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Recent Cases

RECENT CASES

WOLF v. COMMONWEALTH: THE STATE AND THE PAYMENT OF INTEREST IN EMINENT DOMAIN PROCEEDINGS

In the recent case of *Wolf v. Commonwealth*,[1] the Supreme Court of Pennsylvania decided that the state's implied sovereign immunity from paying interest on judgments[2] must bow to an individual's constitutional right to "just compensation" for the taking of his property.[3] The court ruled that the Commonwealth shall be treated in the same manner as all other condemnors and shall be liable for interest on the amount of the condemnation award from the date of the determination of the award until actual payment thereof. The court expressly overruled *Culver v. Commonwealth*[4] which had been the leading authority for the proposition that the state was free from payment of such interest. The purpose of this Case Note is to compare the bases of the *Wolf* decision with the considerations which had, in the past, moved the courts to hold the Commonwealth immune from the payment of interest in condemnation awards.

The facts of the *Wolf* case which are pertinent to this discussion are as follows: on December 26, 1956, the Commonwealth, acting through the Department of Forests and Waters, condemned for state park purposes certain property owned by Robert Wolf. Real estate experts of the several parties arrived at greatly divergent valuations.[5] In April 1958, a board of viewers awarded 415,800 dollars, an amount which included damages as compensation for delay in payment. Wolf appealed therefrom to the court of common pleas, alleging inadequacy of the award. On November 6, 1959, after a trial de novo, the jury brought in a verdict of 355,000 dollars, which amount included no allowance for detention damages. On February 17, 1960, the trial judge entered judgment n.o.v. for Wolf in the amount of 421,917.50 dollars,[6] and provided that the judgment should bear interest at a rate of

1. 403 Pa. 499, 170 A.2d 557 (1961).
2. PA. CONST. art. 1, § 11; PA. CONST. art. 3, § 16.
3. PA. CONST. art. 1, § 10.
4. 348 Pa. 472, 35 A.2d 64 (1944).
5. The state's experts valued the land at $350,000 and $355,000. Wolf's experts' appraisals were $750,000 and $777,000. Record, p. 51a, Wolf v. Commonwealth, *supra* note 1.
6. This amount was composed of $355,000 for the value of the property and $66,917.50 as detention damages computed at 6% per annum from the date of the taking to the date of judgment n.o.v.

six per cent per annum from the date thereof to the date of satisfaction.[7] On March 30, 1960, the state issued a check for 355,000 dollars (the amount of the original jury verdict with no addition for detention damages). This check was paid to Wolf on May 26, 1960. On May 2, 1961, on appeal by the Commonwealth, the Supreme Court of Pennsylvania affirmed the decision.

The supreme court, consistent with prior decisions,[8] continued to recognize a distinction between detention damages and interest on a debt.[9] "Interest as such is recoverable only where there is a failure to pay a liquidated sum due on a fixed day. . . ."[10] Until the value of the property taken by the state for public use is ascertained, or liquidated, there is no fixed sum upon which interest can run. There is, therefore, a non-interest bearing period of time between the taking of property in an eminent domain proceeding and the final determination of the value of the property, at which time interest on the ascertained sum begins to accrue.

To fill in this time gap, the courts have created a new term—*detention damages*.[11] In determining by legal proceedings the amount of the debt due for the taking, damages for delay in payment are a proper element.[12] Such damages are not interest payments.[13] The court, in *Whitcomb v. Philadelphia*,[14] clearly expressed this distinction when it stated:

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7. See Wolf v. Commonwealth, *supra* note 1, at 501, 170 A.2d at 559.

8. Fidelity-Philadelphia Trust Co. v. Pennsylvania Turnpike Comm'n, 352 Pa. 143, 42 A.2d 585 (1945); Whitcomb v. Philadelphia, 264 Pa. 277, 107 Atl. 765 (1919).

9. However, the court altered the normal application of such a distinction. The court computed detention damages to the time of the judgment whereas, in previous decisions, it had computed such damages only to the time of the jury's verdict. The court stated as its reason for allowing detention damages to be computed to the time of the judgment to be that it had "remolded" the jury's verdict. By the definition of detention damages, such damages run until the value of the property taken is ascertained. In the present case, the court reasoned, this value could not be considered ascertained until the entire amount owing was made definite. Such definiteness was not available until the final decision of the court (the court's handing down of its judgment n.o.v., "remolding" the jury's verdict), a point three and one-half months after the verdict. However, the lower court did not change in any way the jury's determination of the value of the land, leaving that figure at $355,000. The value of the land was definite as of the time of the jury's verdict. Therefore, the court's time of "ascertainment" seems questionable.

10. Richards v. Citizens' Natural Gas Co., 130 Pa. 37, 39, 18 Atl. 600 (1889), states:

> Interest as such is recoverable only where there is a failure to pay a liquidated sum due at a fixed day, and the debtor is in absolute default. It cannot, therefore, be recovered . . . in actions of any kind where the damages are not in their nature capable of exact computation, both as to time and amount. In such cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and his default is not therefore of that absolute nature that necessarily involves interest for the delay.

11. *Supra* note 8.

12. *Ibid.*

13. Fidelity-Philadelphia Trust Co. v. Commonwealth, 352 Pa. 143, 42 A.2d 585 (1945).

14. *Supra* note 8.

> When land is taken under the power of eminent domain, the owner thereof acquires the right to its value immediately upon appropriation. Until that value has been definitely ascertained, it is called damages, not a debt due; but when ascertained it relates back to the time of taking, and the owner is entitled to compensation for delay in its payment, unless just cause be shown to the contrary.[15]

By employing the detention damages theory, the courts had found a way to apply what in effect was an interest rate[16] to a portion of the time period during which payment was delayed. At the same time, they had not overthrown the state's immunity from the payment of "interest."

The authority for the payment of any amount in excess of the actual value of the land taken in eminent domain proceedings is derived from the constitutional mandate:[17] "Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." "Just compensation" is usually interpreted as being the full and perfect equivalent in money of the property taken, so that the owner will be put in as good a position pecuniarily as he would have been in had his property not been taken.[18] This amount includes not only the value of the property at the date of the taking, but, whenever the taking precedes payment, compensation for the delay in payment.[19] The reason for this is that, if the prior owner of the property had been paid for his land at the time of the taking, he could, and presumably would, have invested this money immediately. The interest he would have received on his investment is lost if he is not paid at the time of the taking. It is this loss of interest which must be compensated by allowing an amount to be charged for the delay in payment in order to make him whole.

Prior to the *Wolf* decision, the state as condemnor had been held immune from the payment of interest.[20] The courts reasoned that:

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15. *Id.* at 284, 107 Atl. at 767.

16. The court stated:

> This rate will be the normal commercial rate during the period of detention. If no evidence is given as to that rate, the presumption is that the legal rate was in effect. *Ibid.*

Black's Law Dictionary defines legal rate of interest as "that rate of interest prescribed by the laws of the particular state . . . as the highest which may be lawfully contracted for or exacted, and which must be paid in all cases where the law allows interest without the assent of the debtor."

The normal commercial rate of interest is that which is charged by lenders to the average, normal borrower whose credit is not "prime" or unquestionable. Lehigh Valley Trust Co. v. Pennsylvania Turnpike Comm'n, 401 Pa. 135, 163 A.2d 86 (1960). The court in this case would not allow a rate of 4% rather than 6% to be applied. This 4% rate was originally applied by the jury because there was a stipulation by the parties that the prime commercial rate was 4%. The court held that no evidence was produced to show that this was the normal commercial rate.

17. PA. CONST. art. 1, § 10.

18. U.S.C.A., U.S. CONST. amend. V, comments thereto (1961).

19. United States v. Baugh, 149 F.2d 190 (5th Cir. 1945).

20. *Supra* note 4.

> Interest, as between individuals, is recoverable under usage of trade, contract or statute. The theory on which interest is allowed, except in cases of contract to pay interest, is that it is damages for delay or default in payment by the debtor, measured by a rate per cent. The State is not liable to pay interest on its debts unless bound by statute or by contract of its executive officers. The government is presumed always ready to pay, and it would be against public policy to declare it otherwise.[21]

This result as to interest payments had been upheld despite a statute specifically dealing with the payment of interest in eminent domain proceedings, which provides:

> The amount of damages allowed in a report of viewers for the taking, injury or destruction of property by the exercise of the right of eminent domain shall, as finally confirmed, bear interest at the rate of six per centum per annum from the date of the filing of the report.[22]

In *Culver v. Commonwealth*,[23] this statute was avoided on the theory that such statutes do not apply to the sovereign unless the sovereign is included specifically by name or designation.[24]

Thus, there are two diametrically opposed rights—the right of the individual to be justly compensated and the implied right of the state to be free from the payment of interest on its debts. The courts, as was stated previously, prior to the *Wolf* decision, favored the state's immunity from interest payments. However, they did so only to a limited extent, managing at least partially to have the individual land owner "justly compensated." They accomplished this by means of the distinction between detention damages and interest on a debt, maintaining that while "interest" could not be charged against the state, detention damages could. The courts further limited the scope of this sovereign immunity by considering only the state itself as being entitled to such immunity. Instrumentalities of the state, carrying on the state's purposes but created as entities separate from the state government, were held not to be entitled to such immunity. In *Lichtenstein v.*

21. Philadelphia v. Commonwealth, 276 Pa. 12, 14, 119 Atl. 723 (1923).

22. PA. STAT. ANN. tit. 26, § 43 (1958).

23. *Supra* note 4.

24. The court cited the following as its authority for refusing to apply the statute in this fact situation:

> In *Tunison v. Commonwealth* (347 Pa. 76, 78, 31 A.2d 521) we said (p. 78): ". . . it is axiomatic that a statute is never presumed to deprive the state of any prerogative, right or property unless the intention to do so is clearly manifest, either by express terms or necessary implication. *Baker et al. v. Kirschnek et al.*, 317 Pa. 225; *Commonwealth v. Trunk et al.*, 320 Pa. 270; see 59 C.J. 1103, § 653." The Act of 1929, as amended [supra note 22], does not specifically mention the Commonwealth nor does it indicate any intendment on the part of the legislature to deprive the State of its nonliability for the payment of interest on its obligations. (Emphasis the court's.)

Pennsylvania Turnpike Comm'n,[25] the court, although recognizing the *Culver* rationale as to the Commonwealth's freedom from liability for interest, held the commission liable for interest in eminent domain proceedings.

The trend towards limiting the state's immunity from interest payments has culminated, in the *Wolf* decision, in the virtual extinction of that sovereign privilege, at least so far as condemnation awards are concerned. The *Wolf* decision might be qualified to the extent that interest on the judgment will be paid only where the period of time from the taking of the property to the date of receipt of final payment has been unduly extended for reasons not attributable to the fault of the condemnee.[26] One possible reason for the court's allowing interest to be charged against the state in this particular case is that the state retained the check for two months after the check was issued,[27] which in itself was after the trial, verdict and judgment n.o.v. However, it is doubtful that the court ordered the state to pay interest on the judgment *solely* because of such unwarranted delay in paying the amount determined to be due. The majority of the court stated that the payment of interest was not an unreasonable burden to impose upon the state since it could protect itself by paying into court a substantial portion of the value of the property at the time of the taking.[28] The state would thus avoid paying detention damages and interest on the amount paid into court.[29] The court's position is indicative of a desire to undermine such unwarranted delay in payment as occurred in the *Wolf* case, so as to prevent any loss to the owner of the land caused by such a delay.

The Supreme Court of Pennsylvania has abrogated sovereign immunity in the payment of interest in eminent domain proceedings. It is important to consider this decision in the light of the arguments raised in the past for

25. 398 Pa. 415, 420, 158 A.2d 461, 463 (1960). In discussing the liabilities of the Turnpike Commission, the court stated:

> But, it would be carrying this particular immunity beyond justifiable limits to extend it to an instrumentality of the Commonwealth, created for the performance of an essential governmental function, where liability for the principal sum involved resulted from the appropriation by the instrumentality, under its power of eminent domain, of private property for use in the furtherance of the public purpose for which the instrumentality was created. Indeed, it might well be questioned whether the legislature could constitutionally deprive a property owner of interest for delay in a condemnor's payment of an award made for property so taken.

26. See note 1 *supra*, at 505, 170 A.2d at 561.

27. See Brief for Appellee, p. 18, *Wolf v. Commonwealth*, *supra* note 1.

28. *Supra* note 1, at 507, 107 A.2d at 562. The full quotation, found in footnote 7, states:

> The Commonwealth can protect itself by paying into court a substantial amount of the value of the property at the time of its taking as reflected by the opinions and valuations placed on such property by real estate experts selected by the Commonwealth and thus can decrease the detention damages or interest which it may eventually have to pay.

29. Oliphant v. Frost, 9 Pa. 308 (1848):

> A fund in court does not bear interest [chargeable to the obligor]. If the obligor was ready with the money when called for, it was all they could ask.

maintaining the immunity. The Pennsylvania Constitution[30] calls for "just compensation to be first made or secured." The majority in the *Wolf* case seems to consider the word "secured" to mean that the money must be paid into court.

Such an interpretation of "secured" flies in the face of one of the arguments which had supported the state's immunity in the past—the *public faith or credit theory*.[31] Under this theory the money, being held as state funds, is as secure as if it had been paid into court. Although it has not as yet been specifically set aside to pay a particular landowner for the taking of his property, it is available and is certain to be paid.

The obvious rebuttal to this argument is that the state's holding the money is not equivalent to the court's holding it because, if paid into court, the money could earn interest to the benefit of the landowner. The landowner could thus be compensated for the time during which he had neither his land nor the money value thereof. The applicable statute[32] provides:

> In all cases where money arising from any source shall be paid into court, it shall be the duty of the said court, upon application of any party appearing by the record prima facie entitled to said fund, to order the same to be invested pendente lite in the debt of the United States, or some other sufficient security, subject to the decree of the court.[33]

It is apparent that if such money were invested in United States bonds or some other reliable security, earnings thereon would probably not exceed three or four per cent. In view of this fact, it appears rather anomalous that the state should have to pay six per cent interest on such money although it is as secure in the state's treasury as it would be if paid into court.[34] If the risk of non-payment is equivalent in both cases, the difference in the interest rate seems more attributable to a technical application of the rules of judicial proof than to sound reason.[35]

Furthermore, the court has overlooked the constitutional arguments

30. *Supra* note 17.

31. See *In re* Spier Aircraft Corp., 137 F.2d 736, 740 (3d Cir. 1943).

32. PA. STAT. ANN. tit. 12, § 621 (1953).

33. Note that the fund paid into court does not automatically earn interest. The court must receive an application by the party prima facie entitled to the fund (see County Treasurer's Appeal, 8 Erie 83, 40 York 47 (Pa. 1926)). The party so entitled may also request that the fund be paid over to him before the exact amount due him is determined. The reason for this is that the money paid into the court becomes the absolute property of the landowner: see 15 Stand. Pa. Practice, *Tender* § 25 (1939).

34. The reason for this seems to be that interest, although in effect it compensates the landowner for the use of his money, is considered, as it was in Whitcomb v. Philadelphia, *supra* note 8, a charge for wrongfully withholding money. The amount owed is considered as having been loaned to the state and the state must pay the commercial rate of interest on this loan, this being, without evidence to the contrary, 6%.

35. See notes 16 and 34, *supra*.

presented for the proposition that the state is immune from the payment of interest on its debts. Such an immunity has, in the past, been implied from two articles of the Pennsylvania Constitution. One states that "suits may be brought against the Commonwealth *in such manner*, in such courts and in such cases as the legislature may by law direct."[36] (Emphasis added.) From this wording it has been reasoned that it is for the state and not the courts to decide to what extent the state may be sued and for what payments it will be liable. The other article of the constitution which has been considered applicable prescribes that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant by the proper officer in pursuance thereof."[37] The legislature does not appropriate monies to pay interest on its debts and the courts do not have the power to order the legislature to make such appropriations.

However, in a period when the state is making vast public improvements, it frequently finds it necessary to take property under its power of eminent domain. The need for judicial protection of the individual's rights in such times is thus heightened. The landowner can do little to protect himself in such a situation. The state, however, can protect both the individual and itself by paying into court the estimated value of the land condemned. This would substantially avoid both detention damages and the payment of interest[38] upon final determination of the value of the property and, at the same time, fully compensate the owner of the land for the loss of such land. The courts' allowance of a reasonable time for the state to appropriate money from the legislature[39] to pay such estimate will protect the state from paying any amount over the actual value of the land taken so long as it acts with reasonable promptness. The *Wolf* case thus stands as a necessary and desirable judicial safeguard against the state's yielding to the temptation to ignore the right of an individual to "just compensation" for the taking of his property.

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36. PA. CONST. art. 1, § 11.

37. PA. CONST. art. 3, § 16.

38. Except for the desirability of maintaining consistency with the judicial concept of interest (see note 10, *supra*), the *Wolf* decision has obviated the necessity for retaining a distinction, in such cases, between "detention damages" and "interest." The combined effect of the two is equivalent to compound interest being charged from the date of the taking to the satisfaction of the judgment.

39. According to the Record, p. 11a, Wolf v. Commonwealth, *supra* note 1, the Commonwealth had appropriated monies for condemning these and all other properties in the area for the building of the Independence Mall.

DREER'S ESTATE AND THE RENVOI RULE OF CONFLICTS

In the recent case of *Dreer's Estate*,[1] the decedent, a citizen of Pennsylvania but domiciled in France at the time of her death,[2] devised certain movable property to a legatee that predeceased her. The testatrix was survived by her brother's adopted child. This situation presented the Supreme Court of Pennsylvania with the issue of whether the child, legally adopted in Pennsylvania, could under French law take an intestate share of the movable property. In resolving this issue, the supreme court chose to adopt the opinion of the orphans' court. The basis of the decision was founded on an established conflict-of-laws rule whereby succession to movable property is governed by the law of the decedent's domicile.[3] Applying French law the orphans' court decided that the property must be distributed by intestate shares,[4] and the adopted child could not take part in the distribution.[5] Had Pennsylvania law been held to govern the child would have been entitled to her share.[6]

Dreer's Estate presented the supreme court with a conflict-of-laws problem which might have been resolved by the use of *renvoi*.[7] The context of this doctrine is that whenever the forum is referred to the law of another jurisdiction, it should consider not only the internal laws of that jurisdiction, but in addition that jurisdiction's conflict-of-laws rules.[8] This would result in another reference, whereby the forum might be directed to the law of a third jurisdiction,[9] or, as in *Dreer's Estate*, since application of French con-

1. In Re Dreer's Estate, 22 D.&C.2d 737 (Pa. 1960), *aff'd mem.*, 404 Pa. 368, 173 A.2d 102 (1961).

2. This was decided in an earlier proceeding before the Orphans' Court of Philadelphia involving inheritance tax liability. Dreer Estate, 18 D.&C.2d 467 (Pa. 1959).

3. In Re Dreer's Estate, *supra* note 1, at 738, 173 A.2d at 104; see also Orcutt's Appeal, 97 Pa. 179 (1881).

4. There is no anti-lapse statute in French law. In Re Dreer's Estate, *supra* note 1, at 738, 173 A.2d at 104.

5. *Id.* at 379, 173 A.2d at 105-06.

6. PA. STAT. ANN. tit. 20, § 1.8 (1950); In Re Finegan's Estate, 30 Erie 292 (Pa. 1948).

7. *Renvoi* is the French word for refer back, the doctrine having originated in Europe. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 So. CAL. L. REV. 221, at 249 (1941).

8. Schreiber has more precisely stated the issue involved:

> When the conflict-of-laws rule of the forum refers a jural matter to a foreign law for decision, is the reference to the corresponding rule of the conflict of laws of that foreign law, or is the reference to the purely internal rules of law of that foreign law, minus its conflict-of-laws rules?

Schreiber, *The Doctrine of Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523, at 525 (1918).

9. For a clearer understanding of the doctrine, Lorenzen uses the terms "remission" (when the reference is back to the court of the forum) and "transmission" (when the reference is to a third jurisdiction). Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country,"* 27 YALE L.J. 509, 518 (1918).

flict rules would make reference to Pennsylvania,[10] back to the law of the forum. The orphans' court in deciding the *Dreer* case chose to apply only the substantive law of France, ignoring the French conflict-of-laws rules. This Note will consider the propriety of using the *renvoi* doctrine in this case.

Generally, it may be stated that the purpose of *renvoi* is to achieve two desirable results. Its first objective is the attainment of uniform judicial determinations,[11] irrespective of whether it is the foreign or domestic jurisdiction which is the forum. To illustrate, assume that jurisdiction *A* and jurisdiction *B*, having divergent conflict rules, are called upon to administer the same estate. Court *A* following its conflict rule would apply the substantive law of *B*. Court *B* by the use of *renvoi* would also follow *A*'s conflict rule and therefore apply its own law. Had jurisdiction *B* rejected *renvoi* and applied the *substantive* law of *A*, different results would have been reached, causing the estate to pass piecemeal rather than as a unit. Divergent results also permit "forum shopping," *i.e.*, the choosing of a forum which will render a favorable determination. *Renvoi*'s second objective is to enable the forum, through the application of their own more familiar substantive law, to reach accurate decisions with seemingly greater ease; and, in so doing, also permitting the forum consistently to consider its own conflicts rule dictating reference to the foreign law.

Thus far in this country *renvoi* has been predominantly an academic theory, widely discussed by legal scholars, but having received little judicial acceptance. The only Pennsylvania case considering the problem is *Matter of Baird*,[12] which involved a citizen of Pennsylvania who died domiciled in France. The form of decedent's last will satisfied the requirements of the state of its execution, New York, but was lacking so far as domestic French law was concerned. In the will contest which resulted, it was determined that the law of decedent's domicile was controlling. The court, in resorting to French law, applied France's conflicts rule which provides that a foreigner's will is valid if it conforms to the law of the place of its making. The will's validity was thus recognized. In so deciding, the court chose not

10. France also governs the succession of movable property by the law of the domicile, FRENCH CIVIL CODE, Art. 59 (1960). But this concept of domicile is much different from the Anglo-American concept. French law considers a person's *legal* place of establishment as his domicile. *Id.* Art. 102. Aliens desiring to acquire a French domicile under French law must comply with certain police regulations, Ordonnance of Nov. 2, 1945. Decedent here stated in her will that Philadelphia was her *legal* residence, Dreer Estate, *supra* note 2, at 468. The French courts would probably rule that the decedent's domicile was Pennsylvania. See generally Delaume, *A Codification of French Private International Law*, 29 CAN. B. REV. 721 (1951); Lorenzen, *The French Rules of the Conflict of Laws*, 36 YALE L.J. 731, at 733 (1927).

11. 1 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 94 (2d. ed. 1958).

12. Orphans' Ct. of Philadelphia, July 18, 1916.

to mention *renvoi*, although it seemingly applied the doctrine.[13] Alternatively, however, it has been suggested that this decision may simply be an example of the court's indulgent treatment of wills in point of formalities.[14] The only American jurisdiction[15] having clearly accepted *renvoi* is New York.[16] England has also adopted *renvoi*, applying it to cases of succession to movable property.[17] The *Restatement of Conflict of Laws* rejects the doctrine,[18] except in cases involving the validity of divorces and title to real property.[19]

The main criticism of *renvoi* is that it is unfounded in point of logical reasoning. To illustrate, assume that in a fact situation similar to the *Dreer* case, the forum accepts *renvoi*, and resorts to the foreign court's conflict-of-laws rule which refers the matter back to the law of the forum. If the first reference is to the foreign jurisdiction's conflicts laws, should not the second reference (back to the forum) be to the forum's conflict-of-laws rules, resuming the journey once more? In such a situation the courts would obviously flounder in an endless chain of references.[20] This logical inconsistency has caused many writers to reject *renvoi*.[21]

However, three theories, based on practical urgency rather than logical reasoning, are available to avoid the ad infinitum series of references. The first, denoted the "jump off" rationale, causes the courts' second reference to be exclusively to the internal law. The proponents[22] of this "escape

13. This would appear to be an application of the "transmission" type of *renvoi*, see *supra* note 9.

14. Falconbridge, *Renvoi in New York and Elsewhere*, 6 VAND. L. REV. 708, 738 (1953).

15. The American decisions on *renvoi* have been extensively reviewed in Abbot, *Is the Renvoi a Part of the Common Law?*, 24 L.Q. REV. 133 (1908); Falconbridge, *supra* note 14; Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 COLUM. L. REV. 190, 327 (1910); Schreiber, *supra* note 8.

16. In Re Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652 (1950), *aff'd*, 100 N.Y.S.2d 371 (1950). This suit concerned the validity of a will devising certain real property located in Switzerland. The testator was a citizen of the United States and died domiciled in New York. The will was contested because of not conforming to the law of the situs of the property, or Switzerland. Deciding that the Swiss courts would apply New York law to this case, the New York court accepted the reference and upheld the will as conforming to New York law. This case involves the distribution of real property and can be distinguished from the *Dreer* case.

17. See, *e.g.*, Re Duke of Wellington [1947] 1 Ch. 506; Re Annesley [1926] 1 Ch. 692.

18. RESTATEMENT, CONFLICT OF LAWS § 7, Comment *b* (1934).

19. *Id.* § 8.

20. This dilemma has been variously described as a "game of international lawn tennis," BUZZATI, IL RINVIO 77 (1898); a "circulus inextrabilis," In Re Tallmadge, 109 Misc. 696, 712, 181 N.Y. Supp. 336, 346 (1919); and a "merry-go-round," Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1167 (1938).

21. See, *e.g.*, BATY, POLARIZED LAW 117 (1914); Cormack, *supra* note 7; Falconbridge, *Renvoi and the Law of the Domicile*, 19 CAN. B. REV. 311 (1941); Lorenzen, *supra* note 9; Pollock, *The Renvoi in New York*, 36 L.Q. REV. 92 (1920); Schreiber, *supra* note 8.

22. BRESLAUER, PRIVATE INTERNATIONAL LAW OF SUCCESSION 16 (1937); Morris,

device" recognize the inconsistency of stopping after the second reference, but they maintain that to reject *renvoi* entirely is even more unjustified. But were this theory to be applied in *Dreer's Estate*, an added stigma would be present. France evidently has adopted *renvoi*,[23] hence specifically directing the Pennsylvania court on the second reference to consider the Pennsylvania conflict-of-laws rules, forcing the court to return to the endless circle. To escape, the court must ignore the *renvoi* rule of France; but, to do so is to inaccurately apply French law. Thus, the result would be multiple inconsistent reasoning and apparent disregard of its own conflicts rule that the applicable law is that of the domicile. However, an even greater weakness is present. If the Pennsylvania court had adopted this theory, France having previously accepted *renvoi*, the stated purpose of uniform judicial determinations would be unsatisfied because the final reference of both jurisdictions would be to their respective internal law.

A second view is advanced mainly by Westlake[24] and von Bar,[25] who favor the result attained by *renvoi*, but who also realize that the endless circle cannot be avoided. This rationale, termed the *désistement* theory, supposes a mutual disclaimer of jurisdiction by both courts, resulting in the application of the internal law of the forum. Thus, when Pennsylvania has determined the domicile to be France, but France has declined to accept this conclusion stating that the domicile is Pennsylvania, both have disclaimed jurisdiction; and, in the absence of any law to be applied the law of the forum must suffice. This proposal has not been widely accepted.[26] Much like the "jump off" theory, *désistement* is contrary to *renvoi*'s main objective of uniform solutions as it always results in the application of the law of the forum.

The final and most widely accepted theory is designated "*total renvoi*."[27] This proposal directs the forum to resolve the issue precisely as would the

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The Law of the Domicile, 18 BRIT. YB. INT'L L. 32, 33 (1937); one writer maintains that the "jump off" theory is not illogical: Cowan, *Renvoi Does Not Involve a Logical Fallacy*, 87 U. PA. L. REV. 34 (1938).

23. The first court ever to apply renvoi was the Cour de Cassation, France's highest appellate court. Affaire Forgo [1883] clunet 64. The principle of stare decisis is not adhered to in France, but other French courts have followed this decision to such an extent that one writer states that there is a "*jurisprudence constante*" on this matter, Falconbridge, *Renvoi and Succession to Movables*: 2, 47 L.Q. REV. 271, 277 (1931).

24. WESTLAKE, PRIVATE INTERNATIONAL LAW 30-31 (7th ed. 1925).

25. Von Bar, 18 *Annvaire de L'Institut de Droit International* 153-57 (1900).

26. See, *e.g.*, Lorenzen, *supra* note 9, at 516; Schreiber, *supra* note 8, at 532; Abbot, *supra* note 15, at 137.

27. This term is used by Falconbridge in *Renvoi and the Law of the Domicile*, 19 CAN. B. REV. 311, 313 (1941). He considers this theory to be the only one with "a certain measure of coherency." *Id.* at 315.

foreign court to which reference is made. Griswold,[28] in summarizing this view, stated:

> If a French court would apply French "internal law" (either because it "accepts the renvoi" or for any other reason), then the [Pennsylvania] . . . court should apply French "internal law." If the French court would apply [Pennsylvania] . . . "internal law" (either because it "rejects the renvoi" or for any other reason) then the [Pennsylvania] . . . court should apply [Pennsylvania] . . . "internal law." If the French court would apply Chinese "internal law" the [Pennsylvania] . . . court should do the same.[29]

Total renvoi is the doctrinal form adopted by most English cases.[30] But despite its comparative success, *total renvoi* can not always avoid the endless circle. If both the French and Pennsylvania courts adopted this view a solution in *Dreer's Estate* would be very difficult. The Pennsylvania court, in attempting to resolve the issues exactly as would a French court, would find that the latter would be directed to decide the case precisely as would the former. Adoption of *total renvoi* by both conflicting jurisdictions can result only in an impasse. Its universal adoption will defeat it completely—quite a peculiarity for a rule of private international law. Griswold recognized this weakness,[31] but brushed it aside as arising "only infrequently."[32] He stated, "In such a case there might be reason for disposing of the case according to our own [the forum's] internal law."[33]

It is submitted, however, that *total renvoi* if adopted by Pennsylvania would be effective only in exceptional cases. It can not be availed of when the foreign jurisdiction involved is England or any other jurisdiction that subsequently adopts *total renvoi.* Generally, within the United States, no conflict will arise concerning succession to movables since all the states agree that the law of the domicile shall prevail; and their interpretation of domicile is uniform, except for certain peculiarities in the law of Louisiana.[34]

In respect to other foreign jurisdictions, many complications arise which make the use of *total renvoi* extremely difficult. Those courts, not recognizing the domicile principle in deciding succession to movables, usually hold that distribution is decided by the law of the nationality.[35] Thus, on the reference back, the Pennsylvania court is directed to apply the law of

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28. Professor Griswold is acknowledged as a leading American "advocate of the doctrine." Cormack, *supra* note 7, at 254.
29. Griswold, *Renvoi Revisited,* 51 HARV. L. REV. 1165, 1168 (1938).
30. See, *e.g.,* In Re Askew, [1930] 2 Ch. 259; see also *supra* note 17.
31. Griswold, *supra* note 29, at 1169.
32. *Id.* at 1192.
33. *Id.* at 1193.
34. 1 RABEL, *op. cit. supra* note 11, at 145.
35. *Id.* at 117-29.

the decedent's nationality. But since there is no federal law covering descent, a reference to the national law of a citizen of the United States would be ineffective. The court would somehow have to fictionalize a reference to the law of a particular state.[36]

Any court adopting *renvoi*, regardless of the view accepted, will also encounter many practical difficulties. For example, in order for the forum to refer back to its own internal law, it must first interpret the conflict-of-laws rules of the foreign jurisdiction. These principles will be unfamiliar to the court and perhaps be more complicated than the internal laws considered if *renvoi* is rejected. Hence there is greater chance that the court will be misinformed and that a miscarriage of justice will occur. In addition, attorneys will have greater difficulty in correctly advising their clients, thus promoting increased litigation.

Despite these practical adversities, if *renvoi* were to effectuate uniformity of distribution its use might be warranted. However, as Cook suggests, since the forum court may at best hazard a guess as to the manner in which the foreign court would decide the case, "it may well be that the attempt to secure uniformity of distribution of a decedent's movables should be abandoned as probably impossible of attainment."[37] But there are other problems. Latent conflicts between the two jurisdictions in their basic characterization of the question[38] or differences in their procedural rules[39] may lead them to diverse results. Furthermore, the public policy of either the forum or foreign courts may prevent their giving effect to the foreign law. For example, on the facts of the *Dreer* case both courts might by the use of *renvoi* resolve that the Pennsylvania intestate laws allowing an adopted child to share[40] are applicable. However, the French judge might also conclude that to do so would violate the French policy of "forced heirship."[41] Moreover, since French public policy can be decided only on a case to case basis by French judges, foreign courts could not possibly determine such questions accurately.

While the supreme court in the *Dreer* case might well have discussed *renvoi*, their non-application of the doctrine was seemingly the wiser course. Uniformity of decision and distribution is a desirable result, but, as Lorenzen points out, "[such] cannot be obtained until the elimination of the differences in the systems of Private International Law through international agree-

36. A complete discussion of this problem is found in Falconbridge, *supra* note 14, at 721.

37. COOK, LOGICAL AND LEGAL BASIS OF CONFLICT OF LAWS 242 (1941).

38. See generally Lorenzen, *The Qualification, Classification or Characterization Problem in the Conflict of Laws*, 50 YALE L.J. 743 (1941).

39. See generally COOK, *op. cit. supra* note 37, at 166.

40. PA. STAT. ANN. tit. 20, § 1.8 (1950).

41. See In Re Dreer's Estate, *supra* note 1, at 748, 173 A.2d at 109 (1961).

ment."[42] In view of the difficulties of attaining uniformity, perhaps a more realistic objective would be a degree of certainty in this field[43]—and certainty can be best attained if the reference to the law of the domicile is always to their internal law, excluding completely their conflicts laws. However, *renvoi*'s failure to attain uniformity in this case should not suggest that the doctrine be rejected in *all* instances. Many of *renvoi*'s severest critics recognize that there are some situations in which the doctrine should be applied.[44]

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42. Lorenzen, *supra* note 15, at 206.
43. Suggested by COOK, *op. cit. supra* note 37, at 432.
44. See, *e.g.*, Briggs, *"Renvoi" in the Succession to Tangibles: A False Issue Based on Faulty Analysis*, 27 YALE L.J. 193 (1917); Falconbridge, *Renvoi, Characterization and Acquired Rights*, 17 CAN. B. REV. 369 (1939).