CHARACTERIZATION WITH RESPECT TO CONTRACTS IN THE CONFLICT OF LAWS

PAUL A. FREUND
Professor of Law, Harvard University Law School, Cambridge, Massachusetts

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CHARACTERIZATION is an aspect of what Professor Chafee has arrestingly called "The Disorderly Conduct of Words."[1] A concept or a term in a conflict-of-laws rule may be nominally the same in two systems of law—for example, "contract" or "place of making" or "formalities"—and yet its meanings may differ. Which meaning shall be chosen? This kind of problem is not peculiar to private international law. It pervades the law generally, as indeed it does all verbal thinking.

Perhaps a clue to the conflicts tangle may be found if we examine some comparable dilemmas in other areas of the law.

For purposes of the diversity jurisdiction of the federal courts, a corporation is treated as a citizen; a partnership or unincorporated association is not. A foreign association, for purposes of this rule, will be characterized by federal, not by its own, law (though of course the operative features of its organization will be examined, apart from the ultimate label, under the workings of the foreign law).[2] The result is to produce uniformity of treatment within our federal courts not only for the particular association but for all similar bodies, whatever their place of origin.

Whether an issue such as burden of proof is "substantive" or "procedural" is important in the federal courts under *Erie* v. *Tompkins*. Here too the federal courts apply characterization under federal law, irrespective of the state label, terming the issue invariably "substantive." Both with respect to burden of proof and the treatment of foreign associations, then, the federal courts apply their own characterization; but the results are significantly different. In dealing with the burden of proof, the result is not that all such cases are disposed of alike in the federal courts, but that this very case would be disposed of alike in the federal and state courts within a given state.[3] If there are two possible states in which action might

[1] 41 Col. L. Rev. 381 (1941).

[2] Puerto Rico v. Russell and Co., 288 U. S. 476 (1933).

[3] Sampson v. Channell, 110 F. (2d) 754 (C. C. A. 1st., 1940), cert. denied, 310 U. S. 650.

be brought, and they differ in their internal rules on burden of proof, the result is that the burden of proof is on the plaintiff in the state and federal courts of A, and on the defendant in the state and federal courts of B. Had the characterization been adopted from the state law, and had that law deemed it procedural (for conflict-of-laws purposes), there would have been a greater measure of uniformity among the four possible forums: one federal rule in the two federal courts, coinciding with one or the other of the state rules on the subject. I am by no means criticizing the solution actually reached by the federal courts under the *Erie* doctrine. My point is only that characterization is an instrument by which ends may be attained; that even the end of uniformity may have more than one meaning; and that we would do well not to ignore the meaning of those objectives in our concern with choosing among meanings of words and concepts.

One further analogy may be adduced, suggested by the recent notoriety over the *Eisler* extradition case. An asylum state, when asked to surrender a fugitive on the ground that he committed "perjury" in the demanding state, satisfies itself that the offense designated is a crime under the laws of both states. The result is that a given fugitive from the United States may be extradited in one asylum state and not in another, and that of two different fugitives reaching England after committing identical acts in different states, one may be extradited and the other not. Here, obviously the objective of uniformity yields to other policies—or uniformity is defined with qualifications appropriate to those policies.

Now what does all this have to do with characterization in the conflict of laws relating to contracts? Just this, that the problem of characterization may yield more serviceably to criteria of purpose than to analysis in the conventional terms of primary and secondary characterization. Those terms are open to two serious objections.

In the first place, the scope of "primary" characterization tends to be predetermined by the breadth or narrowness, the generality or particularity, of our basic conflicts rules. Thus if we say that the validity of a contract is governed by the law of the place of making, the question of capacity may be thought of as a problem of delimiting the law referred to—*lex loci contractus*; in other words, a problem of secondary characterization, as indeed Robertson argues.[4] But if the basic conflicts rule is more specific, e.g., that capacity to contract is governed by the law of the person's domicil, the problem of characterizing "capacity" would appear to be an instance of primary characterization. A fortiori, where the basic conflicts rule is that the age of consent is determined by the law of the

[4] Characterization in the Conflict of Laws (1940) 46–47, 235 *et seq.*

domicil, there seems to be no real problem of characterization of the issue; it has been absorbed by the particularity of the conflicts rule itself. Much of the dispute over the scope of primary and secondary characterization can be resolved, more meaningfully, into a question of how specific the basic conflicts rules should be.[5]

A second objection to the primary-secondary analysis is that it is apt to be a groundwork for the pat rule that primary characterization is for the *lex fori*, secondary for the *lex loci*, and so to obscure the elements of purpose on which, as I have suggested, attention should be focused.[6]

What are these elements of purpose, and how can they be promoted by characterization?

The first, of course, is uniformity. It may be uniformity of succession to movable property, or it may be uniformity of result in a given case irrespective of forum. It is promoted by characterization according to the *lex loci*, as part of the application of the "whole law" of the *lex loci*. It may be asked whether it is possible to characterize the connecting factor—e.g., place of making—by a law which is not ascertained until the forum itself defines the place of making. The answer is that the forum's reference to place of making may be provisional, subject to a controlling characterization by the law so referred to. But there is no point in such characterization by the *lex loci* unless its operative conflicts rule is adopted as well as its definition of a term. Uniformity requires emulation of results, not of labels. From this point of view, the problem of characterization merges in that of renvoi.

What I have been saying about uniformity can be given concreteness by reference to the Michigan case of *University of Chicago* v. *Dater*,[7] to which in these precincts I will be expected to pay my respects. There, it will be recalled, a married woman domiciled in Michigan became surety for her husband on a note secured by a mortgage on Illinois land. The note was given in consideration of a loan by an Illinois lender, and much of the transaction was carried out through the interstate mails. Action was brought on the note in Michigan. The opinion of Justice Wiest holds that the capacity of the wife is governed by the law of the place of making and that this was Michigan; but that if the place of making be deemed to be

[5] But *cf.* Robertson, *op. cit. supra* note 4, at 87–89, insisting that "validity of marriage" is a proper category of conflict of laws, while "formalities of marriage" and "capacity to marry" are not.

[6] *Cf.* my review of the third edition of Cheshire, Private International Law (1947) in 61 Harv. L. Rev. 1264 (1948).

[7] 277 Mich. 658, 270 N. W. 175 (1936).

Illinois, it will be found that Illinois law would regard the place of making as Michigan, and so the court is brought back to Michigan law.

Several observations and queries may be advanced concerning the *Dater* opinion (assuming an accurate interpretation of Illinois law was made).

(1) It achieves uniformity with the result that would be reached in Illinois.

(2) It does so by applying the Illinois conflict-of-laws rule, including its characterization of place of making, undeterred by the superficial reproach of renouncing its own definition of place of making. It would have been footless to apply an Illinois conflicts rule without the Illinois characterization; or to apply the Illinois characterization of place of making if the Illinois conflicts rule had used a different connecting factor, as for example place of performance.

(3) If Illinois were to adopt the very technique of the *Dater* opinion, it would characterize as Michigan would, but Michigan would characterize as Illinois would, and so there would be the spectacle so familiar in the literature of renvoi, of the endless circle, which must be broken.

A sensible way of breaking it is to select one of the states as the focal point with which uniformity should be obtained. This suggestion leads to a query about the *Dater Case*.

(4) Is it desirable that Michigan seek uniformity with Illinois in the circumstances of the *Dater Case*? Would it be just as desirable, more so, or less so, for Illinois to seek uniformity with Michigan? A helpful answer may be to consider the more probable forum as the focal point in these circumstances. In the *Dater Case*, Michigan, as the residence of the married woman, may be taken as the more probable, or natural, or anticipated forum. It would seem more desirable that Illinois, if it had perchance become the forum, look to Michigan as the focal point for characterization than that Michigan look to Illinois. Thus from the standpoint of a general technique in the interest of uniformity, the *Dater* opinion is dubious on its facts.

Are there any purposes other than uniformity that the technique in the *Dater Case* may promote? The result in the case was to hold the married woman incapable of contracting, by applying the law of the state which happened to be her domicil. The late Professor Cook thought that this result should have been reached more explicitly, where the woman acts in the state of her domicil and this fact is evident to the other contracting party.[8] Professor Cook therefore took issue with the approval of the opinion by Dean Griswold, who evidently regarded it as a contribution to

[8] The Logical and Legal Bases of the Conflict of Laws (1942) 246–248.

uniformity.[9] But if Dean Griswold was perhaps too sympathetic to any employment of the renvoi, Professor Cook may have been too inhospitable. The renvoi, where conflicts rules differ patently, or characterization of the connecting factor by the *lex loci* where the rules differ latently, may serve a creative purpose in avoiding a conflicts rule of the forum which is not altogether satisfactory. A forum may escape its own conflicts rule through the avenue of a foreign rule or characterization when it is not ready to abandon its own rule completely. It may be led to apply its domestic protective legislation when the state which in the forum's view has the closest connection with the transaction would do so.

On the other hand, it may be deemed more important to sustain a multistate commercial transaction if conscientiously possible. Thus, a forum may be led to sustain a transaction when the state which in the forum's view has the closest connection with the issue would do so. Suppose, for example, that the *Dater Case* had arisen in the courts of Illinois. Looking to the Michigan law (leaving aside the *Dater* opinion itself) the forum would find that the contract would be sustained, by reference to Illinois law. Where Michigan is also the domicil, should Illinois recognize a disability that Michigan would not? Should it be more royalist than the king? Might it not rather obey the injunction "Go thou and do likewise"?

To adopt the rule or characterization of the *lex loci* in some circumstances and not in others, depending on whether the disability of a party ought or ought not to be a defense, is not intellectual disingenuousness. The practice and its scope would become regularized and would not differ essentially from alternative references in basic conflicts rules in aid of sustaining contracts, familiar in continental conflicts codes and in the Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes.[10]

[9] "Renvoi Revisited," 51 Harv. L. Rev. 1165, 1207–1208 (1938).

[10] Article 2 of the Convention (June 7, 1930), printed in Hudson, 5 International Legislation 550, 552, provides in part:

> "Art. 2. The capacity of a person to bind himself by a bill of exchange or promissory note shall be determined by his national law. If this national law provides that the law of another country is competent in the matter, this latter law shall be applied.
>
> "A person who lacks capacity, according to the law specified in the preceding paragraph, is nevertheless bound, if his signature has been given in any territory in which according to the law in force there, he would have the requisite capacity."

The first paragraph appears to be broad enough to include a reference from the national law where its characterization of the connecting factor differs from that of the forum. It will be observed that by taking the national law as a focal point the

Thus in the circumstances of the *Dater Case* a forum might well sustain the transaction if it would be sustained either by the internal law of the commercial center of the contract or by the latter's conflict-of-laws reference. From this point of view, as well as from that of uniformity, the actual decision is unsatisfactory—not because the technique is improper but because in the case itself the objectives of its use were inadequately explored and evaluated.

The use of renvoi (in the sense of application of the "whole law" of another state) depending on its effect in sustaining or invalidating a transaction can be illustrated in the field of recognition of foreign divorces. Suppose spouses of French nationality, domiciled in Belgium, are divorced in France and the divorce is brought in question in Michigan. Although the divorce forum did not satisfy the Michigan requirement of domicil, the domicil of the defendant at the time of the divorce would have recognized the divorce because granted in the state of nationality. Should not Michigan do likewise? Compare the English rule of *Armitage* v. *Attorney General.*[11] Now suppose that a divorce is obtained in Connecticut by a wife domiciled there from her husband who is domiciled in, and a national of, Italy. Here the divorce would be sustained under the ordinary jurisdictional requirement of Michigan law but not if regard is had to the "whole law" of Italy, the domicil of the divorced defendant. Should not Michigan recognize this divorce? Indeed, it would presumably be required to do so, assuming proper notice to the divorce defendant, under the Full Faith and Credit Clause.[12] The court that recognized the divorce in the latter situation need not feel compelled by intellectual consistency to reject the rule of the *Armitage Case* where that rule would serve to uphold the divorce.

I am not suggesting that renvoi, or characterization, be employed as a kind of sleight-of-hand to favor worthy as against unworthy litigants, but only that in its employment the objectives of rules of law in general, and conflicts rules in particular, be taken into account.

A word should be added about characterization of substance and procedure. A paradox here is that if our aim is uniformity, we do not secure it by adopting the characterization of the *lex loci.* For if the *lex loci* characterizes the statute of frauds as procedural and would therefore apply its own, a similar characterization by the forum would result in applying the

problem of an endless circle of references is avoided. The second paragraph illustrates the alternative reference in aid of sustaining a transaction.

[11] [1906] P. 135.

[12] Compare the facts in Torlonia v. Torlonia, 108 Conn. 292 (1928); but *cf.* Dean v. Dean, 241 N. Y. 240 (1925). See also Rabel, 1 The Conflict of Laws (1945) 511–513.

forum's statute, producing diversity of result. If instead the statute of each state is to be characterized by its own view, the result may be a gap or the application of two statutes. This is not fatal; but fatality does overtake us if the rules are logically contradictory, as in the case of burden of proof, for we cannot operate with no applicable burden of proof or with two inconsistent ones. No mechanical formula will spare us the obligation to examine our objectives. If we seek uniformity with a focal point above all, we will doubtless adopt the "substantive" characterization. If we seek to uphold consensual transactions in point of form where conscientiously possible, we may adopt an alternative reference for the statute of frauds.

Only a moment remains to consider what may logically be regarded as the threshold problem: characterization of the question presented. It seems to me that pragmatic common sense, together with a study of the operative features of the foreign transaction or legal institution, will go far to produce sensible results. Does the foreign institution possess the essential characteristics that have led us to adopt a given conflicts rule for an institution of our own? The problem is essentially the same as that confronting a federal judge in dealing with a foreign association as a party litigant for purposes of diversity of citizenship.

But whether the institution is foreign or domestic, it should be remembered that the categories are not closed. I recently asked a student how he would go about solving a certain case of breach of promise to marry, having multistate elements. He answered that he would first classify the question as one of tort or contract. I suggested that it might partake of both and be entitled to a conflicts rule of its own. The student, who was fresh from a study of English analytical jurisprudence, retorted with some scorn that there are elephants in the world, and there are wings, but there are no winged elephants. Of course he was right if the categories of conflict of laws are given by the God of Nature. I would only suggest that in our legal universe it might be interesting to create some winged elephants. They might be more serviceable, at all events, than sacred cows.