

4-1-1951

Conflict of Laws—Devise of Foreign Realty—Renvoi Expressly Adopted

Philip A. Erickson

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Conflict of Laws Commons](#)

Recommended Citation

Philip A. Erickson, *Conflict of Laws—Devise of Foreign Realty—Renvoi Expressly Adopted*, 1 Buff. L. Rev. 49 (1951).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol1/iss1/14>

This Recent Decision is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

RECENT DECISIONS

that the sale of a trading partnership interest was the sale of a capital asset, the Commissioner frequently petitioned the Supreme Court for certiorari in order to get a final adjudication on the subject. Certiorari was denied each time. This consistent refusal has been construed to signify that the Supreme Court refuses to disturb the lower court decisions. See *United States v. Shapiro*, 178 F. 2d 459, 461 (8th Cir. 1949). The refusal of the Court to grant certiorari in the *Swiren* case could also be viewed in the same light which, if true, means that the Supreme Court sees no distinction between trading partnerships and professional partnerships. But see Mr. Justice Frankfurter's strong statement that denial of certiorari implies no approval of lower court decisions, *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 917-920 (1950).

Since the Commissioner of Internal Revenue may continue to attack the sale of interests in professional partnerships, the form of the transaction may be important. Care should be taken so that all facts point to the sale of an interest, rather than to a termination of the partnership.

Henry Wojcicki

CONFLICT OF LAWS—DEVISE OF FOREIGN REALTY — RENVOI EXPRESSLY ADOPTED

Testator, a naturalized American citizen, died while domiciled in New York, leaving real property in his native Switzerland. His devise of this property was valid by New York internal law, but invalid in part by Swiss internal law, because of compulsory heirship in near relatives. The realty was sold and proceeds transmitted to New York. *Held*: The devise is valid. Decedent Estate Law § 47, in referring the question of validity of a devise to the law of situs, means all of that law, including its principles of conflict of laws. Swiss conflict law would in this case refer validity to the internal law of decedent's nationality. The proceeds are to be distributed as the realty would have been, i.e. by New York internal law. *In re Schneider's Estate*, 96 N. Y. S. 2d 652, *on reargument*, 100 N. Y. S. 2d 371 (Surr. Ct. 1950).

When a forum has decided that some aspect of the case should be dealt with in view of the law of a particular foreign jurisdiction, it may refer to the purely internal, domestic law of that jurisdiction; or, in the interest of uniformity of decision, i.e. to reach the same result which other courts, including the foreign court, would reach, it may refer to all of the law of the foreign jurisdiction, including its principles of conflict of laws. If it makes the broader reference, it adopts the so-called "renvoi" theory.

Renvoi has not suffered for lack of interest on the part of legal writers. Those who oppose it focus their arguments upon the difficulty which may be encountered in ascertaining a foreign conflict rule, and upon the possibility that these problems are more theoretical than real, and that, in any event, the to the conflict rule of some other jurisdiction which in turn refers to the conflict rule of the forum, with supposedly endless reference and re-reference. See, e.g., Cormack, *Characterization, Localization and Preliminary Question in the*

BUFFALO LAW REVIEW

Conflict of Laws, 14 SO. CAL. L. REV. 221 (1941). Those who favor it answer that these problems are more theoretical than real, and that, in any event, the practical desirability of securing uniform treatment irrespective of the forum chosen—the purpose of conflict rules—should not be sacrificed merely because in some cases, utilization of renvoi does not provide a complete answer. E.g. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938); see also RABEL, *THE CONFLICT OF LAWS, A COMPARATIVE STUDY*, 70-83 (1945). The RESTATEMENT OF CONFLICT OF LAWS, under the influence of the late Professor Beale, one of renvoi's more vigorous opponents, rejects the doctrine, except in the determination of title to land and validity of divorce (§8), both of which exception have been accepted by most writers. Apparently, it is all right to overlook logical difficulties in order to protect traditionally superior interests.

Judicial attitudes, also, have varied. Many Continental and English authorities recognize renvoi and apply it as a general proposition. *Forg-Dicth Heirs v. Tax Adm'n*, Court of Cassation, Clunet (1883) 64 (*Forgo* case); *In re Ross*, [1830] 1 Ch. Div. 377; *In re Annisley*, [1926] Ch. 692. American and Canadian authorities, for the most part, have not met the problem squarely, e.g., *Lister v. McAnulty*, [1944] 2 D L. R. 673 (Can. Sup. Ct. 1944). When they have, the result has been rejection, *Gray v. Gray*, 87 N. H. 82, 174 A. 508 (1934), or acceptance without discussion of the doctrine or its merits, *University of Chicago v. Dater*, 277 Mich. 658, 270 N. W. 175 (1936); *Guernsey v. Imperial Bank of Canada*, 188 Fed. 300 (8th Cir. 1911).

In New York, there are decisions endorsing the renvoi approach; and there are decisions condemning it. In a case involving testamentary disposition of personalty, it was asserted that "renvoi is no part of New York law." *In re Tallmadge*, 109 Misc. 696, 181 N. Y. Supp. 336 (Surr. Ct. 1919). See also *Lann v. United Steel Works*, 166 Misc. 465, 1 N. Y. S. 2d 951 (1938). But the court overlooked a case employing the renvoi approach in construing the New York borrowing statute (Code of Civil Procedure, § 390-a, now Civ. Prac. Act, § 13), concerning time limitations on imported causes of action, *Holmes v. Hengen*, 41 Misc. 521, 85 N. Y. Supp. 35, *aff'd*, 94 App. Div. 619, 88 N. Y. Supp. 1104 (1st Dep't 1904), and disregarded a dictum concerning testamentary disposition of personalty in *Dupuy v. Wurtz*, 53 N. Y. 556 (1873). Subsequently, the Court of Appeals reached the renvoi result in two cases involving validity of foreign divorces. *Ball v. Cross*, 231 N. Y. 329, 132 N. E. 106 (1921) and *Dean v. Dean*, 241 N. Y. 240, 149 N. E. 844 (1925). The instant case is the first, however, to accept renvoi by name. But see *Mason v. Rose*, 176 F. 2d 486 (2d Cir. 1949).

The significance of this decision can be discounted by those who doubt the workability of renvoi, since factually at least, it is within one of the two exceptions which all writers apparently recognize. But such a limitation upon its rationale plainly is not intended. Surrogate Frankenthaler makes it clear

RECENT DECISIONS

that he views the renvoi approach as possessing a definite utility in the solution of problems other than that of succession to land. Its application, he believes, should be the rule and not the exception. A New York court should dispose of the case as if it were a court of the jurisdiction to whose law it refers. 100 N. Y. S. 2d 371, 373. See Griswold, *op. cit. supra* at 1182. No precise limitations upon this approach are expressed in the opinion, but there is a suggestion that foreign internal law should be adopted only when "underlying policies of our law" require it. Civil Practice Act § 13, insofar as it deals with the tolling of statutes of limitation as to causes of action arising in enemy territory during wartime, may well embody such a policy. See *Apton v. Barclay's Bank, Ltd.*, 91 N. Y. S. 2d 589, *aff'd*, 276 App. Div. 910, 94 N. Y. S. 2d 1 (2d Dep't 1950). It seems necessary to make another observation, viz., that parties entering into a contract, when permitted to choose the law of a particular jurisdiction to determine their rights and obligations, would normally intend the internal, domestic law of that jurisdiction and not its principles of conflict of laws. Note, 40 COL. L. REV. 518, 523 (1940); cf. *Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A. C. 277. In addition, there is room for the more basic argument that some of the forum's rules of reference may be founded upon considerations such that a reference to internal law alone is intended; for example, in determining the validity of the terms of a contract, those jurisdictions which refer to the law of the place of making may regard the parties as having contracted with reference only to its internal law.

It is to be noted that, in the instant case, the foreign conflict rule referred to the internal law of the forum, so the problem of continuous reference and re-reference did not arise. If this were always true, there would be little left of the argument against renvoi. It is the possibility that the foreign conflict rule may refer to the conflict rule of the forum, together with a mechanical notion of renvoi, which has led many writers to reject it as impracticable. Other writers have attempted to explain away the difficulties engendered by such an approach, but have realized little success. E.g. Cowan, *Renvoi Does Not Involve a Logical Fallacy*, 87 U. OF PA. L. REV. 34 (1938); Griswold, *In Reply to Mr. Cowan's Views on Renvoi*, 87 U. OF PA. L. REV. 257 (1939). See Rabel, *op. cit. supra* at 78. Without adding to those attempts, it may be observed that the controversy stems principally from a difference in emphasis. Those who reject renvoi demand an approach which provides a complete and easy solution in all cases. Its questionable validity does not seem to trouble them. The others are content with a solution, though somewhat asymmetrical, if it produces substantial similarity of decision in the particular case irrespective of the forum chosen. The instant decision proceeds upon the latter theory and leaves problems of continuous reference to be decided when and if they arise. It would seem that if, as the renvoi approach receives more widespread recognition, it becomes necessary to stop the references somewhat arbitrarily, resort may be had to the point (i.e. the first reference) required by those

BUFFALO LAW REVIEW

who reject renvoi, or, for that matter, to some other point equally arbitrary. But given the renvoi approach—which comes nearest to reaching the objective established for conflict principles—there is good reason to advocate the adoption, by interstate and international agreements, of rules defining the point at which the reference may in each particular situation most appropriately be stopped. See Knauth, *Renvoi, etc. in Transportation Law*, 49 COL. L. REV. 1 (1949).

Philip A. Erickson

HUSBAND AND WIFE — RECOVERY BY WIFE FOR LOSS OF CONSORTIUM

Plaintiff's husband, while in defendant's employ, suffered severe and permanent injuries to his body. As a result, plaintiff alleged that she had been deprived of her husband's aid, assistance and conjugal enjoyment. The husband collected an award under the Longshoreman's and Harbor Worker's Compensation Act, the applicable workmen's compensation law for the District of Columbia. The "exclusive liability" section of the act, 44 Stat. 426, 33 U. S. C. A. § 905, provides that the liability under the act "shall be exclusive and in place of all other liability of the employer to the employee . . . husband or wife . . . and anyone otherwise entitled to recover damages from such employer . . . on account of such injury or death." *Held*: a wife has a cause of action for loss of consortium resulting from a negligent injury to her husband. Also, the "exclusive liability" section of the Longshoremen's and Harbor Workers' Compensation Act is not a bar to her action, because: (1) her right is independent, and (2) the section is aimed at, and only bars, derivative suits. *Hitafer v. Argonne Co.* 183 F. 2d 811 (1950); *cert. denied*, 340 U. S. 852, 71 Sup. Ct. 80 (1950).

Case authority against the proposition that a wife has a cause of action for loss of consortium occasioned by the negligent injury of her husband is uniform throughout the nation. *Tyler v. Brown-Service Funeral Homes*, 250 Ala. 295, 34 So. 2d 203 (1948); *Boden v. Del-Mar Garage*, 205 Ind. 59, 185 N. E. 86 (1933); *Feneff v. N. Y. C. and H. R. R.*, 203 Mass. 278, 89 N. E. 436 (1909); *Landwehr v. Barbas*, 241 App. Div. 769, 270 N. Y. Supp. 534 (2d Dept. 1934); *Goldman v. Cohen*, 30 Misc. 336, 63 N. Y. Supp. 459 (1900); *Bernhardt v. Perry*, 276 Mo. 612, 208 S. W. 462, 13 A. L. R. 1320 (1909); and other cases cited 59 A. L. R. 680 (1929).

Various reasons have been assigned for denying the wife this right. Some cases rule that since the wife is not entitled to her husband's services, she has no cause of action, because "material services" is the only compensable element of consortium. *Boden v. Del-Mar Garage, supra*. Some courts, with this