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## RECENT APPLICATION OF THE RENVOI IN MATTERS OF PERSONAL STATUS

The acceptance or rejection of the Renvoi is one of the most controverted doctrines amongst the teachers of private international law in our day; and it is almost unnecessary to explain what is meant by the Renvoi. The term means, literally, a sending back. It is applied juridically to a process by which, when the court of a country is concerned with a case involving the application of the law of a foreign country, it applies the whole law of that country, including the rules of conflict contained in it, which may remit the matter to the determination of the *lex fori* or to another legal system. There are two branches to the doctrine, which are distinguished in the German terminology as Rückverweisung, that is, the reference back to the law of the country in which the case arises, and Weiterverweisung, that is, the passing on of the matter from the law of the first reference to a third system of law. But the principles involved are the same. Those who oppose the Renvoi doctrine urge that a distinction should be made between the internal laws of a foreign state and its rules of conflict, and that only the former should be respected by the court seised with the matter. They maintain that the *lex fori* should have regard to its own rules of private international law, and not allow them to be deflected by the rules on that subject of another system.

I may say that I do not propose to discuss the theoretical aspect of the question, but simply to examine the recent cases which illustrate the accepted English practice on the point. In British systems less regard is paid than in foreign systems to the theory on such questions as sovereignty; and the practical result is regarded with importance. The jurists are, for the most part, prepared to support and justify the decisions of the judges; and the extent to which any principle has been formed by

judicial decision is an important element in judging of its validity. The doctrine of salvation by works rather than by faith prevails in our law. Moreover, in a British court foreign law is always a question of fact, to be proved by witnesses. The court then ascertains not from textbooks what is the foreign law in general, but from an expert advocate what is the foreign law applicable to the particular case before it. I should say also that I write with some diffidence, particularly in defence of the doctrine of Renvoi, because I know that a distinguished Canadian jurist, Dean Falconbridge, wrote some years ago in the English Quarterly Review a most thorough and acute study of the doctrine of the Renvoi in relation to the succession of movables,[1] and argued there against the existence of any binding English rule for the acceptance of the Renvoi. My article may be regarded as an exchange of courtesies; and I shall not enter into controversy, but merely state the position as, in my view, it has been defined by decisions given in the British courts since the War.

It is noteworthy that from the time that questions of conflict of laws, particularly in matters of succession, came before them, British tribunals have shown a tendency to adopt the standpoint that the court shall give judgment as though it were seated in the foreign country whose law it held to be applicable in the particular case. The clear practical aim was to ensure the same decision whether the question of personal status was raised in a British or foreign court. If, therefore, the law of a foreign country, applicable in its view to the *de cujus*, referred the matter back to the law of England, or forward to the law of a third country, the British court would adopt the decision which, in its view, would have been given by a court in that country. Like the character of Molière, who spoke prose without knowing it, the English courts for nearly a century applied the principles of Renvoi without being conscious of it. The matter arose early in the nineteenth century, with regard to the validity of wills made, usually in English form, by an English testator domiciled abroad. According to the English — and the foreign — law of the time, a will was only valid if made according to the forms of the law of the domicile. But in several cases it appeared that the foreign law would not treat the English testator as domiciled in the country, because it required domicile to be established by a formal act; and therefore the foreign court would have upheld the validity of the English will in the English form. The English judge then held that he must con-

[1] *Renvoi and Succession to Movables* (1930), 46 L.Q.R. 465; (1931), 47 L.Q.R. 271.

sider himself seated in the foreign country — the particular case was Belgium — under the special circumstances of the case.[2]

In another instance the English court considered the effect of a will made by a testator who was born a British subject, had been naturalised in Switzerland, and died domiciled in France. The French law, to which the English court first referred the matter as being the *lex domicilii*, regulated the succession to movables by the law of nationality, and so remitted the determination of the validity of the will to the Swiss court. The English tribunal gave effect to the Swiss judgment in the distribution of the personal property in England,[3] The same principle is illustrated in a well known Canadian decision,[4] where the Supreme Court of Canada upheld a decision of the Quebec court.[5] The case concerned the will of a testator who was domiciled in Quebec and, while on a visit to New York, made a holograph testament which would have been valid if made in Quebec, but was in a form invalid for a person domiciled in the State of New York. The Supreme Court upheld the will; some of the judges on the grounds that it was validly made in the form of the testator's domicile, and a larger majority on the grounds that it was in a form which would have been recognized as valid by a court in New York for a testator domiciled in Quebec. The law in New York would have referred the formal validity of the will to the law of the domicile; and the Canadian court accepted that reference.

The first case in which an English court mentioned the Renvoi doctrine was in 1900 where, in a suit of succession, the judge remarked that if the domicile of the testator was French, according to English principles, and would be held according to French law to be English, he thought it extremely likely that the English court would apply the English law, that is, would accept the reference back from the law of domicile. In the case before him, where he was considering the succession of an English person whom he found as a fact to be domiciled in France, he held that he must assume the position of a judge sitting in France.[6] A few years later the question of the Renvoi was definitely argued before an English court in the case of *In re Johnson*.[7] The circumstances of the case were peculiar, and a double question of Renvoi was involved. It concerned

[2] *Collier* v. *Rivaz* (1841), 2 Curt., 855.
[3] *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch. D. 600.
[4] *Ross* v. *Ross* (1894), 25 Can. S.C.R. 307.
[5] (1893), Q.R. 2 Q.B. 413.
[6] *In re Martin, Loustalan* v. *Loustalan*, [1900] P. 211.
[7] *In re Johnson, Roberts* v. *Attorney-General*, [1903] 1 Ch. 821.

the testamentary succession of a woman who was a British subject, was born out of wedlock in Malta, and died domiciled in the Duchy of Baden. While her will was valid according to the law of Baden, it appeared that by that law the succession to certain personal property of which she had not disposed by her will would be governed by the law of the country of which she was a national. The court held that the movables undisposed of must be distributed according to the law of her domicile of origin which was Malta. It was found as a fact that the Baden law did not recognise any domicile unless made with official authorisation. And the judge observed that, when the law of the domicile disregards domicile and declines to distribute the property of a deceased person in accordance with its own rules, the English court should conclude that there was not any change of domicile *de facto*, and the succession was therefore remitted to the English court. The acceptance of the Renvoi is in accordance with international comity, since the English court mades the distribution in compliance with the foreign law. Accepting the Renvoi to the national law of England, he was then concerned to determine whether the distribution was governed by English law or by the law of that part of the British Empire which the English law pointed to as proper to determine the particular succession. And he concluded that the law to be applied was the law of Malta, as that of the domicile of origin, and that which the English court would apply if it were originally determining the case. At the same time he remarked that, as the law of Baden did not recognise domicile at all, the law of the deceased's domicile of origin might be applied directly to the succession without any consideration of a Renvoi to the English law.

The decision of *In re Johnson* was followed, without argument, some years later, in a case where it was held that the will of an Englishman domiciled in France according to the rules of English law, but not according to French law, and therefore according to French rules subject to a national law, was to be governed by the English law, because the English court should accept the Renvoi from the French to the English system.[8]

That is where the matter stood in English jurisprudence before the War. A series of decisions in which the question has been argued in the last few years have done much to elucidate the position, and at the same time have modified the rules. The decisions have been given in two cases referring to succession,[9]

[8] *In re Bowes, Bates* v. *Wengel* (1906), 22 T.L.R. 711.

[9] *Re Annesley, Davidson* v. *Annesley*, [1926] Ch. 692; *Re Ross, Ross* v. *Waterfield*, [1930] 1 Ch. 377.

and one concerning legitimation by subsequent marriage.[10] In the first succession case the will was made by an Englishwoman who had lived for years in France, and, though she had not taken the steps prescribed by the Article of the French Civil Code—since repealed—to obtain a legal domicile, was domiciled in France in accordance with the principles of English law. The point in issue was whether the will was governed by English law, so that she had a full power of disposition, or by French law, which required a certain portion of the estate to be left to her children. The court found, on the evidence as to French law, that in administering movables of a deceased person who, though not possessing French legal domicile, was regarded by the law of his nationality to be domiciled in France, a French court would accept the Renvoi from the national law back to the French law and would, in fact, apply the French law of succession. The doctrine of Renvoi has been more thoroughly disputed in the French tribunals than anywhere else; and the decisions of the higher courts, which of course are not binding on the lower courts in the way of precedents in England, generally accept the doctrine. In the particular case then, the testamentary power of the woman would be governed by French law.

The decision definitely rejected the reasoning of *In re Johnson* to the effect that where the law of the domicile did not regard a person who by English canons had lost his British domicile as having obtained a foreign domicile, the English court should treat him as having retained his domicile of origin. Domicile in a foreign country must be determined in accordance with the requirements of English law; and the court therefore addressed itself to the question what the French court would decide in the particular circumstances. The judge himself (then Russell J., now Lord Russell) had no love for the Renvoi doctrine, and suggested, *obiter*, that there was no need to consider it. Would it not be a simple solution for the English court to say that, as the testatrix was domiciled in France, the court should apply the municipal law of France? He quoted with approval a decision in this sense of a New York court, *In re Tallmadge*,[11] which rejected the doctrine of the Renvoi. The American case concerned the will of an American citizen whose domicile of origin was in New York, but whose domicile of choice, according to American principles, was in France. He had

[10] *Re Askew, Marjoribanks* v. *Askew*, [1930] 2 Ch. 259.
[11] *Re Tallmadge, Re Chadwick's Will* (1919), 181 N.Y. Supp. 336, and see (1920), 36 L.Q.R. 91.

not obtained a legal domicile, and therefore in the French view his national law would govern the will. The American court applied the French internal law, disregarding the rules of conflict of the French law.

In the second case of succession there was a similar question of the will of an Englishwoman who at her death was domiciled in Italy, and by her will excluded her son from any share in her movable and immovable property in Italy, and in her movable property elsewhere. The son, contesting the will, claimed that the succession should be governed by the Italian law under which he was entitled to a *legitimâ portio*. Alternatively he claimed the same right under the law of Malta, which was the domicile of origin of the testatrix's husband, and as he claimed, was the domicile of his parents' marriage. If the Renvoi from the law of the domicile to the law of the nationality was accepted, the law of Malta should be regarded as the proper law by a further reference of the English national law to the law of the domicile of origin.

The judge (Luxmoore J.) had before him expert evidence that the Italian courts would not apply the Renvoi doctrine, and that in the circumstances it would determine all the rights in succession both to movable and immovable property according to the British national law. He pronounced, then, in favour of the will on the following grounds: (1) the law of the domicile was not the municipal law of Italy, but included the rules of private international law administered by the Italian courts; (2) on the evidence, the Italian courts would refer the question to the law of the nationality; (3) the Italian courts would not accept the reference back from the English national law to their own system. While the immovables in Italy were governed on English principles by the *lex situs*, the reference back from the *lex situs* to the national law—involving a double Renvoi—was to be accepted by the English court, which must give the same decision as a court sitting in Italy.

As regards the plea of the son that the national law of England to which the first reference was made would refer the regulation of the succession to the law of Malta, which was that of his father's domicile of origin, the judge held that the mother's domicile of origin was different from that of her husband, and the law of her nationality to be applied was such part of the British law as was applicable to her domicile of origin, and not to that of her husband or to the matrimonial domicile.

The third case, *re Askew*, contains the most deliberate and complete examination of the Renvoi doctrine which has yet been

given by a British court. The question at issue was whether the legitimated child of a British subject domiciled in Germany, who had been born in Germany while her father was still married to his first wife, could be regarded as legitimate for the purpose of receiving a share in an English trust fund. If the question was governed by English internal law, she would not be legitimate, because of the provision in the English Legitimacy Act that a child born out of wedlock, whose father was at the time married to another woman, could not be legitimated by the subsequent marriage of her parents. On the other hand, if the matter were governed by the internal law of the German domicile, she would be entitled to a share. And the essential question of law was the meaning of the reference to the law of the father's domicile? Was it the internal law of Germany or the whole law, including the German rules of private international law? The court, following the established rule, held that it was a reference to the whole law. The German civil code referred the matter in the first place to the law of the nationality of the father, that is, the English law; but there was uncontested evidence of an expert witness that if the national law threw the case back to the German law, that Renvoi would be accepted.

In order, however, to elucidate the principle, the judge made an excursion into Utopia, and there throwing off all confusing incidents, examines the nature of the process which he proposed to follow. He takes the case of John Doe, a British subject who goes to the foreign country, the Commonwealth of Utopia, and there acquires a permanent home without intention of returning to his native land. The State of Utopia has adopted the principle of nationality for foreigners, and applies the national law to all questions of their status. The first question to be considered is, has John Doe acquired a Utopian domicile? That is purely a question of fact for the English court, and does not connote a legal relation. It must be determined by the English rules as to domicile, despite the fact that the court of Utopia attaches no importance in such case to the law of the domicile. The second question is whether the court means by the law of the domicile the whole of the law, or that part of the law which in Utopia would apply to Utopian subjects? To answer that question we must consider why the English law applies the law of Utopia at all. The main idea of private international law in the eighteenth and part of the nineteenth centuries was that there were a number of civil societies based on domicile, in the sense that the status and capacity of the members of the societies were governed by the law of the domicile whatever

might be their nationalities. For that reason the court would refer to the foreign law of the domicile in determining a question of status. Today the matter was complicated because many foreign countries had adopted the different principle of nationality to govern the personal law. But it was a misunderstanding of the problem to suggest that this difference would lead to a deadlock, the English court referring to the law of the domicile and that law referring back to the national law. The English court did not apply the Utopian law as such, and the phrase was only a short way of referring to rights acquired under the law of the domicile. The enquiry which the English court makes is as to the foreign law as a fact, which is to be proved by evidence. The English courts will enforce those rights, but it does not, properly speaking, enforce the law of Utopia. "It is evident," he said, "that, so stated, the question resolves itself into this. Have the parties acquired rights in Utopia by reason of the personal law of John Doe being English local law or the Utopian local law? There is this alternative and no other. It is apparent that . . . . . the *circulus inextricabilis* [suggested by foreign jurists in their comments on the Renvoi doctrine] is no better than a (perhaps amusing) quibble."

The judgment goes on to say that the English and foreign judges do not bow to each other like the English and the French officers at the battle of Fontenoy. The English court has to decide the matter within its jurisdiction according to English law in the wide sense; and if the matter depends on a foreign domicile it has to prove certain facts as to the rights under the foreign law. In the view of the judge the English court has not anything to do with the Renvoi doctrine, save in so far as foreign experts may expound the doctrine as being part of the law of the domicile. The English judges, therefore, need not worry about the basis of the theory or modifications of the doctrine. All that concerns it is to find out what the law of the domicile, interpreted in its fullest sense, means in any particular case, and it will then give effect to it. If that law in that particular case includes an acceptance of the Renvoi, well and good; the English court applies it. If that law does not accept the Renvoi, and leaves the matter to be governed by the English law, equally well and good; the court will give effect to its disposition.

The effect of the decisions is that every foreign system of private international law, to which reference is made in a case before the courts in England, can determine whether its application of the national law covers all cases or does not cover the case where the national law refers to the *lex domicili*. The

English court will give effect to its determination provided only that the result is not contrary to English ideas of fundamental justice. In *re Askew* the judge made this reservation, that an English court might not accept a disposition of the law of the domicile which was contrary to our views of comity, or which had some specific discriminating provision against foreigners, *e.g.*, a law prohibiting foreigners from bequeathing their property abroad to persons of a foreign state. The old Ottoman law of succession contained a provision to this effect. He suggested that in such a case the English court would be free not to adopt the Renvoi to the internal law of the domicile.

One other general suggestion was made in the case, that, in order to avoid the uncertainty and confusion which arises from the need of finding as a fact in each case what the foreign law is, and particularly of resolving the conflicts of evidence of the expert witnesses who are called to prove whether the Renvoi is or is not accepted in a foreign system of law, the English Parliament should pass an Act — he thought, sanguinely, that it might be a very short Act — defining the rights of British subjects domiciled abroad with regard to matters of personal status. That suggestion has not been acted upon; and it is in fact not easy to see how it could be formulated so as to secure what is the main object of the English rule, namely, uniformity in the solution of a legal problem so that the British court and the court of the foreign domicile shall give the same result in any case.

It is interesting that an attempt was made to resolve questions of domicile in England by Statute as long ago as 1861. The Act provided that no British subject dying in a foreign country with which a Convention has been made is to be deemed to have acquired a domicile there, unless resident there for one year immediately preceding his or her death, and unless he or she shall also have made and deposited in that country a declaration in writing of his or her intention to become domiciled therein. There was a parallel clause with regard to foreign subjects acquiring a British domicile. But the Act has had little effect in practice; and it is to be surmised that any attempt to define the law governing the personal status of British subjects domiciled abroad would have little practical result — unless it were to make confusion worse confounded.

It is notable that the motive for the English judicial adoption of the Renvoi principle, not as such but in the form of interpreting the foreign law to mean the law which the foreign court

would in the particular case apply to the *propositus* — that motive has been accepted in the re-statement of private international law which was drawn up by the American Law Institute in 1926. There it is provided that in a question of status or title to land, the court first decides in accordance with its own rules of conflict by the law of which state the regulation of status or of title is to be determined, and then decides the question as it would be decided by the court of that state.[12] The dominating purpose is to obtain uniformity of decision in such matters so far as the court is able to secure it, and not to allow the choice of *forum* to have an effect on the substance. That point of view may be open to criticism on grounds of logic and theory of jurisprudence. But those considerations are secondary in the British legal mind. Our courts are not concerned with the Renvoi as a doctrine of our law : they deal with it only so far as it is an element of the foreign law in a particular case : and that foreign law is always for them a question of fact.

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[12 This sentence in the text reproduces the substance of sec. 8 of the Tentative Restatement, No. 2, issued by the American Law Institute on Feb. 27, 1926. Except as stated in sec. 8, the theory of the Renvoi was categorically rejected by sec. 7. Subsequently both sections have been substantially redrafted; and in the final Conflict of Laws Restatement, promulgated on May 11, 1934, the exceptional cases in which the Renvoi is accepted are questions of title to land and questions concerning the validity of a decree of divorce.—Ed.]