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Characterization as an Approach to the Conflict of Laws

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two questions: (1) Is it advisable, as a matter of governmental policy, to further extend the power of such an administrative body? (2) Has the Commission abused the power already granted it by Congress? The first of these issues is beyond the scope of this discussion, but the opinions considered above may shed some light upon the second.

From this survey it may be concluded that, insofar as the reorganization plan opinions handed down to date are concerned, the Securities and Exchange Commission has not attempted to go beyond its legislative mandate or even to go to extreme limits possibly permitted by the broad language of the Act. In determining the fairness of proposed plans, adherence to accepted legal criteria has characterized the opinions and, in its determination of feasibility (or "soundness") of proposed capital structures, the Commission has not required standards beyond those of sound fiscal policy. In promoting the purposes of the Public Utility Holding Company Act, the Securities and Exchange Commission has carefully avoided the appearance of arbitrary conduct. It has not, for example, dogmatically prohibited the use of voting trusts, although it has made it plain that it will not countenance the use of any device which will "unnecessarily" complicate capital structures or permit abuse of fiduciary authority.

The moderation and flexibility with which the Securities and Exchange Commission has handled the complex problems presented by proposed corporate reorganization plans heretofore considered by it, merit much commendation. By avoiding dictatorial practices, the Commission has set an example which, if consistently followed by all administrative boards and commissions, would considerably enhance the respect with which administrative law, as a system, is now regarded.

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CHARACTERIZATION AS AN APPROACH TO THE CONFLICT OF LAWS

Litigation may in a sense be divided into two categories. The ordinary case involves operative facts and issues which are connected with only that legislative jurisdiction in which the court sits and the court simply applies the law of the forum. The second category—the conflict of laws case—involves operative facts

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and issues some of which are connected with legislative jurisdictions other than that of the forum. In this type of case no one system of positive law regulates the entire situation. The court might either decide arbitrarily without reference to any system of law, or apply its own law exclusively, or refer the matter to the system of law with which the case seems to have the closest association. This last course is the one followed.

It is usual to think of this reference as being accomplished through the application of a conflicts rule, a rule of the forum by which the issue as defined is referred to a certain law by means of a connecting factor or place element. This connecting factor may be a judicial concept or an extra-legal fact. Thus, capacity to marry may be referred to the law of the domicile; succession to an immovable may be referred to the law of its situs.

In 1891 Kahn[1] in Germany pointed out that the same case might be decided differently in different states because of the conflicts which might exist in the conflicts rules of the states concerned. (1) The conflicts rules themselves might be patently different, as where capacity to marry is referred by one state to the party's domiciliary law and by another state to his national law. (2) The conflicts rules may be apparently the same, but actually different because different meanings may be given to the connecting factor in each state, as where domicile is the connecting factor in each state, but one method of determining domicile does not correspond to the other. (3) The conflicts rules may be apparently the same in each state, with the connecting factors the same in content, but the issue not defined in the same manner in each state, as where the necessity of parental consent is legally defined as a question of capacity in one state and as a question of form in another.

The often cited case of *Odgen v. Ogden*[2] may be given as an illustration of the last type of conflict mentioned, namely the difference in the definition of the issue. A minor Frenchman had married an Englishwoman in England without previously obtaining the consent of his parents as required by French law. An English court considered the French requirement a matter of form

1. Kahn, Gesetzeskollisionen: ein Beitrag zur Lehre des internationalen Privatrechts (1891) 30 Jhering Jahrbücher für de Dogmatic des Heutigen Romischen und Deutschen Privatrechts 1-143, and republished in Abhandlungen zum Internationalen Privatrecht von Franz Kahn, herausgegeben von Otto Lenel und Hans Lewald, I (1928) 1-123, as summarized by Falconbridge, Characterization in the Conflict of Laws (1937) 53 L. Q. Rev. 235, 238.

2. [1908] P. 46.

and applied the English conflicts rule that form is governed by the law of the place of celebration (England). The court found the French law inapplicable and upheld the validity of the marriage. Shortly before, a French court had to decide on the validity of the same marriage. Defining the necessity of parental consent as a question of capacity to marry, the French court applied the French conflicts rule that such capacity is governed by the party's national (French) law, and declared the marriage null. Both England and France had the same conflicts rules that form is determined by the law of the place of celebration and capacity by the law of the party's domicile (or nationality—here the same),[3] but a difference in the definition of the issue led to a difference in result. The problem of defining the issue and the connecting factor is called the problem of characterization; this has also been called "qualification," or "classification."[4]

Six years after Kahn's statement, Bartin[5] concluded that the problem could not be solved. To Bartin, conflicts rules were as much a part of the law of the forum as the rules of internal law. As such they were phrased in terms of the internal law. To give them other characterizations, such as those of a foreign law, would be to give them a meaning not intended by the sovereign. Hence all characterizations must be by the law of the forum.[6] Bartin admitted that the sovereign may deliberately use a characterization which would fit similar concepts or institutions in other

3. Actually, there are two conflicting rules of reference on the question of capacity, but as the Frenchman was domiciled in France by English law, there would have been no difference in result in this case.

4. *"Qualifications"* is used almost exclusively on the Continent. For use of the terms and a survey of the statements of the problem in English see Robertson, A Survey of the Characterization Problem in the Conflict of Laws (1939) 52 Harv. L. Rev. 747. The only other writers in the United States who have given the problem any serious consideration are: Lorenzen, The Theory of Qualifications in the Conflict of Laws (1920) 20 Col. L. Rev. 247; and Rheinstein, Comparative Law and the Conflict of Laws in Germany (1935) 2 U. of Chi. L. Rev. 232, 257 et seq. 1 Beale, A Treatise of the Conflict of Laws (2 ed. 1938) 55, § 7.2, dismisses the problem with the statement that in America "all qualifications are determined by the law of the forum." Stumberg, Conflict of Laws (1937) and Goodrich, Conflict of Laws (2 ed. 1938) seem to ignore the problem entirely. There will be occasion later herein to explain the lack of material on this subject in the United States.

The question of determining the meaning of concepts in the foreign law to which reference is made by the conflicts rule is now generally resolved in favor of definition by the foreign law itself (see note 38, infra). It will not be treated in this paper. The only problem here is that a judge must be careful when using concepts of a system of law with which he may not be familiar.

5. Bartin, De l'Impossibilité d'Arriver à la Suppression Définitive des Conflits des Lois (Clunet, 1897) 24 Journal du Droit International Privé 225-255, 466-495, 720-728.

6. Id. at 235-240.

systems of law, but such a characterization could not be used outside of its own jurisdiction. In considering this law the foreign court would have to characterize its terms according to its own local concepts.[7]

It is important to note that the conflicts rule has, according to Bartin, the same binding force as a rule of internal law and must be applied in the manner in which the sovereign understands it. It is not such a law as will dispose of the issue, but a rule of reference, one which will refer the issue to a certain law, local or foreign, for determination;[8] an "indicative" rather than a "dispositive" rule.[9] Therefore, the juridical definition or characterization of the issue must be known before the conflicts rule can be selected and the law referred to applied. In the words of Falconbridge,[10] the solution of a conflicts case requires the *characterization* of the issue, *selection* of the law to be applied by means of the conflicts rule, and *application* of the law selected Each state having its own concepts and institutions which cannot be expected to be the same in other states, the characterizations of one state will not necessarily conform to those of another, and therefore it is vain to expect uniformity of result for similar conflict cases in different courts. Bartin concluded that there can be no solution to such conflict of decisions in similar cases; this could be eliminated only by having the same laws with similar characterizations in every state; such uniformity cannot be expected.[11]

Bartin admitted two exceptions to his rule that characterization must be made in accordance with the law of the forum. The first was in determining (preliminary to characterization of the issue) the movable or immovable nature of a thing, which he considered must always be by the law of the situs.[12] Bartin reasoned to this exception on the basis of the security which would be afforded to transactions. There could be no dispute as to the location of a thing. All courts could seize upon this material fact and characterize by the law of the place where the thing is found.[13] The second exception was that the determination of the applicable law should be left to the will or intention of the par-

7. Id. at 241 et seq.
8. Id. at 236, 239-240, 480, 732.
9. Taintor, Universality in the Conflict of Laws of Contracts (1939) 1 LOUISIANA LAW REVIEW 695, 696, n. 3, 4.
10. Falconbridge, supra note 1, at 235 et seq.
11. Bartin, supra note 5, at 734.
12. Id. at 246 et seq.
13. Id. at 251-255.

ties wherever possible.[14] Bartin, we are told,[15] has come to realize that this latter point is no exception at all because the forum must first characterize the issue as one of "contract" before the will or intention of the parties to act under one of the possibly applicable laws may be considered. This analysis does not affect the point which we wish to make here, namely, that sovereignty does not always require that concepts of the local law be used in the conflicts rule.[16]

It must be remembered that Bartin reasoned to the necessity of characterization by the law of the forum on the ground that to use foreign concepts in the local rule would deny the intended application of the local conflicts rule. But if the use of foreign concepts in a local conflicts rule might result in the misapplication of that rule, the use of the foreign law in connection with the local characterizations might result in a misapplication of the foreign law.[17] Therefore, argued Despagnet,[18] characterization of the issue must be made in terms of the law to be applied. H. Donnedieu de Vabres[19] admitted that the foreign law could not be given its intended application with local characterizations, but concluded that this result could not be avoided: how would it be possible to determine what law is applicable before characterizing the issue? Thus, in his opinion, Despagnet's views involved a vicious circle.

Bartin's view of the approach to the conflict of laws has been adopted by Arminjon[20] and Niboyet[21] in France, by Cheshire[22] in

14. Id. at 472 et seq.

15. Rabel, Le Problème de la Qualification (Darras, 1933) 28 Revue de Droit International Privé 1, 14, n. 3; and Robertson, supra note 4, at 761, citing (1930) 1 Recueil des Cours 608.

16. Cf. Robertson, supra note 4, at 759-760.

17. By extending Bartin's reasoning we could say that the sovereign creating the conflicts rule has no intention to *apply* the foreign law, but only a law of its own, the content of which is to be found by interpreting the foreign law in terms of local concepts. That such is not actually the case hardly needs refutation. The sovereign might as well direct that its internal law be applied to conflicts cases. The fact that a use of the foreign law is directed would seem to indicate an intention that it be interpreted and applied as in that foreign state.

18. Despagnet, Des Conflits de Lois Relatifs à la Qualifications des Rapports Jurisdiques (Clunet, 1898) 25 Journal du Droit International Privé 253, 261.

19. H. Donnedieu de Vabres, De l'Impossibilite d'une Solution Rationelle et Définitive des Conflits des Lois (Clunet, 1905) 32 Journal du Droit International Privé 1231, 1236-1238.

20. 1 Arminjon, Précis de Droit International Privé (2 ed. 1927) 133-136. For translated selections, see Harper and Taintor, Cases and Other Materials on Judicial Technique in Conflict of Laws (1937) 258.

21. Niboyet, Notions Sommaires de Droit International Privé (3 ed. 1937) 121-125, nos 197-202.

22. Cheshire, Private International Law (2 ed. 1938) 24-45.

England, and by Falconbridge[23] in Canada. In the United States, Lorenzen takes the same view,[24] and Beale seems to be in accord for he dismisses the problem with the statement that in America "all qualifications are determined by the law of the forum."[25] This is not as astonishing as it may seem at first, for the process of characterization, selection, and application gives rise to difficulty only if the concepts and institutions of the states involved cannot be characterized in the same manner. Since the laws of most of the states of the Union are based upon a common tradition of law, the concepts, institutions, and classification of the internal laws are likely to be the same or so similar that conflicts will arise but infrequently. Rheinstein has noted that the use of concepts as a basis of aproach to the conflict of laws "is unobjectionable as long as we have to deal exclusively with conflicts between various bodies of law inside of one single legal system, e.g., between various statua of the medieval Italian cities, between various French coutumes, between various laws of the ancient Dutch provinces, between various jurisdictions inside the Common Law."[26] It would seem that the approach by means of characterization, selection, and application may be used within certain limits in the conflict of laws.

On the continent of Europe, where there are different traditions of law, the process of characterizing by the law of the forum would not lead to satisfactory results. Certain writers, unlike Bartin, Niboyet and Arminjon, could not reconcile themselves to these results and sought other methods. These methods may be roughly divided into two groups: one which sought to characterize on the basis of comparative law, and another which sought to refer all matters to the law of a place which could be readily located by a material fact or by a universally accepted legal concept.

One way of avoiding Bartin's logic was to deny that the conflicts rule of the forum was drafted in terms of local concepts and institutions. The terms used therein were to be understood as terms of international significance, terms which were intended to

23. Falconbridge, supra note 1. Compare the summary of Falconbridge's views by Robertson, supra note 4, at 766-767. For further discussion of Falconbridge's views see infra, p. 722 et seq.

24. Lorenzen, supra note 4, at 268. For a summary of Lorenzen's views see Robertson, supra note 4, at 747-751, 758-762. According to Robertson (at 747, n. 1), Lorenzen has since considerably modified his views.

25. 1 Beale, op. cit. supra note 4, at 55, § 7.2. See also Restatement of the Conflict of Laws, § 7(a); Lorenzen, supra note 4, at 268.

26. Rheinstein, supra note 4, at 263.

include and to refer to similar concepts and institutions in all systems of law; that is, concepts and institutions which, though perhaps not similar, were used for the same function, to protect or to secure similar interests. Thus "tutorship" in a conflicts rule would include in its meaning not only tutorship as understood in the forum's internal law, but guardianship or any other institution with the same function in other systems of law. Similarly, "usufruct" in connection with the property rights of the surviving spouse could include "dower."

Comparative law could be used to discover the corresponding concepts and institutions in all systems of law and, with the gradually extending adoption of the same conflicts rule, uniformity of results could be obtained. This was the theory announced by Rabel[27] in Germany and which seems to have been followed by Wigny[28] in France and Rheinstein[29] in the United States. Meriggi,[30] following a similar doctrine, declared that the number of conflicts in institutions and concepts were very few indeed, and that real conflicts would be found only in what he termed the *substrata* of various systems of law. As long as the *substrata* are the same, that is, as long as the aims of the law are the same, conflicts would not appear. The institutions and concepts of the internal law might differ in detail, but as long as they perform the same function there would be no conflicts for they could be used interchangeably.[31]

From these observations and from observations previously made regarding the possibility of using characterizations of the *lex fori* where different bodies of law in the same system or tradition are involved, we are led to this conclusion: that the process of characterization, selection, and application may be used as long as the issue is characterized in terms of some concept or institution common to all systems of law involved. If the different bodies of

27. Rabel, supra note 15, at 17.

28. Wigny, Remarques sur le Problème des Qualifications (Darras, 1936) 31 Revue Critique de Droit International 392, 418.

29. Rheinstein, supra note 4, at 264-268.

30. Meriggi, Les Qualifications en Droit International Privé (Darras, 1933) 28 Revue de Droit International Privé 201, 205 et seq.

31. Beckett, The Question of Classification ("Qualification") in Private International Law (1934) 15 B.Y.I.L. 46, as reported by Robertson, supra note 4, at 754, 762-766, would seem to advocate characterization of the issue on the basis of conceptions of analytical jurisprudence as found by a study of comparative law, but at the same time he practically denies this principle by the broad exceptions for the characterization of which he would look to the law of the forum. If Robertson's report on Beckett is correct, we cannot class him as an advocate of characterization on the basis of comparative law.

law belong to the same system or tradition, the common elements may be found in the institutions and concepts themselves. If the bodies of law are more widely separated in tradition, but agree in seeking to perform the same functions and to protect the same interests, the common elements will manifest themselves in the function and purposes of the institutions. If the different bodies of law do not seek to protect the same interests, in short, if they are not based on the same philosophy of law, conflicts will appear and they cannot be avoided. Thus the possibility of using the system of characterization, selection, and application is directly proportional to the points of similarity in the systems of law involved. It must be noted that this method presupposes an examination of the various laws which may be applicable in order to discover the characterization which will fit them all. This is contrary to Bartin's reasoning that the foreign law cannot be reached without the reference of the conflicts rule. Although the approach through the conflicts rule is practical, it is artificial, as will be shown below.

Falconbridge[32] maintains that characterization of the issue should precede selection of the applicable law but is unable to accept characterization by the law of the forum because of the obviously unfair results to which it often leads. Likewise, characterization on a strict comparative law basis is not acceptable to Falconbridge because it would demand of the judge a vast and complete knowledge of all systems of law.[33] He therefore sought to provide a *via media.*

Just what Falconbridge means by this *via media* is not clear from his explanation, for he states that characterization of the issue must precede selection of the connecting factor and then proceeds:

> "This characterization of the question—which may be provisional and subject to revision—lays the foundation for the Court's consideration of the concrete provisions of the laws of various countries which are or may be applicable in the light of the characterization of the main question or different aspects of that question."[34]

To say that characterization of the issue may be provisional and subject to revision is inconsistent with the statement that charac-

32. Falconbridge, supra note 1, at 241, 245-246.
33. Id. at 246.
34. Ibid.

terization must precede selection of the connecting factor. Thus it would seem that Falconbridge contradicts himself.

However, a consideration of what Falconbridge includes in "characterization of the issue," and an analysis of his advocated approach to the problem in the *Ogden* case seems to indicate that he has confused—in the *application* of his principles—characterization of the issue and application of the law once selected—the first and third steps to his process.[35] Thus, in discussing the problem of the *Ogden* case,[36] Falconbridge remarks that the English court should examine the laws of England and the laws of France, construing the latter in its context—that is, according to French characterizations—just as a French court would do, in order to determine whether all provisions of English law essential to the formal validity, and all provisions of French law essential to the *substantive* validity of the marriage have been complied with. Finding that the English law does not require parental consent as essential to the formal validity of a marriage in England, it should declare the English law inapplicable; but finding that the French law does require parental consent as essential to the substantive validity of the marriage in that it considers it essential to the party's capacity to marry, it should declare the marriage null.[37] Apparently, "form" and "capacity" are here his "provisional characterizations."

What Falconbridge appears to have done is to characterize the issue as "validity of the marriage" and to apply the conflicts rules that formal validity of a marriage is determined according to the law of the place of the celebration, and substantive validity by the law of the domicile of the parties. Thus, in looking to the English law to determine what related to form, and to the French law to determine what related to capacity, Falconbridge was only *applying* the law selected by the conflicts rule.

This seems to be the only way to interpret Falconbridge and as thus interpreted his writings do not show a *via media.* They do show the necessity of starting with the issue characterized in terms of a concept which is understood in the same way by all the systems of law possibly involved and the necessity of apply-

35. Cf. Robertson, supra note 4, at 767. Falconbridge seems to have done this same thing in most of his examples of characterization of the issue. It should be noted that what Robertson refers to as "primary" and "secondary" classification corresponds to Falconbridge's "characterization of the issue" and "application of the law selected." The latter does not present any particular problem. See note 4, supra.

36. See note 2 and text thereto.

37. Falconbridge, supra note 1, at 254.

ing the foreign law as it is applied in the foreign state. The first point is particularly the subject of this paper; the second is now generally admitted[38] and need not be considered herein. Since Falconbridge has not given us a *via media* on the question of characterizing the issue[39] and since he at least impliedly recognizes the need for universality on this point, we are forced to return to our finding that characterization of the issue must be in terms of function, characterizations to be discovered through the study of comparative law.

Now whereas the comparative law method would seem to be satisfactory for the purpose of characterizing the issue in the case, it could not be used for the purpose of characterizing the connecting factor. The connecting factor is a place element. Even if the issue is given a universal characterization, the outcome of the case will depend upon the system of law to which it is referred. Thus it is imperative that the system of law referred to be the same regardless of the court in which the issue arises. Similarity of function in the connecting factor would not suffice to accomplish this because similarity of function does not necessarily (and often does not) mean identity of place reference. For example, "domicile" and "nationality" are place elements used by different courts for the same issue, but a party's domicile and nationality may or may not coincide and so the result of the case may depend upon the choice of forum. Even the concepts "domicile" and "nationality" may be determined differently in different states. It would seem, therefore, that connecting factors must be universally accepted for the same issues. This universality would probably be best accomplished through international treaties adopting *and defining* the connecting factor.[40]

The realization of the importance of universality in the connecting factor has been, we believe, the reason which prompted Frankenstein[41] to devise his approach. This noted German international law lawyer would reduce the characterization of all issues to the concepts "personal" and "real." He applies to the first a universally accepted notion of nationality for a connecting

38. Even by Bartin. Robertson, supra note 4, at 761, citing I Recueil des Cours 608. See also Cheshire, op. cit. supra note 22, at 38.

39. Falconbridge's lack of a *via media* seems to be confirmed by his later statement that, as a general rule, characterization of the issue must be by the *lex fori*. Falconbridge, supra note 1, at 542, 543. Cf. Robertson, supra note 4, at 766, 767.

40. This does not mean, however, that comparative law could not be used to determine the best place element to be selected.

41. Frankenstein, Une Doctrine Moderne du Droit International Privé (Darras, 1932) 27 Revue de Droit International Privé 47.

factor, and to the second the unmistakable law of the situs of the thing. The manner in which he arrives at his conclusions is ingenious. All laws relate to persons or to things; the solution of problems of conflict of laws lies, therefore, in discovering the closest points of contact between persons and things and the juridical order. Persons are more closely connected with their nations than with any other idea and hence the national law should be used in all cases of purely personal relations. Besides, the idea of nationality recommends itself because of its stability. But where the relation is between persons with regard to things, Frankenstein reasoned that a person is related not only to one other person, but to all persons in the world. As it is impossible to apply all systems of law, the only thing to do is to choose one upon which all persons can agree and which can be easily determined; hence no better solution can be found than to apply the law of the situs of the thing.[42]

Frankenstein's system would be difficult to put into execution. To say the least, it is doubtful whether the national law of the parties is always the law most closely connected with an issue, and it would be difficult at times to determine whether the issue is "real" or "personal." But the fact that such a system has been advocated does show the importance of having connecting factors universally accepted.

We are now in a position to announce what we believe is the best method to follow in approaching the conflict of laws. The issue must be characterized on the basis of corresponding concepts and institutions in all the systems of law which may be involved. For this purpose comparative law must be the guide. If there is nothing corresponding in the systems and if they are fundamentally opposed to each other, it is useless to attempt to reconcile them and the court should dispose of the case in whatever manner it deems best for the interest of all concerned. If some corresponding concept can be found, however, it will be necessary to have all systems of law refer this concept or institution to the law of the same state. For this purpose the aim of the conflict of laws should be to have all states agree on connecting factors or place elements. This should be possible to a great extent if not in all cases, for the place element has little to do with the method by which interests are secured in the internal law,

42. Id. at 50 et seq. Compare the system of Cock, discussed by Delage, Une Nouvelle Théorie pour Résoudre le Conflit des Lois (Clunet, 1936) 63 Journal du Droit International Privé 1038, 1042 et seq.

and international agreements would possibly be the best means. Therefore, the science of conflict of laws should seek to discover by a study of comparative law the corresponding concepts and institutions in all systems of law and seek to have the same connecting factors universally adopted.[43] Only in this manner will any degree of uniformity be obtained in the method of solving conflicts cases.[44]

This goal may not be susceptible of immediate or even ultimate complete achievement. But it does seem that once the similarity of institutions and concepts can be shown by comparative law it should not be too difficult to reach an agreement on the rules of reference. Already in the more widely accepted institutions we see near universality in results because of similarity in effect, though not always in form, of the conflicts rules used. Barbey[45] has shown that a great deal of universality of result exists in the conflict of laws in contract matters in English, French and American law. Taintor has shown that there is even greater universality in this matter than Barbey found,[46] and has discovered a similar tendency in marriage cases in the United States.[47] Cock, we are told, has erected his system of approach to the conflict of laws on the universality of results in conflict cases.[48] And Robertson, while discussing the characterization of property, has shown that considerable uniformity exists regarding the laws to which such matters are referred.[49]

Something must be said of the method of approach through a conflicts rule or, what is the same thing, through characterization, selection and application. Bartin concluded that characterization could be made by the law of the forum alone because he conceived of the conflicts rules as rules of reference created by the sovereign in the same manner as an internal rule of law. To say the least, it would be difficult to imagine a state arbitrarily referring a matter to a foreign law if it did not consider that the

43. It must be noted that universality in conflicts rules would necessarily dispense with the notion of *renvoi*.

44. Cf. J. Donnedieu de Vabres, L'Evolution de la Jurisprudence Française en Matière de Conflit des Lois depuis le Debut du XXe Siècle (1938) 765, 766.

45. Barbey, Le Conflit des Lois en Matière de Contrats dans le Droit des Etats-Unis d'Amérique et le Droit Anglais Comparés au Droit Français (1938).

46. Taintor, supra note 9, at 712, 734-736.

47. Taintor, What Law Governs the Ceremony, Incidents and Status of Marriage (1939) 19 B.U.L. Rev. 353.

48. Cock, as reported by Delage, supra note 42, at 1038.

49. Robertson, The Characterization of Property in the Conflict of Laws (1940) 28 Geo. L.J. 739.

foreign law had more connection with the facts than its own law. Instead, it appears that the conflicts rule must be a generalization of what a court has been doing in certain factual situations. It is true that conflicts rules have been codified and enacted just as rules of internal law, but this in itself would not deprive the rule of its character or purpose.

That a conflicts rule is really not a rule of reference is demonstrated by the fact that it is abandoned in individual cases when it does not lead to satisfactory results; courts use one connecting factor or another in order to reach results which they deem desirable.[50] Again, we find well settled conflicts rules denied application by reason of the doctrine of public policy, the policy against circumvention of the law, the doctrine of acquired rights, and the practice of varying the characterization of the issue itself.[51] Besides, in cases where all the facts have taken place in one state and there does not appear to be any connection with another, even a foreign court does not hesitate to apply the substantive law of that state in its entirety.[52] Rheinstein[53] has suggested that the approach to the conflicts case is no different from that used in an ordinary case in which internal law will be applied. In the latter instance, all the facts are connected with one state alone and so the court never thinks of applying any other law. In a conflicts case, the facts seem to have some connection with other states and thus the problem arises as to which law should be applied. It would seem that a conflicts case is decided by selecting the law to be applied on the basis of the greatest connection between the facts and a system of law, in short, on the basis of what law would seem to have the most valid claim to be applied.[54]

The method of working with conflicts rules is not to be condemned because of its artificiality. The economy of effort and the wisdom of following past solutions which have proved satisfactory would sanction the use of the conflicts rule as a rule of reference, as a guide. But the nature of the conflicts rule must be kept in mind and its application should not be allowed to defeat the pur-

50. Cf. Marvin Safe Co. v. Norton, 48 N.J. Law 410, 7 Atl. 418, 57 Am. Rep. 566 (1886); and Charles T. Dougherty Co., Inc. v. Krimke, 105 N.J. Law 470, 144 Atl. 617 (1929).

51. J. Donnedieu de Vabres, op. cit. supra note 44, at 764. Niboyet, op. cit. supra note 21, at 120, 134, 141, nos 196, 216, 226.

52. Robertson, supra note 4, at 760, n. 20.

53. Rheinstein, supra note 4, at 261-262.

54. J. Donnedieu de Vabres, op. cit. supra note 44, at 740 et seq., has shown that this is the conclusion to be drawn from French jurisprudence.

poses of the law. The doctrines of public policy and the policy against circumvention of the law will preclude undesirable results. By keeping in mind that the conflicts rule is merely a guide based on past experience we can understand how the court can examine all the laws which may be applicable before characterizing the issue. The conflicts rule will also provide a means of working towards universality of results in cases where similar interests are involved. Once the similarity of institutions and concepts is realized through a study of comparative law, the way is open to the universal adoption of connecting factors. In this method lies the future of the conflict of laws.[55]

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EFFECT OF THE FORM OF THE BILL OF LADING ON PASSAGE OF TITLE IN LOUISIANA

SECTION 40 (B) UNIFORM BILLS OF LADING ACT:[1]

> "Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

Under the common law[2] as well as the law of Louisiana[3] a sale of specific goods is presumed to transfer the property therein as soon as the contract is completed, although the price has not yet been paid nor delivery of possession effected. Likewise, when

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55. As to the necessity of universality in conflicts rules, see Levy-Ullmann, La Doctrine Universaliste en Matière de Conflit des Lois, in Barbey, op. cit. supra note 45, at vii-xix.

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1. La. Act 94 of 1912, § 40(b) [Dart's Stats. (1939) § 8104(b)].

2. Crug v. Gorham, 74 Conn. 541, 51 Atl. 519 (1902); Warner v. Warner, 30 Ind. App. 578, 66 N.E. 760 (1903). See E. L. Welch Co. v. Lobart Elevator Co., 122 Minn. 432, 436, 142 N.W. 828, 830 (1913); 1 Williston, Sales (2 ed. 1924) 529, 530, 531, § 264.

3. Art. 2456, La. Civil Code of 1870: "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid."