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IN REPLY TO MR. COWAN'S VIEWS ON RENVOI

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The November number of this REVIEW contained a stimulating article by Thomas A. Cowan with the somewhat startling title: *Renvoi Does Not Involve a Logical Fallacy*.¹ If the assertion so made is really true, it is time that it was found out; for many words and much labor have been spent upon the opposite assumption. Although renvoi is still apparently regarded as a field for specialists,² those who have tried to make their way into its mysteries will welcome Mr. Cowan's study. Whether or not we agree with him, progress is made in difficult fields only by dint of such hard work as his article manifests.

It is not necessary to set out here the substance of the renvoi problem. That is done sufficiently in Mr. Cowan's article and in the references he gives. Nor need we be concerned with Mr. Cowan's general discussion of logical paradoxes. The author has a facility in writing which makes his work much easier to read than most of the material dealing with logical problems. But the conclusion which the author draws may not seem to all as clear as it does to him. This brief reply is intended only as an expression of the doubts which the article raises. If these doubts are warranted, the reply may be justified; if they are not, the paper will serve a purpose if it brings others to Mr. Cowan's defense.

The thesis of the article under consideration is the author's statement that he does not believe "that the ordinary doctrine of renvoi involves either a vicious circle or an infinite regress of definitions".³ He

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1. (1938) 87 U. OF PA. L. REV. 34.

2. See Cavers' reference to "such esoterica as *renvoi*". Book Review (1937) 46 YALE L. J. 1098, 1099.

3. Cowan, *supra* note 1, at 46.

seems to reach this conclusion on the ground that there is no risk of an infinite regression in the renvoi situation until after the second reference, that is, the reference back to the law of the forum. Thus, he says:

"Can we not have one reference back to American law in our chosen case without risking a vicious circle? May there not be one renvoi without danger of illegitimate totality? The answer is that we may have one such reference, provided that the reference back is to American internal law. . . . Therefore, the American court not only can, but must, stop at the second reference, although it need not do so before the point is reached."⁴

On the basis of this and other reasoning (which need not be set out again here), this conclusion is reached:

"A statement of the doctrine of renvoi which avoids logical difficulty may now be formulated as follows:

The French conflict of laws rule refers the court to all pertinent American law including pertinent conflict of laws rules. One of these conflict of laws rules refers the court back to pertinent French law not including the rule of law by which the first reference was made."⁵

Finally, we are told that "the immediate practical result of this analysis is that the logical kinks in the ordinary doctrine of renvoi can be ignored."⁶ 'Tis a consummation devoutly to be wished.

It seems reasonably clear that, when the renvoi situation arises, logical difficulties are avoided *if* we stop with the second reference. It does not seem so clear, however, that we *must* stop with the second reference; nor, indeed that there is any particular reason for stopping after the second reference rather than at any other place. Mr. Cowan seems to feel that we do not get on the merry-go-round until after the second reference, and that after the second reference we are inevitably in a dilemma. He undertakes to establish both of these points through the medium of formal logic. As a mere matter of logic, though, the conclusions do not seem to follow. The series $1 + x + x^2 + \dots + x^n$ is not necessarily an infinite series. If "n" is any finite number, the series leads to a sure and certain result, and this is just as true if "n" is 1 or 3 or 17 as it is when "n" is 2. But if "n" is infinity (and x is 1 or more), the series is indeterminate; and there is no more reason for cutting it off

4. *Id.* at 47.

5. *Id.* at 48. Here the author is apparently starting with a French forum, and ending with French "internal law"; while in the quotation previously set out, he was starting with an American forum and ending with American "internal law". This shift of ground is confusing, but apparently the two passages have essentially the same meaning.

6. *Id.* at 49.

arbitrarily after the second term than after the first or any other.⁷ The series does not *become* infinite after the second term. If it *is* infinite, we do not make it any the less so by arbitrarily ignoring everything after the second term. The renvoi situation seems similar. If the references to the foreign law and back again *are* such as lead to an infinite regress, we do not make them any the less so by stopping arbitrarily after the second reference—or by assuming that the foreign reference is to the internal law of the forum when we know it is not so in fact.

There is another passage in the article which may serve to point out what seems to be a defect in the logical analysis. We are told:

“One may define *X* in terms of *Y* and *Y* in terms of *X*, for this merely makes *X* and *Y* equivalent. But since an infinite regress is to be escaped, the terms must be given meaning at this point.”⁸

The author proceeds to give *X* meaning by making it now the equivalent of the “internal law of *X*”. But does it not seem that he thus makes himself subject to the charge, so difficult to avoid in all logical analysis, that he is using one term in two distinct and inconsistent senses? For when he says, “One may define *X* in terms of *Y*, and *Y* in terms of *X*”, he is using the first *X* to mean “the law of *X* including its conflict of laws”, or “the whole law of *X*”; otherwise there would be no reference from *X* to *Y*. Having once assigned this meaning to *X*, he cannot very well extricate himself from the dilemma by the device of now assigning a different meaning to *X*. He may use *X* to mean either the “internal law” or the “whole law”.⁹ If he uses it consistently to mean the latter, he seems certainly to have a dilemma. If he uses it consistently to mean the former, it would seem that he is merely saying that all cases are to be decided by the “internal law” alone, which amounts simply to a denial of any function to the conflict of laws.

This excursion into formal logic has not been attempted from any belief that law is or should be formulated on any such abstract basis, but only in an effort to meet Mr. Cowan on his own ground. As a result of his analysis, the author seems to feel that his result is *required*; and that, in consequence, he has demonstrated that “renvoi does not involve a logical fallacy”. Unfortunately, it seems difficult to escape the feeling that the result has been assumed rather than established. Mr. Cowan's

7. “If we get into a situation where there is an endless series of references, there is no logical reason for stopping after the second reference (or ‘accepting the renvoi’); it would be just as ‘logical’ to stop after the third reference or the seventeenth.” Griswold, *Renvoi Revisited* (1938) 51 HARV. L. REV. 1165, 1177.

8. Cowan, *supra* note 1, at 46.

9. The terms are here used as they were defined in Griswold, *supra* note 7, at 1166. Mr. Cowan is of course correct in pointing out that the term “whole law” may be confusing unless it is so defined. Cowan, *supra* note 1, at 39.

central thesis seems to reduce to this and to this alone: If you assume a solution of the renvoi problem which involves no paradox, then there is no paradox. This is undoubtedly true; but it is difficult to see what it adds to our knowledge. It has for forty years been the common ground of those who "accept the renvoi", as well as of those who "reject the renvoi", and also of those who would apply the foreign law as the foreign court would apply it. All of these are solutions which either wholly or partially eliminate the paradox.

Mr. Cowan's analysis does not appear to show that the renvoi *situation* is free of logical paradox. It seems instead to be simply an assertion or an assumption of one means of dealing with the situation which will avoid the paradox. The means suggested, namely, stopping after the second reference, does not appear to be either novel or unique. So far as can be seen, it is in all its essentials the equivalent of "accepting the renvoi". But those who advocate "rejecting the renvoi" are equally successful in avoiding the paradox. The thesis advanced in the article seems no more persuasive than a person who advocates "rejecting the renvoi", and seeks proof by asserting: "There is no logical problem in renvoi. All you need to do is to assume that 'rejecting the renvoi' is the answer, and then there is no paradox." What Mr. Cowan has done, it would seem, is to state *a* solution of the renvoi situation and then to assert—like the renvoi-rejecter in the previous sentence—that if you assume this answer there is no logical difficulty.

From the point of view of developing the best solution for an elusive but often practical problem, it is difficult to see where this assumption gets us. There are *many* approaches to the renvoi problem which involve no paradox. The real objective would seem to be to try to work out which of the various possible solutions or approaches produces the most satisfactory disposition of actual cases. To this problem, Mr. Cowan pays no heed; and the result which he reaches seems very hard to defend in many of its practical applications. His conclusion makes the internal law of the forum applicable in every renvoi case, regardless of the circumstances, thus making the outcome of each renvoi case dependent upon the forum in which it happens to be brought. This would seem to be the very negation of conflict of laws, which after all can have as its only purpose the effort to make the result reached in a particular case independent of the forum in which it is brought. Unless this is true, we might as well dispose of all cases according to the internal law of the forum—as the English courts did until some two hundred years ago.¹⁰ Most of us are not prepared to turn the pages of time

10. See Sack, *Conflicts of Laws in the History of the English Law* in 3 LAW: A CENTURY OF PROGRESS (1937) 342.

back so far; but, except as we develop a conflict of laws which produces uniformity of result as far as possible, we have made small progress from that earlier and far simpler rule. Conflict of laws does not exist solely for the purpose of enabling judges to reach an answer in cases. That could be done as effectively by tossing a coin. The justification for a rule of law must be that it yields a better answer than the one reached on arbitrary grounds.

Without yielding to anyone in appreciation of Mr. Cowan's contribution in this difficult field, it seems hard to escape the conclusion that his title is not supported by his text. The renvoi situation still seems to involve the possibility of logical paradox. The device for handling the situation which the article points out does not lead to an endless chain, it is true; but the means suggested does not seem to be essentially new. Perhaps of most importance is the fact that no consideration is given to its desirability in actual practice, as compared with other possible methods of handling the situation. This would seem to depend upon an investigation into the reasons why our law makes reference to a foreign law in a particular case and into the effectiveness of any approach to renvoi in meeting this end. Why, for instance, does our rule of conflict of laws say that such and such a matter is governed by "the law" of another country? Is it only for the purpose of furnishing a means of deciding the case; or is it because our law recognizes a policy that the matter in question should be disposed of uniformly regardless of the chance that it arose in our forum? ¹¹ It is questions of this type which seem likely to be most fruitful for future investigation.

11. Cf. Griswold, *supra* note 7, at 1184-85; LEFLAR, *CONFLICT OF LAWS* (1938) 275, n. 22 ("the social interest in absolute uniformity of results in particular cases").

The chief difficulty with Professor Cook's treatments of the renvoi situation would seem to be the assumption of, or failure to deal with, this question. Cf. Cook, *Tort Liability and the Conflict of Laws* (1935) 35 *COL. L. REV.* 202, 221; Cook, "Contracts" and the Conflict of Laws (1936) 31 *ILL. L. REV.* 143, 166.