

## THE *RENVOI* THEORY AND THE APPLICATION OF FOREIGN LAW.<sup>1</sup>

### I. *Renvoi* IN GENERAL.

No question in the Conflict of Laws has given to the jurists of continental Europe greater difficulty during the last thirty years than the so-called *renvoi* theory. The following example may serve to suggest the problem. Suppose a citizen of the United States, formerly a resident of the State of New York, dies domiciled in Italy, leaving personal property in the State of New York, and that a question arises before the New York courts with respect to the distribution of such property. The obvious answer is: The *lex fori* having adopted the rule that the law of the domicile of the deceased at the time of his death shall govern the distribution of his personal estate, Italian law is to be applied. But what is meant by Italian law? Is the New York judge to apply the Italian statute of distributions, or is he directed by the *lex fori* to apply Italian law in its totality, *i. e.*, including its rules governing the Conflict of Laws? Should the *lex fori* refer to Italian law in the latter sense it would be found that in the Italian system of Private International Law the *lex patriæ* has supplanted the *lex domicilii* in the present instance. If the question came before an Italian judge the personal estate would be distributed in accordance with the law of the country of which the deceased was a citizen or subject at the time of his death, that is, New York law.

The view that under the above circumstances the New York judge should apply the statute of distributions of his own State is generally known as the *renvoi* theory. It should be observed at the very outset that the term *renvoi* is used as a convenient descriptive term denoting that the judge of the forum is to take account of the rules of Private International Law prevailing in the country to which the *lex fori* refers, without regard to any particular theory or to the particular law which may be deemed to control in the end. Unless the contrary appears, this wider meaning will attach to the term *renvoi* in the present article. In its strict sense it would imply that the foreign law, having jurisdiction in the matter, had referred the case back to the *lex fori*.

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<sup>1</sup>The *Journal du droit international privé* will be referred to in this article by "Clunet," the *Revue de droit international privé et de droit pénal international*, by "Darras," the *Zeitschrift für internationales Privat- und Strafrecht*, by "Niemeyer," and the *Annuaire de l'Institut de droit international*, by "Annuaire."

The problem is a general one and is not confined to those branches of the law in which the *lex domicilii* and the *lex patriæ* clash (status, succession, etc.). It arises whenever the rules of Private International Law of the countries in question differ. The question, therefore, is: Must the judge when the law of the forum prescribes the application of a foreign law take notice of the rules governing the Conflict of Laws in such foreign country, and, if he must, in what sense and to what extent?

Notwithstanding its fundamental nature in the science of Private International Law the above question was not raised by the earlier writers on the subject, though occasion was not wanting.<sup>2</sup> 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<sup>3</sup> 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. It was not until the adoption of the *renvoi* doctrine by the French Court of Cassation in the *Forgo* case, decided in 1882,<sup>4</sup> that the problem attracted the serious attention of the jurists.<sup>5</sup> From this time on until its rejection by the Institute of In-

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<sup>2</sup>There were differences of view as to whether a statute was real or personal, whether the domicile of origin or the actual domicile should govern, as to whether the rule *locus regit actum* was imperative or not, etc. See Lainé, *Introduction au droit international privé*. 2 vols., 1888, 1892.

<sup>3</sup>The word "territorial" in this article denotes the municipal law of a country exclusive of its rules governing the Conflict of Laws.

<sup>4</sup>This case, which gave rise to much litigation in France, was set at rest through two decisions of the Court of Cassation, D. 1879, 1, 56; D. 1882, 1, 301. It involved succession to personal property left in France by a Bavarian subject, who was domiciled *de facto* in France, though he had not acquired an authorized domicile there. Under the French law, the *lex patriæ* governed under the circumstances. It being proved, however, that the courts of Bavaria would distribute the property in accordance with the *lex domicilii*, it was held that French law became applicable.

<sup>5</sup>The eminent Belgian jurist, Laurent, appears to have been the first to call attention to the error underlying the *renvoi* theory. See his note to App. Brussels, May 14, 1881, S. 1881, 4, 41. But it was J. E. Labbé, a distinguished professor of the University of Paris, who, in an article entitled "*Du conflit entre la loi nationale du juge saisi et une loi étrangère relativement à la détermination de la loi applicable à la cause*" (12 Clunet 5-16), in which he disagreed with the conclusion of the Court of Cassation in the *Forgo* case, raised the issue in such a forceful manner that it could thereafter no longer be ignored.

ternational Law at its session at Neuchâtel in 1900, the *renvoi* theory, by reason of its fundamental character in the application of foreign law, has occupied the first rank in the theoretical discussions relating to the Conflict of Laws.

Long before the *Forgo* case similar conclusions had been reached in England<sup>6</sup> and in Germany,<sup>7</sup> while contemporaneously therewith the Court of Appeals of Brussels, in *Bigwood v. Bigwood*,<sup>8</sup> introduced the same doctrine into the jurisprudence of Belgium. In all of these cases, it would seem, neither counsel for the interested parties nor the courts were aware of the fact that the application of foreign law could mean anything but foreign law in its totality. The *Bigwood* case has been followed consistently in Belgium ever since.<sup>9</sup> The *Forgo* case has been followed by the lower courts of France<sup>10</sup> until recently, when, as a result of the strong sentiment against the doctrine entertained by the French jurists, two Courts of Appeal have held to the contrary.<sup>11</sup> The French Court of Cassation has had no other occasion to pass upon the question. The earlier cases in Germany agreed with the Court of Lübeck in sanctioning *renvoi*,<sup>12</sup> but the later cases took strong ex-

<sup>6</sup>*Collier v. Rivaz* (1841) 2 Curt. Ecc. 855.

<sup>7</sup>OLG Lübeck, March 21, 1861 (14 Seuffert's *Archiv* 164).

<sup>8</sup>App. Brussels, May 14, 1881 (*Belgique Judiciaire*, 1881, p. 758).

<sup>9</sup>Trib. Civ. Brussels, March 2, 1887 (14 Clunet 748), succession; App. Brussels, Dec. 24, 1887 (D. 1889, 2, 97), legitimation—reserve; Trib. Nivelles, Feb. 19, 1879 (*Belgique Judiciaire*, 1880, p. 982), succession; Trib. Civ. Brussels, Dec. 1, 1894 (23 Clunet 895), grounds for divorce; Trib. Civ. Antwerp, March 16, 1895 (23 Clunet 655), jurisdiction for divorce.

<sup>10</sup>Trib. Civ. Seine, May 19, 1888 (15 Clunet 791), status—interdiction (*semble*); App. Paris, March 23, 1888 (D. 1889, 2, 117), status—legitimation; Trib. Civ. Seine, July 26, 1894 (21 Clunet 1007), status—filiation (*obiter*); Trib. Civ. Tunis, March 25, 1890 (18 Clunet 238), form of donation (*obiter*); Trib. Civ. Seine, April 6, 1894 (21 Clunet 531), status—judicial council; App. Paris, July 31, 1895 (S. 1899, 2, 105), status—judicial council (*semble*); App. Lyons, July 29, 1898 (26 Clunet 569), patronymic name; App. Douai, Feb. 2, 1889 (26 Clunet 825), succession to movables; App. Paris, March 15, 1889 (26 Clunet 794), status—interdiction (*semble*); Trib. Civ. Seine, Dec. 4, 1889 (27 Clunet 368), succession to movables; Trib. Pau, April 19, 1901 (29 Clunet 858), wills—capacity; Trib. Civ. Marseilles, July 19, 1905; App. Aix, July 19, 1906 (34 Clunet 152), succession to immovables.

<sup>11</sup>App. Paris, Aug. 1, 1905 (D. 1906, 2, 169), succession to movables; App. Pau, June 11, 1906 (D. 1907, 2, 1), wills—validity—legitimate portion; see also Trib. Civ. Seine, Feb. 10, 1893 (20 Clunet 530), capacity.

<sup>12</sup>RG Jan. 27, 1888 (20 RG 351), succession; RG Feb. 4, 1892 (2 Niemeyer 469), testamentary succession; Karlsruhe, Oct. 16, 1885 (51 *Badische Annalen* 373, cited in 30 Ihering's *Jahrbücher für die Dogmatik* 12), succession.

ception to the doctrine.<sup>13</sup> The change of view was noticeable also in the decisions of the Court of the Empire. Since 1900 the question has been settled in Germany by the provisions of Articles 27 and 28 of the Law of Introduction to the German Civil Code, which will be considered hereafter. In Switzerland the Supreme Court has rejected *renvoi* with respect to foreign countries,<sup>14</sup> but it has sanctioned it with regard to inter-cantonal law.<sup>15</sup> *Renvoi* has been sanctioned recently also by a lower court of Spain<sup>16</sup> and of Portugal,<sup>17</sup> but it has been rejected by the courts of Italy.<sup>18</sup> As to non-continental countries, exclusive of England and the United States, *renvoi* conclusions were reached only in the case of *Ross v. Ross*, decided by the Supreme Court of Canada.<sup>19</sup>

An examination of the cases supporting the view that the rules of the Conflict of Laws call for the application of foreign law in its totality reveals in the first place the fact that in all of them the court was thereby enabled to apply its own law. It is noticeable also that in the great majority of cases in which it prevailed the *lex domicilii* came into conflict with the principle of nationality. Most of the cases related to succession, intestate or testamentary. There appears to be no case in Belgium, France or Germany in which *renvoi* was allowed with respect to contracts or property rights; in the cases in which such contention was made it was disallowed. In regard to succession, it has been applied in France both to movable and immovable property. In its application to form (*locus regit actum*) the remarks of the Civil Court of Tunis and of the Supreme Court of Canada, in *Ross v. Ross*, favoring the application of *renvoi* were really *obiter* and led, in *Ross v. Ross*,

<sup>13</sup>RG May 31, 1889 (24 RG 326), guardianship; RG April 24, 1894 (5 Niemeyer 58), testamentary succession; RG March 3, 1896 (36 RG 205), succession; RG July 11, 1898 (9 Niemeyer 116), divorce—alimony; OLG Karlsruhe, Oct. 23, 1897, and RG Apr. 19, 1898 (9 Niemeyer 134), succession; LG Strassburg, Oct. 31, 1892 (3 Niemeyer 416), succession; LG Strassburg, June 13, 1892 (3 Niemeyer 520), testamentary succession; OLG Kolmar, May 19, 1893 (4 Niemeyer 151), contract.

<sup>14</sup>*Bundesgericht*, April 6, 1894 (25 Clunet 1095), capacity.

<sup>15</sup>*Bundesgericht*, March 27, 1895 (37 *Zeitschrift für Schweizerisches Recht* 24), matrimonial property.

<sup>16</sup>Barcelona, August 3, 1900 (28 Clunet 911), succession. The court decided the case upon the opinion of a Spanish jurist, who himself misunderstood the attitude of the Conference of the Hague in regard to *renvoi*.

<sup>17</sup>Lisbon, Apr. 6, 1907 (35 Clunet 367), succession.

<sup>18</sup>Cass. Rome, Jan. 5, 1906 (34 Clunet 1205), capacity; Trib. Salerno, June 6, 1899 (65 *Archivio Giuridico* 349), succession.

<sup>19</sup>(1894) 25 Can. S. C. 307.

to the filing of a strong dissenting opinion on that point by Justice Taschereau.

The case-law, then, as it stands to-day, outside of England and the United States, gives support to the doctrine that foreign law means the law in its totality only in the cases in which the *lex domicilii* and the *lex patriæ* come into conflict and the judge is thereby enabled to apply his own law. And even as thus limited the doctrine finds real support only in the decisions of Belgium and of France. In view of the almost complete consensus of juristic opinion against *renvoi* in France, it is probable, moreover, that when the question is presented to the Court of Cassation another time, it will reverse the doctrine of the *Forgo* case.<sup>20</sup>

Before the adoption of the German Civil Code *renvoi* was recognized by way of legislation only in isolated instances. It existed to some extent in several of the Swiss cantons<sup>21</sup> and it was contained also in section 108 of the Hungarian law of December 18, 1894, relating to marriage.<sup>22</sup> Japan has followed the example of the German Code with respect to *renvoi*.<sup>23</sup> Elsewhere there appears to be no legislative support for the doctrine.

The opinion of textwriters is overwhelmingly in favor of the doctrine that the rules of Private International Law refer to the internal or territorial law of the foreign country exclusive of its rules governing the Conflict of Laws.<sup>24</sup> The conclusion to be de-

<sup>20</sup>Very recently the Court of Cassation, in order to bring the law into harmony with juristic opinion, changed its former view regarding the rule *locus regit actum* in its application to wills. Cass. Aug. 11, 1909 (36 Clunet 1097).

<sup>21</sup>See, 1 Meili, *Internationales Civil-und Handelsrecht*, 171.

<sup>22</sup>See *Annuaire de Législation Étrangère*, 1895, p. 377.

<sup>23</sup>Art. 29 of the Law of Ho-rei, of June 15, 1898. See Yamada, 28 Clunet 635.

<sup>24</sup>AUSTRALIA. *In favor*: Brown, 25 Law Quar. Rev. 148, 153.

AUSTRIA-HUNGARY. *Against*: Rostworowski, 18 *Annuaire* 176; de Roszkowski, 18 *Annuaire* 176; Strisower, 17 *Annuaire* 18n.

BELGIUM. *In favor*: Rolin, *Principes de droit international privé*, vol. 1, p. 258; 17 *Annuaire* 215-216; de Paepe, *Revue de droit international et de législation comparée*, 1900, p. 378. *Against*: Laurent, S. 1881, 4, 41.

BRAZIL. *In favor*: Beoilaqua, *Elementos de direito internacional privado*, 1906, § 20. *Against*: Carvalho, *Nova consolidação das leis civis*, art. 25, § 1; Octavio, *Direito do estrangeiro no Brazil*, 1909, n. 323.

CUBA. *In favor*: P. Desvernine, *Una consulta de derecho internacional privado*, 1890, pp. 17-18 (cited by Bustamante, *El orden público*, 159). *Against*: Bustamante, *El orden público*, 167; 17 *Annuaire* 219-220; N. Trelles, *Una consulta de derecho civil*, 51 (cited by Bustamante, *El orden público* 160).

ENGLAND. *In favor*: Dicey, *Conflict of Laws* (2d ed.) 715-716; Westlake, *Private International Law* (4th ed.) 25-40; 17 *Annuaire* 217-219; 18 *Annuaire* 35-40, 164-168. *Against*: Bate, *Notes on the doctrine of Renvoi in Priv. Int. Law*, London, 1904; Holland, 18 *Annuaire* 176.

rived from the great mass of juristic literature which has grown up since Labbé drew attention to the question may be stated in the words of that distinguished Dutch statesman and jurist, Asser:

FRANCE. *In favor*: Weiss, *Traité de droit international privé*, vol. 3, pp. 77-81; 18 *Annuaire* 150-151; Chausse, *Revue critique de législation et de jurisprudence*, 1888, p. 197; 24 *Clunet* 23; Vareilles-Sommières, *La Synthèse du droit international privé*, vol. 2, pp. 97-98. *Against*: Audinet, *Principes élémentaires de droit international privé* (2d ed.) Nos. 314-316; S. 1899, 2, 105; Martin, 30 *Revue de droit international et de législation comparée*, 129-187, 272-310; D. 1898, 2, 281; Baudry-Lacantinerie and Houques-Fourcade, *Traité des personnes* (2d ed.), vol. 1, No. 207 (formerly favoring *renvoi*); Chrétien, 13 *Clunet* 174, n. 2; De Boeck, D. 1889, 2, 97; Despagne, *Précis de droit international privé* (4th ed.), No. 106; 25 *Clunet* 263-264; Dupuis, 18 *Annuaire* 176; Descamps, 18 *Annuaire* 176; Fauchille, 18 *Annuaire* 176; Labbé, 12 *Clunet* 5-16; Lainé, 23 *Clunet* 241-261, 481-494; 2 *Darras* 605-643; 3 *Darras* 43-72, 313-339, 661-674; 4 *Darras* 729-758; 5 *Darras* 12-40; 17 *Annuaire* 14-36; 18 *Annuaire* 34; Ligeoix, 30 *Clunet* 481-498, 31 *Clunet* 551-567; Pic, D. 1899, 2, 410; Pillet, 21 *Clunet* 721; S. 1896, 2, 75; 17 *Annuaire* 220-221; 18 *Annuaire* 148-150; *Principes de droit international privé*, Nos. 63-66; *Droit international privé* 239-242; Lyon-Caen, 18 *Annuaire* 176; Renault, 18 *Annuaire* 176; Surville et Arthuys, *Cours élémentaire de droit international privé* (3d ed.), 49.

GERMANY. *In favor*: v. Bar, *Theorie und Praxis des internationalen Privatrechts* 279-281; 2 *Holtzendorff's Encyclopädie der Rechtswissenschaft* (6th ed. by Kohler), 19; 8 *Niemeyer*, 177-188; 18 *Annuaire* 41, 153-157; 174-175; Barazetti, 8 *Niemeyer* 35-36; Dernburg, *Das bürgerliche Recht des deutschen Reichs und Preussens*, vol. 1, p. 97; Keidel, 28 *Clunet* 82-96; Harburger, 18 *Annuaire* 176; Neumann, *Verhandlungen des deutschen Juristentages*, 1898, I, p. 187; Schnell, 5 *Niemeyer* 337-343. *Against*: Enneccerus, *Verhandlungen des deutschen Juristentages*, 1898, I, pp. 76, 95-97; Gierke, *Deutsches Privatrecht*, vol. 1, p. 215; Kahn, 30 *Ihering's Jahrbücher für die Dogmatik* 9-34; 36 *id.* 366-408; 40 *id.* 56-69; 45 *Kritische Vierteljahresschrift für Gesetzgebung* 620-623; Klein, 27 *Archiv für bürgerliches Recht* 252-282; v. Liszt, 18 *Annuaire* 176; Mitteis, *Verhandlungen des deutschen Juristentages* 1898, I, pp. 76, 95-97; *Niemeyer*, *Methodik* 15-17; *Niemeyer Kodifikation* 82-86; Planck, *Bürgerliches Gesetzbuch* (3d ed.), vol. 6, p. 104; Regelsberger, *Pandekten*, vol. 1, pp. 164-165; Silberschmidt, 8 *Niemeyer* 100-101; Zitelmann, *Internationales Privatrecht*, vol. 1, pp. 242-243.

The German Bar Association pronounced itself against *renvoi* with respect to contracts. *Verhandlungen des deutschen Juristentages*, 1898, iv, p. 127. (The arguments advanced against *renvoi* would apply with equal force to all other branches of the law.)

GREECE. *Against*: Streit, 18 *Annuaire* 162-164; 6 *Niemeyer* 198.

HOLLAND. *Against*: Asser, 32 *Clunet* 40; 18 *Annuaire* 159-161.

ITALY. *In favor*: Brusa, 17 *Annuaire* 227-228; 18 *Annuaire* 177; Fiore, 28 *Clunet* 424-442; 681-704. *Against*: Anzilotti, *Studi critici di diritto internazionale privato* 194 (cited by Buzzati, *Trattato di diritto int. privato secondo le convenzioni dell'Aja*, I, p. 111n); Buzzati, *Revue de droit international et de législation comparée*, 1901, pp. 272-278; *Trattato di diritto internazionale privato secondo le convenzioni dell'Aja*, I, pp. 105-120; 8 *Niemeyer* 449-456; 11 *Niemeyer* 3-15; 17 *Annuaire* 14-36; 18 *Annuaire* 43, 146, 152, 167, 168; Catellani, 18 *Annuaire* 169-170; Corsi, 18 *Annuaire* 176; Fedozzi, 65 *Archivio Giuridico* 352; Fusinato, 17 *Annuaire* 18n; Olivi, *Revue de droit international et de législation comparée*, 1900, pp. 31-32; 17 *Annuaire* 18n; Pierantoni, 17 *Annuaire* 18n; Sacerdoti, 17 *Annuaire* 18n.

PORTUGAL. *In favor*: da Veiga Beirao, 35 *Clunet* 367. *Against*: Midosi, 18 *Annuaire* 176.

"The science of Private International Law \* \* \* must designate the law applicable to each jural relationship. We have no hesitancy in declaring that in our opinion the learned jurists who have opposed the system of *renvoi* have proved in an irrefutable manner that the science of Private International Law has for its aim the direct designation of the very law which is to govern the legal relationship and that its aim must not consist merely in referring to the rules governing the Conflict of Laws in such country.

"When the science teaches us, for example, that the status of an individual is governed by his national law, it is the national law regulating the status that is meant, and not a disposition of the national law which might declare another law, for example, that of the domicile of the individual, applicable to this status.

"The science, in declaring applicable the national law, or the law of the situation of the property, or any other law, has been guided by considerations derived from the nature of the legal relationship in question. It is, therefore, the law itself indicated by it that must be applied, and not another law to which it refers and which could not have been considered by the science."<sup>25</sup>

The question of *renvoi* was discussed by the members of the Institute of International Law at its sessions at The Hague in 1898,<sup>26</sup> and at Neuchâtel in 1900.<sup>27</sup> Article 1 of the final conclusions submitted by the very able report of Lainé and Buzzati, "*rapporteurs*" of the commission to which the question had been committed for preliminary study reads:

"When a legislator, laying down a rule of Private International Law, indicates a rule of foreign civil law as being directly applicable by his courts, he must not subordinate the application of this rule to the condition that it is prescribed also by the foreign legislation, of which the rule of civil law so indicated forms a part."<sup>28</sup>

Great difference of opinion arose with respect to the exact meaning of the above conclusion, the doubt relating mainly to the

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RUSSIA. *In favor*: Ivanowsky, 17 *Annuaire* 16n.

SERBIA. *Against*: Vesnitch, 18 *Annuaire* 176.

SPAIN. *In favor*: de Dios Trias, 28 *Clunet* 905-911; Torres Campos, 17 *Annuaire* 16n.

SWITZERLAND. *In favor*: 1 Brocher, *Cours de droit international privé* 167; Wolf, 37 *Zeitschrift für schweizerisches Recht* 20-24; Roguin, 18 *Annuaire* 170-172; Boiceau, 18 *Annuaire* 176. *Against*: Hilty, 18 *Annuaire* 176; Kebedgy, 18 *Annuaire* 176; Lehr, 18 *Annuaire* 176; Meili, *Das Internationale Civil-und Handelsrecht* 168-169; International Civil and Commercial Law (transl. by Kuhn), 372.

UNITED STATES. *Against*: E. H. Abbott, Jr. 24 *Law Quart. Rev.* 133, 146; 20 *Harv. L. Rev.* 227.

<sup>25</sup>32 *Clunet* 40-41.

<sup>26</sup>17 *Annuaire* 14-36, 212-230.

<sup>27</sup>18 *Annuaire* 34-41, 145-178.

<sup>28</sup>18 *Annuaire* 34.

question whether it referred to actual law or embodied merely an abstract principle. At the end of the discussion it was decided to vote first upon the principle contained in Article 1. The principle rejecting *renvoi* was adopted by a vote of 22 to 6.<sup>29</sup> The resolution finally passed with practical unanimity was expressive of a mere wish, and reads as follows:

"When the law of a State governs a conflict of laws in the matter of private law it is desirable that it should designate the rule of law to be applied in each case and not the foreign rule governing the conflict in question."<sup>30</sup>

Courts admitting *renvoi* have said that in the application of foreign law the judge should consider himself as sitting in the foreign country.<sup>31</sup> Thus interpreted the *lex domicilii*, for example, would be equivalent to a declaration on the part of the *lex fori* that the case in reality belongs to the State in which the domicile has been established, whose law in its totality would, therefore, necessarily govern. Whatever its rule of Private International Law on the point in question, it would on principle be binding upon the judge of the forum, subject to such limitation as the public policy of the forum might establish. If, therefore, the foreign law should have substituted the *lex patriæ* for the *lex domicilii* in its Private International Law, the judge of the forum would have to follow the directions of such foreign law, which, according to the circumstances of the case, might lead to the application of the law of the forum or to that of a third country. When the judge of the forum is thus sent back by the foreign law to the *lex fori* we would have true *renvoi*; when he is directed to apply the law of a third State it would be a case of transmission, or, to use the equivalent German term generally employed, *Weiterverweisung*.

From a theoretical standpoint the fatal objection to the application of foreign law in its totality in the sense that the judge of the forum is to regard himself for the purpose in question as a judge of the country to which the *lex fori* refers is, that upon

<sup>29</sup>The following jurists voted in favor of the principle: Asser, Boiceau, Zuzzati, Catellani, Corsi, Descamps, Dupuis, Fauchille, Hilty, Holland, Kebedgy, Lehr, de Liszt, Lyon-Caen, Midosi, Renault, Rostworowski, de Roszkowski, Sacerdoti, Streit, and Vesnitch.

The following voted against the principle, that is, in favor of *renvoi*: v. Bar, Brusa, Harburger, Roguin, Weiss, Westlake. See 18 *Annuaire* 176-177.

<sup>30</sup>18 *Annuaire* 179.

<sup>31</sup>*Collier v. Rivaz* (1841) 2 Curt. Ecc. 855; Lübeck, March 21, 1861 (14 *Seuffert's Archiv*, 164); RG, January 27, 1888 (20 RG 351).



strict principles of logic it can lead to no solution of the problem. Suppose, for example, a Dane is domiciled in Italy, where he dies, leaving personal property in Denmark, and that the question pending in a Danish court involves the distribution of such estate. Under the above theory the Danish law would direct its courts to apply the *lex domicilii*, i. e., Italian law in its totality. As under Italian law the *lex patriæ* of the deceased is to govern the distribution of his property, the Danish judge should logically be referred back to Danish law in its totality, for the *lex domicilii* in the Conflict of Laws cannot be deemed to have one meaning and the *lex patriæ* another. Both must refer either to the internal or material law of the foreign country or to the foreign law inclusive of its Private International Law.

"‘Otherwise,’ as the report of the first commission of the Institute of International Law well expressed it, ‘one would fall into the absurdity of having to admit that a legislative provision establishes one thing when it is applied by the national judge and an entirely different thing when it is applied by a foreign judge; that a rule of international law changes its meaning, nature, function as soon as it passes the frontiers of the State in which it was promulgated.’”<sup>32</sup>

There would appear to be no escape in legal theory from this circle or endless chain of references.<sup>33</sup> Even Westlake<sup>34</sup> and v. Bar,<sup>35</sup> who favor *renvoi* in another form, have recognized the impossibility of breaking the chain upon principle after the first reference. The courts that have sanctioned *renvoi* actually break it in this place and allow the foreign law to have the last word in

<sup>32</sup>17 *Annuaire* 25.

Where the foreign law, instead of sending the judge of the forum back to his own law, would refer him to the law of a third country, he "would be obliged, 'to use again the language of the First Commission of the Institute of International Law,' either to travel over half of the universe with his investigation, passing from *renvoi* to *renvoi*, or, according to circumstances, he would encounter two foreign laws, each of which in turn sending the decision to the other, without finding any ground for preferring one to the other." 17 *Annuaire* 26.

<sup>33</sup>See Audinet, *Principes élémentaires de droit international privé* (2d. ed.), 234; S. 1899, 2, 105; Bartin, *Revue de droit international et de législation comparée* 144; Buzzati, 18 *Annuaire* 146; Kahn, 30 *Ihering's Jahrbücher für die Dogmatik* 23; Lainé, 23 *Clunet* 257; 3 Darras 48; Ligeoix 30 *Clunet* 485; Pillet, *Principes de droit international privé* 161; *Droit international privé* 241; 1 Regelsberger, *Pandekten* 164-165.

This theory has been appropriately described as involving a game of battledore and shuttlecock (1 Regelsberger, *Pandekten* 164), or as international lawn-tennis (Buzzati, 18 *Annuaire* 146).

<sup>34</sup>Westlake, *Private International Law* (4th ed.), 31.

<sup>35</sup>v. Bar, *Theory and Practice of Private International Law* (Gillespie's transl.), 209n.

the matter, a view approved by Professor Weiss of the *École de Droit*, Paris,<sup>36</sup> and by Dicey,<sup>37</sup> but this is only an expedient resorted to in order to reach a solution. But even if there were nothing illogical<sup>38</sup> in breaking off after the first reference, the strongest scientific reasons, to be considered hereafter, would speak against the doctrine of *renvoi* in this form.

From a practical standpoint it should be noted that the result reached under this theory of true *renvoi* or *Weiterverweisung* would depend (1) upon the rule relating to the Conflict of Laws prevailing in the foreign country upon the point in question; (2) upon the further question whether such foreign law itself sanctioned *renvoi* in one form or another. Assume, for example, that two Englishmen, A and B, leave movables in England, and that A dies domiciled in Italy, and B in France, but without having acquired an authorized domicile in the French sense. Under these circumstances the Private International Law of both France and Italy would require that the property be distributed according to English law. But *renvoi*, which is sanctioned by the courts of France, is not a part of the Italian system of Private International Law. It would follow, granted *renvoi* in the above sense is a part of the law of England, that A's next of kin would be actually determined by the English statute of distributions, while B's next of kin, owing to the fact that *renvoi* is also a part of the French law, would be determined by the French statute.<sup>39</sup> It is apparent also that in those cases in which the law of two foreign countries is involved, as for example in the case of legitimation by subsequent marriage under the English rule of Private International Law when the parties have changed their domicile between the time of the birth of the child

<sup>36</sup> Weiss, *Traité de droit international privé* 80.

<sup>37</sup> Dicey, *Conflict of Laws* (2d ed.), 721-722. So, practically, Piggott, *Foreign Judgments* (3d ed.), II, pp. 263-264.

<sup>38</sup> Zitelmann, Professor of the University of Bonn, says that the attainment of a reasonable result being the object of all interpretation, it must be assumed, in order to obviate the absurd consequence referred to, to have been the legislative intent that there should be only one reference. (*International Privatrecht*, vol. 1, pp. 240-244.) Zitelmann is followed by Klein, 27 *Archiv für Bürgerliches Recht* 266-267. Buzzati's answer to Zitelmann is that the interpretation itself must be reasonable, which it is not when it is necessary to admit that the same rule of the Conflict of Laws says one thing when applied by a foreign judge and the opposite thing when applied by a national judge. *Il Rinvio*, 81 (quoted in Bate, Notes on Renvoi 52).

<sup>39</sup> These are the logical results when the local judge is required to decide a case in the same manner as it would be decided by the courts of the foreign country.

and the marriage, obviously an impossible task would be asked of the judge if he were required to let each of them have the last word with respect to the matter in controversy.

Fiore, the distinguished Italian jurist, would allow the application of foreign law in its totality in all cases governed by the personal law of the parties. Following Mancini, he holds that the country of which a person is a subject, though he is domiciled in another State, should be regarded as the competent legislative authority with respect to all matters affecting his person and that to the extent such jurisdiction has been exercised by the national legislator it must be recognized by all other countries. Hence, if the national legislator should prescribe that the *lex domicilii* shall govern in a given case, such direction must be followed.<sup>40</sup>

Fiore's deductions would appear to be entirely sound, but his assumption regarding the competency of the national legislator is in conflict with the generally established law or accepted theory on the continent, as well as with the principle of the territoriality of the law firmly imbedded in the common law.<sup>41</sup>

v. Bar, Professor of International Law at the University of Göttingen, and Westlake, contrary to the preceding theories, contend in favor of the application of the *lex fori* whenever there is disagreement in the rules of Private International Law in the countries concerned. Both conclude that under such circumstances there is in reality no conflict at all, but a gap in the legislation which the *lex fori* is called upon to fill as a subsidiary law. Westlake's formulation of this theory, which in some respects is more logical than that of v. Bar,<sup>42</sup> is substantially as follows:

<sup>40</sup>28 Clunet 424-442, 681-704.

<sup>41</sup>For an extended analysis and criticism of Fiore's theory see, Lainé, 3 Darras 51-53, 319-335; 5 Darras, 21-24.

<sup>42</sup>With respect to v. Bar's theory consult his *Theorie und Praxis des internationalen Privatrechts*, I, pp. 279-281; 2 Holtzendorff's *Encyclopädie der Rechtswissenschaft* (6th ed. by Kohler), 19; 8 Niemeyer 177-188; 18 *Annuaire* 41, 153-157, 174-175.

According to the same writer the thought of the legislator in directing the application of foreign law is about as follows: "Though I regard my law as the better and the more reasonable, it is generally more important to aim at international uniformity of treatment even at the risk that objectively the result is not so good. If we should desire to apply our law exclusively in those cases also in which the legal relationship has a much more important connection with foreign countries the advantages gained from the application of our better law would be out of proportion to the disadvantages with respect to international uncertainty of law resulting therefrom. \* \* \* Just as I treat foreign law, so shall I also be treated in general. If I expect and demand that my law shall be taken into consideration by other countries, I must as far as possible admit the application of foreign law in analogous cases."

"A distinction between internal law and international law belongs only to the science of law but does not actually exist. Suppose a legislator says (a) that the capacity to make a will shall be acquired at the age of 19; (b) that the capacity of persons shall be governed by their national law. Rule (a) would have no meaning without rule (b). Whose testamentary capacity is acquired at 19? No answer can be given without the aid of rule (b) fixing the category of persons whose capacity the legislator believes he has a right to fix. According to (b), (a) says that the capacity of the subjects of the legislator is acquired at 19, but (b) says nothing regarding the capacity of foreigners domiciled within its territory. If rule (b) had said that capacity shall be governed by the law of domicile it would have said nothing regarding the capacity of its own subjects domiciled abroad.

"In whatever terms rule (b) may be expressed its true sense would be limited to the cases which, according to the ideas of the legislator, fall within his authority. There are normal cases which the legislator deems to belong to him and with regard to which he intends to legislate. The Danish legislator, for example, who attaches a decisive importance to domicile, will regard as the normal case in the matter under discussion a person domiciled in Denmark for which he fixes the age at 21. The Italian legislator, on the other hand, attaching a decisive importance to nationality the normal case will be that of an Italian subject and for him he fixes the age at 19.

"A legislator who regards a certain case as normal will regard analogous cases as being normal for other legislators and as belonging to them. A Danish legislator, therefore, will direct his judges to assign to persons domiciled in a foreign country such capacity as such foreign legislator may have attributed to them, and the Italian legislator will do the same with respect to the capacity of foreigners which their national legislator has attributed to them.

"By means of this second step the Danish legislator disposes of persons domiciled in a country whose legislation in the matter

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"We see therefore that the rule of Private International Law, however closely it may be connected with the rule of substantive law, is nevertheless by no means a pure expression of the applicability of our law; that the legislator establishing a certain point of contact for his Private International Law is far from asserting that he has no substantive law for other cases.

"The legislator determining the right of succession according to the domicile of the deceased says merely: 'For me domicile is a more important point of contact than nationality or any other principle. I would gladly apply my rules concerning succession also to my subjects residing abroad, to all property situated in my territory, etc. Yet I know that if I want to aim at international uniformity of law I can claim, on principle at least, but one point of contact. That being so, I prefer to assure the strict application of my rules concerning succession as to those who live in my territory. I will rather suffer an application of foreign law to my subjects abroad than to admit its application to persons domiciled within my territory.'"

40 Ihering's *Jahrbücher für die Dogmatik* 67-68.

is also based on the *lex domicilii*. But it does not provide a rule for persons domiciled in a country, such as Italy, whose legislation is silent as to the capacity of persons domiciled in such jurisdiction. A third step is here necessary, viz., to direct the judge to apply in the absence of another law, the normal law. The Dane domiciled in Italy will be deemed in Denmark, therefore, to have reached the age of testamentary capacity only at 21 and in Italy, at the age of 19.

"As to what the Germans call *Weiterverweisung*, suppose two citizens of New York (capacity to contract being governed there by the *lex loci*) enter a contract in Italy, being at that time domiciled in France, and that litigation with respect thereto arises in England. The *lex fori* (England) applying the law of the domicile at the time of the making of the contract to determine the capacity of the parties to enter it will refer the matter to France. France having adopted the principle of nationality with respect to capacity, will answer: 'The case does not belong to me; it belongs to the New York legislator.' Should the English judge, following the direction of the French law, ask the New York law it would tell him that, in its opinion, the case did not belong either to New York, but (under the rule *lex loci*) to the Italian legislator.

"But under rule (b) the English judge need not follow the direction given by France to consult New York law. Instead he should apply the normal law of his own country, rule (a). The judge must determine in the first instance to which country the legal relationship presented to him belongs; if the law of the latter, based upon another system regarding the Conflict of Laws, says that the case does not belong to it, there is no further reference to the law of a third state."<sup>43</sup>

A necessary consequence of the theory propounded by v. Bar and Westlake is that it must lead to the rejection of *Weiterverweisung* (transmission). By regarding the aims of the science of Private International Law as confined to a determination of the limits of the application of the domestic law without a corresponding definition of the application of the foreign law, they are led to the view that whenever the rules of Private International Law of two countries differ there is in reality no provision in either legislation regarding the point in question; hence, the judge of the forum, being under an obligation to render a decision in the case, has no recourse except that of applying the *lex fori*.

Without dwelling upon the singular results<sup>44</sup> that would be obtained if Westlake's theory that there is in reality no positive

<sup>43</sup>The above is a condensed statement of Westlake's note to the Institute of International Law. See 18 *Annuaire* 35-40. See also, Westlake, *Private International Law* (4th ed.), 25-40.

<sup>44</sup>For example, the majority of an Englishman domiciled in Italy would have to be determined in Germany (*lex patriæ*) by the German law relating

conflict but merely a mutual disclaimer of jurisdiction became accepted law, it is easy to show that it rests upon premises which lack all real support. His point of departure—that there is an inseparable connection between the rules of Private International Law of a given country and its internal or territorial law, so that, according to the real intention of the legislator, the former must be deemed to define the limits of the latter's application, cannot be admitted. In Roman Law, for example, there were no rules of Private International Law in the proper sense; hence it would appear that the Roman legislator enacted laws without reference to their application in space. As to the modern continental countries, notwithstanding the fact that the science of Private International Law has been known to them since the fourteenth century, their present codes, almost without exception, contain such scant provisions relating to the Conflict of Laws that an assertion that the legislator in adopting a rule of internal law in reality defined its operation in space by the corresponding rule of Private International Law is an absurdity. In most instances no such rule of Private International Law could be found in any law. And with respect to England and the United States the unsoundness of Westlake's contention is all the more apparent for the reason that the law of England was fully developed before the rules relating to the Conflict of Laws, taken over from the continent, became a part thereof. With what show of reason can it be said then that the two are one and inseparable?<sup>45</sup> Laws are enacted by a leg-

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to majority, for the reason that both England (*lex domicilii*) and Italy (*lex patriæ*) would be deemed to have declined jurisdiction.

Buzzati gives another illustration: Suppose, he says, State A applies the *lex rei sitæ* to immovables, the *lex domicilii* to movables, and the *lex loci actus* to the form of wills. The law of B is the same except that the national law of the deceased shall govern the distribution of his movables. A subject of State A dies domiciled in State B, leaving a will executed in B. His estate is composed of movables and of immovable property situated in State B. A judge of A has to decide in regard to the disposition of his estate. The law of B concerning testamentary and intestate succession being proved, the judge would apply its provisions regarding the form of the will and those relating to the immovable property, but when he came to the movable property, he would have to assume that there was a gap—that is, that the provisions of State B regarding the distribution of personal property do not exist. 8 Niemeyer 455.

<sup>45</sup>Bate, in his Notes on Renvoi 87-107, maintains the following thesis: "When once a jural relation, or an element therein, is perceived to be outside the dominion of the [territorial] law of England, it is deemed by English courts to be in the dominion of International Law, and not in the dominion of any other legal system."

islator without any thought of their operation in space.<sup>46</sup> The object of the science of the Private International Law of a particular country is to fix the limits of the application of the territorial law of such country, but its aim is not restricted to this. It includes also the determination of the foreign law applicable in those cases in which the *lex fori* does not control. Otherwise the courts of the forum would be left by the national legislator without a guide as to the applicatory law in that class of cases. Nor can the application of the territorial law of a foreign country be made dependent upon the wishes of the foreign legislator. If its enforcement rested upon mere comity or courtesy to such foreign State and not upon considerations of justice and international convenience, the substitution of the *lex fori* for a foreign law which did not care to govern, might be regarded as a voluntary withdrawal of an offer or unappreciated courtesy extended to such foreign country rather than as resulting from the commands of the foreign sovereign.<sup>47</sup> But, inasmuch as the application of foreign law under modern conditions has become a jural necessity,<sup>48</sup> it

<sup>46</sup>Kahn, 30 Ihering's *Jahrbücher für die Dogmatik* 29-30, has attempted to show that in comparison with the rules of internal law those of Private International Law possess ordinarily a subordinate character.

<sup>47</sup>See Weiss, 18 *Annuaire* 151. (Why not accept the gift when the foreign law yields to the *lex fori*? Why be more of a royalist than the king?); 1 Rolin, *Principes du droit international privé* 259. (Why be more catholic than the pope?)

<sup>48</sup>Savigny, Private International Law (Guthrie's transl.), 27-29; Lainé, *Introduction au droit international privé* 19-44.

The old theory of comity or courtesy, first propounded by the Dutch jurists, Huber and Voet, and accepted in England as the basis of its Conflict of Laws, has given way there, as well as in the United States to-day, to that of jural necessity.

Courts resort to the law of another country "not *ex comitate*, but *ex debito justitiæ*." Lord Brougham in *Warrender v. Warrender* (1835) 2 Cl. & F. 488, 530.

"The application of foreign law is not a matter of caprice or option; it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners." Dicey, *Conflict of Laws* (2d ed.), 10-11.

"The true foundation on which the administration of International Law must rest is, that the rules which are to govern are those which arise from the mutual interest and utility, from a sense of the inconvenience which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return." Story, *Conflict of Laws* (8th ed.), sec. 35.

"Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Mr. Justice Gray in *Hilton v. Guyot* (1895) 159 U. S. 113, 163-164.

follows, in view of the absence of a common superior, that each sovereign State, in accordance with its own sense of duty, both to its own inhabitants and to the rest of the world, must designate the law which, based upon the nature of things, shall settle the controversy.<sup>49</sup> To leave the final decision of a case to a foreign law-giver means, in reality, nothing less than an abdication of sovereignty and a failure on the part of a State to discharge the duties owed to its inhabitants.<sup>50</sup> As a result it may happen that the courts of one State will determine the rights of litigants with reference to the law of a foreign country when such country itself would not so determine them. But, unfortunate as this is, it will happen whether *renvoi* is adopted or not, as long as there are differences in the rules of Private International Law.

A number of authors have advocated *renvoi* in the belief that it would tend toward greater international harmony in the law—the ultimate aim of the science of Private International Law.<sup>51</sup> Such an assumption, however, is unwarranted. Suppose, again, that A, a citizen of the United States, formerly a resident of New York, dies domiciled in Italy, and the question as to who is entitled to his personal estate left in New York arises before a New York judge. If *renvoi* is rejected the New York judge would distribute the property, of course, according to the Italian statute of distributions (*lex domicilii*). The Italian courts, on the other hand, by reason of their principle of nationality, would apply the New York statute of distributions. If *renvoi* is adopted, the New York courts would apply the New York statute of distribu-

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<sup>49</sup>"*Renvoi*, in effect, in whatever manner it be understood, involves the influence, more or less direct and effective, of the state whose law is declared applicable upon the international law of the state which declares it applicable." Lainé, 3 Darras, 332.

The argument that the foreign law, having jurisdiction under the *lex fori*, has created rights which must be recognized involves in effect a *petitio principii*. The very question is whether the *lex fori* should recognize alleged rights created not by the territorial law of the foreign country referred to, but by that of another state which is incompetent under the *lex fori*.

<sup>50</sup>Audinet, S. 1899, 2, 105; Bartin, 30 *Revue de droit international et de législation comparée* 295; Bustamante, 17 *Annuaire* 220; Catellani, 18 *Annuaire* 170; Chrétien, 13 *Clunet* 174 n. 2; 1 Gierke, *Deutsches Privatrecht* 214; Klein, 27 *Archiv für bürgerliches Recht* 273; Labbé, 12 *Clunet* 12; Lainé, 23 *Clunet* 256; 3 Darras, 334-335; Laurent, S. 1881, 4, 42; Olivi, *Revue de droit international et de législation comparée*, 1900, pp. 31-32; Pic, D. 1899, 2, 410; Pillet, *Droit international privé* 241-242.

<sup>51</sup>Chausse, 24 *Clunet* 23; *Revue critique de législation et de jurisprudence* 1888, p. 197; 1 Dernburg, *Das bürgerliche Recht* 103; 2 Vareilles-Sommières, *La synthèse du droit international privé* 98; 3 Weiss, *Traité de droit international privé* 81; 18 *Annuaire* 151.



tions and the Italian courts the Italian statute.<sup>52</sup> There is no identity of result.<sup>53</sup> Each country has simply been forced to distribute the property according to a statute which, in the nature of things, it deemed inapplicable. *Renvoi* or no *renvoi*, such inconsistencies will remain. Uniformity of decision cannot be obtained until the elimination of the differences in the systems of Private International Law through international agreement.

It follows that whenever the question as to the creation of rights under the law of a foreign country arises before the tribunals of another State the existence or non-existence of such rights depends, properly speaking, not upon the will of the foreign law-giver, but upon the *lex fori*, which must be deemed to have adopted the foreign internal or territorial law for the purpose.

It may thus be said that *renvoi* is insupportable in theory, and that it offers no real advantage to recommend its adoption on grounds of expediency. Courts that have sanctioned *renvoi* seem to have done so as a convenient means to escape the necessity of applying foreign law, a task often of considerable difficulty, but they have forgotten that this apparent gain, even if Westlake's theory were adopted, can be had only after proof of the existence of a different rule governing the Conflict of Laws in the foreign country. The burden upon the judge would, in fact, be increased and not diminished, for he would be obliged, to some extent at least, to acquaint himself with the rules of Private International Law prevailing in foreign countries.<sup>54</sup> Concerning our own Conflict of Laws, it has been said by Mr. Justice Porter in *Saul v. His Creditors*,<sup>55</sup> that the questions relating thereto "are the most em-

<sup>52</sup>This statement is based upon the actual decisions in the various countries with regard to *renvoi*. If the rules of Private International Law of both New York and Italy should compel the local judge to regard himself as sitting in the foreign country we should have the same result as if *renvoi* were no part of the law of either country.

<sup>53</sup>That *renvoi* will not promote the execution of foreign judgments has been shown by Martin, 30 *Revue de droit international et de législation comparée* 139-157. See also, Martin, D. 1888, 2, 28; Buzzati, 18 *Annuaire* 152.

<sup>54</sup>The extent would depend upon the theory adopted by the courts. Should Westlake's theory prevail, the *lex fori* would become applicable upon mere proof that the corresponding rule governing the Conflict of Laws in the foreign country was different from that of the forum. If *renvoi* in the stricter sense, inclusive of *Weiterverweisung*, obtained, the judge of the forum might be compelled, according to circumstances, to investigate the Private International Law of several countries, and to decide the case after all, not according to the *lex fori*, but according to the internal or territorial law of some foreign country.

<sup>55</sup>(L.A. 1827) 5 Martin (N. S.) 569.

barrassing and difficult of decision that can occupy the attention of those who preside in courts of justice." How hopelessly embarrassing would they become if the additional burden of applying the Private International Law of any country of the civilized world were placed upon the shoulders of our judges?<sup>56</sup>

*(To be concluded.)*

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<sup>56</sup>The fundamental nature of the differences in their systems of Private International Law and especially the uncertainty of their rules relating to public policy make the application of foreign law as a whole practically an impossible task.