THE *RENVOI* THEORY AND THE APPLICATION OF FOREIGN LAW.

II. *Renvoi* IN PARTICULAR CLASSES OF CASES.

It has been intimated that *renvoi* might be allowed as an exceptional doctrine with respect to the *lex domicilii.* The theory suggested is that since the adoption of the *lex domicilii* in the Conflict of Laws arose from a desire that the rights governed thereby be subject to one law[1]—an aim impossible of realization after many countries have gone over to the *lex patriæ*—courts still adhering to the old rule would be justified in interpreting the same in a *renvoi* sense.[2] This conclusion, however, is inadmissible. Could the question be examined *de novo,* English and American courts, for example, might hold, in view of their tendency to subject transfers of personal property *inter vivos* to the *lex rei sitæ,*[3] that the same rule should govern its distribution upon death. But as long as the *lex domicilii* is retained as the general principle[4] a substitution of the *lex fori* for the foreign law upon the sole ground that the foreign country had become a convert to the *lex patriæ* could be supported neither upon principle nor upon grounds of policy.[5] The objections raised against *renvoi* in general apply with full force to this class of cases.[6]

[1]There is considerable doubt in regard to the origin of the rule *lex domicilii* in the matter of succession. See Harvey *v.* Richards (1818) 1 Mason 381, *per* Story, J.; Thorne *v.* Watkins (1750) 2 Ves. 35 (Lord Hardwicke); Meili, International Civil and Commercial Law 372-374; v. Bar, Private International Law (Gillespie's transl.) 792-806.

[2]See Sewell, 3 Darras 517, 524.

[3]Cammell *v.* Sewell (1860) 5 Hurl. & N. 728; Green *v.* Van Buskirk (1866) 5 Wall. 307; (1868) 7 Wall. 139; Lees *v.* Harding Whitman & Co. (1905) 68 N. J. Eq. 622; Schmidt *v.* Perkins (1907) 74 N. J. Law 785.

[4]It is evident that countries like England and the United States, in which there is no uniform law of succession, cannot, as long as such condition lasts, adopt the *lex patriae* intra-territorially.

[5]Professor Meili, of the University of Zurich, has suggested that *renvoi* might be adopted in the above class of cases by countries still adhering to the *lex domicilii* as a legislative measure of retorsion with a view of checking the encroachments of the *lex patriae.* (*Das internationale Privatrecht und die Staatenkonferenzen im Haag,* 30-31). It is difficult to see, however, even if the propriety of retorsion in the Conflict of Laws were conceded, how it would, in this instance, accomplish any beneficial result. The doctrine of *renvoi* would, in fact, lead to the enforcement of the *lex patriae* when, without such a doctrine, the *lex fori* would have prescribed the application of the *lex domicilii.*

[6]Westlake advocated *renvoi* before the Institute of International Law at its session at the Hague with respect to the above class of cases only. 17 *Annuaire* 31, 217-219. Although the *lex domicilii* differs from the other rules of the Conflict of Laws in that it is based upon the personal

Article 27 of the Law of Introduction to the German Civil Code, which went into effect on January 1, 1900, provides for the application of German law whenever in matters relating to capacity, marriage, matrimonial property, divorce, and succession, the foreign law refers back to German law. According to Article 28 of the same law, Article 27 is inapplicable to property situated in a third State where different rules prevail.

Renvoi has thus been expressly sanctioned by the German legislator with respect to all matters based upon the principle of nationality, in so far as they have been regulated in the Code, provided the foreign law refers back to German law.[7] The reasons for the final adoption of *renvoi* in the form contained in the above articles are enveloped in doubt and obscurity. In the preliminary draft, in which substantially the same provisions are found (section 31), the following is stated:

"The draft starts with the principle that foreign law is applied in Germany not for the reason and to the extent that it wants to be applied, but for the reason and to the extent that its application corresponds to the spirit of our own law. The present section by way of exception takes account of the wishes of the foreign law in so far as the latter does not care to be applied in cases, properly subject to such foreign law by reason of the principle of nationality, if according to the principles of Private International Law adopted by it, German law and not its own law is to be applied. This provision is to be recommended on the one hand because it diminishes conflicts with the *lex domicilii,* and on the other hand because, without violating the aforesaid principle, it assigns to German law a wider sphere of operation, which will promote the security of legal intercourse at home." [8]

---

tie existing between a country and all persons domiciled therein notwithstanding their absence from its territory at the time of the creation of the right or rights in question, it is apprehended that no distinction can be drawn between them with regard to the question of *renvoi.* Upon further reflection Westlake abandoned his former position in favor of the general application of *renvoi.* 18 *Annuaire* 35-40.

[7]Whether or not Article 27 should be regarded as containing a general principle applicable also to those branches of the law not resting upon the *lex patriæ* and to include *Weiterverweisung* is a mooted question among the German jurists and has not been definitely determined by the German courts. It is contended by some that the actual provisions of the Code were intended merely as illustrations of a general principle. Others, with more reason, contend in favor of a restrictive interpretation. See Kahn, 45 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 618; Niemeyer, *Das Internationale Privatrecht des bürgerlichen Gesetzbuchs* 79-86; 6 Planck, *Bürgerliches Gesetzbuch* 106-108. Compare, v. Bar, 8 Niemeyer 188; v. Bar, 2 Holtzendorff's *Encyklopädie der Rechtswissenschaft* (6th ed. by Kohler) 20; Keidel, 26 Clunet 19.

[8]Kahn, 36 Ihering's *Jahrbücher für die Dogmatik* 370.

The first commission after a thorough discussion of the problem pronounced itself against the adoption of Section 31, or of *renvoi* in any other form. The same attitude was maintained by the second commission. By way of exception it allowed a qualified *renvoi* in two cases where expediency strongly suggested its adoption: (1) a marriage invalid under the national law of the parties was nevertheless to be valid if the requisite capacity existed under the *lex domicilii* or the *lex celebrationis,* and sanction for such a marriage could be found in the national law of the parties; (2) a divorce obtained in accordance with the *lex domicilii* of the husband but not in accordance with his national law was to be valid if upheld by his national law. For reasons so far undisclosed, the Federal Council struck out these provisions and adopted the principle contained in the original draft.[9] Whether or not *renvoi* in the form it has received in Article 27 became a part of German law as a result of political considerations, owing to the participation of the Foreign Office in the deliberations of the Federal Council, as Kahn intimates,[10] the fact remains that it reflects neither the opinion of the Court of the Empire at the time[11] nor the juristic sentiment of Germany as a whole.[12] The reasons advanced in the original draft are without merit. The first one, viz., that the adoption of *renvoi* will diminish conflicts is not true, as has been shown above. The second, viz., that from an extension of the *lex fori* greater security of law for the German people would result is broad enough to exclude the application of any foreign law. If political considerations induced the adoption of Article 27 of the German Code, in order to give Germany a position of vantage in its effort to remove conflicts by international agreement, it is still to be regretted from the standpoint of the science of Private International Law.[13]

Article I of the Convention of The Hague relating to marriage, and signed by various continental countries on June 12, 1902, contains the following provision:

[9]See 1 Mugdan, *Die gesammten Materialen zum bürgerlichen Gesetzbuch für das deutsche Reich* 261-263; 6 Planck, *Bürgerliches Gesetzbuch* 104. The deliberations of the Federal Council, which appear to have been but summary, have not as yet been published. See Kahn, 36 Ihering's *Jahrbücher für die Dogmatik* 399.

[10]36 Ihering's *Jahrbücher für die Dogmatik* 399.

[11]See *supra,* p. 193.

[12]See *supra,* p. 195, n. 24.

[13]For a more extended discussion of Article 27 see, Bartin, 30 *Revue de droit international et de législation comparée* 159-170; Niemeyer, *Das internationale Privatrecht des bürgerlichen Gesetzbuchs;* Planck, *Bürgerliches Gesetzbuch* (3d ed.), VI, 103-108.

"The right of contracting marriage shall be governed by the national law of each of the parties intending to marry, unless a provision of such law refers expressly to some other law." [14]

But for the word "expressly" no doubt could possibly be entertained in regard to the meaning of this article and its attitude toward *renvoi.* As it stands it would seem clearly to allow *renvoi* in some sense. The history of this article,[15] however, shows that it was not the intention of its authors to sanction *renvoi* in the ordinary sense. They wished merely to provide for cases that might arise under statutes similar to the Swiss Federal Law of Dec. 24, 1874, relating to marriage. Articles 25 and 54 of this law recognize the validity of a marriage entered into by Swiss subjects abroad if it complies either with Swiss law or with the law of the place of celebration. Though the Convention required for the validity of a marriage conformity with the national law of the parties it seemed that where a national law like that of Switzerland expressly sanctioned an alternative standard for the validity of a marriage by its subjects abroad, a marriage conforming to such alternative provision should be upheld. This is not ordinary *renvoi,* which implies a conflict in the rules of Private International Law. Switzerland does not apply in its Conflict of Laws relating to marriage the *lex loci* in the place of the *lex patriæ;* it has only provided by express legislation that its subjects *may* marry abroad upon complying with the local law. The reference provision of the above article, therefore, does not relate to the general rules governing the Conflict of Laws with respect to marriage under the national law, but merely to such exceptional express legislative enactments as the one contained in the Swiss law. The members of the commission that drafted the Convention relating to marriage, as stated by its chairman Renault,[16] were opposed to *renvoi* upon principle and had no intention of sanctioning its general application. Some members of the Conference may have shared Asser's view[17] that *renvoi,* although indefensible upon principle, should be adopted in international conventions based upon the *lex patriæ* in

[14] *Actes de la Conférence de la Haye chargée de réglementer diverses matières de droit international privé,* III, p. 168.

[15] For the history of this article see *Actes de la Conférence de la Haye, etc.,* I, pp. 39-41, 45-50; II, pp. 43, 47-49; III, pp. 160-161; 167-170. See also Lainé, 21 Clunet 247-257; 22 Clunet 470-471; 28 Clunet 14-15; 5 Darras 24-33; I Buzzati, *Trattato di diritto internazionale privato secondo La Convenzione dell' Aja; Il Matrimonio* 105-120; Kahn, 12 Niemeyer 209-217; 36 Ihering's *Jahrbücher für die Dogmatik* 383-397.

[16] *Actes de la Conférence de la Haye, etc.,* III, p. 169.

[17] 32 Clunet 41-42.

order to extend their beneficial influence to countries still following the *lex domicilii,* which but for such provision would not adhere to the Convention—a view scarcely justified by subsequent events—but if the general sentiment of the Conference had been in favor of *renvoi* upon this ground it would no doubt have been adopted in some of the other Conventions agreed upon. The reference provision in Article 1 of the Convention relating to marriage must be regarded, therefore, as a special rule adopted for the purpose of giving marriage an additional chance of validity.[18]

v. Bar has suggested a line of cases in which he says *renvoi* is indispensable to avoid unjust results.[19] He puts, in substance, the following cases:

(1) Two subjects of State X are married in State Y, where they are domiciled. The validity of the marriage is questioned in State Z on the ground that the parties had no capacity to enter the marriage under the provisions of the laws of Y relating to marriage, though it is conceded that they possessed such capacity under their national law with respect to marriage. The laws of X and Y agree that the *lex patriæ* shall govern the essentials of a marriage. The law of Z, on the other hand, applies the *lex domicilii.* Should the courts of Z regard the marriage as valid?

(2) A, a citizen of State X, dies domiciled in State Y. The laws of X and Y agree that B is entitled to A's personal estate in accordance with A's national law. Subsequently B's heirship is contested in State Z, in which State the *lex domicilii* is held to govern the distribution of personal property upon death. Should B's title be recognized by the courts of Z?

v. Bar would answer both questions in the affirmative upon principles of *renvoi.* He formulated the rule applicable to the above cases in the following thesis which he submitted to the Institute of International Law:

A court must respect: "The decision of two or more foreign legislations, provided it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same legislation." [20]

[18]"It implies a concession to the theory called *'renvoi.'* But, aside from the fact that concessions may be legitimately made in an international convention to theories which scientifically one does not approve, this one is very slight; it is indeed beneficial since it consists in a deference on the part of states to the desire manifested by other states that the marriage of their subjects abroad shall have all possible chances of validity." Lainé, 28 Clunet 15-16.

[19]8 Niemeyer 183-184.

[20]See 18 *Annuaire* 41.

A resolution of similar import was introduced before the Institute of International Law by an opponent of *renvoi,* Professor Streit of the University of Athens.[21] In view of the observation, however, that this resolution involved in fact a proposition quite distinct from *renvoi,* to wit, what effect should be attributed to conventions between, or identical legislation on the part of, two countries by another State, it was agreed by the members of the Institute to make this a special topic for future consideration.[22]

It is not proposed to examine the above cases nor any other special class of cases to which *renvoi* or something akin might perhaps with propriety be applied.[23] The sole object of this article is to deal with the general aspects of the question.

III. *Renvoi* as a Part of English and American Law.

We are now ready to inquire to what extent, if any, *renvoi* has become an established part of the common law, and to discuss, first, the English decisions which lend most support to the doctrine.

In *Collier* v. *Rivaz*[24] certain codicils to a will made by an Englishman whose domicile at the time of his death, in the English sense, was in Belgium, but, in the Belgian sense, was in England, were opposed in the Prerogative Court of Canterbury on the ground that their execution was not in the form required by Belgian law of Belgian subjects. Upon proof that these codicils would be upheld by the courts of Belgium, Sir Herbert Jenner admitted them to probate. The learned justice said:

"Then according to the opinion of these gentlemen, well skilled in the practical application of the Code Napoleon and its dispositions, and which was the law in force in Belgium up to the year 1830, when the separation of the two countries took place, and consequently at the time at which these testamentary documents

[21] 18 *Annuaire* 164.

[22] See 18 *Annuaire* 178. See also Kahn's observations in regard to this question in 45 *Kritische Vierteljahresschrift für Gesetzgebung* 622-623.

[23] Bartin has considered this question with regard to three special classes of cases: (1) with respect to consular jurisdictions; (2) with respect to countries like Switzerland, where the national legislator may have prescribed in particular instances the application of the law of a particular canton or State; (3) with respect to countries bound by international conventions in the matter of Private International Law. See 30 *Revue de Droit International et de Législation Comparée* 283-300.

[24] (1841) 2 Curt. Ecc. 855, 862, 863. Other English cases upholding foreign wills by interpreting the rule of Private International Law relating to the formal validity of wills in a *renvoi* sense are: Frere *v.* Frere (1847) 5 Notes of Cases 593; Crookenden *v.* Fuller (1859) 1 Sw. & Tr. 441, *obiter;* In the Goods of Brown-Séquard (1894) 70 L. T. (N. S.) 811, *ex parte.*

of Mr. Ryan were executed, they do not consider that Mr. Ryan, as a foreigner, was bound by the requisites of the law of Belgium, as to the form and execution of a will, as would necessarily be the case with a free, natural-born subject of Belgium; but the successions of persons who, however long they might have been resident, not having obtained the royal authority to reside there, being considered as mere foreigners, would be governed by the laws of their own country, and would be upheld by the Courts of Belgium, if those Courts were called on to decide. *The Court sitting here decides from the evidence of persons skilled in that law, and decides as it would if sitting in Belgium.*

"Therefore I am of opinion, that notwithstanding the domicile of Mr. Ryan must be considered to have been in Belgium, and that he had in point of law abandoned his original domicile, and had acquired *animo et facto* a domicile in a foreign country, yet that foreign country in which he was so domiciled would uphold his testamentary disposition, if executed according to the forms required by his own country. I am therefore of opinion, that I am bound to decree probate of the will and all the codicils."

This case appears to sanction *renvoi* in its extreme form. Though under the facts of the case English law became applicable, logic would demand that the direction of the foreign law be followed in all cases irrespective of the fact whether it led in the end to the application of the *lex fori* or to that of another country. Actually the case decides only that a will, invalid as to form under the English rules of Private International Law, will be admitted to probate in England if it conforms to the *lex domicilii* inclusive of its rules governing the Conflict of Laws. Such a decision was quite natural at a time when the Court of Delegates had just laid down the narrow and misconceived rule that a will, in the matter of form, *must* comply with the *lex domicilii* at the time of the testator's death.[25] This rule has since been changed by the English Wills Act,[26] which has brought the English law into harmony with that prevailing on the continent, so that to-day the above codicils would be valid under the English rules of Private International

[25]Stanley *v.* Bernes (1830) 3 Hagg. 447. See also Craigie *v.* Lewin (1842) 3 Curt. Ecc. 435; De Zichy Ferraris *v.* Hertford (1843) 3 Curt. Ecc. 468; affd. Croker *v.* Hertford (1844) 4 Moo. P. C. 339; Bremer *v.* Freeman (1857) 10 Moo. P. C. 306; Moultrie *v.* Hunt (1861) 23 N. Y. 394. The English law was in a state of doubt prior to this time. It had been held that a will executed by an Englishman abroad might be in the English form. Duchess of Kingston Case, cited in 2 Add. 21; Curling *v.* Thornton (1823) 2 Add. 6.

[26]1861, St. 24 & 25 Vict., c. 114. In various States of this country also the rule that in formal respects a will must comply with the law of domicile at the time of death has been changed by statute.

Law. These considerations detract somewhat from the authority of this case.[27]

In *In the Goods of Lacroix*[28] the question arose again with respect to the formal validity of a will, but this time under the English Wills Act. The will and codicils in the case were executed in Paris in the English form by a born Frenchman who had subsequently acquired the British nationality. The testator's domicile at the time of the making of the will was probably in France. Upon the affidavit of a French advocate that the instruments would be held valid by the French courts, Sir J. Hannen admitted them to probate as valid according to the law of the place where made.

In this case, therefore, the rule *locus regit actum* under the English Wills Act is taken to refer to the foreign law in its totality. But, as the application for probate was *ex parte,* and the real point in question was simply assumed, not considered, the case is not entitled to any weight.

In the case of *In re Trufort,*[29] a British subject by birth, who had acquired the Swiss nationality, died domiciled in France, leaving personal property in England, Switzerland and Italy, which he bequeathed to defendant. Plaintiff claimed nine-tenths of the estate as his compulsory portion as testator's lawful son under a judgment rendered by the courts of Zurich in accordance with the Zurich law of succession. The competency of the Zurich courts in the matter was recognized by the terms of a treaty between France and Switzerland. Stirling, *J.,* held that the judgment was conclusive upon the English courts.

This case has been cited in support of the doctrine of *Weiterverweisung.*[30] In reality, it stands only for the limited proposition submitted to the Institute of International Law, and regarded by its members as distinct from *renvoi,*—to the effect that where the law of the State in which a party has a domicile and the law of the country of which he is a subject agree that the law of one of them is to govern, the rights created by such law should be enforced or recognized in all jurisdictions in which either the *lex domicilii* or the *lex patriæ* is regarded as the proper rule.[31]

[27]See also, Bate, Notes on Renvoi 109-111; Abbott, 24 Law Quart. Rev. 142-144.

[28](1887) L. R. 2 P. D. 94.

[29](1887) L. R. 36 Ch. D. 600.

[30]Dicey, Conflict of Laws (2d ed.) 718-719; Westlake, Private International Law (4th ed.) 38-39, 104.

[31]For an explanation of the case see also Bate, Notes on Renvoi 112; Abbott, 24 Law Quart. Rev. 142. The conclusions reached in this case find support in an interesting article by Schnell, 5 Niemeyer 337-343.

The case of *Armitage* v. *The Attorney-General*[32] involved the validity of a divorce procured in South Dakota by a married woman under circumstances which would give that court no jurisdiction according to English law, but proved to be sufficient under the law of New York, the State in which the husband was domiciled. It was held that inasmuch as the courts of the State of the husband's domicile would recognize the decree in this instance, the divorce should be deemed valid in England, notwithstanding the English rule that the courts of the State in which the husband has his domicile shall be regarded as having exclusive jurisdiction for divorce.

The doctrine of this case again, if supportable at all, may properly be regarded as limited to cases of marriage or divorce and as applicable to them only where, as the result of such application, the marriage or divorce will be sustained. It will be remembered that the second commission for the preparation of the German Civil Code, which rejected *renvoi* in general, sanctioned it upon grounds of expediency in the cases and for the purpose just mentioned.

The first English case in which the question of *renvoi* was actually considered was that of *In re Johnson*.[33] The facts, in brief, were as follows: Mary Johnson, a British subject, whose domicile of origin was Malta, died domiciled in the Grand-Duchy of Baden, Germany, leaving personal property in Baden and in England. The litigation related to the distribution of the movable property left in England which was undisposed of by will. It was proved that under the Baden law, the law of the country of which the deceased was a subject at the time of her death, would govern.[34] Farwell, *J.*, held that the statute of distributions of Malta, that is, of the domicile of origin, should govern, basing his conclusion upon two distinct lines of argument. The principal argument advanced was that Mary Johnson had not acquired a domicile in Baden, inasmuch as the Baden law attributed no effect to domicile, the learned court saying:

[32] [1906] P. 135.

[33] [1903] 1 Ch. 821, 827-8.

[34] In this case, therefore, the issue of *renvoi* was squarely raised with respect to cases in which the *lex domicilii* comes into conflict with the *lex patriae*. Abbott, in 24 Law Quart. Rev. 140-145, gives too restricted a meaning to *renvoi* when he considers cases in which there has been a reascertainment of domicile with reference to the foreign law as the only instance of true *renvoi*. The question of *renvoi*, as generally understood, is involved whenever the rules of Private International Law of the countries concerned differ.

"In order to establish a new domicile of choice, the Court has to be satisfied that it has been adopted animo et facto—it is essential that there should be both animus and factum. When, therefore, the law of the land said to be chosen as the new domicile disregards domicile and declines to distribute in accordance therewith or to treat it as of any force, there cannot have been any change of domicile de facto; and the case is accordingly remitted to this Court as a case where the propositus has intended but has failed to obtain any effectual domicile of choice. No change is effectual unless the factum is proved, and the factum cannot exist in a country where the law refuses to recognize it. The result is that this Court must conclude that a domicile of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicile at all, and that the propositus, therefore, is left with his domicile of origin unaffected. The Baden Courts would in effect have disavowed him and disclaimed jurisdiction."

In answer to this argument it is sufficient to remark that it disregards the prevailing rule, which is, that the question of domicile,—a mixed question of law and fact,—is to be determined in accordance with the law of the State in which the property affected is situated.[35] Moreover, the court's assumption that the courts of Baden would have declined jurisdiction is erroneous in fact. Under Sections 13 and 27 of the German Code of Civil Procedure jurisdiction on the part of the Baden courts exists in matters of succession where the deceased was a resident of Baden at the time of his death.

The second line of reasoning, in the words of Justice Farwell, was as follows:

"The Baden Courts would have really refused jurisdiction; but, even if this were not so, I should arrive at the same conclusion in a different way. When it is said that the Baden Courts regard the nationality of the propositus, I apprehend that this means that they distribute according to the law of the nation to which the propositus belongs, or in other words, of which he is a subject. But the British Empire is composed of a large number of States, countries, and colonies * * * [with] many different systems of law within its bounds. There is no one uniform law of this Empire which can be taken for this purpose as the law of the nationality of the propositus. To what nationality, then, does the propositus belong, or of whom is he a subject? The only possible answer appears to me to be that he is a subject of the British Crown, and that his

[35]Collier *v.* Rivaz (1841) 2 Curt. Ecc. 855; Anderson *v.* Laneuville (1854) 9 Moo. P. C. 325; Bremer *v.* Freeman (1857) 10 Moo. P. C. 306; Hamilton *v.* Dallas (1875) L. R. 1 Ch. D. 257; *In re* Martin [1900] P. (C. A.) 227, Lindley; Harral *v.* Harral (1884) 39 N. J. Eq. 279. But see *In re* Bowes (1906) 22 T. L. R. 711.

nationality is the British Empire; but inasmuch as there is no one law of the Empire to which the rule in question can refer, resort must be had to the law of England. * * * Foreign States are in diplomatic relation with this country as representing the whole Empire. They know nothing officially of Scotland or Canada, or the Colonies, still less, perhaps, of the Channel Islands or the Isle of Man. * * * The only possible solution appears to me to be that foreign Courts must necessarily refer such questions as these to and decide them according to the law of the country with which alone they are in diplomatic relation; and inasmuch as the law of England distributes such movables in accordance with domicile of origin substantial justice is done to all His Majesty's subjects. * * * I conclude, therefore, that distribution according to the law of the nationality means according to English law, but according to that law as applicable to the particular propositus, and not to Englishmen generally without regard to their domicile of origin."[36]

In this second line of reasoning the learned court, like the Prerogative Court in *Collier* v. *Rivaz,* evidently intended to arrive at the conclusion which the Baden courts would have reached had the case been presented to them for adjudication, but no such course was actually pursued. Courts that have adopted the principle of nationality in their Private International Law are, of course, confronted with a difficulty when the party in question is a citizen or subject of a country which has no uniform legislation on the point in issue, as is usually the case with respect to Great Britain and the United States. The difficulty has been solved by them by the application of the law of that portion of the country in which the party concerned had his last abode.[37] Under the facts of this case the law of Malta would have become applicable. But if the learned court deemed it its duty to decide the question as if it were sitting in Baden, it should have inquired whether *renvoi* was a part of the Baden law, for the courts of Baden would be justified in distributing the property in accordance with the Maltese statute of distributions only in the event that they understood their *lex patriæ* to refer merely to the internal law of the foreign country. But if they understood their rules governing the Conflict of Laws as referring to foreign law in its totality, and finding that the Maltese rule of Private International Law on the point in question (*lex domicilii*) called for the application of the law of Baden, they would have followed such reference and distributed the property

[36][1903] 1 Ch. 821, 832-835.

[37]Trib. Civ. Pau, Apr. 19, 1901 (29 Clunet 858); Trib. Civ. Seine, March 11, 1904 (34 Clunet 434); App. Paris, Aug. 1, 1905 (D. 1906, 2, 169); OLG Karlsruhe, Oct. 23, 1897 and RG Apr. 19, 1898 (9 Niemeyer 134).

in accordance with the provisions of their own law.[38] The statement, moreover, that the English law would distribute such movables in accordance with the law of the domicile of origin is incorrect. The *lex domicilii* at the time of death is the clearly established law in this regard. Upon the false assumption that no domicile had been acquired in Baden the domicile of origin would have remained, of course, unchanged in this particular case. But if the deceased had established a domicile in another part of the British Empire or in a foreign country before going to Baden, the result reached by application of the law of domicile of origin would not have been identical with that of the Baden courts, under the *renvoi* theory or in the absence of such theory, had the case come before them for decision.

In view of the erroneous and confused reasoning of the case and its disregard for established rules of English law, *In re Johnson* lends little, if any, support to *renvoi.*

Renvoi came before Mr. Justice Farwell in another case, *In re Baines,* decided March 13, 1903. The case is unreported, but Dicey gives the following statement of it:

"A British subject probably, but not certainly, domiciled in England, was possessed of land in Egypt. He died leaving a will valid in form according to the law both of England and of Egypt. His Egyptian land was sold by his executors. The proceeds (£16,000) were lodged in a bank in England. The dispositions of the deceased's will were valid according to the law of England, but invalid according to the local or territorial law of Egypt. It was admitted on all hands that the right of succession to the £16,000 depended upon the right to succession to the Egyptian land. But succession to land is under the Egyptian Code Civil, Arts. 77, 78 'governed by the law of the nation to which the deceased belongs.' The meaning of the article was disputed. The evidence of experts was taken: it was by this means proved that the Egyptian courts would hold that in the circumstances of the case succession to the deceased must, under the articles of the Egyptian Code, be governed by the ordinary territorial law of England. The will was held valid."[39]

It is apparent from the above statement of the case that the Egyptian law, applicable as the *lex rei sitæ,* was referred to in its totality by the English law.

[38]The law of Baden at the time was adverse to *renvoi.* OLG Karlsruhe, Oct. 23, 1897 (9 Niemeyer 134). See also Kahn, 30 Ihering's *Jahrbücher für die Dogmatik* 12; Kahn, 36 *id.* 406. Had Mrs. Johnson died since January 1, 1900, Art. 27 of the Law of Introduction to the German Civil Code would have compelled the Baden judge to make the distribution in accordance with the provisions of the German Code relating to succession.

[39]Conflict of Laws (2d ed.) 723.

Advocates of *renvoi,* it must be admitted, find support for their views in the cases so far discussed. Liberally construed, the cases would establish *renvoi* as a part of the English law in the sense of *Collier* v. *Rivaz,* in a more radical form than that assigned to it in any other country either by the courts or jurists. They would seem to sanction *Weiterverweisung* (*In re Trufort*) as well as *renvoi* proper, and to require an application of this doctrine not merely to cases in which the *lex domicilii* and the *lex patriæ* are in conflict, but also to all other cases, whatever the rule of Private International Law involved in regard to which differences may exist in the countries concerned (*In the Goods of Lacroix, In re Baines*).

The contention has been made[40] that the law of England has been settled to the contrary by *Bremer* v. *Freeman,*[41] decided by the Court of Appeal. But this view is erroneous. The question in that case related to the formal validity of a will, disposing of personal property in England, which had been executed in the English form in Paris by an Englishwoman, who was domiciled in France in the English sense but not in the French sense, for want of governmental authorization.[42]

After having found that in accordance with the English law regarding domicile the testatrix had acquired a domicile in France, Lord Wensleydale continued:

"This domicile being established in evidence, the burden is thrown on the Respondent to prove that the Will, in the English form, is sanctioned by the municipal law of France. He must show, upon the balance of the conflicting evidence in the cause, that the Wills of persons so domiciled, in that form, are allowed by that law."

The learned justice thereupon reviewed the testimony of French experts regarding the meaning of Article 13 of the French Code and the French rules of Private International Law with respect to the formal validity of wills; and upon such testimony, and a personal investigation of the decisions of the French courts in regard to the meaning of Article 13, he concluded, (1) that Article 13 did not deprive foreigners not so domiciled of the power to make a will; (2) that under the law of France the will in the English form was invalid.

That the learned court must have understood by the "municipal" law of France French law in its totality and not merely its territorial law appears from the fact that only a rule relating to the

[40]Abbott, 24 Law Quart. Rev. 143-146.
[41](1857) 10 Moo. P. C. 306, 361.
[42]See Article 13, French Civil Code.

Conflict of Laws could sanction a will executed in France in the *English* form. But inasmuch as the case turned principally upon the question of domicile and the meaning of Article 13 of the French Civil Code, the problem of *renvoi* not even being considered, and related, moreover, to the formal requirements of a will, in regard to which the English law, as a result of this decision[43] has since been changed, no great weight can be attached to it in its bearing upon *renvoi*.[44]

Opposed to the preceding cases is *Hamilton* v. *Dallas*.[45] In this case an Englishman domiciled in France in the English sense, but without having obtained an authorized domicile there,[46] died intestate with respect to a part of his estate, and the question was whether the next of kin should be determined in accordance with the French statute of distributions, or in accordance with the English statute. After having determined that the deceased had acquired a domicile in France in the English, though not in the French, sense, Bacon, *V. C.*, assumed as a matter of course that the French statute of distributions would govern. Had the learned judge regarded himself as sitting in France, the English statute should have been applied by virtue of the *lex patriæ* in the French system of Private International Law.[47]

If we look beyond the cases calling for a determination of the question whether the foreign law should be understood in its totality we find certain decisions by the House of Lords which may be regarded as supporting, by implication, the doctrine that *renvoi* is a part of the English law. *Enohin* v. *Wylie*,[48] as explained by *Ewing* v. *Orr Ewing*,[49] established the rule that assets

[43]See Phillimore, Int. Law, IV, p. 226.

[44]At the time of the rendering of this decision the French Court of Cassation recognized the optional character of the rule *"locus regit actum"* only with respect to Frenchmen executing their wills abroad. See Article 999, Civ. Code. Cass. March 9, 1853 (D. 1853, 1, 217). Very recently the optional character of the above rule has been extended to foreigners generally, so that they may now execute their wills in France, as far as form is concerned, by observing either the provisions of their national law or those of French law. Cass. Aug. 11, 1909 (36 Clunet 1097).

[45](1875) L. R. 1 Ch. D. 257.

[46]Article 13, French Civil Code.

[47]In the absence of treaty stipulations or of an authorized domicile in France the French courts would be required to apply the national law of the deceased. But inasmuch as they have sanctioned *renvoi* they would accept a reference back to French law. Cass. June 24, 1879 (1879, 1, 56); Cass. Feb. 22, 1882 (S. 1882, 1, 303); App. Grenoble, March 31, 1908 (35 Clunet 837). *Contra:* App. Pau, June 11, 1906 (D. 1907, 2, 1).

[48](1862) 10 H. L. C. 1.

[49](1883) 9 App. Cas. 34; (1885) 10 App. Cas. 453.

left in England by a person domiciled abroad may, after the satisfaction of local creditors, be distributed by an English judge according to the *lex domicilii,* or be handed over by the court to the foreign representative of the estate.[50] *Doglioni* v. *Crispin*[51] decided that when a deceased dies domiciled abroad a judgment by a court of the State of domicile declaring who is entitled to the personal estate will be regarded as final in England. Should the principles laid down in these cases govern when the rules of Private International Law of the foreign country differ from those of the forum, so that the rights to the succession would not be determined according to the territorial law of the domicile, *renvoi* would have become an established part of the law of England in so far as it relates to the *lex domicilii* in the law of succession. That such is the true import of the decisions was assumed in *Re Trufort*[52] by Justice Stirling with respect to *Doglioni* v. *Crispin.* But if, as has been shown in the first part of this article, the non-application of the territorial law of a foreign State pointed out by the rules governing the Conflict of Laws in the forum, in compliance with the wishes of the foreign country, constitutes in reality a violation of the principles of sovereignty and of the equality of independent States, such an assumption would be without foundation. Instead of remitting the English assets to the foreign court the English judge should make the distribution himself according to the territorial law of the country in which the deceased had his domicile. The decisions in *Enohin* v. *Wylie* and *Ewing* v. *Orr Ewing* rest upon the consideration that the courts of the domicile are in a better position to give a correct interpretation of the *lex domicilii* than are the courts of the forum.[53] But when it appears that the *lex domicilii,* on account of different rules of Private International Law, would apply either the *lex fori* or the law of another State no valid reason exists for yielding to such law. By a similar process of reasoning the application of *Doglioni* v. *Crispin* might be limited to cases in which the foreign court has determined the rights of the litigants according to its territorial law. Should such a restrictive interpretation, however, not be permissible in view of the established rules relating to foreign judgments, *Doglioni* v.

[50]So Harvey *v.* Richards (1818) 1 Mason 381; Lawrence *v.* Kitteridge (1852) 21 Conn. 577.

[51](1866) L. R. 1 H. L. 301.

[52](1887) 36 Ch. D. 600.

[53]See also Hare *v.* Nasmyth (1823) 2 Add. 25; De Bonneval *v.* De Bonneval (1838) 1 Curt. Ecc. 856; Laneuville *v.* Anderson (1860) 2 Sw. & Tr. 24.

Crispin would give no support to *renvoi,* but would disclose only the peculiar nature of the law governing judgments.

It would seem, therefore, that *renvoi* remains unaffected by *Enohin* v. *Wylie, Ewing* v. *Orr Ewing* and *Doglioni* v. *Crispin.*

Other cases holding, (1) that the distribution of personal property upon death shall be according to the statute of distributions existing under the law of the domicile at the time of death notwithstanding the fact that it was changed by subsequent retroactive legislation, valid in the State of domicile;[54] (2) that the domicile of the deceased shall be determined according to the *lex rei sitæ et fori* irrespective of the law of the place of residence,[55] have been mentioned as opposed to *renvoi.*[56] But they are equally inconclusive. In the cases supporting the first proposition the English courts refused to make the distribution in the manner prescribed for the courts of the domicile. But even if *renvoi* were part of the common law these decisions could be sustained as exceptions to the rule. The rights of the next of kin having become vested at the time of death in accordance with the views of the *lex fori,* any attempt by the foreign legislator thereafter to divest them might be disregarded on grounds of public policy. The cases sustaining the second proposition have generally involved the peculiar provision of Article 13 of the Code Napoléon, which provides: "A foreigner authorized by decree to establish his domicile in France shall enjoy all civil rights." Whatever may be the effect of this article upon the status and rights of foreigners without an "authorized" domicile, it is recognized that such foreigners may have a domicile *de facto* in France.[57] The difference between Anglo-American and French law consists then not in an inhibition on the part of the French law against the establishment by foreigners of a domicile in the Anglo-American sense, but merely in the fact that certain rights granted by French law are possessed by foreigners only after they have acquired an "authorized" domicile. These cases, therefore, are not opposed to *renvoi.* They have no direct bearing upon the question.

[54]Lynch *v.* Provisional Gov. of Paraguay (1871) L. R. 2 P. & D. 268; *In re* Aganoor's Trusts (1895) 64 L. J. Ch. 521.

[55]Collier *v.* Rivaz (1841) 2 Curt. Ecc. 855; Anderson *v.* Laneuville (1854) 9 Moo. P. C. 325; Bremer *v.* Freeman (1857) 10 Moo. P. C. 306; Hamilton *v.* Dallas (1875) L. R. 1 Ch. D. 257; *In re* Martin [1900] P. (C. A.) 227 (Lindley); Harral *v.* Harral (1884) 39 N. J. Eq. 279. But see *In re* Johnson [1903] 1 Ch. 821; *In re* Bowes (1906) 22 T. L. R. 711.

[56]Abbott, 24 Law Quart. Rev. 134-137.

[57]Bordeaux, Aug. 19, 1879 (7 Clunet 586); App. Alger, Feb. 27, 1894 (21 Clunet 874); App. Paris, March 20, 1896 (23 Clunet 402); App. Paris, July 9, 1902 (30 Clunet 181).

Can it be said in the light of the foregoing authority that *renvoi* has become an established part of the English law? Leading English writers have answered the question in the affirmative.[58] It seems to the writer, however, that the actual case-law does not warrant such a broad and positive statement. With the exception of *In re Baines* and *In the Goods of Lacroix* the English cases holding that the reference was to the foreign law in its totality bave involved only the *lex domicilii.* In this class of cases, as all opponents of *renvoi* would admit, the *renvoi* doctrine appears in its least objectionable form. No actual decision by a continental court nor legislative provision has extended *renvoi* to the *lex rei sitæ,* to the *lex loci contractus* or to any other rule of the Conflict of Laws, and scarcely a jurist can be found who would give it such a wide application. Whatever the merits of the question may be upon theory an extension of the doctrine beyond the *lex domicilii* (*lex patriæ*) has appeared impracticable. Nothing but clear and controlling authority can be deemed sufficient to establish *renvoi* as a *general* rule of the English law. If *In the Goods of Lacroix* and *In re Baines* represent the English law the validity of a contract entered into in Italy by two Frenchmen who are domiciled in Italy must be determined by the English courts according to the territorial law of France, since the law of Italy in its totality, presumably applicable under the English rules of Private International Law, would so direct (Dicey), or, if Westlake's view is correct, according to the territorial law of England (*lex fori*), inasmuch as there is disagreement between the English and Italian rules governing the Conflict of Laws with respect to contracts. The moment it is a recognized principle that the *lex loci,* as regards form, and the *lex rei sitæ* refer to the foreign law as a whole, it becomes impossible to contend tbat the other rules of Private International Law have a different meaning. It is submitted that the general application of *renvoi* in the English law will require for its support stronger authority than that afforded by *In the Goods of Lacroix* and *In re Baines,* the former an *ex parte* and the latter an unreported decision.[59] It may be said, indeed, that even in its application to the *lex domicilii* in the law of succession *renvoi* is not as yet an

[58]Westlake, Private International Law (4th ed.) 25-40; Dicey, Conflict of Laws (2d ed.) 715-716; Piggott, Foreign Judgments (3d ed.) 11, pp. 261-264. See also, Brown, 25 Law Quart. Rev. 148, 153; 1 Williams on Executors and Administrators (7th Am. ed.) 440.

[59]See also Bate, Notes on Renvoi 9, 119-120; Sewell, 3 Darras 523; 25 Law Quart. Rev. 91.

established part of the English law. In none of the cases relating to *renvoi,* with the exception of *In re Johnson,* was the court aware of the problem. The equivocal meaning of the term "foreign law" misled both court and counsel, causing them to assume in each case that the *lex fori* referred to such law in its totality. The fundamental error underlying such an assumption has since that time been so clearly established by the leading jurists of the world, that, notwithstanding the great authority of Westlake and Dicey, it may be reasonably hoped that when the doctrine with all its consequences is squarely presented to the higher English courts they will not hesitate to reject the decisions of the courts that have lent color to *renvoi* in the English law as unsound in theory and as opposed to the principle of territorial sovereignty—the basis of the whole Conflict of Laws.

The courts of the United States, it would seem, have never been called upon to deal with the question of *renvoi.* Certain portions of the opinion in *Harral* v. *Harral*[60] might create the belief that the Court of Errors and Appeals of New Jersey regarded itself as sitting in France, but it is more than likely that in affirming the judgment of the lower court, which had made it perfectly clear that by the law of matrimonial domicile only the internal or territorial law of the foreign country was meant, it entered upon a discussion of the French rules of Private International Law merely for the purpose of showing that they agreed with American law. Whatever the object of the discussion, as there was no disagreement between the French and American rules of Private International Law with regard to the point in issue, the doctrine of *renvoi* was not involved in the case.

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.[61]

ERNEST G. LORENZEN.

THE GEORGE WASHINGTON UNIVERSITY.

[60](1884) 39 N. J. Eq. 279.

[61]It is desired to correct a printer's error in the first part of this article, published in the March number. On pages 200 and 201, in footnote 42, views are attributed to v. Bar which should have been credited to Kahn. The whole of footnote 42, with the exception of the first paragraph, should be considered a part of footnote 46, in which Kahn's views are discussed.