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RENVOI IN NEW YORK AND ELSEWHERE

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I. *Introduction: Two New York Cases*

In re *Tallmadge*[1] related to the mode of distribution of the residuary estate of one Chadwick. The report of Winthrop, referee, which was confirmed by the Surrogate's Court of New York County, found that "the 'renvoi' is no part of New York law,"[2] whereas thirty-one years later in In re *Schneider's Estate* it was held by Frankenthaler, Surrogate, also in the Surrogate's Court of New York County, that the "broad assertion in *Matter of Tallmadge*, supra, that the *renvoi* principle is not applicable in New York is not in accord with the earlier or later cases. The precise limits of its applicability are as yet undefined."[3]

The mutually irreconcilable, general expressions of opinion by two different judges of the Surrogate's Court of New York County in cases separated widely in point of time and differing widely in their circumstances have at least the merit of directing attention again to the perennially troublesome problem of the renvoi in the conflict of laws. If the problem is regarded as one that should not be limited to New York law, the first of the two judicial statements is too broadly expressed; and the second, although right in denying the validity of the first, is in itself too vague to be very helpful. Whether the decisions in the two cases were right or wrong is a question that can be answered only after an examination of the decisions in the light of all the relevant circumstances of the cases.

I venture at this stage to indicate what I think is the right general approach to the problem, namely, that there are special situations and special questions as regards which the renvoi is a justifiable and useful expedient, but that the doctrine of the renvoi should not be adopted as a general principle applicable to all situations and all questions. It follows of course that in my view the doctrine should be neither rejected nor accepted *in toto*.[4]

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1. 109 N.Y. Misc. 696, 181 N.Y. Supp. 336 (Surr. Ct. 1919).
2. *Id.* at 347.
3. *In re* Schneider's Estate, 96 N.Y.S.2d 652, 659, *aff'd*, 198 N.Y. Misc. 1017, 100 N.Y.S.2d 371 (Surr. Ct. 1950). See discussion of the case in the text part V *infra*.
4. Lewald, *Regles Generales des Conflits de Lois*, 69 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL [hereinafter RECUEIL] 61 (Vol. 3 1939), adhering to the conclusions reached by him in *La Theorie du Renvoi*, 29 RECUEIL 515, 615 (Vol. 4 1929). See also note 8 *infra* (my own view to the same effect);

The situations in the two New York cases and the legal questions arising from them respectively were different, and it is proposed in the present article to present an analysis of the two cases in the course of a broad discussion of the doctrine of the renvoi.[5]

II. *Renvoi — an Expedient in Some Situations but not a Principle for all Situations*

(1) In the *Tallmadge* case, Chadwick, a citizen of the United States, whose domicil of origin was in New York, was domiciled in France at the time of his death. By his will he left his residuary estate (apparently consisting of movables) to two persons, one of whom predeceased him. The share of the deceased legatee would accrue to the benefit of the surviving legatee by domestic French law, but would devolve on intestacy by domestic New York law. It was held that the surviving legatee was entitled as successor to the deceased legatee's share in accordance with the law of France. One view is that "the court was concerned with a question of construction, governed, according to the normal conflict rule, by the law intended by the testator, which is presumed to be the law of his domicile. The situation therefore presented a relatively weak case for the application of the renvoi doctrine, since, if intention is the test, it must be assumed that the majority of testators have never heard of the renvoi doctrine and would therefore expect the internal [that is, domestic] law of their domicil to control."[6]

(2) Even if the legal question arising from the factual situation in the *Tallmadge* case is characterized[7] more broadly as one of succes-

note 5 *infra* (Lewald's comment on the *Schneider* case, *supra* note 3); DICEY, CONFLICT OF LAWS 47 *et seq.* (6th ed. 1949); 1 RABEL, CONFLICT OF LAWS 70 *et seq.* (1945) (a general bibliography on the problem of renvoi).

5. The *Tallmadge* case will be discussed in the text at the beginning of part II, and the *Schneider* case in part V, *infra*. I am especially indebted to Dr. Hans Lewald's comment on the *Schneider* case included in an article published under the title *Renvoi Revisited?* in FRAGEN DES VERFAHRENS — UND KOLLISIONSRECHTES (Festschrift zum 70. Geburtstag von Professor Dr. Han Fritsche, Zurich, 1952). The article has been republished in the 4 SAARLANDISCHEN RECHTS — UND STEUERZEITSCHRIFT 1 *et seq.*, 36 *et seq.* (1952). The author is professor in the University of Basel. After I had substantially completed the present article insofar as it relates to the *Schneider* case, I received, by the courtesy of Professor Arthur Nussbaum, a copy of his article, *American-Swiss Private International Law*, published in 1951 as the first of a series of bilateral studies in private international law in course of preparation under the auspices of the Parker School of Foreign and Comparative Law of Columbia University. Nussbaum's article includes a comment on the *Schneider* case.

6. Morris, *The Renvoi in New York*, 4 INT'L L.Q. 268, 269 (1951). *Cf.* CHEATHAM, GOODRICH, GRISWOLD, AND REESE, CASES AND MATERIALS ON CONFLICT OF LAWS 67 (3d ed. 1951): "Was it necessary to discuss any question of renvoi in order to dispose of this case? Can it be adequately handled simply as a matter of the construction of the will apart from any rule of law?"

7. The theory that the subject of characterization, like the subject of a conflict rule, is a legal question arising from a factual situation is expounded in Falconbridge, *Conflict Rule and Characterization of Question*, 30 CAN. B. REV. 103, 264 (1952).

sion to movables, including the intrinsic validity and effect of a will, but excluding the formal validity of a will, my own personal opinion[8] is that the law of the domicil of the *de cujus* at the time of his death, the governing law as to succession to movables, should, as a general rule, be construed as meaning the domestic rules of the law of the domicil without regard to the conflict rules of that law. The matter is, however, one as regards which widely different opinions have been expressed. On the one hand, comment *d* appended to section 303 of the *Restatement, Conflict of Laws,* states (in accordance with section 7) that when section 303 provides that on intestacy a person's movables are distributed among the persons who are entitled to take by the law of the state of his domicil at the time of his death, the conflict of laws rule of that state is immaterial. There is no similar comment on section 306, relating to the validity and effect of a will of movables, but the last sentence of comment *a* is: "The situation is analogous to the devolution of movables upon intestacy (see § 303)." On the other hand, the renvoi doctrine was applied by English judges in two cases, namely, In re *Ross*[9] and In re *O'Keefe*.[10] The *Ross* case related to the intrinsic validity of a will of movables made by a British subject domiciled in the English sense in Italy, the will being alleged to be invalid in part by reason of the lack of complete disposing power of the testatrix by domestic Italian law. The *O'Keefe* case related to the mode of distribution of the movable estate of a person who died intestate domiciled in the English sense in Italy. In various other English cases the courts have expressed opinions in favour of the renvoi, these opinions being *obiter dicta* in that the courts applied the domestic law of the domicil and therefore reached the same result as if they had rejected the doctrine of the renvoi altogether.

For the present purpose it is interesting to recall Cook's comment[11] on the *Ross* case (much of that comment being equally applicable to the *O'Keefe* case). If the meaning of the conflict rule, that succession to movables is governed by the law of the last domicil of the *de cujus,* were to be decided in accordance with the original purpose of the English courts in adopting that rule, Cook suggests that that purpose was not to secure uniformity of mode of distribution of the movable assets of a given estate situated in different countries, but that very pos-

8. In order to avoid unnecessary repetition of references to my own writings, I cite here (as containing a sufficient exposition of my views, including a statement of the special or exceptional situations or questions as regards which I think that the renvoi is a useful or necessary device) two articles: (1) FALCONBRIDGE, *Renvoi, Characterization and Acquired Rights* in ESSAYS ON THE CONFLICT OF LAWS 156 (1947), 17 CAN. B. REV. 369 (1939); and (2) FALCONBRIDGE, *Renvoi and the Law of Domicile,* in *id.* at 187, 19 CAN. B. REV. 311 (1941), 36 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 45 (1947).

9. [1930] 1 Ch. 377.

10. [1940] Ch. 124.

11. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 239-51 (1942).

sibly the notion was merely that if an Englishman made his permanent home (domicil) in a foreign country he became so much a member of the foreign community (even though not naturalized there as a citizen) that it seemed fitting to English courts to distribute his movables subject to their control in the same way as the courts of the country of the domicil would distribute similar assets of their own citizens domiciled in that country. On this theory of the original purpose of the rule, the domestic law of the domicil would be applicable. It may be assumed, however, that whatever was the original purpose of the English courts, the more important question for a modern English or American court is whether the use of the doctrine of the renvoi is likely to result in uniformity of mode of distribution of the movables, wherever situated, of a given *de cujus*. If uniformity is likely to be achieved, obviously the renvoi is a useful device in the field of succession to movables, but the reported cases do not indicate that the prospect of this happy result is very hopeful. As Cook points out,[12] the exact question is not whether a court is to decide a case in the same way as *the same case* would be decided by a court of the domicil, but is whether a court is to decide that the movables subject to its control shall be distributed in the same way as a court of the domicil would decide that movables subject to its control should be distributed. In the *Ross* case the English court did attempt to distribute the movables situated in England in the same way as a court of the domicil (Italy) would distribute the movables situated in Italy. The *de cujus* was a British subject domiciled in Italy, and Cook's conclusion was that there is "apparently no basis for supposing that the English court really found out what Italian courts would actually have decided as to the distribution of movables in Italy of a British subject dying domiciled in Italy." The inadequacy of the evidence of the Italian experts was "perhaps due to a lack of familiarity with the complexities of British legal institutions. The same excuse cannot be advanced for the English judge."[13] In the absence of trustworthy evidence as to the way in which movables situated in a foreign country would be distributed by a court of the situs, Cook thinks that the attempt to secure uniformity of distribution should be abandoned as being impossible of attainment.[14]

The particular ambiguity in the *Ross* case lay in the reference by Italian conflict of laws to the "national law" of the *de cujus* as the law governing succession on death, there being no evidence that this reference should be construed as a reference specifically to English

12. *Id.* at 240.
13. *Id.* at 241, 242.
14. The misadventures of an English court in the *Ross* case might be the misadventures of an American court in another case. As we shall see, in the *Schneider* case, in different circumstances, a New York court failed in its attempt to ascertain what a Swiss court would do under Swiss conflict rules.

law.[15] Other difficulties in the way of securing uniformity of result may occur, as, for example, when differences of procedural rules in two countries lead to different results,[16] or when a rule of public policy of the law of the forum prevents a court from giving effect to foreign law. Furthermore, as we shall see,[17] uniformity of distribution can be secured between two different countries by the use of the renvoi only if one theory of the renvoi prevails in one country and a different theory prevails in the other country.

(3) The question of the *formal* validity of a will of movables, in my opinion, should be treated as an exceptional question, independent of the acceptance or rejection of the doctrine of the renvoi generally. The English cases are practically unanimous in deciding that if a will of movables is *intrinsically* valid, it is not invalid in point of formalities if it complies with either the domestc rules or the conflict rules of the relevant foreign law. Thus in *Collier v. Rivaz,*[18] four codicils were admitted to probate in England because they complied with the conflict rules of the law of the domicil, although not in the local form of that law, and the will and two codicils which were in the local form of that law were also admitted to probate.

In *Bremer v. Freeman,*[19] the Privy Council decided against the validity of a will of movables made in France in English local form by a British subject of English domicil of origin, domiciled in France in the English sense, but not domiciled in France in the French sense because she had not obtained from the French government an authorization to establish her domicil in France under Article 13 of the French Civil Code. This is the only decision relating to the renvoi of an English appellate court, that is, of an English court hearing an appeal from an English court, and, if it had been unambiguous, would have been of fundamental importance; but the reasoning of the court is so obscure that the case has been regarded by some writers as favourable, and by others as unfavourable, to the renvoi. One explanation of the decision is that the Privy Council (probably erroneously) held that the will was invalid because it did not comply with French conflict rules[20] and it obviously did not comply with domestic French law, so that on the basis of this explanation the decision is favourable, rather than unfavourable, to the renvoi as applied to formalities of a will of movables. In any event, the decision against the validity of the will was viewed with alarm in England, and led in 1861 to the passing by the British Parliament of the statute commonly known as Lord Kingsdown's Act,

15. For further discussion of this particular ground of ambiguity, see text part IV *infra.*
16. COOK, *op. cit. supra* note 11, at 166.
17. See text part III *infra.*
18. 2 Curt. Ecc. 855, 163 Eng. Rep. 608 (Prerog. Ct. 1841).
19. 10 Moo. P.C. 306, 14 Eng. Rep. 508 (1857).
20. *Cf. In re* Ross, [1930] 1 Ch. 377, 393-94.

which may be cited as the Wills Act, 1861. By this statute it was provided, *inter alia,* that a will of a British subject made outside of the United Kingdom should be admitted to probate in England and Ireland and to confirmation in Scotland if it was made according to the forms required either by the law of the place of making or by the law of the domicil of the testator at the time of making or by the laws then in force in that part of Her Majesty's dominions where the testator had his domicil of origin. By a legislative blunder the statute was expressed to be applicable "as regards personal estate," whereas it was doubtless intended to apply only to movables, with the result that a will of movables is formally valid if it complies with the law of the last domicil of the testator or any of the three laws mentioned in the statute, a will of any interest in land that is classified in English law as personal property is formally valid if it complies with the law of the situs or any of the three laws mentioned in the statute, and a will of any interest in land that is classified in English law as real property is unaffected by the statute and must comply with the law of the situs.

The meaning of the law of the place of making under Lord Kingsdown's Act was the subject of *In the Goods of Lacroix*,[21] in which it was held that a will of movables of a British subject, and a codicil, both made in France in English local form, in accordance with the conflict rules of French law, and a holographic codicil made in France, in accordance with the domestic rules of French law, were all entitled to be admitted to probate in England.

The extremely indulgent attitude of English courts with regard to formalities as manifested in the *Collier* and the *Lacroix* cases, would seem to be justifiable, *ut res magis valeat quam pereat.*[22] Strictly speaking, however, this doctrine of the facultative or permissive use of either of two meanings of a reference to a foreign law (either its conflict rules or its domestic rules), or of two different meanings as applied to different testamentary instruments in the same case, does not involve the acceptance of the principle of the renvoi, namely, that a reference to a foreign law means whatever domestic law is indicated by the conflict rules of the foreign law. If a will complies with the forms of the domestic foreign law, but not with the forms of the law indicated by the foreign conflict rules, it seems to be clear that it will none the less be held to be formally valid.

The only Canadian decision on the doctrine of the renvoi is *Ross v. Ross*,[23] in the Supreme Court of Canada, on appeal from the Court

21. 2 P.D. 94 (1877).

22. It is approved in Lewald, *supra* note 5, at 171. Dr. Lewald notes with special reference FALCONBRIDGE, *op. cit. supra* note 8, at 120 *et seq.* [also in 19 CAN. B. REV. 311, 329 *et seq.* (1941)], wherein I stated my change of opinion and my withdrawal of any former adverse criticism of the two cases cited in the text, as regards *formal* validity of a will.

23. 25 Can. Sup. Ct. 307 (1894).

of Queen's Bench for Lower Canada.[24] The testator, domiciled in Quebec, made in New York, during a temporary visit, a holographic will, one of the forms of wills recognized by the domestic law of Quebec, but not recognized by the domestic law of New York. By virtue of Article 7 of the Civil Code of Lower Canada a will is formally valid if it complies with the law of the place of making. The Court of Queen's Bench held unanimously (1) that the rule stated in the article, *locus regit actum,* is imperative, not permissive, so that the question of the formal validity of the will must be decided by New York law, but (2) that the will was valid as being made in a form recognized by New York law in the case of a testator domiciled in Quebec. The Supreme Court held that the will was valid as to movables wherever situated and as to immovables situated in Quebec, the judges being divided (1) three to two in favour of the view that the rule stated in Article 7 is permissive, not imperative, and (2) four to one in favour of the view that the will was valid because it was recognized by New York conflict of laws. The result would seem to be justifiable, if it is regarded as an example of the indulgent treatment of wills in point of formalities.

(4) It is generally admitted, even by writers who do not approve of the renvoi as a principle of universal application, that an exception exists with regard to the title to land, including succession to land. In other words, a reference to the law of the situs of land means whatever law would be applied by a court of the country of the situs, in accordance with the conflict rules of the law of the situs, including the theory of the renvoi that prevails in that law.[25]

(5) There is much to be said, on principle, in favour of the recognition of the title to movables acquired under a foreign law of the situs, that is, in favour of the view that a court in another country should decide the question as it has been or would be decided by a court of the situs, even though, on account of the mobility of the subject matter, the practical necessity for acquiescing in whatever a court of the situs has decided or would decide which exists as regards the title to land may cease to exist by reason of the change of situs of movables.[26]

(6) Another special question which, in my opinion, should be decided in the same way as a court of the domicil would decide it, that is, as regards which the doctrine of the renvoi is a useful device or ex-

24. [1893] 2 Q.B. 413.

25. This is in accord with the latest English case on the renvoi, *In re* Duke of Wellington, [1947] Ch. 506, *aff'd on other grounds,* [1948] Ch. 118. It is also in accord with the *Schneider* case, *supra* note 3, which on this point is right, although wrong in result.

26. *Cf.* DICEY, CONFLICT OF LAWS 60 (6th ed. 1949).

pedient, is a question of the existence of status as distinguished from the incidents attached to a given status by the law of the domicil or a question of the capacity of a person having that status.[27] What I have just said does not apply to marital status, however. Whether a person has the status of a married person is a question which cannot be said to depend on any single law. It may be a question of marriage law relating to the validity of the marriage in itself, governed by the law or laws governing the formal and the intrinsic validity of marriage. Assuming that the marriage is originally valid in itself, its validity may further depend on the validity of the dissolution or annulment of a prior marriage, and that may be a question of divorce or annulment law, involving the jurisdiction of a court to grant divorce or annulment, and the policy of the law of the forum with regard to the recognition of foreign divorces or annulments. As regards some of these various questions, there may be various doctrines designed to secure uniformity of decision so that a given marriage if valid or invalid in one country shall likewise be valid or invalid, as the case may be, in another country, or designed to secure adequate consideration of foreign law and adequate recognition of foreign decrees. In my view, however, these doctrines do not necessarily, or even usually, involve the doctrine of the renvoi. Rightly or wrongly, I am confining my discussion of the renvoi to the problem of the meaning to be assigned to a reference by a conflict rule of the law of *X* to the law of *Y* — the domestic law of *Y* or something more, and how much more?

(7) "Although there is no direct authority on the point, it can be concluded from the proper law doctrine as formulated in the English cases that renvoi has normally no place in the law of contract, although there may be exceptions to this in connection with capacity and other matters. The proper law applies because the parties have intended, or are presumed to have intended, that it should apply. In the absence of strong evidence to the contrary, the parties must be deemed to have intended to refer to the domestic rules and not the conflict of laws rules of their chosen law."[28]

27. *Cf.* FALCONBRIDGE, *op. cit. supra* note 8, at 79, 150, 182, 599. In a later article, *Legitimacy or Legitimation and Succession in the Conflict of Laws*, 27 CAN. B. REV. 1163 (1949), not specifically relating to the doctrine of the renvoi, I have emphasized and elaborated the distinction between the existence of status on the one hand and incidents of status or capacity on the other hand.

28. DICEY, CONFLICT OF LAWS 581 (6th ed. 1949) with references in a footnote. See also *id.* at 690 n.12 (bills of exchange); *id.* at 619 (capacity to contract governed by the law of that country with which the contract is most closely connected). As to the law governing capacity to contract, see notes 109, 110 *infra*. As to the inapplicability of the doctrine of the renvoi to the proper law of a contract expressly selected by the parties, see note 67 *infra*.

III. *English Theory of Total Renvoi, as Distinguished from a Theory of Partial Renvoi and from Rejection of the Renvoi.*

Before the theory of total or perfect renvoi was developed by English courts in the second quarter of the present century, the traditional mode of stating the problem of the renvoi was to present it in the form of a question whether a reference by a conflict rule of the law of *X* to the law of *Y* was to be construed as (1) a reference to the domestic or local rules of the law of *Y*, or as (2) a reference to the "whole law" of *Y*, including the conflict rules of that law. In (1) the law of *X* was said to reject the renvoi doctrine, and a court in *X* applied the appropriate domestic rule of the law of *Y*, disregarding the possibility that the corresponding conflict rule of the law of *Y* either (a) referred back to the law of *X*, or (b) referred forward to the law of *Z*. In (2) the law of *X* was said to recognize or accept the renvoi doctrine, and on this basis a court in *X* would or should give effect to the conflict rule of the law of *Y*, and in (a) apply the domestic rule of the law of *X*, and in (b) apply the domestic rule of the law of *Z*. In some countries, however, the reference back in (a) to the law of the forum would be more readily accepted than the reference forward in (b) to the law of a third country.

What now appears to be an obviously illogical feature of the traditional statement of the renvoi problem was that a court in *X* which had adopted the theory that a reference by a conflict rule of the law of *X* to the law of *Y* was to be construed as a reference to the "whole law" of *Y*, including its conflict rules, accepted a reference back by a conflict rule of the law of *Y* to the law of *X*, and applied the domestic rule of the law of *X*, but failed to consider what theory of renvoi, if any, prevailed in the law of *Y*, and thus failed to consider the possibility that a court in *Y*, when referred by a conflict rule of the law of *Y* to the law of *X*, might construe the reference to the law of *X* as a reference to the "whole law" of *X*, and might accept a reference back by a conflict rule of the law of *X* to the law of *Y*, and apply the domestic rule of the law of *Y*. The renvoi theory of the law of *X* might appropriately be described as a theory of partial or imperfect renvoi, because it does not in fact include a reference to the "whole law" of *Y*, in that it omits a reference to an essential feature of the conflict rules of *Y*. Perhaps an appropriate description might be a theory of receptive renvoi, in view of its unreasoning acquiescence in a reference back leading to the application of the domestic law of the forum.

It has remained for English courts to develop what may be called a theory of total or perfect renvoi. Adding this theory to the traditional theories, we get the following threefold classification of what a court may do in a given situation: (1) it may reject the renvoi doctrine;

(2) it may adopt a theory of partial, imperfect or receptive renvoi; (3) it may adopt a theory of total or perfect renvoi.

The English theory of total renvoi, that is, the particular theory of the renvoi used by English courts in those situations in which they use the doctrine of the renvoi at all[29] or do not ignore the doctrine altogether, is that a reference in an English conflict rule to the law of a foreign country is to be construed as a reference to the whole law of that country in the sense that the English court gives effect not only to the initial reference back contained in the appropriate conflict rule of the foreign law, but also to whatever particular theory of the renvoi, if any, prevails in that law. In other words, the English court enquires whether the foreign law rejects the doctrine of the renvoi, or, if it accepts the doctrine, in what form or in what situations it accepts the doctrine.[30]

Broadly speaking, the effect of the theory of total renvoi is that an English court attempts to decide the case before it in the same way as a court of the foreign country would decide it. This formula originated in English law in 1841 in the case of *Collier v. Rivaz*,[31] but when that case was decided the theory of total renvoi had not been thought of, and the court did not consider what would be the result if the law of Belgium included recognition of the doctrine of the renvoi. Strictly speaking, however, as regards succession to movables, the case hypothetically decided by the foreign court is not the same case as that decided by the English court, because they relate to different movables. What the English court attempts on the English theory of total renvoi is to apply to the movables subject to its control the same rule of decision as the foreign court would apply to movables subject to its control.[32] In any event the English theory of total or perfect renvoi is not quite total or perfect, because local rules of procedure or local rules of public policy may frustrate uniformity of decision.

The efficacy of the English theory of total renvoi depends, paradoxically, upon the supposition that the foreign law does not itself adopt the theory of total renvoi. The paradox may be restated in the form of a general proposition that the doctrine of the renvoi affords a solution only between two countries which have different theories of the renvoi. The situations presenting various phases of this general proposition may be subdivided into six classes, as stated below.

29. That is, as pointed in text part II, certain situations involving reference either to the law of the domicil of a person or to the law of the situs of a thing.

30. Especially noteworthy, among studies of the English theory of the renvoi published in continental Europe, is De Nova, *Considerazioni sul Rinvio in Diritto Inglese*, 30 RIVISTA DI DIRITTO INTERNAZIONALE 388 (1938); *cf.* Grasseti, *La Dottrina del Rinvio in Diritto Internazionale Privato — e la "Common Law" Anglo-Americana*, 26 RIVISTA DI DIRITTO INTERNAZIONALE 3 (1934). For a good statement and discussion, see DICEY, CONFLICT OF LAWS 50 *et seq.* (6th ed. 1949).

31. See note 18 *supra*.

32. See note 12 *supra*.

(1) As between two countries which reject the doctrine of the renvoi, the result of a "negative" conflict of conflict rules, as, for example, if a conflict rule of the law of *X* refers to the law of *Y* and the corresponding conflict rule of the law of *Y* refers to the law of *X*, is that a court in *X* applies the domestic law of *Y* and a court in *Y* applies the law of *X*. This unsatisfactory situation must have been a common one before the doctrine of the renvoi was "discovered," as between two countries with different conflict rules relating to the same question, as, for example, if in one country the question is governed by the national law of a person and in the other country by the law of his domicil. If instead of the conflict of conflict rules being "negative," that is, where the conflict rule of each country refers to the law of the other, the conflict might be "positive," where the conflict rule of each country refers to the law of the forum, so that a court in each country applies the domestic law of the forum. In this situation the doctrine of the renvoi would afford no assistance.

(2) As between two countries, one of which (*X*) has a theory of partial renvoi, and in the other of which (*Y*) the doctrine of the renvoi is unknown or is rejected, the result may be satisfactory in one respect, in that as regards a particular question there will be uniformity of decision in the courts of the two countries (*X* and *Y*), each applying the domestic law of the country (*X*) in which a theory of partial renvoi prevails. One's approval of this result may, however, be rendered somewhat less enthusiastic if it is borne in mind that if the same kind of situation involving the same kind of question arises between two other countries (*Z* and *Q*), and on the same principle, the courts of both countries apply the domestic law of the country in which a theory of partial renvoi prevails (*Z*), the result may be that the question will be decided differently from the way in which it would be decided as between *X* and *Y*. If the question were to arise between *Y* and *Q* the situation would correspond with that described in paragraph (1), and if it were to arise between *X* and *Z* the situation would correspond with that described in paragraph (3). If regard is had to all these potential situations, it might be said by way of criticism that the result will depend on the accidental circumstance of the place of litigation combined with the fact that in the law of that place the theory of partial renvoi prevails. This may, however, not always be a fair basis of criticism, because if the title to land or even to a movable thing is in question, the place of litigation will usually, though not necessarily, be the country of the situs, and it might well be argued that it is justifiable as a general rule to give effect to the conflict rules of the situs whatever they are. On the other hand problems of some nicety may arise if we suppose that *X*, *Y*, *Z* and *Q* are all states of the United States. While it is reasonable to expect that some single theory of the

renvoi will ultimately prevail generally in all the states, in the meantime the diversity of existing theories may be a complicating element as regards giving effect in one state to a judgment pronounced in another state.

(3) As between two countries in each of which a theory of partial or receptive renvoi prevails, the advantage of uniformity of decision is lacking. Instead of each country applying the domestic law of the other, as they do if they both reject the doctrine of the renvoi, each country applies its own domestic law. This situation tends to become common as various countries adopt a theory of partial renvoi.

The matter does not require further elaboration here, but it may require consideration on the part of a court in the United States, which may be inclined to adopt a theory of partial renvoi, or it may be a relevant consideration if the question arises whether effect should be given in one state of the United States to a judgment pronounced in another state.

(4) As between two countries in each of which the theory of total renvoi prevails, no solution at all seems to be possible. If a court of *X* attempts to apply the whole law of *Y*, including the conflict rules of *Y* and whatever theory of the renvoi prevails in the law of *Y*, it will find that in the law of *Y* there is an initial reference to the law of *X*, but that this reference is a reference to the whole law of *X*, including the conflict rules of *X*, and whatever theory of the renvoi prevails in the law of *X*. In other words, all that a court of *X* can ascertain about the conflict rules of *Y* is that a court of *Y* will apply whatever domestic law a court of *X* would apply, and all that a court of *Y* can ascertain about the conflict rules of *X* is that a court of *X* will apply whatever domestic law a court of *Y* would apply. This is the perfect example of the *circulus inextricabilis*.

The situation imagined above has not yet occurred (so far as I am aware) in any reported case, because the theory of total renvoi has not been explicitly expounded in any court outside of England, and in the English cases the other country concerned has always been a country in which either a theory of partial renvoi prevails or the doctrine of the renvoi has been rejected. It is, however, possible, or perhaps inevitable, that the situation will occur. A court in Scotland, or Ontario, or Quebec would not be strictly bound to follow the series of decisions of single judges supporting the theory of total renvoi in English law, but might adopt the theory of total renvoi if the necessity arose in any of those countries of defining exactly what theory of the renvoi prevails or should prevail there, and then, in the event of a conflict of conflict rules arising between that country and England, the conflict would be insoluble. Similarly, courts in the United States

may have to decide more precisely than they have yet done what particular theory, if any, of the renvoi they will adopt, and what bearing, if any, the theory they adopt will have on the question whether effect should be given in one state of the United States to a judgment pronounced in another state. If, for example, X and Y are states of the United States, and a case occurs in which, as regards a particular legal question, the relevant conflict rule of X refers to the law of Y, and the relevant conflict rule of Y refers to the law of X, and in the law of each state the theory of total renvoi prevails, is the relevant domestic rule of the law of X, or that of Y, to be applied?

(5) The application of the English theory of total renvoi to a foreign law which has a theory of partial renvoi is illustrated by In re *Annesley*[33] and In re *Askew*.[34] In the former case the question was whether the testatrix had unlimited disposing power in accordance with domestic French law, the testatrix being domiciled in France in the English sense, but without having obtained French government authorization to establish her domicil in France. In the *Askew* case the question was whether Margarete Askew was legitimated by the subsequent marriage of her parents, her father being a British subject domiciled in Germany, the subsequent marriage being effective to legitimate her by domestic German law, but not by domestic English law. In each case the English court, upon being referred by the English conflict rule to the foreign law of the domicil, found that by the foreign conflict rule there was a reference to English law, but that the foreign law would accept a reference back from English law and apply the domestic foreign law, that is, the foreign law had a theory of partial renvoi. The English court therefore applied the domestic foreign law.[35]

(6) The application of the English theory of total renvoi to a foreign law which rejects the doctrine of the renvoi is illustrated by In re *Ross*,[36] In re *O'Keefe*[37] and In re *the Duke of Wellington*.[38] In the *Ross* case, one question was whether the testatrix had complete disposing power in accordance with domestic Italian law. The testatrix being a British subject of English domicil of origin but domiciled in Italy at the time of her death, the relevant English conflict rule referred to Italian law. Luxmoore, J., found that in Italian conflict of laws succession to movables is governed by the national law of the testatrix,[39] and the doctrine of the renvoi was rejected, and consequently the

33. [1926] Ch. 692.
34. [1930] 2 Ch. 259.
35. The ambiguity arising from a reference in a foreign conflict rule to the "national law" of a British subject is discussed in text part IV *infra*.
36. [1930] 1 Ch. 377.
37. [1940] Ch. 124.
38. [1947] Ch. 506.
39. As to the hiatus in the judicial reasoning with regard to the national law of a British subject, see text part IV *infra*.

domestic rules of the national law must be applied. His conclusion was that the will was valid in accordance with domestic English law. The assets included also land situated in Italy. As to this the relevant English conflict rule referred to the *lex rei sitae*, while the Italian conflict rule referred to the national law of the testatrix and rejected any reference back to Italian law, and Luxmoore, J., reached the same conclusion as he had with regard to the movables and applied domestic English law. In the *O'Keefe* case,[40] the *de cujus* was a British subject, domiciled in Italy at the time of her death, who died intestate leaving movables situated in England. Crossman, J., on the initial reference by the relevant English conflict rule to the law of Italy, as the law of the domicil, found that the corresponding Italian conflict rule referred to the national law of the *de cujus* and that Italian law rejects the doctrine of the renvoi, that is, would not accept a reference back to Italian law, and concluded that the succession was governed by the domestic law of Eire. In the *Duke of Wellington* case the *de cujus* was a British subject domiciled in England and the title to land situated in Spain was in question. On the initial reference to the law of the situs the English court found that Spanish conflict of laws referred to English law and would not accept a reference back to Spanish law. The English court therefore applied domestic English law.

IV. *The National Law of a British Subject, or a Canadian Citizen, or a Citizen of the United States.*

For the sake of clarity and emphasis I have reserved for separate discussion the question of the meaning of a reference in a foreign conflict rule to the national law of a person who is a subject or citizen of a plurilegislative national territorial unit, that is, a unit consisting of two or more "law districts," each of which has its own body of law (including its own rules relating to succession on death and to other topics of civil law such as are likely to give rise to conflict problems), and between which there is no uniform or controlling system of conflict of laws.

A relatively simple example of a plurilegislative national unit is the United States of America, a single unit for the purpose of citizenship or nationality, but consisting of many states, each of which is a separate law district for the purpose of the conflict of laws. If a foreign conflict rule provides, for example, that succession to movables is governed by the national law of the *de cujus*, there is an obvious ambiguity if the *de cujus* was a citizen of the United States, there being no such thing as a general American law of succession, and the reference under the

40. As this case illustrates in a striking manner the question of the meaning to be assigned to a reference in a foreign conflict rule to the national law of a British subject, the case will be further discussed in text part IV *infra*.

foreign conflict rule must be supplemented or explained so as to make it applicable to the law of a particular state.

A much less simple example of a plurilegislative national unit is the British Empire, consisting of many law districts with many different systems of civil law, but being a single unit for the purpose of nationality in the sense that all persons who owe allegiance to the common sovereign are British subjects. The position is complicated by the fact that in addition to various law districts which are colonies, more or less under the control of the government of the United Kingdom, there are several independent self-governing countries, of which one (New Zealand) is a single law district, while others (as, for example, Canada and Australia) are themselves plurilegislative in that they are federal unions, each province of Canada and each state of Australia being a separate law district. A further complicating element is that in recent years, within the framework of Empire-wide British nationality, separate local nationalities have been created, so that, for example, by legislation of the British Parliament[41] there is the status of citizen of the United Kingdom and Colonies, and by legislation of the Parliament of Canada there is the status of Canadian citizen.[42] A citizen of each of these newly created types also has the status of British subject, and may be known either as a British subject or as a Commonwealth citizen.[43]

Before the creation of the separate local nationalities just mentioned, several English cases involved the question of what was meant by a reference in a foreign conflict rule to the national law of a British subject. There being no "British" law of succession, and so forth, and no "British" system of conflict of laws, it was necessary, in order to render the reference to the national law effective in the conflict of laws, to find some way of limiting the reference to a particular law district within the British Empire, as, for example, England, Scotland, Ontario or Quebec. These cases will have to be discussed, but it is to be noted that for the future the search for the particular law district may be somewhat narrowed, but will not be completely eliminated by the existence of separate local nationalities. If the person whose national law in question is a Canadian citizen, there will still remain the problem of limiting the reference to the law of a particular province. If he is a citizen of the United Kingdom and Colonies, there will still remain the problem of choosing between English law, Scottish law, and so forth. Of course if he is a citizen of New Zealand, the search

41. British Nationality Act, 1948, 11 & 12 GEO. 6, c. 56, §§ 4 *et seq.*
42. The status was originally created by the Canadian Citizenship Act, which was passed in 1946 and came into force on January 1, 1947. This statute was amended and re-enacted in consolidated form by the STATUTES OF CANADA 1950, c. 29.
43. British Nationality Act, 1948, 11 & 12 GEO. 6, c. 56, § 1.

for the particular law district will be at an end, because New Zealand is a single law district.

The theory that the national law of a British subject is English law is untenable[44] and is not rendered more respectable by being based on a supposititious but in fact nonexistent "English" nationality. This theory, fallacious as it is, seems to be entertained, however, by some writers of continental Europe, and sometimes an otherwise valuable discussion of the renvoi is marred by the author's apparent unawareness of there being any doubt about the theory. It happens not infrequently that an author gives as an example of the operation of the renvoi the case of a reference by a conflict rule of the law of a country of continental Europe to the national law of a person, and if that person is a British subject the author assumes that his national law is English, and, without more, supposes that there is a reference back from English law. There are, of course, some writers of continental Europe who do not fall into this error, and especially notable for his acute and elaborate exposition of the problems arising from a reference to the national law of a British subject is De Nova.[45]

The question what is the meaning of a reference in a foreign conflict rule to the national law of a person is of course a question that must be answered by the law of which the rule is a part, and therefore the evidence of an expert in that law is required in order to justify construing a reference to the national law of a British subject as a specific reference to the law of England or to the law of some other law district within the British Empire. In the *Ross* case,[46] in which the English conflict rule referred to the law of Italy as the law of the domicil, two of the three Italian witnesses said that "the Italian courts would determine the case on the footing that the English law applicable is that part of the law which would be applicable to an English national domiciled in England." Obviously the witnesses did not understand or answer the material question at all, that is, what is the meaning of a reference to the national law of a "British" national, but answered another and irrelevant question, that is, what is the national law of an "English" national (a nonexistent person). In the *Askew* case,[47] in which the English conflict rule referred to the law of Germany, as the law of the domicil, the German witness said: "I am informed and believe that John Bertram Askew was an Englishman. Therefore English law would be applied by the German court

44. See Sir Frederick Pollock's comment in 25 L.Q. REV. 157 (1900); also his editorial note in the case report, *In re* Askew, [1930] 2 Ch. 259, 269 n.2.

45. DE NOVA, IL RICHIAMO DI ORDINAMENTI PLURILEGISLATIVI (Pavia 1940); De Nova, *Il Caso In re O'Keefe e la Determinazione della Lex Patriae di un Cittadino Britannico Domiciliato all' Estero*, in FESTCHRIFT FUR LEO RAAPE 67 *et seq.* (Hamburg 1948)

46. [1930] 1 Ch. 377.

47. [1930] 2 Ch. 259.

in deciding the question." Obviously the witness did not give a satisfactory answer to the question of the meaning of a reference by the German conflict rule to the national law of a "British" subject. In both the *Ross* and *Askew* cases the English court applied domestic English law on the supposed reference to English law by the foreign conflict rules. In the *O'Keefe* case, relating to the succession on intestacy to the movables of a British subject domiciled at the time of her death in Italy, the English conflict rule referred to the law of Italy and the Italian conflict rule referred to the national law of the *de cujus*. Crossman, J., said: "Italian lawyers cannot say what is the meaning of the law of the nationality where there is more than one system of law of the nationality; but I have evidence, which I think is not disputed, from experts in Italian law that the Italian law would hold that the succession is regulated by the law of the country to which the intestate belonged, and belonged I think at the time of her death."[48] On this lack or ambiguity of evidence he held that the succession was governed by the law of Eire, where he decided the intestate had her domicil of origin because her father had his domicil of origin there, although the intestate had never visited Ireland except on a "short tour" with her father 59 years before her death, and could not in any real sense be said to have "belonged" to Ireland at the time of her death in view of the fact that she had resided for many years in Italy and admittedly was domiciled there. It seems difficult to justify Crossman, J.'s, conclusion on either theoretical or practical grounds, inasmuch as the law of Eire was neither the law which the *de cujus* probably had in contemplation as the law governing the succession, nor the law which was indicated by the English conflict rule that succession to movables is governed by the law of her *last* domicil, nor, so far as appears from the report of the case, the law which an Italian court would apply to movables situated in Italy. In a future similar case adequate evidence of what an Italian court would do may be given, and then we shall know more than we do now on this point. It may be proved that an Italian court would apply domestic Italian law on the ground that the reference to the national law of a British subject is meaningless, or it may be proved even that an Italian court would apply the law of the domicil of origin of the *de cujus*, as was decided without sufficient evidence in the *O'Keefe* case.[49]

The ambiguity now under discussion existed in the *Tallmadge* case[50]

48. [1940] Ch. 124, 126.

49. For a detailed comment on the *O'Keefe* case, see FALCONBRIDGE, *op. cit. supra* note 8, at 187. For the Italian point of view on the case, see De Nova, *supra* note 45. For a brief comment see DICEY, *op. cit. supra* note 26, at 53 *et seq.*; cf. COOK, *op. cit. supra* note 16, at 241, 242.

50. *In re* Tallmadge, 109 N.Y. Misc. 696, 181 N.Y. Supp. 336 (Surr. Ct. 1919). See also CHEATHAM, GOODRICH, GRISWOLD, AND REESE, *op. cit. supra* note 6, at 67.

on the assumption that the court was right in finding that the French conflict rule referred questions of succession to movables to the national law of the *de cujus*. The New York court does not state why the reference is to be construed as a reference specifically to the law of New York. The point of course became immaterial when the court, rightly in my opinion, decided that it should apply domestic French law without regard to French conflict rules.

V. *The Schneider Case and Swiss Conflict of Laws*

In the *Schneider* case[51] the *de cujus*, originally of Swiss nationality, became a naturalized citizen of the United States and was domiciled in New York at the time of his death. His will, disposing of land situated in Switzerland, was valid by domestic New York law, but by domestic Swiss law the *de cujus* lacked complete disposing power inasmuch as his legitimate heirs were entitled to certain fractional shares of his property (*legitime, legitima portio*), and the will was therefore invalid so far as it ignored the claim of these heirs. The administratrix appointed in New York before the admission of the will to probate had sold the land and remitted the proceeds to New York. This conversion of the land into money after the death of the *de cujus* had of course no effect upon the question of the ascertainment of the persons entitled to the land, and consequently to the money, but apparently it had the effect of conferring jurisdiction on the New York court to control the distribution of the money. The case was therefore the unusual one of a court other than that of the situs of the land having to decide a question of the title to land. As already noted, succession to land is one of the cases in which it is generally admitted that a court must decide a question of title in the same way in which it would be decided by a court of the situs, and must therefore resort to the conflict rules of the law of the situs. As expressed by the court, "The meaning of the 'law of the situs' can be ascertained best from a consideration of the reasons underlying the existence of the rule. The primary reason for its existence lies in the fact that the law-making and law-enforcing agencies of the country in which land is situated have exclusive control over such land."[52] In the result, as the court found that on a reference by the conflict rule of the law of New York to the law of the situs (Switzerland), the conflict rule of the law of the situs referred back to the law of the domicil (New York), the will was held to be valid in accordance with the domestic law of New York.

At this stage of the discussion some parenthetical observations may

51. *In re* Schneider's Estate, 96 N.Y.S.2d 652, *aff'd*, 198 N.Y. Misc. 1017, 100 N.Y.S.2d 371 (Surr. Ct. 1950).
52. *Id.* at 656.

be appropriate. So far as just stated the *Schneider* case is of little interest or importance, because it seems to present a simple application of the generally admitted principle that a question of the title to land should be decided in the same way as it would be decided by a court of the situs. This mode of stating the principle is, however, only a mode of stating the theory of total renvoi,[53] that is, that the question should be decided in accordance with the conflict rules of the law of the situs, including whatever theory of the renvoi, if any, prevails in that law. The *Schneider* case only begins to be interesting and important when we pass from the mere general statement of a generally admitted principle to the practical application of that principle, and enquire whether the New York court understood what was implied in the principle, and consequently understood upon what points evidence of Swiss law was required.

It is submitted that there was no basis for supposing that a Swiss court, if it were trying the case would have decided that it should be governed by domestic New York law. In order to justify the New York court's conclusion, the New York court, putting itself in imagination in the place of a Swiss court, must be convinced by trustworthy evidence of Swiss law: (a) that the relevant Swiss conflict rule referred the case to New York law, and (b) that Swiss law would refuse to accept the reference back to Swiss law under the New York conflict rule that succession to land is governed by the law of the situs. In other words, if (a) and (b) are combined, the New York court must find that the Swiss conflict rule referred the case to New York law in the sense of domestic New York law. If the answer to either (a) or (b) is negative, the foundation of the conclusion of the New York court is destroyed.[54]

Even if, as regards point (a), there was an initial reference by the Swiss conflict rule to New York law (a matter to be discussed subsequently), it does not appear from the report of the *Schneider* case that the New York court considered at all the possibility that the answer on point (b) would be that Swiss law would accept a reference back, and therefore that without regard to the answer on point (a), the New York court ought to have applied domestic Swiss law. The question involved in point (b) is what is the attitude of Swiss law to the doctrine of the renvoi. It would seem that the answer to the question is not well settled.[55] There is no clear evidence that a Swiss court rejects the renvoi altogether and construes a reference in a Swiss conflict rule to a foreign law as a reference only to the domestic

53. See text part IV *supra*.

54. Either under the Swiss-American treaty of 1850, to be discussed later, or under Swiss conflict rules apart from the treaty.

55. Petitpierre, 7 REPERTOIRE DE DROIT INTERNATIONAL 158 (1930); MELCHIOR, GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS 198 (1932); NUSSBAUM, DEUTSCHES INTERNATIONALES PRIVATRECHT 53 (1932).

foreign law, and there is some ground for thinking that Swiss law, on its initial reference to a foreign law, would accept a reference back from that law,[56] or at least that a Swiss court, on being referred by a Swiss conflict rule to the law of a foreign country, and finding that the conflict rules of that country did not submit the case to the law of that country, would apply Swiss law.[57]

In order to avoid making the criticism of the conclusion reached by the New York court in the *Schneider* case seem to depend on point (b), which was not considered by the court at all, we may now assume for the sake of argument the only answer on point (b) which is consistent with the conclusion reached by the court, namely that a Swiss court would reject the doctrine of the renvoi altogether and would construe a reference in a Swiss conflict rule to a foreign law as being a reference to the domestic rules and not the conflict rules of the foreign law, and we may proceed to consider whether the judgment in the *Schneider* case is vulnerable on point (a).

As regards point (a), it appears to be highly probable that the New York court was misinformed about, or misapprehended, the relevant Swiss conflict rule and was in error in finding that there was any reference at all by that rule to New York law, so that the New York court, in order to decide the case as a Swiss court would decide it, ought to have applied domestic Swiss law.[58] It must be premised that Schneider, although he was naturalized in the United States, and domiciled in New York at the time of his death, had not formally renounced his Swiss nationality in Switzerland, and therefore was a person of double nationality and from the point of view of a Swiss court was a national of Switzerland. It is proposed first to discuss Swiss conflict rules apart from the treaty of 1850 between the United States and Switzerland, and later to discuss the effect of the treaty.

The relevant Swiss conflict rules are contained in the Swiss federal statute of the June 25th 1891 entitled in the French version *Loi sur les rapports de droit sur des citoyens établis ou en séjour,* Article 28 of which provides as follows:

> 28. The following rules are applicable to Swiss citizens domiciled abroad as regards the law of persons, family law and succession law, subject however to the special provisions of international treaties:
>
> 1. If, according to the foreign legislation, these Swiss citizens are governed

56. A decision of January 30, 1951, of the Obergericht [appellate cantonal court] of Zurich, [1951] Schw. JZ 94, in favor of the acceptance of the reference back, is found in Lewald, *supra* note 5, at 167.

57. Decision of the Swiss Bundesgericht [federal supreme court], November 18, 1949, 75 Enscheidungen des Bundesgerichts 284 (II 1949), cited by Dr. Lewald in a personal letter to me dated June 17, 1952.

58. On this point I am especially indebted to Dr. Lewald and Professor Nussbaum for their comments on the *Schneider* case in their articles cited in note 5 *supra.*

> by the foreign law, nevertheless it is not that law, but the law of the canton of origin which is applied to their immovables situated in Switzerland; it is likewise the canton of origin which exercises jurisdiction in such subject matter.
>
> 2. If, according to the foreign legislation, these Swiss citizens are not governed by the foreign law, it is the law of the canton of origin which is applied to them, and it is likewise that canton which exercises jurisdiction.[59]

As regards succession to land situated in Switzerland of a Swiss citizen who dies domiciled abroad — the precise question involved in the *Schneider* case — Article 28 provides quite clearly that the governing law is the law of the canton of origin, and affords no support for the decision of the New York court in favour of the application of the law of the domicil.

The question of the law governing succession to movables did not arise in the *Schneider* case, but the meaning of Article 28 in this respect should be considered as a foundation for the elucidation of the New York court's misunderstanding of Swiss conflict rules. The effect of Article 28 has been stated by Dr. Magdalene Schoch,[60] as follows:

> "In the case of a Swiss citizen who dies domiciled abroad . . . the succession is governed by the law of the domicile only if that law purports to apply; otherwise the succession is determined by the law of the decedent's canton of origin;[61] and the law of the canton of origin always governs succession to his immovables situated in Switzerland."[62]

Rabel[63] states the Swiss conflict rules somewhat differently, but Schoch's statement appears to be an accurate statement of the effect of the Swiss statute.[64] So far it seems to be clear that the New York

59. English translation by the author [ed. note].

60. Schoch, *Conflict of Laws in a Federal State: The Experience of Switzerland*, 55 HARV. L. REV. 738, 751 (1942).

61. [Footnote by Dr. Schoch] "This is not exactly renvoi, for the rule does not direct the judge to apply the law which the judge of the domicile would apply; if the conflicts rule of the domicile does not refer to the law of domicile, but to some other law, the Swiss judge is directed to apply the law of the canton of origin. If the conflicts rule of the domicile is that the *lex patriae* shall govern, the result is the same as though the Swiss judge applied that rule by way of renvoi; but if the conflicts rule of the domicile uses the situs as the connecting factor, the distinction becomes clear."

62. The fact that intercantonal conflicts were in large measure eliminated by the Civil Code of 1907 (in effect 1912), as related in *id.* at 751 *et seq.*, is irrelevant to the question now under discussion. The code itself provides that the statute of June 25, 1891, remains in force for the legal relations of Swiss abroad and foreigners in Switzerland, and also insofar as the law is different from canton to canton for the relations of citizens of different cantons.

63. 1 RABEL, CONFLICT OF LAWS 81 (1945). As regards land, Rabel has subsequently expressed doubt on the question "whether Swiss courts really refer succession to Swiss immovables back to the domicile." Rabel, *Suggestions for a Convention on Renvoi*, 4 INT'L L.Q. 402, 406 n.5 (1951).

64. *Cf.* Lewald, *supra* note 5, at 178. See also Lewald, *La Theorie du Renvoi*, 29 RECUEIL 515, 531 (Vol. 4, 1929), wherein it is pointed out that even as to

court ought to have applied the *lex rei sitae* and not the *lex domicilii*.

Up to this point I have discussed the *Schneider* case without regard to the Treaty of 1850 between Switzerland and the United States, Article 6 of which provides:

> "Any controversy that may arise among the claimants to the succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated."[65]

In the *Schneider* case the court left out of consideration Article 6 on the ground that it "merely directs, as does the common law of this State, that initially a reference must be made to the laws of the situs . . . [including] conflict of law rules and the rules concerning the rights and privileges of foreign nationals and domiciliaries. . . . It is apparent that nothing contained in the text of that Article prevents either of the signatory nations or states thereof from formulating its own rules of internal law *and* of conflict of laws."[66]

It is submitted that the view just stated is untenable, and that its adoption by the New York court has the effect of frustrating the purpose of the treaty. When the treaty specifies the law of the situs as the law governing succession the obvious purpose is to substitute, between the signatory parties, a new conflict rule for the existing separate conflict rules of the parties, which presumably have been found to be unsatisfactory. The reference must therefore be construed as a reference to the domestic rules of the specified law, and not as a reference to the law which in its turn is to furnish the appropriate conflict rule.[67] It is hardly conceivable that the parties to the treaty intend merely to declare or confirm the existing divergent conflict rules of the parties.

On other grounds also the New York court's interpretation of Article 6 of the treaty would appear to be untenable, but it must be admitted that the article lends itself to misinterpretation. If Article 6 is read by the light of nature it applies to both land and movables, and as regards movables does not express the traditional Anglo-American conflict rule that succession to movables is governed by the law of the last domicil of the *de cujus*. Nevertheless, incredible as it may seem, it appears to be the fact that the primary purpose of the article was to

movables (not in question in the *Schneider* case) Swiss law makes applicable the law of the domicil only subject to the condition that the law of the domicil itself is applicable under the conflict rules of the domicil.

65. 11 STAT. 587 (1850).

66. *In re* Schneider's Estate, 96 N.Y.S.2d 652, 660 (Surr. Ct. 1950).

67. *Cf.* Lewald, *La Theorie du Renvoi*, 29 RECUEIL 515, 578 (Vol. 4 1929); Lewald, *supra* note 5, at 175; Nussbaum, *supra* note 5, at 22. Nussbaum points out that the situation is very similar to the one where the parties to a contract have agreed that the contract shall be governed by a specified law, *e.g.*, English law, and where they evidently contemplate domestic English law. The inclusion of English conflict rules "would mean reckoning with an unknown quantity instead of attaining the certainty aimed at by the parties. Exactly the same view applies to the determination of a legal system by covenanting governments."

ensure the unitary administration and distribution of the movables of the estate of a deceased person in Switzerland and in the United States by the law of the domicil,[68] and that the article must therefore be read as applicable to movables artificially regarded as being situated at the place of the last domicil of the deceased person (*mobilia sequuntur personam*). The language of Article 6 was, at the time of the negotiation of the treaty described in Switzerland as "a little vague" — a masterpiece of understatement — and a Swiss writer has described the wording of the article as "scandaleuse." Apparently, in order to facilitate the confirmation of the treaty by the Senate of the United States, the ambiguous language of the treaty of 1847 was carried forward into Article 6 of the treaty of 1850.

As regards land there is of course no reason for attributing to it a situs other than its actual situs, and Article 6 in accordance with its natural meaning provides that succession to land is governed by the law of the country in which the land is situated. Consequently succession to land situated in Switzerland is governed by domestic Swiss law and succession to land situated in a state of the United States is governed by the domestic law of the state in which the land is situated. That this is the effect of the treaty is stated by Lewald[69] and by Nussbaum.[70] It is of especial interest that Nussbaum points out that the New York court failed to give effect to the express statement of the Swiss Federal Supreme Court in *Matter of Gemeinde Feldis*[71] (a case in which the *de cujus*, of Swiss and American nationality, left land situated in the United States) that the Swiss land was subject to Swiss jurisdiction and the American land to American jurisdiction.

It would appear therefore that both under the treaty and apart from the treaty the New York court was wrong in applying domestic New York law. Under the treaty the court should have given effect to the reference to the domestic law of the situs (Swiss law). Having wrongly disposed of the treaty as being merely a statement of existing conflict rules, the court was then confronted with the problem of the renvoi. Apart from the treaty, the situation was simple in one respect, namely, in that it is generally admitted that a court of one country should as regards the title to land situated in another country decide the case in the same way as it would be decided by a court of the latter country.

68. On this point, and on other matters relating to the treaty, see Nussbaum, *American-Swiss Private International Law*, 47 COL. L. REV. 186, 195 *et seq.* (1947); *cf.* Nussbaum, *supra* note 5.

69. Lewald, *supra* note 5, at 174, 175 (particular attention should he given the works of Petitpierre, Anliker and Guldener cited therein).

70. Nussbaum, *supra* note 5, at 23 (citing Petitpierre, Guldener, Anliker, Meili, Stauffer and Schnitzer).

71. 24 B.E. 1, 312 (1898), correcting a dictum in the earlier *Wohlwend* case, 9 B.E. 507 (1883), concerning merely the attachment of a bank account in Switzerland. The *Feldis* case was discussed in the *Schneider* case in the first and in the affirming decisions.

Even in this relatively simple situation, ironically enough, some of the practical difficulties in the way of applying the doctrine of the renvoi are illustrated, and in fact proved to be too great for the New York court. The New York court, it is submitted, misconstrued the relevant conflict rule of Swiss law (finding a reference by that rule to the law of the domicil, when there was no such reference in the circumstances of the case) and failed completely to consider whether in any event Swiss law would have accepted a reference back to Swiss law, and in the result applied domestic New York law although a Swiss court would have applied domestic Swiss law.

VI. *Other cases in the United States*

It is with some diffidence as a Canadian, that I attempt to assess the value and tendency of the American cases relating to the doctrine of the renvoi, but I can at least make the attempt with a fair measure of impartiality. The Canadian courts have contributed nothing to the solution of the problem except in one, somewhat old case, supporting the doctrine in special circumstances which I think justify the result.[72] On the other hand, the English courts have specifically discussed the problem in a remarkable series of cases, and have developed a distinctive theory of total renvoi,[73] but, as I have already submitted, the English judges have sometimes failed to take notice of some essential elements in the problem and betrayed some unawareness of the difficulties inherent in the application of their own doctrine. If I may hazard a guess as to what is likely to happen if the problem should present itself to a court of one of the Canadian provinces, or at least of one of the common law provinces, it is probable that the court will follow the English cases, even though there is no case in an appellate English court which would prevent the Court of Appeal in England or the House of Lords from reviewing the whole problem. What will happen if the problem presents itself to the Supreme Court of Canada, now the ultimate appellate tribunal in Canadian cases,[74] is impossible to predict.

Compared with the English cases the American cases present a relatively meagre consideration of the doctrine of the renvoi. The two New York cases which are exceptional in this respect have already been discussed. The *Tallmadge* case, decided in 1919, although probably right in the result, is wrong in its treatment of the renvoi as something that must be accepted or rejected as a whole and in its

72. See note 23 *supra*.
73. See text part III *supra*.
74. For the benefit of non-Canadian readers it is perhaps worthwhile noting that the Supreme Court has general appellate jurisdiction, not limited to "federal" questions, so that the whole problem might be reviewed by the Supreme Court, on an appeal from a provincial appellate court, in a way that would be binding on all Canadian courts.

general condemnation of the doctrine. The *Schneider* case, decided in 1950, is much better in its general statement that the "precise limits of [the doctrine's] applicability are as yet undefined [and that it] may be that in some fields the underlying policies of our law will require its rejection and a direct reference to foreign internal law."[75] The case is, as I have submitted, wrong in the result, that is, in its application of the doctrine to the law and the facts, but right in attempting to decide the title to land in the same way as it would be decided by a court of the situs. Furthermore, the case is especially significant because, instead of stating the renvoi in general terms, it expresses it precisely. In other words, to say that a case should be decided in the same way as it would be decided by a court of the country to the law of which the confiict rule of the forum refers is equivalent to the adoption of the theory of total renvoi, involving the application of the conflict rules of that country, including whatever theory of the renvoi prevails in the law of that county.

The way is now cleared for a review of the other cases decided in the United States, beginning with the New York cases. It is not inaccurate, I think, to say that while some of the cases contain statements or implications favourable to the renvoi, or unfavourable to the renvoi, as the case may be, they fail usually to define the content or consequences of the theory, if any, which they accept. In particular they do not direct attention to the particular theory of the renvoi, if any, which may prevail in the other country or state involved, and this, as I have submitted, is an essential element in the practical operation of the renvoi.[76]

Green v. Van Buskirk.[77] It has been suggested to me that in this case the Supreme Court of the United States applied the doctrine of the renvoi. The judgment of the court does not precisely say this, but if it had done so, it would have been right in principle. The contest was between a chattel mortgagee, claiming under a mortgage made in New York of goods situated in Illinois, and a purchaser at a subsequent sale in Illinois pursuant to attachment proceedings and judgment in Illinois. The Supreme Court reversed the judgment of the New York court in favour of the mortgagee and held that it had not given full faith and credit to the Illinois judgment. According to the generally accepted conflict rule that the title to chattels is governed by the law of the situs at the material time, the title acquired under the law of the situs was entitled to recognition elsewhere, and quite apart from the full faith and credit clause, the New York court ought to have

75. *In re* Schneider's Estate, 96 N.Y.S.2d 652, 659 (1950).

76. See, *e.g.*, its various situations classified in text part III, *supra*, and the parenthetical observations in text parts III and V.

77. 5 Wall. 307, 18 L. Ed. 599 (U.S. 1866) (overruling motion to dismiss), *on appeal*, 7 Wall. 139, 19 L. Ed. 109 (U.S. 1868).

given effect to the judgment of a court of the situs. The court of the situs applies of course its own conflict rules, and the recognition of its judgment elsewhere may thus be an example of the renvoi.[78]

Dupuy v. Wurtz.[79] In this case the validity of the will was contested on the ground that after the making of the will, formally valid by the domestic law of New York, where the testatrix was then domiciled, she acquired a domicil of choice in France and was domiciled there at the time of her death, and that by French law the will was formally invalid. The court having found that the testatrix had retained her domicil of origin in New York, the will was of course held to be formally valid, and it was unnecessary to pursue the enquiry on the question whether the will would have been valid by the law of France if the testatrix had been domiciled there at the time of her death. The court did, however, discuss the effect of Article 13 of the French Civil Code and expressed the opinion that if the testatrix had been found to be domiciled in France, but without having obtained French government authorization, the will would have been valid because by French law its validity would be governed by the law of the domicil of origin of the testatrix, that is, by New York law. The judgment includes the dictum, in favor of the renvoi, that "when we speak of the law of domicil, as applied to the law of succession, we mean not the general law, but the law which the country of the domicil applies to the particular case under consideration." As regards the formalities of the making of a will of movables we have seen that the English courts have adopted the principle that the will is valid if it complies with *either* the domestic law of the domicil *or* the conflict rules of that law,[80] and the result of *Dupuy v. Wurtz* is justifiable on any finding as to the domicil of the testatrix at the time of her death.

In re *Cruger's Will.*[81] The will in question in this case was a holograph will, valid in form by the domestic law of France, but not by the domestic law of New York. It was made in France, where, as the surrogate found, the testator was domiciled *de facto* at the time of his death, although he had not obtained French government authorization under Article 13 of the French Civil Code. The surrogate held that under the relevant New York conflict rule the validity of the will was governed by French law, and that the will was therefore valid in form, but that it must "be limited in its effect to grant to the beneficiary named in it no greater rights than the law of France, to which it owes all of the force that it has, gives to it." Consequently, the sole beneficiary named in the will was entitled to only a one-fourth share, the three children of the testator being entitled to three-quarters. The

78. Cf. note 26 *supra.*
79. 53 N.Y. 556 (1873).
80. See notes 18, 22 *supra.*
81. 36 N.Y. Misc. 477, 73 N.Y. Supp. 812 (Surr. Ct. 1901).

surrogate thus applied domestic French law, disregarding any reference back by the French conflict rule to the law of the domicil of origin. He was aware of the case of *Dupuy v. Wurtz*, because he cited it on another point, but he ignored what the Court of Appeals said as to the meaning of the law of the domicil.

Holmes v. Hengen.[82] This case was cited in the *Schneider* case as a case in which 15 years before the *Tallmadge* case "the Supreme Court of this county rendered a decision in which the principle [of the renvoi] was utilized and in which it formed the basis for the result reached." There would seem to be no justification for this view of the decision in *Holmes v. Hengen*. In the last mentioned case the New York court applied, as it was of course bound to do, a New York statute providing, subject to an exception inapplicable in the particular circumstances, that if a cause of action arising in a foreign state or country is barred there by lapse of time, an action cannot be brought in New York on that cause of action. However desirable a "borrowing" statute of this kind may be, as a corrective of the general tendency of Anglo-American courts to characterize statutes of limitation as procedural, it would not seem to have any bearing on the problem of the renvoi, which depends on the question whether a reference in a conflict rule of the law of the forum to a foreign law should be construed as a reference to the domestic rules of that law or to the conflict rules of that law. Similar observations are applicable to the case of *Ross v. Graham*,[83] also cited in the *Schneider* case.

Lann v. United Steel Work Corp.[84] affords an example of the express rejection of the doctrine of the renvoi in the sense of transmission or reference forward to the law of a third country. An action was brought in New York to recover the face value of certain bonds payable to a German bank and endorsed by it in blank, and held by the plaintiff. The bonds granted an option to the holder to require payment in certain designated places in Germany, Holland or Sweden; and the New York court held that effect of the option combined with the fact that the holder presented the bonds for payment in Holland was that the place of performance was Holland, and that all matters connected with the performance of the contract were governed by the law of Holland. By the domestic law of Holland the bonds would be payable in guilders without regard to German foreign currency statutes which would require the holder to accept payment in reichmarks, but by the conflict of laws of Holland the governing law would be German law and the German foreign currency statutes would be ap-

82. 41 N.Y. Misc. 521, 85 N.Y. Supp. 35, (Sup. Ct. 1903), *aff'd mem.*, 94 App. Div. 619, 88 N.Y. Supp. 1104 (1st Dep't 1904).
83. 122 N.Y. Misc. 574, 203 N.Y. Supp. 390 (Sup. Ct. 1924).
84. 166 N.Y. Misc. 465, 1 N.Y.S.2d 951 (Sup. Ct. 1938).

plicable. The New York judge gave judgment for the plaintiff on the basis of the domestic law of Holland, and refused to adopt the doctrine of the renvoi which, he said, "has been rejected almost unanimously." We might conjecture that the court may have been influenced by the desire not to give effect to Nazi restrictive legislation, but this would be mere conjecture. A more substantial justification for the decision might be that the doctrine of the renvoi should not be applied to contracts, especially commercial contracts. As we have seen,[85] English courts have not applied the doctrine to contracts, but it must be admitted that the argument against the renvoi as applied to contracts is stronger in English conflict of laws (because the selection of the proper law of a contract in that system depends to a great extent upon the subjective element of the intention of the parties) than it is in American conflict of laws (because the proper law is determined more objectively by reference to the place of contracting or the place of performance).

Pan-American Securities Corp. v. Fried. Krupp, Aktiensgesellschaft.[86] The facts were similar to those in the preceding case, and the New York court applied the domestic law of Holland, without discussion of the doctrine of renvoi.

Apton v. Barclays Bank.[87] An action was brought in New York for breach of contract and wrongful conversion of the plaintiff's funds in the defendant bank, which had turned the funds over to the Austrian Nazi government bank. The bank pleaded the English and the Austrian statutes of limitation, the former as being applicable under Austrian conflict of laws. The New York court held that it should use New York conflict rules and not Austrian conflict rules in determining whether the English statute was applicable (referring to the doctrine of the renvoi as having been "consistently and universally rejected in this country, and, of more pertinence here, in this state"), and therefore struck out the bank's plea of the English statute. The court also held that the Austrian statute of limitation was tolled by the New York Civil Practice Act, as amended in 1948, by reason of the fact that the United States was at war with Austria when the cause of action arose in Austria.

Mason v. Rose.[88] An action was brought in New York upon an alleged contract made in England. It was contended that even if English law, as the law of the place of contracting, was applicable, under the New York conflict rule, the law of England made applicable the law of California where work was to begin under the contract, California

85. See note 28 *supra.*
86. 169 N.Y. Misc. 445, 6 N.Y.S.2d 993 (Sup. Ct. 1938), *aff'd,* 256 App. Div. 955, 10 N.Y.S.2d 205 (2d Dep't 1939).
87. 91 N.Y.S.2d 589 (Sup. Ct. 1949).
88. 176 F.2d 486 (2d Cir. 1949).

being the place with which the contract had the most real connection, and the law of California being intended by the parties to govern the contract. The judgment of the Court of Appeals was delivered by Swan, J., (Learned Hand, C.J., concurring), holding that whether an English court would look to California law or not, the document in question would be held to be too indefinite with respect to the rights and obligations of the parties for effect to be given to it as a binding contract. Frank, J. concurred in the result, whether the law of England or that of California was ultimately governing, but disagreed with his colleagues' assumption that if English conflict of laws referred to California law, the New York court should also do so. "In the present case, where we all agree on the result, and substantially agree on the road by which we reach that result, I think we should be wary of stirring up the hornet's nest of renvoi along the way."

The foregoing are all the significant New York cases that I have been able to find relating to the doctrine of the renvoi. The cases decided in other states will be reviewed in chronological order.

Milliken v. Pratt.[89] The doctrine of the renvoi is not mentioned in this case, but the case has been cited[90] as an example of cases in which the problem of characterization or the problem of the renvoi will be found involved in the facts, though not recognized and discussed. The facts of the case are stated by Cook[91] as follows: "*W*, a married woman, domiciled in Massachusetts, in that state signed and gave to *H*, her husband, an offer addressed to *P*, offering to guarantee payment by *H* for goods to be sold by *P* to *H*. The offer was for a unilateral contract, the acceptance to be the shipment of the goods from Maine. *H* sent the [offer] by mail to *P* in Maine, who there received it and accepted by shipping the goods from that state. *W* was sued by *P* in Massachusetts. The usual way of stating the problem is, that by the 'law' of Massachusetts *W* lacked capacity to bind herself by such an agreement, but that by the 'law' of Maine she had capacity; and the result is usually stated in the same terms, viz., that the Massachusetts court held that as the contract was made in Maine, the 'law' of Maine was to be applied in determining *W*'s capacity to bind herself." In his discussion of this case[92] Cook's purpose does not appear to be to find fault with the result,[93] but merely to point out that the Massachusetts court contented itself with ascertaining and applying the domestic law of Maine, and did not concern itself with the conflict rules of the law of Maine, so as to ascertain whether this particular married woman was liable

89. 125 Mass. 374 (1878).
90. CHEATHAM, GOODRICH, GRISWOLD, AND REESE, *op. cit. supra* note 6, at 74.
91. COOK, *op. cit. supra* note 11, at 22, 23.
92. *Id.* at 22-26, 32, 33, 379, 434.
93. *Cf.*, however, his discussion of *University of Chicago v. Dater*, note 109 *infra*.

by the law of Maine, and therefore that the Massachusetts court did not recognize and enforce a Maine-created right. The case may, for the purpose of the present discussion, be accepted as an example of the frequent practice of American courts, especially in older cases, of construing a reference by a conflict rule of the law of the forum to a foreign law as a reference to the domestic rules of the foreign law.

Harral v. Harral. The New Jersey appellate court, affirming the decree of the chancellor, held that by reason of the French matrimonial domicil of the parties to a marriage celebrated in France community of property between the parties was created. The doctrine of the renvoi was not mentioned, but the case is favourable to the acceptance of the doctrine in the sense that the court referred to French conflict of laws in its finding that by French law "the marriage of a foreigner in France, without any contract, followed by a conjugal domicile in France, will subject the property of the married persons to the community law."[94]

In re *Lando's Estate.*[95] The validity of a marriage celebrated in Germany by a person who was not authorized by German law to celebrate marriages was in question in a succession case in Minnesota. The appellate court, in order to uphold the marriage, adopted a doubtful construction of obscurely translated provisions of the German Civil Code, and found that German law, in the case of "aliens" referred the validity of the marriage to the national law of the parties ("American" law in the present case) and that under Minnesota law the parties were entitled to the benefit of the presumption of the validity of the marriage. The case is, of course, favourable to the acceptance of the renvoi, at least for the purpose of supporting the validity of a marriage.

Guernsey v. Imperial Bank of Canada.[96] An action was brought in Wyoming by the bank as endorsee of a promissory note against Guernsey as endorser. The note was made and endorsed in Illinois and was payable in Canada. The notice of dishonor given to the endorser was sufficient by the domestic law of Canada,[97] but insufficient by the domestic law of Illinois. It was held in Wyoming that the notice was sufficient because it was sufficient by the law of Canada. This result was reached by two alternative routes, one direct, and the other indirect via Illinois. The court held (1) that by the conflict rule of the law of Wyoming the sufficiency of the notice was governed by the law of the place of payment, Canada, and (2) that if, as contended by

94. 39 N.J. Eq. 279, 294 (1884).
95. 112 Minn. 257, 127 N.W. 1125 (1910).
96. 188 Fed. 300 (8th Cir. 1911).
97. In Canada the law of bills, notes and cheques is uniform in all the provinces of Canada under the federal Bills of Exchange Act.

counsel for the endorser, the governing law was the law of the place of endorsement, Illinois, then by the conflict rule of the law of Illinois the governing law was the law of the place of payment, Canada. Inasmuch as the court rejected emphatically the contention that the sufficiency of the notice was determined by the law of the place of endorsement, the indirect route to Canada via Illinois was unnecessary, and was used by the court only as a secondary route for reaching the same destination. For what it is worth, however, the indirect route is an example of renvoi in the sense of transmission.

Matter of Baird.[98] The will of a Pennsylvania citizen domiciled *de facto* in France at the time of his death was made in New York in New York form and was contested in Pennsylvania on the ground that it was not made in any of the forms of domestic French law. It was held that Pennsylvania conflict of laws referred to French law as the law of the domicil, and that by French conflict of laws the will of a foreigner is formally valid if it is made in the form of the law of the place of making, and that as the will was valid by the law of New York it was valid by the law of Pennsylvania. It may be assumed that if the will had been made in one of the forms of domestic French law, it would have been recognized as valid in Pennsylvania, so that the result is in accord with the English doctrine that a will is formally valid if it complies with *either* the domestic rules *or* the conflict rules of the governing law.[99]

Gray v. Gray.[100] An action was brought in New Hampshire by a woman against her husband (both domiciled in New Hampshire) to recover damages for personal injuries suffered in a motor accident in Maine alleged to have been caused by the defendant's negligence. The defendant filed a special plea that under the law of Maine the plaintiff, being the wife of the defendant, was barred from maintaining the action. The plaintiff's demurrer to this plea was overruled by Sawyer, C.J., who transferred the case upon exception to that ruling. On appeal the exception was overruled by a judgment delivered by Peasley, C.J., concurred in by the other members of the court.

As this case has been discussed by Griswold[101] and Cook,[102] only some supplementary observations are needed here. Peasley, C.J., said: "We do not understand it is claimed that the doctrine of the renvoi ought to be adopted." Griswold suggests, however, that the New Hampshire court ought to have said that "although the matter is to be

98. Orphans Court of Philadelphia, July 18, 1916. My only source of information about this case is Bates, *Remission and Transmission in American Law of Conflicts*, 17 CORNELL L.Q. 311, 316 (1931).
99. *Cf.* notes 18, 22 *supra*.
100. 87 N.H. 82, 174 Atl. 508 (1934).
101. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1205-07 (1938).
102. COOK, *op. cit. supra* note 11, at 248-49, 345-46.

governed by the law of Maine . . . it should be governed by the 'whole law' of Maine, that is, it should be decided the way the Maine court would decide it. . . . . If the New Hampshire court had looked to the 'whole law' of Maine, therefore, it might have concluded that a Maine court would hold the capacity [of spouses] to be governed by New Hampshire law and thus allow the suit." Griswold says that the Maine reference to the law of the domicil as governing capacity would "obviously" be a reference to the "internal" law, that is the domestic law, of the domicil; but if we look at the case from the Maine point of view it is possible that the reference would be to the "whole law" of New Hampshire, and that a Maine court would accept a reference back, and decide the case by domestic Maine law. At the risk of undue repetition, I submit that saying the New Hampshire court should decide the case in the same way as a Maine court would decide it is equivalent to saying that the New Hampshire court should adopt the theory of total renvoi; that is, that the court must look to the conflict rules of the law of Maine, including whatever theory of the renvoi prevails in the law of Maine. If the theory of total renvoi prevails also in Maine, the result would be that no logical solution would be possible.[103] A similar result may possibly occur in any future case in which a court in one of the states of the United States attempts to decide the case in the same way as a court in another state of the United States would decide it. On the other hand, Cook would avoid the difficulties inherent in the doctrine of the renvoi, and reach a satisfactory result in *Gray v. Gray* by another course of reasoning. He suggests that the right of a woman to sue her husband is a question of policy falling in the field of domestic relations which ought to be governed by the law of the domicil rather than that of the "place of wrong," and that the New Hampshire court should take a short cut and hold that the question of the capacity of a New Hampshire wife to sue her New Hampshire husband is one for the law of New Hampshire and not for that of Maine even though the accident occurred in Maine. In other words, accurate characterization of the separate questions arising from the accident in Maine would result in distinguishing between the question of tort liability in general governed by the law of Maine, and the question of the right of a wife to sue her husband governed, as regards New Hampshire spouses, by the law of New Hampshire. Only the latter question was raised by the special plea.

University of Chicago v. Dater.[104] This much discussed case is of unusual interest and importance because it involves a variety of problems. One of the defendants, a married woman, Mrs. Price,

103. *Cf.* text part III(4) *supra.*
104. 277 Mich. 658, 270 N.W. 175 (1936).

signed in Michigan a promissory note dated and payable in Illinois and a trust mortgage on land in Illinois to secure repayment of a loan to be made by the plaintiff to her husband and one Dater. The documents had been sent to the plaintiff's agent in Michigan, and the agent, having procured the signatures to the documents, posted them back to Illinois, and after a cloud on the title had been removed, the transaction was closed by the payment of the money in Illinois. In an action in Michigan upon the note, it was admitted that if the capacity of Mrs. Price was governed by domestic Illinois law she was liable, whereas by domestic Michigan law she was not liable. The three problems raised by the case may conveniently be discussed separately. The discussion may have a significance which is not limited to the particular case and which illustrates some of my own submissions with regard to a court's use of the doctrine of the renvoi, and some cognate doctrines.

(1) The majority of the appellate court (judgment of Wiest, J., in which North, C.J., Fead, J., and Toy, J., concurred) held that Mrs. Price's capacity was governed by the law of the place of contracting, and that by Michigan conflict of laws the place of contracting was Illinois, but that by Illinois conflict of laws the place of contracting was Michigan; and therefore the Michigan court applied domestic Michigan law and held that Mrs. Price was not liable. As we have seen[105] English courts have not applied the doctrine of the renvoi to commercial contracts, but of course a different practice may prevail in the United States. There remain, however, some unanswered questions as to the use made of the doctrine by the Michigan court. (a) If the reference by Michigan conflict of laws to the law of Illinois is construed as a reference to the "whole law" of Illinois, why should the reference by Illinois conflict of laws be construed as a reference to the domestic law of Michigan? (b) If the matter is looked at from the Illinois point of view, on the initial reference by Illinois conflict of laws to the law of Michigan, why should the law of Illinois not accept a reference back by Michigan conflict of laws? (c) If an Illinois court had jurisdiction to entertain an action against Mrs. Price, and an action was brought against her in Illinois, would she have been held liable under the domestic law of Illinois? The foregoing questions are pertinent because the Michigan court accepted the reference back from Illinois law without explaining what its own theory of the renvoi was. If it intended to adopt the theory of partial renvoi,[106] uniformity of decision between Illinois and Michigan would be secured only if the law of Illinois rejected the doctrine of the renvoi altogether or adopted the theory of total renvoi. If the Michigan court intended

105. See note 28 *supra*.
106. As to partial renvoi and total renvoi, see text part III *supra; cf.* COOK, *op. cit. supra* note 11, at 246-47.

to adopt the theory of total renvoi, uniformity of decision would be secured only if that theory did not prevail in the law of Illinois. The case affords a striking example of the inconclusiveness or lack of value of a court's use of the renvoi without due consideration of the practical operation of its theory of renvoi in the light of whatever theory of the renvoi may prevail in the country from the law of which it accepts a reference back.

(2) Three judges dissented (Sharpe, Bushnell and Butzel, JJ.), and held that Mrs. Price's capacity was governed by the domestic law of Illinois, as the law of the place of contracting, ascertained by the law of Michigan without reference to the law of Illinois as to what was the place of contracting. Butzel, J., who wrote a separate opinion, stated that the problem was one of "qualifications" (characterization) and cited Lorenzen's article[107] in a context which shows that he intended to refer specifically to Lorenzen's opinion that the definition of "points of contact" or "connecting factors," such as domicil and place of contracting, but not including nationality, should be determined by the domestic law of the forum, subject to some exceptions not relevant to the case under discussion.[108] On this particular ground it is submitted that the decision in *University of Chicago v. Dater* was wrong.

(3) In another respect the course of reasoning adopted by the court in *University of Chicago v. Dater* does not appear to be satisfactory. The ground of criticism stated in (2) above was that the connecting factor "place of contracting" specified in a conflict rule of the law of the forum should have been defined with exclusive reference to the domestic law of the forum. The ground of criticism of the decision remaining to be stated is a different one, namely, that the court was wrong in saying that the relevant conflict rule referred the question of Mrs. Price's liability to the law of the place of contracting. It is suggested by Cook[109] that in a situation like that in *University of Chicago v. Dater,* where the only acts of the married woman were done in her own domicil, and the other party knows that if he ever sued her, he would probably have to sue her there, grounds of social policy seem clearly to require that her capacity to contract should be held to be governed by the law of the domicil, and not by the law of the place of contracting, interpreted as including under the words "place of contracting" the place where the "last event" or "principal event" occurred, even though that event be the act of the other party,

107. Lorenzen, *The Theory of Qualifications and the Conflict of Laws,* in SELECTED ARTICLES ON THE CONFLICT OF LAWS, at 80 (1947), 20 COL. L. REV. 247 (1920).

108. Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws,* in *id.* at 115, 123-26, 50 YALE L.J. 743 (1941), wherein the *Dater* case is also discussed.

109. COOK, *op. cit. supra,* note 11, at 248, 439-40 (1942).

occurring in another state. On this basis the decision would be justified without recourse to the doctrine of the renvoi.

Personally I am not competent to discuss, and it would be out of place to discuss here, the broad question as to the law which should be the governing law as to capacity to contract in American conflict of laws. The English decisions and judicial dicta are scanty and conflicting, but the current of nonjudicial opinion has set strongly in the direction of saying that capacity to marry and capacity to make a marriage settlement depend on the law of the domicil, and capacity to make a commercial contract depends on the law of the place of contracting or the proper law of the contract. The place of contracting is unsatisfactory if it is purely accidental or casual, and the proper law of the contract is unsatisfactory under the English doctrine that the parties are at liberty to select arbitrarily the law that is to govern the contract. The editors of the new *Dicey* have formulated the rule that "a person's capacity to enter into a contract is governed by the law of that country with which the contract is most closely connected."[110] On the basis of this rule, it would appear that the capacity of Mrs. Price in *University of Chicago v. Dater* should be governed by the domestic law of Illinois. As already noted, English courts do not apply the doctrine of the renvoi to contracts.

House v. Lefebvre.[111] The makers of a promissory note were husband and wife, who were residents of Michigan, and the payee was a resident of Ohio. The wife in Michigan signed the note as surety for her husband at his request, and the note was then taken by the husband to Ohio and there delivered to the payee, who there and then delivered the consideration for the note to the husband. By the domestic law of Ohio the wife was liable on the note, and by the domestic law of Michigan she was not liable. It was held that she was liable in accordance with the law of Ohio, as the law of the place of contracting. Sharpe, J., delivering a judgment which was concurred in by seven other judges, (including two who had joined in the majority judgment, and two who had dissented, in *University of Chicago v. Dater*), cited an earlier Michigan case for the proposition that the "determination of the place of making is termed by the authorities a question of 'qualification' and is a preliminary question governed by the law of the forum." It was apparently not contended that by Ohio conflict of laws the place of contracting was Michigan, and the court seemed to think it could distinguish *University of Chicago v. Dater.* In effect, however, the acceptance of the renvoi from the law of Illinois in the last mentioned case was inconsistent with the proposition quoted above and approved by the court in *House v. Lefebvre.*

110. DICEY, CONFLICT OF LAWS 619, 620-24 (6th ed. 1949).
111. 303 Mich. 207, 6 N.W.2d 487 (1942).