THE THEORY OF CHARACTERIZATION: A CRITICAL LEGAL STUDY PERSPECTIVE

Prem Kumar Agarwal
HOD and Assistant Professor of Law, Hooghly Mohsin College, Hooghly, West Bengal

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Abstract

Characterization or classification of a given factual situation is one of the necessary steps in the decision of a case having some foreign elements. Yet, despite a capacious literature existing on the subject, the problem of characterization is one of the most complicated problems of the private international law. Such is the diversity in the laws of various countries of the world. In modern era, characterization appears to be an impenetrable problem.

Keywords: Characterization, theory of characterization, legal perspective

The concept of characterization is in itself a problem in the context of the private international law. So far the study relating to private international law is concerned, it is the established rules thereof that any court which assumes jurisdiction over a case that involves certain foreign element, has, at the first instance, to determine whether a given factual situation gives rise to rights, or imposes obligation, or creates a legal relations or an institutions or an interest in a thing[1].

Any Court, which assumes jurisdiction over a case involving some foreign element, has, at the first instance, to determine whether a given factual situation gives rise to rights, or imposes obligations, or creates a legal relation or an institution or an interest in a thing. The basic question is: in reference to which law the court is going to characterize the factual situation so that it is able to reach a socially desirable and just result? This is the cardinal question as without answering this question the court can precede no further. For instance, the following are some of the well-recognized rules or private international law: capacity is governed by the *lex domicilii* (this is the predominant view in the common law countries); the formalities are governed by the *lex loci celebrationis* or *lex loci contractus*[2] and immovable are governed by the *lex situs.*[3] Unless the court determines what is meant by capacity, formalities or immovable property, it would be almost impossible for the court to proceed with the case.

The problem of characterization may be understood with the help of a few examples: (i) An Indian court is called upon to adjudicate the question of inheritance to the immovable property situated in India of a married woman domiciled in Tibet. The female had married in polyandrous form of marriage- polyandry being recognized in the Tibetan tribe to which she belonged. The property is claimed by her two husbands and three children on the one side, and by her two brothers on the other. Much will depend the way the Indian court characterizes the polyandrous union of the deceased woman. If this union is characterized as valid marriage her husbands and children would inherit the property. (ii) An Indian domiciled Muslim goes to England and marries there in a registry office a German domiciled woman. Later on the German wife files a petition for a declaration that her marriage is null and void, her husband being already a married person.

Suppose the petition is filed in an England or German court. Much will depend on the question whether the English or the German court will recognize the polygamous marriage performed in India. If they do so, the declaration will be made, otherwise not. But if the petition is filed in India, the petition will not succeed, since in India polygamous unions are recognized as valid marriages under Muslim law.

Theories of Characterization : While explaining about the theories of characterization, it can be said that there are four theories of characterization have been propounded : (I) Characterization should be governed by the lex fori, (II) characterization should be made under the lex causae, (III) characterization should be made in two stages: primary characterization and the secondary characterization; the former should be governed by the lex fori and the latter by the lex causae; and (IV) characterization should be based on comparative law and analytical jurisprudence. Now, these theories can be discussed in the following manner:-

I. Characterization on the basis of the lex fori: When Bartin wrote his famous monograph it was the heyday of law of nations theory in private international law. After elaborately discussing the problem, he came to the conclusion that in this field it is almost impossible to arrive at any conclusion on the basis of law of nations for the simple reason that there are no such rules, and, therefore, in all cases (he recognized only a few exceptions) characterization is to be made in the basis of the lex fori. Bartins formulation not only gave a heavy blow to internationalists in private international law, but also brought the problem of characterization to the fore.

Bartin suggests that the problem of characterization can be solved on the basis of the following two rules:

(i) A court dealing with the question of characterization, must invariably (subject to a few exceptions) apply and decide the issue on the basis of internal law. When a court is called upon to characterize a rule of foreign law, an institution, a legal relationship or some factual situation of a foreign country, it must determine it on the basis of characterization made in its internal law, provided there exists a corresponding rule, institution, legal relationship in the internal law. In case no such corresponding rule, legal relationship or institution exists in the domestic law, it

should be determined on the basis of the closest analogy available in its internal law.

(ii) Once the court has determined that the law applicable is of a particular country or place, then the court should apply that law as it is applied in that country or place, and it should also adopt any subsidiary characterization as might be suggested by the law of that country or place.[4]

Bartin supports his theory on practical reason also. He says, when a judge is called upon to determine a particular issue, he, being trained in the laws of the forum, cannot but decide the issue on the basis of the rules of the forum; for him determination of the issue on the basis of some other law would mean grouping in darkness. Therefore, he says that before the determination of the question as to which foreign law is applicable, the question of characterization has to be answered, by its very nature, in reference to the law of the forum.

However, to the rule that characterization is to be made in the basis of lex fori, Bartin admits two exceptions:

(a) Whether the property is movable or immovable is to be characterized on the basis of the lex situs: this is because, he says, this rule would best sub serve the security of transactions affecting property. This should not mean, he asserts, that the law of situs is given sovereign authority.

(b) When a contract is entered into by correspondence the governing law would be determined by reference to that law which postpones its formation longest.

A universal application of this theory would result in the application of neither the law of the forum nor of lex causae, but of the law which is of neither. "A logical application of the theory would result in an English court, through classifying a French rule in a manner different from that in which it is classified in its country of origin, not merely refusing to apply French law when according to French ideas it should be applied, but also applying French law in cases where, according to French ideas, that law is not applicable at all."[5] This is supportable on the basis of pure logic, otherwise it is so repugnant to common sense that few courts have ever consistently applied it. Whenever courts have applied it, they have, to avoid the absurd position to which it leads, fallen back on the doctrine of renvoi. But the application of renvoi goes against the logical basis of the theory.

II. Characterization on the basis of lex cause:~ In opposition to Bartin's theory, Despagnet and Martin Wolff have propounded the theory of lex causae. According to Wolff "… every legal rule takes its classification from the legal system to which it belongs. French law classifies French legal rules, Italian law Italian rules, and an English court examining the applicability of French rules will have to take the French classification into consideration. Of course, of English rule on conflict of law can either expressly or implicitly forbid the court to accept the foreign classification. Such exclusion may be based, for example, on principles of justice of morality. But this will be a rare exception. To examine the applicability of foreign law without reference to its classification is to fail to look at foreign law at all. Bartin and his followers shut their eyes to good portraits and rest satisfied with a collection of caricatures."[6]

Despagent says that when a judge, drawing inspiration from his own law and the principles of private international law, decides that a foreign law should be applied to a particular judicial relationship, he must be understood as applying such law so far as it organizes and regulates such relationship. The first thing that attracts the legislator and the first thing determined by him is the nature or qualification of the relationship which he regulates. To disregard his decision in this respect will tantamount to non-application of the law to which the judicial relationship in question was, on principal, subject. If the national law has made a certain question one of capacity, can it be said that if the question is covered into one form by the law of the forum, the law which should govern the capacity of the individual has been applied? Obviously not, the very principle has been violated. What is of capital importance and which produces all subsequent juridical consequences is precisely the qualification to be given to a judicial relationship and it would be flagrant contradiction to import the qualification of the forum and at the same time to pretend that one is following the foreign law. This theory has been adopted by some other writers also with some modification.

This theory also bristles with difficulties. Cheshire, speaking of this theory , says : "If the law which is finally to regulate the matter (i.e. the lex causae) depends upon classification, how can a classification be made according to that law?"[7] Wolff has thus answered the criticism: "In my opinion the criticism does not hold good, but is based merely on the peculiar way in which conflict rules are framed. To give examples: „The effect of marriage on the property of spouses is governed by the law of their matrimonial domicile . More correctly phrased this rule will run thus : "If two persons are married to each other the court has to apply all those rules operative at their first matrimonial domicile which according to the law there prevailing regulate the effect of marriage on the property of spouses. This is true in so far as it goes, but still it does not refute the criticism that characterization on the basis of lex causae leads into a vicious circle, and that in many cases on the basis of this theory one cannot arrive at a socially just result. Then, in those cases where two foreign laws are equally applicable, the theory fails to explain why one law should be preferred over the other. Lorenzen rightly says: "It (Despagnet s theory) manifestly begs the entire question. The qualification of a legal transaction cannot, in the nature of things, be determined by the law governing the transaction itself, inasmuch as the problem of qualifications,…..is limited to cases where the application of the foreign law depends upon determination of the preliminary question. Under these circumstances it is impossible….to decide the preliminary question by the law governing the transaction itself."[8]

Some writers mention that problem of characterization can be best solved by dividing the process of characterization into primary characterization and secondary characterization. The former is for the lex fori and latter for the lex causae.

The protagonist of this theory recognize two exceptions to the rule that primary characterization is to be governed by the lex fori, viz., (a) whether things or interest in things are movable or immovable is a question for the lex situs, and (b) where there are two potentially applicable foreign laws and their characterization is the same, then the forum should adopt their common characterization.

The secondary characterization is the, delimitation and application of the proper law, as Robertson puts it.[9] According to Cheshire the difference between the primary characterization and the secondary characterization is that the former precedes and the latter follows.[10] This theory maintains that secondary characterization is governed by the lex causae. However, the conflict of procedural rules is governed by the lex fori. At the secondary stage of characterization whether a matter is procedural or not, according to Cheshire, is to be governed by the lex causae, though, as in the case of primary characterization so here, it is not necessary that the domestic characterization should be followed, rather it should be the classification or private international law.[11]

III. Characterization on the basis of Competitive Law:~ Rabel and Beckett have propounded the view that characterization should be governed by the analytical jurisprudence on the basis of comparative study of laws. Starting on the assumption that "rules of private international law" are rules to enable the judges to decide questions as between different systems of international law-either between his own internal law and a given foreign law or between two foreign systems of law," and therefore these rules "if they are to perform the function for which they are designed, must be such, and must be applied in such a manner, as to render them suitable for appreciating the character of rules and institutions of all legal systems" and as the "classification is simply an interpretation or application of the rules of private international law in a concrete case and the conception of these rules must, therefore, be conception of an absolutely general character". Thus, "these conceptions are borrowed from analytical jurisprudence that general science of law based on the results of the study of comparative law which extracts from this essential general principles of professedly universal application, not principles based on, or applicable to the legal system of one country only. Beckett thus asserts that characterization must be based on analytical jurisprudence.

For the purpose of characterization, Beckett divides the cases into the following three classes: (i) cases not involving characterization of a rule or institution of internal law, (ii) cases involving characterization of rules or institutes of internal law, and (iii) cases involving characterization of rules or institutions of foreign internal law.

The characterization of the first class of cases, according to Beckett is governed by the lex fori. "The only exception which can be made is where it is clear that upon the application of any conception the courts of law of one of two foreign countries must be competent and the two foreign countries must be competent and the two foreign laws are in agreement in following a conception different from that of the lex fori, and in these circumstances a court might in effect, if not in form, adopt foreign conception by the application of a principle analogous to that of the renvoi."

As regards to the second class of cases, he says, "In most cases the court will simply by applying the rule-statutory or common law – of its internal law, in order to determine its application, its ordinary principles of private international law which can in this connection only be interpreted in the light of general jurisprudence."

In respect of the third class of cases he observes that it is essential that the court should not merely ascertain the purport of this rule as a rule of internal law, but also that it should ascertain in what circumstances it is applied by the courts of the country of whose legal system it forms part….. It is only when in possession of this information that a court is in a position to classify the foreign rules or institutions. On the basis of this information the court should classify it according to the conception of analytical jurisprudence.

Criticism:- This theory has been criticised by many. The most apt criticism of the theory is that it is impracticable. Morris rightly says that, "This view is superficially attractive, because judicial technique in conflict cases should be more cosmopolitan and less insular than in domestic cases." The criticism of the theory may be summarized as follows:

(i) This theory is vague and impracticable, as "there are very few principles of universal application, and very little measure agreement as what they are."[12] Thus is more a theoretical than a practical basis of characterization.

(ii) "Characterization on the basis of comparative law would seem to require a supernatural class of judges, deeply learned in comparative law, capable of dissociating problems before them from the law of the forum, and willing to adopt in conflict problems a technique which is entirely foreign to the technique applied by them to other problems."[13]

(iii) The study of comparative law is capable of revealing differences between domestic laws, but of hardly of resolving them.[14] There are acute differences in certain areas in the laws of many countries. Then "how the most could learned analysing jurists remove such differences of classification without thereby alerting the law?" For such divergence of classifications is not jurisprudential in character, it connotes a difference in the law.[15]

Process of Characterization in Practice:~ Before proceeding with the process of characterization in practice, it would help in grapping the problem, if we look into a few decided cases which have posed the problem in most acute from : Two English cases, a German case and a French case are examined here.

Ogden v. Ogden; amply illustrates the complications involved in characterization. In September, 1898, an English domiciled woman and a Frenchman domiciled in France married in London without the knowledge of their parents. At this time the Frenchman was below the age of twenty-five. When the father of the Frenchman came to know of the marriage he took him to France and got his marriage annulled from a French court as under French law the marriage of a person below the age of twenty-five without the consent of the parent is null and void. Subsequently, the Frenchman contracted another marriage in France. Upon hearing this, the Englishwoman brought proceedings in the High Court of England for the dissolution of her marriage on the ground of husband's desertion and adultery. The petition was dismissed for want of jurisdiction. In October 1906 she married an Englishman, William Ogden with whom she lived for some time. Then Ogden filed a suit asking for a decree of nullity on the ground that at the time of marriage she was already a married woman. The court passed a decree annulling the marriage. The English court said that her marriage with the Frenchman was valid as the court would not recognize the nullity decree pronounced by the French court and therefore it held that her marriage with William Ogden was a nullity. The result of the decision is obvious. The parental consent was characterized by the English Court as a matter relating to formalities and as formalities are governed by the lex loci celebrationis, i.e. the English law, the first marriage was valid under the law and since the first marriage was valid the second marriage was invalid being a bigamous union. In the result, this Englishwoman remained a married woman in the eyes of English law, but unmarried in the eyes of French law.

In Re Cohn, Mrs. Cohn and Mrs. Oppenheimer, mother and daughter, who were German nationals domiciled in Germany though resident in England, died in air-raid in London. It could not be established who survived the other, or who died first. Mrs. Oppenheimer was entitled to the property of Mrs. Cohn, provided she survived her. The English and German laws differ as to the presumption in such a case. Under the former the presumption is that the junior in age survives the senior, while under the latter the presumption is that they died simultaneously. Upon counsel for the persons interested in Mrs. Oppenheimer's property arguing that the first question to be determined by the court was whether or not Mrs. Oppenheimer survived Mrs. Cohn and that since that was not certain and since matter of proof. Mrs. Justice Uthwatt said that the question was not "did or did not Mrs. Oppenheimer survive Mrs. Cohn but was the administration to Mrs. Cohn's estate to proceed on the footing that she did not?" On this basis the learned judge said that the law of the domicile applied, under which Mrs. Cohn s relatives were entitled to her estate.

In a German case a Tunisian promissory note was sued upon in a German court. At the time of the suit the German period of limitation had expired, though the Tunisian period had not. The Reichsgericht held that neither of the period was applicable: the Tunisian period was held not applicable because the Tunisian law characterize limitation as procedural and since under the German private international law no rule of procedural law can be applied by the German law, the Tunisian law was applicable. The German period of limitation was not held applicable as the limitation was characterized by the German law as substantive law-the substantive law applicable to the case was the Tunisian law. In the result the promissory note escaped from the application of the law of the limitation of both countries.

In the *French case*, commonly known as *Maltese Marriage* case, a widow claimed a share in her husband's property situated in Algiers. The husband also died domiciled there. The husband and wife, at the time of their marriage were domiciled in Malta. Under the French private international law succession to immovable is governed by the lex rei situs; and the right of husband and wife to property arising out of what is known as "regime des blens entre epoux" is governed by the matrimonial domicile, i.e., in the absence of a contract, the law of the country where the couple intended to establish themselves at the time of marriage. Under the French Municipal law, as then existing, the wife was not entitled to any share in her husband's property, though she was, under it, entitled to half a share in the property acquired in common by husband and wife, i.e. regime des biens. In this case regime des biens was governed by the Maltese law. Under the Maltese law the widow was entitled to half of the regime des biens, and a right of survivorship in one quarter of the assets left by the husband. It should be noticed that the difference of characterization between the two laws was: that according to the succession, while under the Maltese law it raised the question of matrimonial property. The question before the court was whether the widow was entitled to a quarter share in the immovable and movable assets left by her husband. The French court held that Maltese law applied and therefore the widow's claim was upheld.

Stages of Characterozation:~ These cases bring to the fore the complications involved in characterization. It is submitted that usually characterization in its practical application is made in three stages:

(i) The first stage is the stage of characterization of the factual situation, (ii) The second stage is characterization of conflicting factor, and

(iii) in the third stage the characterization of proper law is made.

These stages can be explained in the following manner:-

I. Characterization of Factual Situation :- When a court has determined that it has jurisdiction to entertain the case, it has to decide, before it can select proper law applicable to the situation, whether the factual situation before it constitutes a contract, tort, succession to property, etc. Sometimes it is very easy to place the factual situation in a proper category, but sometimes it is not easy at all. The difficulty arises on account of the fact that different systems of law characterize the same factual situation, institution or legal relationship

differently. Thus the main question at this stage that arises before the court is: categorization of which system it should accept. On what basis it should accept one categorization and reject the other.

Different suggestions have been made by different writers and theorists. Ugner holds the view that it is sufficient if the case falls within the analytical framework of the legal system of the forum: this he illustrates from two English decisions, Re Bonacina and Nachimson v. Nachimson.[16] In the former case a contract unsupported by consideration was held enforceable, while in the latter a Russian marriage , not falling within the definition of English marriage as it was dissoluble at will, was given recognition.[17] Robertson considers Ugner's formulation rather two narrow, as under it those institutions which are not known to English law would not receive recognition. This, he illustrates by citing De Nicols v. Curlilier,[18] where a French institution unknown to English law was recognized and held enforceable by the House of Lords. Therefore according to Robertson, in so far as the characterization of foreign legal situation is determined by the lex fori, the term does not mean strictly the internal law of the forum, but a wider concept which needs to be worked out for the purpose of conflict of laws.[19] Lorenzen also holds similar view.[20]

This aspect of the problem has been more fully discussed by Falconbridge. After elaborately discussing the controversial case, Ogden v. Ogden,[22] Falconbridge said that the English courts might have held that the requirement of English law should be characterized as part of the formalities, and that it was, therefore, inapplicable to marriage of English persons celebrated they might have held that a requirement of French law as to parental consent should be characterized as a matter of capacity, and that it was, therefore, to a marriage celebrated in England of persons therefore, applicable to a marriage celebrated in England of persons domiciled in France.[21] He thinks that the failure of English Courts to maintain this distinction has resulted in arriving at wrong calculations in Ogden v. Ogden[22] and Simonin v. Mallac.[23] A marriage in order to be valid must be extrinsically valid according to the property law governing formalities and must be a marriage between parties who are capable of marrying each other and must be in other respects intrinsically valid according to proper law governing capacity and other matters of intrinsic validity. He maintains that if this formulation is applied to Bartin's hypothetical problem of Hollander's will, a socially desirable result would have been arrived at.[24] After discussing cases relating to distinction between formalities of contract and capacity, between substance (right or obligation) and proceed (remedy), between proprietary rights acquired by the parties marriage on the occasion of marriage or as a result of the marriage and the right of surviving party on the death of the other and between administration of the property of a deceased person and succession to his property. Falconbridge says that in this class of cases there would appear no reason for departing from the general rule that the question before the court should be characterized in accordance with the lex fori, and that any provision or rule of a foreign law which may be the proper law under the conflict of laws of the forum should be characterized, in its context of the foreign law, in accordance with the lex fori.

It is remarkable that even though there may be some difference in this proposition that characterization in the first stage should be on the basis of the lex fori, there is unanimity or near unanimity as to following exceptional cases where the characterization even at the first stage by the lex fori may be abandoned in favour of some other law. These exceptional situations are the follows:-

Proprietary rights in respect of property and rights in property give rise to several situations which can lead to different characterization. It is now almost universally accepted that proprietary rights in a thing are characterized by reference to that lex situs. Falconbridge says, "…proprietary rights in things, as distinguished from rights relating to things, are, as a general rule, governed by the lex rei sitae, and that in many situations this general rule imposes itself imperatively as affording the only practical solution of questions of proprietary rights."

The second exception relates to status. The question whether a person has got certain status is to be characterized on the basis of the lex domicilii. But a distinction is to be made between status and incidence of status and between status and capacity. While status is usually governed by the lex domicilii, the same cannot be said about capacity. Whether a person possesses a particular capacity cannot be answered simply by reference to the law that governs status. Then, capacity in one transaction may differ from another, for example, the question of capacity to marry is to be characterized as a matter of intrinsic validity of marriage, the capacity to succeed to property is to be characterized as a matter of succession, the capacity to make an ordinary commercial contract is to be characterized as a matter of intrinsic validity of the contract, and so on. In short, in every case the question of capacity has to be characterized in connection with the kind of transaction into which a given person enters or intends to enter.

The third exception arises in those cases where the characterization of the factual situation by the two foreign laws applicable to the situation is the same, then the characterization at the first stage by reference to the lex fori may be abandoned.

In summary, it may be said that in the countries of common law, including India and in most countries of civil law system including the Soviet Union and most of the East European people's democracies, the characterization at the first stage of the factual situation, legal relationship, institution, etc. is made by reference to the lex fori. In this regard there is some difference as to the meaning of the lex fori. Some take the view that the lex fori means here the internal law in the narrow sense, while others hold the view that it should mean internal law in the wider sense including

the rules of private international law. But it is submitted that the latter view is preferable.

II. Characterization of Conflicting Factor:- The inquiry at the second stage of characterization precedes the inquiry as to the proper law applicable to the given situation or question. On the ascertainment of this, the factual situation, legal relationship or institution is connected to the law of the country which is to be applied. The inquiry at the second stage therefore is the inquiry of the "connecting factor" or of "localizer". For instance, when the court at the first stage comes to the conclusion that the factual situation or question at issue relates to succession, contract, tort, marriage, etc. then the court is directed by the choice of law rules of the forum to apply the lex domicilii, lex loci contractus or the lex loci delicti of some such law, then these are called the connecting factors may be very easy, but in others it may present complications. The complications arise because laws of countries of the world differ as to the precise meaning of these terms. The English law recognizes the doctrine of reverter in cases of domicile, while the American law does not.

There may be a latent conflict of conflict rules, and the difference in the characterization of the question may result in the use of different connecting factors and consequently the election of different proper laws as applied to the same factual situation. If, on the other hand, different connecting factors are specified in the corresponding conflict rules of two countries with respect to the same type of question, there may be a patent conflict of conflict rules applied to the same factual situation, notwithstanding that the question before the court is characterized in the same way in both countries. The third class of cases are those where conflict rules of two countries are in terms the same in that they both use normally the same connecting factor with respect to a question which is characterized in the same way in both countries, but nevertheless there may be a latent conflict of conflict rules, because the place element specified as the appropriate connecting factor in the conflict rule of one country may be characterized differently from the place element specified in the corresponding conflict rule of the other country.

Most of the writers favour characterization of the connecting factor with reference to the lex fori, as, in the words of Cheshire, "an English court must assign to the conception, say domicile, that meaning which it has always borne in English law. To follow any other course would be to abandon the English rule for the choice of law."[25] This view is also supported by the practice of English and American courts.[26] Lorenzen who favours application of the lex fori at the second stage of characterization suggests that in those cases where the forum has no connection with them except as a place of trial and if the characterization of the two foreign countries with which the cases have connection is the same then the characterization made by the lex causae should be accepted as it would be conductive to international harmony and there is no inescapable necessity of applying the law of the forum.[27]

The problem of characterization of the connecting factor is given a different dimension by those authors (such as Robertson) who, though accept the application of the lex fori, are yet inclined to accept the doctrine of renvoi. This means that they would accept the foreign characterization as far as it is indicated by the application of the doctrine of renvoi.

The difficulty involved in the characterization of the connecting factor may be illustrated by the following examples:

Suppose an Indian court at the second stage of characterization comes to the conclusion that the domicile of the plaintiff is French. The question still remains: what is the meaning of French domicile? Is it to be decided on basis of Indian law or French law?

In respect of a contract an Indian court comes to the conclusion that the lex loci contractus is the connecting factor. But then which is the lex loci contractus? Under the Indian law the place from where the acceptance of an offer is sent is the place where the contract is formed, while according to the Soviet law a contract is formed at the place where acceptance is received.

A Spanish domiciled person dies heirless leaving behind some movable property in England. According to Spanish law the state inherits the property of person who dies heirless. Under English law succession to movables is governed by the lex domicilii of the deceased. There is almost a unanimity in the laws of the countries of the world that the property of a person dying heirless goes to state. However, there is a difference of opinion in the laws of countries of the world as to whether state takes the property as an heir, this is the law in Italy, Germany, Spain and India or whether state takes it by forfeiture (such is the law in Turkey). An English court before which the question of succession whether it would accept the characterization of Spanish law. The predominant view is that the characterization of the lex fori governs the matter. However, in the last situation, In the Estate of Maldonado the English court took the view that the Spanish characterization will be recognized, as the law of domicile regulates all aspects of succession to movables.

III. Characterization of Proper Law:- In the third and the last stage the court is called upon to apply the law indicated by the connecting factor. Robertson calls it, "the delimitation and application of proper law". Apparently, it would appear that once the first two stages have been passed, the application of proper law should follow almost automatically and there should be no difficulty or complication at the third stage. However, in reality it is not so, though in some cases it may happen that there is no difficulty. In the words of Falconbridge the difficulty arises because the thing which is characterized is not the factual situation; but the juridical question raised by the factual situation, including the various place element. It is true that once the court has chosen the connecting factor, the link joins the situation in question with some country, and this link also directs the selection of the law of some place as the proper law, and in the third stage of characterization the proper law should be applied to the issue before the court and decision should be rendered accordingly. Looked at from this angle, the inquiry at this stage is: which provisions of proper law will exactly be applicable? For instance, an Indian court has to decide a case involving the distribution of personal property of a deceased person. Suppose it comes to the conclusion that the domicile of the deceased at the time of his death is the connecting factor, and then, characterizing it on the basis of the lex fori it comes to the conclusion that the deceased died domiciled in France. Or, suppose in an adjudication in respect of a

contract it comes to the conclusion that the lex loci contractus is the connecting factor and again it finds that the place of connection is France. The question that still remains to be solved before the court is: which French law will be applicable:internal French law or French private international law ? The complications arise, and question becomes vital when the French rules of conflict differ from the Indian rules, the lex fori. Here again it may involve the application of doctrine of renvoi.

Robertson who discusses the problem under the head "secondary characterization" holds the view that on principle the characterization of proper law should be on the basis of lex causae. It is because, once the proper law is indicated by the rules of the forum, the lex causae will determine the question. Cheshire also takes the same view.[28] A brief reference to Dutch case and of Ogden v. Ogden will amply make the problem clear. In the former case a Hollander made a holographic will in France. The Dutch law prohibits Hollanders from making holographic will either at home or abroad. Assuming that the Dutch law considers it as one of formalities, Bartin is of the view that the case is once where no uniformity of decision could be arrived at. [29]

Cheshire considers it to be a problem of primary characterization and hence holds that the lex fori governs the matter.[30] On the other hand, Robertson who considers it to be a matter of secondary characterization, says that if such a will disposing of movables is executed in England, the English court has to enquire as to what is the meaning of capacity under the French law and of formalities under the English law: the English private international law lays down that capacity is governed by the lex domicilii and formalities by the lex actus. It is interesting to note that Lorenzen summarily disposes of this case by saying that, from the standpoint of Dutch law, the will be invalid without any need of characterization of capacity or form. According to him the case does not pose any problem of difference in characterization.[31]

Conclusion

At the end of the discussion, it can be said that whether or not the question and the subsidiary questions that might arise after the foreign law has been chosen by the lex fori, should invariably be referred to the lex cuasae. The answer to the question would be simple if the characterization of the problem at this stage merely involves the application of foreign internal law-the answer would be that, the foreign law should govern. Thus, if the proper law to be applied is directed to be, say, French law, then if the case is, say, of contract or of tort, all subsidiary questions, as for instance, whether the contract is to be regarded as a loan or deposit, or whether master is responsible for the tort of the servant. Should be governed by the lex causae. But since the question cannot be answered that simply, complications arise. The complications arise because some countries take the view that the doctrine of renvoi is applicable; complications arise because sometimes it is said that the lex causae means the law which would be applied if the judge of the country of the lex causae would be seized of the matter.

References

[1] *Falconbridge, "Characterization in the Conflict of Laws" , Law Quarterly Review, April 2005, Vol., 2, Issue 2, Sweet & Maxwell Publication, p.193*

[2] *This is one of those rules of private international law which have found almost universal acceptance.*

[3] This rule was propounded at the earliest period of private international law and is now universally accepted by all the countries of the world.

[4] *See the illustrations given by Beckett at, p. 52./Cited in Paras Diwan & Peeyushi Diwan, "Conflict of Law", 4th Revised Edition (2008), Deep & Deep Publication, at p.77*

[5] *Beckett, p.54. See also Wolff, p.152/ Cited in Paras Diwan & Peeyushi Diwan, "Conflict of Law" , 4th Revised Edition (2008), Deep & Deep Publication, at p.77 .*

[6] *M. De Boer, Facultative Choice of Law : "The Procedural Status of Choiceof-Law Rules and Foreign Law" , 1st Edn (1996), Polity Press Publication, p. 274-275,*

[7] *Paras Diwan & Peeyushi Diwan, "Conflict of Law" , 4th Revised Edition (2008), Deep & Deep Publication, at p.79 .*

[8] *Lorenzen, "Cases on the Conflict of Laws", 3rd Edition (1953), West Publishing Company, p. 113.*

[9] *A. H. Robertson, "Characterization in the Conflict of Laws"*, 4th Edn. (1996), *University of Toronto Press p.118.*

[10] *Supra 7 , at p.83.*

[11] *This has been illustrated by Cheshire from the construction given by courts to the Statute of Fraud and Statute of limitation.*

[12] *Dicey(6th ed.), p.67;(8th ed.),p.25. See also Wolff,p.154, Cheshire (2nd ed.), p.65 / Cited in Paras Diwan & Peeyushi Diwan, "Conflict of Law" , 4th Revised Edition (2008), Deep & Deep Publication, at p.79. [13] Ibid.*

[13] *Supra 1,at p.245.*

[14] *Dicey and Morris (8th ed.), p.25; Wolff, p.154./ Cited in Paras Diwan & Peeyushi Diwan, "Conflict of Law" , 4th Revised Edition (2008), Deep & Deep Publication, at p.85*

[15] *L.R. (1908) p.46*

[16] *L.R.(1930) p.217.*

[17] *(1937) 19 Bell yard 3.*

[18] *L.R,(1900) A.C.21.*

[19] *Supra 9 at p.63.*

[20] *Supra 8,at p.122. [22] L.R.(1908) p.46.*

[21] *Supra 1 at p.543.*

[22] *(1860) 2 Sw. & Tr. 67*

[23]Supra 1 at p.543

[24] *[27] Ibid.*

[25] *"Conflict of Law" , 4th Revised Edition (2008), Deep & Deep Publication, at p.90* [2]

[26] Supra 9 at p.123.

[27] *Supra 8,at pp. 126-27.*

[28] *Cheshire, p.36 / Cited in Paras Diwan & Peeyushi Diwan, "Conflict of Law" , 4th Revised Edition (2008), Deep & Deep Publication, at p.90*

[29] *The Impossibility of Arriving at a Definite Suppression of the Conflict of Laws.*

[30] *Cheshire, p.37 / Cited in Paras Diwan & Peeyushi Diwan, "Conflict of Law" , 4th Revised Edition (2008), Deep & Deep Publication, at p.92 [34] Supra 9 at, p.94.*

[31] *Supra 8, at p.130.*