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CONFLICT OF LAWS - RENVOI THEORY - CONFLICTS RESTATEMENT

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COMMENTS

CONFLICT OF LAWS — RENVOI THEORY — CONFLICTS RESTATEMENT — The case of *University of Chicago v. Dater*,[1] recently decided by the Michigan Supreme Court, contains interesting and unusual problems in the field of conflict of laws. The University of Chicago had agreed to loan money to a Michigan resident, to be secured by Chicago realty. The note and trust mortgage were sent by plaintiff to a Michigan bank, as agent, which procured the signatures of defendant and her husband, and sent the papers back to plaintiff's agent in Chicago. Some question as to title to the land arose, followed by further negotiations, and nearly a month after the papers reached Chicago, the title having been cleared, the money was paid to the makers in Chicago. The obligation of the note was also payable in Chicago. In

[1] University of Chicago v. Dater, 277 Mich. 658, 270 N. W. 175 (1936).

a suit against the wife for a deficiency judgment, it was held that either Michigan or Illinois law governs the capacity of the married woman to contract in such a case, that by Michigan law defendant would not be bound, and that in such a case Illinois law would apply the Michigan law as to capacity, so defendant is not bound on either supposition. Justice Sharpe dissented on the basis that the contract should be held an Illinois contract, and should be governed by the Illinois law, by which a married woman has full capacity to contract. Butzel, J., concurred with Sharpe, J., in result, analyzing the majority opinion as applying Illinois law to a question of "qualifications," which Justice Butzel considered should be controlled by Michigan law.

For clearness of thought in the problems here raised, it is necessary to keep in mind a distinction between what may be called the "internal law" of a state, and the rules of conflict of laws[2] which that state enforces when faced with a choice of law from jurisdictions the law of which may be in some way applicable to a problem. Together, the "internal law" and the conflict of laws rules make up what may be called the "entire law" of the state. The majority opinion in the principal case gives a result which may be said to be an application of the renvoi theory. The premise of this theory is that when the conflict rules of a state direct the application of the law of another state or country, that law to be applied is the *entire* law of the other state or country, thus including the rules of conflict of laws of that state. Thus on the facts of the principal case, if the forum (Michigan) decides that the contract was an Illinois contract, and applies the rule that the law of the place of making a contract governs with respect to the capacity of parties, i.e., Illinois law in the present case, then the entire law of that state is applicable. Hence, if the Illinois conflict of laws rule would refer the issue back to Michigan law, the forum would then apply Michigan internal law. The renvoi doctrine may embrace not only a "remission" to the internal law of the forum, but also a "transmission" to the law of some third jurisdiction, e.g., as if in the above situation the Illinois law should hold that the case should be governed by the law of Ohio and that law should therefore be applied.

The usual renvoi situation is one where the two or more jurisdictions involved would apply a different conflict of laws rule to the facts. Such a situation would be presented, if the Illinois law were to declare the capacity of the parties to be dependent upon the place of performance of the contract, and the Michigan conflict of laws rule referred to the law of the place of making the contract. But here, both jurisdictions are agreed that capacity of the parties should be

[2] Also called "private international law" or, more descriptively accurate, "choice of laws." See BLACK, LAW DICTIONARY, 3d ed., 396-397 (1933).

governed by the law of the place of making the contract.[3] Normally, this would mean that the conflict of laws rule of both jurisdictions would refer to the internal law of the same state, and so would reach like results whether there were a renvoi or not. In the present case, however, the Illinois law as construed by the majority would hold that the place of making the contract was in Michigan,[4] whereas Michigan law would seem to construe the contract to have been made in Illinois, as explained by the dissenting opinions.[5] The point of difference between Illinois and Michigan law would then be in the definition of "place of contract." As pointed out by Justice Butzel,[6] this is a conflict in "qualifications" or "classification."

Whether regarded as a general renvoi question, or one of qualifications, an application in this case of the entire law of the jurisdiction referred to is counter to prevailing American opinion. The commonest argument against renvoi is that if the reference to a foreign law is properly interpreted to include reference to the foreign conflict of laws rules, the same should be true when there is a reference back to the law of the forum. The logical result would be an endless circle of references back and forth, and it is claimed to be illogical to stop with the internal law of the forum. A similar situation, with more complications, may arise where the second reference is to the law of a third state. It is also claimed that adoption of the renvoi doctrine would render results more uncertain,[7] because of dependency on the conflict of laws rules of other states. Further objection is made that it is errone-

[3] Walker v. Lovitt, 250 Ill. 543, 95 N. E. 631 (1911); Sherman v. Gassett, 4 Gilm. (9 Ill.) 521 (1847); Benedict v. Dakin, 243 Ill. 384 (1909); Burr v. Beckler, 264 Ill. 230, 106 N. E. 206 (1914); Strawberry Point Bank v. Lee, 117 Mich. 122, 75 N. W. 444 (1898); Arbuckle v. Reaume, 96 Mich. 243, 55 N. W. 808 (1893); Tolman Co. v. Reed, 115 Mich. 71, 72 N. W. 1104 (1897).

[4] The majority in the instant case rely on Burr v. Beckler, 264 Ill. 230, 106 N. E. 206 (1914), where the Illinois court applied the law of the place where delivery by deposit in the mails occurred. The facts of Burr v. Beckler would seem to be distinguishable from the instant case, the court regarding the note as being binding on the maker when mailed (264 Ill. 230 at 236), and there being absent the circumstances of the instant case of the delay and subsequent approval of security and payment of consideration. Other Illinois cases would indicate that the law of the place of delivery controls, because a contract is consummated or completed on delivery, with the possible inference that the law of the place where the final act necessary to make a binding contract would govern. See Walker v. Lovitt, 250 Ill. 543, 95 N. E. 631 (1911).

[5] The dissenting justices cite GOODRICH, CONFLICT OF LAWS 218 (1927); 5 R. C. L. 935 (1914), and 2 BEALE, CONFLICT OF LAWS 1045 (1935), to the effect that the "place of contracting" which governs is the place where the last act necessary to create a binding agreement occurs. University of Chicago v. Dater, 277 Mich. 658 at 665-667, 270 N. W. 175 (1936).

[6] University of Chicago v. Dater, 277 Mich. 658 at 667, 270 N. W. 175 (1936).

[7] Matter of Tallmadge, 109 Misc. 696, 181 N. Y. S. 336 (1919).

ous for the forum in effect to constitute itself a foreign court; that it is the duty of the forum to apply its own ideas as to when a sufficient bond exists between the facts and a foreign jurisdiction to warrant application of the foreign law.[8] The chief aim of the renvoi doctrine is the achievement of the same legal result on the same factual occurrences, irrespective of the court in which the question arises. But, it is argued, if all the states or countries should adopt the renvoi doctrine the forum in each case would apply the conflict of laws rule of another state, and the total result would not produce greater conformity.[9] If the conflict of laws rules of all jurisdictions were uniform, there would be no need for renvoi.

There have been only a limited number of American cases where the problem has been presented, and few of these furnish satisfactory authority. This is in some measure due to the fact that the conflict of laws rules of the various states are more uniform than those existing between the various European countries.[10] It is said, however, that because the conflict of laws rules with respect to contracts differ more among the states, there would be more situations for a renvoi in this field.[11] In *Harral v. Harral*,[12] the court considered the effect of the French law of conflict of laws, but the result of both the French and the forum's rules on the question was that the internal law of France should be applied to define marriage property rights. A New York testamentary case[13] contained a dictum to the effect that the decision could be reached by application of the French rule of conflict of laws, but the decision was based on other grounds. The Orphan's Court of Philadelphia made renvoi the basis of a decision sustaining the validity of a will, but did not discuss the merits of the rule, and the case was settled before appeal.[14] On the other hand, the New York court in a 1901 decision overlooked without mention a situation where renvoi would have been applicable.[15] In *Matter of Tallmadge*,[16] a New

[8] Schreiber, "The Doctrine of the Renvoi in Anglo-American Law," 31 HARV. L. REV. 523 at 533 ff. (1918).

[9] Ibid., p. 535. See also, Lorenzen, "The *Renvoi* Doctrine in the Conflict of Laws," 27 YALE L. J. 509 at 524 ff. (1918).

[10] Bates, "Remission and Transmission in American Conflict of Laws," 16 CORNELL L. Q. 311 at 312 (1931).

[11] Schreiber, "The Doctrine of the Renvoi in Anglo-American Law," 31 HARV. L. REV. 523 at 526 (1918).

[12] Harral v. Harral, 39 N. J. Eq. 279 (1884).

[13] Dupuy v. Wurtz, 53 N. Y. 556 (1873).

[14] Matter of Baird, Orphan's Court of Philadelphia, July 18, 1916, cited in Bates, "Remission and Transmission in American Conflict of Laws," 16 CORNELL L. Q. 311 at 316 (1931).

[15] In re Cruger's Will, 36 Misc. 477, 73 N. Y. S. 812 (1901).

[16] Matter of Tallmadge, 109 Misc. 696, 181 N. Y. S. 336 (1919).

York case, is found the only adequate American consideration of the renvoi theory, with the court concluding that it should not be adopted. In *Lando's Estate*,[17] the Minnesota court relied on a German reference to the national law of the parties, to sustain the validity of a marriage. This was a renvoi application, but its general authority is weakened by the policy of upholding marriages, and the manner in which proof of German law was made.[18]

If the problem in the principal case be analyzed as one of qualifications, such American authority as can be found supports Justice Butzel's contention that the internal law of the forum should control.[19]

The principal case presents some perplexing questions in the interpretation of the American Law Institute *Restatement of the Law of Conflict of Laws*. In the principal case, the difference between Illinois law, as construed by the majority, and the Michigan law concerns where the place of contract is, which would resolve itself into an inquiry as to whether the contract was effective on the delivery in Michigan, or not effective until a later event, e.g., upon approval of the security in Illinois. What answer does the *Restatement* give when the two states involved differ as to whether the contract is effective on delivery? If the contract were agreed to be effective on delivery, sections 311 and 312[20] indicate that the place of delivery governs questions concerning the formulation of the contract, which would include capacity, consideration, etc. But by which law does the *Restatement* direct that it be determined whether or not the contract is effective on delivery?

[17] Lando's Estate, 112 Minn. 257, 127 N. W. 1125 (1910).

[18] German law was put in proof by stipulation of the parties, and the law stipulated included the conflict of laws rule.

[19] Lorenzen, "The Theory of Qualifications and the Conflict of Laws," 20 COL. L. REV. 247 (1920); State ex rel. Fulton v. Purse, 273 Mich. 507, 263 N. W. 874 (1935). On qualifications theories, see also Beckett, "The Question of Classification ('Qualification') in Private International Law," 15 BRITISH YEARBOOK OF INTERNATIONAL LAW 46 (1934).

[20] CONFLICTS RESTATEMENT, § 311 (1934): "Place of Contracting. The law of the forum decides as a preliminary question by the law of which state questions arising concerning the formation of a contract are to be determined, and this state is, in the Restatement of this Subject, called the 'place of contracting.' "

Section 312, "Except as stated in § 313 [which deals with renewal contracts], when a formal contract becomes effective on delivery the place of contracting is where delivery is made." This use of the phrase "place of contracting" in a peculiar sense in the Restatement is confusing. Thus, Justice Butzel in his dissent in the principal case, 277 Mich. 658 at 666, cites the Conflicts Restatement, § 333, as authority that the place of contracting controls the question of capacity of the parties. But Justice Butzel by "place of contracting" apparently means the place where the contract was made or entered into, whereas the Restatement by definition in § 311 uses the phrase to indicate the law which the forum decides shall be applied to a given question, which the Restatement does not say shall be the place the contract was entered into.

If we assume that whether a contract is effective on delivery is a question concerning the formation of the contract, which seems reasonable, section 311 declares that it be controlled by the jurisdiction chosen by the forum to be the "place of contracting." Section 332 also indicates that the law of the "place of contracting" will determine capacity, form, consideration, and "any other requirements for making a promise binding," which would seem to include questions relating to the effectiveness of the contract. But sections 312-331, which give rules as to where the "place of contracting" will be in particular situations, take as an assumption that the contract is effective on delivery, on mailing, or on some such event, and do not indicate by what law effectiveness on delivery is to be determined. To say that whether a contract is effective on delivery is a question concerning the formation of the contract within section 311 would lead only in a circle so far as *Restatement* rules are concerned, because the determination of the place of contract involves predetermination of when the contract is effective. It could, of course, be concluded that although a question concerning the formation of the contract, the *Restatement* does not purport to cover it.

If we can assume that effectiveness on delivery is a question of conflict of laws within section 7,[21] or of the "quality and character of legal ideas" within section 7(a), the law of the forum is to decide whether the contract is to be regarded as effective on delivery. But whether a contract is effective on delivery would not seem to be a "question of conflict of laws" or of the "quality and character of legal ideas." However, whether a contract is effective on delivery would be decided in determining *where* the contract was made, and the whole question would be governed by the law of the forum as a question of the quality and character of legal ideas, under § 7 (a), since the question *where* the contract was made seems to fall into this category.

Suppose, then, that on the preliminary question of form of contract the forum applies its own internal law of contracts, which holds that the contract in question is not effective on delivery, but, as is

[21] CONFLICTS RESTATEMENT, § 7 (1934): "Law of Forum Applied. Except as stated in § 8, when there is a difference in the Conflict of Laws of two states whose laws are involved in a problem, the rule of Conflict of Laws of the forum is applied;

"(a) in all cases where as a preliminary to determining the choice of law it is necessary to determine the quality and character of legal ideas, these are determined by the forum according to its law;

"(b) where in making the choice of law to govern a certain situation the law of another state is to be applied, since the only Conflict of Laws used in determination of the case is the Conflict of Laws of the forum, the foreign law to be applied is the law applicable to the matter in hand and not the Conflict of Laws of the foreign state."

claimed in the dissenting opinions of the principal case, is effective on some condition subsequent. What is to be done under the *Restatement*? If the contract is not effective until the giving of value or approval of security in a state other than that where delivery was made, section 312 [22] does not apply, and none of the following sections dealing with delivery by mail, by agent, by escrow, etc., apply to such a contract. This type of situation seems not to have been provided for by the *Restatement*. Is the forum, then, to disregard the *Restatement* as not covering this case, as in other instances where a caveat has been inserted emphasizing no opinion of the law on a particular situation? [23]

The references to foreign law in sections 312-331 are to the internal law of the foreign jurisdiction. Could there be an inference by omission of the situation in the principal case, to the contrary of those situations provided for, that if the forum applies the law of Illinois,[24] it may in the omitted situation apply the entire law, including a renvoi to the contract law of the forum as to capacity of the parties? In general language, section 7 [25] would in the principal case mean that any reference to Illinois law would be only to the internal law as to capacity of the wife, and would exclude application of Illinois conflicts law or definition of place of contract. A question might be raised, however, that, since this type of formal contract not effective until payment of value or approval of security was apparently omitted or overlooked in connection with sections 312-331, *Restatement* section 7 is not intended to apply to such a fact situation either, and that therefore section 7 expresses no opinion as to renvoi on this problem. The contrary interpretation would be that sections 7 and 8 lay down a general rule, applicable to the whole field of conflicts questions, with the two exceptions made in section 8.[26]

If the facts of a case should be that delivery occurred in Illinois,

[22] Quoted, supra, note 20.

[23] As in connection with § 10, "Caveat: The Institute expresses no opinion whether if by the law, etc."

[24] As just mentioned the Restatement seems to provide no rule as to what law should be applied here, unless we reason by analogy from the rules in §§ 312-331, which seem to apply the law of the place where the last act was performed which was necessary to make a binding contract. Such acts in the principal case occurred in Illinois. Then if Illinois law be applied, the possible renvoi problem raised here in the text is presented.

[25] Quoted, supra, note 21.

[26] Section 8 provides that questions concerning title to land and validity of divorce decrees be decided by the law of the state of situs and domicil of the parties, respectively, including the conflict of laws rules of that state. The reasons for these exceptions to § 7 are the necessity of complying with the law of situs as to land, and the public policy involved in uniformity in the law as to validity of divorces. Bates, "Remission and Transmission in American Conflict of Laws," 16 CORNELL L. Q. 311 at 318-319 (1931).

and that the forum should declare the contract effective on delivery, whereas Illinois law were that such a contract was not effective on delivery, what result would be reached? By section 312,[27] the forum would refer to Illinois law, but by the contract law of Illinois, no contract would be made at time of delivery, and the comment to section 311 states that the law of the state referred to is to determine if there is a contract. Is the conclusion: (1) that there will be no contract, as the internal law of Illinois is to be applied to the facts; or (2) the forum having decided as a preliminary question that such a contract is effective on delivery, that there will be a contract irrespective of the law of Illinois; or (3) that the *Restatement* expresses no opinion as to what law will govern existence of a contract ("place of contract" in *Restatement* terminology) when the law of the place of delivery provides that there is no contract until some event after delivery? The first construction would seem more consonant with sections 7, 311, 312, of the *Restatement*, if it be assumed that the application of the law of the forum under section 7 is confined to determination of effectiveness on delivery only in order to select the state the internal law of which is to determine the existence of a contract under sections 311, 312.

The principal case on its facts would seem to put the Michigan court on record in support of the renvoi doctrine or of the related qualifications theory. It may be wondered whether this indirect support is given without full consideration of the problems involved, or is rather to be accounted for as a result which the majority of the court favored in this case, but without necessarily outlining a general doctrine. The fact that the dissenting opinion of Justice Butzel pointed out the issue as to "qualifications" would indicate the latter.

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[27] Quoted, supra, note 20.