. While the forum will not enforce a penal law of another jurisdiction, it will recognize an effect upon status of foreign citizens resulting from one.

It is a generally recognized rule of the conflict of laws on the continent that testamentary capacity with regard to movables is governed by the personal law of the deceased and that the formalities of a will are governed by the law of the place where it is executed. Robertson, Characterization in the Conflict of Laws (1940), 258. The primary characterization is that the matter is one of property.

It is assumed that the parties are domiciled in a third State. The primary characterization is that the matter is one of property. The jurisdiction of situs will not disagree as to this, but will have to decide whether, under its public policy as to property, it will follow the domiciliary rule upon the ground that it affects the status of interested individuals. Robertson considers this included in the primary characterization. Characterization in the Conflict of Laws (1940), 219.

The illustration is better if it is assumed that the agent is appointed in a jurisdiction other than that in which the property is situated. The matter is primarily characterized as one of property. The jurisdiction of situs will then have to decide whether the particular question is within the scope of its body of property law. Cf. Charles T. Dougherty Co., Inc. v. Krimke, 105 N.J.L. 470, 144 Atl. 617 (1929).

The illustration is better if it is assumed that the husband was not domiciled in the forum. The primary characterization is that the matter is one of property. The jurisdiction of situs will have to decide whether, under its public policy as to property, it will look to the domiciliary rule as involving the status of interested parties. Robertson considers this included in the primary characterization. Characterization in the Conflict of Laws (1940), 158. See, not distinguishing between
(g) As to property outside the forum at the death of a decedent, is a question in regard to legitimation or adoption of a claimant to be treated as a matter of status or of property?\(^{112}\)

(h) As to personal property outside the forum at the death of a decedent, is a question in regard to revocation of a will by subsequent marriage or by the birth of a child to be treated as a matter of the law of wills or of property?\(^{113}\)

(i) As to personal property outside the forum at the death of a decedent, is a gift in contemplation of death inter vivos or testamentary?\(^{114}\)

(j) Is the effect, upon the death of one of the parties, of a joint deposit in a bank outside the forum, a trust or a testamentary matter?\(^{115}\)

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\(^{112}\) It is assumed that the alleged legitimation or adoption occurred in a jurisdiction other than that of the situs, and the illustration is better if it is assumed that none of the parties were domiciled at the forum or the situs. The primary characterization is that the matter is one of property. The jurisdiction of situs must decide whether, under its public policy in regard to property, it will look to a domiciliary rule upon the ground that the status of interested parties is involved. For discussion of these problems, not noticing the characterization aspect, see 2 Beale, Conflict of Laws (1934), 967, §§246.2-247.1 & 1033, §§304.1-305.1. In an article, Professor Beale raises the characterization question in regard to inheritance by illegitimates, without distinguishing between primary and secondary. The Conflict of Laws, 1899-1930, 50 Harv.L.Rev. 597, 890 (1937). For a discussion of legitimation with another method of approach, which will be discussed in §5, infra, see Robertson, Characterization in the Conflict of Laws (1940), c.VI, pp.135-156. Professor Rheinstein considers that no problem of characterization is involved here. Review of Harper & Taintor: Cases and Other Materials on Judicial Technique in Conflict of Laws, 8 Brooklyn L.Rev. 253, 256 (1938).

\(^{113}\) It is assumed that the alleged revocation occurred when the decedent was domiciled in a jurisdiction other than the situs. The primary characterization is that the matter is one of property. The alternative expressed in the question, between the law of wills and that of property, can be expressed more exactly by saying that the jurisdiction of situs is confronted with the problem, under its public policy in regard to property, as to how to divide its body of property law between those matters as to which it will look to the law of the jurisdiction of domicile of the decedent, and those matters where it will apply its own domestic law. This is a problem of secondary characterization, as the decision will turn upon the viewpoint of the jurisdiction of situs as to whether it is sound public policy that the question should be regarded as per se relating to wills or to property as such. Problems of secondary characterization are as subject to practical considerations of public policy as any other part of the law. See, as to marriage, not distinguishing between primary and secondary characterization, Falconbridge, Conflict of Laws: Examples of Characterization, 15 Can.Bar Rev. 215, 227 (1937). An answer to the question is given in Restatement, Conflict of Laws (1934), §307.

\(^{114}\) It is assumed that the property was not at the domicile of the decedent, and the illustration is better if it is assumed that the decedent was not domiciled at the forum. The primary characterization is that the matter is one of property. Contra: Robertson, Characterization in the Conflict of Laws (1940), 184.

\(^{115}\) The primary characterization is that the matter is one of property. Contra: Robertson, Characterization in the Conflict of Laws (1940), 171.
III. (§ 4) LOCALIZATION

When a court has completed characterization of a problem, it selects a "connecting factor" which causes it to relate the case to the law of a particular jurisdiction. The connecting factor may be, for example, the domicile of a party, the situs of property, or the place where a tort or crime occurred, an agent acted, or a marriage ceremony was performed.

Normally the court will not be aware that anything more than a question of fact is involved in designating the particular foreign jurisdiction which fits the description called for by the connecting factor—if there is a legal element it will ordinarily be taken care of through "shorthand" reasoning. If a legal question does consciously arise, as when the person whose domicile must be determined is returning to his domicile of origin, or when it becomes necessary to assign a situs to intangibles, the problem is not one of characterization, as the nature of the problem is clear—it is entirely a question of selecting one or the other of two specific rules to govern selection of a domicile, etc. This process of selection of a specific rule for the identification of the jurisdiction indicated by the connecting factor (together with any necessary fact investigation) has been termed the "localization" of the connecting factor. While localization has generally

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116 It is assumed that, as a result, the forum does not desire to apply its own domestic law.
117 The term was originated by Dean Falconbridge, Characterization in the Conflict of Laws, 53 Law Quar. Rev. 235, 236 (1937), and is used in Robertson, Characterization in the Conflict of Laws (1940), 92. Professor Lorenzen has used the term "point of contact." The Theory of Qualifications and the Conflict of Laws, 20 Col.L.Rev. 207, 258 (1920), and Unger "elements of introduction." The Place of Classification in Private International Law, 19 Bell Yard 3 (1937). For a discussion of foreign terms, see Falconbridge, 53 Law Quar. Rev. 537, 549 (1937).
119 The same case may involve more than one connecting factor. For example, in a contract case, the forum may use the places of contracting and of performance.
120 As another illustration, it may be difficult to ascertain the place of execution of a contract, particularly insurance contracts. Robertson, Characterization in the Conflict of Laws (1940), 225. In a situation involving foreign countries, a difficult problem may be presented when an offer is sent from one country and the acceptance despatched from another. By the law of one country the contract may come into existence when the acceptance is sent, and by the law of the other when it is received. In connection with personal property, it may be necessary to ascertain the situs at a particular time. Hellendall, The Res in Transitu and Similar Problems in the Conflict of Laws, 17 Can.Bar Rev. 7 & 105, 109 (1939). Cheshire discusses (as though characterization) the situs of a debt secured by a charge on land. Private International Law (2d ed. 1938), 411. Robertson gives a number of illustrations of such problems in the field of torts. Robertson, ibid., 227.
121 Unger, The Place of Classification in Private International Law, 19 Bell Yard 3, 4, 16 (1937). The present writer has "Americanized" the spelling. Nussbaum has suggested that the connecting factor may be termed the "localizator." Review of Robertson: Characterization in the Conflict of Laws, 40 Col.L.Rev. 1461, 1464 (1940). Robertson states that the connecting factor is "localized."
been treated as included within characterization,\textsuperscript{122} it is believed advisable, for clarity of thinking in a new field, to recognize the distinction between the two processes.\textsuperscript{123}

Whatever law, i.e., the law of whatever jurisdiction, is selected to govern characterization, will also govern localization.\textsuperscript{124} The same considerations apply in regard to the selection of a governing system of law for both processes. The same danger of an otherwise insoluble dilemma exists. For example, if the forum desires to look to the domicile of a party, each of the possible jurisdictions of domicile may claim that it is the true domicile, or, conversely, each may claim that it is not. The same exception suggested in connection with characterization, that when the jurisdictions which are considered possibilities agree as to the rule to be adopted, they should be yielded

\begin{itemize}
\item Characterization in the Conflict of Laws (1940), 8, 102. Falconbridge says that "the thing or the act is necessarily localized." Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235 & 537, 550 (1937).
\item Robertson says that when it is necessary to decide such problems as where a man is domiciled, or where a contract was made, "what the judge does when he 'qualifies' is to characterize some of the facts presented to him as constituting a connecting factor with some particular system of law (usually a foreign system of law in a case that involves conflict of laws)." Characterization in the Conflict of Laws (1940), 11. See also ibid. 105-106.
\end{itemize}

Falconbridge says that two countries may "both use nominally the same connecting factor with respect to a question which is characterized in the same way in both countries, and nevertheless there may be a latent conflict of conflict rules, because the place element specified as the appropriate connecting factor in the conflict rule of one country may be characterized differently from the place element specified in the corresponding conflict rule of the other country." Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235 & 537, 551 (1937).


\begin{itemize}
\item Following Unger, The Place of Classification in Private International Law, 19 Bell Yard 3, 4-5 (1937).
\item With a single exception, only localization of a connecting factor selected as the result of primary characterization has been considered by the writers, who have been unanimous that the forum is to follow its own views.
\item Robertson says: ". . . There is general agreement among the Anglo-American writers that the connecting factor must be determined by the law of the forum. . . . This unanimity is probably due to the fact that the determination of domicile is usually taken as the typical case, and this is one of the few examples of the characterization problem which has been consciously and consistently dealt with by the courts." Characterization in the Conflict of Laws (1940), 107-108. See also ibid. 225-229. Accord: Restatement, Conflict of Laws (1934), §§10 & 311, Comment (d); 1 Beale, Conflict of Laws (1935), 105, §10.1; 2 ibid. 1046, §311.2; Beckett, The Question of Classification ("Qualification") in Private International Law, 15 Brit.Y.B.Int.Law 46, 62 (1934); Cheshire, Private International Law (2d ed. 1938), 29; Falconbridge, Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235 & 537, 555 (1937); Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 Co.L.L.Rev. 247, 208 (1920); Mendelssohn-Bartholdy, Renvoi in Modern English Law (1937), 36; Unger, The Place of Classification in Private International Law, 19 Bell Yard 3, 4 (1937).
\item Harper and Taintor suggest, as to localization: "The solution of this problem may be avoided (1) by ignoring it altogether, or (2) by refusing to recognize it as
to, applies here. The exception suggested, in connection with primary characterization, that the jurisdiction of situs or of domicile should be yielded to if it claims that the matter is one of property or of status, respectively, by its nature can not apply here, as the problem with localization is to determine which is the jurisdiction of situs or of domicile.

It may be helpful to think of localization as the fitting of the minor premise into a syllogism the major premise of which has been stated as the result of the process of characterization. The syllogism will run thus: This problem (because characterized as a certain sort of problem) is governed by the law of the domicile. Jurisdiction B (because of the rule used in localization) is the domicile. Therefore, this problem is governed by the law of jurisdiction B.

When the forum looks to the law of another jurisdiction for secondary characterization, it will likewise do so for the localization of any connecting factor selected through the secondary characterization. Therefore the distinction between primary and secondary forms is applicable to localization in the same manner as to characterization.

IV. (§5) PRELIMINARY QUESTION

Another doctrine, although believed illusory, must be discussed, in order that this survey may be complete. It is that of the so-called “preliminary question” recently advanced upon the Continent. The doctrine is that if the forum finds that a “main” or “principal” question turns upon the decision of a “preliminary” question, the conflict-of-laws rule of the jurisdiction looked to upon the principal question should govern the preliminary question.

a problem to be solved by the law of any particular state.” Cases and Other Materials on Judicial Technique in the Conflict of Laws (1937), 158. The present writer does not agree with them, ibid., that the Restatement seems to have adopted the second alternative mentioned.

The only writer who seems to have considered the possibility that localization might be referred on to the law of another jurisdiction, under the same circumstances and in the same manner as characterization, is Robertson. Ibid. 110. This is undoubtedly sound, as will be noted in the text.

A connecting factor will be selected thus only in connection with an application of the renvoi doctrine.

The French term for the doctrine is la question préalable, and the German die Vorfragen. Robertson feels that “primary characterization of the second order,” suggested by Professor Griswold, “would seem to afford a better description of the process involved,” but is too cumbersome to serve as a name. Robertson, Characterization in the Conflict of Laws (1940), 137.

To consider, as an illustration, a situation involving a series of preliminary questions, let it be supposed that the forum, jurisdiction $A$, is the situs of personal property, to be administered at death. The forum holds that this is to be governed by the law of the domicile of the decedent, jurisdiction $B$. A question arises as to whether a claimant is legitimate, so as to be entitled to take. This turns upon the validity of a marriage performed in jurisdiction $C$. This depends upon the effect to be given to a divorce previously granted in jurisdiction $D$. Analyzing this situation, the question of legitimacy is a “preliminary” question to the determination of the “principal” question whether the claimant is entitled to share in the estate. The validity of the marriage in jurisdiction $C$ is a preliminary question to the determination of the question of legitimacy. The effect to be given to the divorce in jurisdiction $D$ is a preliminary question to the determination of the validity of the marriage. This last preliminary question, upon which the case ultimately turns, is the latest problem to appear chronologically in the course of investigation into the case, but in the solution of the case it is logically the question which must be disposed of first. As the same is true in considering each of the other preliminary questions, in relation to their principal questions, respectively, it may be said that preliminary questions logically must be disposed of in the inverse order of their chronological appearance in the case. Each preliminary question may involve problems of characterization and localization. Under the doctrine, in each instance the conflict-of-laws rule to govern the preliminary question should be that of the jurisdiction governing the “principal” question, for the solution of which determination of the particular preliminary question is required.

If the forum follows the conflict-of-laws rules of other jurisdictions in dealing with these questions, it is applying the renvoi doctrine. It will be recalled that that doctrine is to the effect that when the forum looks to the law of another jurisdiction, the forum will follow the conflict-of-laws rules of that jurisdiction, and it has been previously stated herein\(^{180}\) that in this country the doctrine is, in general, rejected, matters of property and status being exceptions to the rule of rejection in all countries in general rejecting the doctrine.\(^{181}\) The reason for the exceptions is the obvious fitness of governing matters of property by the rule of the situs and matters of status by the law of the domicile.\(^{182}\) The renvoi doctrine will be considered in detail in the following sections. It will be observed that, in the illustration, the basic “principal” question, who is to take the estate, is one of property,

\(^{180}\)See supra, at footnotes #4-5; see, also, infra, §14.

\(^{181}\)These exceptions exist in all countries that reject the renvoi doctrine in general. See, also, infra, §14.

\(^{182}\)In this country, while the forum will follow the conflict-of-laws rule of the jurisdiction of situs or of domicile, that jurisdiction will not adopt the conflict-of-laws rule of any other (subject to very limited exceptions). See infra, §§9 & 14. With most foreign countries nationality must be substituted for domicile.
and each of the other questions is one of status. Therefore, when the preliminary-question doctrine requires that these questions be determined by the conflict-of-laws rules of the situs or of the domicile, it amounts only to an application of the renvoi doctrine to them. Therefore, as the renvoi doctrine is everywhere applied to matters of property and of status, the illustration given, although it is used by writers upon the subject, and although it involves the sort of questions most commonly discussed in this connection, proves nothing, from the standpoint of establishing the utility of the preliminary-question doctrine.

Robertson, who believes in the doctrine, and devotes a chapter to it, cites only illustrations involving matters of property and of status, save in two instances, where he states that the situations are exceptions to the doctrine. It may be observed, further, that Robertson is wrong in treating the preliminary-question problem as one of characterization. The argument which he states in favor of the doctrine, at p. 140, is that used in favor of the renvoi doctrine generally, as he recognizes. The renvoi doctrine will be discussed in the following section.

Robertson refers to Wengler, German exponent of the preliminary-question doctrine, for further exceptions. Wengler's seventeen suggested exceptions do not throw any light upon the general nature of the doctrine. Twelve relate to matters of status. Of the others, one is the first exception given by Robertson, supra. The eighth in Wengler's list involves a situation where parties to a contract have different places of performance, and there is a doctrine of mutuality of performance, that is, that one party can be compelled to perform only if the other one can. Wengler seems to assume that the "principal" question is the enforceability of performance upon the part of whichever party happens to be defendant. The ninth is to the effect that where notice of defects under the law of sales "has been validly given under the law of the place of performance of the buyer, it must be recognized as valid at the place of performance of the seller." Again it seems to be assumed that the seller will be the defendant, and that therefore his liability is the "principal" question. In the eleventh the "principal" question is whether a guarantor is liable, and the "preliminary" question is whether he can secure indemnity from his principal, that being a prerequisite to the guarantor's liability. The twelfth is the same, except that the liability is that of joint debtors, and the "preliminary" question is as to subrogation.

It seems to be assumed that the liability of the particular debtor who is defendant will be the "principal" question.

He says that the "preliminary question" is a "special exemplification" of the
nature of the problems is not involved—it is simply a question whether or not the forum will make use of a connecting factor selected for it by another jurisdiction. Cases which might be thought to have applied the preliminary-question doctrine are entirely lacking in this country, and almost so abroad, and the present writer knows of none not involving matters of property or of status.

It remains to be considered whether the preliminary-question doctrine has any possible validity, upon principle, as to matters other than those relating to property and to status. The strongest and best illustration in favor of such application of the doctrine which has occurred to the present writer is where a defendant acting in one jurisdiction has inflicted injury in another, and a question arises as to whether or not he has acted under a privilege or a duty, the forum being a third jurisdiction. Here the "principal" question is whether or not there has been a tort, and the "preliminary" question is whether or not a privilege or a duty has existed. It is obvious that application of the preliminary-question doctrine will never make any difference in the result unless the conflict-of-laws rule of the jurisdiction looked to upon the principal question is different from that of

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188Robertson, Characterization in the Conflict of Laws (1940), 151; Nussbaum, Review of ibid., 40 Col.L.Rev. 1461, 1471, footnote #40 (1940).
189Robertson, Characterization in the Conflict of Laws (1940), 149, uses In re Stirling [1908], 2 Ch. 344, involving inheritance turning upon legitimacy and a prior divorce, and, at 151, footnote #58, a German case of a similar nature, Oberlandesgericht Karlsruhe, March 20, 1931, 9 Jahrbuch für Entscheidungen der freien Gewaltungshoheit des Kantons Basel-Stadt in Echtungs- und Erbschaftsangelegenheit, in French Revue (1932) 702. A later German case, Reichsgericht II. Ziv. Sen., March 16, 1938, 67 Juristische Wochenschrift 1718 (1938 No. 27), apparently failed to apply the doctrine. Robertson, ibid., 152 footnote #60. A French case cited in the same note is possibly against the doctrine. Nussbaum, who is opposed to the doctrine, refers to French Court of Cassation, April 21, 1931, Journ. du Droit Int. 142 (1932), in connection with it. Review of Robertson: ibid., 40 Col.L.Rev. 1461, 1471, footnote #40 (1940).
190Robertson says: "It seems . . . that the United States is not likely to be troubled with this particular problem, and we may confine our search to European cases." Characterization in the Conflict of Laws (1940), 151. He also says that the question "is not likely often to arise in cases outside family law." Ibid. 154.
141For illustrations suggested by Professor Griswold's article, Renvoi Revisited, 51 Harv.L.Rev. 1165 (1938), see infra, footnote #225.
142For example, the defendant, acting as health officer in jurisdiction A, may have burned materials, the fumes damaging persons and property in jurisdiction B. Or the defendant, acting as a peace officer in jurisdiction A, may have shot at a fugitive under circumstances such that he would not have been privileged to do so in jurisdiction B, and his shot may have crossed the line and injured a person in the latter jurisdiction. It is elementary that a tort is considered to occur where the injury is inflicted, and that in general the forum will apply the domestic law of that jurisdiction. Restatement, Conflict of Laws (1934), §§377-379. The Restatement makes questions of privilege, duty and standards of care exceptions to the rule. Restatement, ibid., §§380, 382. As to criminal law, cf., in general, Stimson, Conflict of Criminal Laws (1936), esp. 46-57, 64-65 & 80-103.
the forum, and so we must assume that such is the case here. This will mean that, if the forum is to apply the doctrine, 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. An example of the latter would be a suit to enjoin the defendant. Can the forum reasonably be expected to do this? In the writer's opinion it can not.

The only argument which seems to have any weight in favor of asking the forum to enter such a judgment is that, if all jurisdictions would agree to do so, it would lead to certainty in that sort of case, that is, in any such case the parties would know that the conflict-of-laws rule of the jurisdiction where the injury occurred would be applied, regardless of what jurisdiction happened to be the forum. Of course they could not be certain that the problem involved would be presented in the form of a preliminary and not of a principal question, although the illustration suggested is very strong in that regard. While certainty in the field of conflict of laws is a desideratum of the utmost importance, it is not believed that in this instance the degree of certainty to be attained is sufficient to outweigh the forum's sense of justice. Certainty in the field of conflict of laws is largely a will-of-the-wisp until there is agreement upon principles of justice, and here, by assumption, such agreement does not exist. It is purely a mechanistic circumstance that the problem of privilege or of duty is presented to the forum as a preliminary question, and this will have no bearing upon the forum's sense of justice.

In the field of conflict of laws, to state that if all courts would agree upon a proposition certainty would be achieved, really proves nothing, in

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143 Robertson, Characterization in the Conflict of Laws (1940), 149. Determination of what is the conflict-of-laws rule of that jurisdiction may involve the entire renvoi problem, treated in the remaining sections of this article.

144 For present purposes we are interested in the actual state of the law only from the standpoint of determining whether or not the illustration is entirely hypothetical, which it is not unless agreement is clear. That it is not clear that such agreement exists, see Goodrich, Conflict of Laws (2d ed. 1938) 224, §91; Stumberg, Conflict of Laws (1937), 182 et seq. For the Restatement position, see Restatement, Conflict of Laws (1934), §382. Professor Beale, Conflict of Laws (1935), does not have a section accompanying the Restatement section, but in volume 2, p.1294, §380.1, he discusses rules and standards of care. The matter seems not to be discussed in Wharton, Conflict of Laws (3rd ed. 1905); see vol. 2, pp.1098 et seq., §478.

145 For a brief but trenchant criticism of the preliminary-question doctrine by Dr. Arthur Nussbaum, a well known Continental authority upon conflict of laws, now Research Professor of Public Law at Columbia University, see his review of Robertson; Characterization in the Conflict of Laws, 40 Col.L.Rev. 1461, 1471, footnote #40 (1940). The disagreement of European writers in regard to the doctrine is discussed in Robertson, ibid., 140.

146 Assuming that the forum does not follow the renvoi doctrine generally. Whether or not that should be done will be considered in detail in the following section.

147 Apart from matters of property and status, which stand apart in this field as a class by themselves, for the reason about to be outlined in the text. See infra, §§9-13; see, also, infra, §14.
making progress toward a solution of problems. Such a contention does not
distinguish one proposition from any other in the entire field, where cer­
tainty has not already been obtained.\textsuperscript{149} Every judge or other writer who
has ever advanced a proposition in the field has hoped that the world would
see the light and follow him. It is largely going around in a circle to say
that so long as there is disagreement upon conflict-of-laws principles there
will be problems of choice of conflict-of-laws principles. Stating the same
thing conversely, agreement upon conflict-of-laws principles will end the
necessity of making a choice of conflict-of-laws principles. But upon what
shall courts agree? It would be reasonable to ask them to agree, upon
grounds of balancing the interests of individuals, or of other public policy,
that in dealing with such a problem of privilege or of duty they will apply
the domestic law\textsuperscript{150} of the place where the defendant acted, or that they
will do the contrary, that is, that they will proceed from the standpoint of
the injured party, and apply the domestic law of the place where the injury
occurred. Agreement either way would lead all such cases to be decided the
same way, as far as choice of conflict-of-laws principles is concerned. But it
is not believed that any progress is going to be made by asking courts to
adopt an accidental mechanistic test which will only at times apply to a
given problem, and which has no relation to the forum's sense of justice
or to any considerations of public policy.

We have seen that, in dealing with matters of property and of status,
even in countries rejecting the renvoi doctrine in general, the forum will
adopt the conflict-of-laws rules of the jurisdiction of situs or of domicile.\textsuperscript{161}

\textsuperscript{149}Without going beyond matters of property and status, Dean Falconbridge has
criticized the preliminary-question doctrine upon the ground of its mechanistic
(1939).

Two other considerations already noted, in connection with the discussion of
primary characterization, \textit{supra}, at footnotes \#\#30 \& 37, could again be adverted to
here: the additional burden placed upon the court of the forum in applying the
conflict-of-laws rules of other jurisdictions, not to be assumed unless there is a
compensating advantage; and 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.

In connection with the "preliminary question" in particular, it may also be
suggested that it is hard to imagine that there will be more than one controverted
question of the sort in a single case, and it would be very difficult, where a matter
of property or of status is not involved, to induce any judge, as the result of
labored scholasticism, not to go directly to the heart of the problem in accordance
with his own views of the conflict of laws.

\textsuperscript{150}As before defined, the law applied by that jurisdiction when all the facts
occurred within it.

\textsuperscript{151}\textit{Supra}, at footnotes \#\#5 \& 131-132. For detailed discussion, see \textit{infra},
\S\S\ 9-13; see also \textit{infra}, \S\ 14. With most foreign countries nationality must be sub-
stituted for domicile.
but there the situation is very different. As to property matters relating to property situated elsewhere, and as to matters of status relating to persons domiciled elsewhere, the forum makes no attempt to apply its own principles of justice—its only desire is to recognize the title to the property as it is at the situs, or the status as it is at the domicile. So in connection with such matters the forum's sense of justice is not shocked because the court decides the same question differently at different times—it is not a mere mechanical circumstance that the court is required to pass upon the titles to property situated in various jurisdictions, or upon the status of individuals with varying domiciles. Concluding our consideration of the "preliminary question," it is believed that the doctrine is unsound, and that it will not find a permanent place in any legal system.

V. Renvoi

1. (§6) THE PROBLEM

The famous, insidious and baffling "renvoi" problem is this: When the forum looks to the law of another jurisdiction, does it do so for the foreign conflict-of-laws rule, or for the foreign domestic law? The domestic, or internal, law is that which a court of the foreign jurisdiction applies when all the facts are local to, that is, occurred within, that jurisdiction. What is known as the renvoi doctrine is that the forum shall follow the foreign conflict-of-laws rule. If the forum does so, the result may be an application by the forum of the domestic law of the foreign jurisdiction, but this is after the renvoi problem has been solved. Having endeavored to become familiar with everything written in the English language upon renvoi, the present writer doubts whether it has been surpassed by any other topic in the law in the amount of material written upon it which, upon analysis, is seen to consist of nothing but dogmatic statement of the result desired to be reached.

"Renvoi" is the French word for "return". The doctrine received this name because the courts were troubled with this sort of case, the first

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152 Or, abroad, those having nationality elsewhere.
153 To be more exact, this is an imitative sense of justice upon the part of the forum in regard to these matters. See also infra, §14.
154 The French writer Maury has pointed out that there is a principle of uniformity of decisions in a national court as well as one of uniformity of international decisions. Règles Générales des Conflits de Lois (1936-III) Recueil des Cours 329, 561-562; discussed, Robertson, Characterization in the Conflict of Laws (1940), 140. The forum can be expected to depart from the former principle only when, as with matters of property and of status, it is in harmony with its principles of justice to do so. See also infra, §14.
155 "... The paper and ink devoted to the problem had already been so great a number of years ago that one author recorded in despair that 'Juristic speculation has been almost infinite.'" Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165 (1938), quoting Note, A Distinction in the Renvoi Doctrine, 35 Harv.L.Rev. 454 (1922).
156 Possibly "remit" is a better English equivalent. Note, 14 Law Quar.Rev. 231, 232 (1898).
of which, the famous Forgo Case, arose in France in 1878. In that case, by the law of France, which was the forum of litigation and the situs of movables, succession was governed by the law of the nationality of the decedent, which was Bavarian. By the law of Bavaria, on the other hand, succession to movables was governed by the law of the situs, thus causing a "renvoi", or return, of the problem to the law of France. The court decided to "accept the renvoi," and apply the domestic law of the forum. The difficulty was that the courts found themselves in the throes of an apparently insoluble logical dilemma. If it was logical to do as a court of the foreign jurisdiction would, and therefore apply its conflict-of-laws rule to look to the law of the forum, it was just as logical to again apply the conflict-of-laws rule of the forum looking to the foreign jurisdiction. Obviously, this process could be carried on ad infinitum without any result being reached. This dilemma has caused the problem to be referred to as international lawn-tennis, battledore and shuttlecock, ping-pong, merry-go-round, hide-and-seek, logical cabinet of mirrors, circle or endless chain of references, and in other ways.

A further difficulty arose when it was the conflict-of-laws rule of the foreign jurisdiction to refer the problem on to the law of a third jurisdiction. This has sometimes been referred to as the problem of "transmission," to distinguish it from the problem of "remission", or return, to the law of

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157 Administration des Domaines contra Ditch et autres, Cour de Cassation, June 24, 1878, Dalloz Recueil de Jurisprudence, 1879 I. 56; Sirey, 1882 I. 393. This much discussed case laid the basis for the doctrine. Theoretical consideration of the problem commenced with an article by Labbé, Du Conflit entre la Loi Nationale du Juge Saisi et une Loi Etrangère Relativement à la Determination de la Loi Applicable à la Cause (1885), 12 Cunet 5. For an excellent brief statement of the case, see Cowan, Renvoi Does not Involve a Logical Fallacy, 87 Univ.Pa.L.Rev. 34, footnote #1 (1938).

158 In §19, infra, will be discussed a variation of this solution of the problem under the renvoi, the difference not being material for purposes of the discussion in the present section.

159 The ping-pong theory is stated and discussed by Dean Falconbridge, an outstanding writer in this field, Renvoi, Characterization and Acquired Rights, 17 Can. Bar Rev. 369, 379 (1939).

160 As a translation of the French ou jeu cette fois à cache-cache, Bartin, Principles de Droit International Privé selon la loi et la Jurisprudence Françaises (Paris, 1930), translated, 169 Law Times 147, 148 (1930). Bartin commented: "It all ends, then, in this absurdity, that each of the two countries which eventually has jurisdiction applies to devolution the law which its own rules of conflict invite it to reject." Ibid.

161 Referring to reasoning which has been used in support of the renvoi doctrine, it has been termed the "foreign court theory" and the "acquired rights theory," Falconbridge, Renvoi, Characterization and Acquired Rights, 17 Can.Bar Rev. 369, 382 et seq. (1939). See infra, at footnotes #173 & 182.

The situation has also been referred to as an Alphonse and Gaston one, which will bring back memories to those who perused the comic strips of a generation ago. Following this simile, the position of the courts which follow the renvoi doctrine is like that of the excessively polite Frenchmen when both desired to enter a room, but neither could do so because of his insistence that the other should precede him. Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1169 (1938).
While "renvoi" is sometimes used, and the doctrine sometimes supported, in the narrow sense of "remission" to the law of the forum, in general usage the term has become a generic one to refer to any problem of adoption by the forum of the conflict-of-laws rule of another jurisdiction, and it is so used herein. In this sense, characterization, localization and the preliminary question are special variations of the general problem of renvoi. As a doctrine, to repeat, renvoi means that the forum will follow the conflict-of-laws rule of the foreign jurisdiction. Apparently the first reference in the English language to the renvoi doctrine is in the Law Quarterly Review, in 1898.

The situation which has given rise to most of the decisions in which the courts have been conscious of the renvoi problem is very similar to that in the original French case above mentioned. In this typical situation, the forum. Corresponding German terms are Rückverweisung, for remission, and Weiterverweisung, for transmission.162

Professor Cowan, in a learned article upon the subject, uses the term renvoi only in the "remission" sense, devoting only a paragraph, just prior to his conclusions, to "transmission." Renvoi Does Not Involve a Logical Fallacy, 87 Univ. Pa.L.Rev. 34, 37, footnote #15 & 48 (1938).

Some foreign writers illogically support the renvoi doctrine with remission, but not with transmission. Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country," 27 Yale L.Jour. 509, 518 (1918). This has been termed the "mutual disclaimer of jurisdiction theory," being to the effect that if the jurisdiction looked to by the forum declines jurisdiction, by holding that its domestic law does not apply, there is no law applicable to the subject, and the forum fills the gap by applying its own domestic law. Ibid. 512 et seq. Professor Lorenzen says that the distinction "has no basis unless it be a desire to apply, wherever possible, the law of the forum. It is nothing else than a return pro tanto to the doctrine of the exclusive prevalence of the internal law of the forum." Ibid. 520. Cowan, a supporter of the doctrine, expressly avoids the "mutual disclaimer" error. Cowan, ibid., 48.

Robertson, upon the basis of his illusory "preliminary question" doctrine, objects in part to this practice. Characterization in the Conflict of Laws (1940), 97. Accord: Beckett, The Question of Classification ("Qualification") in Private International Law, 15 Brit.Y.B.Int.Law 46, 55, footnote #1 (1934). See also Robertson, ibid., 141-142.

Note, 14 Law Quar.Rev. 231 (1898). The writer states that the principle had been known, but not the name. The word "renvoi" first appeared in a judicial opinion in the English language in In re Johnson [1903] 1 Ch. 821, 831. For an excellent historical survey by Professor Lorenzen in 1910, see The Renvoi Theory and the Application of Foreign Law, 10 Col.L.Rev. 190 & 327 (1910). At p. 19, footnote #24, he includes a bibliography of foreign materials. Neither Story, Wharton nor Minor referred to the doctrine. Story, Conflict of Laws (8th ed. 1883); Wharton, Conflict of Laws (3rd ed. 1905); Minor, Conflict of Law (24 ed. 1901). Minor did make the obscure statement that "the strict letter of the lex domicilii of the testator at the time of his death will control, and no foreign law can be incorporated into it for the purpose of any particular case." Minor, ibid., 334; quoted, Bates, Remission and Transmission in American Conflict of Laws, 16 Corn. L.Qur. 311, 317 (1931).

the forum is disposing at death of personal property of which the forum is the situs. The decedent was a citizen of the forum, with domicile elsewhere. Under the conflict-of-laws rule of the forum, the disposition of the property is governed by the law of the domicile of the decedent, but under the rule of the jurisdiction of domicile it is governed by the law of the jurisdiction of nationality, which is the forum. 167

2. (§7) ARGUMENTS FOR AND AGAINST DOCTRINE

Perhaps the chief reason why the renvoi problem has proved so baffling is that those who have devoted thought to it have been groping for an increase in certainty in the field of conflict of laws through its adoption or rejection. 168 Apart from the special situations discussed elsewhere, 169 this is a vain hope. To make this clear, let us consider as an example the simple, common and important situation referred to at the beginning of this paper. The forum, jurisdiction A, it will be remembered, has presented to it a question relating to the validity of a contract executed in jurisdiction B, and to be performed in jurisdiction C. It is the conflict-of-laws rule of the forum, jurisdiction A, that the validity of a contract is governed by the law of the place of execution, jurisdiction B; but it is the rule of jurisdiction B that all matters relating to contracts are governed by the law of the place of performance, jurisdiction C. Let us add the factor that the conflict-of-laws rule of jurisdiction C is the same as that of jurisdiction A, that the validity of a contract is governed by the law of the place of execution. This will cause jurisdiction C to look back to the law of jurisdiction B. 170

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167 This situation is the only one given in the Restatement as an illustration in connection with the general American rule of rejection of the renvoi doctrine. Restatement, Conflict of Laws (1934), §7, Illustration 1. It is given as the typical example by Professor Griswold at the beginning of his excellent article, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1166 (1938). See also 1 Beale, Conflict of Laws (1935), 56, §7.3.

168 Professor Griswold contemporarily argues that "rejecting the renvoi" leads to uncertainty and contradiction in a manner which should give its proponents pause." Renvoi Revisited, 51 Harv.L.Rev. 1165, 1180 (1938). However, he excepts from his argument in favor of adoption of the renvoi doctrine "the few cases where this step would lead to the insoluble difficulty of the endless chain." Ibid. 1183. The illustration about to be given in the text herein is therefore outside the scope of his argument, as he expressly recognizes. Ibid. 1192.

169 Professor Lorenzen, opposing the renvoi doctrine, says: "Its introduction into our law would be most unfortunate on account of the uncertainty and confusion to which it would give rise in the administration of justice and its demoralizing effect upon the future development of the Conflict of Laws." The Renvoi Theory and the Application of Foreign Law, 10 Col.L.Rev. 190 & 327, 344 (1910). See Goodrich, Conflict of Laws (2d ed. 1938), 13.

170 The mechanistic possibility of greater certainty in connection with the preliminary-question doctrine, in case a problem happens to be presented in that form, has been discussed in the preceding section. Matters of status and of property, as previously indicated, stand out in the field of conflict of laws, and will be discussed in §§89-13, infra. See also §14, infra.

170 This gives us a "circle," from B to C and back to B. It will be recalled...
If the renvoi doctrine is rejected, that is, if the forum does not follow the conflict-of-laws rules of other jurisdictions, the court of jurisdiction $A$ will apply the domestic law of jurisdiction $B$, and the conflict-of-laws rules of jurisdictions $B$ and $C$ will be irrelevant. On the other hand, if the forum, rejecting the renvoi, happens to be a jurisdiction which has the rule that validity of a contract is governed by the law of the place of performance, it will apply the domestic law of jurisdiction $C$, and again the conflict-of-laws rules of jurisdictions $B$ and $C$ will be irrelevant. In either instance, the outcome of the case depends upon the accidental circumstance that the forum happens to be a jurisdiction holding one or the other of the two views mentioned. This is clearly undesirable. Let us therefore see whether the situation is improved through adoption of the doctrine of the renvoi.

We shall consider the same illustration from the standpoint of the various possibilities under an application by the forum of the renvoi doctrine. Returning to the first supposition previously made as to the view of jurisdiction $A$, that its conflict-of-laws rule is that validity of a contract is governed by the law of the place of execution, jurisdiction $B$, the court of the forum will, under the renvoi doctrine, look to the law of jurisdiction $B$ in the first instance. But the forum will look to jurisdiction $B$ for its conflict-of-laws rule, and, finding that that rule is to look to the law of jurisdiction $C$, the forum will do likewise. Again the forum will look for the conflict-of-laws rule of the jurisdiction referred to, now jurisdiction $C$, and, finding that that rule is to refer the matter back to jurisdiction $B$, the forum again will follow suit. Having previously looked to the law of jurisdiction $B$, as the first step in its search for a governing law, the forum has now completed a circle from $B$ to $C$ and back to $B$, and so finds itself in the logically insoluble dilemma which has been described. Therefore the forum will "accept the reference" back to the law of $B$, and apply the domestic law of that jurisdiction.

Now, still under the renvoi doctrine, let us take the other suggested supposition as to the conflict-of-laws rule of jurisdiction $A$, that is, that it holds that validity of a contract is governed by the law of the place of perfor-

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that it was this type of situation which first directed attention to the renvoi problem. Professor Griswold objects: "... By approaching the matter from the abstract and theoretical point of view, the fear of the endless chain has been magnified into a generalization; while the endless chain is in fact and in practice an extremely rare apparition." Renvoi Revisited, 51 Harv.L.Rev. 1165, 1192 (1938). The reader will have to judge whether or not the illustration being considered is far fetched. To the present writer it seems that the best way to understand the renvoi problem, and to appreciate its full implications, is to approach it primarily from the standpoint of the "circle" situation. That aspect is ably discussed incidentally by Professor Griswold. Ibid. It is true, as pointed out by Griswold, that even though a jurisdiction adopts the principle of the renvoi doctrine, there are a number of types of situations where the "circle" difficulty will not arise. Ibid. 1183, 1188-1192. These situations will be discussed in the course of the present paper.

171See footnote #158, supra.
formance, jurisdiction C. The course of the forum's search will now be from C to B, and back to C, when, again having completed a circle, it will "accept the reference," and apply the domestic law of jurisdiction C. So we see that, whether the renvoi doctrine be accepted or rejected, the outcome depends upon the accident of the view held by the jurisdiction which happens to become the forum for litigation. As Professor Lorenzen, after discussing a different illustration of the same point, said:

"Renvoi or no renvoi, such inconsistencies will remain. Uniformity of decision cannot be obtained until the elimination of the differences in the systems of Private International Law through international agreement."174

The various arguments, apart from certainty, in favor of the renvoi doctrine as a general principle, may be briefly stated as follows, arranged in order of decreasing weight which the present writer feels that they have had:

(1) The foreign court theory. This is that, when the forum looks to the law of another jurisdiction, it should do as a court of that jurisdiction would.175 The adoption of this theory is a natural reaction in dealing with this type of case, and, as pointed out, was the original reaction of the courts. Even when not expressed, it has been felt and applied unconsciously. This theory is relied upon more than any other by the distinguished contemporary advocate of the doctrine, Professor Griswold of the Harvard Law School. He quotes Mr. Justice Jemner, in a decision of a century ago:

"The Court sitting here decides from the evidence of persons skilled in that [foreign] law, and decides as it would if sitting in Belgium."176

For his own reasoning, Professor Griswold says:

"It is . . . the thesis of this article that domestic courts referred abroad should not blind themselves to foreign rules of conflict of laws. They should instead, as a matter of course, look first at the 'whole law' of the other state, and undertake to dispose of the case as the foreign court would dispose of it; and if the foreign court would in its disposition apply some rule of conflict of laws the

172The situation referred to by Professor Lorenzen was discussed in the text, supra, at footnote #160.
173In 1910 Professor Lorenzen was using this Continental term to refer to conflict of laws.
174Lorenzen, The Renvoi Theory and the Application of Foreign Law, 10 Col.L.Rev. 190, 205 (1910). Insofar as alternative rules to validate legal transactions are worked out and applied, such uncertainties are avoided, a very desirable result. A familiar example of this is the provision of the Uniform Wills Act that a will of personal property is valid if executed in accordance with either the law of the domicile or that of the place of execution. Uniform Wills Act, Foreign Executed, §1; Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country," 27 Yale L.Jour. 509, 531 (1918). The range of such possibilities would seem to be limited.
176Collier v. Rivaz, 2 Curteis 855, 863 (Ecc. Ct. 1841).
domestic court should do the same. There will be a few cases which will not lend themselves to this approach, but it is believed that these will in fact be rare and that they can be handled as and when they arise. 177

(2) Disclaimer, or mutual disclaimer, of jurisdiction. This theory is to the effect that if it is not the conflict-of-laws rule of the jurisdiction looked to by the forum to apply its own domestic law, the foreign State disclaims jurisdiction, and that then there is no objection to the forum's applying its own domestic law, which it does. 178 The theory is sometimes referred to as one of mutual disclaimer, with the thought that the forum disclaimed jurisdiction when it looked to the foreign law in the first instance. 179 The disclaimer theory applies whether the foreign jurisdiction looked to by the forum refers the matter back to the forum or on to the law of a third jurisdiction. 180 The theory therefore results in applying the domestic law of the forum whenever the conflict-of-laws rule of the jurisdiction looked to by the forum is different from its own. 181

(3) Vested, acquired, or foreign-created rights. This theory is to the effect that, in a conflict-of-laws case, the forum is enforcing rights created elsewhere, and that the conflict-of-laws rules of the foreign jurisdiction should be included as one aspect of those rights. 182 Professor Griswold asks:

"Without any thought that there is anything inevitable or logically necessary about the process, is it not true that the enforcement here of rights which would be recognized abroad is ordinarily sound conflict of laws?" 183

(4) Desistement, or gap. This theory is that if it is not the conflict-of-laws rule of the jurisdiction looked to by the forum to apply the domestic law of such foreign jurisdiction, there is a hiatus in the law, which the forum fills with its own domestic law. 184 While the present writer feels that

177 Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1182 (1938). It should be remembered that Professor Griswold's attention is primarily directed to situations in which the present writer feels should be treated as exceptions to the general American rule of rejection of the renvoi.


179 The older generation will recognize this as an "Alphonse and Gaston" approach. See supra, footnote #161.


181 This theory, first developed by the German von Bar, has been much more influential abroad than in this country. See Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country," 27 Yale L.Jour. 509, 512 (1918).


183 Renvoi Revisited, 51 Harv.L.Rev. 1165, 1186 (1938).

184 Bate, Notes on the Doctrine of Renvoi in Private International Law (1904),
this theory as used in the present connection is unsound, it has a proper use for a different purpose, which will be discussed later. Professor Griswold says:

"It is somewhat as if our law had referred us to the law of an area which has no law. In such a case there might be reason for disposing of the case according to our own internal law, in default of any other law which will settle the question. This is the solution adopted by the common law in the situation where a conflicts rule refers to the law of a foreign state and there is a failure to prove what that law is. There is here in effect a failure or inability to prove how the foreign court would dispose of the case. The law is full of such arbitrary dispositions where there is no other persuasive basis for settling the issue. Since this is really a case where the conflicts rule is in fact ineffective, the legislature might well provide by statute that the court should dispose of the case by applying its own internal law."185

(5) Effectiveness of reference to foreign law. Robertson suggests, in favor of the renvoi doctrine:

"... This is the only way of respecting the determination already made that the selected proper law is to govern the question in dispute."187

(6) The territorial theory. This theory is to the effect that all conflict-of-laws problems should be approached from the standpoint of a basic principle that every act is to be governed by the law of the place where it occurred. While Professor Beale, the revered leader of the "territorial" school, disagrees, others have pointed out that the logic of the position is in favor of the renvoi doctrine.188

(7) Reconciliation of contradictory principles. Professor Cowan, making a highly theoretical approach, contends:

"... It [the renvoi doctrine] reconciles two contradictory


185See §17, infra.

186Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1193 (1938). On the preceding page he says: "This is not désistement; it is rather the recognition of a fact."

187Robertson, Characterization in the Conflict of Laws (1940), 156. While he is here directing his attention primarily to the "preliminary question," he refers to the argument as "that given elsewhere for the application of the renvoi," and at 103, 140, indicates that he believes in the renvoi doctrine in general.


189"Mr. Beale's argument against renvoi seems very difficult to reconcile with his vested rights approach. ... Dicey alone seems to have been consistent here." Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1187, footnote #70 (1938). To the same effect: Falconbridge, Renvoi, Characterization and Acquired Rights, 17 Can.Bar Rev. 369, 387 (1939). It should be noted that, under the territorial theory, foreign acts create vested rights, to be enforced by the forum. There are thus only differences of approach and of emphasis between the "vested rights" and the "territorial" theories. The "vested rights" theory may be said to be an application of the "territorial" theory.
principles of decision. The one is the conflict of laws rule which directs the court under certain general circumstances to apply foreign law. The other is the intuitive conviction of the judge that in the special circumstances of the renvoi case before him the ends of justice will be served just as well, if not better, by the application of the familiar law of the forum rather than the unfamiliar law of a foreign jurisdiction. Whether legitimate or not, renvoi is a device which permits both of these contradictory needs to be satisfied.\(^{190}\)

To the present writer's mind, these theories all leave unanswered the difficult basic question. Why should the court of the forum so regard the problem?

Recognizing the difficulty of the task, and benefiting by the efforts of those who have written upon the subject previously, the present writer will endeavor to state why he believes that the renvoi doctrine, as a general principle, should be rejected, the reasons being arranged in order of decreasing importance.

(1) Economy of effort. The difficulties of judges and attorneys are increased when it becomes necessary for them to apply the law of a foreign jurisdiction. As to the foreign domestic law, the demands of justice in conflict-of-laws cases require this, assuming that the relevant facts have not occurred within the jurisdiction of the forum. As to the foreign conflict-of-laws rules, this task is avoided if the renvoi doctrine is rejected. This seems to be a sound reason for rejection of the renvoi doctrine, unless a sufficient consideration to the contrary can be found.\(^{191}\) Dean Falconbridge, of the Osgoode Hall Law School, of Toronto, a distinguished writer, says:

"... Practical, if not theoretical, considerations lead to the conclusion that, as a general rule, a court should not have to concern itself with the conflict rules of the proper law selected by it according to its own conflict rules. The burden, sometimes heavy, some-

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\(^{190}\)Cowan, Renvoi Does Not Involve a Logical Fallacy, 87 Univ.Pa.L.Rev. 34 (1938). Professor Cowan emphasizes that, in the article quoted, he is not taking a position either way in regard to the value of the renvoi doctrine for the solution of controversies, but is merely attempting to show that logical objections to it are not valid. *Ibid.* 36, 49.

Professor Cowan contends that the renvoi doctrine does not involve a logical fallacy, or the possibility of a "vicious circle," because when the foreign jurisdiction refers the matter back to the forum, the reference must be taken to mean that it is to the *domestic* law of the forum. *Ibid.* 47-49. As has been aptly pointed out by Professor Griswold, while the reference back by the foreign jurisdiction may be so regarded, no reason is apparent why it must be. If the law of the forum applicable to the case in the first instance includes its conflict-of-laws rules, which lead the forum to the law of the foreign jurisdiction, and if the applicable law of the foreign jurisdiction includes its conflict-of-laws rules, which refer the matter back to the law of the forum, it is hard to see why the reference back should not also be regarded as being to the *entire* law of the forum, including its conflict-of-laws rules. Professor Griswold points out that Mr. Cowan assigns two different meanings to the "law of the forum." Griswold, In Reply to Mr. Cowan's Views on Renvoi, 87 Univ.Pa.L.Rev. 257, 258-260 (1939).

\(^{191}\)See supra, at footnote \#30, for the same thought in connection with characterization. "There are no practical advantages to be gained from the adoption
times almost insuperable, of ascertaining and applying foreign conflict rules should not, as a purely practical matter, be imposed on a court unless it appears, or is made to appear by one of the litigants, that the situation is an exceptional one in which consideration of the conflict rules of the proper law is required or justified on more or less practical or theoretical grounds or on the basis of policy in order to reach a just result.\textsuperscript{192}

(2) Integrity of judge of forum. It is a basic principle of integrity, in the fulfillment of functions as a judge as well as in all other activities of life, that a person should act in accordance with his own judgment unless there is a sufficient reason for preferring that of another.\textsuperscript{193} This principle is an important one in the development of strength of personality. It can, of course, easily be overdone in application.

(3) The local theory. The "local" school of thought is so named to distinguish it from the "territorial" school, already referred to.\textsuperscript{194} Adherents of the latter school, it will be recalled, feel that all conflict-of-laws problems should be approached from the standpoint of a general principle that every act is governed by the law of the place where it occurred; and it has been pointed out that the logic of this position is in favor of the renvoi doctrine.\textsuperscript{195} Members of the "local" school, among whom the present writer counts himself, will ordinarily reach results in harmony with application of the territorial principle, but feel that conflict-of-laws problems, like all others, should be approached purely from the standpoint of pragmatic considerations deriving from the necessities of the particular situation. This makes it easier for them to act in accordance with the arguments against the renvoi doctrine which have just been advanced.\textsuperscript{196}

Other arguments which have been advanced against the renvoi doctrine, apart from the question of certainty, but which have failed to carry conviction of the renvoi doctrine." Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country," 27 Yale L.J., 509, 523 (1918). Professor Griswold states, in regard to the "endless chain" situation: "No disposition can be made of the question which is not purely arbitrary. There is no more reason for 'rejecting the renvoi' than for 'accepting' it." Griswold, Renvoi Revisited, 51 Harv. L.Rev. 1155, 1179 (1938). He modestly overlooks the fact that on the following page he presents the argument set forth in the text of the present article. At another point, in connection with the same thought, of lessening the effort required of the court of the forum, Mr. Griswold points out that it should not be regarded as conclusive. \textit{Ibid.} 1179. This is, of course, true, when sufficient reason to the contrary can be found. Professor Lorenzen also makes the point set forth in the text. The Renvoi Theory and the Application of Foreign Law, 10 Col.L.Rev. 190, 206 (1910).

\textsuperscript{193}See \textit{supra}, at footnote \#37, for the same thought in connection with characterization.
\textsuperscript{194}\textit{Supra}, at footnote \#188.
\textsuperscript{195}\textit{Supra}, at footnote \#189.
\textsuperscript{196}While there has been much discussion as to whether the forum, if it applies rules of foreign law to the case before it, receives the foreign law as matter of law or of fact, such discussion seems fruitless in the present connection.
tion to the mind of the present writer, in most instances because they seem
to assume the point at issue, may be briefly stated as follows:

(4) **Obstacle to progress of the law.** Professor Lorenzen has said:

"The general recognition of the *renvoi* doctrine . . . would be fatal to the harmonious development of the rules of the conflict of laws in the future. No proper system of the conflict of laws can be built up among the civilized nations as long as this doctrine remains."\(^{197}\)

(5) **Public policy of the forum.** Professor Lorenzen has said:

"The moment it is granted that the adoption of the rules of the conflict of laws rests upon considerations of justice, expedience, and policy, it follows that each state must exercise its own judgment in the matter and determine the matter *finally*. This it fails to do when it adopts the theory of *renvoi* proper in its wider sense."\(^{198}\)

"A mere statement of the operation of the 'renvoi' doctrine should be sufficient to condemn it. The policy which guides our courts when they apply the law of domicile, the law of the contract, or any other rule of the conflict of laws, must manifestly be determined by our own law and cannot reasonably be left to the judgment of a foreign legislator."\(^{199}\)

(6) **Abdication of sovereignty.**

"Many writers have argued that the acceptance of the *renvoi* doctrine amounts to an abdication on the part of one sovereign in favor of another."\(^{200}\)

(7) **Subversion of law of forum.**\(^{201}\)

(8) **Stultification of law of forum.**

"Another grave objection to the English attitude [in favor of the *renvoi*] is that it tends to stultify English private international law. . . . The result is that whenever English private international


\(^{199}\) E. G. Lorenzen, Renvoi in Divorce Proceedings Based upon Constructive Service, 31 Yale L.Jour. 191, 192 (1921).

\(^{200}\) Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country," 27 Yale L.Jour. 509, 522 (1918). Bentwich is quoted, and the matter discussed, *ibid.* Mendelssohn-Bartholdy replies: "It is not outside the province of a sovereign to allocate every possible legal relationship wherever situated to one of the jurisdictions of the world, if in doing so he is aware of the law of reciprocity and does not claim to do it otherwise than for the benefit of complete justice dispensed by his own courts to the persons who may seek their protection." Renvoi in Modern English Law (1937), 85.

\(^{201}\) Cheshire holds that the renvoi doctrine is "subversive," and "flouts" the law of the forum. Private International Law (2d ed. 1938), 57, 59. Professor Griswold discusses and replies to Dr. Cheshire's views, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1177 (1938). Cheshire has been quoted herein in regard to this. Footnote #37, supra.
law differs from that of a country to which it refers a question involving a foreign element, the English courts surrender their own criterion in favour of that of the foreign country. The formula ‘Decide the case as it would be decided by the courts of the foreign country’ seems to involve the result that whenever a difference exists between the English and foreign private international law it must be resolved by applying the foreign system. ‘The English court repudiates its rules directly a foreign judge is pleased to be displeased with them, and a foreign law which is called as a witness is allowed to sit as a Court of Appeal.’ [Bate, Notes on the Doctrine of Renvoi, p. 114.] If this is really the attitude of English law, it may well be wondered why we have a system of private international law at all; for, to adapt the Abbé Sieyès's celebrated remark about Second Chambers, if our rule disagrees with the foreign rule it is mischievous, and if it agrees with it it is unnecessary. 208

(9) Lack of logic.

"It [the renvoi doctrine] is illogical, because it defeats the purpose which a national system of Private International Law is designed to effect, i.e. to indicate the mode in which a conflict of laws must be solved." 204

Anglo-American opinion is overwhelmingly against the renvoi doctrine. 205 Foreign writers 206 and courts 207 are divided. While much has been written to prove that it is the English law that the renvoi doctrine is rejected, the situation is still not clear. 208

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202Such as the English House of Lords.
204Cheshire, Private International Law (2d ed. 1938), 57; quoted and discussed, Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1176 (1938). Dean Falconbridge considers the doctrine "intrinsically illogical." Renvoi and Succession to Movable, 46 Law Quar.Rev. 485 (1930); 47 ibid. 271, 291 (1931), quoted Griswold, ibid., 1173. Professor Lorenzen agrees with Mendelssohn-Bartholdy that the doctrine is illogical. Lorenzen, Review of Mendelssohn-Bartholdy: Renvoi in Modern English Law, 47 Yale L.Jour. 857, 859 (1938).
205An excellent discussion is presented in Griswold, Renvoi Revisited, 51 Harv. L.Rev. 1165, 1170 et seq. (1938).
208The latest case is Vita Food Products, Inc. v. Unus Shipping Co. [1939] A.C. 277, noted, 40 Co.L.Rev. 518 (1940). For an excellent comment upon the difficulty of interpreting the English decisions, see Lorenzen, Review of Mendelssohn-Bartholdy: Renvoi in Modern English Law, 47 Yale L. Jour. 857 (1938).
3. SITUATION UNDER AMERICAN AND OTHER REJECTION OF RENVoi

A. (§8) General Rule of Rejection

In view of the paucity of case materials consciously dealing with the renvoi problem, possibly the future tense rather than the present should be used in speaking of the state of the law. While dealing with rejection of the renvoi doctrine, our attention will be focused upon situations involving only American States, but it is believed that the statements made will be equally applicable to any situation involving foreign countries all of whom "reject the renvoi" as a general rule. Bearing in mind the fact that the courts very seldom have had their attention directed to renvoi potentialities, the entire body of Anglo-American decisions in conflict-of-laws cases is evidence that it has been the practice of the courts to apply the domestic law of the jurisdiction selected by the forum as the proper one to govern the case, without inquiring into the conflict-of-laws rules of that jurisdiction. For the reasons stated in the preceding section, it is believed that they should continue that practice, and it is felt that they will do so. Situations which may be thought to give difficulty will be considered in the following section, as will Professor Griswold's contention that support for the renvoi doctrine can be found in the present state of the American law.

In addition to the overwhelming weight of Anglo-American scholarly legal opinion, it has been indicated more directly that the courts are not going to depart from their settled practice upon having their attention directed to the renvoi doctrine. The much discussed case of In re Tallmadge, in an inferior New York court, presented the typical situation mentioned which has been largely responsible for directing attention to the renvoi problem throughout the world, an estate of local personal property of a decedent domiciled elsewhere. Mr. Referee Winthrop, in a scholarly opinion, said:

"... I am of the opinion that the 'renvoi' is no part of New York law. ... To state accurately the problem in regard to the 'renvoi' would seem almost sufficient to refute the doctrine. ..."

"The 'renvoi' doctrine is not supported by reason. It inconsistently requires either the application of internal New York law after the reference by the French law, although the first reference had been from New York to the French conflict of laws rule, or

209 An English writer says: "Nor must we forget that for every case which lends the [renvoi] doctrine some support there are hundreds in which the municipal law of the foreign country was automatically applied." Morris, The Law of the Domicille, 18 Brit.Y.B. Int.Law 32, 39 (1937). Cheshire refers to "myriads of decisions" where it has been assumed that the foreign law meant simply the domestic law. Private International Law (2d ed. 1938), 66.


211 It has been said that the "confused" referee, "in a most learned and most objectionable way, rejected the renvoi." Nussbaum, Review of Robertson: Characterization in the Conflict of Laws, 40 Col.L.Rev. 1461, 1472 (1940).
the endless reference back and forth, which has been called a circulus inextricabilis.

"It has been argued that the New York court should constitute itself a French court; the assumption being that it is charged with the administration and enforcement of French law in the same manner as a French court is charged. But this assumption is erroneous. The New York court was created and exists for the purpose of enforcing the New York law, including the state's own rules as to the conflict of laws." 212

The Restatement is against the renvoi doctrine:

"Except as stated in §8 [title to land and divorce], when there is a difference in the Conflict of Laws of two states whose laws are involved in a problem, the rule of Conflict of Laws of the forum is applied:

(a) [characterization] . . . ;

(b) where in making the choice of law to govern a certain situation the law of another state is to be applied, since the only Conflict of Laws used in the determination of the case is the Conflict of Laws of the forum, the foreign law to be applied is the law applicable to the matter in hand and not the Conflict of Laws of the foreign state." 213

B. Property and Status

a. (§9) General Situation as Exceptions

It will be recalled that in the discussion of the "preliminary question" 214 it has been pointed out why matters of property and of status stand out in a class by themselves in the field of conflict of laws. To repeat, it has been recognized throughout the world as peculiarly fitting that matters of property should be governed by the law of the situs, and matters of status by the law of the domicile. 215 As to them a forum which is not itself the situs or


In University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 174 (1936), which has attracted a great deal of attention, the Michigan court permitted the Illinois conflict-of-laws rule to govern the contractual capacity of a Michigan married woman, under an alternative assumption that, according to Michigan conflict-of-laws rules, the matter was governed by Illinois law. The opinion does not refer to the renvoi doctrine, although a dissenting judge refers to the doctrine of qualifications [characterization], directing his attention to what is here termed localization. Professor Griswold approves the result reached by the majority of the court. Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1207-1208 (1938).

213Restatement, Conflict of Laws (1934), §7.

214Supra, at footnotes #132 & 153-154; see, also, infra, §14.

215Beale, Conflict of Laws (1935), 57, §8.1: "Because of the paramount social importance of treating the existence of marriage, for instance, in the same way in all states, the law of the forum attempts to bring about a warranty of such treatment by providing in its law for a decision of the question in the way that the law, which in its opinion is the proper law would determine it; not because of any effect given to that law but simply as the rule adopted by the law of the forum for the determination of such problems. The same argument applies to a determination of the title of foreign land; it being essential to the protection of the interests of all parties that such a title should be determined everywhere as
the domicile makes no attempt to apply its own principles of justice—its only desire is to recognize the title to the property as it is at the situs, or the status as it is at the domicile. Not only does this accord with the forum's senses of justice and of fitness, but it would be singularly ineffective for the forum, in the relatively few cases in which matters relating to foreign property or status are presented to it, to attempt to apply a different rule from that existing at the situs or the domicile. Any such attempt would evidence a remarkably narrow public policy upon the part of the forum.

In keeping with this line of thought, the forum will follow the conflict-of-laws rule of the jurisdiction of situs or of domicile. In countries rejecting the renvoi doctrine in general, this makes these situations exceptions to the rule of rejection. Any use of the conflict-of-laws rules of another jurisdiction has been defined, it will be remembered, as an application of the renvoi doctrine. Use of the renvoi doctrine with matters of property and of status makes for certainty, because, and only because, of the universal agreement upon the basic propositions stated, which are of the utmost practical importance, that matters of property are to be governed by the law of the situs, and matters of status by the law of the domicile. In the absence of such agreement, as we have seen in our consideration of renvoi and non-

the state of situs would determine it since that state alone must have the final authority. The cases on the point are in complete agreement.

To the same effect as to real property: Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country," 27 Yale L.Jour. 509, 530, 531 (1918), referring to "the permanent and exclusive physical control which a nation has over immovable property within its territories." Professor Lorenzen also says that "it would seem that in the conveyance of immovable property there is a reasonable basis for the expectation that the adoption of the renvoi doctrine would promote international uniformity of decision." Ibid. 531.


It must be remembered that even in most conflict-of-laws cases the forum is itself the situs or the domicile, so that the problem now being discussed does not arise.

In the case of personal property the time element enters in, that is, the forum applies the law of the situs at the time of the relevant occurrences. See also infra, §14.

As compared with those presented to the courts in the jurisdiction of situs or of domicile itself. Judgments in those cases will ordinarily be binding upon the forum, under full-faith-and-credit principles.

Apart from racial matters such a policy is almost, if not entirely, unknown. It is of course proper for the forum to regulate the conduct of foreign citizens, while within its borders, in accordance with its own ideas of fitness, regardless of their status.

At footnote #164.

Comment, Renvoi in Divorce Jurisdiction, 39 Harv.L.Rev. 649 (1926). See also infra, §14. With most foreign countries nationality must be substituted for domicile in connection with status.
renvoi possibilities in connection with contracts, there is no increase in certainty through adoption or rejection of the renvoi doctrine.

In this connection, it is important to remember carefully that, in countries in general rejecting the renvoi doctrine, the jurisdiction of situs or of domicile, where these matters of property or of status ordinarily arise, rejects the renvoi doctrine even as to them. Therefore, when the forum follows the renvoi doctrine to the extent of following the conflict-of-laws rule of the situs or of the domicile, there is involved only application of the domestic law of the jurisdiction selected by the situs or the domicile, without considering the conflict-of-laws rule of the jurisdiction thus looked to by the situs or the domicile. For this reason, in countries in general rejecting the renvoi doctrine, it may be helpful to think of these matters of property or of status as “limited” exceptions to the general rule of rejection. Or, more colloquially, it may be helpful to think of them as involving a “one-step” use of the renvoi, as only a single foreign conflict-of-laws rule will be made use of by the forum.

It is believed that here again, as with the general American rule stated herein of rejection of the renvoi, the statements made are an accurate synthesis of what the courts of such countries as the United States have been doing, should do, and will continue to do. Those who would like to consider cases along this line are referred to Professor Griswold’s able article, 222

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222In re Lando’s Estate, 112 Minn. 257, 127 N.W. 1125, 30 L.R.A.[N.S.] 940 (1910), is an exception to this rule. That was a “hard case” involving a purported marriage, believed at least by the surviving woman to be valid, in Germany, between two young residents of Minnesota. The court stressed the presumption in favor of matrimony, so that it would not have to “brand the dead with betrayal and the living with dishonor.” The court felt that “the considerations relied upon to repeal that presumption are not clear nor satisfactory, nor are all conclusive.” Referring to German conflict-of-laws rules, which the court found difficult to understand, the final conclusion was “that the marriage in question, conforming as it did to the Minnesota law, conformed also to the German law.” The renvoi doctrine was not referred to. The case is mentioned, Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1200, footnote #123 (1938), and discussed: Bates, Remission and Transmission in American Conflict of Laws, 16 Corn.L.Quar. 311, 316 (1931); Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of “The Law of a Country,” 27 Yale L.Jour. 509, 510 (1918). In most foreign countries nationality rather than domicile controls status.

223Even Nevada nominally governs matters of status by the law of the bona fide domicile. According to a newspaper report, a lady was sentenced to two days in jail for contempt of court because she stated in her testimony that it was her intention to leave Nevada as soon as she had secured her divorce. Then, presumably because of fear of frightening away future customers, the sentence was suspended. Whether the divorce was later granted was not stated. It has been held that in Arkansas residence instead of domicile is the jurisdictional basis for divorces, Squire v. Squire, 185 Ark. 511, 54 S.W.(2d) 281 (1932), but of course such divorces of persons domiciled elsewhere would not be recognized in other States.
Professor Griswold’s conclusion is opposed to the synthesis here made. He feels that the cases where the forum has followed the conflict-of-laws rule of the situs or of the domicile indicate that the courts are in general adopting the renvoi doctrine, and that the “few cases which will not lend themselves to this approach... can be handled if and when they arise.” It is believed that Professor Griswold has failed to appreciate the significance of the general agreement upon the basic principles that matters of property are to be governed by the law of the situs, and matters of status...
by the law of the domicile. As will be seen, in the succeeding sections of this study, the significance of this was only partially grasped by the framers of the Restatement. Compared with the entire body of the law, matters of property and of status are only a small segment. Because as to them, by virtue of their special position, certainty is attained through a limited use of the renvoi, it does not follow that the courts should reverse their usual practice and adopt the renvoi doctrine in general, where no increase in certainty would be gained.

It may be asked whether there is not also agreement upon other basic principles of conflict of laws, justifying similar limited use of the renvoi in regard to them. The example which will probably occur to the reader's mind is the situation where a defendant acting in one jurisdiction has inflicted injury in another. There, however, the forum, assuming a difference of conflict-of-laws rules between it and the jurisdiction where the injury occurred, has no basic prepossession in favor of treating the matter from the standpoint of the defendant, who may have acted in good faith under a privilege or a duty existing by the law where he acted, or from the standpoint of the injured plaintiff. If, as and when agreement either way arises, the situation is ready for addition to the list of exceptions to the rule of rejection of the renvoi. In order to qualify the situation for addition to the list of exceptions, however, it will also be necessary that differences of conflict-of-laws rules still remain as to when or how far to look to the law of the place where the defendant acted, otherwise the problem will have ceased to exist. It is a task for the judges and scholars of the future to bring about agreement upon all conflict-of-laws principles as far as possible. Law is an ever-developing social science, and the fact that future progress is to be anticipated does not detract from the validity and value of a synthesis based upon what has been already accomplished.

227§§10-13. With most foreign countries nationality must be substituted for domicile.

228Professor Griswold does not contend for "just a change of emphasis," but for "a whole different approach." Renvoi Revisited, 51 Harv.L.Rev. 1165, 1183 (1938). He excepts the "few cases where this step would lead to the insoluble difficulty of the endless chain." Ibid. It is believed that it has been sufficiently indicated in the text herein that the possibility of this exists in all situations except those of status and of property. See also, as to attaining certainty, infra, §14.

Dean Falconbridge has suggested that possibly the American States, because of their relative agreement upon conflict-of-laws principles, should be considered as a class by themselves, as opposed to all other countries. Renvoi, Characterization and Acquired Rights, 17 Can.Bar Rev. 369, 387 (1939).

229At footnotes #141-148. See also, as to certainty, infra, §14.

230For illustrations suggested by Professor Griswold's article, Renvoi Revisited, 51 Harv.L.Rev. 1165 (1938), see supra, footnote #225.

231Otherwise the question can not arise.

232As to the state of the law, see supra, footnote #144. See also infra, §14.

233Bartin, the great French scholar, groped for a synthesis such as that set forth herein. He said, in part: "The idea of renvoi . . . seems to me indefensible on the limited ground of personal status. Its promoters would perhaps ..."
b. (§10) Real Property

The Restatement provides:

"All questions of title to land are decided in accordance with the law of the state where the land is, including the Conflict of Laws rules of that state."234

c. (§11) Personal Property

Although not recognized in the Restatement as a general exception to the rule of rejection of the renvoi, upon principle the situation is the same in regard to personal property.235

It is pointed out in the Restatement, apparently without realizing that a limited use of the renvoi is involved, that if a chattel mortgaged in one State is removed to another with the consent of the owner, and the chattel is there judicially sold:

"... The title of the purchaser at such sale will be recognized as valid against the mortgagee in any state, even the state in which the chattel was at the time of the mortgage."236

As the judicial sale is based upon the conflict-of-laws rule of the second State, refusing to recognize the foreign mortgage, a use of the renvoi doctrine is involved when the title thus acquired is brought into question in a State other than that in which the sale occurred. Applicability of the "full faith and credit" provision does not change the principles involved.

The following illustration given in connection with Section 278 of the Restatement, Conflict of Laws (1934), §8(1). Assuming that "title to land" sufficiently describes all real property matters, this adequately covers the use of the renvoi doctrine in that connection. It could well have been pointed out in the Restatement, along the line of the discussion in the text herein, that only a "limited" use of the renvoi is involved. The illustrations given in the Restatement Comment accompanying the section are in harmony with this.

Dean Falconbridge has pointed out that, as personal property can be moved from one jurisdiction to another, there is not the same practical necessity for following the conflict-of-laws rule of the situs as in the case of real property (Contract and Conveyance in the Conflict of Laws, 81 Univ.Pa.L.Rev. 661, 682-683 [1934], and it is true that, in dealing with personal property, the forum is more likely to be influenced by "reciprocity," or other narrow public policy of the forum, to discard its usual conflict-of-laws principles and apply the domestic law of the forum. All of this, as Dean Falconbridge would agree, does not detract from the validity of the principles set forth in the present study.

234Restatement, Conflict of Laws (1934), §270, Comment (d).
Restatement is to the same effect, without being complicated by any "full faith and credit" feature:

"A sells an automobile to B in state X, reserving title. This reservation of title is valid according to the law of X. With the consent of A, B takes the automobile to state Y and there sells it to C, a purchaser for value and without notice. According to the law of Y, title passes to C. C takes the automobile into state Z, the law of which is the same as that of X. A brings action in state Z to recover the automobile. C's title, having been validly acquired in Y, is recognized as valid in Z."

Foreign recognition of the conflict-of-laws rules of the situs is implied in connection with other sections of the Restatement setting forth rules in regard to acquisition of title to personal property in accordance with the conflict-of-laws principles of the situs. The rules stated would be largely rendered ineffective if the title acquired were to be recognized only so long as the chattel did not cross a state line.

d. (§12) Status

This is partially covered by the Restatement. Section 8(2) provides:

"All questions concerning the validity of a decree of divorce are decided in accordance with the law of the domicil of the parties, including the Conflict of Laws rules of that state." The Comment upon Section 131 states:

"If... a statute [prohibiting both parties to a divorce from remarrying] is by its provisions applicable to a marriage of a domiciliary in another state or if it is interpreted by the court as being so applicable, remarriage in another state by such a domiciliary after a divorce in the state in which he was domiciled, will be invalid everywhere."

Section 132 also recognizes the control of the jurisdiction of domicile over the conflict-of-laws rules governing marriages of its citizens. In addition to the text of the section, the Comment states:

"... If a marriage offends a strong policy of the domicil in any other respect [than those enumerated in the section], such marriage will be invalid everywhere."

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237For example, Restatement, Conflict of Laws (1934), §§269, 271 & 276-277.

238The 1926 draft of Section 8 referred to "question of status," and the 1930 draft to "existence of a marital status." See Falconbridge, Renvoi, Characterization and Acquired Rights, 17 Can.Bar Rev. 369, 393 (1939). Evidently basing his remark upon the 1930 draft, Dean Falconbridge stated that in his opinion it went "further in the direction of recognizing the doctrine of the renvoi than the English cases go or are likely to go." Contract and Conveyance in the Conflict of Laws, 81 Univ.Pa.L.Rev. 661, 682 (1934).

239Professor Lorenzen has pointed out that the modern Italian theory that law is primarily personal to the individual logically leads to the conclusion that fora should permit all conflict-of-laws rules relating to an individual to be selected by the law of his nationality. E. G. Lorenzen, Note, 29 Yale L.Jour. 214, 218 (1919). This is in harmony with the Nazi-Fascist ideology of the superiority of their citizens. If in any case a "superior" individual were adverse to an "inferior" one, presumably the views of the jurisdiction of nationality of the latter would be ignored.
Courts and writers are likely to use "shorthand reasoning," and refer directly to the law of the place where a marriage is performed, for example, without stating that it controls because such is the will of the jurisdiction of domicile. Professor Beale is very clear:

"If . . . any state takes an exceptional view . . . and refuses to attach a status to the valid contract of marriage (where most courts would give it effect), all courts should, in dealing with the marriage of domiciliaries of that state, decide the question as the courts of the domicile would decide it."241

In dealing with status matters (or any others), a narrow public policy of the forum may cause it to depart from its usual conflict-of-laws rules, and apply the domestic law of the forum.242 Insofar as the forum is guided by such public policy, except in that sense it has no law of conflict of laws. If such public policy were to be applied to all matters, the forum would always apply its own domestic law. Therefore, decisions of that sort prove nothing as to conflict-of-laws principles when such principles are applied.

e. (§13) Property Matter Treated as Though One of Status, or Vice Versa

From the standpoint of the present discussion, this type of situation, as where personal property at death is governed by the law of the domicile of the decedent,243 is sui generis.244 By looking to the law of the domicile, the matter, though one of property,245 is treated as though it were one of status. It seems clear that if the forum is a third State, later required to pass upon the effect of death upon the title to the property,246 it will apply any relevant conflict-of-laws rule of the domicile, for example, that a will is

240 For example, Restatement, Conflict of Laws (1934), §§121 et seq. This point is made in Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1199 (1938). Problems of characterization arise in determining which portions of the law of status shall be referred by the domicile to other jurisdictions. Adoption involves jurisdictional problems. Dean Falconbridge erroneously distinguishes marriage law from that governing status. Characterization in the Conflict of Laws, 53 Law Quar.Rev. 235 & 537, 564 (1937).
242 Beale, Conflict of Laws (1935), 668, footnote #1, §121.2.
243 Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1185 (1938); Lorenzen, The Renvoi Theory and the Application of Foreign Law, 10 Col.L.Rev. 190 & 327 at 327 (1910). With most foreign countries nationality must be substituted for domicile.
244 In a country in general rejecting the renvoi.
245 That it is one of property is proved by the fact that the jurisdiction of situs may, and occasionally does, depart from the historic and usual rule that personal property at death is governed by the law of the domicile of the decedent. Cal. Prob.Code (1939), §40; 1 Beale, Conflict of Laws (1935), 58, §§2; Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1195 (1938) (quoting statute); 2 Page on Wills (3d ed. 1923), 2405, §1431. That the validity of this will be recognized by other jurisdictions is either stated or assumed by these writers. As to Russian refugees, see Dobrin, The English Doctrine of the Renvoi and the Soviet Law of Succession, 15 Brit.Y.B.Int.Law 35, 45 (1934); discussed, Griswold, ibid., 1196, footnote #105.
246 There may have been noprobate proceedings in State B. The action of the forum would be the same if it were the situs, but that situation would not present the present problem.
valid if executed in accordance with the law of the place of execution.\textsuperscript{247} This involves a second use of foreign conflict-of-laws principles by the forum, as it has already followed the conflict-of-laws rule of the situs that the matter is to be governed by the law of the domicile.\textsuperscript{248} This second use is in conflict with the statement previously made,\textsuperscript{249} that the exceptions to the American rule of rejection of the renvoi involve only a single, or "one-step," use of foreign conflict-of-laws principles by the forum. As there is here a second, or "two-step" use, this situation must be remembered as an exception to that statement.\textsuperscript{250} Ordinarily, in solving such a problem, this would not be noticed, as "shorthand reasoning" would be used, and the court of the forum would look directly to the law of the domicile.

The reasoning applicable will be the same if a situation arises where a jurisdiction of domicile treats a matter of status as though it were one of property.

C. (§14) Agreement Among Potentially Governing Jurisdictions

In connection with characterization and localization,\textsuperscript{251} the suggestion has been made that if the forum feels that its own domestic law is not applicable, and if the jurisdictions whose domestic law the forum considers potentially applicable agree, the forum should yield to their view. The thought seems equally applicable here. It furthers the attainment of certainty in these cases, and avoids the gamble dependent upon the view held by the jurisdiction which happens to become the forum for litigation. For example, if the forum, jurisdiction $A$, finds that in a case involving a contract executed in jurisdiction $B$ and to be performed in jurisdiction $C$, $B$ and $C$ agree upon which system of law should be applied, the forum should follow that view, although contrary to its own.

\textsuperscript{247}Uniform Wills Act, Foreign Executed, §1. "Borrowing" statutes are discussed in Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1201 (1938), and herein supra, footnote #225. A case has arisen involving the situation set forth in the text, except that the forum was also the situs. Baird's Estate, Orphan's Court of Philadelphia, July 18, 1916, unreported, but stated, Bates, Remission and Transmission in American Conflict of Laws, 16 Corn.L.Qur. 311, 316 (1931); discussed, Griswold, ibid., 1191.

\textsuperscript{248}That such a conflict-of-laws rule is involved in the process, see footnote #245, supra.

Griswold correctly points out that Beale and Cheshire are in error in holding that this is not a rule of conflict of laws. Griswold, Renvoi Revisited, 51 Harv. L.Rev. 1165, 1198 (1938). Abbot is also in error in concluding that because the law of the situs is supreme the law of the domicile is only evidentiary. Is the Renvoi a Part of the Common Law?, 24 Law Quor.Rev. 133, 141 (1908).

\textsuperscript{249}Supra, between footnotes #222 and 223.

\textsuperscript{250}There will be no possibility of a third, or "three-step," use of foreign conflict-of-laws principles by the forum, because, as previously seen, supra, between footnotes #222 and 223, the jurisdiction of domicile will reject the renvoi in regard to the problem, and not inquire into the conflict-of-laws rules of the jurisdiction whose domicile law has been selected by the domicile to govern.

\textsuperscript{251}Supra, at footnotes #38 & 125.
4. UNDER RENVOI, HOW TO END SEARCH

A. (§15) Own Domestic Law

We shall now consider how, when the forum, and all other jurisdictions involved in the situation, have the full renvoi doctrine, the forum brings to a successful conclusion its search for a domestic law to govern the problem before it. The key to our endeavor is the principle that under the renvoi the court follows the conflict-of-laws rule of the jurisdiction looked to.

The forum, either originally, or upon a subsequent reference, may look to the law of a jurisdiction whose conflict-of-laws rule also is to apply its own domestic law, that is, the law of the foreign jurisdiction. The forum then applies that law to the problem.\textsuperscript{252}

B. Gap, or Desistement

a. (§16) No Conflicts Rule

What will the forum do, under the renvoi, if it is unable to ascertain the conflict-of-laws rule of the jurisdiction looked to? Such a situation is not all unlikely in this relatively unsettled field. It is the feeling of the present writer that the forum, probably using "shorthand reasoning," will apply a presumption that the jurisdiction looked to has the same conflict-of-laws rule, that is, that the domestic law of such foreign jurisdiction is to govern. If so, the result, as in the preceding section, is that the forum will apply that law to the problem. The adoption of such a presumption seems to be an easy and natural way to dispose of the problem, and one as likely as any other to reach good practical results.\textsuperscript{253}

b. (§17) No Domestic Law

If the forum desires to apply the domestic law of a foreign jurisdiction, but is unable to ascertain what it is,\textsuperscript{254} the rule is well settled that the forum will apply its own domestic law.\textsuperscript{255} This is another aspect of the "gap," or "desistement,"\textsuperscript{256} doctrine. The theory is that the forum's

\textsuperscript{252}Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1190 (1938). In various connections reference has been made, at footnotes #38, 125 & 251, to the possibility that the forum may feel that its own domestic law is not applicable, but may find that the jurisdictions considered potentially applicable agree upon a view contrary to that of the forum as to which should control. If such a situation develops in connection with choice of conflict-of-laws rules, when the forum is following the renvoi doctrine, the search leads to a jurisdiction which applies its own domestic law, in line with the discussion herewith in the text.

\textsuperscript{253}No reference to this problem has been found.

\textsuperscript{254}If the forum and the foreign jurisdiction are both common-law jurisdictions (or both civil law), the forum may "ascertain" the foreign law through the application of a presumption, in the absence of proof.

\textsuperscript{255}This rule is also applied when the forum is rejecting the renvoi doctrine. It does not detract from the validity of the principle of rejection. See the preceding footnote, and also, supra, at footnote #185.

\textsuperscript{256}As previously indicated, this term is also used to refer to an argument in favor of the renvoi doctrine in general, that if for any reason the jurisdiction looked to by the forum does not claim that the law of such foreign jurisdiction is applicable to the case, there is an absence of any law to govern the situation,
domestic law is the best that is available, in the judgment of the forum, with which to fill the hiatus in the law of the foreign jurisdiction. The absence of a conflict-of-laws rule, considered in the preceding section, also involves a gap, or hiatus, in the law, but the desistement doctrine seems to have been thought of only in connection with the absence of a domestic law, and it is believed that only here will it be applied.

C. Finding a Circle

a. (§18) Completing a Circle

If a jurisdiction looked to, either originally or upon a subsequent reference, refers the matter back to the law of the forum, or to that of any other jurisdiction which has already been looked to in the search for a governing law, a literal renvoi is had. This is the type of situation, it will be recalled, which first directed attention to the problem, now subdivided into the four problems discussed in this paper, whether the forum should follow its own choice of a conflict-of-laws rule.

In this situation, as already indicated, the forum "accepts the renvoi," that is, the domestic law of the jurisdiction looked to a second time is applied. This affords a way out of the logical dilemma of perpetual reference back and forth. When the forum thus deals with such a situation, it may be said that the forum desists from further efforts in the search for a governing law when it has found, or completed, a circle.

b. (§19) Circle and a Half

A variation of the "circle" solution has been developed, in situations where the jurisdiction originally looked to by the forum immediately refers the matter back of the law of the forum. Here it has been reasoned: that the forum is endeavoring to do as a court of the foreign jurisdiction would; that a court of the foreign jurisdiction would "accept a reference" back to its law from that of the forum; and that, therefore, the forum should in which event the forum fills the hiatus by applying its own domestic law. See supra, at footnote #184.


It will be developed in the text that it is believed that the variation is fallacious. All decisions and discussions relating to the variation which have been found have involved the situation of an immediate reference back to the law of the forum from that of the jurisdiction originally looked to, and the discussion in the text herein will deal only with this situation. However, no reason is discernible why the same fallacy may not appear in connection with any other sort of reference of the problem back to the law of a jurisdiction which has previously been looked to. Such a possibility involves only different mechanical application of the reasoning for and against the variation which will be set forth in the text, and does not warrant further exploration.
do likewise, and apply the domestic law of the foreign jurisdiction. The result reached is thus the same as though the forum had rejected the renvoi doctrine. This method of achieving that result has been termed a "double renvoi;" or it may be said that the forum has completed a "circle and a half."

The reasoning upon which the "circle and a half" solution is based seems illogical. To decide the case as a court of the foreign jurisdiction would, the forum should consider what that court would do if it were substituted as the forum. In the "circle and a half" reasoning it has been overlooked that this is not being done. If the conception of "accepting the reference," upon which the "circle and a half" reasoning is based, is sound, it would seem logical to accept the reference as soon as a circle situation is encountered. If the foreign court, substituted as the forum, were to do so, it would accept the original reference back to itself, and apply its own domestic law, and not that of a foreign jurisdiction, as the forum is doing under the "circle and a half" reasoning.


263In In re Annesley, [1926] 1 Ch. 692, 708, Mr. Justice Russell, who preferred for himself to reach the same result through rejecting the renvoi, said: "... I have come to the conclusion that I ought to accept the view that according to French law the French courts, in administering the movable property of a deceased foreigner who according to the law of his country, is domiciled in France, and whose property must, according to that law, be applied in accordance with the law of the country in which he was domiciled, will [accept the renvoi and] apply French municipal law, and that even though the deceased had not complied with art. 13 of the Code (permitting acquisition of a domicile in France). The result is that [applying French domestic law] as regards her English personal estate and her French property the [English] testatrix in this case had power only to dispose of one-third thereof by her will."

264In re Tallmudge, 109 Misc. 606, 181 N.Y. 336, 344 (1919), Mr. Referee Winthrop, who concluded that the renvoi is not part of the law of New York, said: "A possible alternative is the application of French internal law on the second reference. For, if a New York court, in attempting to apply French principles governing the conflict of laws, must regard itself as a French court, a view that has been urged by many of the courts indorsing 'renvoi,' it should apply the law as a French court would apply it. But the French court would look to the national law (the law of New York), and then accept the reference back to France—in other words would apply the law of France—so that the New York court, sitting as a French court, would apply the French law; the result being the same as if there were no 'renvoi' at all, in other words, as if the New York court applied French territorial law in the first instance under its own view of the conflict of law." See also Lorenzen, The Renvoi Theory and the Application of Foreign Law, 10 Col.L.Rev. 190, 199, 206 and footnote #52 (1910), referred to by the learned referee.


In dealing with matters relating to foreign property, or to the status of those domiciled elsewhere, certainly can be attained, under the renvoi, through the use of "circle and a half" reasoning. This is because of the agreement upon basic conflict-of-laws principles in regard to these subjects which, as has been seen, enables the American States to achieve certainty as to them through the American "limited" use of the renvoi. For this practical reason "circle and a half" reasoning should be used, under the renvoi, in dealing with these matters. Apart from these matters certainty is neither gained nor lost through adoption or rejection of such reasoning.

5. (§20) Combination of Jurisdictions Adopting and Rejecting Renvoi

Here again the key to the solution is that adoption or rejection of the renvoi doctrine by the forum determines whether or not it acts in accordance with the conflict-of-laws rules of other jurisdictions. If the forum rejects the renvoi, it is immaterial whether the jurisdiction looked to by the forum does so or not, as the forum will not inquire into the conflict-of-laws views of the foreign jurisdiction.

Professor Griswold, however, favors application of the renvoi doctrine in this form. He says: "There is . . . a fourth method of approach, which . . . was the earliest of all to appear in the English cases. The English judge in our case is referred by his conflict of laws rule to the law of France. What is the law of France? According to this view it is the law which a French court would apply to this very case. If a French court would apply French 'internal law' (either because it 'accepts the renvoi' [italics inserted] or for any other reason), then the English court should apply French internal law." Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1168 (1938). He later concludes: "The conclusion is . . . that common-law courts should adopt the fourth view outlined at the beginning of this article and should abandon it only if it is clear that it does not lead to a definite and satisfactory disposition of the particular case." Ibid. 1182. See also ibid. 1190-1191.

As it is the practice under the renvoi doctrine to "accept the renvoi," Professor Griswold's advocacy of the doctrine, as applied to a situation involving a "circle" among jurisdictions all applying the full renvoi to the problem, seems almost entirely academic. Assuming that the jurisdiction looked to by the forum "accepts the renvoi," Professor Griswold has the forum apply the domestic law of the foreign jurisdiction, which would have been the result if the forum had rejected the renvoi doctrine. The only possible exception to this would be a most extraordinary case, where a jurisdiction looked to in the course of the search for a governing law refers the matter back to the law of a jurisdiction which has previously been looked to, and which is neither the forum nor the jurisdiction originally looked to by the forum. See footnote #261, supra.

With most foreign countries nationality must be substituted for domicile.

Except in dealing with foreign property, or the status of one domiciled outside the forum, the forum applying the renvoi doctrine should avoid "circle and a half" reasoning. See the preceding section.

Breslauer makes the novel suggestion that the international disagreement as to adoption or rejection of the renvoi doctrine is, as a practical matter, beneficial: "It helps to avoid the insoluble difficulties which would obviously arise if two or all of them should accept either the unqualified theory of renvoi, including 'double-renvoi,' or the English doctrine. On the other hand it diminishes the number of cases in which courts will apply a foreign law which would consider itself inapplicable—a necessary consequence of the adoption of the American view." Breslauer, Private International Law of Succession (1957), 17. See also ibid. 41.
If the forum follows the renvoi doctrine, it will complete the search for a governing law in accordance with that view, unless, in the course of the search, it is caused to look to the law of a jurisdiction which rejects the renvoi, in which event the search will be concluded upon that basis, and the conflict-of-laws rules of any further jurisdiction will be immaterial. If the forum is following the renvoi, it may be said that the search for a governing law is worked out upon a renvoi basis until the renvoi chain is broken by looking to the law of a jurisdiction which rejects that doctrine.

Griswold, Renvoi Revisited, 51 Harv.L.Rev. 1165, 1190 et seq. (1938).