CHAPTER VII

Multiple Contact Cases: Introductory Discussion

SECTION 37

APPLICATION OF ONE OR OF SEVERAL CHOICE-OF-LAW PRINCIPLES

Hitherto in our discussion we have only dealt with cases in which the operative facts occurred within the bounds of a single jurisdiction, the state of wrong. The problems with which we were concerned all arose from the circumstance that the litigation to determine the legal consequences of those facts had been instituted in another jurisdiction, the forum. However, conflict of laws cases are not all as simple as this. Courts are often confronted by cases in which the very operative facts themselves are spread over two or even more jurisdictions whose internal laws are different. For example, A, blasting rock in state X, causes a piece of rock to fly over into state Y and injure B who is standing there. A has not been guilty of any negligence. Under the internal law of state X, A is liable to B whether he has been negligent or not. Under the internal law of state Y, B cannot recover without proving negligence. Can B recover damages? Another example, A injures B in state X. B signs a contract in state Y releasing A from all liability. Such contracts are void under the internal law of state Y, valid under the internal law of state X. Can B recover damages from A?

For the sake of convenience we venture to call cases of this kind “multiple contact cases” because the facts make significant contacts with a number of jurisdictions. But there is another important element in these cases besides their multiplicity of contacts which makes them difficult to decide; the
The internal laws of various jurisdictions concerned are different. If, in either of these examples, the laws of state X and state Y were identical, there would be no problem. We could determine the legal effect of the operative facts according to the law of either state and the results would be the same. But when the two relevant laws are different, we are forced to resolve the "conflict of laws." In other words, there are two essential elements in a multiple contact problem: (1) multiple contacts and (2) different laws.

In solving multiple contact cases the courts appear to have used two formal techniques. One of these techniques involves the application of a single choice-of-law principle in such a manner as to select the law of one of the various jurisdictions and exclude the laws of the others. This technique would very likely be used in the "rock blasting" example above. An American court would probably decide the case according to the law of state Y where the injury occurred and ignore the law of state X where the defendant acted. The single choice-of-law principle applied would be that the law of the place of wrong determines liability in tort. This principle does not, as stated, carry us very far because "place of wrong" means "place where the acts and events of which the plaintiff complains occurred."1 That description would include either state X or state Y. But, for reasons which we shall discuss later, the case would probably be handled as if both the blasting and the injury had happened in state Y. The law of state X would not have any effect upon the final decision.2

The second formal technique which the courts adopt in

1 See above, p. xvii.

MULTIPLE CONTACT CASES

multiple contact cases involves the use of two or even more choice-of-law principles. Through the operation of these choice-of-law principles, each of the relevant laws is permitted to govern a particular aspect of the case in hand. We should probably find this technique employed in the "injury and release" example above. The injury having been inflicted in state X, the law of that state would be allowed to determine the nature and extent of A's liability in tort. But since the contract of release was signed in state Y, its law would be allowed to determine the validity and effect of the release. This would be the court's general theoretical approach to the problem. Probably the contract of release, being void under the internal law of the place where it was made, would be treated as having no legal effect in any forum. The theory of this second technique, employing two or more choice-of-law principles, is that no one body of law should regulate the entire series of transactions. Questions of tort liability are referred to the law of the place of wrong; questions relating to the effect of the contractual transaction are referred to the law of the place of contracting.³

The operation of this second technique, involving more than one choice-of-law principle, may be illustrated by another example. A buys a railway ticket in state X. During the journey he is injured in state Y. He brings suit against the railroad company. Upon the facts of the case, A has a good cause of action against the railroad company under the internal law of state X; he has no cause of action under the internal law of state Y. By what law should the case be governed? In favour of the law of state Y it may be urged that the law of the place of wrong usually defines the defendant's liability in tort. But since the contract of carriage was

³For a general discussion of the solution of multiple contact cases in terms of several choice-of-law principles, see: Stumberg, Conflict of Laws (1937) 182; Note, (1935) 44 Yale L. J. 1233; Rheinstein, "Comparative Law and Conflict of Laws in Germany," (1935) 2 Univ. of Chi. L. Rev. 232, 265.
made in state X, its law might be permitted to determine how the contract should be performed. Some courts have held that in such cases they will apply both choice-of-law principles.\(^4\) The law of state Y will determine whether the plaintiff has any claim in tort; the law of state X will determine whether he has any claim for breach of contract.

The case of *Burkett v. Globe Indemnity Co.*\(^5\) exemplifies a problem to which either of the two formal techniques which we have discussed might have been applied with the same result. A, an automobile repairman, was commissioned by B to repair B's automobile in Louisiana. A left the car in such a dangerous condition that while B was driving it in Alabama, it ran off the road and injured C. C brought an action against A for damages. The court referred the question of A's liability to C to the law of Louisiana and awarded damages to C. Now we could explain this decision as an illustration of the first technique by saying that that court regarded Louisiana, where the car was negligently repaired, as the place of wrong. It therefore chose Louisiana law, as the proper law to determine A's liability to C in tort.

However, there is a good deal of authority for the view that when a negligent act, done in one state, causes injury in another, the law of the state of injury should be applied exclusively, i.e., that state is the place of wrong. On this view, the law of Louisiana ought not to be chosen, since the injury occurred in Alabama. If pressed with this argument, we could explain the result reached in *Burkett v. Globe Indemnity Co.* as an application of the second technique. This involves the use of two choice-of-law principles. One choice-of-law principle directs that the law of the place of wrong governs all questions of tort liability. The weight of authority supports the view that "place of wrong" means "place of injury."

\(^4\) See below, p. 192.

\(^5\) *Burkett v. Globe Indemnity Co.*, (1938) 182 Miss. 423, 181 So. 316.
Hence the law of Alabama will decide whether C has any cause of action against A for the wrong or tort. But we may invoke another choice-of-law theory; the effect of a contract is to be determined by the law of the place of contracting. A’s failure to repair B’s car properly was a breach of the contract for the repairs, made between A and B in Louisiana. This contract was also breached by A in Louisiana. That breach caused injury to C. May not the law of Louisiana be permitted to impose a liability upon A in favour of C, arising out of this breach of contract? Thus we have two arguable theories, each based upon a different choice-of-law principle, to explain the court’s reference to Louisiana law.

SECTION 38

CHOICE-OF-LAW POLICIES IN MULTIPLE CONTACT CASES

In the subsequent sections of this work we shall examine in detail a number of different types of multiple contact cases. Before doing so, however, it may be useful to discuss in a somewhat general fashion the various social interests which are likely to come into play in such cases. Such a discussion will facilitate the more detailed treatment of particular problems later on.

As a preliminary point it should be noted that, in a multiple contact case, the forum may be one of the states with which the operative facts are connected. This circumstance does not in itself alter the character of the choice-of-law problem. But in practice it will be found that the court of the forum is likely to give more careful and favourable consideration to the policies of its own local law. For example, the legislature of state X exacts a workmen’s compensation law making employers responsible for the costs of industrial accidents. An employee who does most of his work in state Y is injured in state X while performing some temporary service
there. He applies for compensation in state X. In dealing with this type of multiple contact case, the court will doubtless take into account the general choice-of-law principles governing wrongs and breaches of contractual relations. But the most important factor in determining the issue will probably be the court’s opinion regarding the policies and purposes of the local compensation law.

In section 11, above, we discussed at some length the significance of “uniformity” as a juristic ideal in the conflict of laws. It is most desirable that when certain transactions give rise to a controversy between two parties, one of those parties should not be able to gain an advantage by commencing litigation in one jurisdiction rather than another. All courts should cooperate, as far as possible, in the application of choice-of-law principles, so that wherever the dispute may be litigated the result will be approximately the same. This ideal is not completely realized in present-day practice, but American courts have achieved a considerable degree of success in minimizing the improper advantages to be gained by suing in particular jurisdictions.

These considerations apply to multiple contact cases quite as much as to others. Hence a court, confronted by a multiple contact problem, ought to give most careful consideration to the decisions which have been handed down by the courts of other jurisdictions in dealing with identical or closely analogous problems. This practice is regularly followed by courts in the United States with regard to decisions given by the courts of other American states. It has enabled them to build up a fairly uniform conflict of laws jurisprudence.

It may be conceded, however, that at least some species of multiple contact cases are rather rare. When a case of this kind occurs there may be no existing precedent which can be said to have established a uniform standard of decision. The court will then be free to give full play to other social
interests besides that of uniformity. It is impossible to pursue uniformity until some pattern has been set up to which we may conform. But even if such a pattern has been set up by prior decisions it will be no great matter if, in a rare type of case, a particular court refuses to follow it. Because where the problem presented is an uncommon one, a lack of consistency in its solution from state to state will affect only a small class of persons. For example, a statute is passed in state X imposing very strict liability upon all persons who set out fires. A sets out a fire in state X which spreads into state Y and causes considerable damage to B's property in state Y. B sues A in state X. Now the prevailing doctrine in such cases is that the law of the state where the damage occurred should govern the defendant's liability. But if the court of state X decides to disregard the prevailing doctrine and apply its own law, the law of the place where the defendant acted, no great harm will be done. Such a ruling, even if followed in other cases will only affect the comparatively small group of persons who set out fires in one state and so cause injury in another. And even they are not likely to be affected if they can keep themselves and their property out of state X. If, on the other hand, the court of state X had undertaken to apply its local statute to all cases of damage by fire wherever they occurred, such a decision would be highly objectionable from the conflict of laws point of view.

In other words, although uniformity is always a matter for consideration in multiple contact cases, its significance is liable to be diminished by the fact that the solution of unusual cases of this type will affect only a small class of persons. Uniformity and predictability are not the sole objectives in the conflict of laws. Cases may arise in which a court will deem it desirable to depart from the established pattern of decision in order to protect some other social interest. If, however, no other important social interest appears to be at
stake, uniformity will remain, as always, our principal ob-
jective in the conflict of laws.

In the ordinary case where all the operative facts are
located in a single state, we refer the question of defendant’s
liability in tort to the law of that state because it appears to
have the greatest social interest in the matter. In a multiple
contact case, where the operative facts are spread over sev­
eral states, one or more of these states may be said to have
an interest in the outcome of the controversy. And in some
cases these interests may conflict with one another. Thus,
in our “fire spreading” example, it is clear that the govern­
ment of state Y, where the damage occurred, has an interest
in the protection of persons or property within its borders.
At the same time state X, where the acts causing the damage
occurred, has also an interest in determining the legal conse­
quences of the entire series of acts and events. The govern­
ment of state X may desire to regulate the conduct of persons
who set out fires there. It may desire to impose a liability upon
such persons if they carry on their operations in such a manner
as to produce serious injury to others, even though the injury
occurs in some other state.

In this case it would probably be an exaggeration to say
that the policies of state X and state Y regarding the setting
out of fires conflict with one another. The law of state X im­
poses a somewhat stricter liability than the law of state Y but
there is no need to assume that this strict liability is contrary
to the policy of state Y. However, in some multiple contact
cases it may be a matter of importance to one state that a lia-

1 See above, p. 61.

2 On this point see Stumberg, Conflict of Laws (1937) 182; Lorenzen,
483, 493; Note, (1935) 44 Yale L. J. 1233.

A similar problem arises in the field of criminal law. Almost any of the states
connected with an interstate crime are likely to mete out justice to the wrong­
doer according to their own laws. See Stimson, Conflict of Criminal Laws
bility should not be imposed. For example, the law of state X creates a privilege in favour of certain acts such as shooting criminals to prevent their escape or inflicting injury to save a human life. The law of state Y does not recognize these defences. If a person, doing one of these acts in state X, produces injurious consequences in state Y, the policies of the two states will, in a measure, come into conflict with one another. The court of the forum will have to choose between them.³

Let us consider another example. A injures B in state X. B signs a contract in state Y which releases A from all liability for the injuries. This contract is quite valid under the law of state Y but a statute of state X purports to make such releases absolutely void. Now state Y has an interest in prescribing the validity and effect of contracts made there. But state X has also some interest in extending contract-proof protection to persons who have been injured within its borders. Hence the policies of the two states are, to some extent, opposed to one another.

It is not suggested, of course, that in all multiple contact cases each of the states involved has of necessity a vital interest in the outcome of the litigation. All we desire to indicate is that in such cases the interests of the states involved may have to be taken into consideration.

Where the forum is one of the states connected with a case, its claim to impose or eliminate liability is likely to receive very careful consideration. The same sympathetic treatment ought also to be given to the claims of other states. But there is no need for the court of the forum to give the laws of other states any more ample recognition than that which they would receive at home. To illustrate, A, who is shooting in state X, accidentally injures B in state Y. There is no negligence or want of care upon A's part. Under the internal law of state X, B can recover; under that of state Y, he cannot. B

³See the Conflict of Laws Restatement (1934) § 382.
brings suit against A in state Y. Since A was physically present in state X at the time of the shooting, state X has some claim to determine the legal effect of A's conduct. The court of state Y might feel inclined, in the absence of some clear domestic policy to the contrary, to give effect to the law of state X by imposing liability upon A. Suppose, however, it was shown that, in a case identical with this one, the court of state X would not apply its own internal law but would apply that of state Y. If the court of state X would not apply its own law to such a case, there is no reason why the court of state Y should do so. The court of state X is the best judge of that state's interests and policies. ⁴

In such a case as this, the fact that the court of state X would apply the law of state Y is probably a good reason for the court of state Y to do the same thing. By following the precedent set by the court of state X, the court of state Y is helping to achieve the choice-of-law ideal of uniformity in all jurisdictions. The parties receive the same treatment in the court of state Y as they would have received in the court of state X.

This solution of the problem should not be regarded as a general approval of the renvoi doctrine. Under the circumstances of the problem supposed, a reference to the total law of state X and a renvoi to the internal law of state Y would doubtless reach the same result. But the solution which we have suggested is not derived from any general theory of "do renvoi" or "don't renvoi." It is based upon the idea that if a certain state refuses to apply its own internal law to a particular type of multiple contact cases, it cannot be said that other states ought to make such an application out of respect for the interest of the state in question. They may safely as-

⁴ See The Vestris, (D. C. N. Y., 1931) 53 F. (2d) 847 (vessel of British registry sinking on the high seas; American court held, following British decisions, that British loading regulations did not govern such cases).
sume that the state in question has no real interest in the solution of such cases, and proceed to adopt what appears to be the uniform practice.

SECTION 39

THE THEORY OF CAUSATION APPLIED IN MULTIPLE CONTACT CASES

A theory which is somewhat analogous to that of proximate cause in internal tort law has been invoked in certain multiple contact cases to exclude the application of the law of a particular state. Perhaps the best-known example is found in the "automobile owner's liability" cases. A, an automobile owner, lends his car to B in state X. B drives the car into state Y and while operating the car there, injures C. C brings an action against A. Under the internal law of state Y, A is vicariously liable to C for injuries inflicted by the operation of his car; under the internal law of state X, A is not liable to C. In favour of the application of the law of state Y, it may be said that state Y has an interest in prescribing the conditions respecting civil liability which will govern the use of automobiles on its highways. But in favour of A it may be argued that his liability ought not to depend upon the law of state Y because he did not cause the car to be taken there. The only reason for making A liable under the law of state Y is that his car was involved in an injury there. The causal connection between A's act of lending the car to B and the car being in state Y is so remote that it seems unfair to make A liable under the law of state Y.

To put the argument in another form; if B while driving the car in state X had injured C there, most persons would think it rather harsh to subject A to liability for a violation of the laws of state Y. From A's point of view, the case is not different when C is hurt in state Y because A had nothing
to do with the car being in state Y. It was B, not A, who took the car into state Y. This argument has made so much impression on the courts which have dealt with the problem that they have adopted a via media. Although applying the law of state Y, they indicate (some more explicitly than others) that the automobile owner (A) must be shown to have given an express or implied consent to the use of his car in state Y.¹

It should be observed that the idea of causation as it affects this conflict of laws problem is different from the idea of causation in ordinary internal tort law. In the latter context we are called upon to decide whether a person should be liable for certain harmful events. It is customary to require some causal connection between that person’s act and the harmful events in question. In the conflict of laws situation we are called upon to decide whether a person should be subjected to liability under the law of a particular state. If the person has not entered the state in question, it is suggested that we should require some degree of causal connection between his act and the fact that certain events have occurred in that state. In brief, we are concerned for conflicts purposes, not with the relation of an act to events, but with the relation of an act to the location of events.

To make this distinction clearer and further illuminate the significance of the causation conception in conflict of laws let us consider another example. Suppose A injures B in state X. B is removed into state Y and dies there. The question is raised whether A’s liability to B or to B’s dependents should be determined by the law of state Y. Now the causal connection between A’s act and B’s death may be perfectly clear and satisfactory. But the connection between A’s act and the fact that B died in state Y seems very vague and remote. A might be in no way responsible for the location of the death which might be due to the act of B himself or of some third

¹ See below, p. 237.
MULTIPLE CONTACT CASES

party. There would be an element of unfairness to A in making his liability depend upon these circumstances which have so little relation to his original act. Hence the courts which have been confronted by this problem have unanimously declined to make any reference to the law of the place of death.²

SECTION 40

THE PROBLEM OF CLASSIFICATION IN MULTIPLE CONTACT CASES

In introducing the topic of multiple contact cases we suggested that these cases, like all other cases which come before the courts, involve a pattern of operative facts. But these cases are peculiar in that the pattern of facts is spread over a number of jurisdictions whose laws are different, a state of affairs which raises the question, “which law or laws is to be applied?”

In dealing with these cases the courts sometimes adopt the law of one state to determine the legal effect of the entire series of transactions. The other laws are excluded from consideration. A second technique, not infrequently employed, is to make a selection of legal rules from each of the relevant laws, by using several choice-of-law principles. No one body of law is allowed to determine all the legal consequences of the fact situation.

When there appears to be a possibility of applying two or more choice-of-law principles to a set of operative facts, the problem may be stated as a problem of classification (characterization, qualification). To illustrate this point we may use an example which we considered in section 38. Suppose A

² See below, p. 255.

injures B in state X. B signs a contract in state Y which releases A from all liability for the injuries. According to choice-of-law principles the internal law of state X governs matters of tort liability, the internal law of state Y determines the legal effect of the contract. We find that the contract of release is valid under the internal law of state Y (where it was signed) but void under the internal law of state X (where the injury occurred). Thus we have a rule of the internal law of state X which is contrary to a corresponding rule of the internal law of state Y. Which rule ought to prevail? The formal problem of classification might be stated in any one of three ways: does state X's rule avoiding the contract belong to the category of tort or to the category of contract? does state Y's rule upholding the contract belong to the category of tort or to the category of contract? does the subject-matter of these rules (contracts releasing tort claims) belong to the category of tort or to the category of contract? But the actual problem is always the same irrespective of the form in which it is stated; the court must decide which of the two conflicting rules shall govern the decision. This accounts for the fact that writers who employ this terminology sometimes appear to be classifying different things.\(^1\)

These three formulae which state the problem in terms of a classification do not provide us with a very complete picture of the real issues which are at stake. In a sense, they oversimplify the problem. They omit all the important social factors to which we referred in section 38. In multiple contact cases of this kind, the conflicting rules of the various states involved may embody important social policies which the court of the forum will want to take into consideration. In the example which we have used, state X's rule avoiding

\(^1\) Another explanation for this apparent disparity in the objects of classification is found in the treatment of certain writers who divide the classification process into two stages. At the first stage they classify the facts, at the second, the rules of the appropriate internal law. See below, section 41.
MULTIPLE CONTACT CASES

releases is probably a rule of this kind. Another matter which ought to be taken into account in all conflicts cases is the ideal of uniformity. If possible, it is desirable that the court trying this case should decide it as other courts have decided similar cases, or would be likely to decide this one.

The classification analysis does not seem to find any place for these matters. It suggests that the problem is one of pure logic. A legal rule or a legal rule’s subject-matter necessarily belongs to some category. The court’s only task is to discover the correct pigeon-hole. The writers who employ this analysis usually try to find some general theory which the courts ought to follow in making their classification. They debate whether the classification ought to be governed by the internal law of the forum or by one of the relevant proper laws. They seem to lay very slight emphasis upon the relation of the classification to conflict of laws policies.

In favour of this approach to the problem it may be urged that many multiple contact cases do not involve any important policies of the states with which the case is connected. In many cases it is a matter of indifference to these states whether the case be decided one way or the other. Uniformity is the sole objective. What is wanted, therefore, is a simple general principle of classification to which the courts of every state may resort and which will enable them to deduce a solution for every case. It may be conceded that in many multiple contact cases uniformity is the most important objective. But this is not true of all such cases. Under these circumstances it would be most dangerous to adopt some formula which, by producing satisfactory results in some cases, would lull us into a state of complacent indifference to social factors which might, in other cases, assume a position of crucial importance.

This criticism or warning regarding the use of the term “classification” is not by any means a purely theoretical ob-
jection. Courts and writers are very prone, in dealing with conflicts problems, to be too much influenced by some sweeping general principle or some over-simplified mechanical analysis and to ignore the social factors involved in these problems. Whatever may be the reasons for this tendency, it is so real that certain American writers have been constrained to protest against it quite vigorously. If we are to employ the term “classification” to describe the application of choice-of-law principles, we must use it with caution and reservation. We should remember that it does not refer to a process of automatic deduction but to a technique for deciding actual controversies and laying down the rules by which men live. In making a classification, a court ought to be guided by a consideration of the various social factors which are important in the conflict of laws: the ideal of uniformity, the recognition of the interests of different states, etc.

The term “classification” has also been applied to the problem of deciding whether a particular rule of foreign law should be regarded as a rule of procedure which the court of the forum could not conveniently enforce. Although certain formal analogies can be drawn, this problem is really quite different from that involved in a multiple contact case. In dealing with the substance-procedure problem the court makes a selection of legal rules from the law of the forum and from the law of some foreign state or states. The prime objective is to apply as much of the foreign law as possible. No such general policy can be laid down for the multiple contact cases. In those cases the arguments of policy in favour of the various

---


See also our discussion of the classification analysis as applied to the substance-procedure problem in section 14, above.

8 See above, sections 14 and 15.
laws involved will depend upon the tenour of their specific provisions and the nature of the contacts. The use of the same term "classification" in connection with both problems is rather unfortunate and may lead to confusion.

We are indebted to some of the writers who have discussed the classification problem for a clarification of certain matters incidental to the application of choice-of-law principles. One of these matters is the relation between the terms of choice-of-law principles and the internal law of the forum. Choice-of-law principles normally contain verbal symbols which are used in the internal law of the forum, such as contracts, torts, intestate succession, etc. But when these terms are used in the conflict of laws they have a significance different from that attached to them in internal law contexts. Their conflict of laws connotation is broader and more inclusive than their internal law connotation. They may include rules and obligations of foreign law which are not part of the forum's internal law. For example, an English court will enforce a foreign contractual obligation created under circumstances in which English internal contract law would not create any obligation, as where the parties have made an agreement without consideration. The term "contract" as used in English conflict of laws is broad enough to include such obligations. Similarly the term "quasi-contract" as used in English conflict of laws, includes foreign obligations unknown to English internal law. The term "tort" as used in the conflict of laws by the courts of an American state normally includes tort obligations which would not be imposed by the

---

This point is particularly emphasized by Cheatham, "Internal Law Distinctions in the Conflict of Laws," (1936) 21 CORN. L. Q. 570. See also Beckett, "The Question of Classification ('Qualification') in Private International Law," (1934) 15 BRITISH YEAR BOOK INT. LAW 46, 58; Unger, "The Place of Classification in Private International Law," (1937) 19 BELL YARD 3; Robertson, Characterization in the Conflict of Laws (1940) 81.

Re Bonacina, [1912] 2 Ch. 394.

Batthyany v. Walford, (1887) 36 Ch. D. 269.
internal law of that particular state. Whether we can say the same thing for the term “tort” as a term of English conflict of laws is very doubtful. English courts have laid down the rule in conflict of laws that “the [foreign] wrong must be of such a character that it would have been actionable if committed in England.”

When the forum is one of the jurisdictions with which a multiple contact case is connected, its internal law will presumably be well known to the court. The same cannot be said of the laws of other jurisdictions. This is especially true in European countries where the laws of nearby states are often written in different languages and very different in their contents. The importance of a careful and sympathetic examination of the provisions of a foreign legal system which is involved in a conflicts case has been emphasized by Falconbridge. Rules of a foreign legal system ought not to be torn from their native jurisprudence and casually classified as tort or contract according to their most obvious characteristics. They should be considered in their proper context, which is the legal system from which they are derived. Most important of all, a serious attempt should be made to understand their purpose, to discover what social interests they have been designed to uphold.

---

7 See above, sections 3 and 19.


MULTIPLE CONTACT CASES

SECTION 4I

THE THESIS OF A PRIMARY CLASSIFICATION

In our discussion of multiple contact cases we have assumed that a multiple contact case would normally present itself to a court for decision as a pattern of operative facts spread over a number of states whose internal laws were different. We have also assumed that the court would know the relevant provisions of the internal laws of these states and would take them into account in working out its solution for the case. It may be inferred from the works of certain writers that they would object to this point of departure.

These writers divide the classification problem into two stages which they call primary and secondary classification. They argue that in the first stage, i.e., that of primary classification, it is illogical to give any consideration whatsoever to foreign law. "We cannot consider foreign law," they argue, "before we have decided which foreign law is to govern the case." In their view, the court starts with a pattern of operative facts spread over several states. It knows no law save that of the forum, i.e., the forum's internal law and also its choice-of-law principles. With these legal elements in mind the court must first classify the legal issue or question presented by the facts. It must determine what legal problem or problems are raised by the facts. Contemplation of a set of facts will not in itself suggest any legal problems; hence the court must consider the facts in the light of the forum’s internal law and its choice-of-law principles. Having classified the problem, e.g., as one of tort liability, or as one of contractual liability, the court then applies one or more of its choice-of-law principles and for the first time is brought to consider the content of the foreign law in detail. A second stage is thus reached at which further issues may arise with regard to the classification of particular rules of the foreign law. This stage is called by these writers "secondary classification" or "delimitation"
of the foreign law.” At this stage the court may, according to these writers, take into consideration rules of the foreign law and their classification within the foreign legal system.¹

Even as a purely theoretical introduction to the classification problem, this primary classification without reference to foreign law is an entirely artificial and unnecessary invention. Courts and counsel need not, in practice, attack a conflict-of-laws problem like a game of blind man’s buff, shutting their eyes to all legal rules save those of the forum until they have reached a particular stage.² In a conflict of laws case counsel for both sides will very probably scrutinize the provisions of all the relevant legal systems to see whether their side can gain any advantage thereby. If they think there is a possibility of this they will plead and, if necessary, prove the foreign law or laws in question. The court may have a detailed knowledge of all the relevant foreign laws at the time when it decides whether to adopt them or ignore them. When an appellate court decides to apply a foreign law it is almost certain that it will have the rules of that law before it. In actual practice, the point of departure is not a pattern of facts plus a knowledge of the law of the forum but a pattern of facts plus a knowledge of the internal law of every state with which they make a connection of any possible significance.

The idea of a primary classification without reference to foreign law is also theoretically unsound because, if rigidly followed, it would exclude from the court’s consideration any distinct legal conception of foreign law which had no counterpart in the law of the forum. Suppose an English court starts with the fact that two people have been married in France.

¹ This theory of a primary classification is put forward by Unger, “The Place of Classification in Private International Law,” (1937) 19 BELL YARD 3; CHESHIRE, PRIVATE INTERNATIONAL LAW, Ed. 2 (1938) 30; ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS (1940) 20, 59.

² This point is made by Cavers, “A Critique of the Choice-of-law Problem,” (1933) 47 HARV. L. REV. 173. Falconbridge, who has written extensively on the classification problem, apparently does not accept the idea of dividing the classification process into two different stages. See his “Renvoi, Characterization and Acquired Rights,” (1939) 17 CAN. BAR REV. 369, 373.
How can this fact, in the light of English law, suggest to the court that a question of an implied marriage contract for community of goods\(^3\) might be raised?

"The solution," says Unger, "depends on the recognition that at this stage the *lex fori* is not applied to decide the issue but merely to give a legal characterization of the circumstances. It follows that only the analytical framework of that legal system without its body of detailed provisions need be considered."\(^4\) This is all very well for such cases as Unger cites: a foreign contract without consideration, a foreign marriage without English formalities. But if the foreign legal conception was absolutely unlike anything known at the forum, it would never occur to a court which closed its eyes to everything except the "analytical framework" of the forum's internal law.

Robertson contends even more pointedly than Unger that in its initial attack upon a conflicts case the court must classify the bare facts as they have been proved. He further insists that at this stage of the game the court cannot logically take into consideration the provisions of foreign law. But he does not explain how the court can effectively classify a set of facts which would have no legal consequences whatever under the internal law of the forum without some knowledge of the foreign law which would endow these facts with legal significance. He admits, however, that the "analytical framework" of the forum's internal law will not meet the exigencies of the problem suggested.\(^5\) As described by these writers the task of making a primary classification in the proper manner becomes very difficult indeed. It goes beyond mere blind man's buff and involves pulling oneself up by the bootstraps.

\(^3\) As in *De Nicols v. Curlier*, [1900] A. C. 21.


\(^5\) See Robertson, Characterization in the Conflict of Laws (1940) 59-63, 68, 83.