

'CHARACTERIZATION' IN THE CONFLICT OF LAWS*

WALTER WHEELER COOK †

"The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote."—*Oliver Wendell Holmes*

"The meaning doesn't matter, if it's only idle chatter of a transcendental kind."—*W. S. Gilbert*

AN examination of the history of human thought, whether in the field of philosophy, of logic, or of science, will reveal that often what at first sight seem to be difficult or insoluble problems prove not to be problems at all: the seeming problems have been generated by unfounded assumptions or the use of misleading and ambiguous language. It is believed that in considering the subject of the present article it will be helpful to note one or two examples of the disappearance in other fields of thought of what may be called phantom problems when unfounded assumptions were discarded, or misleading and ambiguous language was adequately analyzed. It is hoped that in this way something may be done to dispel the somewhat dense verbal "smog" in which much of current discussion of characterization is carried on.

* This article is another in a series on THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS. Those already published are: *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457; *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV. 368; 'Substance' and 'Procedure' in the Conflict of Laws (1933) 42 YALE L. J. 333; *Tort Liability and the Conflict of Laws* (1935) 35 COL. L. REV. 202; 'Contracts' and the Conflict of Laws (1936) 31 ILL. L. REV. 143; and 'Contracts' and the Conflict of Laws: 'Intention' of the Parties (1938) 32 ILL. L. REV. 899; 'Immovables' and the 'Law' of the 'Situs' (1939) 52 HARV. L. REV. 1246; and 'Contracts' and the Conflict of Laws: 'Intention' of the Parties—Some Further Remarks (1939) 34 ILL. L. REV. 423. The author is collecting, arranging, and revising these articles with a view to their publication, with additional chapters, in a volume entitled THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS.

† Professor of Law, Northwestern University School of Law. Formerly Professor of Law in the University of Chicago Law School, Yale University School of Law, Columbia University School of Law, The Johns Hopkins University Institute of Law. Author of CASES ON EQUITY (3d ed.), READINGS ON THE FORMS OF ACTION AT COMMON LAW, THE POWERS OF COURTS OF EQUITY.

As a first example of what may happen to even the ablest students of a subject, consider the following 'logical paradox', which is regarded as merely one of a series of such paradoxes that have been supposed by many students to raise serious questions as to the validity of orthodox theories of logic:

"Each adjective-word has, of course, an associated adjective, which is its meaning; and it is to be presumed that this meaning will sometimes apply to the word itself, and sometimes not. Thus, 'long' is not a long word, 'bad' is not a bad word, 'big' is not a big word, etc., so that what these words mean does not apply to the words themselves. On the other hand, 'short' is a short word, 'good' is a good word, etc., and each of these does have a meaning which applies to it. We may, accordingly, divide all such words into *autological* adjective-words, which are those whose meanings apply to them, and *heterological* adjective-words, which are those whose meanings do not. But, now, 'autological' and 'heterological' are adjective-words, so that the question may be raised whether 'heterological' is heterological. If it is, it must be autological, since its meaning will apply to it, but if this is so, it must, in turn be heterological, since that is what it means for this word to be autological."¹

Other writers have expressed the same 'paradox' by saying that "an adjective which describes itself" is "autological"; one which does not, "heterological". According to these writers, the adjective "short" is autological, since "it describes itself": "short" is short. On the other hand, "long" is not long, *i.e.*, does not "describe itself", and so is "heterological". Observe now what happens when a competent student of linguistics subjects the 'logical paradox' to an adequate analysis of carelessly used verbal symbols.

"The fallacy is due to misuse of linguistic terms: the phrase 'an adjective which describes itself' makes no sense in any usable terminology of linguistics; the example of *short* illustrates a situation which could be described only in a different discourse. *E.G.*: We may set up, without very rigid boundaries, as to meaning, various classes of adjectives. An adjective which describes a phonetic feature of words is *morphonymic* (*e.g.*, *short*, *long*, *monosyllabic*). A morphonymic adjective which describes a phonetic feature of itself is *autological*. A morphonymic adjective which is not autological is *heterological*. The adjectives *autological* and *heterological* designate meanings of adjectives and not phonetic features; hence they are not morphonymic. Contrast the following sensible discourse: A *hakab*

1. This statement of the paradox is from LEWIS & LANGFORD, *SYMBOLIC LOGIC* (1932) 449. A similar statement is found in BELL, *NUMEROLOGY* (1933) 157. This particular paradox was devised by Weyl, one of the greatest living students of mathematical logic. A detailed discussion of it will be found in RAMSAY, *THE FOUNDATIONS OF MATHEMATICS* (1931) 27, 42 ff.

is a word that ends in a bilabial stop (p, b). A word that is not a hakab is a *cowp*. The words *hakab* and *cowp* are hakabs."²

That is to say, the eminent logicians and mathematicians in question failed to analyze carefully the meaning of the words they were using. These words were: "Each adjective-word has, of course, an associated adjective, which is its meaning," and so "short" is "an adjective which describes itself." When analyzed, the words "which describes itself" can mean in this context no more than that the adjective in question describes a "phonetic feature" of itself, *e.g.*, "short" is short. Consequently, the classification in question is of adjectives which describe phonetic features of words: "morphonymic" adjectives. Now, when we classify "morphonymic" adjectives into "autological" and "heterological", we are not using these two terms to describe phonetic features of words, but to designate meanings of adjectives. Clearly, then, the two adjectives in question, "autological" and "heterological", are not "morphonymic" adjectives, and the classification of such adjectives into "autological" and "heterological" can by definition have no application to them. The alleged paradox has disappeared; there is no logical problem left for solution. In other words, a careless statement of an alleged problem in terms of misleading and inadequately analyzed verbal symbols has led some of the ablest students of logic and mathematics to write what may fairly be called "idle chatter of a transcendental kind", which "makes no sense in any usable terminology of linguistics."

As a second example, consider the alleged logical paradox of the barber, said to have been invented by that distinguished student of philosophy and mathematical logic, Bertrand Russell:

"There exist a certain village, V, and a certain barber, B, who lives in V. The barber shaves *all* those, *and only those*, who live in V and who do *not* shave themselves. Now, does the barber shave himself? If he does, he doesn't. If he doesn't, he does. Therefore . . ." ³

In this case it seems that the difficulty arises because the language in question has been taken out of its setting, *i.e.*, is not interpreted with reference to time and place, and so as involving some particular individual. This means that the unfounded assumption has been made that actual problems can be dealt with by means of purely formal logic. Discard that assumption, and what happens? As Dewey says:

2. Bloomfield, *The Linguistic Aspects of Science* (1935) 2 PHILOSOPHY OF SCIENCE 499, 501, n. 3.

3. This statement is from BELL, *NUMEROLOGY* (1933) 168. This and other similar paradoxes are supposed to raise doubts concerning the "law of excluded middle" in Aristotelean logic. Compare the discussion of another alleged paradox, that of "Epimenides the Cretan", in LEWIS & LANGFORD, *op. cit. supra* note 1, with that in DEWEY, *LOGIC* (1938) 383.

"The appearance of contradiction vanishes the moment reference to time and date [place?] is introduced, and since the act of shaving is existential [and not 'conceptual' merely], such a reference must be introduced implicitly in the context or else explicitly. When the act of shaving is interpreted existentially and temporally, the command is unambiguous and there is no difficulty in determining how it is to be obeyed. If the barber [who is assumed to be a soldier who is ordered by his superior officer to shave all the men in his company who do not shave themselves] is one who has not *in the past* shaved himself, then he obeys the order by *now* shaving himself; if he has shaved in the past, he obeys the order by *now* abstaining from shaving himself."⁴

In other words, the students of logic who try to treat that subject as purely formal, and yet as applicable to real problems, and so completely sever its roots which keep it in touch with the earthly experience from which it has been derived, thereby generate phantom problems which they cannot solve until they re-establish contact with the earth and interpret their symbols once more with reference to some concrete situation. When they do this, the supposedly insoluble problem disappears.

Doubtless all this will appear to many readers as remote from our present discussion, and so of little if any value for our purposes. What follows is an attempt to show that this is not the case, and that, on the contrary, much valuable light will be shed upon the problems of this article if we apply to them methods of analysis similar to those used by Bloomfield and Dewey in dealing with the 'logical paradoxes' referred to.

As the rules of the conflict of laws have developed and been subjected to discussion, writers have discovered that what seem to be the same verbal symbols have different meanings given them in different systems of law. For example, 'domicil' may have a different meaning in English or American law from what it has in French or German law. Confronted with a rule which contains one or more verbal symbols of this kind, theoretical writers have sought to develop general rules for the "qualification", "characterization", or "classification" of what they call the legal "concepts" or "ideas" for which the verbal symbols are supposed to stand. In doing so they have — at least so it seems to me — more often than not forgotten to keep in mind and so to take adequate account of the purposes which particular rules of the conflict of laws were devised to serve, as well as of the relativity in the use of language. In this way it has come about that many of the discussions of characterization suffer from infirmities more or less

4. DEWEY, *op. cit. supra* note 3, at 364. Compare the discussion by Bridgman, *A Physicist's Second Reaction to Mengenlehre* (1934) 2 SCRIPTA MATHEMATICA 101, 111.

similar to those involved in discussions of the logical paradoxes referred to above. That is to say, they are based upon unfounded assumptions and (or) carried on in terms of inadequately analyzed verbal symbols, the meaning of which is assumed without sufficient reference to the concrete problems which offer themselves for solution. It is believed that this will be clear if we examine concrete examples from current discussions. Before doing so we need to note the distinction made by many writers between "primary characterization" and "secondary characterization". The former has to do with "the allocation of the issue to its correct legal category"; the latter is made only after "the law applicable to the case" [the *lex causae*] has been established.⁵ With this in mind we are ready to examine concrete illustrations of the curious results sometimes reached when verbal symbols are not adequately analyzed as to their meaning *with reference to the specific problem* presented for solution.

We begin our discussion with primary characterization. In his recent article in the *Yale Law Journal*⁶ Professor Lorenzen is analyzing objections made by some writers to the conclusion of others that the wholly "internal" (*i.e.*, the domestic) law of the forum must determine the question whether a given situation is to be 'characterized' as a 'contract', a 'tort', etc. He writes:

"Unger called attention to this point in connection with two English cases. One⁷ involved a foreign contract unsupported by consideration. . . . The contract, being governed by the foreign law and being valid there, was enforced in England. If the court had applied the strictly internal law, which required that a contract be supported by consideration, the fact-situation could not have been characterized as a contract."⁸

If I am not mistaken, the seemingly logical conclusion is reached through a misuse of verbal symbols. That is to say, the word 'contract' is not being used in the same sense throughout the argument. This careless use is indeed common in discussions of the 'validity' of 'contracts' in the conflict of laws. At one moment the word is used to signify the factual transaction or 'agreement,'⁹ without reference to whether or not legal obligation results; at another moment, it is used to mean that a factual transaction is 'legally binding,' *i.e.*, has legal

5. See CHESHIRE, PRIVATE INTERNATIONAL LAW (2d ed. 1938) 30-38.

6. *The Qualification, Classification, or Characterization Problem in the Conflict of Laws* (1941) 50 YALE L. J. 743, 749.

7. *In re Bonacina*, [1912] 2 Ch. 394 (C.A.).

8. (1941) 50 YALE L. J. 743, 749.

9. The words 'factual agreement' are here assumed to be sufficiently clear for present purposes. In connection with other phases of the problem, we should undoubtedly have to discuss more carefully just what is to be included under this term.

obligation attached to it. In the conflict of laws, in discussions of the 'validity' of 'contracts', the problem is to determine what, if any, factual 'agreements' with foreign elements in them shall have attached to them what we call 'contractual obligation'. By definition the "internal" law of the forum does not apply to such agreements; it merely tells us what factual agreements wholly domestic in character have contractual obligation attached to them. By hypothesis — unless we abandon completely the notion that a transaction with foreign elements in it may be held legally binding by the forum even though a similar but purely domestic transaction would not be so held — we are to determine under what circumstances the forum will 'apply' (take account of) foreign rules of contract law in dealing with factual 'agreements' not wholly domestic in character. If we keep this in view, we see that it is without meaning to talk about applying the "strictly internal law" which requires consideration to support a "contract", for to do so would mean that the forum was abolishing all the rules of the conflict of laws as to the 'validity' of 'contracts', *i.e.*, the rules which determine whether factual agreements with foreign elements in them are to be held legally binding, even though similar but purely domestic agreements would not be so held.

We may state this in another way. We are confronted with a 'factual agreement'. Courts have classified such agreements, for conflict of laws purposes, into two groups: (1) those with no foreign factual elements; (2) those with such elements. In working out our rules for the latter, we have fallen into the careless habit of calling them 'contracts' instead of 'factual agreements', *i.e.*, we do this before we have decided whether they are to be held 'contracts', in the sense of 'legally binding' agreements. Characterization of the "fact-situation" — to use Professor Lorenzen's term — has therefore nothing to do with its being a 'contract' in the second sense (of a legally binding agreement), for we are characterizing the fact-situation (factual agreement) in question in order to reach a decision as to whether or not it is to be held a 'contract', *i.e.*, legally binding. All that is needed is to characterize it as a 'factual agreement', *i.e.*, one which, if held to have legal obligation attached to it, will result in what we classify as 'contractual obligation', as distinguished from tort liability, quasi-contractual obligation, etc.

The fallacious character of the type of reasoning under discussion will appear if we consider the following hypothetical illustration from the field of torts. Assume that some states hold that intentionally producing fear of bodily harm by pointing an unloaded gun at another is an 'assault'; others, that it is not. Assume also that the forum, State *F*, takes the latter view, State *X* the former; and that all the events have occurred in State *X*, but the suit is in State *F*. If we were to argue as was done in the excerpt quoted from Professor Lorenzen's discussion,

we would have to say: "If the forum were to apply the strictly internal law, which requires that the gun be loaded in order that the acts constitute an assault, this foreign fact-situation could not be held to be an assault." We would thereby abolish the rule that whether a fact-situation gives rise to liability in tort is to be determined by the law of the 'place of wrong'.

In the same paper Professor Lorenzen calls attention to the discussion of a number of recent writers, in which they ask the following question: Assuming that the law of the forum has first of all decided that the factual transaction before it is to be 'governed' by the 'substantive law' of some foreign state, but 'procedure' by the 'law' of the forum, should (or must) the former allow the 'law' of the foreign state in question to characterize rules of law as 'substantive' or 'procedural'? Or is the forum to characterize the foreign state's rules according to its own notions? Characterization at this stage is called by these writers "secondary characterization". If we consult Cheshire's work, we find his conclusion stated as follows:

"It is clear that with one important exception secondary classification [characterization] must be effected according to the *lex causae*.¹⁰ The exception is this, that if the result of classifying some English or foreign rule in the manner adopted by the foreign *lex causae* is to infringe a rule of *English* internal law which is regarded in this country as a rule of procedure, then the English classification must be followed."¹¹

At a later point Cheshire adds:

"Once it has been established that by the Private International Law of England a foreign legal system is the appropriate law to govern the whole of a particular transaction, it is only logical to admit that the foreign law shall henceforth govern the matter in every respect. To rule otherwise is to stultify the English rules for the choice of law. If the Court has already decided that English law is inapplicable, since all the facts and events concerning the matter are connected with country X, why should it discard just that one part of the law of X which comprises the rules of classification?"¹²

According to Professor Lorenzen, Bartin and Robertson agree with Cheshire. In discussing these views, Professor Lorenzen says:

"According to these writers, if the law of the forum has decided that a contract or a tort is governed by the law of State X, and no rules of procedure of the forum are involved, such questions as

10. That is, the foreign law assumed to have been selected by the forum as the 'applicable law'.

11. CHESHIRE, PRIVATE INTERNATIONAL LAW (2d ed. 1938) 38.

12. *Id.* at 40.

whether a writing required by the law of State *X* affects the formation and validity of the contract or relates to evidence, whether by the law of State *X* the running of the statute of limitations discharges a contract or merely bars the remedy for its breach, whether the failure to give notice to the wrong-doer required by the law of State *X* will discharge the cause of action or whether it is merely a procedural requirement for the bringing of the suit, should be governed by the law of State *X*. What are the consequences of this view? According to the proponents of the secondary classification theory, if the law of the forum says that the statute of limitations is substantive and the law governing the contract says it is procedural, the action would be maintainable, even though it is not brought within the time prescribed by either law. The statute of limitations of the forum would be applicable only to contracts governed by the law of the forum and the foreign statute of limitations, being procedural, would be disregarded, as the courts do not enforce the procedural laws of another country. The same would be true in the case of the statute of frauds. If the law of the forum says it is substantive and the law governing the contract says it is procedural, the contract would be enforceable upon reasoning similar to that used in connection with the statute of limitations, although neither statute is satisfied. If the law of the forum should have a substantive rule requiring notice of the injury suffered by the plaintiff and the law of the place where the injury arose should regard the requirement of notice as a matter of procedure, the action would lie, although no notice was given, that is, neither law was complied with. If the law of the forum should regard the burden of proof as substantive and the law of the state where the wrong was committed should regard it as procedural, there would theoretically be no law applicable to the burden of proof."¹³

It may be that the writers in question would not agree that these conclusions do follow from what they have written.¹⁴ Be this as it may, what is noteworthy is that Professor Lorenzen does not see that the arguments as he states them "make no sense in any usable terminology" of legal logic, and that any plausibility they may have is due to a misuse of words and (or) unfounded assumptions.¹⁵ Consider, for example, the remarkable conclusion at the close of the quoted passage, that "there would theoretically be no law applicable to the burden of proof." By what process is so absurd a conclusion reached? Not, it is submitted, by any valid reasoning process whatever, but merely by a misuse of verbal symbols. It will be well to be specific. Consider the following hypothetical case.

13. (1941) 50 *YALE L. J.* 743, 759.

14. Apparently Lorenzen's statements are a fair representation of Cheshire's argument: see excerpts quoted *supra* p. 197.

15. He does see how absurd the results are, and repudiates them as unsound.

A suit is brought in State *F* for an alleged tort committed wholly in State *X*; the plaintiff and defendant are domiciled citizens of the latter state. Note that for a court in State *X* the case is a purely domestic one, as it contains no foreign factual elements. Consider now the curious character of the supposedly logical reasoning. It is assumed, be it noted, that the forum has first decided to characterize its own rule as 'substantive', and so as not applying to the case in hand: a tort wholly committed in another state. We are then told that:

"If the law of the state where the wrong was committed should regard it [its own rule as to burden of proof] as procedural, there would theoretically be no law applicable to burden of proof."

It is respectfully submitted that no such conclusion can be reached if the terms used are adequately analyzed. What is meant by the statement that "the law of the state where the wrong was committed [State *X* in our hypothetical case] regards its rule [as to burden of proof] as procedural"? There are two possible meanings, namely: (1) that State *X* has characterized the rule in question as 'procedural' *for other purposes*; (2) that State *X*, when it was the forum in a case involving a wholly foreign tort, has characterized the rule as 'procedural'. If the conclusions reached in my article on "'Substance' and 'Procedure' in the Conflict of Laws"¹⁶ are accepted, meaning (1) does not necessarily tell us how State *X* would characterize the rule for conflict of laws cases: the rule may well be characterized one way for one purpose and the other way for some other purpose. Meaning (2) of course does tell us State *X*'s characterization for conflict of laws purposes. Note, however, that *State X's conflict of laws rules, including its characterization for that purpose of its own rule as to burden of proof, would have no application to the case now before the court in State F, if that case were before the courts of State X*. This is obvious when we recall that the case under consideration is for a court in State *X* a purely domestic one, and so only its purely domestic rules would apply if the suit were there. It therefore becomes relevant to ask: Why should or "must" State *F*, in the case before it, characterize the rule of State *X* as to burden of proof in the same way in which a court in State *X* would characterize it if it had before it not this case but a similar one presenting for it a problem in the conflict of laws?

It seems that Cheshire, and others who share his view, are led to the conclusion that the forum should or "must" follow the characterization of the *lex causae*, in cases of the kind under discussion, because of the unfounded notion that that characterization is part of the 'substantive' law of the 'place of wrong' *applicable to the case before the forum*

16. (1933) 42 YALE L. J. 333. The list there given—not an exhaustive list—is of eight different types of situations in which the terms in question are involved.

for decision. As shown above, this is clearly not the case, and the alleged conclusion does not follow logically from the assumed premises. If we ask why it seems to some to follow from those premises, the answer appears to be that those who draw the erroneous conclusion in question do so partly because of the unfounded assumption that a given rule is either 'procedural' or 'substantive' for all purposes.¹⁷ Consequently, decisions of State *X* characterizing its rule as to burden of proof for other purposes are assumed without discussion to determine its characterization for the case in hand. This type of logical error is not at all uncommon: the 'law of identity' in logic, which asserts that "a thing is either *A* or not-*A*," seems to some to justify it. Careful analysis shows, however, that a thing may be *A* for one purpose and not-*A* for another; *i.e.*, the verbal symbol *A* may have different meanings in different contexts. Another reason why the writers in question reach their logically unfounded conclusion is that they are—like the 'autological-heterological' logicians—careless in their use of language: they fail to note the ambiguity of the word 'law' in their premises. That ambiguity lay, as shown above, in the word 'law' in the premise that "the law of the state where the wrong was committed regards [characterizes] its rule as to burden of proof as procedural." A third reason is that they have attempted to deduce the answer from broad general rules about "secondary characterization" and forgotten to take into consideration the purpose of the particular rule in the conflict of laws which is involved, namely, the rule that the 'substantive law' of the 'place of wrong' is to be applied.

It will perhaps be helpful at this point to offer a restatement of the problem presented by the hypothetical case under consideration, in terms of what is believed to be a more accurate and helpful analysis. This briefly is as follows:

No court ever enforces foreign law as such. Under our system of the conflict of laws, an American court when asked to give damages for an alleged foreign tort (wholly committed in some other state) will 'apply' the 'substantive law' of the other state in question. Although it is often said that the 'substantive law' of the other state 'governs' the case, the word 'governs' is misleading: an American court does not hand the case over to the law of the foreign state for decision. If it allows a recovery, it merely decides, on grounds of social convenience, to give a right to damages "as nearly homologous as possible" to the right given by the foreign law. As a purely practical matter, however, it can not undertake to follow the rules for service of process, of pleading, of evidence, etc., of the foreign state. This is expressed in general language by saying that the forum will follow its own 'procedural law'.

17. So far as I can discover, neither Cheshire nor Robertson recognizes the relativity of meaning of these terms, and it is at this point the difficulty begins.

This distinction is one which is being drawn by the court of the forum for its own protection: it cannot devote too great effort to an attempt to give *precisely* what the foreign court would give. Whenever it is called upon to decide for the first time, in cases of this kind, whether a given rule of the purely 'domestic' law of the foreign state shall be classified ('characterized') as 'substantive' or 'procedural', its problem is to decide *from the standpoint of its own practical convenience*, whether the rule in question is important enough to justify spending the time required to ascertain what that rule is and how it is to be applied. In the case of the rule as to burden of proof, it is obvious that it is often of decisive importance in tort litigation. It follows that if the forum treats the rule in question as 'procedural' (and so applies a different rule found in its own purely domestic cases) it will be more than likely to give the plaintiff a substantially different chance to recover than he would have had if the suit had been in the 'place of wrong' (State X). If both forum and place of wrong are two American states, there seems every reason, therefore, why the rule as to burden of proof should be characterized by the forum as part of the 'substantive law' of the place of wrong.¹⁸ If so, the courts of State F in determining the meaning to be given to the verbal symbols in their own rule should characterize the rule in question as part of the 'substantive law' of State X, and that state's characterization is irrelevant.

The same type of analysis can be applied to the other illustrations found in Professor Lorenzen's discussion quoted above. For example, consider the rule as to giving notice of injury: for pleading purposes this may be regarded by either State F or State X as 'substantive', *i.e.*, it must be alleged in a complaint as one of the "facts constituting the cause of action." It may well be held 'procedural' for some other purpose, *e.g.*, the running of the statute of limitations, so that the 'cause of action' is regarded as complete when the injury happens; if so, *for this purpose* the giving notice is not part of the facts which constitute the cause of action, and the statute runs from the time of injury and not from that of giving notice. How, then, should a forum which has a notice statute similar to that of the place of wrong, but differing in details, characterize the notice rules for the purpose of a suit on a foreign tort? There seems to be little if any difficulty in 'applying' the rule in force at the place of wrong as part of the 'substantive law' of that state; consequently if the court at the forum keeps its attention focussed upon the purpose in view — to give a right as nearly like that given in the

18. Of course the majority of American decisions have held the rule 'procedural', perhaps because of the assumption that if it is 'procedural' for some purposes it must be for all. See, however, *Byron v. Brown*, 53 R. I. 91, 163 Atl. 881 (1933), applying the rule of the 'place of wrong' as to burden of proof; and *Preccourt v. Driscoll*, 85 N. H. 280, 157 Atl. 525 (1931), to the same effect.

place of wrong as convenience permits — the answer thus seems clear: follow the notice rule of the place of wrong.¹⁹

A similar discussion is applicable to the statute of limitations. First of all we need to recall that in our hypothetical case the alleged tort was wholly committed in State *X*, and that in its courts obviously its statute of limitations would apply, irrespective of whether that statute is called 'substantive' or 'procedural'. Furthermore, any characterization of the statute there as 'procedural' for purely domestic purposes is not decisive for conflict of laws cases.²⁰ Also, if State *X*, when it had presented to it an action on a tort committed wholly in some other state, had characterized its statute of limitations as 'procedural' and so applied it to bar an action on the foreign tort, there is no reason why this rule of State *X*'s 'conflict of laws law' should be followed by the court in State *F*, since State *X*'s conflict of laws rules would not in State *X*'s courts be applicable to the case before the forum, since that case would present for State *X* what is for that state a purely domestic case.

If the forum, *F*, is confronted with the more complex situation of an 'interstate tort', *e.g.*, one in which the 'act' of the defendant has been committed in one state — either the forum or some third state, say State *Y* — and the consequences (last event) have occurred in State *X*, the discussion would be somewhat as follows:

The accepted American rule in such cases is to 'apply' the 'substantive law' of the state where the 'last event' has occurred. This rule, construed in the light of the actual decisions, means that the law of the forum will give the plaintiff a right to recover if the purely 'domestic' rule of the 'place of wrong' (place of the 'last event') would give a right in a similar but purely domestic case. Consequently, the forum is to ascertain what State *X* (the 'place of wrong') would do in a similar but purely domestic situation.²¹ The conflict of laws rules of State *X*, including *X*'s char-

19. Here and in discussing 'burden of proof' I am assuming that the court at the forum, like American courts in general, does not regard it as contrary to its public policy to give damages for an alleged tort wholly committed elsewhere, even though by the forum's own domestic rule no such right would be given in similar but wholly domestic circumstances.

20. In the case of claims arising from contracts, the statute has been held 'procedural' in order to justify enforcing a new promise to pay a debt barred by the statute. Here, at common law, the pleading rules obscured the issue: the statute of limitations had to be pleaded affirmatively. The new promise thus had to be set forth in a replication. It was then argued that the new promise merely nullified the effect of the plea, and so that the recovery was on the old debt: a bit of rather obvious sophistry, since recovery actually was upon the facts giving rise to the original debt plus the new promise. *Cf.* RESTATEMENT, CONTRACTS (1932) § 86, treating the new promise as enforceable "without consideration"; and discussion by the present writer in (1939) 33 ILL. L. REV. 497, 508.

21. See Cook, *Tort Liability and the Conflict of Laws* (1935) 35 COL. L. REV. 202.

acterization for conflict of laws purposes of its own rule as to burden of proof (or as to giving notice) are wholly irrelevant;²² State *F*'s rule of decision is to be modelled entirely upon *X*'s purely domestic rules of 'substantive law'.²³ Should the words 'substantive law' include *X*'s purely domestic rule as to burden of proof or as to notice? If the purpose is to give a right (in this conflict of laws case) as nearly like that which State *X* would give in a similar but purely domestic case, the answer seems to be "yes", since to do so would not unduly burden the court of the forum in ascertaining the 'law' of State *X*.

To discuss adequately, within the space here available, the problem of the statute (or better, statutes) of frauds is impossible. A few suggestions, however, will indicate what is believed to be a helpful approach. To begin with, there are at least three general types of such statutes; doubtless these would need to be subdivided in any adequate treatment of the problems involved. These three types are: (1) statutes which on their face seem intended to determine 'substantive rights'. Such, for example, is the North Carolina statute, which enacts that "all contracts to sell or convey lands, tenements or hereditaments, or any interest in or concerning them . . . shall be void" unless the appropriate written memorandum is duly signed.²⁴ (2) A second type is found in statutes which on their face seem to regulate 'procedure'. An example is the provision in Iowa that "no evidence of the following enumerated contracts is competent unless it be in writing."²⁵ (3) A third type is found in statutes adopting the wording of the Fourth Section of the English statute, which provides that "no action shall be brought" to charge any one on the enumerated types of contract, unless the memorandum is duly signed.

Any discussion of a problem involving these statutes must first of all note which types are involved, *i.e.*, the precise wording of the statutes in question. It must also take account of, or determine, the policy underlying each, so that its proper construction may be determined. Here, as in other problems involving characterization, general talk about "the statute of frauds" being characterized as 'substantive' or as 'procedural' gets one nowhere: the problems need breaking down into more specific issues. As an example of inadequate statements of the problem, consider the following, taken from Comment *b* of Section 334 of the Restatement:

22. It is assumed that there is no question involved as to 'capacity' to sue, a matter which requires separate treatment.

23. In the article referred to *supra* note 21, there has been pointed out the arbitrary nature of the choice by American law of the 'law' of the place of the 'last event'. It is assumed here that that choice has been made and is to be adhered to.

24. N. C. CODE ANN. (Michie & Sublett, 1939) § 988.

25. IOWA CODE (Reichmann, 1939) § 11285. Among the contracts enumerated are "contracts for the creation or transfer of an interest in lands."

"If the statute of frauds of the place of contracting is procedural only and that of the forum goes to substance only, an oral contract will be enforced though it does not conform to either statute."²⁶

Consider now a concrete case: In State *X*, *P* and *D* enter into an oral bilateral contract for the purchase and sale of a farm in State *F*, which has the North Carolina type of statute, making oral agreements for the purchase and sale of land "void". State *X* has, it is assumed, the Iowa type of statute ("no evidence is competent"). Assume further that the delivery of the deed and payment of the purchase price are to be made in State *X*. A suit for specific performance, or for damages for breach of the contract, has been brought in a court in State *F* (an American state, where the land is situated). If the court in State *F* accepts the Restatement, it will be likely to argue: "our statute is 'substantive', and so cannot apply to this contract as it was made and is to be performed in State *X*. The statute in *X* is 'procedural'; therefore it cannot apply in our court; it follows that judgment must be for the plaintiff, although if the same oral agreement had been made in this state, we would not enforce it."

Note how without adequate consideration it has been assumed that the statute of State *F*, if once characterized as 'substantive', can not apply to this contract since it was made and is to be performed in State *X*. To be sure, if one assumes, as does the Restatement, that only the law of the place where a contract is made [*X*] can determine its validity, even though it is an agreement for the conveyance of land in another state [*F*], the conclusion reached seems on its face logical enough. There appears to be no reason, however, why a court in State *F* might not properly decide that its 'substantive' statute *lays down a policy as to all agreements for the sale of land in State F, no matter where made*, rather than a policy as to all agreements made in State *F*, irrespective of the location of the land. It is universally agreed that the law of the *situs* of land can and does determine the validity of all deeds no matter where executed and delivered; why can not the same law, if the statute properly construed so says, also determine the legally binding character of agreements to convey?

If the court in State *F* should, after consideration, reject this construction of its statute, and so hold it not applicable to a contract made (and to be performed) in State *X*, there is another possibility still to be considered, namely, that although the statute of State *X* seems on its face to be 'procedural' ("no evidence is competent"), and a court there might for its own purposes very properly call it that, the

26. Lorenzen asserts that the same conclusion follows from the principles as to characterization adopted by Cheshire and Robertson: "The contract would be enforceable . . . although neither statute is satisfied." (1941) 50 YALE L. J. 743, 759.

court in State *F* is not necessarily precluded from saying that the statute in question ought to be characterized as 'substantive' for the purposes of its (*F*'s) own conflict of laws rule. That is to say, the court in *F* is deciding from its own standpoint which rules of law of State *X* are to be taken account of and 'applied' as 'substantive', so as to give the plaintiff as nearly as practicable the same right, and no more, that he would have in a court of State *X*. From this point of view, the rule of State *X* that "no evidence is competent" unless in writing and duly signed, effectively nullifies any right of the plaintiff to recover there (so long as the requisite memorandum has not come into existence), and so may well be treated by State *F* as the kind of rule denoted for it by the word 'substantive' in this particular rule of the conflict of laws. If this is not done, the result will be to give a plaintiff relief in *F* when he is entitled to none in the courts of *X*. If I am told, as I doubtless shall be, that the statute of State *X* is 'procedural' and so can't be 'substantive', I shall reply by paraphrasing the language of Mr. Justice Holmes used in holding that a stevedore, who never went to sea, was a 'seaman' within the meaning which ought to be given to that word in the statute he had under consideration:

"It is true that for most purposes, as the word is commonly used, such a statute is not substantive. . . . But words are flexible . . . The policy of the rule is directed to giving a right as nearly like that given by the other state as is practicable. . . . We are of the opinion that a wider scope than usual should be given to the word 'substantive' in this rule of the conflict of laws, whatever it might mean in rules of a different kind."²⁷

I shall perhaps be told that it is not to be expected that courts will adopt so flexible a method of dealing with the meaning of the words 'substance' and 'procedure'. To this there are several answers: (1) we are by hypothesis discussing how courts ought to determine the meaning to be given to the words in question; (2) courts, perhaps without realizing it most of the time, have varied the meaning of the words as problems have changed;²⁸ and (3) some courts in dealing with statutes of frauds have recognized the need for flexible methods in interpreting language. An example of the latter is found in the treatment of the Massachusetts statute by Mr. Justice Holmes. This is of course quite what one would expect from so intelligent a judge. In *Emery v. Burbank*,²⁹ he was confronted with a statute which said that "no agreement . . . shall be binding, unless such agreement is in writing." The defendant's testator, who was domiciled in Massachusetts,

27. See *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 51 (1926).

28. See Cook, 'Substance' and 'Procedure' in the Conflict of Laws (1933) 42 YALE L. J. 333.

29. 163 Mass. 326, 39 N. E. 1026 (1895).

while temporarily in Maine made an oral agreement that if the plaintiff would leave Maine and take care of the testator, the latter would leave the plaintiff all his property at his death. An agreement of this kind was one of those enumerated in the statute, but it was argued that that statute was clearly 'substantive' and so could not apply to a contract made in Maine. In holding that the Massachusetts statute applied to the Maine contract, Mr. Justice Holmes argued as follows:

"It is possible . . . that a statute should affect both validity ['substance'] and remedy by express words, and this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other. . . . The words of the statute before us seem in the first place, and most plainly, to deal with the validity, and form of the contract. . . . But we are of opinion that the statute ought not to be limited in its operation on the form of contracts made in this State . . . [It] evidently embodies a fundamental policy. . . . The nature of the contract [here sued upon] is such that it naturally would be performed or sued upon at the domicil of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts testators should be sued here upon such contracts without written evidence, wherever they are made. . . . In our view the statute, whatever it expresses, implies a rule of procedure broad enough to cover this case. . . . It might be possible . . . to construe the whole statute as directed only to procedure. Upon this question we express no opinion. All that we decide is that the statute does apply to a case like the present."³⁰

With this introduction, we are ready to take note of the famous—perhaps we should say notorious—decision of the Court of Common Pleas in the case of *Leroux v. Brown*,³¹ which required a determination of the characterization to be given for conflict of laws purposes to the Fourth Section of the English statute ("no action shall be brought" etc.). In that case the English court refused to enforce an oral agreement, made and to be performed wholly in France, for personal services not to be performed within a year, although under French law such an oral agreement was binding and enforceable. The court treated the words "no action shall be brought" as "plain and unambiguous" and as clearly referring to "procedure". If so, the section applied to all contracts of the specified kinds wherever made or to be performed. The opinion of the court is in striking contrast with that of Holmes, J., in the case discussed above, and has very properly been considered inadequate. To be sure, the statute does not make an oral agreement of the

30. *Id.* at 328-29, 39 N. E. at 1027.

31. 12 C. B. 801 (1852).

kind specified 'void' in the sense that it has no legal effects whatever. Apparently the prevailing view, under statutes having language like that of the Fourth Section of the English statute, is that the necessary memorandum is sufficient if it comes into existence any time before action is brought; that there need be no intention that it constitute a memorandum; and that a defendant in pleading may admit the making of the oral agreement and yet rely on the statute. Notions differ, however, as to whether the absence of a memorandum must be set up affirmatively or may be shown under a general denial.³² Furthermore, the equitable doctrine of 'part performance' is usually recognized in states having the wording of the English statute, but is not recognized, *e.g.*, by North Carolina, which has the 'void' type of statute. Finally, under the 'void' phraseology a plaintiff who is in default under an oral contract within the statute is more frequently allowed to recover in quasi-contract for benefits conferred than is the case under the wording of the English statute that "no action shall be brought", or its intended equivalent in the Uniform Sales Act, to the effect that the oral agreement "shall not be enforceable by action."

In any event, the English court reached the conclusion that "the agreement may be a very good agreement, though for want of a compliance with the requisites of the statute, not enforceable in an English court of justice,"³³ the final conclusion being that the statute goes not to the validity of the agreement, *i.e.*, is not 'substantive', but merely 'procedural'. To the present writer, the notion that because the statute does not make the oral agreement a complete legal nullity, it must therefore be held 'procedural' and not 'substantive' is entirely inadmissible. For example, many consensual transactions are not completely binding, *i.e.*, are 'voidable' under common law rules. For instance, sales induced by fraudulent (or perhaps even innocent) misrepresentation are so treated. 'Voidable' means that the defrauded party may elect either to let these transactions stand ('ratify' them) or to 'rescind' them.³⁴ Surely such rules, which do not make the transaction a complete legal nullity, are not necessarily to be classified as merely 'procedural'. Why then should the statute of frauds be so treated? The problem is, of course, one of the construction of the language in the statute in view of its under-

32. Apparently at common law the statute of frauds had to be pleaded in an action of special assumpsit, but not in general assumpsit, and always had to be specially set up as a defense in equity. In some states noncompliance with the statute could be shown under a general denial. See AMES, CASES ON PLEADING (2d ed. 1905) 332; SHIPMAN, COMMON LAW PLEADING (3d. ed. 1923) 325-26.

33. Jervis, C. J., in *Leroux v. Brown*, 12 C. B. 801, 824 (1852).

34. 'Rescind' here means that the defrauded person may either ask a court of equity for rescission in a proper case, or in some cases 'rescind' by his own acts and sue at law for restitution.

lying purpose. The more flexible approach of Holmes, J., would recognize that the supposedly clear and unambiguous language of the Fourth Section is not necessarily conclusive, as the English court thought it was.

Had the court in *Leroux v. Brown* examined the matter from this point of view, it might have concluded that the Fourth Section was 'substantive' and so did not apply to the French agreement in question. Note the use of the word "might" in the last sentence: there is no intention to assert that the decision would necessarily have been different; the conclusion might conceivably have been that the statute laid down a policy that English courts were not to spend their time trying to ascertain by oral testimony what the agreement of the parties was, no matter where the agreement was made or to what it referred. Even so, the decision would have been arrived at by means of an intelligent consideration of the real problem.

Suppose now an American State, *F*, is confronted by a suit on an oral agreement, made and to be performed in State *X* (another American state), the agreement calling for the conveyance of land situated in *X*. Assume that this type of agreement (for the sale of an interest in land) is one of those specified in the statute of State *X*, and that that statute reads, "no action shall be brought" etc. Assume further that the courts in State *X*, when confronted with a suit on a similar oral agreement (for the conveyance of land in another state, *Y*, and made in State *Y*) have held their own (*X*'s) statute 'procedural', *i.e.*, have followed *Leroux v. Brown*, and so have denied recovery even though, let us say, the oral agreement before them was enforceable in State *Y*. The question is, Must or should the court in State *F* hold the statute of State *X* 'procedural' for the purpose of their own conflict of laws rule, and so enforce the oral agreement (made and to be performed in *X*, for conveyance of land in *X*), even though State *X* would not enforce it? By no means, if the analysis set forth above is accepted: the court of State *F* may very properly refuse to give the plaintiff greater rights than he would have in State *X* if the suit were there.³⁵ Of course, if the statute in State *F* were itself construed as 'procedural', it would be unnecessary for the forum to 'characterize' State *X*'s statute. If, however, State *F* had a 'substantive' statute, which then by hypothesis would not be applicable to the case in hand, there is no reason why it

35. Compare *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795 (1892): contract made and to be performed in Illinois, relating to an interest in Illinois land; suit for damages in Indiana. Illinois had the Fourth Section type of statute. Held: the Illinois statute was 'substantive' and applicable to the case before the Indiana court. It did not appear in the case that Illinois had ever held, for conflict of laws purposes, that its statute was 'procedural'. The contention in the text is that this would be irrelevant: the case before the Indiana court would for the Illinois court be a purely domestic situation, and so the Illinois conflict of laws rules irrelevant.

should follow State *X*'s 'characterization' of its statute as 'procedural': that characterization is irrelevant and not decisive for *F*, since the case in hand would for State *X* be a purely domestic case, and its conflict of laws rules would be inapplicable.

If in a still different hypothetical case we assume that State *F* has the English type of statute ("no action shall be brought" etc.) and also that the land is situated in State *F*, and (let us say) that State *X* (where the contract for conveyance of the land was made and to be performed) has the 'void' phraseology, other considerations would need discussion. By hypothesis, the contract was made and to be performed in State *X*, but calls for the conveyance of land in State *F*. In this case, it would seem to make little difference whether the court in State *F* decided to label its statute 'substantive' or 'procedural'. If 'procedural', the plaintiff could not recover. If 'substantive', it might still be held, without doing violence to any unalterable law of the legal universe, that State *F* has the right to say whether or not it will give effect to an agreement, no matter where made, if that agreement calls for the conveyance of land situated within its borders. To be sure, the court in State *F*, if it read the Restatement, might be misled into thinking that if it held its statute to be 'substantive', it could not apply that statute to the agreement in question: only the law of State *X* (where the agreement was made) has 'jurisdiction' to apply its law. It is believed that the fallacious character of this reasoning ought by now to be clear. It should be added that even if State *F* were to refer the matter for decision to the 'law' of State *X* (place of contracting), the court there might say: (a) our 'substantive' statute applies only to contracts for the conveyance of land situated in this state; (b) if we were confronted with a suit on this agreement, there is no reason why we should not treat the statute of State *F* as 'substantive', and refuse to enforce this agreement if a court in the *situs* would not enforce it, even though, for purposes of its own, State *F* were to 'characterize' its statute as 'procedural', and so apply it not only to contracts for the sale of domestic land but to all other contracts, no matter where the land is or the contracts were made.

Illustrations could be multiplied without end, showing what happens when 'characterization' is undertaken without keeping in mind the particular type of problem, *i.e.*, the particular rule, involved, and without carefully determining the precise meaning to be given to the verbal symbols used in the discussion. The suggestion thus is that each rule of the conflict of laws needs separate discussion, and that ambiguities in the verbal expression of a rule can be cleared up intelligently only if we keep constantly in mind what purpose, social or economic, the rule in question is supposed to have.

If one turns to the Restatement, he finds the matter dealt with in Section 7, which reads:

"Except as stated in §8, 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) in all cases where as a preliminary to determining the choice of law it is necessary to determine the quality and character of legal ideas, these are determined by the forum according to its law."³⁶

In interpreting this section we need to take account of Section 584:

"The court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure.

- (a) The rule stated in this Section is an application of the general principle that a court applies the Conflict of Laws rule of its own state (see §7)."

It is difficult to ascertain just what these sections mean. To begin with, it seems clear that a court can never follow a foreign conflict of laws rule to the exclusion of its own conflict of laws rule. Its conflict of laws rule *may* tell it to take account of a foreign state's conflicts rule in deciding a case with foreign elements; if it does so, it is still following its own conflicts rule. For this reason the phraseology adopted in these sections seems unfortunate. For example, to tell a court to follow its own "Conflict of Laws rule" in determining "whether a given question is one of substance or procedure," tells it absolutely nothing. Consider the 'burden of proof' problem, in the case of a wholly foreign tort: the forum, *F*, will follow its own conflicts rule if it characterizes the rule as to burden of proof of the 'place of wrong' as 'substantive', and so applies that. It will equally follow its own conflicts rule if it calls the other state's rule 'procedural' and its own rule also 'procedural', and so follows the latter.

Clearly, the language of the section fails to state the problem accurately, and adds confusion to its discussion. Note, now, where the learned Reporter and his advisers finally come out in dealing with the rule as to burden of proof. Section 595 reads:

"(1) The law of the forum governs the proof in court of a fact alleged.

(2) The law of the forum governs presumptions and inferences to be drawn from evidence.

(a) Proof in court covers all matters falling within the description 'burden of proof'."

36. Paragraph (b) of the section, which deals with Renvoi, is omitted.

Presumably these statements are supposed to follow from the earlier sections quoted above. Presumably, also, Section 595 means that in an action on a foreign tort the forum will apply the same rules as to burden of proof and as to presumptions that it applies in purely domestic transactions. It would be difficult to find a clearer example of how lack of careful analysis, especially of the meaning of the verbal symbols used, may lead to results which tend to nullify the purpose of the rules involved, which is to give a right as nearly like that created by the foreign system of law in question as is reasonably practicable, without unduly burdening the court.³⁷ As the present writer has pointed out, this purpose is defeated unless the forum follows the rules as to burden of proof and presumptions of the foreign state whose 'substantive law' is being 'applied'.³⁸

In the case of *In re Annesley*,³⁹ the first question discussed in the opinion of the court was, whether it was enough that Mrs. Annesley was 'domiciled' in France according to the usual English definition of that term, or whether she must also be 'domiciled' there according to French law. The decision was that only the former was necessary, and that 'domicil' under French law was not necessary. The rule involved was said by the court to be that the "personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country shall be administered in accordance with the law of that country." In deciding the case Russell, J., did so on the basis that French law would dispose of Mrs. Annesley's "personal estate" situated in France according to the law of her nationality, namely, English law. Falconbridge has pointed out that under the French conflict of laws the law of the 'domicil' is to be applied.⁴⁰ The question then arises: Assume a similar case, involving the 'personal estate' of a decedent, situated partly in an American state and partly in France, and that both states would apply the law of the 'domicil' at death, but that the meaning commonly given to that term is not precisely the same in

37. At this point the reference is to a wholly foreign fact-situation connected solely with the foreign state in question. If an 'inter-state' situation is involved, the purpose is to give, so far as is reasonably practicable, a right as nearly like that which the foreign state in question would give in a similar but, for it, wholly domestic situation.

38. See Cook, 'Substance' and 'Procedure' in the Conflict of Laws (1933) 42 YALE L. J. 333.

39. [1926] 1 Ch. Div. 692, involving the distribution of the 'personal estate' of an English subject alleged to have died domiciled in France. In the text I have used the term 'personal estate' without further definition, as sufficiently clear for our present purposes. In *In re Ross*, L. R. [1930] 1 Ch. 377, the term used is 'movables'. The distinction is discussed in Cook, 'Immovables' and the 'Law' of the 'Situs' (1939) 52 HARV. L. REV. 1246, and more recently by Falconbridge in an annotation in [1941] 1 D. L. R. 699, 703.

40. See Falconbridge, *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 537, 553.

the two systems of law, How shall the American state 'characterize' (in plain English, define) the term 'domicil' *for the purposes of the particular rule in question?* Clearly, a solution can be reached only by first of all determining what the purpose of the rule is supposed to be. It has been suggested by some that that purpose is to bring about uniformity, *i.e.*, that the American court should seek to distribute the decedent's personal estate subject to its jurisdiction in the same way in which the French court would distribute the 'personal estate' of the decedent situated there. If we accept this as the purpose of the rule, it is clear that the American court would need to find out whether or not the decedent was 'domiciled' in France *under French law* before it could accomplish its purpose. That is to say, it could not tell what a French court would do with the decedent's 'personal estate' there until it knew whether that court would say that the 'domicil' at death was or was not in France. In other words, French 'law' would determine the distribution if the 'domicil' of the decedent at death was, according to French law, in France, the word 'law' meaning, in this context, the 'domestic rule' of France; but if the 'domicil' was, *according to French law*, in the American State concerned, the French court would apply 'American law',⁴¹ *i.e.*, the law of the American State in question. Consequently, to disregard the French meaning of 'domicil' would defeat the assumed purpose of the rule.

It may well be, of course, that the purpose of the rule is not that stated above, but something else. If so, the 'characterization' of 'domicil' might well be made without taking account of the French definition of the term. The matter, however, cannot be discussed adequately without taking note of the ambiguity of the word 'law' in the rule in question: the 'law' of the 'domicil' is to be applied. How is 'law' to be defined ('characterized')? Does it mean the domestic rule or the conflict of laws rule of the foreign state? Obviously, that will depend upon what one conceives the purpose of the rule to be; and if one concludes that uniformity of distribution of movables is the object in view, one finds oneself referred to the conflict of laws rule of the foreign country in question; and so is confronted with the problem of 'Renvoi'. It seems best, therefore, to postpone further discussion of the purpose of the rule under consideration until it can be dealt with adequately, in connection with a somewhat careful exploration of the mazes of 'Renvoi'. To this a later article will be devoted.

41. Falconbridge has recently pointed out that foreign courts which purport to apply the law of nationality (rather than of the domicil) are confronted by the difficulty that there is no single body of 'national law' for British subjects or American citizens, applicable, *e.g.*, to the distribution of decedents' estates. These difficulties are usually overlooked by judges and lawyers in Anglo-American jurisdictions, at times with lamentable results: see his *Renvoi and the Law of the Domicile* (1941) 19 CAN. B. REV. 311.