THE 'PRELIMINARY QUESTION' IN THE CONFLICT OF LAWS.

The science of conflict of laws consists mainly of the formulation and application of a variety of choice of law rules to designate the appropriate law for the determination of different types of cases. It provides different choice of law rules for contracts, torts, succession to movables, succession to immovables, matrimonial property, legitimacy, and so on. Before the judge can 'apply' any one of these rules, he must know that he has to dispose of a question falling into one of these categories. Normally the decision that the case before him falls into one of these categories presents no difficulty; exceptionally, however, a problem may arise with a borderline case. For example, if the plaintiff took a ticket for the journey by air from London to Paris, and was injured through the negligence of the aeroplane company's servants in an accident in France, is the action one for breach of the contract of safe carriage, or is suit brought for a foreign tort? This determination must be made before it is possible to select the appropriate choice of law rule to dispose of the case.

This process of determining the juridical nature of the problem presented for solution, or allotting the factual situation to its correct legal category, the present writer has elsewhere called 'primary characterization'. After the process of primary characterization has been performed, it will be possible for the judge to select the proper law to dispose of the case by means of a connecting factor which will lead him to it. For example, if the question is one of succession to movables, the connecting factor of domicil will lead him to the law of the country where the deceased was domiciled; if it is succession to immovables, the connecting factor will be the situs of the land; if it is tort, the connecting factor will be the place of injury.

After the judge has selected the applicable proper law by means of determination of the connecting factor, he will have
to decide how much of that law is to be applied, e.g. as substantive, and how much of the law of the forum, as procedural. For example, in a case of contract or tort does the foreign rule of prescription affect the plaintiff's substantive rights, and does the English Statute of Limitations bar his remedy? This is the process of 'secondary characterization'.

The problem of the 'preliminary question' is different from these, but not unrelated. It may best be explained by an example. If an English Court is called on to decide the question of inheritance to the movables of an Englishman who died domiciled in Germany, it will determine that succession is governed by the law of the domicile; this it will interpret as meaning the internal law of Germany, perhaps by way of a double renvoi as in Re Askew; the law of Germany may say that legitimates may inherit in certain shares; and the further question will then arise 'who are legitimates?' Now legitimacy is one of the categories of English conflict of laws which has certain choice of law rules available for its determination. It will therefore be possible for the English Court to perform another primary characterization, and choose the English conflict of laws rule appropriate to legitimacy, by which it may determine the question by the law of the domicile of the child at the time of birth. This, then, will involve a second process of primary characterization and selection of the appropriate choice of law rule in the same case. Alternatively, when the judge finds that legitimates may inherit under German law, he may decide that who are legitimates should be determined by German law, that is to say by the German conflict of laws rules applicable to the question of legitimacy, i.e. by the national law of the husband of the child's mother. In either case he will have to perform a second process of primary characterization and selection of the appropriate choice of law rule in the same case.

7 Ibid. at p. 758. The distinction between the different types of characterization performed at the different stages in a conflict of laws case is more fully explained in that article passim, particularly at pp. 751-3.

8 [1930] 2 Ch. 259. This involved a double renvoi, because the reference to German law was taken to mean the law which a German judge would apply, and a German judge would have referred to English law as the lex patriae, and, finding that that referred to German law, have accepted the reference back and applied German internal law.

9 See Cheshire, pp. 378-380, and Legitimacy Act, 1926, s. 8 (1).

10 Ss. 18-22 of the Introductory Act to the German Civil Code apply the principle of nationality to German subjects, and this is applied by analogy to aliens. Cf. Re Askew [1930] 2 Ch. 259.

7 Assuming, of course, that the question of legitimacy itself involves a choice of law problem. If the father of the person whose legitimacy is disputed was a domiciled German national at all relevant times, it is obvious that the English Court would apply German internal law.
It is to be observed that this determination of who are legitimates differs from secondary characterization. The latter is concerned with the delimitation of the proper law already chosen as applicable with regard to some matter which is essentially subordinate or subsidiary to the primary characterization already performed. Thus the limitation of actions, or the requirement of contracts of a certain type to be in writing, only arise as subsidiary questions to the primary characterization of contract. Similarly, contributory negligence in tort cases only arises as subsidiary to the main question of tort. These, therefore, are what Bartin calls ‘qualifications en sous-ordre’, because they never arise except as subsidiary questions to some prior determination of primary characterization. The question of legitimacy, on the other hand, may arise in its own right, and without any previous primary characterization having been performed. It has choice of law rules of its own, and these may differ in different systems of law. The problem, therefore, is, when English law refers to German law as the law governing succession, and the question of legitimacy then arises, shall the process of selection of the choice of law rule which now has to be performed be by the law of England or the law of Germany?

This problem is called ‘La Question Préalable’ in French, and ‘Die Vorfrage’ in German. Dr. Breslauer has used the English translation of ‘the preliminary question’ in his book, which has been adopted by Mr. Morris. It is proposed to adopt this same term in the present article, although it is not in all respects satisfactory. ‘Preliminary question’ appropriately draws attention to the fact that this question must be decided before the ultimate solution of the main question is possible; the question is preliminary in that sense. On the other hand, if one considers the order in which the questions arise, it is subsequent to the main question, because it is only after the judge has, on our example, referred to the law of Germany as the lex domicilii that the question of legitimacy comes up at all. In this sense, therefore, the question is not preliminary, but subsequent. It appears, then, that the

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8 Bartin: La Doctrine des Qualifications, Academy of International Law, 1930, Recueil des Cours, I, 608.
question is both preliminary and subsequent, according to whether one looks to the order in which the questions must be ultimately solved, or the order in which they come up for consideration. Neither term by itself, therefore, would seem entirely suitable as a description. It is not easy, however, to think of a suitable word that does not have these temporal connotations. 'Subsidiary' and 'subordinate', which readily suggest themselves, do not seem suitable, as they more appropriately describe secondary characterization, particularly in view of Bartin's use of 'sous-ordre'.

'Primary characterization of the second order' has been suggested, and would seem to afford a better description of the process involved. It seems, however, more suitable as a description than as a name, and it is thought that its repeated use would be too cumbersome. 'Preliminary question' at least has the advantage that it is a term of art used on the Continent, and, to a slight extent, in English. Consequently it is proposed to adopt it in this article, with the proviso that it should be read in quotation marks, in order to remind the reader that the problem is only preliminary in one sense, and is subsequent in the other sense already explained.

It is interesting to notice that the preliminary question partakes at the same time both of the nature of the renvoi problem and of the characterization process. Its similarity to the renvoi problem consists in the fact that if, on the example given, the English judge undertakes to determine the question of legitimacy by German law, that will involve his applying the German conflict of laws rules, which may refer the question back to the law of England, or on to some third country, and consequently one's attitude to this question is liable to be coloured by one's attitude to the renvoi in general. Its similarity to the characterization process lies in the fact that any application of the choice of law rules appropriate to any particular legal category must be preceded by the determination that a question falling into that category has arisen. The judge is not concerned to find out what are the appropriate rules to determine a question of legitimacy until he has decided that he is confronted with a question of legitimacy. The decision 'this is a question of legitimacy' will be a process of primary

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12 In describing secondary characterization, see Recueil des Cours, 1930, I, 608, and supra, n. 8.
13 I am indebted to Professor E. N. Griswold for this suggestion.
14 This will only be renvoi in the widest sense of 'applying the foreign conflicts rules', and not in what is thought to be the proper sense of 'applying the foreign conflicts rules to the same question that is referred to the foreign law'.
characterization, even though it may be performed unconsciously and without giving rise to any problems. It will, in fact, be a ‘primary characterization of the second order’, in the sense already explained. Further it will be apparent that the preliminary question gives rise to the problem which is common to all types of the characterization process, namely that of determining by what law the meaning of given terms shall be ascertained.

When the English judge is concerned to find out who are legitimates in the example given, there are four possibilities which he might adopt. He might apply:—

(1) English internal law.
(2) English conflict of laws.
(3) German conflict of laws.
(4) German internal law.

The arguments in favour of the different possibilities are:—

(1) None, if there is any merit in applying the foreign law in a conflict of laws situation.

(2) That who are legitimates in an English conflict of laws case is a question for English conflict of laws. The judge, therefore, should apply his own conflict of laws rules.

(3) That when the determination has been made that German law governs the succession, that should mean that those persons take who would take by German law, and it is only possible to determine this question by doing what the German judge would do, i.e. by applying German conflict of laws rules.

(4) That when the judge has finally got to German internal law after the cumbersome process of the ‘double renvoi’, he should apply the German internal law to the question of succession, including its characterization of who are legitimates, for fear of further renvoi difficulties if he applies the German conflict of laws rules. The staunch opponent of the renvoi will argue that it is bad enough to refer to German conflict of laws at all in order to find out what is ‘the law of the domicile’; he may well continue, therefore, that when you have at last got off the roundabout it would be pure folly to get on again.

The first and fourth views may be dismissed at once. The decision who are legitimates in a conflict of laws case must be determined by the conflict of laws rules of some country. Both English and German internal law are quite inappropriate for this decision. Breslauer states that there are two main views on the Continent with regard to this problem, favouring respectively the conflict of laws rules of the forum, and the conflict

See supra, n. 4.
of laws rules of the country whose law regulates the principal question. Raape takes the first view, and Melchior and Wengler the second. Maury explains the grounds on which these views are held.

The argument in favour of the application of the conflict of laws rules of the country by whose law the main question is to be determined may be summed up as follows: If England refers to German law as the domiciliary law of the deceased for the question of succession, it is admitted that German law determines the categories or classes of persons who may take. The only question is precisely who are included in those classes, or, in other words, what content shall be given to the general concepts ('concepts de cadre') of German law. When German law provides the concepts, it is only reasonable to allow German law to specify what is their content. Secondly, in the interests of international uniformity of decisions, the English Court should determine this question in the same way that the German Court would, because otherwise conflicting decisions on the same question may be pronounced by different Courts.

Against these arguments of Wengler and Melchior, who both admit certain exceptions to their general rule, Maury points out that the principle of uniformity of decisions in a national Court is at least as important as international uniformity of decisions. The question of legitimacy or filiation may come up in the Court of the forum on other occasions besides the instant case determining succession; on those other occasions, the Court will have to follow its own conflicts rules; is it now to determine the same question by the conflicts rules of another State? If the question of legitimacy depends on a marriage which would be held good by the conflicts rules of the forum, but bad by the conflicts rules of the country whose law governs the succession, is the child of the marriage, asks Raape, to be held legitimate during the lifetime of his parents (when the Court would apply its own conflicts rules), but a bastard after their death (if the Court applies the conflicts rules of the law governing succession)? 'There are not', he adds, 'two marriages, and two relationships, one during lifetime and one after death. There can never be but one.'

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19 Die Grundlagen des Deutschen Internationalen Privatrechts, pp. 245-265.
23 Raape: Les rapports juridiques entre parents et enfants comme point de départ d'une explication pratique d'anciens et de nouveaux problèmes fondamentaux
In spite of these criticisms, however, it is believed that the better view is that the Court should, as a general rule, determine the preliminary question by the conflicts rules of the law which governs the main question. This will mean that, on the example given, the English Court should determine the question of who are legitimates for the purposes of the German law of succession by the German conflicts rules. The reasons why this submission is made are the following:

(1) If the English Court decides that the case before it is governed by the German law of succession, then the only way of finding out what is the German law of succession is to see who would take by German law, which will involve applying the German conflicts rules. This is substantially the same as the argument in favour of secondary characterization by the proper law already chosen as applicable, i.e. that if the Court of the forum says it will apply the foreign law and then puts its meaning into the foreign concepts, it is simply not applying the foreign law at all.

(2) Applying the foreign conflicts rules in this type of case does not involve one in the renvoi difficulty, as properly understood. As pointed out above, renvoi is often described as applying the foreign conflicts rules, and that may be taken to be its wider sense. Renvoi in that sense will clearly be involved here. But renvoi in this wider sense does not involve the difficulty of the *circulus inextricabilis* or infinite regression. That does not arise merely from referring to one system of law and then applying its conflict of laws rules; that difficulty arises from referring some question to some foreign system of law, and then applying its conflict of laws rules to the same question that was referred to it. This is renvoi in the narrower sense, when the real difficulty arises. Thus the typical case so often discussed is where the English Court refers the question of succession to the law of France, and, finding that France refers the same question back to the law of England, accepts the reference back. Here the difficulty of the *circulus inextricabilis* is immediately apparent. This narrower sense of renvoi is thought to be the proper sense; it is, at least, the sense which gives rise to the problem which has occasioned so much discussion. With renvoi in the wider sense, however, this is not
the case. If the English Court refers the question of succession to German law, and then applies the German conflicts rules to the quite different question of legitimacy, this in itself gives rise to no such difficulty. It is true that a renvoi problem may subsequently arise, in the course of applying the German conflicts rules to legitimacy, in the same way that it may in applying the English conflicts rules to legitimacy, or, indeed, in applying the conflicts rules of almost any country to a great variety of questions. This, however, does not immediately concern us now. But it is important to notice that the application of the German conflicts rules to the question of legitimacy in the example supposed does not in itself involve any question of renvoi (in the narrower sense); and though it is true that such a question of renvoi may subsequently arise in the course of the application of those rules, that is no more likely than in the application of the English conflicts rules, and indeed, if it arises, will be less of a problem, owing to the much greater certainty of the German attitude to the renvoi than of the English.

(3) Thirdly Raspe's argument that the same Court should not determine the same question in two different ways on two different occasions may be met by a plea of confession and avoidance. The assertion made is clearly true. It is not, however, suggested that a Court should do anything of the sort. When an English Court is called on to determine the question of the legitimacy of X, it must clearly do so by the English conflicts rules. When, on the other hand, it is called on to determine whether X may take property in the course of a succession governed by German law, and that gives rise to the 'preliminary question' of legitimacy, then the English Court does not decide whether X is legitimate or not, but whether X is legitimate by German law or not, or, in other words, whether X may succeed by German law. To decide that by German law X is not legitimate, and so not entitled to succeed, would not be to deny a previous determination that by English law he is legitimate.27 Further, even if an English Court should hold that a determination once made that X is legitimate means that he is legitimate for all questions that shall arise in an English Court, that would not prevent it from applying the

27 That the two questions are distinct was well illustrated by the Kentucky case of Sneed v. Ewing (5 J. J. Marsh. 460 (1831)), in which the Kentucky Court of Appeals held that Mrs. Ewing, being legitimate by Kentucky law, could inherit Kentucky land, but remanded the case for a further hearing to determine whether she was legitimate by Indiana law, and so entitled to the movables which were governed by Indiana law as the law of the decedent's domicil.
foreign conflicts rules to the preliminary question in those cases (which will be the vast majority) when it has not been the subject of a previous independent examination, in view of the fact that in such cases there are believed to be other very persuasive grounds for applying the foreign conflicts rules as the general principle.

That the question of legitimacy is different from the right to inherit is clear from Lord Brougham’s judgment in *Birtwhistle v. Vardill*, and the comments on that decision in *Re Goodman’s Trusts*. It was not decided that the plaintiff in error was not legitimate by reason of the subsequent marriage of his parents in Scotland, but merely that he could not succeed as heir to English real property. Again the distinction between legitimacy and lawful marriage is illustrated by the South African case of *Seedat’s Executors v. The Master*, in which it was decided that the polygamous wife of an Indian, who married her when domiciled in India, but later moved to and died in Natal, was not a ‘surviving spouse’ in the meaning of South African law, but the children of this union, being legitimate by the law of their domicil of origin, were legitimate in South Africa. The Connecticut case of *Moore v. Saxton*, similarly distinguished between legitimacy and lawful marriage, holding that children born of parents bigamously married and domiciled in California, by whose law they were legitimate, will be recognized as legitimate in Connecticut. Therefore, when the distinction so clearly exists between the right to inherit and legitimacy and marriage, it is not true to say that a judgment pronounced on one question will also be a determination of the others. Raape’s assertion, therefore, that there cannot be two marriages, one before and one after death, will remain entirely true, but has no bearing on the point of view here advocated.

Raape’s attitude to this question seems to be based fundamentally on a belief in the reality of status as an independent concept including its own incidents. If it were true that a status created by the proper law, and the incidents attached to it by that proper law, should be recognized everywhere, then his argument would follow. Now it is true that the status of marriage, and most of its incidents, is recognized generally

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25 7 Cl. & F. 940, 955 (1840).
26 17 Ch. D. 266, 299 (1881).
28 90 Conn. 164 (1916).
if validly created by the proper law, provided it is sufficiently similar to the concept of marriage of the forum; further, the status of legitimacy, as created by the proper law, is generally recognized in other States also; but the incidents to be attached to that status, such as the right to services, the right to inherit, etc., vary greatly from one State to another, and it is by no means established that the incidents accorded to the status by the law creating the status will be recognized abroad. Consequently there seems no objection to holding that the existence of the status of legitimacy shall, for certain purposes, be determined by one system of law, but that the right to inherit shall, for other purposes, be determined by a quite different system of law. Indeed one may go further, and say not only that there is no objection to determining the existence of the status and the incidents to be attached to it by different systems of law, but also that that is the established practice of the conflict of laws of every country. In the ordinary case where no question arises as to the legitimacy of the legatee or distributee, the Court would not think of looking to the law of any State other than the law governing the succession. Thus, on the example given, if the English Court has to dispose of the estate of a deceased person domiciled in Germany, but no question arises as to the legitimacy of the distributee, it looks to the German law governing succession. Now the legitimacy of the person whom German law designates as the successor may be determinable (should the question arise) by the law of France. That, however, will not alter the fact that German law has been selected as the appropriate law to govern the succession. It may be that one of the incidents of legitimacy by French law is to succeed to one-half of the parent's estate, and that German law would only give the same person a third share. Nevertheless it is not asserted that the German law of succession should give way to the French law, on the ground that the status of legitimacy is determinable by French law, and that the incidents accorded to that status by French law should be recognized everywhere. It is clear that in the ordinary case of this type, where there is no dispute as to legitimacy, the right to inherit is determined quite independently of the rights given by the law that created the undisputed status. Why, then, should the rights of the successor become suddenly enlarged because his status is disputed? That is what

33 Falconbridge also takes this view: '... the distinction between a question of the existence of the status and a question as to capacity or as to the incidents of status is an essential part of my submission.' "Characterization in the Conflict of Laws", 53 L. Q. R. 235, 264 (1937).
Raape's argument amounts to when he asserts that the status and the right to inherit should be determined by the same law.  

(4) Fourthly, the assertion is made that the preliminary question should, as a general rule, be determined by the conflicts rules of the law governing the principal question for the reason that this is believed to be the view most consistent with the English decisions.  

Breslauer is of the opposite opinion. Thus he writes  

'... the question whether a person is to be considered legitimate in matters of succession is governed by the law of the child's status of legitimacy'.  

By the last expression he means, if I understand him aright, the law governing the child's status according to the conflicts rules of the forum. Unfortunately he does not make it clear whether he thinks the choice is, on the example given, between the conflicts rules of England and the internal law of Germany, or between the English conflicts rules and the German conflicts rules. Of course, the English conflicts rules will be applied rather than German internal law. If that is all he means to assert, there is no dispute and no problem. The problem of the preliminary question arises when the English and German conflicts rules would produce different results. I presume those are the alternatives he is considering, as that is the 'preliminary question' discussed by the continental authors whom he cites.  

In support of his view Breslauer cites Re Goodman's Trusts. Dicey, Westlake, Foote and Burgin. These authorities, however, do not support his contention. Thus the question in Re Goodman's Trusts was the distribution of the estate of a woman who died intestate domiciled in England; this was the principal question, and was undoubtedly to be governed by English law. When the preliminary question of legitimacy arose, therefore, there could be no doubt that it should be determined by English conflicts rules, as English law was both the law of the forum and the proper law of the principal question. Further, the authors whom Breslauer quotes admittedly say that the question of legitimacy in English law is determined by the domicil of origin; but they are doing no more than state the English conflicts rule, and their attention is not directed to the possibility.  

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24 For this argument the writer is indebted to Dr. Magdalene Schoch and Mr. Charles W. Taintor, II.  
25 Breslauer, op. cit. p. 70.  
26 Maury states the problem as follows (op. cit. p. 558): 'Le tribunal français, pour cette succession régie par la loi anglaise, doit-il recourir au droit international privé français, ou à l'anglais? Tel est le problème à resoudre.'  
27 17 Ch. D. 266 (1881).
of there being a foreign law already chosen as applicable to the principal question before the Court. Of course the question of legitimacy is determined by the law of the domicil of origin in the ordinary type of case; but statements to that effect cannot be taken as authority for the same rule to prevail in cases involving the problem of the preliminary question, when the authors of the statements were not directing their attention to that problem at all.

Thus Dicey, whom Breslauer cites, is clearly thinking of the ordinary English conflicts rule on legitimacy, and not of a case where there is some foreign proper law already chosen as governing the principal question. The case he cites is *Re Goodman’s Trusts*, where, as we have seen, the principal question was to be governed by English law; indeed Dicey himself goes on to say in the next paragraph:—

‘... since the intestate was an Englishwoman, dying domiciled in England, it is clear that her movable property could devolve only on persons who were her legitimate next of kin under the Statute of Distribution ...’

Again, Foote is thinking only of the ordinary conflicts rule, and bases his statement on *Re Goodman’s Trusts*. The same is true of Burgin, and of the passage from Westlake which is cited. Westlake, however, in another passage, does direct his attention specifically to the question of applying the foreign conflicts rules to the preliminary question, and lends his support at least in one case, not to the view of Breslauer, but to that advocated in the present article. He considers the question of a second marriage depending on the validity of a previous divorce, and observes that if the personal law of the *propositus* at the time of the remarriage, and the law of the place where the remarriage was celebrated, regard the previous divorce as valid,

‘it would seem to be an excess of refinement to make any objection on the ground that at the date of the divorce his personal law (i.e. by the conflicts rules of the forum) was that of a country in which the jurisdiction that granted the divorce would not be deemed internationally competent’.

Westlake goes on to say that the case would be different with regard to a woman who remarried after an invalid divorce, but

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Burgin: Administration of Foreign Estates (1913) pp. 143 ff.
P. 102."
this would be due not to a reluctance to recognize the determination of her personal law, but to her inability to change her personal law independently of her husband. (Of course, the latter question of her personal law depending on that of her husband is the result of the application of English conflicts rules, and so Westlake is insisting pro tanto on their application. But the balance of his support does not seem in favour of Breslauer.)

It is not easy to find decided cases which squarely bring up the problem of the preliminary question. The reason for this is that in cases involving succession the forum is usually either the domicil of the deceased, if moveables are involved, or the situs of the land, if real property, or the seat of the trust, if the claim arises under a settlement or trust. Thus Re Goodman’s Trusts, Re Andros, Re Birtwhistle v. Vardill, Re Wright, Shaw v. Gould, and Re Askew represent the first type of case; Birtwhistle v. Vardill, the second type; Re Wright, Shaw v. Gould, and Re Askew the third. A fourth type of case is where the question comes up in connexion with the payment of succession duty; here it is a question of construing the tax statute of the forum, so clearly the law of the forum is the proper law applicable to the principal question. Cases of this type are Skottowe v. Young, Atkinson v. Anderson, and Seedat’s Executors v. The Master. Even if the forum is not the domicil, the situs, or the seat of the trust, it will not be enough that there is a foreign domicil, situs or seat; thus in Doglioni v. Crispin the English Court had to administer the estate of one domiciled in Portugal, but both English and Portuguese law determined the question of legitimacy by the law of Portugal, so there was no conflict of the type we are considering. In order to present a case squarely, it is necessary to have the forum decide that the principal question is governed by some foreign system of law, and that foreign system have different conflicts rules for deciding the preliminary question from those which the forum would apply to the preliminary question if it arose independently. The only English case which the present writer has been able to find which squarely

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42 17 Ch. D. 266 (1881).
43 24 Ch. D. 637 (1883).
44 2 K. & J. 595 (1856).
45 7 Ch. & P. 940 (1840).
46 2 K. & J. 595 (1856).
47 L. R. 3 H. L. 55 (1869).
48 1930] 2 Ch. 289.
49 L. R. 3 H. L. 55 (1869).
52 L. R. 1 H. L. 301 (1866).
presents this problem is *Re Stirling.* The English Court had to determine the question who was entitled to certain Scotch land. (The question came before the English Court because there was personalty within its jurisdiction which was to devolve the same way.) This in turn involved the legitimacy of a child born of his mother's second marriage, the first having been dissolved by a divorce decree pronounced by the North Dakota Court when neither of the parties was domiciled there. The English Court determined this preliminary question not by their own conflicts rules, which would clearly have held the divorce invalid, but by the Scotch rules which say that the child of a putative marriage is legitimate. Now admittedly the case for applying the foreign conflicts rules is stronger when the principal question is title to foreign land than when it is succession to be governed by the law of the foreign domicil. This case, therefore, is not authority for the proposition here asserted that in a simple succession case the preliminary question should be determined by the foreign conflicts rules. It is, however, so far as the present writer is aware, the only English case at all in point.

Breslauer also cites American authorities in support of his contention that the preliminary question of legitimacy in matters of succession must be determined by the conflicts rules of the forum that deal with legitimacy. These, however, support him no better than the English authorities already discussed, because they are only considering the principles which apply to legitimacy as a general rule, and not when it arises as a preliminary question to which different conflicts rules would be applicable by the law of the forum and the law governing the principal question. This applies to both sections 246 and 304 of the Restatement. These sections state that the question of legitimacy must be determined by the proper law governing the status of the person concerned, and not the internal law of the situs of real property or the internal law of the domicil of the deceased. That, however, does not solve our problem. The problem is: what is the proper law when the conflicts rules of the forum and the conflicts rules of the law governing the principal question determine the proper law differently? Beale's discussion is similarly not directed to

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53 [1908] 2 Ch. 344.
54 Even by the Scotch rules the result was the same, namely that the child was illegitimate; but the important thing is that the Court applied the Scotch rules.
55 Breslauer, *op. cit.* p. 70.
this question. One statement of his would seem to be authority for the proposition here advocated, namely that the conflicts rules of the law governing the principal question should also determine the preliminary question, or, on the example first given, that when England refers succession to German law it should decide the question of legitimacy as German law would. Thus he writes:

'It is entirely for the law of the state of domicil of the intestate to determine the question, upon its doctrine of what law governs legitimation ...'

But this statement is based on the authority of the Virginia case of Denny v. Searles, in which the domicil of the deceased was also the law of the forum, and so the problem we are considering was not presented. Similarly Wharton is stating the rule that legitimacy must be determined by the proper law, rather than the internal law governing succession or descent, but not examining the possibility of a conflict on the question what is the proper law. There is, in fact, one place where he considers that this question what is the proper law may give rise to difficulties, and so one might hope that he would discuss the problem now under consideration; but the alternatives he considers are the law of the domicil of the mother and the law of the domicil of the father, and so one's hopes are disappointed.

The present writer has not been able to find one American case which presents the problem of what law shall govern the determination of the preliminary question, having regard to a possibility of conflict between the conflicts rules of the forum and the conflicts rules of the law governing the principal question. Nor is this surprising. Having regard to the comparative homogeneity of the conflict of laws rules of the different States within the United States, the likelihood of a conflict of conflicts rules existing, of the type we are considering, is small, and it is doubted whether one is to be found in the decided cases. It seems, therefore, that the United States is likely not to be troubled with this particular problem, and we may confine our search to European cases.

A recent German case supports the submission of the present work. The Court of Appeal of Karlsruhe had to decide the question of succession to the property of an Alsatian who

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57 Beale, p. 1083.
58 150 Virginia 701 (1938).
died domiciled in Germany but had become a French national by the Treaty of Versailles. This involved the preliminary question of the legitimation by subsequent marriage of a child born adulterously. The Court said that this question must be determined by French law, which was the proper law governing the succession. This decision is criticized by Raape. He points out that the Court gave no reasons for applying French conflicts rules rather than the provisions of the German Civil Code. The reason for this would seem to the present writer to be that if the Court said French law governed the succession, it was obvious that who would take by French law could only be ascertained by applying the French conflicts rules to the preliminary question. Raape goes on to say that the German judge did not succeed in his attempt to apply the French conflict of laws rules, even though he tried to, because French 'ordre public' would have intervened and refused to recognize such an adulterous child. Whether the German judge correctly applied the French law the present writer is not able to say; but it does seem clear to him that the method of approach adopted was correct, even if unsuccessfully carried out.

The preliminary question, of course, will not only arise in the determination of legitimacy in succession cases. The question of legitimacy itself may give rise to the further question of the validity of a marriage. Breslauer would call this a preliminary question 'of the second degree'. This question in turn might involve the further question of the validity of a previous divorce, or the nullity of a previous marriage. In this way it is possible to think of a case involving a number of successive stages, each one of which has to be separately determined, and each one of which constitutes a 'preliminary question' (of

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62 It is noteworthy that Lewald, though fundamentally opposed to the renvoi, approves this decision—Rechtvergleichendes Handwörterbuch, Vol. IV (1933) p. 454. A more recent case of the German Reichsgericht seems to have decided the preliminary question by the conflicts rules of the forum rather than those of the law governing the principal question. This was a question of matrimonial property, which was admittedly governed by Belgian law. The question then arose whether certain rights in a partnership were or such a nature as to be included in matrimonial property. The Court seems to have decided by its own conflicts rules that this was a German partnership, and so applied German law. Reichsgericht, II, Ziv. Sen. March 16, 1938. 67 Juristische Wochenchrift 1718 (1938 No. 27). These German cases are not mentioned in an attempt to state the German law, but merely by way of illustration. A recent decision of the Court of French Morocco at Rabat decided the preliminary question of a marriage by French conflicts rules, even though the principal question of succession was governed by Greek law; but this may be explained by the rule of French public policy which will not allow the impeachment of a marriage validly celebrated in France according to French law. Tribunal de Rabat, Dec. 28, 1932, Clunet 1933, 992.
63 Breslauer, op. cit. p. 19.
a different degree) by itself. Thus in Shaw v. Gould 64 the succession depended on the legitimacy of the claimants of the fund, which in turn depended on the validity of their mother's previous divorce. However, the preliminary question was not presented as a problem in this case, as the principal question of succession was governed by English law.

Nor will the question only arise incidentally to a principal question of succession. The principal question may itself be divorce, nullity, legitimacy, or a number of other legal disputes. Thus in Ogden v. Ogden 65 the principal question was the validity of the marriage between the parties. This in turn depended on the validity of Mrs. Ogden's previous marriage to the Frenchman Léon Philip. Here again, however, the preliminary question did not present a problem (in the sense we are now considering), because the principal question was governed by English law, as the law of the domicil, and so there was no question of applying foreign conflicts rules to the preliminary question.

It is not unusual, therefore, in the conflict of laws, to have a principal question depend on a 'preliminary question'. It is unusual, however, to have that situation present the problem now under discussion, because for that to happen it will be necessary not only that the principal question should be governed by some foreign system of law, but also that that foreign system of law would determine the preliminary question by different conflicts rules from those which the forum would apply to the preliminary question if it arose independently. Such cases are not common. It has already been pointed out how in the English legitimacy cases the law of the forum is generally applicable as the law governing the succession or the law of the seat of the trust 66; further, how in the United States, even if this is not the case, the conflicts rules of the law governing the principal question are almost invariably the same as the conflicts rules of the forum. 67 Again, in European cases where a principal question of legitimacy, nullity or divorce involves a preliminary question of previous marriage or divorce, the forum is usually the domicil of the parties at all relevant times, and so there will be no conflicts rules other than those of the forum applicable to the preliminary question. Of course if there has been a change of domicil between the time of the

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61 L. R. 3 H. L. 55 (1868).
62 1908, P. 46.
63 Supra, p. 577.
64 Supra, p. 579.
previous marriage and the time of bringing suit, then the problem of the preliminary question may arise (if also the law of the previous domicil would apply different conflicts rules from those of the forum). But such cases are not frequent.

The preliminary question is not likely often to arise in cases outside family law. In contract and tort such subsidiary questions as do arise (e.g. requirements of writing, limitation of actions, survival of actions, contributory negligence, capacity to contract, etc.) will be, for the most part, questions of secondary characterization, because essentially subsidiary to the main questions of contract and tort, and not questions which have conflicts rules of their own appropriate to them in their own right. Cases might arise in connexion with title to property that has been subject to several transactions in different States, if not only different effect would be given to the different transactions in the different States, but also different conflicts rules would be employed in order to ascertain their effect. But again it may be said that such cases are not common.

Both Melchior and Wengler, while asserting the general rule which is here submitted, namely that the conflicts rules of the law governing the principal question should determine the preliminary question, nevertheless allow exceptions in certain types of cases. One of these is a tortious action in which the title of the plaintiff is in dispute. The plaintiff must be required to prove his title by the conflicts rules of the forum, and not by those of the lex loci delicti commissi, because otherwise the forum might give the plaintiff damages for the infringement of his title, when by its own conflicts rules he did not have title, and someone else might be entitled to succeed on the same cause of action against the same defendant. Another exception is in the case of a 'condictio indebiti', or action for the restitution of money paid under a mistake. Suppose the action is brought in State A for the repayment of money paid in State B. The conflicts rules of the forum say that the question of restitution must be determined by the law of B. (This is the principal question.) The defence is entered that the money was paid not under a mistake, but to satisfy a previous obligation incurred in the course of a contract made in State C and to be performed in State D. Suppose further that by the conflicts rules of A the existence of the contractual obligation should be determined by the law of C, and that law would hold that a valid obligation existed; but by the conflicts rules of B the contractual obligation would be determined by the law of D, and by that law there was no valid obligation. The Court of the forum (A) now has
to determine whether there was a valid obligation under the contract (the preliminary question). If it applies its own conflicts rules, it will refer to the law of C, and find that there was a valid debt, and so refuse restitution. If, on the other hand, it applies the conflicts rules of the law governing the principal question (the law of B), it will refer to the law of D, and find that there was no previous debt, and so order restitution. It is submitted that in this case it should apply its own conflicts rules to the preliminary question of the existence of the previous debt, because otherwise it will be holding that the plaintiff owed nothing to the defendant when the question comes up in an action for restitution, whereas if the defendant had simply sued the plaintiff on the debt, it would have given judgment in his favour.\textsuperscript{65}

Wengler admits further exceptions.\textsuperscript{69} It is thought that at least the two cases just mentioned should be admitted as exceptions to the general rule here submitted. They are to be justified on plain considerations of justice, which forbid that the same defendant should be liable to two suits on the same cause of action, or that a debtor should be able to discharge his debt by the procedure of paying it and then bringing an action for restitution. However, the fact that considerations of justice require that the preliminary question be decided by the conflicts rules of the forum in these cases is not thought to be a reason for applying the same rule when the same considerations require just the opposite procedure, that is to say in those cases in which the reasons already given seem to require that the preliminary question be determined by the conflicts rules of the law governing the principal question.

To sum up, then, the preliminary question, though likely to arise in comparatively few types of cases in England, and in hardly any in the United States, must be given consideration in connexion with the subject of characterization, as being a special exemplification of that process. Similarly, it must be recognized as one of the fundamental problems in the conflict of laws, at least where international, and not merely inter-State, conflicts are concerned, and its relation recognized both to characterization and to the renvoi. As a general rule, it is submitted that the preliminary question should be determined by the conflicts rules of that system of law which is selected as appropriate to determine the principal question. The reason for this is the same as that given for secondary characterization

\textsuperscript{65} See Maury, \textit{op. cit.} p. 561.

\textsuperscript{69} \textit{Ibid.} and Wengler, \textit{op. cit.} pp. 213--224.
by the appropriate proper law, and that given elsewhere for the application of the renvoi,\textsuperscript{70} namely that this is the only way of respecting the determination already made that the selected proper law is to govern the question in dispute. It is recognized that there may be exceptions to the general rule given when considerations of justice require, but those exceptions are not thought to alter the desirability of the general rule submitted. As Raape writes, in asserting just the opposite view to that here advocated, ‘it is apparent that considerations of justice and equity have led us to the solution suggested, both in the problem of the preliminary question and in all the other problems dealt with in the present work.’\textsuperscript{71}

A. H. Robertson.


\textsuperscript{71} Raape, op. cit. p. 495.