Chapter 3

Classification

1. INTRODUCTION

In a case containing a foreign element, the English court will have to examine various matters in sequence. First, it will have to be determined that the English court has jurisdiction both over the parties and the cause of action. The detailed rules on jurisdiction are discussed later.2 Then, having satisfied itself that it possesses jurisdiction, the court must next determine the juridical nature of the question that requires decision. Is it, for instance, a question of breach of contract or the commission of a tort? Until this is determined, it is obviously impossible to apply the appropriate rule for the choice of law and thus to ascertain the applicable law. This is the first issue of classification to be

1. An alternative English word for classification is "characterization". In French it is called qualification. The problems that it raises, since their discovery by Kahn in 1891 and Bartin in 1897, have been widely discussed both in England and abroad. The following are the chief contributions in English: Beckett (1934) 15 BYBL 46; Robertson, Characterization in the Conflict of Laws (1940); Falconbridge, pp 51–123; Cook, pp 211 et seq; Lorenzen (1920) 20 Col LR 247; Unger (1937) 19 Belllyard 3; Lederman (1951) 29 Can Bar Rev 3, 166; Inglis (1958) 74 LQR 493, 503 et seq; Lipstein, [1972a] CL 67, 77–83; Ehrenzweig, XXth Century Comparative and Conflicts Law, pp 395 et seq; Kahn-Freund (1974) III Hague Recueil 147, 367 et seq; Dixie [1983] Jut Rev 73; Forsyth (1998) 114 LQR 141; Jackson, The "Conflicts" Process, Chapters 5 and 6; Levontin, Choice of Law and Conflict of Laws, Chapter 5; Anton, pp 65–75; Wolff, pp 146–167; Morris, paras 20-001–20-010; Dicey, Morris and Collins, paras 2-001–2-045.

2. Infra, p 199 et seq.
discussed in this chapter—classification of the cause of action. The court, having done this, must next select the legal system that governs the matter. This selection will be conditioned by what has aptly been called a connecting factor,\(^3\) ie some outstanding fact which establishes a natural connection between the factual situation before the court and a particular system of law. The connecting factor varies with the circumstances. If, for instance, a British subject dies intestate, domiciled in France, leaving movables in England and land in Scotland, his movables will be distributed according to the law of France because of his domicile in that country; but Scots law, as being the law of the situs, will determine the succession to the land. This raises the second issue of classification to be examined here—classification of a rule of law. This is the identification of the department of law under which a particular legal rule falls, in order to ascertain whether it falls within the department with regard to which the chosen law is paramount.

### 2. CLASSIFICATION OF THE CAUSE OF ACTION

**(a) Meaning of classification**

The “classification of the cause of action” means the allocation of the question raised by the factual situation before the court to its correct legal category. Its object is to reveal the relevant rule for the choice of law.\(^4\) The rules of any given system of law are arranged under different categories, some being concerned with status, others with succession, procedure, contract, tort and so on, and until a judge, faced with a case involving a foreign element, has determined the particular category into which the question before him falls, he can make no progress, for he will not know what choice of law rule to apply. He must discover the true basis of the claim being made.\(^5\) He must decide, for instance, whether the question relates to the administration of assets or to succession, for in the case of movables left by a deceased person, the former is governed by the law of the forum, the latter by the law of the domicile. Whether undertaken consciously or unconsciously, this process of classification must always be performed. It is usually done automatically and without difficulty. If, for instance, the defendant is sued for the negligent damaging in France of the claimant’s goods, the factual situation before the court clearly raises a question of tort.

**(b) Difficulties**

Occasionally, however, the matter is far from simple. In the first place, it may be a case near the line in which it is difficult to determine whether the question falls naturally within this or that judicial category. Secondly, it may be a case where English law and the relevant foreign law hold diametrically opposed views on the correct classification. There may, in other words, be a conflict of classification, as, for instance, where the

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\(^3\) Falconbridge (1937) 53 LQR 235, 236; adopted by Robertson, Characterization in the Conflict of Laws, p 92.


question whether a will is revoked by marriage may be regarded by the forum as a question of matrimonial law, but by the foreign legal system as a testamentary matter.  

These two difficulties are well illustrated by the historic Maltese Marriage case, decided by the Court of Appeal at Algiers in 1889, which made the problem of classification a fashionable subject of study.

A husband and wife, who were domiciled in Malta at the time of their marriage, acquired a French domicile. The husband bought land in France. After his death his widow brought an action in France claiming a usufruct in one quarter of this land. There was uniformity in the rules for the choice of law of both countries: succession to land was governed by the law of the situs, but matrimonial rights were dependent on the law of the domicile at the time of the marriage.

The first essential, therefore, was to decide whether the facts raised a question of succession to land or of matrimonial rights. At this point, however, a conflict of classification emerged. In the French view the facts raised a question of succession; in the Maltese view a question of matrimonial rights. When a conflict of this nature arises it is apparent that, if a court applies its own rule of classification, the ultimate decision on the merits will vary with the country in which the action is brought. On this hypothesis, the widow would have failed in France but have succeeded in Malta.

The crucial question, therefore, is—on what principles do English judges classify the cause of action? Or, to put it in another way—according to what system of law must the classification be made? Must it be made according to the internal law of England, on the ground that the internal rules and the rules of private international law in any country are based on the same legal conceptions? It is arguable, for instance, that when English private international law submits intestate succession to movables to the law of the deceased's domicile, the expression "intestate succession" must be given the meaning that it bears in English internal law and not a more extensive meaning than may be attributed to it in the foreign domicile. In opposition to this view, which had wide support, it has been suggested that classification must be based on the "essential general principles of professedly universal application" of analytical jurisprudence and comparative law.

But, although it may be desirable to solve the problem in this scientific manner, it is scarcely practicable to do so whilst there are no commonly agreed general jurisprudential principles.

(c) Basis on which classification is made

There can be little doubt that, in practice, classification of the cause of action is effected on the basis of the law of the forum. Thus, by application of the principles of English law, an English judge makes an analysis of the question before him and, after determining its juridical nature in accordance with those principles, assigns it to a particular legal

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6 Cf Re Martin, Loutalian v Loutalian [1900] P 211.
7 Antonio v Bartolo (1891) Cliner 1171. For a fuller and more detailed account see Robertson, Characterization in the Conflict of Laws, pp 158–162; Beckett (1934), 15 BYBIL 46, 50 n 1; Wolff, p 149.
8 In fact the French court applied the matrimonial law of Malta.
10 Beckett (1934) 15 BYBIL 46, 59.
category. Although English law principles are being applied here, the case is in which contains a foreign element, and so the classification which is made will necessarily be the same as that which would be made in a purely domestic case. In this its object is to serve the purposes of private international law and, since one of the functions of this department of law is to formulate rules applicable to a case that impinges on the laws, it is obviously incumbent on the judge to take into account the accepted rules of institutions of foreign legal systems. It follows, therefore, that the judge must not confine himself to the concepts or categories of English internal law for, if he were to adopt this parochial attitude, he might be compelled to disregard some foreign concept in order to embrace “analogous legal relations of foreign type”.

The various legal categories into one of which the judge must decide that the question falls before he can select his conflicts rule, must be wider than the categories of the internal law, because otherwise the judge in a conflicts question will be unable to make provision for any rule or institution of foreign law which does not find its counterpart in his own internal law, and thus one of the reasons for the existence of the science of conflict of laws will be defeated.

Two examples will show that English judges have been prepared to solve the problem of classification in this broad spirit. In De Nichols v Curlier the facts were as follows:

A couple, French by nationality and by domicile, were married in Paris without making an express contract as to their proprietary rights. Their property, both present and future, thus became subject by French law to the system of community of property. The husband died domiciled in England, leaving a will which disregarded his widow’s rights under French law. The widow took proceedings in England to recover her community share.

The rule of English private international law is that the proprietary rights of a spouse to movables are governed primarily by any contract, express or implied, that the parties may have made before marriage. Failing a contract, the rights are determined by the law of the matrimonial domicile of the parties. Thus the problem of classification was whether the right claimed by the widow was to be treated as contractual or testamentary, for only after

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11 Statutory provision to this effect is made, in relation to tort claims, by the Private International Law (Miscellaneous Provisions) Act 1995, s 9(2), in respect of the interpretation of which, see Trafigura Beheer BV v Koelmin Bank Co (Preliminary Issue) [2006] EWHC 1450: “the words 'for the purposes of private international law' in s 9(2) indicate that Parliament should examine relevant issues to decide whether they would be characterised as relating to tort only by reference to English legal concepts and classifications, but by taking a broad 'internationalist' view of legal concepts. It followed that the word 'tort' in s 9 was to be construed broadly, so as to embrace non-contractual civil wrongs that gave rise to a remedy.” (Aikens J, at [68].)


14 Nussbaum (1940) 40 Col LR 1461, 1470.

15 Robertson, op cit, p 33.

16 [1900] AC 21.