Vanderbilt Law Review

Volume 6
Issue 3 *Issue 3 - April 1953*

Article 11

4-1953

Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws

Edwin W. Briggs

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Conflict of Laws Commons, and the Jurisdiction Commons

Recommended Citation
Edwin W. Briggs, Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws, 6 *Vanderbilt Law Review* 667 (1953)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol6/iss3/11

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

UTILITY OF THE JURISDICTIONAL PRINCIPLE IN A POLICY CENTERED CONFLICT OF LAWS*

EDWIN W. BRIGGS†

INTRODUCTION

Various recent studies[1] have confirmed the suspicion that courts continue to find it necessary to approve and rely heavily on the principle of "legislative jurisdiction" residing in some one state, even though they do not often admit it in so many words. Since the discussion of the problem by courts generally assumes that the single question in conflicts is choice of law, and since one of the most influential writers on the subject in recent times has denied the validity of the jurisdictional principle at the common law[2] as a means of solving a conflicts problem, a study giving further attention both to that principle's validity and to its possible usefulness in solving the many problems arising in the conflicts field may be in order.

That there are at least two basically different kinds of conflicts rules, and that the courts use both regularly, though describing them by the single term "choice of law," may be demonstrated by the simplest possible illustration. Let us consider *F*, a forum without any other substantial interest in the litigation than as the forum, and *S*,[3] another state and possible forum having such decisive contacts with the litigation as to leave no doubt that its legislative policy must ultimately control the litigation. One of the first things we must recognize *in a policy centered conflicts* is that in at least several fields of the law, even though both *F* and *S* may choose to refer to a foreign law, the policy considerations causing *F* to make such reference are fundamentally different from those causing *S* to make a reference.

* This acknowledges the assistance of Mr. Joseph W. Drake, a senior law student at Montana State University, in proofreading the manuscript, and in giving his impressions and reactions to the paper as a student in our current class in conflict of laws.

† Professor of Law, Montana State University.

1. FALCONBRIDGE, ESSAYS ON THE CONFLICT OF LAWS 111-14, 102 (1947); RE, FOREIGN CONFISCATIONS IN ANGLO-AMERICAN LAW 42, 47, 49 (1951); Briggs, *The Jurisdictional — Choice-of-Law Relation in Conflicts Rules*, 61 HARV. L. REV. 1165 (1948); Briggs, *The Dual Relationship of the Rules of Conflict of Laws in the Succession Field*, 15 MISS. L.J. 77 (1943); Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1194 (1938); Cavers, Comment, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950); Picotte, Comment, *Validity of Deed Given under Compulsion of "Foreign Courts,"* 12 MONT. L. REV. 59 (1951). As noted later, Rabel also would give jurisdictional effect to certain conflicts rules.

2. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942), particularly Chapters I and II.

3. We shall use the symbols *F* and *S*, to describe the forum and the second state referred to from the forum, respectively. *T* will describe any third state referred to by *S*.

Hence, it is not possible to advance a single general procedure for solving conflicts cases for all courts without regard to this basic fact. In a series of earlier papers, the writer has sought to demonstrate the correctness of these conclusions.[4]

The difference in the two references may be simply stated. If *F* has no other substantial interest than as forum, in some fields at least it will refer immediately and directly to *S*, the state with the decisive contacts vesting it with exclusive recognized legislative power to delimit interests, for the sole purpose of recognizing that power, and nothing more. In that case it is to be assumed that *F* will exercise a reasonably diligent effort to delimit the interests as nearly exactly like *S* would delimit them as it can. On the other hand, if *S*, agreeing with other legal systems, rules that it has this exclusive recognized power, it will look further in its own legal system, to ascertain just how that system *chooses* to exercise this legislative power for this particular case. It may or may not find a *choice-of-law* rule referring itself to another law. If it does, it obviously will be for an entirely different purpose and at quite a different level than that causing *F*'s reference to *S*. When *F* referred to *S*, by that act it delegated or abdicated legislative competence — it surrendered itself (excepting some procedural questions) to the legislative will (for this litigation) of *S*. In contrast, *S* keeps a tight rein on any of its references at every stage, because it is going about the business of actually creating the right.

UTILITY IN THE FIELDS OF LAND AND MOVABLES

The fields most obviously fitting this description are land and chattels. Other fields may also be involved but these will suffice at the moment for illustration. Practically all legal systems recognize an exclusive legislative power in the situs of land to delimit interests therein. Such policy is equally important and equally controlling both in the situs' law and in foreign legal systems. There is every reason for stating this policy in a formal explicit rule if possible. It recognizes a legislative power and nothing more. And it must have a distinctive name. Until a better name is suggested, we shall call it a power recognizing rule, or rule of legislative jurisdiction — a jurisdictional rule. The rule is that the law of the situs has exclusive recognized power to delimit interests in land.

Contrast the use of this rule by *F*, as the forum only, with that to which the situs puts such a rule as, for example, that the domicil governs succession interests in movables — or in land; or, that a deed,

4. Briggs, *The Jurisdictional — Choice-of-Law Relation in Conflicts Rules*, 61 HARV. L. REV. 1165 (1948); Briggs, *The Dual Relationship of the Rules of Conflict of Laws in the Succession Field*, 15 MISS. L.J. 77 (1943); Briggs, In re *Duke of Wellington: The Law Governing 'Movables' and 'Immovables' — Another Word*, to be published shortly.

or a contract to sell, or a will, will be deemed formally valid if it conforms to the formal requirements either of the situs, the place of its execution, or the law of the domicil of the one executing the instrument. These latter rules do not intend to express a policy conflicting with the situs rule as to where is the paramount governmental interest, but rather are based on complete agreement that the situs controls and are an exercise of that controlling legislative jurisdiction by the situs. So the first service a recognition of the jurisdictional principle performs is to separate rules serving fundamentally different functions and to emphasize the nature of that difference based on the differing policies supporting the rules. Before proceeding further, it should be helpful to visualize this analysis by the following chart:

F	*S*	*T*
JURISDICTIONAL RULE Situs Controls	JURISDICTIONAL RULE Situs Controls	JURISDICTIONAL RULE Situs Controls
CHOICE OF LAW (None for this case)	CHOICE OF LAW Domicil or National or Place of Execution or Situs	CHOICE OF LAW (None for this case)
INTERNAL LAW Dispositive Rule	INTERNAL LAW Dispositive Rule	INTERNAL LAW Dispositive Rule

Diagram Analysis

One of the first things to note from this chart is that, as diagrammed here, there is no opportunity for any conflicting references giving rise to the so-called renvoi. This is because there is no possibility of conflict of policy between any of the states involved so long as they all agree that *S* has the exclusive legislative power, and *S* itself knows why it refers to another law at the choice of law level and is guided thereby. The next thing to note particularly is that neither *F* nor *T* has any choice of law for this particular litigation. If *S* were to refer horizontally to either or both *F* and *T* at its own choice of law level, it should find no choice-of-law rule in either for this land. At most, it would find the choice of law that *F* and *T* would make if they were the situs — for entirely *different* land.

We believe that we are justified in the diagram in showing that the reference from *S* goes to some internal law, because the policy considerations causing *S*, with exclusive legislative power, to refer to another law generally are best served by applying the internal law. This is the justification for the conclusion reached in another study,[5] that

5. Briggs, In re *Duke of Wellington: The Law Governing 'Movables' and 'Immovables' — Another Word.* (To be published)

it is a grevious error to discuss such a question as renvoi in the abstract as though the problem of how much foreign law to include were exactly the same for any and all courts before whom the question may arise. *F* has exhausted its policy formulating rules when it recognizes a power in *S*, including in the reference *S*'s applicable choice of law rule. The various policy considerations which have been mentioned heretofore in literature on the subject, such as practical convenience, social convenience, justice, uniformity of result, integrity of the chain of title and reasonable expectations of the parties, among others, are not appropriately considered by *F* at all — Cook, Lorenzen, Goodrich,[6] and others notwithstanding. The only law in a position to give effect to those policy considerations is the situs', at its choice of law level, *subordinated* to the situs rule. This may be illustrated in the many different situations in which we find the situs referring to a foreign law.

The great mass of critical discussion of the so-called renvoi problem has assumed that a basic conflict arises in the succession field between the common law, which generally applies the law of the domicil, and the civil law, more commonly applying the succession statute from the national law, and that the problem is to resolve the conflict between these two.[7] We have tried to show that there is no conflict at all with respect either to land or movables between either the national and domiciliary law, or between either one of these and the situs' law. They all agree that the situs has exclusive legislative power.[8] The

6. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 65, 252-3 (1942); Goodrich, *Two States and Real Estate*, 89 U. OF PA. L. REV. 417, 418 (1940); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 748 (1933).

7. 1 RABEL, CONFLICT OF LAWS 78-79 (1945); Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1184 *et seq.* (1938) (The problem receives an inconsistent treatment, *id.* at 1194 *et seq.*). See also COOK, *op. cit. supra* note 2, at 239. In spite of being aided by Falconbridge's analysis, demonstrating the correctness of the proposition revealed in the above diagram that a foreign court has no choice of law for movables situated in *S*, Robertson continuously poses the problem thus. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 109 (1940). Wolfe's general treatment seems to point in the same general direction. WOLFE, PRIVATE INTERNATIONAL LAW 202 (1945) (A little more consideration to the interests of the situs is given elsewhere, however. *Id.* at 578).

8. The series of articles by Briggs (Briggs, *supra* notes 1, 4, 5) seeks to establish this proposition with respect both to land and movables primarily for the common law, but in the third article discussing the *Wellington* case, it is argued that both civil law and common law countries generally will recognize ultimate paramount power in the situs. This should be compared, however, with the general practice in Europe, as depicted by Wolfe, in which it almost appears that the personal law is pitted directly against the situs' law, treating the former as having quite as much "legislative power" as has the situs' law, even though, in Wolfe's own words, "Is it consistent with justice to establish rules which are necessarily ineffective?" WOLFE, PRIVATE INTERNATIONAL LAW 580 (1945). One might ask even more tellingly whether it is not utter nonsense to do so. (We are not unaware of the subtle, though profound differences in the traditional analysis of the continent, and that here presented, making isolated comparisons dangerous, and of itself, requiring extended examination.)

A startling characteristic of nearly all discussion of this issue by European writers is not that they simply place the personal law on a level with the situs'

potential conflict is between the different situses, so if uniformity be the object, so as to maintain the "unitary" character of the estate's devolution, it must be sought by bringing the situses together in their choice-of-law rules. This would seem to entail a reference to each situs involved in the distribution of an estate. For those looking to the domiciliary law, maximum uniformity is achieved by all going directly to its internal rules. As between those *situses* choosing the national law and those selecting the domiciliary law, it does not appear that uniformity is increased in any measure by including either's choice of law rule in the reference.

Situs Generally Refers to Internal Rule

The domiciliary rule just discussed establishes that it is consistent with the common law for a state with exclusive recognized legislative power to choose to utilize the law of another state. That rule as to succession of movables is a choice of law developed at the common law by the movable's situs. Though no comparable rule regarding land was developed, it being assumed that the situs' internal rules governed all questions as a matter of course, there is no doubt whatever that it could so develop. Indeed, a primary purpose of one of Cook's last studies was to convince the situs of land that it should utilize the internal law of a third state much more generally than it does at the common law[9] — at the same time that he readily agrees that other courts should look to the situs' "whole" law.[10] His suggestion that the situs should use the matrimonial domicil's rule as to

law — they don't even mention the situs' law as being relevant. Hence, they do not even weigh the one against the other. This leads to the strong suspicion that all discussion goes on at what we would call "the choice-of-law level," with no attempt made to evaluate paramountcy of power. No doubt, there are many contributing reasons for this fact, though one important one probably is the ease with which a highly conceptual approach *permits* one to divorce the law from reality.

We submit, however, that the rule recognizing paramount power in the situs, found in the German Code, is one accepted by legal systems generally, and should be made explicit in each system. That Wolfe himself recognizes the absurdity of the continental rationalization as he describes it is further expressed when he says, "Have the claims of W to the house in Copenhagen and of S to the house in Amsterdam any reality outside the lawyer's files?" *Id.* at 581. The "claims" he mentions are those based on the personal law as against conflicting claims based on the situs' law. Again, approving of Germany's statutory concession to the situs, he observes, "This partial German departure from its leading principle is as good a concession *to reason* as half measures can be." *Id.* at 586 (italics added.) The difficulties, if any, real or fancied, to the articulating of that principle in the formal conflict of laws of each country poses a different problem. But continental students may do well to ponder this proposition: *A rational basis for determining when to include foreign conflicts rules, and when to exclude them, cannot be developed until the jurisdictional principle is recognized regularly and treated as a distinct category of conflicts rules, paramount to choice-of-law rules.* In traditional language, it puts rhyme and reason in the so-called renvoi problem.

9. COOK, *op. cit. supra* note 2, at c. 10; Cook, *'Immovables' and the 'Law' of the 'Situs'*, 52 HARV. L. REV. 1246 (1939).

10. COOK, *op. cit. supra* note 2, at 264; Cook, *supra* note 9, at 1258.

capacity of a married woman to convey land is especially pertinent here. This is a sound suggestion, because obviously that issue most vitally involves the governmental interest generally regulating the marriage status (or does it unduly complicate the chain of title?). However, the important point for our purpose is that it would be worse than futile to include the domicil's conflicts rule in the reference to it. The reference to it, to give effect to the domicil's concern in this personal status, must be limited to its internal rule regulating that status. A leading case without discussion[11] assumes that to be true.

That the situs may be expected to refer directly to the internal law of the personal[12] law referred to, likewise is supported by a recent leading English case,[13] which reaches that conclusion strictly on the reason for making the reference. Construing a will of Spanish land by an English national domiciled in England, the court first referred to Spanish law "for the purpose of sitting and judging as would the Spanish court." It then concluded that the reference in the Spanish law to the national law of the testator was to the national law's applicable internal rule, because that was the best way to preserve the universality of the succession, the supposed reason for Spain's reference.[14]

Again, when the situs passes a statute selecting foreign laws to validate an instrument affecting title, it almost certainly does so for a purpose requiring that the reference go directly to the internal law. Indeed, such is the assumption in current literature,[15] apparently because the reference is found in a statute. It never is made clear by those arguing that such references should include the whole law of the domicil or nationality why this should be any different from references traditionally made by the courts.

Situs May Utilize Foreign Choice-of-Law Rule

Of course, as we have noted elsewhere, there is nothing to prevent the situs from including another state's choice of law if that will best serve *S*'s choice-of-law policy. But, it must be stressed that in contrast to *F*'s reference including *S*'s choice of law, based on a recognition of no "legislative" competence in *F*, here *S* examines the foreign conflicts rule only tentatively, not to be controlled directly by it, but rather as a possible guide to molding or modifying its own choice of law. For

11. Proctor v. Frost, 89 N.H. 304, 197 Atl. 813 (1938).
12. The term "personal law" will be used to include both the "national" law and the "domiciliary" law, in contrast to the situs' law, where a choice between the first two is not necessary for the discussion.
13. *In re* Duke of Wellington, [1947] Ch. 506, 2 All E.R. 854.
14. [1947] 2 All. E.R. at 860, 862.
15. See Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165, 1190 (1938). See also Falconbridge, Essays on the Conflict of Laws 215 (1947), assuming that any acceptance of a reference from the national law by the situs law is necessarily for the purpose of applying its own (the situs') *internal* rule.

example, it frequently has been suggested[16] that where there are three interested states in a succession case — namely, the national state, the domicil, and the situs — the "choice-of-law" rule preferred by the majority should be accepted by all. Granted there is some argument for such view, it is all too easy to overlook the fact that the only one of the three in a position even to consider the argument is the situs, and if it considers the argument favorably, it does so only for the purpose of shaping its own choice of law accordingly. It cannot possibly be said to be sitting as either of the foreign courts and applying the choice of law found in either system, because it frames a special choice of law for its own property in the exercise of its own admitted exclusive legislative power, based on a *combination* of the choice-of-law rules of *two* other states, which is not the basis for the choice-of-law rule of either of the other states for their own property. A variation of this suggestion is that if there are only two states involved, one the situs of some property, and the other the domicil and situs of other property, the first situs might decide to make its own choice-of-law rule conform to the domicil and situs if it is especially interested in doing all it can to preserve a unitary succession, on the ground that the latter has a paramount governmental interest established on cumulative contacts. But in doing so it is framing its own choice of law for its own property and nothing else. Nothing but confusion confounded can result from insisting that *S* must be guided directly by the domicil's "choice of law" for entirely different property.[17]

Jurisdictional Principle, Applied to Movables

Everything that has been said above concerning the utility of the situs rule in explaining the conflict of laws controlling interests in land is said with equal conviction about interests in movables, particularly with regard to their inheritance.[18] The big difference between the two is that in the latter, the common law came to apply so universally the rule that the law of the domicil governs succession interests to movables that all too often both courts and students have thought that it supplanted the situs rule. If true, entirely different

16. Griswold, *supra* note 15, at 1170.

17. Both of the illustrations suggest another possible difficulty that might become serious, if choices of law are individualized to such a point as almost to become "unique" for each case, in the situs' law. It might become unbearably difficult for foreign courts to ascertain those choices by the situs. The result might be either for *F* to limit its own consideration of such cases, thus restricting its "judicial jurisdiction," or, in furtherance of the maintenance of a minimum of transitoriness of action, the situs might prefer to indulge in less "individualization."

18. Briggs, *The Dual Relationship of the Rules of Conflict of Laws in the Succession Field,* 15 MISS. L.J. 77 (1943); Briggs, *The Jurisdictional — Choice-of-Law Relation in Conflicts Rules,* 61 HARV. L. REV. 1165, 1177, 1201 (1948).

laws would regulate land and movables respectively. An article, published some years ago,[19] is devoted to establishing that, at least in the United States, the domiciliary rule never did *replace* the situs rule but supplements it only, being an expression of the legislative power recognized by the latter rule. Another paper published currently maintains that this is equally true of the common law as developed in England.[20]

Of course, this is not to say that delimiting interests in movables presents exactly the same problem as does land. The former is complicated somewhat by its transitory character. In some situations, for example, it may be simply the locus for the time being that is recognized as having exclusive legislative power, though that has not been true for succession purposes in the past.[21] Whether there is a single jurisdictional rule in the movables field for all questions involving ownership remains a question for future consideration. Answering that question might eventually show something of the practical limits of the "jurisdictional" concept. However that may be, the confusion resulting from losing sight of the fact that the situs always has been recognized as ultimately controlling succession to movables is illustrated in a number of situations. This confusion has expressed itself in tax cases, and the courts do not clear up their thinking until they realize that the situs, having exclusive jurisdiction, need not surrender its tax powers to the domicil merely because it uses the domcil's succession statute.[22] Other cases raising the issue of to what state do movables escheat have reflected the same cloudiness of thinking. Perhaps the best example of this is the apparent ruling of English cases on the subject.[23] On these issues, however, the United States Supreme Court never has strayed for a moment,[24] which is

19. Briggs, *supra* note 18.

20. Briggs, *In re Duke of Wellington: The Law Governing 'Movables' and 'Immovables'—Another Word.* (To be published). The latter paper also demonstrates what a mistake it is to assume that the question of how much of the foreign law should be included raises exactly the same problem for the situs court as for a non-situs court—and how serious are the consequences of such a mistake and of assuming that the "sitting and judging" formula should be applied generally by all courts alike.

21. This is pointed out in Briggs, *The Jurisdictional—Choice-of-Law Relation in Conflicts Rules,* 61 HARV. L. REV. 1165, 1175 n.32 (1948).

22. Compare the following cases: Succession of Popp, 146 La. 464, 83 So. 765 (1919); Succession of Harrow, 140 La. 570, 73 So. 683, L.R.A. 1917D, 281 (1916); Fidelity & Deposit Co. v. Crenshaw, 120 Tenn. 606, 110 S.W. 1017 (1908).

23. *In re* Musurus, [1936] 2 All E.R. 1666 (P.); *In re* Bell, [1908] 52 Sol. J. 600; *In re* Barnett's Trusts, [1902] 1 Ch. 847. These cases all seem ready to surrender property to the domicil's sovereign if, by the domiciliary law, the sovereign took as *ultimus heres* rather than as *bona vacantia,* though Robertson queries whether, if put to the test, the English court would surrender the property to a foreign sovereign in any case. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 173 (1940). *Cf.* Griswold, *Renvoi Revisited,* 51 HARV. L. REV. 1165, 1170 (1938).

24. See cases cited in Briggs, *The Jurisdictional—Choice-of-Law Relation in Conflicts Rules,* 61 HARV. L. REV. 1165, 1179 *et seq.* (1948).

remarkable testimony of the substance to the jurisdictional concept.

Dynamic Factors Supporting Jurisdictional Principle

Before going further, it is quite important that we give some consideration to just what are the principles supporting the use of jurisdictional rules for land and movables. Superficially considered, it would appear that a short answer could be given by referring to the "territorial" theory of law. In a study of the law of confiscation, Professor Edward D. Re declares that we cannot ignore the principle of territorialism,[25] in very acutely affirming the situs rule as controlling the problem.[26] However, so stated, the "territorial principle" would seem to be just as valid for other fields as for land. It was Cook's refusal to accept the principle of territoriality as universally controlling, justifying a formal and logical *a priori* extension to all questions, that led him to revolt[27] against the "classical" school of conflicts, and with good reason. Mechanical operation of rules is not consistent with a policy centered law, which was his overriding objective. The formulation of jurisdictional rules must be rooted in the dynamic factors in the case.[28] They must reflect the political and social pattern that is significant — they must be a true and complete portrayal of the facts of controlling significance, rather than reflecting merely a sterile extension of such a concept as territorialism — although *sometimes* the dynamic element controlling the case may be this very territorialism, as is true of land.

As to land the dynamic element is the bald fact of exclusive legal power over the subject matter — the land. This seems to be aptly enough expressed in the territorial principle.

An exceptional statement of this ultimate basis for the situs rule is found in In re *Schneider's Estate,* a recent New York case speaking as a nonsitus forum. Instead of talking generally about "convenience," "desirability," or "justice," this court said:

> "The meaning of the term 'law of the situs' can be ascertained best from a consideration of the reasons underlying the existence of the rule which requires the application thereof. The primary reason for its existence lies in the fact that the law-making and law-enforcing agencies of the country in which land is situated have exclusive control over such land....

25. RE, *op. cit. supra* note 1, at 49.

26. Elsewhere, he fails to apply that principle consistently — talking about "convenience" and "justice" for all courts. *Id.* at 42.

27. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942), in its entirety, but particularly *Chapters* 1 *and* 2.

28. Of course, in many cases the "governmental interests" may be so nicely balanced that general agreement as to the paramount one may prove difficult, if not impossible. All the more reason for our recognizing those areas in which there is such agreement in fact, making the most of it. See Briggs, *The Jurisdictional — Choice-of-Law Relation in Conflicts Rules,* 61 HARV. L. REV. 1165, 1200 *et seq.* (1948) (discussing the practical limitations on the formation of the jurisdictional rule).

> As only the courts of that country are ultimately capable of rendering enforceable judgments affecting the land, the legislative authorities thereof have the exclusive power to promulgate the law which shall regulate its ownership and transfer. . . . If an instrument which was intended to transfer that land did not meet the standards set by that law. . . the courts had the physical power to deny its effect and enforce instead the rights decreed by the law of that country *or the law of any other country which the law-making agencies deemed appropriate in a particular case.*"[29]

However, if we express the basis for exclusive legislative jurisdiction in terms of a phrase we already have used several times — governmental interest[30] — we strongly indicate both the dynamic element involved and the fact that a sterile application will not always suffice. If we give effect to the implications of that phrase, we must realize that there is a social-economic-political pattern involved here, transcending national boundaries quite often, and including in its sweep many transactions, which, by traditional analysis (including Cook's[31]) it has been insisted must be governed by some other law than the situs.

The shining example of this view is the contract to convey land. We

29. *In re* Schneider's Estate, 96 N.Y.S.2d 652, 656 (Surr. Ct. 1950) (italics added).

30. Justice Jackson recently expressed dissatisfaction with the procedure of "balancing state interests" (presumably substantially this concept) as a basis for equating state interests under the full faith and credit clause. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Col. L. Rev. 1, 28 (1945). If the Supreme Court launches out on a program of applying the full faith and credit clause to require each state to give full faith and credit to the laws of every other state, compelling some kind of criterion for making a choice between those coming into direct conflict, doubtless it will find many headaches in that practice, emphasized by the great diversity of view — economic, political, social and even ethical — on the Court itself. Jackson, it seems, would seek a superior interest of a higher order, residing in the federation, under which the conflicting interests of each state would be resolved. Surely that is the ideal, and, conceivably, much might be accomplished over the long term in the name of "the general welfare." However, the Supreme Court has shown little capacity in that direction so far; indeed some of its strongest tendencies have been quite to the contrary — as in those cases stressing the "native superiority" of our federal system, permitting legislative experimentation at the state level. Jackson's own most recent pronouncement is, "if it [the forum] undertook to adjudicate the rights of the parties, the Constitution would require it to apply the law of Utah, because all elements of the wrong alleged here occurred in Utah. . . ." First National Bank of Chicago v. United Air Lines, 342 U.S. 396, 400, 72 Sup. Ct. 421, 96 L. Ed. 441 (1952) (concurring opinion).

As stated in note 28 *supra*, I have no illusions as to the concept of "governmental interest" being an all-inclusive catalyst. But at least we should be sure that we do not fail to recognize what basic agreement we do have and may be able to achieve on the basis of an admittedly superior governmental interest. And the measure of this possible agreement may be much greater than appears to many. Even in that most intractible field, contracts, we find more and more talk suggesting that a contract should be governed by the "proper law," which may very well be determined by the "subject matter" of the contract, which often points surely to some one law to the exclusion of all others. The same may be done in the torts field.

31. In Cook, *op. cit. supra* note 2, at 404 *et seq.*, Cook uses the contract to convey foreign land, as an example where the "intent of the parties" should control, though he suggests that the same law as that intended by the parties, *i.e.*, the situs' law, might be selected on the alternative ground that it was the "proper law." *Id.* at 407, n.55.

find many authorities insisting that its intrinsic validity must be governed by the "place of contracting"[32]; others insist that it should be governed "according to the intent of the parties."[33] With respect to all issues bearing directly or indirectly upon the title itself in any way, we submit that the situs must control absolutely. So, capacity of the parties,[34] formal sufficiency (whether it supports specific performance,[35] whether there has been performance) should all be so governed.[36] On the other hand, whether the alleged contract is a sufficient contract in fact to support an action for damages might be governed by another law, because that issue is such as not to be drawn to the situs' law at all in terms of exclusive jurisdiction.

Again, many writers and many courts assume that when *F* takes jurisdiction to compel the defendant to convey title to land in *S*, it is the intrinsic power of the court itself over the defendant that makes the resulting transfer valid.[37] It is submitted that nothing can be farther

32. 2 BEALE, CONFLICT OF LAWS §§ 340.1, 346.6 (1935); RESTATEMENT, CONFLICT OF LAWS § 340 (1934).

33. See note 31 *supra*.

34. Beale sharply distinguishes between capacity to make a contract and capacity to transfer property. 2 BEALE, CONFLICT OF LAWS § 333.3 (1935). He insists that the place of contracting governs the former, and the situs the latter. He relies heavily on *Ex parte* Pollard, Mont. & Ch. 239 (1840), and Polson v. Stewart, 167 Mass. 211, 45 N.E. 737, 36 L.R.A. 771 (1897). BEALE, *op. cit. supra* at 955, 957.

35. The "capacity" Beale would have the place of performance regulate is not just that necessary to support an action in damages, or some other relief provided by contract law generally, but capacity sufficient to support an action for specific performance of the contract, compelling the owner to make a transfer, even though by the situs' law the plaintiff is not entitled to specific performance at all, again relying most heavily on the *Pollard* and *Polson* cases. The former case is based on the notorious statements by Lord Cottenham, to the effect that, "but when there is no such impediment [flat prohibition by the situs, admittedly controlling] the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, *act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situated,* or of the manner in which the courts of such countries might deal with such equities." *Ex parte* Pollard, Mont. & Ch. 239, 250 (1840) (italics added).

36. Of course, this does not limit in any way the use of the applicable internal rule of the place of contracting, or any other foreign law, *if the situs chooses to so utilize it.*

37. The entire basis for supporting the "place-of-contracting" rule with respect to intrinsic validity, or to formalities, even to the extent of granting specific performance (although, by the situs' law, the contract is not enforceable, for some reason) is the purported independent power of *F* to compel *D* to give a deed to foreign land. Actually, the entire proceeding of a foreign court granting specific performance, in any case, is at the sufferance of the situs. That being true, it is workable at all only so long as the situs does not repudiate the deed given by compulsion — only if the situs has a favorable "choice of law" on the matter. Beale himself recognizes an unqualified discretion in the situs to accept or reject these deeds — for any or no reason at all. 1 BEALE, CONFLICT OF LAWS § 97.5 (1935). He cites cases in which it has rejected such deeds. However he assumes that the mere fact that *F* has completely disregarded the situs' law as to capacity of the parties, formal sufficiency, or what constitutes "fraud" supporting a rescission, raises no danger that the situs will reject the deed. Duke v. Andler, [1932] Can. Sup. Ct. 734, a leading Canadian case, is a sufficient refutation of that assumption. See also

from the truth. *F* court has no jurisdiction of any kind giving that deed inherent validity. The *only* law that can do that is the situs'.[38] This should be evident from the distinction that is made between cases where the defendant in whom is vested the title transfers the property, and one where *F* tries to order its agent to effect that transfer. The situs regularly has rejected such attempts as being "void"— a *brutum fulman*.[39] *F* has exactly the same inherent power in both situations. If it is its own law that validates the transfer where the owner-defendant obeys the court, *F*'s agent's act should be as good— it is perfectly good for local land. The answer is that the situs just has two different choice of law rules for these differing situations. It chooses to recognize the deed actually given by the owner, because of traditional common law conceptions of title and of what is involved in causing an effective transfer — it has not been prone to inquire beyond the fact that the deed is genuine, given by the owner by his own act with power to convey, though in pursuance of an equity power (which the situs court probably would itself venture to exercise in a similar situation). But it chooses *not* to recognize the deed given by the court's agent, and all other jurisdictions concede this power. This makes the validity of the one and the invalidity of the other understandable, though, if a common law situs court decided to treat both alike (and certainly it might), it probably would declare them both void rather than both valid.

In dealing with succession to movables, the common law has considered the question to be nearly enough identical with that raised

---

Gordon, *The Converse of Penn. v. Lord Baltimore*, 49 L.Q. Rev. 547, 549 (1933). So, what Beale's argument really comes to is that the situs *should* have a choice of law permitting foreign courts to render such decisions — and *should allow* the "place of contracting" to regulate the contract.

38. Briggs, *The Jurisdictional — Choice-of-Law Relation in Conflicts Rules*, 61 Harv. L. Rev. 1165, 1182-83 (1948); Picotte, *Validity of Deed Given under Compulsion of "Foreign" Court*, 12 Mont. L. Rev. 59 (1951). If the proposition in the text is correct, it puts an entirely different light on Holmes' opinion in *Polson v. Stewart*. The astounding thing in comments generally made on this case is that they all speak as though Holmes stated a rule here displacing the situs' rule. Rabel declares that the "simplicity of the old doctrine," apparently subjecting all contracts "relating to land," to the law of the situs, "was efficiently shaken by the famous judgment of Holmes. . . . Theoretically at least, it would seem that at present the ancient doctrine has been abandoned in the United States. . . ." 3 Rabel, The Conflict of Laws 102 (1950). *Accord*, Goodrich, Conflict of Laws 459 (3d ed. 1949). By this construction, the situs' rule, controlling contracts to convey generally, has been *repudiated, though it was the situs that laid down that rule*. That is the only thing giving the rule its authenticity and authoritativeness and suggests nothing as to what is the choice of law in other situses. The fact is that *Polson v. Stewart* simply states a choice-of-law rule of the situs, for this particular property, subordinated to the jurisdictional rule. We have tried to show that exactly the same kind of error has occurred in the past in interpreting the rule that "the domicil governs succession interests in movables." Briggs, *The Dual Relationship of the Rules of Conflict of Laws in the Succession Field*, 15 Miss. L.J. 77 (1943).

39. Fall v. Eastin, 215 U.S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65 (1909); Morris v. Hand, 70 Tex. 481, 8 S.W. 210 (1888).

by land to require the same jurisdictional rule, (though developing a different choice of law) in spite of its greater mobility. The feeling that succession must be determined as of the moment of the owner's death probably has contributed to that decision — a clear illustration of vested or acquired rights. Then too, the situs at death is in a position to impound the property in order to assure its succession according to its own legislative will, which brings the problem very close to that for land. For that matter, the *Schneider* case shows how close the two really are, because in that case, though originally immovable, the estate had been converted into cash and forwarded to New York, the forum, giving it complete power thereover at the time of the trial. So the portion quoted *supra*[40] becomes apt also with regard to movables.

Careful Delimitation of Jurisdictional Rule

However, implicit in this criterion of "governmental interest" as the measure for recognized exclusive jurisdiction is the corollary that it not impinge on other areas of governmental interest. Hence all other courts may be expected to resist and even to declare void attempts by the situs to include in the sweep of its exclusive legislative power all subjects sufficiently independent of situs control, and with such significant contacts with another law as to warrant a recognition of a paramount governmental interest in that government. This means that *F* must delimit the scope of its own jurisdictional rule. Only it is in a position to do that.

A simple example of the practical limits of the situs' power is found in a suit for damages for breach of an alleged contract to convey foreign land. It may be desirable even here to determine the right to damages according to whether it was an enforceable contract by the situs' law. But it is clear that there is not the same compulsive element controlling this issue as controls the other issues respecting the sufficiency of the "contract."

Again, it would be entirely beyond the competence of the situs to try to control the validity of a foreign marriage generally, by nondomiciliaries, simply because one of the parties owned land at the situs. On the other hand, it would be entirely proper for the situs to treat the marriage *as if it were void* for the single purpose of determining rights in local land. The same point may be made with respect to nationality. Though no court can establish the nationality as being in a foreign nation, generally the situs can determine rights in its land by treating a party *as if* he were such foreign national, if its policy so dictates. Other illustrations of the importance of every court being sensitive to the need for carefully measuring the scope of its

40. *In re* Schneider's Estate, 96 N.Y.S.2d 652, 656 (Surr. Ct. 1950).

jurisdictional rules will be considered after examining the general utility of the jurisdictional principle in several other fields.

UTILITY IN OTHER FIELDS — UNIFORMITY

The factual basis for establishing the jurisdictional rule governing land and movables is clear and compelling. Not so in other fields to the same extent. However, there may be other compulsions just as surely calling for the development of a jurisdictional rule. Wherever the end sought can be achieved only by localizing the legislative power in some one state, with all other states creating the rights just as that state would create them, the jurisdictional principle is called for. So it may be utilized by the courts in many other fields to serve a variety of purposes. Although we have submitted that "uniformity" of result is not the controlling consideration with respect to land and movables, it may well be in other fields, as for example, divorce and marriage. The strongly felt need for giving a divorce exactly the same legal effect in every state may lead the courts to strive realistically to achieve that result. Obviously, all that has to be done to that end is for *all* legal systems to agree that some one law has exclusive control, and then be guided by that one law. In this case it is a sense of social necessity, expressed as a legal necessity that leads to framing of the legislative rule. Once that objective is chosen as really paramount, the courts immediately become subject to certain compulsions which they cannot avoid. If they adopt the matrimonial domicil to control the validity of foreign divorces, for which there is some authority,[41] then it must apply that law just as would the domicil court to the precise divorce involved (assuming the domicil agrees its law controls), no matter how unsatisfactory the result may be to *F*.[42] Elsewhere we have considered the question[43] of whether we can be sure that a common law court would not deviate from its avowed purpose of achieving uniformity here.

Much the same objective may control in the law of marriage. That the marriage should be valid or invalid everywhere is a social objective

41. Dean v. Dean, 241 N.Y. 240, 149 N.E. 844 (1925); Ball v. Cross, 231 N.Y. 329, 132 N.E. 106 (1921); Armitage v. Attorney General, [1906] P. 135.

42. In Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees — A Comparative Study*, 65 HARV. L. REV. 193 (1951), Dean Griswold advances the thesis that the matrimonial domicil should govern the validity of foreign divorces, as the subject of his principal address before the Convention of the Law Council of Australia in a visit "down under" in the summer of 1951. In his conclusion, Griswold reports that, though the reaction among the Australian lawyers was mixed, there was a rather strong negative reaction, based on stare decisis. If the common law lawyers can first be persuaded to modify their traditional approach with respect to land, and even more as to movables, in these fields, so as to harmonize its own various rules, they might gradually be prevailed upon to extend it to the divorce field.

43. Briggs, *The Jurisdictional — Choice-of-Law Relation in Conflicts Rules*, 61 HARV. L. REV. 1165, 1202 n.105 (1948).

of the highest order, with which the law always has been concerned. If some one or limited number of determinate laws can be selected as controlling for each marriage, such objective will be substantially obtainable. However, the law of marriage presents special difficulties. Some further consideration of them will suggest some of the conditions for realizing the maximum usefulness of the jurisdictional principle.

MARRIAGE FIELD RAISES SPECIAL PROBLEMS

If it is true that the domicil(s) of the parties ultimately control the validity of the marriage, it must follow that the further rule that the place of the celebration of the marriage ceremony governs the validity of the marriage is a choice-of-law rule of the domicil(s), just as the domicil-succession rule is a choice of the situs. No other jurisdiction, as forum, can apply that rule consistently with the jurisdictional rule just stated. The logics of the jurisdictional principle compel that conclusion. So we get a criterion for statutory interpretation, where the place of celebration rule is expressed in a statute, as it is in Montana.[44] That "choice-of-law" rule can be properly applied only when Montana is the domicil (or at least one of the domicils) of the parties. However, in addition to the considerable difference of opinion whether it is enough if one domicil would raise a marriage, or whether it takes complete agreement in both domicils, or whether the controlling jurisdiction should be the prospective matrimonial domicil,[45] all of which views have some support, there is the still more fundamental question of whether in fact common law courts do not use the place of celebration as a jurisdictional rule for some purposes. Griswold tentatively approves[46] Beale's simple suggestion that the law of the parties' domicil has ultimate control.[47] But it is not that simple.

At least one section of the *Restatement* might be cited in support of the rule that the domicil(s) have exclusive ultimate control. After stating in section 121[48] that the place of the ceremony determines the validity of the marriage contract as to the formalities of the ceremony, the capacity of the parties, and in all other respects "except as stated in Sections 131 and 132," the *Restatement* in section 132[49] finds a "reserve power" in the domicil of either party to declare such marriage void

44. MONT. REV. CODES ANN. § 48-113 (1947): "All marriages contracted without the state, which would be valid by the laws of the country in which the same were contracted, are valid in this state."
45. Taintor, *What Law Governs the Ceremony, Incidents and Status of Marriage*, 19 B.U.L. REV. 353, 366 (1939).
46. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1199 (1938).
47. 2 BEALE, CONFLICT OF LAWS § 132.6 at 697 (1935).
48. RESTATEMENT, CONFLICT OF LAWS § 121 (1934).
49. *Id.* § 132. This section enumerates generally: polygamous marriage; incestuous marriage, where relationship is so close as to violate a strong domiciliary policy; miscegenation, if considered odious at the domicil.

for certain specified reasons and further in section 132 (d),[50] apparently for any reason whatsoever if so declared by statute. This section is framed upon the premise that the domicil (s) has the sole ultimate power to determine the status of the attempted marriage, but that at common law it will elect to give effect to the *lex loci contractus* as to formalities of the ceremony itself, capacity of the parties, and so forth, but that if it declares such marriage void by statute (apparently for any reason whatsoever) it will be deemed void everywhere. But note that section 132 has to do only with a *negative* jurisdiction, *i.e.*, power to *invalidate* a foreign marriage, and not validate one, though invalid at the place of celebration for want of formalities, capacity, and so on. There is nothing in this section justifying the conclusion that it intended to cover both negative and affirmative power — they are not inseparable. Beale himself states it only as a negative power. But so long as their power is negative only, it is not correct to say that the domicil (s) have exclusive jurisdiction.

But does the case law even support the "exclusive negative jurisdiction" in the domicil (s) to the extent formulated in that section? No doubt the framers had in mind the general recognition of certain marriage evasion statutes, particularly the Uniform Act. Griswold cites[51] that kind in supporting his suggestion. But suppose the domicil of one or both spouses, by statute, imposed upon its domiciliaries its own marriage formalities and capacity requirements, say as to minimum age, regardless of where they married, without other extenuating circumstances. Does it follow that any *third* state will give ultimate jurisdiction to either domicil in these matters? This gives rise to the question of whether there is not a form of ultimate concurrent or co-ordinate controlling jurisdiction here, considered from the standpoint of the completed marriage. From the standpoint of the various individual elements entering into the final attempted marriage, however, it might better be stated as a *divided* controlling jurisdiction, with the *lex loci* controlling as to formalities and capacity (with certain exceptions) and the domicil (s) of the parties controlling to the extent that if the marriage violates a strong policy there, which appears to third states to be a reasonable one, then the marriage will be held void everywhere. (Even here, is either domicil's power more than a negative one?)

Utility in Corporations and Partnerships

The common law has moved largely in the direction of "localizing" exclusive jurisdiction over a corporation and the corporate-stockholder

50. *Id.* § 132 (d): "[M]arriage of a domiciliary [is void everywhere] which a statute at the domicil makes void even though celebrated in another state."
51. Griswold, *supra* note 46, at 1199 n.122.

relation[52] in the corporate domicil. Obviously legal theory as to the essential nature of corporate personality combines with political and economic compulsions to support this practice. Indeed, so strong is this rule that on occasion courts have refused to entertain jurisdiction[53] over litigation involving corporate-stockholder rights and duties, on the ground that the controlling statutes at the corporate domicil had not been construed by the domiciliary court. So strong is this principle that, in a recent very important suit to determine succession rights in Coca-Cola stock, the opposing parties agreed by stipulation to a proposition often stated as controlling — that the *situs of the stock* was at the corporate domicil, wherever the certificates might be for the time being.[54]

The domicil's governmental interest in the permanent corporate-stockholder relation, in maintaining the power to regulate and supervise and limit those rights, with a general recognition that these legal relations must generally be determined by a single law, makes it almost as natural to state a jurisdictional rule looking to the corporate domicil, as it is to look to the situs to control land.[55] The shape of the future points to more governmental regulation of these matters rather than less, calling for a delimitation of legislative power thereover to minimize conflict. So if that domicil chose to utilize the law of a third state to determine these rights, certainly it should be included in any reference from *F,* foreign court, to the domiciliary law.

Justice Frankfurter very recently gave a partial summary of the types of corporate cases in which the Supreme Court has felt it necessary to establish an exclusive legislative power in the corporate domicil.[56] The compulsion stemming from a strongly felt need for uni-

52. RESTATEMENT, CONFLICT OF LAWS §§ 53, 182-202 (1934), reflects this general proposition.

53. Lewisohn Bros. v. Anaconda Copper Mining Co., 26 Misc. 613, 56 N.Y. Supp. 807 (Sup. Ct. 1899); Simms v. Garrett, 114 W. Va. 19, 170 S.E. 423 (1933).

54. Riley v. New York Trust Co., 315 U.S. 343, 62 Sup. Ct. 608, 86 L. Ed. 904 (1942).

55. See Clark v. Williard, 292 U.S. 112, 54 Sup. Ct. 615, 78 L. Ed. 1160 (1934), for an extremely interesting case setting off the interest of Iowa, in regulating insolvency proceedings for an Iowa corporation, against the interest of Montana in regulating the distribution of local securities and moneys belonging to the insolvent corporation. Though recognizing a strong interest in Iowa as the corporate domicil, Justice Cardozo finally stated the clearest kind of rule that can be analyzed only by resort to the dual category: Although there is much authority supporting the title of the statutory liquidator, as the situs of the chattels Montana has a clearly paramount power to determine whether its own local creditors shall be preferred by execution or otherwise. Hence, it is for Montana to make the decision as to which should prevail, *at its own "choice-of-law" level.* On a second appeal, from a second Montana ruling, in Clark v. Williard, 294 U.S. 211, 215, 55 Sup. Ct. 356, 79 L. Ed. 865 (1935), the Supreme Court declared that "Iowa may not say . . . that a liquidator with title who goes into Montana may set at naught Montana law as to the distribution of Montana assets, and carry over into another state the rule of distribution prescribed by the statutes of the domicile."

56. See Hughes v. Fetter, 341 U.S. 609, 615-16, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951). Many cases might be added to Frankfurter's list.

formity of result in construing rights under the share contract, or insurance policy even, has motivated the court. Though the Supreme Court may have gone a bit beyond the common law in assimilating some of these contract questions to the law controlling the corporation and corporate-stockholder relations, it is founded on perfectly orthodox common law principle. And a characteristic of these cases is to subject other laws to any "choice-of-law" rule at the corporate domicil.[57]

We see a well-developed rule in these corporations cases subordinating contract rights to a single law, according to the subject matter and the governmental interest deemed to be paramount, regardless of the formal place of contracting, in much the same way as was insisted above that contracts involving interests in land must be assimilated to the situs' law. Time alone will answer the question of how far this process will and should go.

A partnership-contract case, as interpreted by Hohfeld in one of his early studies, establishes an interesting variation in the development of the law held to control the contract. At the time, he was trying to determine what law controls the liability of a special partner to third persons on a contract made in a state foreign to the law under which the limited partnership was created. Analyzing *King v. Sarria*,[58] he said:

> "It would seem important to remember that the case was decided by the highest court of New York, the very jurisdiction in which the contract was made . . . the court's opinion lends at least some support to the following conclusions: (1) that the obligations of partners . . . are . . . to be determined . . . by . . . the lex loci contractus . . . (3) . . . when a Cuban limited partnership does business . . . in New York the law of that state, in determining whether or not the special partner has incurred any obligation, 'recognizes' the relation created by the Cuban agreement of the partners *inter se*. . . . Thus the vital question in weighing *King v. Sarria* as precedent seems to be this: Is the Cuban law as such deemed controlling in the first instance; or is the rule of that law important only because, for sufficient reasons, it is adopted by the lex loci contractus, — the latter in turn being applied by the court of the forum in which the action happens to be brought? That the latter represents the true interpretation of the opinion in *King v. Sarria* finds support in two other New York cases. . . ."[59]

57. See Broderick v. Rosner, 294 U.S. 629, 55 Sup. Ct. 589, 79 L. Ed. 110, 100 A.L.R. 1133 (1935); Clark v. Williard, 292 U.S. 112, 54 Sup. Ct. 615, 78 L. Ed. 1160 (1934); Converse v. Hamilton, 224 U.S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749 (1912). A fine example of statutory choice of law in the corporate field is recognized by RESTATEMENT, CONFLICT OF LAWS § 53, comment *d* (1934), in saying that if the corporate domicil has enacted the Uniform Stock Transfer Act, it will control the share transfer by means of the certificate transfer wherever that takes place.

58. 69 N.Y. 24 (1877).

59. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 256, 257 (Cook ed. 1923); Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws*, 9 COL. L. REV. 492, 519-20 (1909).

To support this interpretation Hohfeld uses the analogy of the situs really controling succession to movables, "Yet . . . the law of the *situs* generally *adopts* the rule prevailing at the domicil of the decedent at the time of death."[60] And this in the contracts field, of all places!

UTILITY IN EVALUATING A SINGLE CASE

Elsewhere, we have dealt at some length with individual contracts and torts cases, demonstrating that the use of the jurisdictional principle aids greatly in their analysis to determine their authority as precedent. *King v. Sarria,* as interpreted by Hohfeld, is a supreme example of using the jurisdictional principle to that end. This case, with the others discussed elsewhere,[61] justifies the conclusion that quite apart from the principle of 'recognized power' revealed by the jurisdictional rules generally controlling such fields as land and movables, the ready and regular use of the jurisdictional principle has great utility purely as an analytical tool, not only with respect to a *single* legal system, mentioned above, but even for the purpose of evaluating a *single case as precedent,* even though there is no uniform development of the dual category in that field. It serves to answer these questions. What does the case really stand for? Exactly how does it actually use the conflicts rules looking both to the "law of the partnership" and "to the place of contracting," to avoid their being in irreconcilable conflict? That is, what really is the correct relationship between these two rules in the case? Hohfeld himself says that this is, "the vital question in weighing *King v. Sarria* as precedent. . . ." Of course, either rule can be used jurisdictionally with the other rule a choice-of-law rule coming from the law with the recognized legislative power. But, if Hohfeld's analysis is correct, not only does that analysis control New York law, but any foreign court looking to New York law as the place of contracting should consider this case controlling the use of the Cuban law, if it really wants to apply the place of contracting law as the courts there apply it.

Suffice it to refer here only to one additional case in contracts, because it demonstrates another variety of usefulness of the jurisdictional principle. That is, even where the place of contracting is deemed to govern the intrinsic validity of the contract and related matters, that law may, conceiving it to be an enlightened policy, choose at the pure choice of law level to shape its contracts law for this par-

60. HOHFELD, *op. cit. supra* note 59, at 256 n.65; Hohfeld, *supra* note 59, at 520.

61. See Graves v. Johnson, 156 Mass. 211, 30 N.E. 818 (1892); Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61 (U.S. 1839), and Egley v. T. B. Bennett & Co., 196 Ind. 50, 145 N.E. 830 (1924). These cases are excellent illustrations of this fact. These cases are discussed in Briggs, *The Jurisdictional — Choice-of-Law Relation in Conflicts Rules,* 61 HARV. L. REV. 1165, 1189-90 (1948). The cases discussed in notes 78-88 *infra,* establishing procedural choices of law for the particular case, further illustrate this utility.

ticular case in the light of the policy of another state. In a suit for the price of whisky, to be retailed in Maine unlawfully but sold and delivered in Massachusetts, where the contract and performance were valid, Holmes gives us a remarkable statement of his philosophy in his earlier days as a judge. Rendering a judgment for the defendant, he says:

> "The question is to be decided on principles which we presume would prevail generally in the administration of the common law of this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a *similar* question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. . . . Of course it should be possible for an independent state to enforce all contracts made and to be performed within it without regard to how much they might contravene the policy of its neighbors' laws, but in fact no state pursues such a policy of barbarous isolation."[62]

Of course it is not clear that Maine would not have enforced the claim in its own courts, though Holmes gives the clearest kind of statement of the 'sitting and judging as the foreign court' formula. But what Holmes actually does is to shape the Massachusetts contracts rule, as the clearly controlling law, just as Maine would like it to be expressed, in order to cooperate with Maine to the fullest in helping it enforce its own prohibition laws.[63] The possibilities for cooperative or "assistance" legislation for the benefit of other governments, based on a spirit of magnanimity and tolerance suggested by this statement, are clear, though as yet they have hardly been touched. The fuller development of recognizing an exclusive power, with that state developing a policy of cooperation at the choice-of-law level, might bear careful consideration in a policy centered conflicts.

Common law courts have shown a very strong inclination in the past to look to the *lex loci delictus* as stating a jurisdictional rule. Cook himself states it succinctly thus: "It will be seen that the theory in question [the obligatio theory] is in its origin one of 'jurisdiction,' that is, the 'power' of some 'sovereign' to apply his (or its) 'law' to the situation in question"[64] The force of the principle is enunciated in the strongest kind of language in two very recent United States Supreme Court cases,[65] in which the Court assumes that the law of the

62. Graves v. Johnson, 156 Mass. 211, 30 N.E. 818, 819 (1892).
63. I have submitted this case and statement to my own students to see how many would analyze it in terms of the "dual category" of conflicts rules. For those who analyzed in traditional terms, it is an incomprehensible and outrageous decision, seemingly violating all choice-of-law rules. For those analyzing it in terms of the dual category, it not only is understandable instantly but generally seems quite reasonable to them.
64. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 319 (1942).
65. First National Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396, 72 Sup. Ct. 421, 96 L. Ed. 441 (1952); Hughes v. Fetter, 341 U.S. 609, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951).

place where the death occurs must govern the question of whether an action for wrongful death is given. Though the actual decisions do not quite say, as between *F*'s law governing wrongful death as the forum, and *S*'s as the place of the injury causing death, that the latter *must control* (the majority pointing out that this is not quite the issue)[66] much that is said, both in the majority opinion and in the special opinions rendered, strongly points to that. Certainly there is a genuine governmental interest in the place of the injury, with respect to harms sustained there, which ordinarily seem to be paramount. Perhaps this has not been better stated by anyone than by Justice Stone in *Bradford Electric Light Company v. Clapper:*

> "The courts of New Hampshire, in giving effect to the public policy of that state, would be at liberty to apply the Vermont statute and thus, by comity, make it the applicable law of New Hampshire. . . .
> The interest, which New Hampshire has, in exercising that control, derived from the presence of employer and employe within its borders, and the commission of the tortious act there, is at least as valid as that of Vermont, . . . it [full faith and credit] should be interpreted as leaving the courts of New Hampshire free, in the circumstances now presented, either to apply or refuse to apply the law of Vermont, in accordance with their own interpretation of New Hampshire policy and law."[67]

Of course, in terms of governmental interest, where the transaction finally resulting in the injury occurs partly in several different states, a strong argument can be made for the reasonableness of any of the other states with a substantial contact therewith dealing legislatively with the matter, in some circumstances. The *Restatement* recognizes the force of that argument.[68] But this is a very different thing from suggesting that just any court, merely as forum, should feel free to create rights without regard to whether the states with a substantial interest therein have thought it advisable to do so.

In any case, if *S*, as the place of the wrong, takes into full account the contacts that the transaction has had with other states and utilizes their law intelligently at its own choice-of-law level, the hostility to recognizing even an exclusive legislative power in *S* would be greatly mitigated. On the other hand, wherever the place of the wrong shows an inclination to extend its legislative prerogative entirely beyond the governmental interest involved in the harmful act, or so as to bring that interest into direct conflict with other equally substantial interests, other courts must be diligent in carefully delimiting their recognized power, *i.e.,* the *lex loci* rule, where used jurisdictionally. The following cases illustrate the general problem.

66. Hughes v. Fetter, 341 U.S. 609, 612 n.10, 71 Sup. Ct. 980, 95 L. Ed. 1212 (1951).
67. Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 163-65, 52 Sup. Ct. 751, 76 L. Ed. 1026, 82 A.L.R. 696 (1932) (concurring opinion).
68. RESTATEMENT, CONFLICT OF LAWS §§ 64, 65 (1934).

FURTHER DELIMITATIONS OF JURISDICTIONAL RULE

Cavers, an able advocate of the local law analysis, confirms our long held conviction that Learned Hand, often looked to as the high priest for the local law cult, uses the *lex loci* rule jurisdictionally in *Scheer v. Rockne Motors Corp.*,[69] whereupon he proposes to excommunicate Hand, forthwith. We think that Hand did two things in the case, which cannot be fully understood without also considering the companion case, *Young v. Masci.*[70] Both of these cases recognized a power in the state of the accident to subject to liability persons not liable at the common law, who by traditional doctrine would not be subject to its legislative action. But, relying on *Young v. Masci*, which he was sure laid down the constitutional limits of due process between states, Hand believed that same rule to be good enough for conflicts purposes between nations.[71] And there is eminent authority for the proposition that in doing so he gave full *jurisdictional* effect to the rule that the place of the tort controls rights of action arising therefrom. The forum is the only one in a position to set up criteria for limiting the scope of its own jurisdictional rules. We already have shown that it must do this for the rule that the situs controls land. And often such limitation may be appropriately described as (for want of a better term) *common law due process.* There can be no doubt that the common law has developed to a considerable extent the concept of "due process," which facilitates the stating of conflicts purely in terms of policy.[72]

Another case, uncritically applying the place of the tort rule much too broadly, is *Buckeye v. Buckeye*,[73] a modern Wisconsin case, which not only treated Illinois, the place of the injury, as having exclusive

69. 68 F.2d 942 (2d Cir. 1934). As Cavers points out, Hand's leading decisions regularly are an exposition of the jurisdictional principle. Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822, 826 (1950). See Siegmann v. Meyer, 100 F.2d 367 (2d Cir. 1938); Louis-Dreyfus v. Paterson Steamships, Ltd., 43 F.2d 824 (2d Cir. 1930). Cavers might well have been even more concerned with Hand's decision in Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947), in which Hand not only recognizes the "rule-of-decision" principle, based on exclusive jurisdiction, but fails to demonstrate nearly the astuteness that one is accustomed to expect of him to avoid an unnecessarily extreme application of that principle, resulting in the most serious injustice.

70. 389 U.S. 253, 53 Sup. Ct. 599, 77 L. Ed. 1158, 88 A.L.R. 170 (1933).

71. See Scheer v. Rockne Motors Corp., 68 F.2d 942, 945 (2d Cir. 1934): "It was inevitable that the opinion [*Young v. Masci*] should read equally as one on constitutional law, or on the conflict of laws. We regard it as authoritative in each aspect, and we hold that if the defendant authorized Clemens to take the car into Ontario it became liable to the extent contemplated by the statute."

72. Schibsby v. Westenholz, L.R. 6 Q.B. 155 (1870); Buchanan v. Rucker, 9 East 192, 103 Eng. Rep. 546 (K.B. 1808); Copin v. Adamson, L.R. 9 Ex. 345 (1874). Each of these cases involves the attempted exercise of legislative jurisdiction, and the English court stated limits of *recognized* power quite as much in terms of what is reasonable or just, as in any other terms. *Cf.* Note, *British Precedents for Due Process Limitations on In Personam Jurisdiction*, 48 COL. L. REV. 605 (1948).

73. 203 Wis. 248, 234 N.W. 342 (1931).

power to delimit any possible tort remedy at the moment of the injury, but insisted that it must also control the question of the effect of a *subsequent* marriage between the plaintiff and defendant, though Wisconsin, the forum, also was the domicil of both parties at all times, and the marriage may have been celebrated there as well. Wisconsin did not even make any effort to find out what the Illinois court would do in such case — as to these nondomiciled parties — simply assuming that since husband and wife became one by Illinois domestic relations law, the cause of action was voided, though husband and wife retained their separate legal personalities in Wisconsin. Surely this is a clear case of *F* unreasonably extending the scope of its own jurisdictional rule looking to Illinois as the place of the injury. Such decision allows Illinois governmental interest in the injury itself to impinge altogether too much upon even a more enduring governmental interest in Wisconsin, a result uncalled-for.

Two very recent cases continue this problem, with variations. Both involve parties married at the time of the accident. Careful analysis of the interest expressed in the rule that *W* cannot sue *H* should help suggest how it should be limited in its application. Refusal to allow suit may be predicated on any one of several interests: (1) the interest of the matrimonial domicil; (2) the interest of *F*, solely as a forum concerning parties eligible to sue therein; (3) the possible interest of the state where the wrong occurred. If the object of barring suit between spouses is to preserve the integrity of the marriage relation, surely the matrimonial domicil has the paramount interest. The place of the wrong should weigh carefully the desirability of refusing a cause of action between spouses merely as the place of the wrong. Every presumption against its doing so should be indulged in. In *Mertz v. Mertz,* [74] the injury having occurred in Connecticut, New York was both the domicil and the forum. The court is by no means clear whether its rule that *W* cannot sue *H*, though Connecticut did not so restrict, is founded primarily in its domiciliary or its forum interest — or a combination of both. In *Gray v. Gray,*[75] though New Hampshire, the domicil and forum, had no rule against such suit, the court dismissed *W*'s suit on the ground that Maine, where the accident occurred, refused absolutely to create any such rights between any spouses. It is believed that the court so concluded only after making a real effort to find a Maine rule allowing the domiciliary policy to govern the effect of the marriage status on the suit.[76] Cook insists[77] that even though that state does refuse to create any cause of action between

74. 271 N.Y. 466, 3 N.E.2d 597, 108 A.L.R. 1120 (1936).
75. 87 N.H. 82, 174 Atl. 508 (1934).
76. Compare Griswold, *Renvoi Revisited,* 51 HARV. L. REV. 1165, 1205 *et seq.* (1938).
77. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 249-50 (1942).

spouses, the matrimonial domicil should feel *free* to entertain a suit and create the right of action for *W*. Though this is good, "local law" doctrine, if the place of the wrong clearly refuses to give such right, it is not surprising to find forums generally refusing to give the plaintiff a verdict. Again, the case may be better tested by placing the suit in a third state, *F*. Following Cook, *F* should feel just as free to create rights, regardless of what both the domicil and the place of injury said about it. It is submitted that it will not and should not feel so free, however. But it is free to mold its decision so as to give substantial effect to the interests of both the domicil and *S*, the place of injury. *F* may well presume that the latter does not deny an action to a non-domiciled wife. Even if *S* has a rule against suits between spouses, that rule presumptively applies only to its own domiciliaries, and possibly to parties suing there. Though the right is created by the place of the wrong, that need not close the matter, however. *F* may properly look further to the policy in the matrimonial domicil and govern accordingly its own *procedural* rule stating who may sue in *F* — a special choice of law in the procedural field for this particular kind of suit. And finally, even though the place of injury gave no right, if the domicil clearly creates a right in *W* for the foreign injury inflicted by her husband, *F* might be disposed to be governed accordingly, though this would be a fundamental modification of doctrine. The domicil may have a sufficient governmental interest in the marriage relation to justify such rule. But it does not follow that *F* should create such rights in the face of a contrary policy in both the domicil and the place of injury.[78]

It may be suggested that the least that utilizing the "jurisdictional principle" does in analyzing these cases is to show that the practice of considering whether an exclusive legislative power should be recognized in some one state contributes greatly to make it clear that policy considerations must be much more sharply distinguished and limited in their scope in the light of the real governmental interest involved than has been done in the past.

UTILITY IN THE PROCEDURAL FIELD

So far, we have considered the "utility" of the "jurisdictional principle" as a tool or device to demonstrate the proper relationship between the conflicts rules of different legal systems, and to bring order and system out of chaos in that body of rules. However, by the same token, it serves incidentally to bring organization, order and internal consistency within each legal system. Indeed, it is submitted that there is no other way to establish the correct criteria for interpreting

78. This discussion assumes that a rule against suits between spouses may further a substantial governmental interest.

much of the current legislation which we find dealing with a conflicts situation. This is true particularly of a body of rules which the forum always applies from its own law as a matter of course — rules of procedure — a field which may never have been thought of in connection with land, movables, divorce and related fields, as raising the question of whether it illustrates the development of the dual category of conflicts rules.

The rules we have considered so far all involve the recognition of a power in a *foreign* law; this rule similarly recognizes an exclusive power in *F*'s law to furnish certain rules. In so doing, it is complementary to the other conflicts rules, serving as a limitation on them, and so clearly must be considered with them. Ordinarily, this rule has been thought of as simply delimiting the scope of the reference to a foreign law — the object being to exclude all procedural rules therefrom. At the same time, however, the court recognizes a power *in itself* and in its own procedural law, *i.e.*, that only its own rules of procedure will be used by the forum in exercising its judicial power. At first glance it may seem that such rule is not particularly important for our purposes, because the important thing in the development of the double function of conflicts rules is the recognition by a forum of legislative power in *another* legal system. However, as soon as legislatures or courts begin for some reason to apply the procedural rules of another state, the following question becomes important: are these systems repudiating the traditional rule that the only recognized power in this field is in the forum, or are they explicitly re-asserting that power? A way to point up the practical importance of this question is to keep in mind the fact that a foreign rule, quite generally deemed procedural in character, may be applied by the forum for any one of at least four quite different reasons: (1) because *F* finds that *S* considers the applicable rules to be part of its substantive interest creating rule — an example is a statute of limitations incorporated into a statute creating a right of action for wrongful death; (2) because *F* changes its own view as to what is essentially "substantive" in character; or alternatively, (3) because *F* decides that the applicable rule so vitally affects the substantive rights created by *S* that the rule should be included in *F*'s reference even though *S* classifies it as procedural (and very possibly even though *F* likewise so classifies it); (4) because *F*, having determined that the particular question is essentially procedural and that it should apply its own law (as in the case of an ordinary statute of limitations) nevertheless, upon examining that law further, finds that it is directed by its own legislation to resort to the general statute of limitations of a third state. This last situation is the one in which it is particularly necessary to recognize that the rule saying that only the forum's procedural law is applied operates or functions as a power

recognizing and delimiting rule in order to show the correct relationship between it and the rule referring to *S*'s procedural law. In such case the statutory rule referring *F* to the statute of limitations of a third state becomes the *only* choice-of-law rule involved, and it certainly is a *procedural* choice of law. Thus it would seem that the rule that the forum's procedural rules always apply has been in much the same position in all common law systems as was the rule that the situs governs interests in land. Both rules generally have been treated as if they were simple choice-of-law rules directing a reference immediately into *F*'s internal law, but submerged in the rule has been the "jurisdictional" element at all times, ready to emerge upon the development of different rules at the "choice-of-law" level.

Of course, the language of different statutes varies, but ordinarily, the reasons causing the legislature to direct that the "law of the *lex loci contractus*" shall be referred to in determining whether the action is barred will dictate that *F* refer directly to *S*'s internal law, selecting the latter's applicable statute of limitations. However, in at least one famous case[79] the New York court made a horizontal reference to the law of Nebraska, including its procedural choice of law, which in turn referred New York to Texas; in doing so it treated Nebraska's borrowing statute of limitations as essentially a part of Nebraska's internal interest creating rule. Since Nebraska's borrowing statute is extremely comprehensive in character, it might possibly be so treated, and although it may be doubted whether the New York court was fully aware of the import of its action, there is absolutely no objection to the decision if the New York court understood its own statute as directing it to include that much of the Nebraska statute. There is the practical objection, however, that such references are likely to become very complicated if they are continued indefinitely. Furthermore, there is a very real question whether the court asked itself realistically, "Why are we referred to the Nebraska law?" This they certainly should have done. It would seem that a presumption for statutory interpretation might be raised in such case that in selecting the contact with Nebraska as the significant one, the New York legislature intended that the case should be treated by the New York court as if it were strictly a domestic case arising and tried in Nebraska. But in any case, it is simply a question of statutory interpretation as to how much the New York legislature intended should be included in the foreign reference, in the light of the actual reason for making it in this particular type of case. Still another form of procedural choice-of-law is illustrated in statutes permitting wills to be proved before the situs court simply by properly authenticated proof that it already has been probated at the domicil or in some other court, as an al-

79. Holmes v. Hengen, 41 Misc. 521, 85 N.Y. Supp. 35 (Sup. Ct. 1903).

ternative to proving it according to the situs' internal rule. An Ohio statute of this character is discussed in *McCormick v. Sullivant*,[80] cited approvingly in *Robertson v. Pickrell*.[81] Such rule vitally affects interests in local land, differs materially from the common law and surely is binding on all courts.

The changes in procedural choice of law that we have just been discussing have been by legislative action. However, there is precedent for effecting some procedural changes at the choice-of-law level by judicial action. In *Dickenson v. Jones*,[82] the Pennsylvania court had to decide whether one of its own administrators could sue in that state on a wrongful death action given by a New York statute to the administrators appointed in New York or "in any other state."[83] Its ruling that the Pennsylvania administrator could sue locally has been criticised[84] on the ground that the court treated a matter, historically conceived of as being procedural and hence governed by the forum's law, as substantive, and therefore governed by the law of New York, the situs of the tort. Treating the terms "substance" and "procedure" simply as descriptive of that part of *S*'s law applied on the one hand and that part of *F*'s law applied on the other, it is submitted that this criticism completely loses sight of what the court really did. True, it declared that New York must first create the right of action before *anybody* could sue on it (jurisdictional). Nevertheless, it never lost sight of the fact that it had the sole power to delimit the power of its own administrator to sue in its own courts — that it was deciding a procedural quesion under its own law. Once New York created the right, it still was for Pennsylvania to say whether its procedural law permitted its own administrator to sue on it. In substance, by a "choice-of-law rule," it elected to utilize the New York statute, incorporating it into its own system for this particular litigation, because that statute was consistent with Pennsylvania's own dominant policies as to who should ultimately receive the benefits of such a cause of action.[85]

80. 10 Wheat. 192, 6 L. Ed. 300 (U.S. 1825).
81. 109 U.S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049 (1883).
82. 309 Pa. 256, 163 Atl. 516 (1932).
83. N.Y. DECEDENT ESTATE LAW § 130.
84. Note, 81 U. OF PA. L. REV. 765 (1933).
85. Dickenson v. Jones, 309 Pa. 256, 163 Atl. 516, 517 (1932): "The argument is made that to permit an administrator raised here to sue in our courts is against public policy. . . . There would certainly be an anomaly in permitting a recovery by an administrator of a foreign state over whom we could exercise no direction or control, and denying it to an administrator created here and fully subject to our jurisdiction." Having found that the beneficiaries for wrongful death are the same under New York and Pennsylvania law, the court continues: "The purpose of the New York act was not to confer greater powers upon a Pennsylvania administrator than he would get under our law, but to designate him as the person to enforce a right given by the state of New York *which we in comity will enforce*." (italics added). *Id.* at 519.

A New Hampshire case, *Ghilain v. Couture*,[86] likewise trenchantly states the law controlling the power of a foreign administrator in terms of our "recognized power—choice-of-law" process. A foreign administratrix, without asking for local papers, sued in New Hampshire within the limitations period under a death statute requiring that the action be brought within two years. After the two year period, she sought ancillary papers. The question was whether she should be recognized as a proper party plaintiff in the original suit so as to satisfy the statute of limitations on the action. In declaring that she should be so treated, the court said:

> "While the rule [that a foreign administrator cannot sue locally, as such] presupposes that an administrator has no claim to recognition *as a matter of right*, beyond the bounds of the state of his appointment . . . such want of *legal right* is not the reason for the rule. The rule does not arise from any want of inherent authority in the court to accord such recognition. . . . No statute or infrangible principle of the common law forbids it."[87]

That is, it is altogether a question of discretion in *F*, having the sole recognized power to delimit its judicial jurisdiction, as to the circumstances under which and the purposes for which a foreign administrator may be allowed to sue locally.

An interesting variation on the operation of a procedural choice of law is found in an exceptional Iowa rule which, in an action to garnishee wages of a nondomiciliary, elects to utilize the debtor's exemption statutes found at the domicil rather than its own, a most sensible ruling, giving effect to the paramount governmental interest related to the particular issue involved.[88]

A case already mentioned suggests something of the possibilities for the future in this field. When the wife sues her husband in tort, *F*, if acting only as a forum, may well shape its procedural rule as to eligible parties according to the rule at the matrimonial domicil — unless it feels strongly that the old disability is so archaic as not to merit consideration.

This consideration of the procedural field may be concluded by a brief reference to a justly famous federal court of appeals decision, to consider whether the court might not more aptly have stated its rule as a procedural choice of law than in the manner in which it did state it. In *Sampson v. Channel*,[89] a suit originating in Massachusetts

86. 84 N.H. 48, 146 Atl. 395 (1929).
87. *Id.* at 397.
88. For an interesting statutory example of a *procedural* choice of law, selecting a foreign law for *some* classes of litigants only, see N.J. Stat. Ann. § 2:42-7 (1937), providing that a nonresident may not attach wages or other personal property of another nonresident situated in New Jersey, "if such property is exempt from liability for debts by the law of the state of which the debtor and creditor are residents."
89. 110 F.2d 754, 128 A.L.R. 394 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940).

on a Maine injury, the court of appeals felt compelled under the doctrine of *Erie v. Tompkins,* supposedly requiring the federal courts to strive to reach the same result as would the local state courts, to apply the same rule as to the burden of proving contributory negligence as would the Massachusetts state court. To achieve this result it decided that it should "characterize" this burden of proof as being "substantive," but that it should apply Massachusetts law — although normally that characterization would refer it to Maine law as the appropriate law. Moreover, this result was reached even though Massachusetts characterized burden of proof as procedural, and even though federal courts had, before *Erie v. Tompkins,* applied their own rule — a part of the so-called "general law." At the same time, the court clearly accepted the proposition that the whole matter of "burden of proof" *might* have been covered under the Federal Rules of Civil Procedure, but it found that it had not.

While it may be granted that the terms "substance" and "procedure" may be interchangeably applied to some rules, if the purposes for which the rules are being used really require such interchange, it is submitted that the courts should avoid unnecessary confusion from an interchange of these terms. There surely is much semantic confusion in the *Sampson* decision. If it be true that procedural rules are now admitted to be subject to federal power, might not it have been much better for the court to have considered itself to be applying federal procedural rules in this decision and to have selected the Massachusetts rule by means of a "procedural choice of law" found in the federal legal system? Incontrovertibly, it was a *federal* policy which dictated the selection of that rule — the policy that federal decisions in diversity cases should conform as nearly as practicable to local state rulings, and presumably it is a policy controlling the court in *all* diversity cases appearing before it, regardless of what law is deemed to be applicable "substantively" under the Rules of Decisions Act. This policy, embedded in the federal legal system, is the ultimate source of the procedure adopted here, and there clearly was no "delegation" of legislative power involved in the case at all.[90]

90. All of this raises the question of whether the *Erie* doctrine itself, as developed by the Supreme Court, does not express a procedural rule, or policy, operating at the "choice-of-law" level. The fact is that the policy of requiring the federal courts to reach the same result as would the local state court in diversity cases, is expressed in a "choice-of-law" rule that must be characterized as procedural as long as there is any residuum of difference in meaning between the two terms "substance" and "procedure," for whatever purpose that distinction is maintained. The least that recognizing this fact does is to make apparent certain important questions that may have been obscured heretofore.

UTILITY IN FEDERAL-STATE AREA

So far, nothing has been said about the utility of the "jurisdictional principle" applied to the federal-state area, or to interstate transactions as limited by the Constitution.[91] That the principle is absolutely necessary in these areas is most obvious, because here a superior law, the Constitution, states the principles.[92] However, two points of importance command our attention at the moment. The first one is that although there is here a clearly legal source of the jurisdictional rules, providing the *compulsive* element in those rules, and differing in that respect from those jurisdictional rules developed at common law, *functionally* they are identical in character — they both serve equally to recognize an exclusive legislative power in some one system.[93] The other point is that it is fully as important to recognize the

91. There is nothing in the analysis set forth herein calculated to keep the law "provincial," or to make more difficult in any way desirable developments in the direction of increasing uniformity in the international area, or of developing constitutional doctrine in the conflicts field in the "national interest." In fact, quite the contrary is true. This approach points out that genuine uniformity can exist, and seeks to exploit that fact. Though the writer is committed to the unremitting search for the "more inclusive order," he has the conviction that that idea suffers defeat when areas of real agreement are not recognized, or when supposed agreement is based on illusion. This analysis seeks to lay bare the areas of genuine agreement, in contrast to illusory agreement, completely divorced from reality, so as to achieve a "more inclusive order" on valid and unassailable grounds — without doing violence to real regional interests.

In terms of a policy centered law, it surely will aid in revealing the diverse policies involved, and in insisting on organizing those policies so as to demonstrate which are paramount and which subordinate. Further, it seeks to minimize one of the greatest dangers in a policy centered law — that is stating policies in terms of broad abstractions (done by the "realists" themselves in conflicts) rather than with particular reference to specific concrete social situations. This evil can be illustrated by practically any case coming before a court. But Nussbaum well stated it in the large, for a federation particularly, recently, in the following:

> "So long as one contemplates the problem of interstate public policy in the abstract, everything seems to speak in favor of the critics (of state policy prevailing). The desirability of having a uniform law throughout the United States and of eliminating the sources of discord is so manifest that any discussion almost appears to be a waste of time.
>
> "The picture, however, changes if one tackles concrete situations suggested by actual cases. . . . State legislative experimentation is going on and may be extended in the future. . . . The public policy rule operates as a guarantee that such experimentation will not affect the 'sphere of interest' of other states. . . ." Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws,* 49 YALE L.J. 1027, 1053-54 (1940).

92. In the field of land and movables, so far the Supreme Court has interpreted the Constitution as being almost completely declaratory of the common law. Even here, however, a clearer perspective of the issues would help the Court avoid floundering in its decisions, as in United States v. Pink, 315 U.S. 203, 62 Sup. Ct. 552, 86 L. Ed. 796 (1942); United States v. Belmont, 301 U.S. 324, 57 Sup. Ct. 758, 81 L. Ed. 1134 (1937).

93. Though it may be granted with Cook that there is no *legal* compulsion on *F* to use a rule jurisdictionally, there are different orders of compulsion. In the land field there is a de facto compulsion, just as effective as a constitutionally imposed legal compulsion. Once this is admitted, it becomes easy then to see that the only court with real *freedom of choice* in utilizing another law is the situs court. This is something that Cook never did really recognize,

fundamental difference between jurisdictional rules and genuine "choice-of-law" rules, found only in the law with the recognized legislative power in these areas, as it is in the common law development of the dual category of jurisdictional — choice of law rules.[94]

UTILITY FOR SOLVING THE "RENVOI"[95]

If our conclusions are valid to this point, the jurisdictional principle must be accepted as at least a useful, if not absolutely necessary tool for an adequate analysis of conflicts rules to show both the variety of those rules and their proper relationship to each other. If it can be shown further that the jurisdictional principle frames a satisfactory procedure for resolving such problems as renvoi and characterization, it should add measurably to its usefulness. Resort to the diagram given above, with the accompanying analysis will make it much easier to understand why the supposed renvoi problem is a false issue—a straw man — resulting from an incomplete and faulty analysis of the question, "How much of *S*'s law should *F* include in a reference to it?" For convenience, that diagram is repeated here.

F	*S*	*T*
JURISDICTIONAL RULE Situs Controls	JURISDICTIONAL RULE Situs Controls	JURISDICTIONAL RULE Situs Controls
CHOICE OF LAW (None for this case)	CHOICE OF LAW Domicil or National or Place of Execution or Situs	CHOICE OF LAW (None for this case)
INTERNAL LAW Dispositive Rule	INTERNAL LAW Dispositive Rule	INTERNAL LAW Dispositive Rule

insisting to the last that if a non-situs court decides interests in foreign land as would the situs court, it does it purely for "social convenience." See COOK, LOGICAL AND LEGAL BASES FOR THE CONFLICT OF LAWS (1942).

94. The need for describing both federal legislation and decisions in terms of the dual category is far greater and more widespread than is generally recognized. In fields exclusively controlled by federal law jurisdictionally, the practice by Congress of *choosing* to use the law of a state in various situations is extremely common. Further, there is hardly a Supreme Court decision dealing with the subject the analysis of which is not expedited by asking exactly whose law is being applied, and whether the immediately controlling rule operates at the "choice-of-law" level or involves a recognition of, or a limitation on, legislative jurisdiction. D'oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 62 Sup. Ct. 676, 86 L. Ed. 956 (1942), is a strikingly dramatic example. Again, much of the uncertainty in recent times as to when a court can exercise personal jurisdiction over a defendant has revolved around the question of whether the generally adopted rules were expressions of the limits of recognized power, or were a discretionary expression operating at the choice-of-law level within a broader area of recognized power.

95. Though not attempting completeness, Griswold gives an extensive bibliography, largely critical, on the subject of renvoi in Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 n.4 *et seq.* (1938). To these should be added the

A brief summary of the elements in the traditional practice creating the seeming "renvoi problem" provides the setting for demonstrating that it results from adherence to inconsistent policies in the conflicts field.

The supposed problem has presented itself almost altogether in those areas, and certainly has apparent substantial support only in those fields which, we submit, can be correctly described only by the "dual category" of conflicts rules, as given in the chart above. The initial error results directly from making no provision for the jurisdictional level, confusing these rules with genuine choice-of-law rules, each of which serves fundamentally different functions. Associated with this historically established practice of recognizing only the two bottom levels of rules is the further erroneous assumption that each court is equally free to apply its system of choice-of-law rules, without regard to whether it has any governmental interest in the litigation. These characteristics of the traditional practice are combined with still another assumption that if *S*'s "choice of law" appears to be different from *F*'s, there is fundamental conflict between the two systems that will have to be resolved in some manner if *F* includes *S*'s "conflicts rules." That there is complete agreement between *F* and *S* (if the right "*S*" is used), with all that implies, cannot be discerned until the jurisdictional and the choice-of-law rules are separated, and their proper relationship to each other established.

But worse than this, all too often the situs' law is not looked to at all; instead, some other law, having no legislative interest in this property or issue involved, is referred to, with the same assumption being made regarding its "conflicts rules." Not only does this pose a conflict that does not exist, but it generally leads most competent students of the subject to pose the conflict between two countries that are not even interested legislatively in the property involved. The English courts in particular glibly talk about the forum always applying its own "choice-of-law" rules, and so the law of the domicil must be looked to directly for succession purposes, even though the property is entirely beyond the borders of the Empire, and the situs has a positively stated contrary "choice-of-law" rule.[96] Famous scholars talk about resolving the conflict between the domiciliary law and the national law, without granting the situs the courtesy of even being mentioned[97] — presumably because that is assumed to be completely

discussion in CHESHIRE, PRIVATE INTERNATIONAL LAW 85-128 (3d ed. 1948), presenting a thorough analysis, unalterably and unqualifiedly opposed to renvoi. Morris also expresses an unremitting opposition in Morris, *Renvoi*, 64 L.Q. REV. 264 (1948), commenting critically on the *Wellington* case.

96. *In re* Duke of Wellington, [1947] Ch. 506, [1947] 2 All E.R. 854, and *In re* Annesley, [1926] Ch. 692, sufficiently support this statement.

97. 1 RABEL, THE CONFLICT OF LAWS 78 (1945); ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 135 *et seq.* (1940) (discussing particularly the "pre-

irrelevant. So long as this kind of "fighting with windmills" continues, it obscures the vital fact that there are fundamentally different policy considerations governing *F* when it refers to *S* from those governing *S* when it refers to *T*, and that the latter generally should cause *S* to go directly to *T*'s dispositive rule. Where *F*'s policy is pitted against the domicil's — or the national law's — rather than integrated with the situs' law (as is necessary to make *F*'s own controlling policies consistent), there just is no way to discover this fact.

We have just finished stating the two "keys" to demonstrating the falsity of the "renvoi issue." They are these basic propositions: (1) rather than the conflict supposedly existing between them, complete agreement, in fact, exists between *F* and *S* that *S*'s law must control legislatively in those fields involved; (2) fundamentally different policies cause *F* to make a reference to *S*'s law from those causing *S* at its choice-of-law level to make a reference to still another law.[98] In complete agreement with *S* that its law should govern, *F* refers to *S* to recognize a power and nothing more; from its choice-of-law rule, if *S* refers to a third law, it will be for reasons which ordinarily will be best served by going directly to *T*'s internal rule for the proper dispositive rule. From these propositions flows an equally important corollary, a third proposition, that although it may be *loosely*[99] said

liminary question"); Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1185 (1938). But compare Griswold, *supra* at 1194 *et seq.*

98. Cook was stabbing at this vital proposition in his article, *'Immovables' And The 'Law' of the 'Situs'*, when he said:

> "This brings us to the main point of this paper, one which has been overlooked by practically all courts and writers, namely, that *the rule that the 'law' of the situs is to be applied furnish no guide whatever to a court of the situs, unless it is first assumed that the word 'law' in the rule means in such a case the purely 'domestic' rule of the situs, and not its conflicts rule.*
>
> "We are thus confronted with the fact that if a court of any state other than the situs applies the rule, the word 'law' means the conflicts rule of the situs, but if a court at the situs is called upon to apply the very same rule, it can do so only by giving the verbal symbols, 'law of the situs,' a different meaning, namely, the domestic rule of the situs." COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 264 (1942), 52 HARV. L. REV. 1246, 1258 (1939).

Having rejected the jurisdictional principle, Cook is forced to treat the problem as simply one of semantics. In contrast, we say that submerged in the "law-of-the-situs" rule as traditionally stated are the embodiment of our two classes of rules. Section 8 of the *Restatement, Conflict of Laws*, expresses only the jurisdictional rule, which — and this is very important — contrary to Cook's statement, is just as present in the situs' law as a general proposition as in any other law. It controls in all laws. When the situs court looks to its own law, it finds the situs rule controlling jurisdictionally. Then it looks further and finds an applicable choice-of-law rule which *is not* present in any other legal system for this particular land — so the choice of law rule, even though it should refer further to the situs' internal law, *is not* "the very same rule" as the "situs rule" applied jurisdictionally by a foreign court.

99. A detailed analysis showing in what respects the "sitting and judging" formula differs from the principal one, will demonstrate that it is not strictly correct to say that *F ever* includes *all* of *S*'s conflicts rules to be directly controlled thereby. If *F*'s and *S*'s conflicts rules differ at the jurisdictional level, *something very much like de'sistement obtains.* The difference in rules at this

that *F* should consider itself sitting and judging as would the *S* court, it is not correct at all to advise the *S* court that it should consider itself sitting and judging as would the *T* court, as has been done by a recent leading and very influential study of the problem.[100] It is not possible to frame a *single* formula equally valid for both courts — overgeneralization continues to be the nemesis of correct analysis. These propositions lead to the conclusion that there is a perfectly rational explanation in policy for one legal system to include foreign conflicts rules and for another legal system *not* to include them — one accepting "renvoi," and another rejecting it. (This may provide a common ground upon which pro-renvoists and anti-renvoists can resolve their differences.) Furthermore, if these conclusions are valid, as already observed, there is no opportunity for any conflicting references giving rise to the so-called renvoi. Hence, seizing upon this difference in treatment as a purely fortuitous device for avoiding the *circulus inextricabilis* in a single case clearly is based on a complete misinterpretation of the character of the problem involved.[101]

UTILITY FOR RESOLVING CHARACTERIZATION QUESTIONS

If this analysis provides a framework for resolving the so-called renvoi problem satisfactorily, it should also do much to resolve the inseparably related problem of characterization.[102] As we have said, these two questions are but different aspects of a single problem. It is believed that the profound though subtle differences in results arising from different analyses of conflicts problems are more strikingly revealed in the characterization field than in any other.

A primary question in the case first interesting us in trying to resolve the many apparently contradictory principles in conflicts — or the contradictory things said by writers — was a characterization question: what law should be looked to to determine whether slaves should be treated as movables or immovables? Providing an answer to that question, recently called one of the most difficult of all characterization questions,[103] was one of the first uses to which we put the above graph depicting the double level of the conflicts rules. Naturally, we have been especially interested in the characterization question

level does not result in conflict, when measured by the reason for *F*'s recognizing jurisdiction in *S* in the first place. But the important fact in those fields where there is a developed practice of including foreign choice of law rules, is the fact that there is *fundamental agreement between F and S, jurisdictionally.*

100. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938).

101. *Cf. id.* at 1183, 1190 (1938).

102. Only a few examples, summarily given, are possible at this time. The profound though subtle differences both in analysis and in the results derived under this thesis and under other treatments, such as Robertson's, can be realized only by an extended comparative study, yet to come.

103. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 190 (1940).

and have analyzed particular characterizations on the basis of our graph from the first seminar presentation in 1936. Applying the chart to that problem, we decided that generally the law controlling characterization changes with each level of rules. Further, each rule *as a unit,* and every word in it, must be characterized by the law providing the policy expressed in the rule. This is just one of the reasons why it is so extremely important that we determine precisely whose rule it is being applied. It followed, almost inevitably it seemed, that we should call these characterizations at the different levels (1) primary, (2) secondary and (3) tertiary characterizations. We used that terminology in 1936[104] (except that we talked about qualification, or classification at the time).

Movables

McCollum v. Smith,[105] the original leading case, rules that whether slaves situsеd in Louisiana at the death of the owner should be treated as movables or immovables must be determined by the law of Louisiana as the situs, notwithstanding the fact that they had since been brought into Tennessee, the forum and the deceased owner's domicil, *since* F *recognized equal power in Louisiana to control succession to both.* But, a full answer to this problem dramatically lays bare the error resulting from failure to separate jurisdictional rules from genuine choice-of-law rules. Until that is done, it is very difficult, if not impossible, to realize that the word "movables" must be characterized *twice* at least in the one suit (I should prefer to say "categorized once" and "characterized once"). *F* must "categorize"[106] according to the legal categories it recognizes as controlling. If it has a jurisdictional rule saying that the situs controls succession interests in movables, it must categorize the facts in relation to every significant word in this rule, including "movables."[107] At the jurisdictional level in *F's* law, for this rule, "movables" may be determined according to

104. This terminology grew out of a discussion of the matter with Professor J. Westwood Smithers in the seminar class at the time.

105. 19 Tenn. 342, 33 Am. Dec. 147 (1838).

106. "Categorizing" involves the process of subsuming the "facts" to what the court considers the appropriate "legal category." As has been pointed out, this process must take place as a preliminary step in every suit. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 80 (1940). This is Robertson's "primary characterization." As interpreted by Robertson, Unger feels that there is good reason to distinguish between the initial step of assigning the controlling facts to their appropriate legal category, and "defining" legal terms. *Id.* at 19. This distinction may be helpful — just how helpful must depend on further analysis — and it is that distinction that is preserved by the two terms "categorizing" and "characterizing" used here.

107. Of course, if it has framed a jurisdictional rule formally merging "movables" and "immovables" (such as the rule that the situs controls succession interests in all "tangibles"), it need not distinguish between the two terms in the "categorization" of "tangibles" — and in this event, contrary to Robertson, the differentiating physical characteristics are not significant. *Cf. id.* at 205.

their "physical" properties, as has been urged by some authorities[108] — or it may be characterized on some other basis by *F*. But, however *F* categorizes the facts or characterizes "movables" *for its own jurisdictional rule,* it gives no answer as to its meaning if we encounter the word again in the situs' choice-of-law rule. Here it probably will appear in the rule that the "law of the domicil governs succession interests in movables." This rule, an expression of the exclusive recognized legislative power residing in *S*, must be widened or narrowed in scope, according to the free choice of the situs. Since it has equal power over both movables and immovables (and this is the reason why the exclusive power to determine whether a given property shall be treated *as if* it were an immovable lies in the situs), it is perfectly free to move any given property fitting either category from one class to the other to delimit legal interests therein, either according to its actual physical properties, or because of its relationship to other property,[109] or for any other reason appealing to it. This, the Tennessee court fully recognized in declaring that Louisiana law, as the situs, should characterize slaves for succession purposes at the owner's death.

These conclusions suggest why there is conflict on how "movables" should be characterized. Those insisting that it is a question of fact for *F* to determine have in mind the first "characterization," performed by *F*;[110] those insisting that *S* must characterize have in mind the second "characterization."

Domicil

Perhaps the term "domicil" has been characterized erroneously by common law courts more often than any other word. It is almost a platitude among courts and writers that *F* must characterize "domicil," in the rule that "the law of the domicil governs succession interests to movables." Further, it is almost uniformly declared that *F always* characterizes this word.[111] But again, whose rule is it in fact? If *F*

108. 2 BEALE, CONFLICT OF LAWS 933-4 (1935); ROBERTSON, *op. cit. supra* note 103.

109. A striking example of the classification of a physical movable as an immovable because of its vital connection with effective land use is the common one of characterizing slaves as part of the plantation. See McCollum v. Smith, 19 Tenn. 340 (1838), involving Louisiana law applied to slaves sitused there; Jones v. Marable, 25 Tenn. 82 (1845), involving Arkansas law applied to slaves sitused there.

110. Of course, as to some issues involving legal interests in personal property, whether it is movable in fact may become of vital importance in measuring the limits of *F*'s jurisdictional rule, narrowing it beyond that regarding land.

111. *In re* Annesley, [1926] 1 Ch. 692, the English court reaffirms this proposition as axiomatic. Robertson declares in substance that there is no greater unanimity on any question of "characterization" than that the forum *always* characterizes "domicil," citing it as the classical example of the proposition that *F* always characterizes the "connecting factor." On this he says: "Thus Lorenzen, Beckett, Falconbridge, Unger, and Cheshire all take this view. This unanimity is probably due to the fact that the determination of domicil is

should use this rule jurisdictionally (as it is perfectly free to do — so long as the situs lets it get away with it), then, of course, it must characterize "domicil." If, however, this rule must be assigned to the situs' law, as we are convinced it is at the common law, then the situs must characterize "domicil," just as it characterizes "movables" in the same rule[112] — and as it must characterize every other term in that same rule. (Remember that these conflicts rules must be characterized as a unit, functionally.) So, if in the administration of a given estate the situs of the property has determined where the deceased was domiciled, every other court should determine that fact in the same way, and be governed accordingly.[113]

On the other hand, if the issue *F* is considering is the validity of a foreign divorce, and *F* has adopted the rule that the matrimonial domicil shall govern its validity, this clearly is a legislative jurisdictional rule *found in F's law,* and it must characterize "matrimonial domicil" to implement the policy expressed in that rule. Or, if the term "domicil" were an integral part of the dispositive rule in *T*, referred to by *S*, and if *S* intended to apply the whole of that rule without limitation, *T* must characterize "domicil" as a "tertiary" characterization. So, in the very process of carefully delimiting the reference to a foreign law, according to the policies causing that reference, the characterizing law is established.

Place of Celebration

A striking example stressing the necessity of first determining the function of the entire rule providing the term to be characterized is found in the rule that "the place of the celebration governs the validity

---

usually taken as the typical case, and this is one of the few examples of the characterization problem which has been consciously and consistently dealt with by the courts." ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 108 (1940). Failure to recognize the fundamental difference between jurisdictional and choice-of-law rules leads all of these authorities to *assume* that any word that appears to be a "connecting factor" must be for *F* to define, because their analysis provides no framework for finding a "connecting factor" from *S* as the situs, to *T* a third law. The only place where Robertson suggests what he calls a possible exception "in one sense" is where *F* refers to *S* "to sit and judge as the *S* court." This raises the apparent conflict in characterization simply between two laws, both of which apply the domiciliary rule, without regard to where is the situs. *Id.* at 108-10.

112. Under our hypothesis that the law *actually* providing the policy expressed in any rule must characterize the entire rule, the fact that there is so nearly general agreement that the situs characterizes "movables" in its own choice-of-law rule supports completely the conclusion that it likewise must characterize the word "domicil" in that same rule.

113. In discussing a recent famous United States Supreme Court decision, the writer has taken the position that in spite of that Court's dictum that characterizing domicil is a question of fact (categorizing), wherever the situs of movables has already made a formal adjudication thereof, it must bind all other courts. Briggs, *The Jurisdictional — Choice-of-Law Relation in Conflicts Rules,* 61 HARV. L. REV. 1165, 1169 n.11 (1948), discussing Riley v. New York Trust Co., 315 U.S. 343, 62 Sup. Ct. 608, 86 L. Ed. 885 (1942). Of course, the meaning of domicil is by no means always just a question of fact.

of the marriage." Of course, this is a step in determining to what legal system belongs the rule. If, in fact, it should become generally agreed that the law (s) of the domicil (s) of the contracting parties at the time of the ceremony really has exclusive legislative jurisdiction to determine the validity of a marriage, then the rule that a marriage valid at the place of celebration is generally valid everywhere becomes a "choice of law" of the domicil (s). Hence the phrase "place of celebration" must be characterized by the domiciliary law (s). If, however, the rule is used jurisdictionally, recognizing part of the legislative power in the place of celebration, then that rule must be characterized by *F*. But the terms in this rule cannot possibly be *correctly* characterized, *until* F *first determines for itself in which way it intends to use the rule.*

Substance and Procedure

The problem of characterizing "substance" and "procedure" likewise strikingly shows the vital importance of expressing *all* the applicable policies in rules and in recognizing whose policy it is controlling. Having concluded that characterization of these terms necessarily involves secondary characterization, simply because it arises only after the reference to *S* and involves a question as to the character of *S*'s rules, a recent thorough study of the problem[114] is led inexorably by its own logic to conclude that the *S* law *must* necessarily characterize. But whose policy rule is it that makes these terms relevant? The rule that such foreign references includes only substantive law, and that *F* applies its own procedural rules, is a policy originating in *F*'s law, simply as a forum. This policy serves to complement the application of *F*'s jurisdictional rule, delimiting it strictly according to *F*'s controlling policy in framing that rule. (We already have noted that *F* must resist unwarranted attempts by *S* to extend beyond "reasonable" limits its jurisdictional power.) This being so, in line with our basic premise that the law furnishing the rule must characterize it, clearly it is for *F* to so characterize.[115] Being a self-imposed restriction, of course *F* may formally repudiate that rule entirely if it wishes. Or it

114. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 123 *et seq.* (1940).

115. Several leading authorities have taken this view — but other leading authorities, if not quite as numerous, have agreed with Robertson. Cook strongly supports the conclusion that the forum must characterize these two terms: "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 the rule is and how it is to be applied." COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 222-23 (1942). It is believed, however, that the present analysis gives a clearer and more easily understood basis for the conclusion that *F* should characterize these terms.

may expand or contract its definition of substance and procedure instead.[116]

Legitimacy

Ordinarily, a question of "tertiary" characterization should not cause difficulty, as where *S*, properly delimiting its reference to *T*'s law, includes only *T*'s applicable internal dispositive rule. Generally, *T* must characterize every term in that rule. However, that this reference is not always so simple is strikingly shown by a problem receiving considerable recent attention by European writers, called the "preliminary question,"[117] best illustrated by the question of what law should characterize "legitimacy" for succession purposes. Consider the case of an Englishman dying domiciled in Germany, with the question of inheritance of movables being raised before the English court. Those discussing the question generally do not consider it of enough importance to determine whether *F*, the English court, also is the situs court, or is a foreign court.[118] On their analysis, *F* would look directly to the domiciliary law, referring to Germany's succession statute (perhaps by the double renvoi),[119] where it would find succession rights limited by the legitimacy of the heir. If the father of *H*, heir, was domiciled in a third state at *H*'s birth, this supposedly poses the question of whether *F* should use its own law (either internal or conflicts) or the present domicil's (internal or conflicts) to determine legitimacy.

The near universal practice of looking immediately to the personal law instead of to the situs first, in a succession case, continues to be the principal source of confusion here as with other issues arising out of the law regulating succession rights. Of course, if the situs ultimately is recognized as controlling succession rights both to land and movables, any foreign court should look first to the situs and be guided by its disposition of the case. So the first cardinal principle governing here is that the *situs*' "choice of law" on the subject must prevail. However, the situs court likewise has the problem of deciding whether if it chooses to utilize *T's* (domicil's) dispositive rule, it should include the question of legitimacy in *its* reference to *T*'s law. It is submitted that, contrary to recent suggestions,[120] the fact that the term "legitimacy"

116. Exactly the same rationale as governs substance and procedure applies for explaining what law should characterize the word "penal" in the rule that *F* will not aid in the enforcement of foregin penal laws — or that *F* enforces only its own penal laws.

117. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 135 *et seq.* (1940), and authorities there cited.

118. See note 95 *supra*.

119. Robertson analyzes the problem in detail thus. ROBERTSON, *op. cit. supra* note 177, at 135 *et seq.*

120. ROBERTSON, *op. cit. supra* note 117 at 135 *et seq.* His analysis indicating that the question of legitimacy arises for the first time after getting into Germany's interal rule is highly artificial and unreal. Almost certainly it will be recognized as a primary issue at the outset, one which the situs may

may formally appear for the first time in *T*'s succession rule as a limitation on rights acquired does not prevent the situs from withholding that issue from *F*. It is a distinct issue which may be withdrawn from the general reference to the personal law, without invalidating in any way the remainder of the reference from the situs' "choice of law." *Failure to recognize the fact that, at its choice-of-law level,* S *is perfectly free to include or exclude any part of* T*'s law it sees fit to, in contrast to* F*'s lack of such freedom in referring to* S*'s law, because of the fundamental difference in the purposes for the two references, makes adequate analysis impossible.* The briefest consideration of succession to land should demonstrate this.

The actual problem cannot arise under existing English rules regulating land interests, because England's own internal succession statute always is applied. But, even were England to adopt the personal law's inheritance rule generally (commonly done in Europe), it is not likely that it would have included the question of legitimacy in the reference. We need only consider the political, social, economic and even religious overtones of land ownership, with legitimacy correllated thereto, in England in the past to justify this conclusion. Granted that the same policy considerations probably would not have the same force as to movables, and that England as the situs might choose to utilize the domicil's choice of law on legitimacy,[121] the point we would make here is that the question of what law should characterize this so-called "preliminary question," must await intelligent examination of all these policy considerations *with the only possible source for an answer coming from the situs.*

CONCLUSION

In presenting these illustrative materials in the briefest possible compass, we have been but participating in the never-ending search for that analysis most completely revealing both the nature of the conflicts problem and how it can best be handled. If it does a better job of giving effect to the entire legislative process — not merely the end operation in the courts; if it provides a vehicle for solving renvoi and characterization; if it permits the free operation of social and political dynamics; if it works well with the trend toward an explicitly stated policy centered law, involving a balancing of interests; if at the same

feel it is vitally interested in, though this fact is lost in the confusion, so long as *F* is treated as just any court.

121. See *In re* Askew, [1930] 2 Ch. 259. Here, the question of legitimacy was the sole issue referred to the German law. Trustees of a trust asked the opinion of the court whether a power of appointment over the trust had been validly executed, which turned on the legitimacy of the object of the appointment. However, the case suggests that probably the English court would apply the domicil's (Germany's) choice of law governing legitimacy in the same way in a pure succession to movables case.

time, it adapts and builds on traditional doctrine, making it more acceptable to judges; it is worth considering.

If there remains any doubt as to the suitableness of the term "jurisdictional principle" as used here, in view of such determined campaigns as Cook's[122] to extirpate the "jurisdictional principle" from the conflicts field, it is submitted that the grounds upon which Cook waged that campaign do not touch the thesis of this and its related papers. His concern was to demonstrate the nonexistence of any *legal* and *logical* principles compelling a court to refer to a foreign law, or to utilize it in any particular. This analysis grants that there is no such *formal legal* compulsion on *F* that it use a rule jurisdictionally.[123] But we start where Cook left off. We are interested in studying the actual *function* or *operation*[124] of different rules. If, in fact, in numerous fields, *F* has seen fit to so use many conflicts rules, recognition of the jurisdictional principle is absolutely necessary as an analytical tool. It is believed that the discussion of the materials included herein establishes the fact that some conflicts rules are used jurisdictionally, and it is hoped that this study also provides a partial answer to the question of why the courts have so used the "jurisdictional principle."[125]

122. Cook's entire monograph is devoted to this thesis. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942).

123. Cook's "logical" bases for the development of his analysis seems to stem largely from the demonstration that there is no *superior legal* system imposing jurisdictional limitations on judicial action of any forum. But he does not take into account certain *facts*, from which stem certain compulsions, as the exclusive effective control in the situs over land, or universal agreement on some end objective, which can be achieved only by all courts recognizing an exclusive legislative power in one legal system, and then doing their practicable best to create rights for this particular litigation, just as would that system. There are "logics" here involved which lead almost inevitably to the development of the jurisdictional rule.

124. Every writer cited in note 1 *supra*, approves the term "jurisdictional," applied to a conflicts rule operating to recognize a legislative power and nothing more, as do the rules here discussed at the "jurisdictional level." To these citations may be added 1 RABEL, THE CONFLICT OF LAWS 78 (1945): "Indeed, the nationality principle does not mean that a foreign national is subject necessarily to the substantive law of his country; it means that the state to which the individual belongs should determine his personal relations. The law of domicil does not mean that everybody must be subject to the substantive law of his domicil. The reasonable construction is that the law of the place of domicil determines what law should govern." This is a very good description of how the *situs rule* does in fact govern. Our big quarrel with Rabel is that failing to see that ultimate jurisdiction already is recognized in the situs, at least at the common law, *he proposes to vest it in the personal law*, stating this as a justification for the supposed renvoi — as does Dean Griswold in at least one place. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1186 (1938), which declares, in effect, that a "vested right" is created under the domiciliary law rather than under the situs' law.

125. The second half of this paper, as originally written, had to be omitted for want of space. It will be published as a separate paper.