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RENOI AND THE LAW OF THE DOMICILE

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In the latest English case on the doctrine of the *renvoi*,¹ an English court, having found that the *de cuius* was domiciled at the time of her death in Italy, decided that the proper law governing the succession to her movables situated in England was the law of Eire. This choice of law seems on its face to be so lacking in any real or substantial foundation that it is worth while to consider whether there are any grounds, practical or theoretical, that can possibly justify the result reached.

§ 1. REJECTION OF RENVOI, THEORY OF PARTIAL RENVOI AND THEORY OF TOTAL RENVOI

If, with regard to a particular question arising in a court of country X, a conflict rule² of the law of X refers to the law of country Y (in its character as the *lex domicilii*, or as the case may be), and if, with regard to a similar question, the corresponding conflict rule of the law of Y refers to the law of X,

¹ *In re O'Keefe, Poingdestre v. Sherman*, [1940] Ch. 124. The judgment as reported in the *Law Reports* differs in some respects from the earlier version reported in 162 L.T. 62, 56 Times L. R. 204, 109 L.J. Ch. 86, and [1940] 1 All E.R. 216; cf. note 47, *infra*. As to the facts, see p. 326, *infra*.

² For the sake of brevity a "rule of the conflict of laws" will be referred to in the subsequent discussion as a "conflict rule", as contrasted with a "domestic rule" or "domestic law" (variously called a "local", "internal", "territorial" or "municipal" rule or law). Alternative terms suggested by Taintor, "*Universality*" in the *Conflict of Laws* (1939), 1 Louisiana L. R. 695, at p. 696, are "indicative" rules as contrasted with "dispositive" rules.

there is what may be called a conflict of conflict rules,³ and the court of X might do any one of three things,⁴ according to its particular attitude towards the doctrine of the *renvoi* :

(1) The court of X might apply the domestic law of Y, that is, the law of Y appropriate to a similar question arising in a purely domestic situation in Y, or, in other words, the law of Y appropriate to the actual situation presenting itself to the court of X except that it is divested of any of the place elements which have given rise to the problem of conflict of laws, so as hypothetically to become a domestic situation localized in Y which presents itself to a court in Y. According to this view the court of X rejects the doctrine of the *renvoi* and decides that the conflict rule of X means what it says, and that effect is to be given to the forum's selection of the law of Y without regard to the conflict rules of the law of Y or any doctrine of the *renvoi* prevailing in the law of Y.

(2) The court of X might give effect to the conflict rule of Y in the sense that the court accepts the reference back from the law of Y to the law of X and applies the domestic law of X without considering what, if any, theory of the *renvoi* is included in the conflict rules of Y, that is, without considering whether, if a similar question arose in Y, a court of Y would itself give effect to the conflict rule of X by which the proper law is the law of Y. According to this view the court of X adopts what may conveniently be called a theory of partial, imperfect or pseudo *renvoi*.

(3) The court of X might give effect to the conflict rule of Y as it would be applied by a court of Y to the same situation, including whatever theory of the *renvoi* prevails in the conflict

³ A conflict of conflict rules may arise in any one of the three successive stages of characterization of the question, selection of the proper law and application of the proper law. My own suggestions as to the existence of these three logical stages in the court's enquiry, and as to the different kinds of conflicts of conflict rules arising in these stages respectively, are contained in *Characterization in the Conflict of Laws* (1937), 53 L.Q.R. 235, 537; *Conflict of Laws: Examples of Characterization* (1937), 15 Can. Bar Rev. 215, and *Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 369.

⁴ As to the three-fold character of the choice which confronts a court, cf. CHESHIRE, *PRIVATE INTERNATIONAL LAW* (1st ed. 1935) 132-135, (2nd ed. 1938) 47-56; MORRIS, *The Law of the Domicil* (1937), 18 Brit. Y.B. Int. Law 32, at pp. 33-34. The somewhat different language of my own restatement, in the text, of the three possible views is designed to present the problem in such a way as to lead on to the subsequent discussion of some of the difficulties raised by the English cases. While I think that as a general rule a reference to a foreign law by a conflict rule of the forum should be construed as a reference to the domestic foreign law, I would admit larger classes of exceptional cases than the authors above mentioned seem disposed to do. See 17 Can. Bar Rev. 388-396, and § 5 of the present article, *infra*.

system of Y, so that the court of X decides the case exactly as the same case, including all the actual place elements of the situation, would be decided by a court in Y if the case arose there. According to this view the court of X adopts what may conveniently be called a theory of total, perfect, true or integral *renvoi*.⁵

It is of course possible that a court of Y, in deciding a similar case, might adopt any one of the three theories above mentioned with regard to the doctrine of the *renvoi*, that is, it might (1) reject the doctrine altogether, (2) adopt a theory of partial *renvoi*, or (3) adopt a theory of total *renvoi*. If the conflict rules of X and Y are in agreement in both adopting theory (1) or in both adopting theory (2), a similar case would be decided in different ways in the two countries. If they are in agreement in adopting theory (3), no logical solution is possible.⁶ If, on the other hand, the conflict rules of X and Y adopt different theories with regard to the *renvoi*, the courts of the two countries may reach similar conclusions in similar cases, but this satisfactory result is purely fortuitous, in that it depends, paradoxically, upon the fact that at least one of the two systems of law has a defective theory of the *renvoi*.⁷ Two different theories cannot both be right, though they may both be wrong.

As found by Luxmoore J. in *In re Ross*,⁸ the law of Italy adopts theory (1) above mentioned, that is, it rejects the doctrine of the *renvoi*, so that when one of its conflict rules says that

⁵ Cf. De Nova, *Considerazioni sul Rinvio in Diritto Inglese* (1938), 30 *Rivista di Diritto Internazionale* 388 ff.

⁶ There does not appear to be any English case in which the English court has attempted to apply its theory of total *renvoi* to the law of a foreign country which itself adopts a theory of total *renvoi*.

⁷ Cf. De Nova, *op. cit.*, 411; Maury, *Règles Générales des Conflits de Lois*, RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL, vol. 57, (1936, III) 539: "Il est au moins surprenant qu'un système de portée logiquement générale ne puisse éviter la contradiction que par une application limitée, réduite, que la victoire en tous pays de la conception jugée la meilleure en doive marquer le définitif abandon." Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws* (1941), 50 *Yale L.J.* 743, at p. 753: "Personally, I cannot approve a doctrine which is workable only if the other country rejects it. Apart from that, I do not favour handing over our conflicts problems to so-called experts on foreign private international law. It is difficult enough to get accurate expert testimony with respect to foreign municipal law, but such testimony is much more unreliable with respect to foreign conflict of laws. For these reasons I should still regard the general acceptance of the *renvoi* doctrine in our law as most unfortunate."

⁸ [1930] 1 Ch. 377, at pp. 403-404. The law of Italy was of course a matter of fact in the English court, and it is possible that in another case, on the evidence of other expert witnesses, an English court will take some other view of the Italian law relating to the *renvoi*. It is at least probable that Luxmoore J.'s view of the Italian law does not correspond with what an Italian court would in fact do in the case of a reference by Italian

succession to movables is governed by the national law of the *de cuius*, the domestic rules of the national law are to be applied. In supposed compliance with the Italian conflict rule, the English court, adopting theory (3)—the total *renvoi*—applied domestic English law to a question of the intrinsic validity of a will of movables made by a testatrix of English domicile of origin who was at the time of her death a British subject domiciled in Italy. The same result would have been reached if the English court had adopted theory (2), but would of course have been different if the English court had adopted theory (1).

On the other hand French law, as found by Russell J. in *In re Annesley*⁹ and German law, as found by Maugham J. in *In re Askew*¹⁰ adopt theory (2), that is, the theory of partial *renvoi*. In the first case, when the French conflict rule refers the question of the intrinsic validity of a will of movables to the law of the domicile (in the French sense) of the *de cuius*, namely, English law,¹¹ and the English conflict rule refers the same question to the law of the domicile (in the English sense), namely French law, then French law accepts the reference back from English law and applies domestic French law. Accordingly, the English court, adopting theory (3)—total *renvoi*—applied domestic French law. In the second case, when the German conflict rule refers the question of legitimation by subsequent marriage to the national law of the father of the *de cuius*,¹² but German law will accept a reference back from the national law to German law as the law of the domicile, the English court, adopting theory (3), applied domestic German law, with the result that an adulterine child was held to be legitimated¹³ although there would have been no legitimation by domestic English law. The same result would have been reached if the

conflict rules to the "national law" of a *de cuius* who at the time of his death was a British subject domiciled (in the English sense) in Italy. This question will be further discussed below. See notes 34 ff., *infra*.

⁹ [1926] Ch. 692.

¹⁰ [1930] 2 Ch. 259.

¹¹ In the *Annesley Case* the French conflict rule was, inaccurately, said to refer to English law *qua* national law of the *de cuius*, and the judgment in this case, like that in the *Ross Case*, ignores the difficulties inherent in a reference to the national law of a British subject.

¹² The construction of the reference by the German conflict rule to the "national law" of the father of the *de cuius* as being a reference specifically to English law encounters the same logical difficulties as does the construction of the reference in *In re Ross* (note 38, *infra*) by the Italian conflict rule to the national law of the *de cuius* as being a reference to English law. See note 19, *infra*.

¹³ A point not noticed by Maugham J. in the *Askew Case* is that the child, even though legitimated, was not a child of the second marriage within the terms of the power of appointment there in question. On this point the decision seems to be inconsistent with *In re Wicks' Marriage Settlement*, [1940] Ch. 475: cf. comment (1941), 19 Can. Bar Rev. 44.

English court had applied theory (1), that is, if the English court had rejected the doctrine of the *renvoi* and said that the reference of the English conflict rule to the *lex domicilii* is a reference to the domestic rules of the domicile,¹⁴ but of course a different result would be reached if the English court adopted theory (2)—the partial *renvoi*—and in that event the English court on the one hand, and the French or German court on the other hand, would each apply the domestic law of the forum.¹⁵

§ 2. CONSEQUENCES OF THE THEORY OF TOTAL RENVOI

The three leading modern English cases already mentioned—the *Ross*, *Annesley*, and *Askew Cases*¹⁶—present, superficially, a doctrine which has a certain measure of coherency, a doctrine of total *renvoi*, the result in each case in the English court depending supposedly on the particular doctrine of the *renvoi* which prevails in the conflict rules of the foreign proper law, that is, in each of these three cases, the law of the country of domicile (in the English sense). The question whether this doctrine is theoretically or practically justifiable is one upon which it is possible to write from many points of view. The purpose of the present article is to draw attention to one aspect of the subject, namely, that a court which adopts the doctrine of the total *renvoi*, in whatever form it may be expressed, imposes upon itself the duty of giving effect to whatever would be decided in a particular case by a court of the country to the law of which reference is made by the conflict rule of the forum,¹⁷ and if the court is misinformed as to the foreign law or fails to interpret accurately the evidence of the foreign law, the supposed application of the doctrine of the total *renvoi* may lead to a grotesque result or a miscarriage of justice. It does not appear, on an examination of the leading

¹⁴ Russell J. in the *Annesley Case* expressed his personal preference for this mode of solving the problem, and Maugham J. in the *Askew Case* thought that there was "much to be said" for the "simple and rational solution" suggested by Russell J.

¹⁵ This prediction as to what a French or German court would do is based on the assumption that French and German law adopt theory (2) as stated above and as found in the *Annesley* and *Askew Cases*.

¹⁶ See notes 8, 9 and 10, *supra*.

¹⁷ This foreign court theory is exactly what the court in the *Ross Case* purported to apply, whereas in the *Annesley Case* the court adopted a mixture of this theory and the *ping-pong* or *lawn tennis theory*, and in the *Askew Case* the court adopted the *acquired rights theory*. See my *Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 369, at pp. 378-388, where some of the difficulties inherent in each of these theories are discussed. All three theories may be described as variants of the doctrine of total *renvoi* now under discussion.

modern cases already mentioned and other cases, that English judges have adequately performed the duty which they have assumed, or have even realized that the adoption of the doctrine of the total *renvoi* involves the assumption of that duty. Consequently the discussion of the *renvoi* doctrine by English judges is sometimes distinguished by a certain measure of *naïveté*—a certain unawareness of the nicety of the problems implicit in the method of solution adopted or a tendency to regard that solution as simpler than it really is. Part of the fault may probably be attributed to the existence of the rule of English conflict of laws that foreign law is treated as a matter of fact which must be proved by the party who relies on a provision of foreign law. This rule is not so bad, though not wholly satisfactory, when the foreign law to be proved is foreign domestic law, but even in that case there exists the danger that the evidence of a foreign expert, or a statement of foreign law agreed on or accepted by the parties, may not relate strictly to the domestic rules of the foreign law but may be confused by reference to the conflict rules of the foreign law.¹⁸ On the other hand, when the evidence of the foreign law relates or is intended to relate to foreign conflict rules, including the particular doctrine of the *renvoi* adopted in the foreign law, the danger of misunderstanding exists all along the line from the parties or their advisers who are not likely to understand in advance exactly what is to be proved, through the expert witnesses who may not be really expert in the intricacies of the *renvoi* doctrine, to the English judge who may thus be furnished with insufficient material for a decision with regard

¹⁸ In this respect a foreign judgment may be misleading evidence of the foreign law unless the reasons for judgment distinguish clearly between the domestic rules and the conflict rules of the foreign law: cf. my *Administration and Succession in the Conflict of Laws* (1934), 12 Can. Bar Rev. 136-138.

Even as regards domestic rules of foreign law the proof adduced, or a statement agreed on, may be defective. An unfortunate aspect of the rule that foreign law is a matter of fact which must be proved is that in the absence of proof the foreign law is presumed to be identical, at least apart from statutory changes, with the law of the forum. It is obviously not satisfactory that a court should act on a statement of the foreign law, or a presumption of foreign law, which it knows or has the means of knowing to be false. Cf. comment (1939), 17 Can. Bar Rev. 546, supplemented on another point (1940), 18 Can. Bar Rev. 308. Another curious point suggests itself in this connection. If a court adopts the theory of total *renvoi*, that is, if it says that a reference by a conflict rule of the forum to a foreign law is a reference to whatever law a court of that country would apply, then the foreign law to be proved includes the conflict rules of the foreign law and the foreign court's particular theory of the *renvoi*. Therefore, if the domestic law of the foreign country is proved to be different from that of the forum but no evidence is given of the foreign conflict rules or the foreign theory of the *renvoi*, these should be presumed to be identical with those of the forum, and no logical conclusion is possible: see note 6, *supra*.

to the foreign law and who may not even be aware of the insufficiency of the material.

The affidavit of Dr. Rost, "accepted by all parties as being correct" in the *Askew Case*,¹⁹ and apparently accepted by Maugham J. as satisfactory proof of German law, may be mentioned *en passant* as an example of evidence which discloses on its face that the witness with regard to the foreign law was not aware of the inherent difficulty of a reference by a German conflict rule to the national law of a British subject domiciled in Germany. He says "I am informed and believe that John Bertram Askew was an Englishman. Therefore English law would be applied by the German court in deciding the question." Askew was an "Englishman", however, only because his domicile of origin was English, whereas the reference by the German conflict rule was to the "national law" of the *de cuius*. How the witness transformed a reference to the law of a British subject, whatever that means, into a specific reference to the law of England is not explained. The witness does not purport to tell the English court how a German court would construe a reference to the national law of a British subject, which was what the case required, but merely says what a German court would do in the case of a person who as the witness is informed and believes "was an Englishman".

A similar inherent difficulty arises in the case of a reference by an Italian conflict rule to the national law of a British subject domiciled in Italy. As the Italian law was in question in both the *Ross Case*²⁰ and the *O'Keefe Case*,²¹ it may be worth while to consider more attentively than the English courts have done what an Italian court would probably do in a situation in which at the material time the *de cuius* was a British subject domiciled (in the English sense) in Italy, the matter being one which by the English conflict rule is governed by the domiciliary law of the *de cuius* and by the Italian rule is governed by his national law.

§ 3. UNITARY AND COMPOSITE SYSTEMS OF LAW

A reference by a conflict rule may be a reference

(1) to the law of a country which has a unitary system of territorial law, or

¹⁹ [1930] 2 Ch. 259, at p. 276. As to a similar patent error of a witness as to Italian law, see *In re Ross*, [1930] 1 Ch. 377, at pp. 403-404: note 38, *infra*.

²⁰ See notes 8, 19, *supra*.

²¹ See note 1, *supra*.

(2) to the law of a country which has a composite system of territorial law, or

(3) to the law of a country which has a composite system of personal law.²²

The significance of the foregoing classification may be considered, first, from the point of English conflict of laws or any other system in which domicile, not nationality, is the criterion of personal law or, in other words, in which domicile is the connecting factor in a given situation, and, secondly, from the point of view of Italian conflict of laws or any other system in which nationality, not domicile, is the criterion or connecting factor.

If an English conflict rule refers to the law of the domicile of the *de cujus*, the reference in either (1) or (2) is clearly to a territorial unit in which a single system of law peculiar to it prevails, that is, a separate "law district",²³ and it is immaterial whether that district is coextensive with a national political unit, as in the case of Denmark, Brazil, France, Italy or Germany,²⁴ or is merely one part of a larger political unit, as in the case of England, Scotland, Ontario, Quebec, New York or Pennsylvania. The reference to a distinct law district by the English rule is unequivocal, and the question whether the reference is to be construed as a reference to the domestic rules or as a reference to the conflict rules of the law of that district is a question of the construction of the conflict rule which may be answered in either of the two senses without affecting the unequivocal character of the reference so far as it indicates a particular law district.

In other words, in (1) and (2), the reference by the English conflict rule to the law of the domicile is unequivocal in its indication of the law of a particular law district as the proper law, but the reference may be either to the domestic rules or to the conflict rules of that law, according to the forum's particular theory with regard to the *renvoi*. In (3), however, not only is

²² This tripartite classification is stressed in Grasseti, *L'Art. 9 Disp. Prel. Cod. Civ., la Forma dei Testamenti ed un pretesa Caso di Applicazione della Teoria del Rinvio* (1935), 5 *Rivista di Diritto Privato*, n. 1, with particular references to a case falling within (3).

²³ READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW UNITS OF THE BRITISH COMMONWEALTH* (1938) 6, 7.

²⁴ The existence of the territorial divisions of Europe as of 1933 being assumed for the purpose of the present discussion, and the overseas possessions of France and Italy, and Alsace-Lorraine, likewise being disregarded for the same purpose, France, Italy and Germany are standard examples of countries with unitary systems of law, each of these countries being governed by a single civil code and being a separate law district.

the reference to the law of a particular law district unequivocal, but the reference is unequivocal also in another sense. The question whether the reference is to the domestic rules or the conflict rules of that law does not arise, and therefore no question as to the *renvoi* arises. If the country to the law of which reference is made by an English conflict rule is one which (at least with regard to the matter in question, as, for example, succession to movables) has no system of territorial law, (that is, it has not a system of domestic rules applicable normally to all cases which contain no foreign element in addition to a system of conflict rules for cases which contain a foreign element or foreign elements), but only a system of special rules applicable to different classes of persons on the basis of race, religion, caste, nationality, etc., it is obvious that the reference to the law of the country must mean the personal law of the *de cuius*, ascertained by the rules of law of the country. The personal law of the *de cuius* so ascertained is part of the domestic law of the country—the only domestic law applicable to the case—and the fact that the domestic law of the country takes the form of incorporating the rules of law of some other country does not mean that an English court, in applying rules of law so incorporated by reference, is adopting the theory of the *renvoi*.²⁵ There is and can be in the circumstances no election by the English court between the domestic rules and the conflict rules of the proper law.

§ 4. THE NATIONAL LAW OF A BRITISH SUBJECT

If we turn next to consider the significance of the tripartite classification above stated (namely, respective references to the laws of countries having (1) a unitary system of territorial law, (2) a composite system of territorial law, and (3) a composite system of personal law), from the point of view of Italian conflict of laws or of any other system of conflict of laws in

²⁵ The failure to observe the distinction between a reference by a conflict rule to the law of a country with a territorial system of law and a reference to the law of a country with a personal system of law underlies the misuse of the case of *Bartlett v. Bartlett*, [1925] A.C. 377, in support of the doctrine of the *renvoi*, in DICEY ON THE CONFLICT OF LAWS (appendix 1, Meaning of "Law of a Country", and the Doctrine of the *Renvoi*, 5th ed. 1932, p. 876, under the sub-heading "The *Renvoi* and Extra-territorial Jurisdiction"). See, especially, Vesey-Fitzgerald, in a review of the 5th edition of Dicey in the *Journal of the Society of Public Teachers of the Law* (1932) 54, quoted in part (1934), 12 *Can. Bar Rev.* 140-141. The distinction in question is pointedly discussed by Grassetti, *op. cit.*, note 22, *supra*.

which nationality, not domicile, is the criterion of personal law,²⁶ we may for the purpose of the present article confine the discussion to a case falling within item (2) of the classification. It is true that some day there may be a case in which an English court, on being referred by its conflict rule to the law of Italy, will take upon itself the burden of following a further reference by an Italian conflict rule to the law of a third country, Utopia, and Utopia may be a country falling within either item (1) or item (3) of the classification. We may, however, leave that contingency to be considered when such a case arises,²⁷ with the view of concentrating attention on the question already raised by English cases, but not adequately considered in those cases, namely, how an Italian court would construe a reference to the national law of a national of a country with a composite system of territorial law, or, specifically, the national law of a British subject.²⁸ The Italian court, having ascertained the nationality of the *de cuius* to be British, and having been informed of the existence of various systems of law within the British Empire, would encounter a difficulty in selecting one of these systems as the proper law—a difficulty of which the draftsmen of the Italian conflict rules (referring to the “national law”) were apparently unaware,²⁹ and which is logically insuperable—namely, that a reference to the national law of a British subject does not in itself afford any guide to the selection of the law of any specific law district from the numerous law districts composing the British Empire.³⁰ There

²⁶ The necessity for considering the point of view of the foreign system of conflict of laws arises of course from the fact that some English judges have adopted the theory that it is the duty of an English court, when directed by an English conflict rule to the law of a given foreign country, to take into account the conflict rules of the foreign country; and the following analysis of the problem which would confront a court of the foreign country is intended to test the theoretical and practical value of this theory.

²⁷ If Utopia were (1) a country with a unitary system of territorial law, the case would be relatively free from difficulty, because the Italian reference to the national law of the *de cuius* would clearly point to a country which is a political unit as well as being a single law district. If Utopia were (3) a country with a composite system of personal law, there might be more difficulty in ascertaining what an Italian court would do. If Utopia were (2) a country with a composite system of territorial law, as, for example, the United States of America, the difficulties inherent in the Italian reference would be the same as those inherent in an Italian reference to the national law of a British subject, to be discussed in the text.

²⁸ For a detailed discussion from the Italian point of view, see DE NOVA, *IL RICHIAMO DI ORDINAMENTI PLURILEGISLATIVI: STUDIO DI DIRITTO INTERLOCALE ED INTERNAZIONALE PRIVATO* (1940).

²⁹ It would appear that the draftsmen had in mind only a reference to a country with a unitary system of law.

³⁰ It may be observed incidentally that whereas a reference to the national law of a citizen of the United States of America would be futile because it does not point to a particular state of the Union, in the case of

is of course no general "British" law of succession to movables or any other matter which might be governed by the personal law of an individual person, so that the reference to the national law of a British subject is in effect meaningless.

It happens that in the Italian system of conflict of laws the doctrine of the *renvoi* is rejected, and therefore the reference by an Italian conflict rule to the national law of a person is construed as a reference to the domestic rules of the proper law, but the reference to the national law of a British subject is equally ineffective, whether the conflict rules or the domestic rules of some system of law are to be applied, because the Italian conflict rule affords no indication of any particular system of law within the British Empire, and has to be supplemented by some device for selecting that particular system. If the question is one which by universal agreement among the conflict systems of the British Empire is governed by the *lex domicilii*, and the *de cujus* was domiciled at the material time in some part of the British Empire, as, for example, in a particular province of Canada or in a particular unit of the United Kingdom, an Italian court might say that the reference to the national law of a British subject means the law of that part of the British Empire in which the *de cujus* was domiciled, thus using the supposititious universal "British" conflict rule as an interprovincial or interregional conflict rule, as distinguished from an international conflict rule, without abandoning its general anti-*renvoi* attitude, that is, without abandoning its doctrine that an Italian court is concerned with the domestic rules, not the conflict rules, of a foreign proper law. Apart from the fineness of the distinction between private international law and private interprovincial or interregional law,—a distinction which is not drawn in Anglo-American conflict of laws—a substantial objection to the suggested construction of the Italian

the British Empire, even the larger units of the composite Empire, such as the United Kingdom, Canada, Australia, etc., are themselves composite units, each consisting of various law districts, so that an Italian court, even if it got so far as to construe a reference to the national law of a British subject as meaning in a specific case the law of Canada, would still have reached no solution unless it could find some way of selecting the law of a particular province of Canada as being indicated by the reference to the national law of a British subject. As was stated (with particular reference to domicile and rights dependent on domicile) by Lord Merrivale, delivering the judgment of the Privy Council in *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, at p. 450, [1926] 2 D.L.R. 762, at p. 765, [1926] 1 W.W.R. 742, at p. 745, it is only in an individual province of Canada, not in the Dominion of Canada as a whole, that are found uniformity of law, civil institutions existing within ascertained territorial limits and juristic authority in being there for the administration of law. Thus the British Empire is doubly composite, or composite to the second degree.

conflict rule lies in the fact that there is in fact no system of conflict of laws common to all parts of the British Empire.³¹ While the English system prevails, broadly speaking, in many parts of the Empire, that is, in the common law units, there are substantial differences between the English system of conflict of laws and the systems prevailing in, for example, Quebec, Scotland and the provinces of South Africa. In the matter of succession to movables, the primary rule in Quebec is that the *lex loci actus*, not the *lex domicilii*, governs the formal validity of a will, and a Quebec court might, as regards a question governed by the *lex domicilii*, arrive at a different conclusion as to the domicile of the *de cuius* from that which would be reached in a common law province.³² Even in the common law provinces there are diverse versions or modifications of Lord Kingsdown's Act.³³ These are merely examples showing the non-existence of a uniform "British" system of conflict of laws. Obviously, an Italian court would not be justified in resorting to the conflict rules of England in order to decide, and before deciding, that the Italian conflict rule refers to the law of England rather than to some other part of the British Empire.

If we pass now from the case of a *de cuius* who was a British subject domiciled at the time of his death in some part of the British Empire to the case of a *de cuius* who was a British subject domiciled at the time of his death in some country outside the British Empire, then there arises an almost insoluble problem to be solved by the court of the domicile (which we may suppose, for the purpose of discussion to be an Italian court), and consequently to be solved by an English court which, by reason of the Italian domicile of the *de cuius*, has undertaken the task of ascertaining how an Italian court would construe a reference by an Italian conflict rule to the national law of the *de cuius*. An Italian court might conceivably do any one of three things, namely :

³¹ This fact is observed by DE NOVA, *op. cit.* (note 28, *supra*) 151, citing, *inter alia*, BATY, *POLARIZED LAW* (1914), p. 119 ("There is no common British law of succession for the whole Empire; there is not even a common British rule for the choice of a law of succession, for any colony might any day abandon the test of domicile, and indeed some of our possessions have already done so for, at any rate, some purposes."), and p. 32 ("In the same way, each legislature may adopt its own system of Private International Law.").

³² See JOHNSON, *CONFLICT OF LAWS*, vol. 1 (1933) 91, 119-121, vol. 3 (1937) 1.

³³ See (1940), 18 Can. Bar Rev. 572, and [1941] 1 D.L.R. 706, bringing up to date my earlier account of these versions or modifications contained in [1932] 1 D.L.R. 56-57, (1934), 12 Can. Bar Rev. 131-133.

(1) It might apply domestic Italian law *qua lex fori* on the ground that the reference by the Italian conflict rule to the national law of the *de cuius* is meaningless or ineffective in the circumstances.

(2) It might apply domestic Italian law *qua lex domicilii* on the theory that it is giving effect to a supposititious British conflict rule referring to the law of the domicile.

(3) It might apply the domestic law of that part, if any, of the British Empire in which the *de cuius* had his domicile of origin.

Of these three possible solutions the first would seem to be the best. It does not involve an Italian court in the doctrine of the *renvoi*, but does involve its frank acknowledgment of the failure of the Italian conflict rule to indicate any ascertainable law district within the area of the British Empire which might, by the subsidiary use of domicile as a connecting factor, furnish the law answering to the Italian reference to the national law of the *de cuius*. It would appear that this solution is likely to prevail in Italy in the future, as Italian courts will be fully informed, by Italian writers on the conflict of laws, of the impossibility of giving effect to a reference by an Italian conflict rule to the national law of a British subject who dies domiciled in Italy.³⁴

The second solution is indefensible in so far as it is based on a supposititious but in fact non-existent British conflict rule.³⁵ It would be equally indefensible if it were based on an English conflict rule, erroneously supposed by an Italian court to be

³⁴ This is the solution advocated by Grasseti, *op. cit.* (note 22, *supra*) 7.

DE NOVA, *op. cit.* (note 28, *supra*), mentions (p. 26), as a situation which gives rise to peculiar difficulty, a reference to the national law of a national of a country with a composite system of territorial law and no unitary system of interregional conflict of laws. He comes subsequently (p. 81) to the discussion of this situation, and arrives in due course (p. 107) at the special problem arising when the *de cuius* is not connected by any available criterion with any particular part of the state of which he is a national, but is connected rather with some other state, a problem raised in the specific situation of a British subject domiciled in Italy. He discusses (pp. 108 ff.) two cases decided some 20 years ago in Italian courts, proceeding to a discussion of the views of various authors. He concludes (pp. 149 ff.) with a systematic discussion of the various methods proposed for the solution of the difficulties inherent in a reference to a composite system of law which lacks a unitary or uniform system of interregional conflict of laws. De Nova's own opinion (p. 185) is that in such case the *de cuius*, whose national law furnishes no guide for the solution of the problem, should be regarded as a person without nationality. On this basis, in the case of a British subject domiciled in Italy, an Italian court would apply domestic Italian law.

³⁵ Attention has been drawn earlier in the present article to the non-existence of any "British" conflict rule or even of uniformity of conflict rules in different parts of the British Empire. See notes 31, 32, 33, *supra*.

applicable to the case either on the theory that English law is the dominant law of the British Empire or on the theory that the Italian conflict rule refers to a non-existent "English" nationality.³⁶ This solution is less likely to be adopted in the future as Italian courts become better informed with regard to British nationality and the diversity of laws within the British Empire. This solution is also objectionable from the Italian point of view because it would involve an Italian court's admitting an exception to the prevailing *anti-renvoi* theory of Italian conflict of laws.

The third solution is indefensible from any point of view. If the *de cuius* had his domicile of origin in England and had a domicile of choice in Italy at the time of his death, then, from the English point of view, his domicile of origin, having been superseded by his domicile of choice, is immaterial to the succession to his movables, unless an English court, thinking that it must apply to the case whatever law an Italian court would apply, is convinced by satisfactory evidence that an Italian court would apply the law of the domicile of origin of the *de cuius*. From the Italian point of view, it is almost incredible that an Italian court, if it were well informed with regard to the composite character of the British Empire and the diversity of both domestic and conflict rules of law prevailing therein, would reach the conclusion that the reference by an Italian conflict rule to the national law of the *de cuius* means a reference to the law of his domicile of origin.³⁷ Strange to

³⁶ As regards the theory that a reference to the national law of a British subject indicates specifically English law, Pollock, (1909), 25 L.Q.R. 157, says: "The fallacy about England and English law having some kind of official predominance in the British Empire appears to be hard to eradicate," and in an editorial note to *In re Askew*, [1930] 2 Ch. 259, at p. 269, referring to Maugham J.'s use of the expression "law of England", says: "A compendious name for the result of allegiance to His Britannic Majesty: there is no suggestion in the present case of any presumption that a British subject's personal law is that of England rather than any other part of the Empire. Such a suggestion has been made elsewhere, but, it is submitted, without foundation." The equally fallacious theory that a reference to the national law of a British subject can be converted into a reference to English law by describing the nationality as English has sometimes made its appearance in the evidence given by Italian experts in English courts, and has misled English judges (see note 19, *supra*, and note 38, *infra*); it has also given rise to misunderstanding on the part of Italian judges: cf. DE NOVA, *op. cit.* (notes 28 and 34, *supra*) 137.

³⁷ The fact that in the past an Italian court may have so construed the reference, or even, in the case of a British subject having both his domicile of origin and his domicile of choice in Italy, may have construed the reference as a reference to English law because the family of the *de cuius* was of English origin (DE NOVA, *op. cit.*, 135-136), does not render it probable that an Italian court would so construe the reference today. An Italian court today would probably be aware that any reference to the domicile of origin of the *de cuius* would be inconsistent with the English

say, English courts have on several occasions, in situations identical with or similar to that which is now under discussion, applied the law of the domicile of origin, sometimes without any evidence as to how a court of the domicile would construe its reference to the national law of the *de cujus*, sometimes on evidence which was vitiated by errors apparent on the face of the witnesses' statements. An example of evidence of this kind is afforded by *In re Ross*.³⁸ Two of the three witnesses said that "the Italian courts would determine the case on the footing that the English law applicable is that part of the law which would be applicable to an English national domiciled in England." Apparently it did not occur to Luxmoore J. to inform the witnesses that there was no such person as an "English national", and that if "British national" were substituted for "English national", in accordance with the reference by the Italian conflict rule to the "national law" of the *de cujus*, there would be no foundation left for a reference specifically to the law of England (whether domestic rules or conflict rules) as distinguished from the law of any other part of the British Empire. Nor did it occur to Luxmoore J., apparently, to inform the witness that there was no rule even of English law (whether domestic rule or conflict rule) that the domicile of origin, which had been superseded by the domicile of choice, would have any bearing on the distribution of the movables of the *de cujus*. If the witnesses had been informed of these matters and cross-examined on them, they might well have come to a different conclusion. Again, if, in a future similar case, a witness with regard to Italian law is fully informed about the British Empire and its systems of law, and about British nationality, he might well say that an Italian court would apply the domestic law of Italy. In other cases English courts have applied the law of the domicile of origin of the *de cujus* without any evidence at all that a court of the domicile would construe a reference to the national law of the *de cujus* as a reference to the law of the domicile of origin. For example, in *In re Johnson*,³⁹ a case in which the *de cujus* was domiciled at the time of her death in Baden, and the only evidence before

conflict rule that the law of his domicile at the time of his death governs the succession to his movables. As Dicey once remarked (19 L.Q.R. 244), whatever the words "law of his domicile" mean, they do not mean the law of his domicile of origin as such.

³⁸ [1930] 1 Ch. 377, at pp. 403-404. As to a similar patent error of a witness with regard to German law, see *In re Askeu*, [1930] 2 Ch. 259, at p. 276; note 19, *supra*.

³⁹ [1903] 1 Ch. 821. For references to critical comments on this case, see note 45, *infra*.

Farwell J. was a finding of fact contained in a master's certificate (which was binding on all parties because there had been no summons to vary) that "according to the law of Baden, the legal succession to the property of the deceased of which she has not disposed by will is governed solely by the law of the country of which the testatrix was a subject at the time of her death". Without a shred of evidence on the question of the meaning which a court of Baden would attribute to this reference to the national law of a British subject, Farwell J. applied the law of the domicile of origin of the *de cuius*, that is, the law of Malta. In the recent case of *In re O'Keefe*⁴⁰ there was little, if anything, more in the evidence. The *de cuius* was domiciled at the time of her death in Italy, where she had resided continuously for 47 years. Admittedly the Italian conflict rule said that the succession was governed by her national law. Crossman J. said: "Italian lawyers cannot say what is the meaning of the law of the nationality where there is more than one system of law of the nationality; but I have evidence, which I think is not disputed, from experts in Italian law that the Italian law would hold that the succession is regulated by the law of the country to which the intestate belonged, and belonged I think at the time of her death." On this lack or ambiguity of evidence the learned judge held that the succession was governed by the law of Eire, a political unit which had come into existence during the long residence of the intestate in Italy and of which she was not a citizen by the law of Eire itself, and a country which the intestate had never visited except on a "short tour" with her father 59 years before her death. By what process of reasoning Crossman J. selected the law of Eire as being the law of the country to which the *de cuius* "belonged" at the time of her death, is not clear,⁴¹ but it is clear that the process of reasoning was that of the judge and not that of the witnesses.⁴² *In re Johnson* was not cited in the judgment, although the two cases are strikingly similar, and whatever has been said by many persons in criticism of *In re Johnson* is equally applicable to *In re O'Keefe*.

The contrast between what Crossman J. did and what he purported to do is interesting. He purported to follow *In re*

⁴⁰ [1940] Ch. 124.

⁴¹ Cf. comment by J. H. C. Morris in (1940), 56 L.Q.R. 144.

⁴² The result was unreal to the point of absurdity, because the law of the domicile of origin was not the law indicated as such by an English conflict rule or the law which the *de cuius* might have had in contemplation or the law which there was any reason to suppose an Italian court would have selected.

Ross⁴³ and *In re Askew*,⁴⁴ but in each of these cases the English court did attempt, in accordance with the doctrine of the total *renvoi*, to give effect to the evidence of experts on the question what law would be applied by a court of the domicile (although that evidence was vitiated by patent error), whereas in *In re O'Keefe* there was no evidence that an Italian court would apply the law of Eire in the particular circumstances of the case. One might even suspect that Crossman J., purporting to follow the two earlier cases on a point of law, allowed himself to be influenced by the evidence of a matter of fact (Italian law) given in the *Ross Case*, and thereby supplemented the evidence given in the *O'Keefe Case*. In substance, however, what he did, without expressly saying that he was doing so, was to use at least one, and perhaps both, of the two lines of reasoning of Farwell J. in *In re Johnson*.⁴⁵ In that case Farwell J. held that a domicile of choice in Baden was not effectually acquired because the law of Baden did not recognize the domicile of the *de cuius* in Baden for the purpose of succession to movables, and therefore the English court must fall back on the law of the domicile of origin. Notwithstanding the condemnation of this line of reasoning in *In re Annesley*,⁴⁶ it was used by Crossman J.⁴⁷ Alternatively, Crossman J. followed in effect Farwell J.'s second line of reasoning, namely,

⁴³ [1930] 1 Ch. 377, note 38, *supra*.

⁴⁴ [1930] 2 Ch. 259, note 19, *supra*.

⁴⁵ [1903] 1 Ch. 821. See critical comments: Dicey (1903), 19 L.Q.R. 244; Pollock, at first differing from Dicey and approving the decision (1903), 19 L.Q.R. 246, but subsequently converted to the view that both the grounds of decision are untenable (1920) 36 L.Q.R. 92; cf. (1915), 31 L.Q.R. 106-107, (1937), 53 L.Q.R. 200; BATE, NOTES ON THE DOCTRINE OF RENVOI IN PRIVATE INTERNATIONAL LAW (1904) 19 ff., 115 ff.; Abbott, *Is the Renvoi a Part of the Common Law?* (1908), 24 L.Q.R. 144-145; Brown, *In re Johnson* (1909), 25 L.Q.R. 145; BENTWICH, LAW OF DOMICILE IN ITS RELATION TO SUCCESSION (1911) 169-172; Lorenzen, *The Renvoi Theory and the Application of Foreign Law* (1910), 10 Columbia L.R. 335-338; cf. *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 Harvard L.R. 554-557. For my own previous comments on the *Johnson Case*, see (1931) 47 L.Q.R. 273-276, [1932] 1 D.L.R. 25-28, (1932) 27 Rev. dr. int. pr. 454-458; cf. (1939), 17 Can. Bar Rev. 380-381.

⁴⁶ [1926] Ch. 692, at pp. 703-706, on the basis of older cases of authority.

⁴⁷ (1939), 162 L.T. 62, at p. 63: "Her domicile of origin, which was Southern Ireland, is something which remains in reserve ready to attach again whenever no other domicile arises. It is true that at her death her domicile was Italian and that I am bound to accept because that is the hypothesis on which the question arose, but removing the Italian domicile the only other domicile which she could have had was the domicile of Southern Ireland." The italics are mine. The quoted sentences are reported in almost the same words, in 56 Times L.R. 204, at p. 205, 109 L.J. Ch. 86, at p. 88, and [1940] 1 All E.R. 216, at p. 218, but are omitted from [1940] Ch. 124.

that a reference by Italian law to the national law of a British subject domiciled in Italy means the law of that part of the British Empire in which the *de cujus* had her domicile of origin. As pointed out earlier, this conclusion was erroneously reached in the *O'Keefe Case* and in the *Johnson Case* without any evidence that an Italian court would have construed the Italian conflict rule in this sense, whereas in the *Ross Case* and the *Askew Case*, both cited by Crossman J., there was some, though insufficient, evidence of this kind.⁴⁸ The learned judge's citations of Cheshire and Dicey were, to say the least, extremely casual. He appropriately cited, as supporting his view of the construction of the Italian conflict rule, a passage from the former,⁴⁹ but ought to have pointed out that the same learned author does not think that the English court should concern itself with the foreign conflict rule.⁵⁰ In the case of Dicey, the reference is misleading, because that author, although he approves of the doctrine of the *renvoi*, expresses himself somewhat ambiguously with regard to what he calls the "decidedly ambiguous judgment" in *In re Johnson*,⁵¹ criticizing it on one page, and on the following page making the suggestion (which, strange to say, is left without change or comment by Dicey's present editor, himself a notable expert in the legal systems of the British Empire), that a reference by the law of the domicile to the law of a British subject may be construed as a reference to "English law, being the true national law of every British subject".⁵²

If the leading cases discussed above are looked at from a purely practical point of view, it would appear that, at least as regards the intrinsic validity of a will of movables or succession to movables on intestacy, the results reached by English courts are such as to cast serious doubt on the desirability of the courts' perseverance in their attempt to follow the will-o'-the-wisp of the total *renvoi*, that is, the attempt

⁴⁸ See notes 19 and 38, *supra*.

⁴⁹ CHESHIRE, *PRIVATE INTERNATIONAL LAW* (2nd ed. (1938) 161-162. On grounds already stated, it is submitted that there is no justification for the construction stated by Cheshire and apparently approved by Crossman J.: cf. notes 37 ff., *supra*.

⁵⁰ CHESHIRE, *op. cit.*, pp. 47 ff.

⁵¹ DICEY, *CONFLICT OF LAWS* (5th ed. 1932) 872-873.

⁵² The error inherent in this mode of statement has been already pointed out in connection with the *Ross* and *Askew Cases*, notes 19 and 38, *supra*. Only a few lines further on, in a note to Dicey's text (p. 873, note i) it is said, "As to succession there exists no national law applicable to every British subject, save the principles of the conflict of laws providing for the application to movables of the *lex domicilii* and to immovables of the *lex situs*." The saving clause appeared for the first time in the 5th edition (1932), and, it is submitted, is erroneous in so far as it suggests that there is a single or uniform British system of conflict rules relating to succession: cf. notes 31, 32 and 33, *supra*.

to follow a foreign court in the application of the conflict rules of the foreign law, including the foreign court's theory of the *renvoi*. The results have been haphazard and accidental in the sense that admittedly in any future case relating to a situation substantially similar to that arising in a former case, new evidence with regard to foreign conflict rules may lead to a different result. The consequent unpredictability of result in any future case constitutes in itself a grave defect in the law. Furthermore the results reached have sometimes been unreal to the point of absurdity (as when the law of the domicile of origin has been applied under a conflict rule which says that the law of the domicile of the *de cuius* at the time of his death is to be applied), and at other times have merely coincided with the results that would have been reached by the direct application of the domestic rules of the *lex domicilii* (as is likely to happen in a future case in which the *lex domicilii* is the law of Italy). In no case does it appear that a result of obvious intrinsic merit has been reached solely by the use of the *renvoi*, at least in the field of succession to movables, nor does it appear that such result is more likely to be reached in the future by the use of the *renvoi*. With respect it is submitted that English judges have lost their way in a labyrinth into which they have gratuitously entered, and that in future, while the matter is still open, in the absence of any unequivocal decision of an appellate court⁵³ they should, as far as possible, save themselves the trouble of making imaginary journeys to foreign countries for the purpose of adjudicating as if they were foreign courts, and consequently effect a notable simplification and improvement of the rules of the conflict of laws.

§ 5. GENERAL OBSERVATIONS AND EXCEPTIONS

Emphasis has been placed in the present article on the failure of English courts to find, by the use of the *renvoi*, solutions which are of practical utility or intrinsic merit. It is

⁵³ The only decisions of appellate courts having any bearing on the doctrine of the *renvoi* are *Bremer v. Freeman* (1857), 10 Moo. P.C. 306, and *Ross v. Ross* (1894), 25 Can. S.C.R. 307. The judgment of the Privy Council in the former case is so obscure that the case has been cited sometimes for, and sometimes against, the doctrine. Cf. (1939), 17 Can. Bar Rev. 389. The result of the judgment of the Supreme Court of Canada in the latter case may be justified on the special ground that it related to the formalities of making of a will of movables. Cf. note 63, *infra*. *Bartlett v. Bartlett*, [1925] A.C. 377, it is submitted, has no bearing on the doctrine of the *renvoi*: see note 25, *supra*. Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws* (1941), 50 Yale L.J. 743, at p. 753: "Although a goodly number of decisions and dicta in England seem to accept *renvoi*, there is no clear-cut decision by a higher court which really establishes the doctrine in English law."

not intended to repeat here what I have said on other occasions⁵⁴ with regard to the theoretical or logical aspects of the problem of the *renvoi*, but some general observations may be appropriate sequel to the account already given of some of the practical difficulties encountered by English courts.

The misunderstandings which have been a striking feature of the attempts made by courts in the twentieth century to apply the doctrine of the *renvoi*, naturally suggest the celebration of the centenary of the case of *Collier v. Rivaz*,⁵⁵ in which, exactly one hundred years ago, the doctrine had its origin in English conflict of laws. The decision in this case involved all the elements of confusion which have bemuddled the subject in subsequent cases. Firstly, Sir Herbert Jenner's famous formula, namely, that the English court should decide the case as if it were sitting in Belgium was analogous to the clearly erroneous theory stated by him in an earlier case,⁵⁶ namely, that the court of the domicile has exclusive jurisdiction to adjudicate on the validity of a will of movables. Secondly, Jenner J. was led into confusion as to the concept and effect of domicile in English law by the fact that article 13 of the French Civil Code, then in force in Belgium, provided for an authorized domicile, but not for an unauthorized domicile acquired *animo et facto*.⁵⁷ The same article caused confusion in subsequent English cases in which the *de cuius* was domiciled in France, but was repealed in France in 1927.⁵⁸ Thirdly, Jenner J. confused the issue by failing to distinguish between formalities of making of a will and intrinsic validity of a will or succession on intestacy. The only question before him being the validity in point of form of various testamentary instruments—a will and six codicils—he admitted them all to probate in England. Those which were made in local Belgian form, that is, in accordance with the domestic rules of the law of the country in which the testator was domiciled at the time of his death, were admitted without argument. Those which were made in English local form were admitted to probate in England as being made in accordance with the conflict rules of the *lex*

⁵⁴ See the articles cited in notes 3 and 4, *supra*, supplementing *Renvoi and Succession to Movables* (1930-1931), 46 L.Q.R. 465, 47 L.Q.R. 271, [1932] 1 D.L.R. 1, and *sub. tit. Renvoi et Succession Mobilière* (1932), 27 *Revue de Droit International Privé* 254, 451. These articles contain references to many articles by various writers.

⁵⁵ (1841), 2 Curt. 855.

⁵⁶ *DeBonneval v. DeBonneval* (1838), 1 Curt. 857. As to this confusion between *lex* and *forum*, see (1939), 17 Can. Bar Rev. 382-384.

⁵⁷ *Cf.* (1930), 46 L.Q.R. 476-479, [1932] 1 D.L.R. 13-16.

⁵⁸ See obituary notice in (1930-1931), 46 L.Q.R. 472-474, 47 L.Q.R. 284-285, [1932] 1 D.L.R. 9-11, 36-37.

domicilii. Obviously the learned judge did not decide that a reference to the law of the domicile means a reference exclusively to the conflict rules of that law, but decided merely that, facultatively or alternatively, a will of movables is formally valid if it complies with either the domestic rules or the conflict rules of the law of the domicile. Similarly, in *In re Lacroix*,⁵⁹ under Lord Kingsdown's Act, which alternatively allows a will of "personal estate"⁶⁰ to be made in the form required by the law of the place of making, it was held that a holograph codicil made in France, in accordance with the domestic rules of the law of the place of making, and a will and codicil made in France in English local form, in accordance with the conflict rules of the law of the place of making, were all entitled to be admitted to probate in England. Thus a reference by an English statutory conflict rule to the law of France, which itself was only one of three alternative statutory references, in addition to the alternative reference under the old law to the law of the domicile, was itself construed as permitting a choice between either one of two meanings of the law of the place of making. This extreme indulgence shown by English courts in the case of formalities of making of a will of movables, *ut res magis valeat quam pereat*, seems to me, notwithstanding the opinion to the contrary which I formerly expressed,⁶¹ to be justifiable. If a testamentary instrument admittedly expresses the latest desire of the testator, and is not intrinsically invalid, it would seem that it should not be held to be formally invalid if it complies with either the conflict rules or the domestic rules of the proper law or of any of the proper laws indicated by the

⁵⁹ (1877), 2 P.D. 94, Sir James Hannen.

⁶⁰ The incongruities introduced into English conflict of laws by reason of the fact that the British Parliament in 1861 inadvertently used the words "personal estate" when it meant "movables" have been frequently pointed out: cf. comment cited in note 62, *infra*, and comment (1940), 18 Can. Bar Rev. 568, on *In re Cutcliffe's Will Trusts*, [1940] Ch. 565, and references there given; see also JOHNSON, CONFLICT OF LAWS, vol. 3 (1937) 21, 24. For the purpose of the present article the point to be emphasized is that although the legislature made a mistake in including within the scope of the statute such interests in land as are classed in English law as personal property (which ought not to be governed by a different conflict rule from that which governs such interests in land as are classed in English law as real property, namely, the *lex rei sitae*), nevertheless, as regards movables, the legislature was right in sanctioning the principle that so far as formalities are concerned various alternatives should be allowed to a testator, so as to justify the upholding of various testamentary instruments made by the same testator, some made according to the forms required by one law, others made according to the forms required by another law.

⁶¹ (1930), 46 L.Q.R. 483, [1932] 1 D.L.R. 20; but cf. 47 L.Q.R. 290, [1932] 1 D.L.R. 46.

conflict rules of the forum.⁶² This construction of the conflict rules of the forum would support the result in *Ross v. Ross*,⁶³ and *Frere v. Frere*.⁶⁴ Incidentally a similar doctrine might justifiably be applied so as to uphold a marriage in point of formalities, if it is celebrated in accordance with either the domestic rules or the conflict rules of the law of the place of celebration.⁶⁵

While the result reached in *Collier v. Rivaz* is justifiable in the special circumstances of the case, the language of the judgment has given rise to far-reaching misunderstanding in later cases. Owing to the fact that the testamentary instruments made in Belgian local form were not opposed, only those made in English local form were discussed in the reasons for judgment, and when Jenner J. said that the English court should decide the case as if it were a court sitting in Belgium, he appeared to be stating a general formula applicable to any and every reference by an English conflict rule to the law of a foreign country, and this formula became the basis of judgments in subsequent cases of a different kind. Whereas he was stating merely an alternative or facultative construction of an English conflict rule in order to uphold a will in point of form, judges in later cases applied his formula as a general rule, namely, that a reference to a foreign law means whatever a foreign court would decide in a similar case.

If the question before a court relates to the intrinsic validity of a will or to succession on intestacy, and a conflict rule of the forum refers the question to a given foreign law, the forum must choose between the domestic rules and the conflict rules of that law, if the application of the conflict rules would lead to a different result from the result reached by the application of the domestic rules. The forum must decide one way or the other whether the testator had or had not disposing power and whether therefore there is or is not a partial or total intestacy, and in case of intestacy, who are the successors. The conflict is between different policies expressed in two different systems of law, not on the question whether a testator with sufficient disposing power has expressed his admitted testamentary desires in a particular form, but on the question whether,

⁶² Cf. comment, [1941] 1 D.L.R. 703, on *Re Landry and Steinhoff*, [1941] 1 D.L.R. 699.

⁶³ (1894), 25 Can. S.C.R. 307; cf. (1939), 17 Can. Bar Rev. 389-391.

⁶⁴ (1847) 5 Notes of Cases 593: notwithstanding MENDELSSOHN-BARTHOLDY, *RENOI IN MODERN ENGLISH LAW* (1937) 67, "It is an unequivocal judgment based on the doctrine of *renvoi*, rank and undiluted."

⁶⁵ Cf. (1939), 17 Can. Bar Rev. 394.

regardless of formalities, there are limitations on his power, by any form of will, to control the disposition of his "property" after his death, and, to the extent that he has not validly disposed of all his property, on the question what is the "will of the law" which defines the successors. The forum must necessarily choose between the two systems of law, one of which is to furnish the rules for answering these questions, applying either the domestic rules or following the conflict rules of the proper law, each to the exclusion of the other. In which way this choice should be made has of course been the subject of acute controversy, though, if some judges had not decided otherwise, it would seem clear that an English conflict rule saying that succession to movables is governed by the *lex domicilii* means what it says and is a statement of the policy of English law that the matter is to be governed by the domestic rules of the *lex domicilii*. My immediate point is, however, that in this kind of case a court cannot possibly do what Jenner J. did with regard to formalities, namely, apply both the domestic rules and the conflict rules of the foreign law in the same case, upholding some testamentary instruments under the domestic rules, and others under the conflict rules, of the foreign law. In Jenner J.'s judgment his formula was merely an alternative device for supporting a testamentary instrument in point of form, and his judgment afforded no real basis for the exclusive use of his formula.

There may be some kinds of questions which the forum must decide as a court of a foreign country would decide, as, for example, a question of title to land situated in a foreign country, whether the question arises on the death of the owner or by reason of a transaction *inter vivos*. There may also be other kinds of questions which it is desirable that the forum should decide as a court of a foreign country would decide, as, for example, a question of status, as distinguished from the consequences or incidents of status or as distinguished from capacity.⁶⁶ There may of course be legitimate difference of opinion as to where the line should be drawn, but it is submitted that, as regards the intrinsic validity of wills of movables and succession to movables on intestacy, there is no reason why an English court should make the attempt to follow what any foreign court would do with regard to movables situated

⁶⁶ Cf. my comment (1941), 19 Can. Bar Rev. 42-43, on *In re Luck's Settlement Trusts*, [1940] Ch. 864, citing Allen, *Status and Capacity* (1930), 46 L.Q.R. 293 ff., Falconbridge (1937), 15 Can. Bar Rev. 240 ff., 53 L.Q.R. 544 ff., ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS (1940) 145, Taintor (1940), 18 Can. Bar Rev. 591-592, 691-694.

in a foreign country,⁶⁷ and it is submitted that from a practical point of view the futility of such an attempt has been demonstrated by what English courts have done, as discussed in the present article.

In the case of a commercial contract it would seem obvious that the proper law selected in accordance with the conflict rules of the forum means the domestic rules of the proper law. The matter would indeed hardly be worth mentioning, were it not for the dictum to the contrary contained in the judgment of the Privy Council in *Vita Food Products v. Unus Shipping Co.*⁶⁸—a dictum occurring in relation to the proper law arbitrarily selected by the parties, a case in which it is almost inconceivable that when parties say that the contract is to be governed, for example, by English law, they mean some law to be selected by a court in accordance with the doctrine of the *renvoi*.⁶⁹

§ 6. POSTSCRIPT : RENVOI AND CHARACTERIZATION

The latest item in the series of recent writings concerning characterization in the conflict of laws⁷⁰ is Cormack's comprehensive article entitled *Renvoi, Characterization, Localization, and Preliminary Question in the Conflict of Laws*.⁷¹ A special feature of this article is that the author makes *renvoi* the central theme to which characterization is merely subsidiary. He does not specifically discuss those phases of the *renvoi* to which I have attempted in the foregoing pages to direct especial attention,⁷² and his analysis and conclusions will have to be considered adequately by some future writer on *renvoi* and characterization. I venture merely, by way of postscript to my article, which was completed for publication before Cormack's article appeared, to

⁶⁷ Cf. (1939), 17 Can. Bar Rev. 378 ff., as to problems arising chiefly in the field of succession to movables.

⁶⁸ [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433.

⁶⁹ See *Bills of Lading: Proper Law and Renvoi* (1940), 18 Can. Bar Rev. 77; cf. (1939), 17 Can. Bar Rev. 391; (1941), 19 Can. Bar Rev. 217.

⁷⁰ Husserl, *The Foreign Fact Element in Conflict of Laws* (1940), 26 Virginia L.R. 453; Pascal, *Characterization as an Approach to the Conflict of Laws* (1940), 2 Louisiana L.R. 715; ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940); Nussbaum, review of ROBERTSON (1940), 40 Columbia L.R. 1461; Yntema, review of ROBERTSON (1941), 4 U. of Tor. L.J. 233; Lorenzen, *op. cit.*, notes 7 and 53, *supra*; Hellendall, *The Characterization of Proprietary Rights to Tangible Movables in the Conflict of Laws* (1941), 15 Tulane L.R. 374.

⁷¹ (1941), 14 So. Calif. L.R. 221.

⁷² *E.g.*, the difficulties inherent in a reference by a foreign conflict rule to the national law of a British subject or of a citizen of the United States of America. These difficulties are only casually mentioned in Griswold, *Renvoi Revisited* (1938), 51 Harv. L.R. 1165, at p. 1175, note 30.

make some observations on particular points as to which, with due respect, some expression of doubt or dissent would seem to be justified.

Cormack states (pp. 257 ff.) his reasons for thinking that the doctrine of the *renvoi*, as a general principle, should be rejected, but admits some exceptions, as, for example in the case of "property" and "status" (pp. 262 ff.). He thinks that the doctrine of the preliminary question is "illusory" (p. 243), but that the distinction between primary characterization and secondary characterization is "sound" (p. 236). As regards the rejection of the *renvoi* as a general principle, and the existence of exceptions, I agree, though I should be disposed to state the exceptions somewhat differently.⁷³ I agree also as regards the "preliminary question", but doubt the soundness or utility of the doctrine of "secondary characterization".

As to Cormack's exception of "property" from his rejection of the doctrine of the *renvoi* as a general principle, I agree to this extent, that questions of proprietary interests in things must be treated exceptionally because overriding effect must be conceded to the *lex rei sitae* so far as by that law a person has a proprietary interest. This is clear at least with regard to an interest in an immovable thing (land). As regards an interest in a tangible movable thing (chattel), the *lex rei sitae* should also be decisive, but precisely because of the mobility of the thing in which the interest exists or is claimed, the practical necessity for conceding overriding effect to the *lex rei sitae* may not always exist. Obviously, in this connection the fact that according to the *lex rei sitae* a particular interest in land is characterized or classified as personal property is immaterial, and the only characterization necessary for the purpose of the selection of the proper law is based on the distinction between interests in immovables and interests in movables,⁷⁴ unless a statute, such as Lord Kingsdown's Act, requires the forum to base its selection of the proper law upon the distinction between realty and personalty.⁷⁵

⁷³ Cf., generally, *Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 369, at pp. 388 ff., and § 5, *supra*.

⁷⁴ Cormack, *op. cit.*, p. 237, note 97, quotes textually from my article (1937), 53 L.Q.R. 561, but at p. 267, note 235, citing (1933), 81 U. of Penn. L.R. 682-683, he makes me say "personal property," where the reference to the mobility of the subject matter was clearly confined to movables and could not apply to an interest in land which may be classified as personal property.

⁷⁵ Cf. *Personal Property and Movables in the Conflict of Laws*, [1941] 1 D.L.R. 703, and note 60, *supra*.

The matter may be put in another way, so as to introduce some observations relating to the distinction between primary characterization and secondary characterization. If the question may be one of a proprietary interest in land, a court in a country other than that of the situs must decide in accordance with the *lex rei sitae* whether such interest exists,⁷⁶ and it is immaterial whether the result is expressed in terms of total *renvoi*⁷⁷ or secondary characterization or what not. The forum must decide as a court of the situs would decide, and if the *lex rei sitae* makes the result depend on the distinction between real property and personal property, that is merely an example of the application of the domestic rules of the proper law to a case in which the *lex rei sitae* has already been selected on the basis of the distinction between immovables and movables or at least without regard to the distinction between realty and personalty. In such case if the result is expressed in the form "that the question for primary characterization is whether the problem relates to a property matter, and that it must then be decided by secondary characterization whether the property is real or personal",⁷⁸ this mode of statement does not afford an example of secondary characterization which is material to the decision. In other words, examples of secondary characterization in accordance with the *lex causae*, to be of any real significance, must present situations other than those in which the forum is prepared in any event to adopt the doctrine of the *renvoi*, including necessarily characterization in accordance with the *lex causae*. Thus, apart from the practical difficulty that those who advocate the theory of secondary characterization by the *lex causae* are not even approximately agreed on where the line is to be drawn between primary and secondary characterization, the difficulty presents itself that in effect the theory involves, at least partially, the adoption of the doctrine of the *renvoi*. The latter difficulty exists, of course, only for those who think that the doctrine of the *renvoi*, as a general principle, should be rejected.⁷⁹ They, at least, are bound to consider how far any examples they give of secondary character-

⁷⁶ Cf. *Conflict of Laws: Examples of Characterization* (1937), 15 Can. Bar Rev. 215, at pp. 233 ff.

⁷⁷ Cf. note 5, *supra*.

⁷⁸ Cormack, *op. cit.*, p. 237.

⁷⁹ ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940) 103-104, approves of the *renvoi* as a general principle applicable to cases arising between states of the United States of America, but reserves judgment as to other cases. At p. 156 he mentions *renvoi*, preliminary question and secondary characterization as being different methods of giving effect to the *lex causae*.

ization in accordance with the *lex causae* are reconcilable with their general anti-*renvoi* attitude.⁸⁰

As to Cormack's exception of "status" from his rejection of the doctrine of the *renvoi* as a general principle,⁸¹ the exception should, it is submitted, be limited to the existence of status as distinguished from capacity and from the incidents or consequences of status.⁸² Again, it would seem to be clear that if the existence of a status depends solely upon the validity of a given marriage (whether it is the status of the parties as married persons or that of a child of the marriage), there is no question of status as such, governed by the proper law of status, but a question of marriage law. The validity of the marriage must be decided as an independent question, the governing law being selected according as the question is characterized as one of formalities of celebration, or one of capacity to marry or one involving some other phase of intrinsic validity.⁸³ Precise characterization of each question arising in a given factual situation and the consequent selection and application of the proper law governing that question will furnish an answer to that question. There may be two or more questions arising in a given factual situation, and they may have to be answered separately by the selection and application of different proper laws respectively. It may happen that what looks like a question of status is really not an independent question, but a result which follows of course from the answer to another question, as in the example given above of the status of a person as a married person or as a child of the marriage. Generally, however, there would not seem to be any valid ground for saying that merely because a given question is the principal (or ultimate) question to be decided by a court in a given case, other questions must be treated as preliminary questions to be decided in accordance with the proper law of the principal question.⁸⁴ The doctrine of the preliminary question would appear to be not merely illusory, but also misleading in the sense that its application

⁸⁰ CHESHIRE, PRIVATE INTERNATIONAL LAW (2nd ed. 1938) 65, is especially emphatic in his condemnation of the doctrine of the *renvoi*. He suggests no exceptions, and takes no notice of the possible interrelation of *renvoi* and secondary characterization.

⁸¹ Cormack, *op. cit.*, pp. 262 ff.

⁸² Cf. note 66, *supra*.

⁸³ Therefore, with respect, I am unable to agree with Cormack, *op. cit.*, p. 267, when he says that I "erroneously" distinguish marriage law from that governing status.

⁸⁴ Cf. examples given (1939), 17 Can. Bar Rev. 369, at p. 377; cf., as to status dependent on marriage, p. 394.

may in effect involve, to an extent that its advocates would not approve, the adoption of the doctrine of the *renvoi*.⁸⁵

One of the examples of secondary characterization given by Cormack⁸⁶ is the characterization of a requirement of parental consent to the marriage of minors. Cheshire⁸⁷ thinks that it is a matter of primary characterization. Cormack is quite aware that secondary characterization by the *lex causae* may involve the *renvoi*, because he states, as to secondary characterization, that the "purpose of looking to the law of the other jurisdiction is to dispose of the problem as it would be disposed of there",⁸⁸ and his examples of secondary characterization all appear to be cases which might be brought within his exceedingly wide concepts of "property" and "status" exceptions to his rejection of the *renvoi* as a general doctrine. Whether these concepts are too wide is of course another question. Thus, he says, if the forum in country X has to adjudicate on the validity of the marriage of parties domiciled in country Y who are married in country Z, without consent of parents, the primary characterization is that the question is one of the creation of marital status, to be determined by the law of the domicile, and therefore the forum must decide in accordance with the secondary characterization of the law of Y whether a requirement of parental consent relates to capacity to marry or to formalities of celebration.⁸⁹ This analysis of the problem would not seem, however, to correspond with the way in which a court should or would deal with a case of this kind. I venture to submit, firstly, that from a practical point of view it is unlikely that an Anglo-American court would analyze the problem in terms of primary characterization and secondary characterization, involving the abandonment to the *lex causae* of the secondary characterization, and that such an analysis is not justified unless the forum considers that the case is one in which it is prepared to adopt the theory of total *renvoi* and therefore decide the case as it would be decided by a court of the domicile; and, secondly, that the analysis suggested involves a *petitio principii*,

⁸⁵ Cf. Cormack, *op. cit.*, pp. 243-249, leading to the conclusion that the doctrine of the preliminary question is unsound; contrast ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS (1940) 135-156, approving of the doctrine, even though it involves the *renvoi* (cf. note 79, *supra*).

⁸⁶ *Op. cit.*, 235. See also ROBERTSON, *op. cit.* (1940) 45, 53, 239-245; contrast my Characterization in the Conflict of Laws (1937), 53 L.Q.R. 247-256.

⁸⁷ PRIVATE INTERNATIONAL LAW (2nd ed. 1938) 34-36.

⁸⁸ Cormack, *op. cit.*, p. 234, adding in a footnote: "Assuming agreement upon the part of that jurisdiction as to primary characterization, which will generally exist."

⁸⁹ Cormack, *op. cit.*, p. 235; admittedly involving the *renvoi*, *ib.*, note 89.

because the selection of the law of the domicile as the proper law depends on the characterization of a provision of that law, which must necessarily precede the selection of that law as the proper law, and that there is no sufficient justification for saying that the question is one of status which the forum must decide in accordance with the law of the domicile. So far as the forum in X can characterize the question at all in the abstract, that is, without regard to the specific provisions of the laws of Y and Z which may be applicable, the forum cannot, it is submitted, do more than say that the question is one of the validity of a marriage, and (assuming that there is no material question of procedure or public policy of the forum governed by the *lex fori* as such) in accordance with its own conflict rules the forum will subdivide the question of the validity of the marriage into two questions, that of intrinsic validity, governed by the law of Y (the *lex domicilii*), and that of formal validity, governed by the law of Z (the *lex loci celebrationis*). Only when the forum is informed of the specific provisions of the law of Y or the law of Z does any real problem of characterization arise.⁹⁰ If we assume that the only alleged ground of invalidity is the lack of parental consent, the forum cannot select the proper law until it has characterized the provision of the law of Y, or that of the law of Z, or both, relating to parental consent. A requirement of the law of Y which the forum characterizes as a matter of intrinsic validity will be applicable to the marriage because of the domicile of the parties in Y. Similarly a requirement of the law of Z which the forum characterizes as a matter of formal validity will be applicable to the marriage because of the celebration of the marriage in Z. In the circumstances the forum consults the provisions of the laws of Y and Z, not because it has selected either of these laws as the proper law, but tentatively or provisionally in order to characterize their provisions for the purpose of selecting the proper law from among the potentially applicable laws. The forum must consider the specific provision of each of the laws of Y and Z in its context, but in characterizing the provision of a given foreign law the forum, on the one hand, will not be bound to characterize it in the same way as a court of the foreign country would characterize it, and, on the other hand, will not charac-

⁹⁰ The court might of course, by a short cut, reach this problem in a slightly simplified form, if it appeared *ab initio* that the only question was the effect of the failure of the parties to obtain parental consent under a provision of a given foreign law, whether that of Y or that of Z. The court would then go directly to the characterization of the provision of the given foreign law.

terize the provision solely in accordance with the concepts of the *lex fori*, that is, it will not decide that the provision of the foreign law is a matter of intrinsic validity or is a matter of formal validity, as the case may be, merely because a requirement of the *lex fori* as to parental consent, differently expressed or in a different context, and *ex hypothesi* inapplicable to the marriage under consideration, is characterized in the domestic law of the forum in one way or the other. It is submitted that the suggested method of approach may fairly be described as a *via media* between characterization in accordance with the local concepts of the forum and characterization in accordance with the *lex causae*.⁹¹

In conclusion, it would seem to be doubtful whether the doctrine of secondary characterization in accordance with the *lex causae* has any utility as an independent doctrine. If the question is characterized as one with regard to which the forum is prepared to adopt the doctrine of the *renvoi*, the forum will of course adopt the secondary characterization of the *lex causae* in the application of the proper law. If the question is one which can be finally characterized only after examination of the provisions of a foreign law, the characterization necessarily precedes the selection of the proper law and is not secondary characterization. In the first kind of case, secondary characterization, if any, in accordance with the *lex causae* is an inevitable incident of the adoption of the doctrine of the *renvoi* by the forum, while the second kind of case does not raise the problem of secondary characterization. Other kinds of cases have been put forward as presenting problems of secondary characterization,⁹² but those who put them forward are not in agreement with each other. It appears that one writer analyzes a case in such a way that a given question is the subject of primary characterization, prior to the selection of the proper law and strictly in accordance with the *lex fori*, and that another writer analyzes the case in such a way that the same question is the subject of secondary characterization, after the selection of the proper law and strictly in accordance with the *lex causae*. This lack of agreement in itself suggests doubt as to the validity or utility of the distinction between primary and secondary characterization, and the process of characterization would seem to be too artificial or too much a matter of individual opinion to serve

⁹¹ Cf. *Characterization in the Conflict of Laws* (1937), 53 L.Q.R. 235, at pp. 245, 247-256.

⁹² The examination of all these cases is outside the scope of what is merely a postscript to an article on the *renvoi*, not an article on characterization.

as a working guide to a court.⁹³ Except in cases involving the *renvoi* courts are too much inclined to characterize a question in accordance with the local concepts of the *lex fori*.⁹⁴ They should be encouraged to characterize questions, not in the abstract or in the dark, but in the light of the provisions of potentially applicable laws and prior to the final selection of the proper law,⁹⁵ but that is a very different thing from asking them, under the guise of secondary characterization, to deliver over to the tender mercies of a foreign law the construction and application of the conflict rules of the forum.⁹⁶

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⁹³ Cf. Yntema, *op. cit.*, note 70, *supra*, (1941), 4 U. of Tor. L.J. at p. 234.

⁹⁴ As was done in *Ogden v. Ogden*, [1908] P. 46.

⁹⁵ Yntema, *op. cit.*, at p. 234: "No inherent necessity requires the settlement of the so-called primary characterizations before the various alternatives are explored." See also my *Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 373-376.

⁹⁶ Nussbaum, reviewing Robertson's book (1940), 40 Columbia L.R. 1467-1468, says "In fact the author considerably overdoes Cheshire's views; this is perhaps the most original feature of his disquisition. In order to establish a kind of balance between 'primary' and 'secondary' qualification, he tends to inflate the latter by allocating to it situations which in reality are subject to primary qualification under the law of the forum."