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RENVOI, CHARACTERIZATION AND ACQUIRED RIGHTS

§ 1. INTRODUCTION

There is no sign that the stream of writing on the doctrine of the *renvoi* is drying up. In England in 1938 Cheshire,[1] in accord with Mendelssohn-Bartholdy,[2] whose book had been published posthumously under Cheshire's editorship, joined the ranks of the opponents of the doctrine. In the United States there was until 1938 a practically unanimous chorus of opinion adverse to the doctrine as a principle of general application.[3]

[1] PRIVATE INTERNATIONAL LAW (2nd ed. 1938) 45 *ff.*; reviewed by Cook (1938), 33 Illinois L.R. 365, Griswold (1938), 51 Harv. L.R. 1127, Gutteridge (1939), 55 L.Q.R. 130, and Falconbridge (1938), 16 Can. Bar Rev. 501.

[2] RENVOI IN MODERN ENGLISH LAW (1937); reviewed by Cook (1937), 32 Illinois L.R. 504, Lorenzen (1938), 47 Yale L.J. 857, Griswold (1938), 51 Harv. L.R. 573, Haynes (1938), 54 L.Q.R. 137, Unger (1938), 1 Modern L.R. 332. Gutteridge (1938), 6 Camb. L.J. 473, and Falconbridge (1938), 16 Can. Bar Rev. 153.

[3] See especially Lorenzen, *The Renvoi Doctrine in the Conflict of Laws; Meaning of "The Law of a Country"* (1918), 27 Yale L.J. 509; Schreiber, *The Doctrine of the Renvoi in Anglo-American Law* (1918), 31 Harv. L.R. 523; *In re Tallmadge* (1919), 181 N.Y. Supp. (215 N.Y. St.) 336, 109 Misc. Rep. (N.Y.) 696; CONFLICT OF LAWS RESTATEMENT, § 7, and BEALE, CONFLICT OF LAWS (1935), vol. 1, pp. 55 - 57; Cook, *Tort Liability and the Conflict of Laws* (1935), 35 Columbia L.R. 202, at pp. 221 ff.; *'Contracts' and the Conflict of Laws* (1936), 31 Illinois L.R. 143, at pp. 166 - 167. The question of exceptional treatment of certain classes of cases will be discussed in § 6 *infra*.

This chorus of opinion was interrupted by Griswold in *Renvoi Revisited*,[4] followed by articles by Cowan[5] and Griswold,[6] and one may safely predict the appearance of further articles in the future. Part of the voluminous material published in continental Europe on the subject of the *renvoi* consists of a considerable number of articles specifically devoted to the *renvoi* in Anglo-American law, including, in 1938, an acute study by De Nova.[7] In the circumstances I venture myself to "revisit" the *renvoi*,[8] in order to make some tentative suggestions for reconsidering the *renvoi* problem in connection with problems of characterization and acquired rights, with the view of finding a solution somewhere between the two extremes of absolute rejection and absolute acceptance of the doctrine of the *renvoi*. After a review of various classes of conflict of conflict rules;[9] and some supplementary observations on characterization,[10] an attempt will be made to analyze the various forms in which the doctrine of the *renvoi* has been stated, and to point out some of the difficulties encountered in its general application.[11] On the other hand the doctrine may afford a useful, sometimes even an inevitable, device in some exceptional classes of cases,[12] and perhaps if attention were concentrated on the special treatment of some classes of cases, there would be less need for anyone to put himself absolutely in the camp of the advocates, or in the camp of the opponents, of the *renvoi*. Many writers, whether they defend or condemn the doctrine, admit exceptions, and it would appear that the controversy has passed beyond the stage in which the doctrine can be either wholly rejected, or wholly accepted, on supposedly logical or other grounds.

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[4] (1938) 51 Harv. L.R. 1165. Most of the material written in English pro and con is there cited.

[5] *Renvoi Does Not Involve a Logical Fallacy* (1938), 87 U. of Penn. L.R. 34. References are given to many books and articles published in continental Europe.

[6] *In Reply to Mr. Cowan's Views on Renvoi* (1939), 87 U. of Penn. L.R. 257.

[7] *Considerazioni sul Rinvio in Diritto Inglese* (1938), 30 *Rivista di Diritto Internazionale*, N. 1 - 2 - 3 - 4.

[8] My latest former visit to the land of the *renvoi* took place two years ago in *Characterization in the Conflict of Laws* (1937), 53 L.Q.R. 235, at pp. 552 - 554, 565 - 567; *Conflict of Laws: Examples of Characterization* (1937), 15 Can. Bar Rev. 215, at pp. 236, 237, 243 *ff*. To avoid repetition I have inserted in the present article occasional references to my earlier discussion of some of the cases.

[9] See § 2, *infra*.

[10] See §§ 3 and 4, *infra*.

[11] See § 5, *infra*.

[12] See § 6, *infra*.

§ 2. Conflicts of Conflict Rules[13]

The problem of the *renvoi* arises of course only in case of a conflict between the conflict rules of different countries, whether the conflict be patent or be latent, and some advance may be made towards general agreement if the different classes of conflicts are analyzed and distinguished, because the *renvoi* may afford a reasonable solution in one kind of conflict and may be inappropriate in another kind of conflict. In the course of analyzing different kinds of conflict of conflict rules one will inevitably encounter problems of characterization (qualification, classification), and problems of acquired rights, so that it may appear that problems of *renvoi*, characterization and acquired rights are all interrelated problems, and can be solved only by their being considered as such.

Conflict rules are usually expressed in terms of legal concepts combined with place elements, as, for example, when it is said in effect that as regards the transfer of the property in a thing *inter vivos* the dominant place element is the situs of the thing, as regards succession to movables the dominant place element is the domicile of the *de cujus*, and as regards the formal validity of a contract or of a marriage the dominant place element is the place of making (celebration). The dominant place element is thus the connecting factor, that is, the factor which connects the factual situation with a particular country, and leads to the selection of the law of that country as the proper law with regard to a particular question involved in the factual situation. The selection of the proper law must logically be preceded by the characterization of the question, and the purpose must be followed by the application of the proper law. Thus, in effect, in any case in which the factual situation includes any foreign place element or elements, the court's enquiry is divided into three stages. Firstly, the court must characterize, or define the juridical nature of, the question or each of the questions, raised by the facts. Secondly, the court must select a particular place element as being the important one with regard to the question or each of the questions as characterized, and, using that place element as a connecting factor, must select the law of a particular country (which may be the law of the forum or may be the law of another country) as the law governing a particular question. Thirdly, in order to find a definitive answer to the question or each of the questions, the court must apply the law of the

[13] *Cf.* (1937), 53 D.L.R. 235 - 238; (1937), 15 Can. Bar Rev. 215 - 217.

selected country to the factual situation. The application of the proper law to the factual situation raises the problem whether the proper law is to be applied to the actual situation, that is, the factual situation including its actual place elements, or is to be applied to a factual situation in which the place elements are hypothetically located in the country the law of which has been selected as the proper law. This is of course one of the matters which will come up for consideration in the subsequent discussion of the doctrine of the *renvoi*.

In each of the three stages of the court's enquiry there may be a conflict of conflict rules between the law of the forum and the law of a foreign country. In the first stage there may be a latent conflict arising from the fact that although the conflict rules of two countries are on their face the same in that they use the same connecting factor in the same sense, nevertheless they may be different in effect because the nominally identical question to which the rules relate is characterized in one way in one country and in another way in the other country, as, for example, if the conflict rules of both countries say that capacity to marry is governed by the *lex domicilii*, and that formalities of solemnization of marriage are governed by the *lex loci celebrationis*, but a requirement as to parental consent to the marriage of a minor is characterized in one country as a matter of capacity to marry (or some other aspect of intrinsic validity of marriage or essential feature of family law), and in the other country is characterized as a matter of formalities of solemnization of marriage. In the second stage there may be a latent conflict of conflict rules arising from the fact that the conflict rules of two countries are on their face the same, but are in reality different because the nominally identical connecting factor specified in the conflict rules is characterized or defined in different ways in the two countries, as, for example, if the conflict rules of both countries say that the *lex domicilii* is the governing law with regard to a given question, such as succession to movables, but domicile means one thing in one country and another thing in the other country. In the third stage there may be a patent conflict of conflict rules arising from the fact that the conflict rules of two countries are on their face different, as, for example, if the conflict rule of one country says that the *lex domicilii* governs a given question, such as succession to movables, and the conflict rule of the other country says that the question is governed by the *lex patriae*.

§ 3. Characterization of the Question[14]

In conformity with a theory of characterization which is not infrequently advocated by writers of continental Europe,[15] some Anglo-American writers have recently submitted that it is important to distinguish between (a) primary characterization of the question, preliminary to the selection of the proper law and therefore something which logically must be done in accordance with the concepts of the *lex fori* and without regard to any foreign law, no foreign law, *ex hypothesi*, having been yet selected as the proper law, and (b) secondary characterization occurring in the third stage of the court's enquiry (that of the application of the proper law), something which may logically be, and should be, done in accordance with the concepts of the *lex causae*.[16]

There are of course problems arising in connection with the application of the proper law which may be described as characterization, delimitation or classification, including some phases of the *renvoi*, but one must not be too frightened by the argument that it is illogical, or putting the cart before the horse, to consider the provisions of a given foreign law which may be the proper law on some characterization of the question before that law is selected as the proper law. It is sometimes a good thing to look before you leap, and especially in the conflict of laws it is sometimes desirable that the forum know something in advance about the definitive solution which will result from its selection of a particular law as the proper law. The content of the foreign law may even suggest analogies which lead to the formulation of a conflict rule of the forum in

[14] Cf. (1937), 53 L.Q.R. 246 *ff.*; (1937), 15 Can. Bar Rev. 218 *ff.*

[15] *E.g.*, Fedozzi, Il Diritto Internazionale Privato: Teorie Generale et Diritto Civile (1935) 181 *ff.*, with special reference to Anzilotti; *cf.* Hakki, Les Conflits de Qualifications dans les Droits Français, Anglo-Saxon et Italien Comparés (1937) 95 - 97, with special reference to Cavaglieri and Anzilotti; Bartin, Principes de Droit International Privé (1930) vol. 1, pp. 231 - 235; Maury, *Règles Générales des Conflits de Lois*, Recueil des Cours, Académie de Droit International, vol. 57 (1936, III) 469, 508 *ff.*

[16] *Cf.* Unger, *The Place of Classification in Private International Law* (1937), 19 Bell Yard 3, at pp. 17, 19, 21; Mendelssohn-Bartholdy, Renvoi in Modern English Law (1937) 87; Cheshire, Private International Law (2nd ed. 1938) 30, 34, 37, reviewed by Unger (1939), 2 Modern L.R. 330; Hellendall, *The Res in Transitu and Similar Problems in the Conflict of Laws* (1939), 17 Can. Bar Rev. 7, at p. 107; Robertson, *A Survey of the Characterization Problem in the Conflict of Laws* (1939), 52 Harv. L.R. 747, at pp. 767 *ff.* The distinction between primary and secondary characterization does not appear to have been stressed by previous writers in English: Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920), 20 Columbia L.R. 247; Beckett, *The Question of Classification ("Qualification") in Private International Law* (1934), 15 Brit. Y.B. Int. Law 46.

such terms as to bring about a reasonable economic or social result. Courts are all too likely to select the proper law in accordance with the concepts of the *lex fori* without regard to the consequences, and it would seem to be a pity to encourage them to do this by attempting to convince them that they cannot logically do anything else. This seems, however, to be what is meant when so much emphasis is placed upon the distinction between primary and secondary characterization. There would not seem to be any logical or other objection to the forum's considering the provisions of any potentially applicable law before definitely selecting the proper law. Exactly what is meant by the characterization of the question may be stated in somewhat more technical language. If characterization in this connection is defined as the determination of the juridical nature of something, the thing characterized must itself be juridical and not purely factual. We may perhaps speak of the subsumption of facts under rules of law, but we may not speak of the characterization of the facts or of a factual situation. A factual situation has no legal consequences without the actual application of rules of law to the facts, and cannot be thought of as having legal consequences without at least the hypothetical application of rules of law to the facts. If in the first stage of the court's enquiry the court must characterize the question as a preliminary to the selection of the connecting factor and consequently the selection of the proper law, the question to be characterized must be a legal question, that is, a question arising from the facts by reason of the hypothetical application of some rules of law. There is therefore no real distinction in principle between the characterization of the question and the characterization of rules of law. And since the main object of the enquiry in a situation containing foreign place elements is to determine whether the applicable rules of law are to be the local rules of the *lex fori* or rules of law identical with, or similar or analogous to, the local law of a foreign country, it would seem to be desirable, to say the least, that the characterization of rules of law should so far as is practicable precede and not follow the selection of the proper law, in the first stage. If important matters of characterization are to be relegated to the third stage, as is suggested by some of those who insist upon the distinction between primary and secondary characterization, the process of characterization is deprived of elasticity and real efficacy, because *ex hypothesi* the proper law has been already finally selected without regard to the provisions of any foreign law, and it is too late for the

court to revise its decision with regard to the selection of the proper law. It would seem to be desirable that the process of selection of the proper law should be rendered as flexible as possible, and it is essential for this purpose that the court should characterize the question in the light of all potentially applicable rules of law, and not, so to speak, in the dark; and any effort to create logical obstacles to freedom of choice on the part of the court in its search for a satisfactory solution is, it is submitted, to be deprecated.

By way of precaution it should be mentioned that there is such a thing as primary characterization (in a different sense from that mentioned above), which must clearly precede the selection of the proper law, that is, the preliminary characterization which is involved in the distinction between matters falling within the stringent local public policy of the forum (including its procedural public policy) and other matters. If the unruly horse of substantive public policy is left out of consideration,[17] it would appear that the forum must dispose *in limine* of any procedural question which may be a decisive factor in the case before it embarks on the selection of the proper law. In other words, the court applies as a matter of course the procedural rules of the forum and excludes the procedural rules of any other country, and the selection of the proper law is confined to substantive law.[18] The distinction between substance and procedure is sometimes an elusive one,[19] and of course involve the characterization of rules of law of the forum and of other potentially applicable laws.

§ 4. Application of the Proper Law[20]

As suggested above, undue emphasis on the distinction between primary and secondary characterization is to be depre-

[17] Stumberg, Conflict of Laws (1937) 179: "The real difficulty with public policy as a limitation is that it is incapable of measurement. All law is an expression of policy and whether a particular foreign rule falls under the ban is a matter of opinion which can easily become a matter of whim. At the same time, it is something that must be reckoned with as a possible factor, though an exceptional one."

[18] *Cf.* Mendelssohn-Bartholdy, *Delimitation of Right and Remedy in the Cases of Conflict of Laws* (1935), 16 Brit. Y.B. Int. Law 20, at p. 27; *cf.* reviews, by Mendelssohn-Bartholdy (1935), 51 L.Q.R. 553, and by Rheinstein (1936), 84 U. of Penn. L.R. 438, of Schoch, Klagbarkeit Prozessanspruch und Beweis im Licht des internationalen Rechts (1934); Unger, *The Place of Classification in Private International Law* (1937), 19 Bell Yard 3, at p. 21.

[19] *Cf.* Cook, "*Substance and Procedure*" *in the Conflict of Laws* (1933), 42 Yale L.J. 333.

[20] Generally, as to the application of the proper law, *cf.* (1937), 53 L.Q.R. 235, at pp. 556 ff.

cated because it tends to lead to the conclusion that the forum must in its so called primary characterization of the question have regard only to the concepts of the *lex fori* and because, by seeming to raise a logical objection to the consideration by the forum of the concepts of any potentially applicable foreign law prior to the selection of the proper law, it excludes from consideration elements which might assist the forum in reaching a desirable social or economic result. On the other hand the theory that so called secondary characterization or delimitation in the stage of the application of the proper law, is exclusively governed by the *lex causae*, would also appear to be open to criticism, as being too broadly or absolutely stated, because, if it means the complete abandonment of characterization to the *lex causae* or acceptance by the forum of the mode of characterization adopted by the *lex causae*, it may lead to the *renvoi;* and perhaps characterization or delimitation by the *lex causae* should be limited to those cases in which the question may be one which is governed by the law of a given foreign country and as regards which the forum is disposed to accept whatever a court of that country has decided or would decide. In other words it may be that characterization strictly in accordance with the *lex causae* is justified only in those exceptional classes of cases in which the forum is willing to apply the doctrine of the *renvoi*.[21] Apart from these exceptional classes of cases, it is submitted that the forum, having characterized the question in the light of the potentially applicable laws, and having selected the proper law, should, in the stage of the application of the proper law, apply only such provisions of the proper law as, in the view of the forum, relate to the particular question with regard to which the forum has selected the particular law as the proper law.

The matter of the characterization or delimitation of the provisions of the proper law has been expressed in a pointed way by Wolff, who says that a conflict rule of the forum which runs "succession to movables is governed by the law of the domicile of the *de cujus* at the time of his death" means that all the rules of the *lex domicilii* which are characterized as part of the succession law of the domicile are to be applied.[22] The same principle may be used if there are two or more questions arising from the factual situation, and if there is the consequent

[21] See § 6, *infra*.

[22] INTERNATIONALES PRIVATRECHT (1933) 37; (I have changed Wolff's example by substituting the *lex domicilii* for the *lex patriae*); *cf.* generalized statement by *Maury, Règles Générales des Conflits de Lois*, RECUEIL DES COURS, ACADÉMIE DE DROIT INTERNATIONAL, vol. 57 (1936, vol. III) 485.

selection by the forum of two or more proper laws, so that on each question all the provisions of the selected proper law, and only such provisions, are to be applied as relate to the specific question, that is, the specific aspect of the case, with regard to which the proper law has been selected.[23]

Closely connected with the matter just discussed is the problem of the "preliminary question" (*question préalable, Vorfrage*) which in recent years has been discussed as a separate question by some writers of continental Europe.[24] Suppose that A claims to be entitled to succeed to property as the legitimated son of B, who has gone through the form of a marriage with C after C has given birth to A, and suppose that there is controversy as to (a) the validity of the marriage, (b) the legitimating effect of the marriage, and (c) the right of A to succeed. In a sense questions (a) and (b) are preliminary to question (c), but that is so only because in the particular case question (c) is the final question. It might happen that question (a) would arise in an entirely different connection, as, for example, with regard to the legitimacy of D, a child born to B and C after their marriage, or that question (b) would arise in connection with some question other than question (c), and it is submitted that all three questions should be considered separately.[25] If the alleged marriage is sought to be impeached on the ground of its formal or intrinsic validity, the matter should be decided by the proper law or laws selected by the forum, and even the legitimacy of A and his right to succeed may be governed by different laws. There would not seem to be any valid reason why the proper law governing A's right to succeed should also be the proper law governing any preliminary question. Various views have been advanced, however, in favour of the subordination to a greater or less extent of the decision of the preliminary question to that of the principal question.

[23] See, *e.g.*, the famous case, so often discussed by continental writers, of the Hollander who makes a holograph will in France notwithstanding that he is forbidden by the law of Holland to make a holograph will. The separate application of the proper laws governing capacity and formalities seems to give a satisfactory solution; (1937), 53 L.Q.R. 235, at pp. 256-259. This solution is not, however, approved by Maury, *op. cit.* 487. The case is sometimes used by continental writers as an example of irreconcilable characterizations of the same question in different countries.

[24] BRESLAUER, PRIVATE INTERNATIONAL LAW OF SUCCESSION (1937) 18, gives credit to Anzilotti for having first discussed the question, and refers to the discussion in MELCHIOR, DIE GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS (1932) 245 ff., and *Wengler, Die Vorfrage im Kollisionsrecht* (1934) 8 *Zeitschrift für Ausländisches und Internationales Privatrecht* 148. Various views are discussed by Maury, *op. cit.*, 554 ff.; *cf.* Raape, *les Rapports entre Parents et Enfants*, RECUEIL DES COURS, ACADÉMIE DE DROIT INTERNATIONAL, vol. 50 (1934, iv) 485.

[25] *Cf.* (1937), 53 L.Q.R. 563 - 564; (1937), 15 Can. Bar Rev. 240 *ff.*

It would appear, however, that there may be some exceptional cases in which a question may properly be regarded as being subsidiary to some other question, and governed by the law applicable to that question. For example, the characterization or classification of property as movable or immovable would appear to be subsidiary to the main question whether a proprietary right in immovables has been acquired in accordance with the *lex rei sitae*. Again, the characterization of an alleged right as being contractual or proprietary would appear to be a subsidiary question which must be answered in accordance with the *lex rei sitae*, not only as regards immovables, but also as regards movables, at least to the extent that proprietary rights in movables are governed by the *lex rei sitae*.[26] There may also be other cases which may possibly be expressed in terms of a "preliminary question", but the utility of this mode of expression is not obvious and it is submitted that the enquiry whether one question is preliminary to another, or, conversely, whether the latter is subsidiary to the former, is only another way of saying that a court must characterize exactly the question upon which its adjudication is required, and must of course decide whether the question is an independent one governed by its own proper law or is merely incidental to or a sequel to some other question and therefore governed by the proper law of that question.

§ 5. Three Modes of Stating the Renvoi

The problem of the *renvoi*, that is, the question whether a reference to the law of a given country includes or does not include a reference to the conflict rules of that law, arises only if there is a conflict between the conflict rules of two countries. As had already been suggested,[27] conflicts of conflict rules are divisible into three classes. A conflict of the first class is a latent conflict arising from a divergence in the characterization of the question involved in the factual situation, and the consequent selection of different connecting factors. A conflict of the second class is a latent conflict arising from a divergence in the characterization or definition of the nominally identical connecting factor indicated in the conflict rules of the two countries in relation to the same question. A conflict of the third class is a patent conflict arising from the fact that the conflict rules of the two countries indicate different connecting

[26] See § 6, *infra*, notes 69 and 70.
[27] See § 2, *supra*.

factors in relation to the same question. It is of course possible that a conflict of conflict rules of any one of these three classes may give rise to a *renvoi* problem. The problem is sometimes stated, however, as if it arose only from a conflict of the third class, although in fact in English cases the conflict giving rise to the problem has not infrequently been a conflict of the second class, and the difference between these two classes of conflicts has not always been sufficiently noted. On the other hand, there has been little or no disposition on the part of judges or authors even to speculate on the possibility of the *renvoi* in conflicts of the first class.[28] One might attempt to discuss possible situations giving rise to *renvoi* problems in each of the three classes of conflict rules *seriatim*, but a better approach perhaps is to state the various ways in which the doctrine of the *renvoi* has been expressed and to discuss some of the implications and difficulties inherent in each form of statement.

(1) *The ping-pong theory.* One mode of stating the doctrine of the *renvoi* is that which is suggested by the word *renvoi*, namely, that the forum in X, in accordance with one of its own conflict rules refers to the law of Y as the proper law relating to a particular question, and the corresponding conflict rule of Y either (a) refers back to the law of X (*renvoi*, return reference, remission, *Rückverweisung*) or (b) refers forward to the law of a third country, Z (*renvoi*, forward reference, transmission, *Weiterverweisung*). If the original reference to the law of Y is regarded as a reference to the whole law of Y, including its conflict rules,[29] there is no logical reason why the reference by the law of Y (a) to the law of X or (b) to the law of Z should not be a reference to the whole law of X or Z, as the case may be, so that in (b) there may be a further reference forward from Z to a fourth country or back to X or Y, and in (a) there may be a reference back from X to Y. In (b) the practical

[28] See § 7, *infra*.

[29] It has been suggested that logically one ought to speak of a reference to the conflict rules as contrasted with a reference to the local rules of law, and that one ought not to contrast the "whole law" with the local rules of law, because one includes the other, and that a reference to the "whole law" means a simultaneous reference to two different parts of the law —conflict rules and local rules—the application of which may lead to mutually inconsistent results. *Cf.* Abbott (1908), 24 L.Q.R. 133, 135-136; Schreiber (1918), 31 Harv. L.R. 523, 526. *Semble*, however, that there is no objection to contrasting the "whole law" with the local rules of law. A court applying the whole law must, expressly or impliedly, decide whether the local rules are applicable or not to the case, whereas a court applying the local rules only must exclude from consideration any question of choice of law. The alternatives are mutually exclusive. Cf. Griswold, *Renvoi Revisited* (1938), 51 Harv. L.R. 1165, at p. 1166, note, 7.

difficulties in the way of the forum in X ascertaining how the case is to be decided are almost too terrifying to pursue, though the *circulus inextricabilis* is less likely to occur in (b) than in (a). In (a), however, the forum in X knows or is supposed to know its own law, including its conflict rules, and therefore merely has to decide whether it will *"accept the renvoi"*[30] from Y, and apply its own local law, abandoning its own original reference to the law of Y, or will send the case back again to Y, with the possibility that the reciprocal references will continue forever. The game or puzzle, including the alleged logical inevitability of its eternal duration, has been described in various more or less picturesque terms — international lawn tennis, legal battledore and shuttlecock, *circulus inextricabilis*, logical cabinet of mirrors, endless oscillation, circle or endless chain of references, merry-go-round. Whether a vicious circle is necessarily inherent in the doctrine of the *renvoi*, as is sometimes plausibly argued, is one thing, and whether logically or illogically the *renvoi* affords a satisfactory solution in some situations is another thing.[31]

The clearest example of the *renvoi* arises from the third class of conflict rules mentioned above, that is, the patent conflict resulting from the facts that the law of X says that a given question (as, for example, succession to movables) is governed by the *lex domicilii*, and that the law of Y says that the same question is governed by the *lex patriae*, and that the *de cujus* was a national of X domiciled in Y. Formerly English courts flirted with what is sometimes called the *désistement* theory,[32] that is, that if the reference by the law of X to the law of Y in its character of the *lex domicilii* is rendered futile because no effective domicile for the purpose of succession was acquired by the *de cujus* in Y in accordance with the law of Y, or because domicile is immaterial for the purpose of succession by the law of Y, then the forum ceases to attempt to apply a foreign law which itself disclaims its own applicability, and falls back upon the law of the former domicile — usually the domicile of origin — of the *de cujus*. In later cases the English

[30] The expression has become sterotyped, but is not a happy one because it has to be distinguished from accepting the doctrine of the renvoi —something which the forum may do without necessarily accepting or acquiescing in the first reference back.

[31] See § 6 *infra*.

[32] *In re Johnson*, [1903] 1 Ch. 821, one line of reasoning of Farwell J., apparently approved by WESTLAKE, PRIVATE INTERNATIONAL LAW (5th ed. 1912) 40; *cf.* (1931), 47 L.Q.R. 273 - 276, [1932] 1 D.L.R. 25 - 28. As to *In re Johnson*, and the *désistement* theory, see especially Schreiber, (1918), 31 Harv. L.R. 529 - 532, 554 - 557.

courts have disapproved of this doctrine, in accordance with older decisions[33] that domicile in an English conflict rule means domicile in the English sense without regard to the views of the law of the country of domicile concerning domicile or its effect, and have evolved the theory, that (a) if Y is willing to accept a second reference from X, the forum in X will apply the local law of Y,[34] but (b) if Y is not willing to accept a second reference, the forum in X will apply the local law of X.[35] The basis of alternative (a) is that the law of Y is receptive of the doctrine of the doctrine of the *renvoi* at least to the extent of construing its own conflict rule in such a way as to lead to the application of the local law of Y, whereas the basis of alternative (b) is that the law of Y is not receptive in this respect.

On analysis of the three cases in which the results just mentioned were reached, it would appear that each of the decisions has its own peculiar features. The *Ross* and *Askew* cases have this in common that the *renvoi* problem arose in each case from a patent conflict of conflict rules of the third class, whereas in the *Annesley* case the conflict was a latent conflict of the second class, and the decision was illogical in the sense that the court in X found the *de cujus* to be domiciled in Y in the teeth of the law of Y, and nevertheless applied provisions of the law of Y which by that law were applicable because the *de cujus* was domiciled in X, not Y.[36] The modes of stating the doctrine of the *renvoi* were somewhat different in the three cases, the mode adopted in the *Annesley* case being a mixture of the first mode, now being discussed, and the *foreign court theory*, presently to be discussed, the mode adopted in the *Ross* case being the *foreign court theory*, and the mode adopted in the *Askew* case being the *acquired rights theory*.[37]

The two opposing views with regard to the meaning of a reference by the conflict rule of X to the law of Y may be restated in another way, namely, (a) that the law to be applied in X is the law which in Y would be applicable to the factual

[33] *Bremer* v. *Freeman* (1857), 10 Moo. P.C. 306; *Casdagli* v. *Casdagli*, [1918] P. 89, 109, [1919] A.C. 145, 194.

[34] *In re Annesley*, [1926] Ch. 692 (France); *In re Askew*, [1930] 2 Ch. 259 (Germany). This is sometimes called the "double renvoi", and reaches the same result as if X applied the local law of Y on the first reference.

[35] *In re Ross*, [1930] 1 Ch. 377 (Italy). This solution seems to bear some resemblance to the *désistement* theory.

[36] For an analysis of the *Annesley* case, see (1931), 47 L.Q.R. 270 - 283, [1932] 1 D.L.R. 31 - 35.

[37] As to the *Ross* case, see (1931), 47 L.Q.R. 285 - 287, [1932] 1 D.L.R. 38 - 39. As to the acquired rights mode of stating the *renvoi*, see *infra* in the present § 5.

situation, including its actual place elements, that is, in accordance with the conflict rules of Y, and (b) that the law to be applied in X is the law which in Y would be applicable to a factual situation similar to the actual situation except that all the place elements are hypothetically situated in Y, that is, the local law of Y.[38]

(2) *The foreign court theory.* A second mode of stating the doctrine of the *renvoi* — the oldest occurring in English case law — is that which is contained in the judgment of Sir Herbert Jenner (afterwards Sir Herbert Jenner Fust) in *Collier* v. *Rivaz*,[39] namely, that the forum in X, when it is referred by its own conflict rule to the law of Y, must decide the case as if it were a court sitting in Y. The same judge had indeed in an earlier judgment, in a case involving the formal validity of a will of movables,[40] expressed the opinion that the court of the domicile had exclusive jurisdiction.[41] Even the formula stated in *Collier*

[38] Cook, '*Contracts*' *and the Conflict of Laws* (1936), 31 Illinois L.R. 143, at pp. 166 - 167, note 59, quotes the following version, prepared by him and approved by Beale, but not adopted by the American Law Institute, of § 7 of the Conflict of Laws Restatement; "Except as stated in §8, whenever in this Restatement any matter is said to be determined or governed by the law of a given state, the term 'law' shall be construed to mean the purely 'local' or 'domestic' rule of that state, i.e., the rule applicable to a case similar in all other respects to the case in hand but presenting for a legal tribunal in that state no problem in the Conflict of Laws (or, containing from the point of view of a legal tribunal in that state no foreign element)."

[39] (1841), 2 Curt. 855; *cf.* (1930), 46 L.Q.R. 476 - 477, [1932] 1 D.L.R. 13 - 16; Schreiber (1918), 31 Harv. L.R. 539 - 541.

[40] *DeBonneval* v. *DeBonneval* (1838), 1 Curt. 857. Having found that the *de cujus* was domiciled in France, Jenner J. said: "The courts of that country are the competent authority to determine the validity of his will and the succession to his [movable] estate, and, as in the case of *Hare* v. *Nasmyth*, 2 Add. 25, the court suspends the proceedings here as to the validity of the will till it is pronounced valid or invalid by the tribunals of France." *Hare* v. *Nasmyth* was "a similar case, putting Scotland for France, before Sir John Nicholl in 1815" (Westlake). As to the *DeBonneval* case, see Schreiber (1918), 31 Harv. L.R. 537 - 539.

[41] A confusion between *lex* and *forum* which was condemned in *Orr* v. *Orr-Ewing* (1885), 10 App. Cas. 453, at pp. 502 *ff.*, Lord Selborne; *cf.* (1934), 12 Can. Bar Rev. 134. Before the beginning of the seventeenth century the idea had prevailed in England that causes governed by a given law were determinable by courts administering that law and not by any other courts, and apparently it was not till the second half of the eighteenth century (*Holman* v. *Johnson* (1775), 1 Cowp. 341, at p. 344) that it was unequivocally stated (by Lord Mansfield) that by "the law of England" a cause of action might in an English court be governed by the law of a foreign country (cf. *Robinson* v. *Bland* (1760), 2 Burr. 1077, 1 W. Bla. 234, 256). The same thing was said in effect by Sir William Scott (afterwards Lord Stowell) in *Dalrymple* v. *Dalrymple* (1811), 3 Hagg. 54. The old principle of exclusive administration of the court's own law still prevails in England in the matter of divorce. See Sack, *Conflicts of Laws in the History of the English Law*, in LAW: A CENTURY OF PROGRESS (1937), vol. 3, 342, at pp. 375, 395 - 398. From this point of view it is interesting to note Jenner J.'s shift from jurisdiction of the foreign court (1838) to application of foreign law by an English court (1841), and it is obvious

v. *Rivaz*, limited to law and excluding jurisdiction, is not simple in its general application. If the court in Y adopts the same formula, and decides the case as if it were sitting in X, we get into the *circulus inextricabilis*. In *Collier* v. *Rivaz* the conflict of conflict rules was of the second class, a latent conflict arising from the use of nominally the same connecting factor, *domicile*, in two senses, and the case resembles *In re Annesley* in this respect. In other ways also the formula is not so simple as it might seem to be on first reading. In a case arising in X relating to the succession to the movables of a person who at the time of his death was domiciled (in the sense of the law of X) in Y, the formula may mean that the court distributes the movables situated in X :

(a) in the same way as a court in Y would distribute the same movables, that is, movables situated in X, belonging to the estate of the same person, that is, a *de cujus* who was domiciled (in the sense of the law of X) in Y, but who may have been domiciled (in the sense of the law of Y) in X or may have been a national of X, so that on one or other ground the law of Y may say that the succession is governed by the law of X; or

(b) in the same way as a court in Y would distribute, not the same movables, but movables actually or hypothetically situated in Y, belonging to the estate of the same person as explained in (a); or

(c) in the same way as a court in Y would distribute movables actually or hypothetically situated in Y and belonging to the estate, not of the actual *de cujus*, but of a *de cujus* hypothetically domiciled (in the sense of the law of Y) in Y or (if by the law of Y succession to movables is governed by the *lex patriae*) hypothetically a national of Y.

In (a) the situation in which the court of Y is supposed to serve as a guide to the court of X is the actual situation in which the court in X must give a decision, whereas in (b) the supposed decision of the court of Y relates to different movables, and in (c) not only are the movables different, but they belong to the estate of a different person. Logically it is only in (a) that a court in X can be thought of as being obliged to follow a judgment of a court in Y, or, in the absence of an actual

that it was natural for him to express the application of foreign law in terms of the English court deciding as if it were sitting in the foreign country.

judgment, to follow a hypothetical judgment; and probably Jenner J. had in mind something like construction (a), because he said that the English court "must consider itself sitting in Belgium under the particular circumstances of the case".[42] It happens, however, under the Anglo-American theory and practice, that there is normally a separate administration in each country in which the *de cujus* has left assets, so that a judgment in Y with regard to movables situated in X must be a hypothetical judgment, not an actual judgment, and in order to confer jurisdiction upon a court in Y for the purpose of its hypothetical judgment, the actual situation must be varied by supposing at least that the movables are situated in Y,[43] so that, in order to make the formula workable at all, construction (a) gives place to construction (b), by a mysterious process of conscious or unconscious transmogrification.[44] If it is permissible to play fast and loose with the situation by the imaginary transfer of the situs of the movables from X to Y, thus making the conflict rule of Y applicable to movables actually situated in X, why not render the situation a wholly domestic one in Y by the imaginary transfer of the *de cujus* from X to Y so as to make applicable the local succession law of Y, under construction (c) of the formula? If the succession law of Y is purely territorial in the sense that it relates only to movables situated in Y and directs their distribution in accordance with the local succession law of Y, without regard to the domicile or nationality of the *de cujus*, and contains no rules whatever as to movables situated elsewhere, then on construction (a) of the formula a court in X could *ex hypothesi* get no information as to what a court in Y would decide beyond

[42] *Collier* v. *Rivaz* (1841), 2 Curt. 855, at p. 859. As to Jenner J.'s probable meaning, see also notes 40 and 41, *supra*. The *Collier* v. *Rivaz* formula was applied in *In re Ross*, [1930] 1 Ch. 377 (*cf.* note 37, *supra*), without consideration of the difficulties involved in an English court's deciding a case as if it were sitting in a foreign country. It is pointed out by MENDELSSOHN-BARTHOLDY, RENVOI IN MODERN ENGLISH LAW (1937) 34 - 35, that the formula should mean that the English court would decide the case in the light of every provision of the foreign law, substantive or procedural, which the foreign court would apply to the case, and the learned author asks, "Would the doctrine of *renvoi* survive that?"

[43] Incidentally it may be pointed out that on any view the judgment of a court of Y could not fairly be regarded as a judgment *in rem* and as such binding on a court in X, because on construction (a) of the formula the court in Y would not have within its control the movables situated in X, and on construction (b) or construction (c) a judgment of a court in Y would relate to movables which *ex hypothesi* are different from those which are to be distributed by the court in X. *Cf.* (1937), 53 L.Q.R. 235, at pp. 566 - 567; (1934), 12 Can. Bar Rev. 136 - 138.

[44] *Cf. In re Ross*, [1930] 1 Ch. 377, at p. 390; DICEY, CONFLICT OF LAWS (5th ed. 1932) 872; Dobrin, *The English Doctrine of the Renvoi and the Soviet Law of Succession* (1934), 15 Brit. Y.B. Int. Law 36.

disclaiming jurisdiction, and the court in X would presumably apply the local law of X, but on either construction (b) or construction (c) of the formula the court in X would apply the local law of Y.[45]

Attempts have sometimes been made to explain *Collier* v. *Rivaz* on the theory that Jenner J. meant to give effect, not to the conflict rules of the country of domicile, but to special local rules of the law of that country applicable to the making of wills there by foreigners.[46] Whether Jenner J. had in mind any distinction of this kind is of course a highly speculative question, but in any event the result of the application of the formula stated by him would not appear to be limited in accordance with the distinction suggested. The result is that the forum gives effect to the law of the court of the domicile as to the disposition of a case containing from the point of view of the domiciliary court a foreign element. It is a matter of definition, but a rule of law which determines the effect of this foreign element would seem to be properly regarded as a rule of conflict of laws,[47] and, in the light of later cases in which the *Collier* v. *Rivaz* formula has been understood in a broad sense, it has seemed better in the foregoing discussion of the difficulties inherent in the formula to assume that it involved the application of the conflict rules of the domicile. It should be mentioned, however, that there may be a class of cases (of which *Collier* v. *Rivaz* is not itself an apt illustration) in which the forum in X, upon being referred by its own conflict rule to the law of Y, must give effect to a reference back to the law of X or forward to the law of Z. If, for example, Y is a country in which there is no common territorial law applicable normally to local transactions between local people, but merely different sets of special rules applicable to different categories of persons on the basis of race, religion or nationality, and the case which the forum in X has to decide depends upon the personal law of a person domiciled in Y, the forum has no choice but to apply the special rules of the law of Y applicable by the law of Y to that person, even though this involves the

[45] Dobrin, *op. cit.*, note 44, *supra*, points out that this would mean that as many refugees from Soviet Russia would, by reason of their intention to return to Russia in the event of a change of régime there, be held by an English court not to have lost their domicile of origin, they could not make a valid will except within the narrow limits of Soviet succession law, if at all.

[46] See especially MENDELSSOHN - BARTHOLDY, RENVOI IN MODERN ENGLISH LAW (1937) 59 - 66.

[47] *Cf.* Griswold, *Renvoi Revisited* (1938), 51 Harv. L.R. 1165, at p. 1198.

forum's giving effect to a reference by the law of Y to the law of X or Z.[48]

(3) *The acquired rights theory.* A third mode of stating the doctrine of the *renvoi* is an attempt to evade the difficulties inherent in the first mode of stating the doctrine (the *ping-pong theory*) and in the second mode (the *foreign court theory*) respectively, by the theory that the forum in X is referred by its conflict rule to the law of Y merely for the purpose of ascertaining whether rights have been acquired under the law Y which ought to be recognized in X, so that the forum is concerned with the doctrine of the *renvoi* only to the extent that the doctrine is recognized by the law of Y.[49] Thus the arbitrary stopping of the game either on the return of the service[50] or after the server has been allowed a second stroke[51] depends solely upon the whim of the player in whose court the ball has been placed by the server. The result is therefore the same as under the first mode of statement, but the result is rendered more plausible by the omission of all mention of possible reciprocal references; and if the law of Y adopts the same theory, that is, that the reference by the conflict rule of Y to the law of X is solely to ascertain whether rights have been acquired under the law of X, we are back in the *circulus inextricabilis.* Furthermore, the third mode of stating the doctrine would seem, on analysis, to be lacking in reality. If rights are acquired in Y which ought to be recognized in X, it must be because the law of X says that the law of Y has jurisdiction to create the rights in question, and the rights in question must be rights arising from the application of the law of Y to the actual factual situation which presents itself to the court in X, as, for example, is contemplated by construction (a) of the *foreign court theory* formula — the second mode of stating the doctrine of the *renvoi* already mentioned. Just as the theory that the court in X decides as if it were sitting in Y is deprived of the quality of reality when a hypothetical situation is substituted for the actual situation, so the acquisition of rights by the law of Y ceases to be a reality if the court in X, instead of asking what rights have been acquired by the law of Y in the actual situation, asks what rights would have been

[48] As to "cases on extra-territorial jurisdiction", such as *Bartlett* v. *Bartlett,* [1925] A.C. 377, see Vesey-Fitzgerald, in a review of the 5th edition of DICEY'S CONFLICT OF LAWS in *Jo. Soc. Public Teachers of the Law* (1932) 54, quoted (1934), 12 Can. *Bar* Rev. 140 - 141; *cf.* (1937), 53 L.Q.R. 567.

[49] *In re Askew,* [1930] 2 Ch. 259; note 34, *supra.*

[50] *In re Ross,* [1930] 1 Ch. 377; notes 35 and 37 *supra.*

[51] *In re Annesley,* [1926] Ch. 692; notes 33 and 36, *supra.*

acquired by the law of Y in some other situation, as, for example, when the movables are hypothetically transferred to Y so as to confer jurisdiction upon a court in Y, or to confer upon the law of Y jurisdiction to create rights, in respect of the movables. The acquisition of rights under the law of Y is a pure fiction invented by the court in X either (a) when the law of Y is inapplicable to be actual situation and therefore does not create any rights, or (b) when the court in X supposes that the actual situation is a different situation in order to make it one to which the law of Y is applicable. In either event the rights are created by the law of Y only in the sense that the law of X says that they are so created.

As between different states of the United States the acquired rights theory may be said to be based upon the existence of a common theory with regard to jurisdiction to create rights. Between those states there may be supposed to exist a substantial identity of conflict rules, so that problems of the *renvoi* or problems arising from conflicts of characterization are so infrequent as to be negligeable. The acquired rights theory is in these circumstances only a disguised mode of stating the scope and meaning of the common body of rules relating to the choice of the proper law; and is therefore relatively unimportant. If a question of the conflict of laws arises, however, between a state of the United States and another country, there may be no common theory of jurisdiction to create rights, or no common theory as to choice of law or characterization, and the problem of the *renvoi* is more likely to arise. In these circumstances the forum in a state of the United States must do, what it does not ordinarily have to do in a case involving two states of the United States, that is, it must define its attitude with regard to the relation between the conflict rules of the forum and the conflict rules of the foreign country. In this connection one cannot help thinking of the obvious contradiction[52] between the theory of acquired rights, or of jurisdiction to create rights, stated in various sections of the Conflict Laws Restatement of the American Law Institute on the one hand, and the rejection of the doctrine of the *renvoi* as a general rule and the insistence on characterization by the *lex fori*, stated in § 7 of the same Restatement, on the other hand. Possibly we must think of most of the Restatement as an exposition of a system of the conflict of laws limited in

[52] *Cf.* Cook, *Tort Liability and the Conflict of Laws* (1945), 35 Columbia L.R. 202, at pp. 121 ff.; *'Contracts' and the Conflict of Laws* (1936), 36 Illinois L.R. 143, at pp. 166 - 167.

its application to the states of the United States, within which there exists theoretically a common law of the United States with regard to jurisdiction to create rights and a common system of characterization, so that there is no need to provide for cases of conflict of conflict rules. And possibly we must think of § 7 of the Restatement as containing special provisions applicable as between a state of the United States and a foreign country, that is, to cases in which there is more likely to be a conflict of conflict rules, the effect being to maintain the supremacy of the conflict rules of the forum by expressly negativing the doctrine of the *renvoi* and providing for characterization by the *lex fori*, and of course impliedly negativing the acquired rights theory. Whether or not this conjecture is right in the sense that it affords a possible explanation or alleviation of the mutually inconsistent theories of the Restatement, it seems strange that no serious attempt has been made to reconcile the theories. Somewhat analogous to my conjecture is the interesting suggestion made by Griswold[53] that an objection to the *renvoi* "which might be of some weight in a country where Continental law has to be applied ought not to be generalized into an absolute rule against any recognition of foreign conflicts rules in any circumstances whatever." Apparently he contemplates, however, the contrast between the conflict rules of all Anglo-American countries and those of other countries,[54] whereas my conjecture contemplates that the states of the United States constitute one group and all other countries another group, and that in any conflict between a state of the United States and any other country the Restatement in § 7 is intended to exclude from consideration the conflict rules of the other country.

§ 6. Exceptional Situations

It has been suggested that theories in the conflict of laws go round and round, and that their chief merit is that they are good mental gymnastics, sharpening the wits of lawyers and students,[55] and this suggestion may seem especially appropriate to theories concerning the *renvoi*. In any event it should be

[53] *Renvoi Revisited* (1938), 51 Harv. L.R. 1165, at p. 1179.

[54] The author adds in a footnote: "Compare the argument that conflict of laws rules in situations involving states of the United States, or other Anglo-American jurisdictions, may well be different from the rules applicable where the reference is to a foreign or non-common-law country. This is best developed in Du Bois, *The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions* (1933), 17 Minn. L. Rev. 361."

[55] Cf. de Sloovère, Book Review (1938), 15 N.Y. Univ. L.Q.R. 601.

noted that the English case law which affords the basis for speculation on the doctrine of the *renvoi* consists, with one obscure exception,[56] of decisions of single judges, differing *inter se* in their reasoning, and not binding on other judges,[57] although some writers of continental Europe seem more inclined than Anglo-American writers to regard the problem of the *renvoi* in Anglo-American law as being settled by authority.

Again, the English decisions upon the *renvoi* relate only to the meaning of "the law of the domicile" in an English conflict rule,[58] and afford no support for a general principle that a reference by an English conflict to the law of a foreign country means the whole of that law, in cases in which domicile is not the connecting factor,[59] and in fact in many cases English courts have as a matter of course applied the local rules of the proper law indicated by English conflict rules, apparently without considering the possibility of the renvoi.[60]

Moreover, most if not all of the older cases upon the *renvoi* belong to a still more limited field, namely, the law of the domicile in its relation to the formalities of making of a will. These cases constitute perhaps a separate class in which the *renvoi* is a justifiable alternative device for upholding a will

[56] *Bremer* v. *Freeman* (1857), 10 Moo. P.C. 306; *cf.* (1930), 46 L.Q.R. 480 - 482, [1932] 1 D.L.R. 16 - 19; (1934), 12 Can. Bar Rev. 140. The reasoning of the judgment is so obscure that the case has been cited sometimes for the *renvoi*, sometimes against the *renvoi*. Luxmoore J., in *In re Ross*, [1930] 1 Ch. 377, at pp. 393 - 394, gives a summary of the reasoning, and considers that the case supports the theory of *Collier* v. *Rivaz*. Maugham J., in *In re Askew*, [1930] 2 Ch. 259, does not even mention *Bremer* v. *Freeman* as an authority for or against the *renvoi*. MENDELSSOHN-BARTHOLDY, RENVOI IN MODERN ENGLISH LAW (1937) 69, says that the judgment in *Bremer* v. *Freeman* "effectually disposes of *Collier* v. *Rivaz*". If the judgment in *Bremer* v. *Freeman* had been unequivocal, it would, as a judgment of the Privy Council on appeal from an English court, have had considerable weight as an authority on the *renvoi* in English law. On the other hand, the Privy Council, if it hears an appeal from another "country" (province, state, colony, etc.), must of course decide the case as if it were sitting in that country, and apply the conflict rules of that country, and if such conflict rules contain a reference to the law of England or the law of some other country, the application of the law indicated by that reference is not an example of the *renvoi:* cf. (1934), 12 Can. Bar Rev. 141; (1937), 53 L.Q.R. 567. As to cases on extra-territorial jurisdiction, see note 48, *supra*. The case of *Ross* v. *Ross* (1894), 25 Can. S.C.R. 307, decided by the Supreme Court of Canada, will be especially mentioned later.

[57] Goodhart, *Precedent in English and Continental Law* (1934), 50 L.Q.R. 40, at p. 42: "Nor is one court of first instance bound by the decision of another court of similar jurisdiction, although it will pay it great respect."

[58] One exception is *In the Goods of Lacroix* (1877), 2 P.D. 94, in which the conflict rules of the place of making of a will were applied; *cf.* note 61, *infra*.

[59] *Cf.* MENDELSSOHN-BARTHOLDY, RENVOI IN MODERN ENGLISH LAW (1937) 17.

[60] MENDELSSOHN-BARTHOLDY, *op. cit.* 44 - 57.

which admittedly embodies the expression of a testator's latest testamentary intention, and which is admittedly a valid will in every point except in point of formalities. As regards the formal validity of an otherwise valid will there is much to be said for the view that the will should be upheld if it complies with either the local rules or the conflict rules of the proper law selected in accordance with the conflict rules of the forum, that is, as to immovables the *lex rei sitae*, as to movables the *lex domicilii*, or, as to personal property, the *lex loci celebrationis* or any of the other alternatives allowed by Lord Kingdown's Act.[61] When English courts in various cases applied the conflict rules of the domicile for the purpose of upholding wills in point of form,[62] they did not decide, and it is almost certain that no English court will ever decide, that a will made in accordance with the local forms, but not in accordance with the conflict rules, of the domicile would be formally invalid. The courts will almost certainly continue to uphold wills in point of form by the alternative application of the local rule and the conflict rule of the selected proper law, and until the courts have decided that one of the two rules is exclusively applicable, the cases relating to the formal validity of wills have really no bearing on the general question whether the reference in a conflict rule of the forum to a foreign law means the whole law or the local law.[63] Nevertheless, although cases of this kind ought not to be used in support of the general doctrine of the *renvoi*, it was through such cases that the doctrine obtained a foothold in English law.

The case of *Ross* v. *Ross*,[64] decided by the Supreme Court of Canada, should be specially mentioned here. A holograph

[61] *Cf. In the Goods of Lacroix* (1877), 2 P.D. 94, note 58, *supra*, in which a will made in France in a form recognized by the conflict rules of the place of making was held to be valid in England. Clearly, if the will had been made in one of the local forms of the place of making, it would have been held to be valid in England. The construction of the statute as authorizing wills to be made in *either* the local form, *or* according to the conflict rules, of the place of making, is approved by Griswold, *Renvoi Revisited* (1938), 51 Harv. L.R. 1165, at p. 1191.

[62] *Cf.* cases cited by WESTLAKE, PRIVATE INTERNATIONAL LAW (5th ed. 1912) 38 - 39. MENDELSSOHN-BARTHOLDY, RENVOI IN MODERN ENGLISH LAW (1937) attempts (pp. 59 *ff.*) to explain away *Collier* v. *Rivez* (1841), 2 Curt. 855, but admits (p. 67) that he cannot explain away *Frere* v. *Frere* (1847), 5 Notes of Cases 593. He thinks (p. 69) that both cases were overruled by *Bremer* v. *Freeman* (1857), 10 Moo. P.C. 306, but says that *In the Goods of Lacroix, supra*, returns to the view taken in *Frere* v. *Frere* (p. 71).

[63] This was pointed out by BATE, NOTES ON THE DOCTRINE OF RENVOI IN PRIVATE INTERNATIONAL LAW (1904) 109; *cf.* (1931), 47 L.Q.R. 290, [1932] 1 D.L.R. 46.

[64] (1894), 25 Can. S.C.R. 307. For a good discussion of the case, see Schreiber, *The Doctrine of the Renvoi in Anglo-American Law* (1918), 31 Harv. L.R. 523, at pp. 561 - 564.

will made in New York by a testator domiciled in Quebec was held to be valid in Quebec under article 7 of the Civil Code of Lower Canada, which provides in effect that a will is valid if it is made according to the forms required by the law of the place of making. In the Supreme Court (a) three of the five judges held article 7 to be permissive, not imperative, and (b) four of the five judges held that a will made in a form recognized as valid by New York law although not made in a local New York form was valid even if article 7 were imperative. Some observations might be made on the case as an authority on either of the alternative grounds of decision or on the *renvoi* generally[65], but the result, limited to the question of the formal validity of a will, is in accordance with the trend of English decisions and with the view advanced above in favour of treating cases relating to the formalities of making of wills as a special class.

In England, as already pointed out, the courts have been inclined, in cases not involving the *lex domicilii* as such, to assume that a reference to a foreign law means a reference to the local rules of that law, and in the United States the disregarding of the possibility of the *renvoi* has been even more general. On that account the case of *University of Chicago* v. *Dater*[66] appears to be a veritable *enfant terrible*. One of the defendants, a married woman, signed, in Michigan, a promissory note and a mortgage on land situated in Illinois to secure repayment of a loan to be made by the plaintiff to the woman's husband and others. The documents were posted in Michigan by the plaintiff's agent to the plaintiff in Illinois, and, after the removal of a cloud on the title to the land, the loan was completed by the payment of the money in Illinois. In an action brought in Michigan upon the note it was held that the married woman was not liable, she having no capacity by the law of Michigan to bind her separate estate by a personal engagement for the benefit of other persons, although by the law of Illinois a married woman has complete capacity to contract. According to the opinion of the majority of the appellate court, if the place of contracting was Michigan the married woman was clearly not liable, and if the place of con-

[65] *Cf.* (1931), 47 L.Q.R. 287 - 288, [1932] 1 D.L.R. 40 - 41; (1934), 12 Can. Bar Rev. 139 - 140.

[66] (1936), 277 Mich. 658, 270 N.W. 175; LORENZEN, CASES ON THE CONFLICT OF LAWS (4th ed. 1937) 448; HARPER AND TAINTOR, CASES ON JUDICIAL TECHNIQUE IN THE CONFLICT OF LAWS (1937) 248; comments in (1937), 50 Harv. L.R. 1119, 1159; 35 Mich. L.R. 1299; 21 Minn. L.R. 739.

tracting was Illinois the result was the same because by the conflict rules of Illinois the married woman's capacity would be governed by the law of Michigan as the law of the place of contracting. Three of the seven judges dissented, on the ground that by the *lex fori* the contract was made in Illinois, and that the Michigan court should disregard the Illinois law as to the place of making and should apply the local law of Illinois as to capacity to contract. The case is notable because the majority of the court applied the doctrine of the *renvoi* in the field of commercial contract law, a field which has been hitherto relatively free from the doctrine, and because the conflict of conflict rules was of a class in which, it is submitted, the *renvoi* is peculiarly open to objection, that is, a conflict as to the characterization or definition of the connecting factor, a matter usually considered as being one which should be decided in accordance with the concepts of the forum. The decision is of course inconsistent with § 7 of the Conflict of Laws Restatement (rejecting the *renvoi* and providing for characterization by the *lex fori*), but on the other hand it is in accord with the acquired rights theory[67]. The Michigan court did recognize a right to immunity created by the law of Illinois; whereas if it had applied Illinois local law it would have recognized "hypothetical relations of hypothetical parties"[68].

An exception is generally made in favour of the *renvoi*, even by those who do not approve of the general application of the doctrine, in the case of title to land. It would appear that as regards proprietary interests in immovables it is logical, and indeed inevitable, that a court sitting in a country other than that of the situs should acquiesce in whatever the *forum rei sitae* has decided or would decide, including, as a subsidiary question, or as a necessary incident in the process of the characterization of the question, the characterization or classification of property as movable or immovable[69]. Also, as regards proprietary rights in tangible movables, there is much to be said on principle in favour of the same view, that is, that overriding effect should be given to the *lex rei sitae*, although, owing to the mobility of the subject matter, the practical neces-

[67] *Cf.* my conjectural explanation, at the end of § 5, *supra*, of the apparent inconsistency between different theories of the Restatement.

[68] STUMBERG, CONFLICT OF LAWS (1937) 207 (with reference to some earlier cases); *cf.* Cook, *Logical and Legal Bases of the Conflict of Laws* (1924), 33 Yale L.J. 457, at pp. 471 - 473; Griswold, *Renvoi Revisited* (1938), 51 Harv. L.R. 1165, at p. 1207.

[69] *Cf.* (1937), 53 L.Q.R. 543, 561 *ff.*, and the somewhat more detailed statement, (1937) 15 Can. Bar Rev. 234 *ff.* As to the "preliminary question", see § 4, *supra*.

sity of giving effect to a proprietary right created by the *lex rei sitae* may subsequently cease to exist. As to both immovables and movables, if effect is to be given to a proprietary right acquired under the *lex rei sitae,* it follows that the subsidiary question whether the right acquired is proprietary (*jus in re*) or is personal (*jus ad rem*), must itself be answered in accordance with the *lex rei sitae*[70]. To this it has been objected that it is illogical to characterize a question in accordance with the *lex rei sitae* when the applicability of the *lex rei sitae* depends on the particular way in which the question is characterized, and that the question must be decided by the *lex fori*, though the principle of effectiveness requires that the *lex rei sitae* be consulted as a part of the factual situation.[71] If the view is accepted, however, that the *lex rei sitae* is the governing law with regard to proprietary rights, it is submitted that full effect can be given to this rule only if it is by that law that it is decided whether a right is proprietary or not. Therefore, if a person claims to have acquired, by transfer *inter vivos*, a proprietary right in a thing, not only must the *lex rei sitae* be consulted because it may be the proper law, but also that law is decisive of the question whether the right, if any, is proprietary or not.[72]

As regards the application of the doctrine of the *renvoi* to cases other than title to land, there is great diversity of opinion. The Conflict of Laws Restatement, in the various drafts of § 8, shifted from a "question of status" (1926) to the "existence of marital status" (1930), and finally to "questions concerning the validity of a decree of divorce" (1934).) In its final form the Restatement would appear to be right, so far as it goes. Some measure of uniformity with regard to divorce decrees is secured by the acceptance of the view that a decree is valid if it either was pronounced by a court of the domicile or is a decree which would be recognized as valid by a court of the domicile; and the acceptance of this view will partially bridge the gap between countries in which divorce jurisdiction is based on domicile and countries in which divorce jurisdiction is based on nationality. The matter is one of jurisdiction, however, and not one of choice of law, and if there is anything which may properly be called the *renvoi*, it is *renvoi* in a somewhat different sense from

[70] See note 69, *supra.*

[71] Hellendall, *The Res in Transitu and Similar Problems in the Conflict of Laws* (1939), 17 Can. Bar Rev. 7, at pp. 107 - 109.

[72] *Cf.* (1938), 16 Can. Bar Rev. 146 - 147.

the *renvoi* which is discussed in the present article. It is a theory of jurisdiction of courts which helps to make uniform the recognition of marital status so far as that status is dependent solely upon the validity of the dissolution of a given marriage.

Again, if the existence of marital status is dependent solely upon the validity of a given marriage, as distinguished from the validity of the dissolution of a given marriage, there is no question of status that can be referred to a single law governing status, and the question is really one of marriage law, which may be referable to one or more of several laws according as the marriage is sought to be impeached as being invalid in point of formalities of celebration or as being intrinsically invalid by reason of incapacity of parties or otherwise. In a sense the question of the validity of the marriage is a preliminary question[73] to the question of the existence of the status, but there would seem to be no reason why on that account the selection of the proper law with regard to any aspect of the validity of the marriage should be subordinated to the selection of the proper law with regard to status; on the contrary the question of status is in the circumstances a mere incident or result of the decision on the main question of the validity of the marriage. As to the validity of a given marriage, there is much to be said for the view that if the only point in issue is its formal validity, it should be sufficient that either the local formalities of the *lex loci celebrationis* or any formalities recognized as valid in the particular case by that law have been complied with.[74]

As regards the existence of status other than marital status, and distinguished from capacity and from consequences of status, it would seem to be desirable, in order to secure uniformity, that whatever has been decided or would be decided by a court of the domicile (whether by the use of its conflict rule referring to the *lex domicilii* or the *lex patriae*, as the case may be, or by the application of its own local law) should be followed by a court elsewhere.[75] A status may be regarded as a *res*, at least

[73] As to the "preliminary question", see § 4, *supra*.

[74] See *In re Lando's Estate, Lando* v. *Lando* (1910), 112 Minn. 257, 127 N.W. 1125, LORENZEN, CASES ON THE CONFLICT OF LAWS (4th ed. 1937) 750, HARPER AND TAINTOR, CASES ON JUDICIAL TECHNIQUE IN THE CONFLICT OF LAWS (1937) 300; *cf.* the analogous treatment of the formalities of making of an otherwise valid will already suggested.

[75] *Cf.* (1937), 53 L.Q.R. 235, at pp. 544, 566; 15 Can. Bar Rev. 215, at pp. 240 *ff.* On this ground the decision in *In re Askew*, [1930] 2 Ch. 259, *supra*, notes 34 and 49, may be right in the result, but it should not be used as an authority for the general application of the doctrine of the *renvoi*.

in a metaphysical sense.[76] It is a single *res*, and a judgment of a court of the domicile may be regarded as a judgment *in rem*, whereas in the case of succession the movable property situated in one country is one *res* and that situated in another country is another *res*, so that a judgment of a court of the domicile with regard to the movables situated in the country of domicile cannot be regarded as a judgment *in rem* with regard to movables situated elsewhere.[77]

Again, if all the factual elements of a situation have taken place or are localized in a foreign country, so that in a court of that country the situation would be a purely domestic situation presenting no problem in the conflict of laws, and litigation takes place in another country with which the situation is wholly unconnected except by reason of the fact that that country is the place of litigation, a relatively strong case is presented in favour of the view that the forum should decide the issue as if it were a court sitting in the foreign country[78], or should give effect to rights acquired under the foreign law.[79]

It may be objected that the result of the foregoing is that the general rule that the doctrine of the *renvoi* should be rejected is eaten up by the exceptions, and that it would be better to accept the doctrine except in cases in which it leads to the *circulus inextricabilis*.[80] It is submitted, however, that the exceptions relate to a relatively small part of the whole field of law, and that practical, if not theoretical, considerations lead to the conclusion that, as a general rule, a court should not have to concern itself with the conflict rules of the proper law selected by it according to its own conflict rules. The burden, sometimes heavy, sometimes almost insuperable, of ascertaining and applying foreign conflict rules should not, as a purely practical matter, be imposed on a court unless it appears, or is made to appear by one of the litigants, that the situation is an exceptional one in which consideration of the conflict rules of the proper law is required or justified on more or less

[76] *Cf. Salvesen or von Lorang* v. *Administrator of Austrian Property*, [1927] A.C. 641, at pp. 655, 662.

[77] *Cf.* note 43, *supra*.

[78] *Cf.* note 42, *supra*.

[79] *Cf.* Cook, *Tort Liability and the Conflict of Laws* (1935), 35 Columbia L.R. 202, at pp. 204, 224. While the reference is apt with regard to the general principle, it is of course not appropriate to the particular case of tort liability in English conflict of laws, because, unlike the rule prevailing in the United States, the English rule is in effect that the existence and extent of liability in tort is governed by the *lex fori*, subject only to the limitation that the act in question must not be justifiable by the law of the place where it was done.

[80] *Cf.* Griswold, *Renvoi Revisited* (1938), 51 Harv. L.R. 1165, at p. 1183.

practical or theoretical grounds or on the basis of policy in order to reach a just result. While it cannot be expected that there will be unanimous agreement as to all the exceptional cases, it does not seem to be unlikely that substantial agreement can be reached.[81]

§ 7. Renvoi and Characterization.

A *renvoi* problem may of course arise from any conflict between the conflict rules of the forum and the conflict rules of a foreign country.[82] It has appeared from the foregoing review of some aspects of the doctrine of the *renvoi* that the doctrine has been much discussed in connection with the second and third classes of conflict of conflict rules, and that in that connection courts have shown some inclination to defer to the conflict rules of foreign countries. In the third class of conflicts courts have sometimes given effect to a foreign conflict rule which is patently different from the conflict rule of the forum in that different connecting factors are specified in the two rules, and in the second class of conflicts they have sometimes given effect to a foreign conflict rule which is different from that of the forum only because the nominally identical connecting factor bears different meanings in the two countries. Strange to say, courts have not shown a similar disposition to defer to the conflict rules of a foreign country in the first class of conflicts of conflict rules, that is, where the conflict rules of two countries are the same in terms, using the same connecting factor in the same sense, and the conflict arises solely from a difference in the characterization of the question involved in the factual situation. It might have occurred to the courts in this first class of conflict rules, as in the second and third classes, that they should apply the doctrine of the *renvoi*, but on the contrary they have been inclined to go to the other extreme in characterizing the question in accordance with the concepts of the *lex fori*, apparently either without realizing that there is a conflict of conflict rules at all or without conceiving that it may be desirable to approach the problem of characterization in such a way as to avoid or alleviate the conflict. At the risk of repetition I venture to suggest that the process of characterization should be a flexible one, involving the consideration of the provisions of potentially applicable laws and the conse-

[81] For various suggestions as to exceptional cases, see Lorenzen (1918), 27 Yale L.J. 529, 531, and (1921), 31 Yale L.J. 191, 193; (1922), 35 Harv. L.R. 454, 455; (1926), 36 Yale L.J. 114; Griswold (1938), 51 Harv. L.R. 1165, 1171, 1176; Cowan (1938), 87 U. of Penn. L.R. 1, 7 - 8.

[82] See § 3, *supra*.

quences of the selection of the proper law.[83] It is at least clear that the interrelation of characterization, the *renvoi* and acquired rights has not yet been fully explored, and it is submitted that the matter deserves further consideration.

One of the most recent writers on the *renvoi* has indeed laid stress on the possibility of the *renvoi* problem arising in connection with the conflicts of characterization,[84] but it would appear that he has chiefly in mind conflicts relating to the characterization or definition of the connecting factor, such as domicile or place of contracting. In fact in English law the *renvoi* problem originally arose in connection with this class of conflict of conflict rules, with particular reference to the concept of "domicile".[85] My present point is, however, somewhat different, namely, the applicability of the doctrine of the *renvoi* to the case of a conflict in the characterization of the question in two countries, leading to the selection of different connecting factors, as, for example, if by the law of X a requirement as to parental consent to the marriage of a minor is characterized as part of the formalities of solemnization of marriage, so that the *lex loci celebrationis* is the governing law, and by the law of Y such a requirement is characterized as a matter of capacity to marry or intrinsic validity of marriage, so that the *lex domicilii* is the governing law. My object is limited for the moment to pointing out that, so far as there is any question of logic in the present subject, the application of the doctrine of the *renvoi* might be just as logical or illogical in this class of conflict of conflict rules as in any other class. Conflicts of this class may be less obvious or more subtle than the conflicts in which the doctrine has heretofore played a part, but as the courts become more conscious of the existence of latent conflicts arising from divergent modes of characterization, then, if they are disposed to decide a case as it would be decided by a court of a given foreign country, there is no particular reason why they should not extend the doctrine of the *renvoi* to these conflicts. Personally I am not in favour of their doing so, as I think that the doctrine should be rejected apart from exceptional classes of cases already discussed, and I submit that without abandoning characterization of the question abso-

[83] See § 2, *supra*.

[84] Cowan, *Renvoi Does Not Involve a Logical Fallacy* (1938), 87 U. of Penn. L.R. 1; note 3.

[85] See § 5, *supra*. In *University of Chicago* v. *Dater* (1936), 277 Mich. 658, 270 N.W. 175, note 66, *supra*, the *renvoi* was applied in a conflict of conflict rules of the same class, with particular reference to the concept of "place of contracting."

lutely to the *lex causae,* a just result may be reached if the question is characterized by the forum in the light of the potentially applicable laws. Sometimes the same result will be reached as if the doctrine of the *renvoi* were applied, but something will be left to the discretion of the forum.[86]

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[86] See §§ 3 and 4, *supra.*