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## REMISSION AND TRANSMISSION IN AMERICAN CONFLICT OF LAWS

LINDELL T. BATES\*

Differences in the rules of private international law in the various countries have given rise to the legal problem called in French "*Renvoi*", in German "*Rückverweisung*". The nearest English word is "Remission". Simply stated, the problem is this: When the law of the place of trial refers to a foreign law is that foreign law to be read as exclusive or inclusive of the private international law? If the reference is merely to foreign so-called 'internal' law, the solution is directly found; but if the reference is conceived to include the foreign rules of private international law, or as we say, the Conflict of Laws, and these refer the solution back to the *lex fori* or to still another foreign law, the solution is not directly found. Thus if the foreign rules of Conflict of Laws were followed the *lex fori* might find itself applying its own internal law or that of a foreign country different from the one originally consulted. In the language of the continental authors it may make a simple "remission" (*Renvoi*) back to the law of the place of trial, or a "transmission" (*Weiterverweisung*) to the law of still another country. In our Conflict of Laws nomenclature the French word "*Renvoi*" is used to cover both remission and transmission.

An example of transmission is the following: An Englishman domiciled in France dies intestate in New York leaving personal property in the State. The Anglo American law looks to the law of the late domicile to determine the manner of distribution. New York Conflict of Laws would therefore refer to French law as *lex domicilii*, French Conflict of Laws would refer to British law as *lex nationalis*. Should the New York court refuse the transmission and apply the French statute of distributions, or accept the transmission and apply the British? A question of remission would be presented if the decedent were a national of the United States in which instance the problem is still further complicated because, by the hypothesis taken, he had no domicile at all on this side of the water.

In these circumstances, according to Beale:

"Three courses are open to the law of the forum: 1. To refuse the *renvoi*, remit the case in turn to the foreign law, and thus engage in a perpetual deadlock; 2. To accept the *renvoi* and

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decide the question in accordance with the terms of its own law, on the ground that the attempt to settle it in accordance with the foreign law has failed: "an expedient resorted to in order to reach a solution." 3. To disregard the *renvoi* and decide the question in accordance with the terms of the foreign law, on the ground that the foreign substantive law [*i. e.*, internal law] alone concerns the question, and there is no submission to the foreign doctrines as to the conflict of laws."<sup>1</sup>

It is surprising that so vital a question should be of relatively recent origin abroad and almost wholly new to the United States. The question has arisen rarely in this country because the several States have for the most part similar rules regarding private international law, so that *Renvoi* can but rarely take place. It may do so, however, for instance in the field of the validity of contracts. Between the states and foreign countries the problem has already been presented and in the future on many occasions it surely will again require adjudication. Speaking of the novelty of the *Renvoi* question, Lorenzen says:

"Notwithstanding its fundamental nature in the science of Private International Law the above question was not raised by earlier writers on the subject, though occasion was not wanting. They appear to have assumed that in the nature of things the rules of Private International Law were to point out the law which should itself distribute the property, determine the capacity, decide upon the validity of a marriage, etc., and thus called for the application of the internal or territorial law of the foreign State to the exclusion of its rules of Private International Law. Even in modern times the same assumption appears to have been made by the continental jurists as well as by those of England and the United States."<sup>2</sup>

Regarding the fundamental importance of the matter, Buzatti, an Italian authority, writes:

"The doctrine of *Renvoi* means nothing else than a change in the character and function of conflict rules. Till now they have been understood to determine the internal law directly applicable to a juristic relation. Instead of this, the *Renvoi* doctrine would have them exercise the function of indicating the laws which determine the internal law directly applicable to a juristic relation."<sup>3</sup>

In favor of including in the reference the whole foreign law and accepting a *Renvoi*, it is argued that the *lex fori* in referring to a foreign law desires a solution such as a foreign law court would give.

<sup>1</sup> BEALE, A TREATISE ON THE CONFLICT OF LAWS (1916) 76.

<sup>2</sup> Lorenzen, *The Renvoi Theory and the Application of Foreign Law* (1910) 10 COL. L. REV. 190, 191.

<sup>3</sup> BUZZATTI, *THEORIA DEL RINVIO NEL DIRITTO INTERNAZIONALE* (1898) 77.

Were the legal issue presented to a foreign court, *i. e.*, in the illustration used, a French court, the latter's own Conflict of Laws rules, if applicable, would surely be considered. So it would be inconsistent for the *lex fori* to refer to the law of a foreign country and notwithstanding decide otherwise than would a court of the same foreign sovereign in applying this law. To this, the answer is that a reference to the whole of a foreign law cannot practically take place. If one were to consult the whole foreign law, foreign procedure and public policy should logically be applied, but in actual practice foreign procedure is nearly if not always excluded in a reference to foreign law and foreign public policy is rarely taken into account. An American court decides as an American court, not as a French one.

A further argument in support of the doctrine that the reference is to the totality of foreign law, so that *Renvoi* should be accepted is found in the so-called "*désistement*" theory. This asserts that when the foreign law refers the problem whether back or further afield, the remission or transmission indicates that the foreign law first consulted (the French in the present illustration), has itself no solution, but desists or withdraws from the problem. In such case it is argued that the *lex fori* should itself apply, to fill the vacancy, or lacuna. To this argument the answer is that the theory of withdrawal is a fiction; there is no real withdrawal. A solution does exist and could be found in the foreign internal law first consulted.

To the arguments favoring the reference to the whole of the foreign law and the consequent acceptance of the so-called *Renvoi* doctrine several objections may be opposed.

Thus, a reference to the whole of the foreign law may mean the creation of an endless circle of references. Kahn explains this complication as follows:

"The principle of *Renvoi* is logically unworkable. If the rule adopted by our system is so framed that the foreign law is to be applied in its totality, including its rules of private international law, it must also be the import of the foreign rule that our law in its turn is to be applied in its totality, including our own rules of private international law. The consequence is—that in virtue of the foreign law ours is applied in its totality and in virtue of ours, the foreign law is again applied in its totality and so on and so on; a logical 'cabinet of mirrors' (*Spiegelkabinett*)."<sup>4</sup>

Finally, it is argued by opponents of *Renvoi* that the *lex fori* in referring to a foreign law, desires a solution according to the particular judicial system referred to and not a solution according to the system of the *lex fori* or that of some other foreign law.

<sup>4</sup>KAHN, 30 JHERING'S JAHRBUCHER (1897) 23.

Concerning the merits of the controversy, a considerable majority of the foreign jurists are opposed to obeying a *Renvoi*, that is, in the illustration, to going beyond the rules for distribution of an intestate's property indicated by the French law. In 1900 the Institute of International Law, by a vote of 17 to 7, adopted the following resolution:

"When a legislator, establishing a rule of private international law, designates as directly applicable by his courts to a given subject a certain foreign civil law, he ought not to subordinate the application of that law to the condition that it be also prescribed by the foreign legislation to which the civil law so designated is a part."<sup>5</sup>

By this resolution is meant that a reference is to internal law, merely, notwithstanding that the foreign Conflict of Laws may provide that in a like case arising in the foreign country its own internal law would not apply.

So much for the problem and its implications. Of the Civil Law countries, France accepts the *Renvoi* and *Weiterverweisung* doctrines to the fullest extent; Germany and Switzerland are also usually in favor of *Renvoi*. Italy is opposed.<sup>6</sup> The British authors and courts are unfortunately still so far at odds on the question that no English rule can be cited as authority to assist our American courts to reach a decision.<sup>7</sup>

In the United States few cases bear directly upon the *Renvoi* question. The courts have usually overlooked the problem.

Consider first the situation in New York. (1) *In re Cruger's Will*.<sup>8</sup> In this case an American testator, de facto domiciled in France but leaving personal property in New York, made a will in France in French form. He disregarded the legal reserve or *légitime* established by French law in favor of children, and purported to dispose of

<sup>5</sup>18 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (1900) 3.

<sup>6</sup>POTU, LA QUESTION DU RENVOI EN DROIT INTERNATIONAL PRIVÉ (1913) 75, 109, 116, 120.

<sup>7</sup>The situation in England has been described by Abbott (Abbott, *Is Renvoi a Part of the Common Law?* (1908) 24 L. Q. REV. 133) and J. P. Bate (BATE, NOTES ON THE DOCTRINE OF RENVOI IN PRIVATE INTERNATIONAL LAW (1904)) who are both opposed to *Renvoi*; also by Westlake (18 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (1900) 35) and Dicey, who favor it. The latter remarks; "The contention here maintained is that, in any English rule of private international law, the term "law of a country", which is admittedly ambiguous, means, as applied to a foreign country, e. g., Italy . . . , any principle of law, whether it be the local law of Italy or not, which the Courts thereof apply to the decision of the case to which the rule refers." DICEY, CONFLICT OF LAWS (4th ed. 1927) 811 app.

<sup>8</sup>36 Misc. 477, 73 N. Y. Supp. 812 (Surr. Ct. 1901).

more of his property than the French statute of distributions allowed. The Surrogate enforced the reserve, namely French internal law, apparently overlooking the fact that the material validity of a will, according to French private international laws, is governed by *lex nationalis*, namely, in the case at bar, by New York law, which recognizes no such reserve.

(2) *Dupuy v. Wurtz*.<sup>9</sup> This case is as follows: A New York citizen, who had resided abroad for some twelve years, made her will in France in American form. It was argued by counsel for the proponent that New York domicile had in fact been retained and that no domicile could be acquired by an American in France without a French Presidential decree. This argument amounted to alleging a *Renvoi* on domicile from French law to New York law. The court found that in fact New York domicile had never been lost. The court, however, stated:

"The inquiry into domicil becomes unnecessary if it turns out that, with respect to this individual succession, the law of New York and of France is the same, for when we speak of the law of domicil as applied to the law of succession we mean not the general law, but the law which the country of domicil applies to the particular case under consideration. (*Maltass v. Maltass*, 1 Rob. Ecc. R. 72., per Dr. LUSHINGTON)."<sup>9a</sup>

This would appear to be a dictum in favor of applying any *Renvoi* found in the whole of foreign law.

(3) *Matter of Tallmadge*.<sup>10</sup> The facts of this case are these: An American citizen of New York domiciled de facto in France, made his will in New York leaving a joint legacy. One of the joint legatees died before the testator, and the issue was whether the legacy lapsed under New York law or accrued to the survivor under French. Egerton L. Winthrop, Jr., Referee, decided that the French law of wills should be applied, whereby the survivor took the whole legacy. He therefore refused to consider the French Conflict of Laws, which provided that the effect of a will as to substance should be determined by *lex nationalis*. The *Renvoi* problem was directly raised in the case and thoroughly considered. The contestant who sought to have New York law applied, relied principally upon the "*désistement*" theory to support the remission, but the Referee and the Surrogate who confirmed the report rejected this theory and condemned *Renvoi*. After an extensive review of the authorities, Mr. Winthrop said:

"On account of its inconsistency with common-law theories of the conflict of laws, its fundamental unsoundness, and the

<sup>9</sup>53 N. Y. 556 (1873).

<sup>9a</sup>*Ibid.* 573.

<sup>10</sup>109 Misc. 696, 181 N. Y. Supp 336 (Surr. Ct. 1919).

chaos which would result from its application to the conflicts arising between the laws of the states of this country, it is my opinion that the "Renvoi" has no place in our jurisprudence."<sup>11</sup>

The problem of *Renvoi* has also been presented in other States. (a) New Jersey. *Harral v. Harral*.<sup>12</sup> In this case an American citizen married a French woman in France, observing the French solemnities. As there was no express contract of marriage, the wife at the death of the husband claimed to have been married under the regime of community property, that is the French system. The matrimonial domicile in fact was France and the court found that both French and New Jersey law applied the rule *lex domicilii matrimonii* to the property relations of married couples. The court further found that de facto domicile in France was sufficient matrimonial domicile in French law and so allowed the wife's claim to a division of the estate under the terms of French internal law. The Court looked beyond the internal French law governing married couples' property to the law of domicile and to the French Conflict of Laws rule concerning marriage contracts, but ended by applying French internal law.

(b) Pennsylvania. *Matter of Baird*.<sup>13</sup> A Pennsylvania citizen de facto domiciled in France, made his will in New York in New York form. It was contested in Pennsylvania on the ground that it was not in one of the three forms provided by internal French law. Pennsylvania law referred to French law, as *lex domicilii* at the date of death. The French Conflict of Laws rule is that a will of a foreigner is valid as to form if made in the form provided by the *lex loci actus*. The will, in fact, was valid as to form under New York law; it was accordingly sustained in Pennsylvania. This is apparently the first case in the United States in which a court, rejecting the arguments opposed to *Renvoi*, deliberately decided to accept it. The case involved not remission but transmission. It is to be regretted that the case went no further, being compromised before the appeal was heard. The Pennsylvania court did not attempt to explain why it accepted *Renvoi* (*Weiterverweisung*) and appeared not to grasp the significance of the problem.

(c) Minnesota. *Lando's Estate*.<sup>14</sup> Two American citizens married in Hamburg without observing the requirements of internal German law, but fulfilling the simple requirements of Minnesota law. After the husband's death the wife sued in Minnesota for dower in her hus-

<sup>11</sup>*Ibid.* 715, 181 N. Y. Supp. at 348.

<sup>12</sup>39 N. J. Eq. 279 (1884).

<sup>13</sup>Orphan's Court of Philadelphia, July 18, 1916.

<sup>14</sup>112 Minn. 257, 127 N. W. 1125 (1910).

band's real estate. Her claim was opposed on the ground that the marriage was illegal for failure to comply with the German formalities. The parties to the suit quoted in a stipulation the German code provisions which they deemed applicable and included therein a Conflict of Laws provision, which the Minnesota court thought adopted *lex patriae* as a test of the formal validity of marriage between foreigners. Minnesota law referred to German law as *lex loci contractionis*, and this law in turn referred back to Minnesota law as *lex patriae*. Minnesota law was applied and the marriage was declared valid. The *Lando* case is of doubtful authority because the decision was influenced by public policy in favor of the validity of a marriage, and the parties in their stipulation had included the German Conflict of Laws provision.

A few other cases exist in which a *Renvoi* has taken place, but they do not clearly pass upon the remission problem or decide the particular issue in a manner which assists a solution.

Turning now to the American legal writers, Lorenzen, writing in 1910, before the *Lando*, *Baird* and *Talldadge* cases were decided, said:

"The *renvoi* doctrine is, therefore, no part of the Conflict of Laws of the United States. Its introduction into our law would be most unfortunate on account of the uncertainty and confusion to which it would give rise in the administration of justice and its demoralizing effect upon the future development of the Conflict of Laws."<sup>15</sup>

Of the other distinguished American authors on private international law neither Wharton,<sup>16</sup> nor Story,<sup>17</sup> refers at all to the *Renvoi* question. Speaking of the conflict rules governing wills, Minor makes the obscure statement that "the strict letter of the *lex domicilii* of the testator at the time of his death will control, and no foreign law can be incorporated into it for the purpose of any particular case."<sup>18</sup> An excellent article has been written by the late Ernst Otto Schreiber, Jr.<sup>19</sup> in which he also comes out against *Renvoi*. Beale says:

"We may be the less troubled about the finer points of this discussion because the territorial theory of the conflict of laws, which is accepted by the American courts, has no room for any doctrine of *renvoi*. If an American court, having according to the territorial theory to apply its own law to existing rights, finds that a right has, by its law, arisen under another law, it

<sup>15</sup>Lorenzen, *op. cit. supra* note 2, at 344.

<sup>16</sup>WHARTON, CONFLICT OF LAWS (3d ed. 1905).

<sup>17</sup>STORY, CONFLICT OF LAWS (8th ed. 1883).

<sup>18</sup>MINOR, CONFLICT OF LAW (2d. ed. 1901) 334.

<sup>19</sup>Schreiber, *The Doctrine of Renvoi in Anglo-American Law* (1918) 31 HARV. L. REV. 523.

has only to learn the terms of that law and the nature of the right which it created; if, on the other hand, it is a question of a new right, created by the law of the forum, but the latter law in creating the right acts in accordance with the provisions of some foreign law, as for instance the law of a foreign domicile, again it has only to learn the terms of that particular foreign law and apply it. In no case is the court concerned with the views of any foreign court on a question of the conflict of laws."<sup>20</sup>

Goodrich who is the latest writer on the subject is still another opponent of *Renvoi*. He says:

"While the accepting of the *Renvoi* theory seems to have found some place in English decision, it seems not to have been adopted in this country. . . . On common law principles of the Conflict of Laws there is no occasion for using the doctrine."<sup>21</sup>

Notwithstanding the foregoing, the American Law Institute's Tentative Restatement No. 2, of February 27th, 1926, on the Conflict of Laws, accepts *Renvoi* in two classes of cases. Sections 7 and 8 read as follows:

"7. Except as stated in Section 8, if a right alleged to have been created in one state is brought in question in a court of another state, its existence will be determined by that court, applying only such part of the law of the first state as determines in that state the creation of similar rights involving no question of foreign law."

"8. If a question of status or of title to land is to be determined, the court first decides in accordance with its own Conflict of Laws, by the Law of what state the existence of the status or of the title is to be determined and then it decides the question as it would be decided by a court of that state."

Commenting upon these Sections the learned Committee which drafted them says:

"This is not a case of adopting the foreign law *in toto* to govern its decision."

The exception was recognized under the "vested rights" theory and in an effort to obtain uniformity in the attitude of courts toward

<sup>20</sup>BEALE, *op. cit. supra* note 1, at 77.

<sup>21</sup>GOODRICH, HANDBOOK ON CONFLICT OF LAWS (1927) 23. The various university law reviews contain valuable notes on the *Renvoi* doctrine, in particular, see (1919) 19 COL. L. REV. 496; (1913) 11 MICH. L. REV. 236; (1926) 25 MICH. L. REV. 174; (1918) 27 YALE L. J. 1046; and (1920) 29 YALE L. J. 214. LORENZEN, CASES ON THE CONFLICT OF LAWS (2d ed. 1924) 834 should be mentioned as a source of instructive comments on British and American cases. Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a country"* (1918) 27 YALE L. J. 509 likewise merits close attention.

foreign divorce. *Dean v. Dean*<sup>22</sup> supports the exception in relation to status.

The present situation appears to be that the American authors who have investigated the subject are in majority opposed to *Renoi*, but some admit *Renoi* in relation to status and land. The New York courts are now opposed to *Renoi* in testamentary matters, but the Pennsylvania and New Jersey courts have rendered decisions which support *Renoi* in this relation. Minnesota applied *Renoi* to a question of status and so did New York. Consequently the problem may be said to be still unsolved in American law and no established rule yet exists for the solution of this important Conflict of Laws problem.

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<sup>22</sup>13 App. Div. 360, 210 N. Y. Supp. 695 (4th Dept. 1925).