PART ELEVEN

PROPERTY
CHAPTER 54

Tangible Property

I. REAL RIGHTS

1. Concept of Proprietary Rights

From time to time, the basic distinction between proprietary or real rights (jura in re) and relative, particularly obligatory, rights has been subjected to severe sociological, economical, or logical criticism. To name only a few of the distinguished iconoclasts in this topic, Adolf Wagner, Vinding Kruse, and Hohfeld may be mentioned. These arguments, which have impressed

1 I have treated this subject repeatedly; for a broad recent exposition, see HANS PETER, Wandlungen der Eigentumsordnung und der Eigentumslehre seit dem 19. Jahrhundert (Aarau 1949).

2 ADOLF WAGNER, Grundlegung der politischen Ökonomie (1894).

3 FR. VINDING KRUSE, The Right of Property (1929), translated from the Danish into German I (1931) 185, into English (1939) 131; Ussing, “Le transfer de la propriété en droit danois,” 4 Rev. Int. Dr. Comp.

Most recently, the Scandinavian doctrines have been lucidly presented by GOTTHEINER, Eigentumsübergang beim Kauf beweglicher Sachen, 18 Z. ausl. PR. (1953, published May, 1954) 356. With respect to the consequences in the conflicts field, the most challenging point lies in the rule, especially distinct in Denmark, that the creditors of the seller are barred from attaching or seizing in bankruptcy proceedings articles that have been sold without any formality of payment or delivery. While the authors deny a distinction between obligatory and proprietary rights, at least inter partes, it would seem under the usual categories that the obligation concluded between seller and buyer has an effect as to those persons deriving their rights from the seller, an effect of relative relationship in rem, i.e., diminishing the ownership of the seller, a phenomenon that occurs not infrequently in other situations elsewhere. Should this effect be respected in another country to which, e.g., the sold object were removed without delivery or other new events? This offers an interesting problem which, however, needs fuller investigation than is possible here.

4 HOHfeld, Fundamental Legal Conceptions (1923) 74 ff.
some of the writers on conflicts law,⁵ should be examined in the light of comparative legal history as well as of technical needs.

In both Roman and English legal history, a clear distinction has been made between actions in rem, claiming directly against a thing, and actions in personam, directed against a person. In the republican Roman procedure per legis actionem in rem, as has become certain beyond any doubt, the claimant seized the thing (vindicatio), and only when another claimant raised opposition, thereby acquiring the role of defendant,⁶ did the law suit commence. In the classic Greek and early Germanic procedures, there were analogous configurations. All such primitive actions were directed against an object rather than a subject; this “obligatio” was literally the binding of a person with a rope, and agere in personam meant seizure of a man. All actions were originally tort actions; when the vindicatio of a slave or an ox was opposed by a contravindicatio, the issue was which claim was wrongful.⁷

Thus, there was no fundamental difference in the thinking of Greece, republican Rome, and medieval Europe about the essence of real and obligatory rights, whenever they were distinguished from the corresponding actions. Real rights, in Germanic and English law, are correctly described as bundles of rights (or better, faculties) in various quantities, essentially connected with possession (seisin, Gewere) and, at least in the case of immovables, endowed with effect as against third persons only through

⁵ Under the spell of Hohfeld, Falconbridge, Conflict of Laws 527, speaks of the “misleading expression jus in rem,” as suggesting an “untenable theory” or “futile” attempt to distinguish rights “in personam,” and sums up: “All rights are personal” (index, 726).
additional publicity. These ancient ideas permeated the feudal law; remainders are outstanding in the common law. Germanic concepts also have some bearing on the Scandinavian customary law. Right and possession were neatly separated by the Roman jurists, who crystallized a learned concept of dominium, which is a power over a physical thing, "absolute," i.e., effective against everyone, and unlimited in principle, but upon which public and private law have imposed more or less considerable restrictions. But once the common lawyers had disengaged tort and contract as well as property and debt, the Roman concept was plainly helpful as a means of further clarification.

In the broad European development of concepts, the distinction is fundamental. An action *in personam*, as the term denotes, is directed against one or several persons indicated in the source of the right claimed by the plaintiff. An action *in rem* opposes anyone who disputes the plaintiff's right; out of a real right, an indefinite number of claims may arise against persons as yet unascertained. Disregard of these simple phenomena necessarily creates difficulties in connection with such doctrines as limitation of actions, adverse possession, or *res judicata*.

Full ownership in a corporeal thing and lesser rights such as easements and encumbrances, *jura in re aliena*, are tools of our profession, indispensable for the technical language of an advanced jurisprudence. Conflicts law has to use such terms. They represent clear and practical concepts which do not prejudice the contents of the rules, domestic or international.

2. Objects of Real Rights

In all systems, ownership in a thing and the thing itself have long been designated by the same word, such as the Germanic "*eigen*" and the English "property."
sions made by Roman jurists, *res mancipi* and *nec mancipi*, *res corporales* and *incorporales*, *species* and *genus*, *res in nostro patrimonio* (or *commercio*) and *extra patrimonium*, for the most part are conceived as distinguishing legal rules rather than their objects. Why should our own terminology now be confined either to the things or the rights in them? Attacking the usual language, Cook has claimed that tangible physical objects should always be called land and chattels, and as such be characterized as immovable or movable, while interests in them should be termed realty, real estate, or real property and personalty or personal property. Such strained language is unnecessary for lawyers who understand the traditional ambiguity; it is misleading precisely in interpreting the legal rules distinguishing movables and immovables, which primarily refer to rights and not the objects of rights.

The objects of true real rights, however, are mere tangible, physical things, whereas rights in real rights, in debts, in intangible goods such as industrial property, are constructions, as also are rights in aggregate units (*universitates rerum*). We confine our discussion in the present chapter strictly to the narrow class of real rights in individual (isolated) tangible physical things. It does not seem important whether they are termed rights or interests. They include legal and beneficial ownership as conceived by the common law. Equitable interests are but somewhat weaker real rights, in contrast to mere obligations such

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9 Cf. Restatement, Introductory Note to §208.

10 For a consequence of the distinction in conflicts law see Re Hole (Manitoba K.B.) [1948] 4 D.L.R. 419. The right to the purchase price, in the absence of a lien, was personal property, situated in Manitoba where the seller was domiciled, the document executed, and the price payable, although the sale concerned Saskatchewan land.
as the right of a buyer to whom neither title nor constructive possession has passed.\textsuperscript{11}

Accordingly, we shall have to limit our main discussion to particular assignments of property, that is, individual transfers \textit{inter vivos}, excluding all general assignments. Only the problem of characterization will make it necessary to enlarge the outlook.

\section*{II. The Statutist Doctrine}

The local situation of immovable property and the transfer of its ownership has a very large significance, extending to taxation, jurisdiction, succession, administration of estates, social policy, and measures against enemy property. In this field, old concepts are deeply rooted.

\subsection*{1. Lex Situs}

As historical research has shown,\textsuperscript{12} the long life of the \textit{statutum reale}, or in the modern version, \textit{lex rei sitae, lex situs}, was prepared in the early middle ages by gradually increasing emphasis on territorial power, in opposition to the original principle that law is an order of personal groups, tribes, cities, and peoples. In the first development, reaching back into the Roman provincial organization, possession of the soil became the subject of tributes and taxation. Thereafter, jurisdictional power and competency on territorial basis were strongly promoted by the feudal system. From the thirteenth century, the territorial rule in-

\textsuperscript{11} Insofar as equitable interests are not effective against everyone, they resemble the category of relative real rights which has been developed in German theory. Furthermore, modern theory begins to study more profoundly the effects of obligations on third parties, \textit{cf.} Wilburg, "Gläubigerordnung und Streitverfolgung," 71 Juristische Blätter (1949) 29-33. There is great need for comparative research concerning the problems respecting equitable interests as sketched in the literature collected by Wolff, P.I.L. (ed. 2) 583.

\textsuperscript{12} Neumeyer, 2 Gemeinrechtliche Entwicklung 33 ff., 89 ff.; Meijers, Bijdrage 58 ff.
cluded land and increasingly also chattels. The result was the conception that the territorial law governs not only persons (statuta personalia), but also things situated in the territory (statuta realia).

2. Movables Follow the Person

(a) Theoretical basis. The Italian, French, and Dutch commentators drew a fundamental distinction between immovable and movable assets: immovables are subject to the law of the place where they are situated, but mobilia personam sequuntur or mobilia ossibus inhaerent, that is, movables are governed by the law of the owner’s domicil. The French coutûmes adopted this rule instead of the feudal absolute lex situs.

It is doubtful, however, whether the rule was a remainder of the ancient personality of law or originated as a presumption that chattels are situated where their owner is (particularly used by Bartolus in the matter of seizure.) In the prime of the statutist doctrine and in French literature of the nineteenth century, the authors, though they agreed on the rule mobilia sequuntur personam, always remained divided on its basis. It is true that most of them believed that movables have no situs—“personalty has no locality,” it was said in England: one line of authority deduced the rule from the personal law of the owner or of the possessor; another from the fiction that they are at the

13 2 Lainé 228 ff.
14 Thus Meijers, 49 Recueil (1934) III 588, 638.
15 Freyria, La loi applicable aux successions mobilières (Thèse, Lille 944) 48 ff.
16 2 Lainé 233; Weiss, 4 Traité 169 ff., as of 1912.
17 D’Argentré, Comm. ad patrias Britonum leges (1621) art. 218 glossa 6, no. 30: Sed de mobilibus alia censura est, quoniam per omnia ex conditione personarum legem accipiunt, et situm habere negantur, nisi affixa et cohaerentia, nec loco contineri dicuntur, propter habilitationem motionis et translationis. Quare statutum de bonis mobilibus vere personale est et loco domicillii
place of his domicil. The first, applying the *statutum personale*, which had the influential support of D’Argentré and Pothier, was used in France in modern times to support the proposition that succession to movables should be governed by the national law of the deceased, as supplanting the law of his domicil. The second view, including movable property under the *statuta realia*, by fiction considered domicil as the territorial contact of property. This view finally prevailed in English and American law, and, since 1939, the traditional domiciliary law has also been definitely restored in the French conflicts system relating to inheritance.

Some French writers insist on speaking of two territorial laws of succession, those of situs and of domicil. But the domiciliary law of succession also may well be conceived as an application of the personal law.

(b) *Scope of the rule* respecting particular assets ("uti singuli"). The statutists also were not in accord whether the slogan "*mobilia personam sequuntur*" included individual transactions, such as sale, gift, or pledge of isolated chattels, so that in all cases immovables would be governed

judicium sumit et quodcumque judex domicilii de eo statuit ubique locum obtinet; *id. art. 447*, glossa 2; and 1.1 C. de Summa Trinitate, a.o. Among the authors following him were BURGUNDUS, (see WEISS l.c.; FREYRIA l.c. 79 against LAINE), BOUHIER, POTHIER, and STORY §§ 379ff. Historical justifications have been proposed by MEIJERS, 49 Recueil (1934) III 638; NIBOYET, S. 1940.1.49; contra FREYRIA 109 ff.

18 DUMOULIN, *Obs. sur l’art. 41 du ch. 11 titre XII de la coutûme d’Auvergne*: Fallit si habet bona alibi sita ubi potest amplius legare, quia reliquum capietur in bonis alibi sitis scilicet immobilibus: quia ex quo habet domicilium, mobilia censentur hic esse. This theory was perfected by RODENBURG, *De jure quod oritur ex statutorum diversitate*, tit. I, cap. II, tit. II, cap. II, no. 6, and particularly by JAN VORÉT, *Commentarius ad Pandectas*, liber I. tit IV, pars II (De Statutis) no. XI. Other adherents were BOULENOIS, MERLIN, FOELIX, and in Germany GAII and HERTIUS. DUMOULIN’S approach has been considered of historic merit by LAINE, 2 Introd. 246; PILLET, 1 Traité 694; contra FREYRIA 103 ff.
by the *lex situs* and movables by the law of the owner's domicil. The rule has been expressed in such generality in the Prussian and Austrian Codes and very distinctly hinted at in the French Code. It appeared later in other jurisdictions, including Quebec. English decisions have accepted this principle since 1790. Lord Loughborough in 1791 called it "a clear proposition, not only of the law of England, but of every country in the world where the law has the semblance of science." Story expressly defended the application of domiciliary law to all transfers *inter vivos* of personalty because of its general utility; this doctrine "could not fail to recommend itself to all nations by its simplicity, its convenience, and its enlarged policy." A narrower theory, however, was favored by many statutists. Only for the purpose of succession and marital property was the necessity commonly felt that movables scattered in several jurisdictions should be subjected to a common regulation. In France, on the eve of the Civil Code, the writers applied the maxim merely to "universal" assignments, only if the assets were situated in the same state as the decedent. Also in Germany this restricted

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Austria: Allg. BGB. § 300.
France: C.C. art. 3 par. 2: "Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française." This provision, by its contrast to par. 3 and its clear history, expresses the old theory according to almost all non-French observers.
Similar: Bolivia C.C. art. 3.
20 Quebec: C.C. (1866) art. 6, par. 2.
Puerto Rico: C.C. art. 10 (referring to the national law of the owner).
The Netherlands: Law of May 15, 1829, art. 7 (as the French).
Spain: C.C. art. 10.
Cuba: C.C. art. 10.
21 Bruce v. Bruce (1790) 6 Bro. P.C. 566.
22 Sill v. Worswick (1791) 1 H. Bl. 665, 690; Somerville v. Somerville (1801) 5 Ves. jun. 750 ff.; Bayley, J. in *In re Ewin* (1830) 1 Cr. & J. 151, 156.
23 STORY § 379.
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theory appeared clearly in the eighteenth century, and later was given prominence by Savigny.25

The interpreters of the Prussian, French, and Austrian Codes have given their legal texts forced constructions to comply with this reduction of the movable-rule to general assignments.26

The Italian Code of 1865 retained the national law of the owner to govern movables but only as a subsidiary device: "except for the contrary provisions of the law of the country where they are found." 27 The Italian literature prevailingly endeavored to minimize even the tenuous rule thus remaining.28 But the section of the Field Code, adopted in four states in this country, has appropriated this formula, "really not the happiest one," 29 by stating that "Where the law of the place at which movables are situated does not provide otherwise, movables follow the person of the owner and are governed by the law of his domicil." 30

Of the Spanish provision, it is recognized that, in copying the Italian text, it has omitted by error the essential restriction just mentioned. In regard to movables situated in

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25 Codex Maximilianeus Bavaricus civilis (1756) I 2 § 17; SAVIGNY 176 ff. § 366; Zürich: Priv. Ges. Art. 2; Greece: C.C. (1856) art. 5 par 1. WACHTER, 24 Arch. civ. Pr. 293.
France: NIBOYET, Acquisition 38; 4 WEISS 195.
Austria: 1 EHRENZWEIG I 97 § 26; WALKER in 1 Klang's Komm. 234;
OGH. (Feb. 8, 1928) 10 SZ. 57 n. 26.
On Quebec: see 3 JOHNSON 217 ff.
27 Disp. prel. art. 7 par. 1.
28 Cf. 1 FIORE § 93; DIENA, 2 Principi 36 ff., 223 ff., and in Revue 1911, 563; CAVAGLIERI 159; App. Milano (March 30, 1909) Clunet 1910, 1323.
29 PACIFICI-MAZZONI, 1 Istituzioni di Dir. civ. Ital. (ed. 5 by Venzi 1925) 471 n. (g).
North Dakota: Revised Code of 1943 § 47-0701.
Spain, public policy corrects most of the effects, but there remain unfortunate possible consequences.  

The same change of mind occurred in the Anglo-American doctrine during the last century. In England, it is true, the old doctrine in its generalized variant applying the domiciliary law to all transactions involving movables, has been tenacious, and some decisions, loosely formulated, created confusion between the three connecting factors: situs, actus, and domicil. This has given rise to three theories and continues to preoccupy the textbook writers who usually take pains to show how impractical the old doctrine is. Some recent authors even treat the matter at great length as an open problem. In the United States, similar discussions occur, but in the American courts the last decisions following Story's view were rendered half a century ago, and

31 See Trías de Bes, Der. Int. Priv. 52 ff.; Audinet, Clunet 1891, 1115; Niboyet, Acquisition 43.  
32 Sill v. Worswick (1791) 1 H. Bl. 665, 690, per Lord Loughborough; In re Ewin (1830) 1 Cr. & J. 151, 156 per Bayley, J.  
33 Westlake 189 ff; Dicey (ed. 5) 620, rule 154 (ed. 6) 561 ff.; Schmitt-Hoff 182; Wolff, Priv. Int. L. § 490 ff.; Morris, 22 Brit. Yearbook Int. Law (1945) 232; Wortley, Recueil 1947 II at 75.  
34 It seems sometimes also that a foreign title acquired by the lex situs to choses in possession is merely recognized in the form of a presumption of validity of title, such as the presumption of the correctness of foreign judgments.  
35 Cheshire (ed. 4) 430 ff.; Graveson, The Conflict of Laws (ed. 2) 199-215. Cheshire and Wortley advocated the lex loci theory in a committee of the Seventh Hague Conference on Int. Priv. Law against a great majority. A new theory by Morris in Dicey, (ed. 6) 559 ff. and Morris, Cases (ed. 2) 277, 289, claiming the "lex actus" as proper law, seems practically to agree with lex situs, respecting tangible things with constant situs.  
However, the present doctrine has been evidently expressed by Lord Maugham, then judge in re Ansiani [1930] 1 Ch. 407, 420, when he announced:  
"I do not think that anybody can doubt that with regard to the transfer of goods, the law applicable must be the law of the country where the movable is situate. Business could not be carried on if that were not so."  
37 See for the decisions reaching to Crapo v. Kelly (1872) 16 Wall. (83 U.S.) 610, 622, and Whitney v. Dodge (1894) 105 Cal. 192, 38 Pac. 636, Stumberg (ed. 1) 357 ff. In New York, the shift from the owner's domicil
the dominant opinion has been contrary for much longer.\textsuperscript{87}

At present, in transactions \textit{inter vivos}, individual chattels are subjected in principle to the domiciliary law of the owner only by the above-mentioned sporadic provisions. Among them, the Spanish rule alone states that movables are generally governed by the personal, here the national, law of the owner; and this is regretted. The older Italian formulation of the domiciliary rule followed in the Field Code is practically devoid of meaning.

(c) \textit{Exceptional function of the rule}. Savigny, enouncing the control of tangible movables by the \textit{lex rei sitae}, nevertheless left a place for the \textit{lex domicilii}, in the case of movables, such as articles of personal use or chattels touching a territory merely temporarily, which have no permanent situation.\textsuperscript{38} Under the influence of his authority, the Argentine Code recognizes the \textit{lex situs} only as follows:

"movables permanently situated and which are held without the intention of removing them, are governed by the laws of the place where they are located; but movables which the owner always carries with him, or which are for his personal use, whether he be in his domicile or not, as well as those which are kept to be sold or carried to another place, are governed by the laws of the domicile of the owner."

To illustrate a permanent location, Vélez Freitas in his annotations mentions Savigny's example of a library in the owner's house. Decisions have added bank deposits,\textsuperscript{40} instru-

\textsuperscript{87} I \textsc{Wharton} 674 §§ 297 ff. The first decisions against the domiciliary law involved a ship and a cargo not to be found at the owner's domicil, as \textsc{Stumberg} (ed. 2) 391 notes.

\textsuperscript{38} \textsc{Savigny} 178 (transl. 179) § 366, \textit{cf.} below Ch. 57 n. 1.

\textsuperscript{39} Argentina: C.C. art. 11.

\textsuperscript{40} \textit{Cf.}, Cám. civ. 2a Cap. (June 22, 1925) 57 Gac. Foro 99, 16 Jur. Arg. 189.
ments payable to bearer,\textsuperscript{41} and mortgage certificates,\textsuperscript{42} while other decisions have declared the contrary.\textsuperscript{43}

The Brazilian law has been analogous;\textsuperscript{44} the reform of 1942 retains the law of the owner's domicil for

"the movables which he carries or which are destined to be transported to other places." \textsuperscript{45}

Modern theory, to be discussed later, recognizes some such cases not warranting the normal rule of \textit{lex situs}, but does not apply the personal law.\textsuperscript{46}

In the aftermath of all this, the Código Bustamante establishes a presumption that movables are normally situated at the residence of the owner or possessor,\textsuperscript{47}—an arbitrary fiction.\textsuperscript{48}

(d) \textit{Obsolete remainders} of the "mobilia maxim," thrown out of the law of property, are sometimes cited in special connections. In particular, this "misleading maxim" has

\textsuperscript{41} Cám. civ. 1a Cap. (Feb. 6, 1928) 27 Jur. Arg. 33.
\textsuperscript{43} WALDEYER, Sucesiones Argentino-Aleman de intestato, Jur. Arg. 1951-I Doctrina 53 f.
\textsuperscript{44} Brazil, former Introductory Law of 1917, art. 10:
"Property, movable or immovable, is subject to the law of the place where situated; those movables, however, that serve his personal use or which he has always with him, or which are intended for transportation to other places, remain under the personal law of the owner.

"Unique Paragraph. Movables the situation of which changes during a real action concerning them, continue subject to the law of the place in which they were at the beginning of the suit."

\textsuperscript{45} Introductory Law of 1942 to the C.C., art. 8 § 1. Cf., Uruguay: C.C. art. 5 par. 2, extending the \textit{lex situs}: "also to the movables which are permanently in the Republic." On the difficulties which make the \textit{lex rei sitae} almost always the most certain rule, see TENORIO § 548.
\textsuperscript{46} \textit{Infra} 33.
\textsuperscript{47} Código Bustamante, art. 111, followed by Brazil: L. Intr. Art. 8 § 2.
\textsuperscript{48} WOLFF, Priv. Int. L. (ed. 2) 510 n. 2; see the controversy on the meaning between 2 SERPA LOPEZ § 229 and TENORIO § 373.
often been attributed to the law of insolvency, but has no standing there and appears now to be finally discredited.\textsuperscript{49}

3. Characterization of Movables and Immovables

The practical importance of distinguishing movables and immovables for conflicts purposes has been narrowed, since the conflicts rules of almost all countries have adopted the \textit{lex situs} for individual movables and many systems have abandoned the distinction altogether, subjecting the whole estate to one rule of succession or marital property. Nevertheless, what law determines “movability,” is a question preliminary to frequent issues of jurisdiction, enforcement, bankruptcy, taxation, and others. The problem also has retained considerable bearing on the general controversy about characterization. It may therefore be treated here at some length.

The traditional principle that the \textit{lex situs} determines whether a thing or interest is immovable, still prevails\textsuperscript{50} but has been challenged by a recent and growing group of writers with their creed that the \textit{lex fori} does everything. Moreover, the application of the principle by the English and American courts has produced certain peculiar points, introducing a scarcely noticed third theory.

(a) \textit{The traditional characterization}. The principle that the \textit{lex situs} determines whether an interest is movable, still enjoys such world-wide prevalence that documentation is unnecessary.\textsuperscript{51} The practical purpose of this auxiliary rule


\textsuperscript{50} In 1931 Gutzwiller named only Niboyet as opposed.

\textsuperscript{51} Examples outside the common law:

France: Cass. Civ. (April 5, 1887) S. 1889 1. 387: “la question de savoir si certains biens sont meubles ou immeubles ne peut être résolue que par la loi du pays où ils se trouvent;” (Aug. 5, 1887) D. 1888 1. 65, BEALE, 2
is obvious. It is still the Anglo-American conflicts law that a decedent leaves separate estates in the jurisdictions where they are situated and in addition an estate composed of the movables situated anywhere. Frictions in the application of this system can be avoided only if the question what is movable is answered in all jurisdictions by the same method, that is, in accord with the law of the place where the thing is situated.

But to understand the historical idea of the entire institution, which is still so strong in so many countries, we have again to go back to the meaning of the statuta realia, as it has slowly developed. A piece of land has a status as has an individual. The object of law is land or an individual; a statute is a statutum reale or personale, the objects of doubtful classification being collected in the statuta mixta. The land is an individual object of rights, automatically—not by any reference from a foreign conflicts rule—subject to the power of the feudal superior and subject to donation, sale, acquisition of marital interest, legacy, or intestate succession. There is no tie between the lands of one man in several territories. Hence, every sovereign determines the legal rules exclusively governing the fate of the land, and quite naturally also which things situated in the same territory go with the land—such as serfs, herds, easements in neighboring lots, especially the objects affording continuous use as "heritage," i.e., investment—and which do not, such as Bouteiller enumerates as chatels or cateux: barns, stables, and trees not bearing fruit. Moreover, owing to the Ger-


52 Cf., supra Vol. I, 328, concerning marital property.

53 Bouteiller, Somme rural, I, tit. 74 (ed. 1603 p. 429).
manic idea of property, various possessory rights may exist simultaneously: those of the king, the barons, and the lower vassals, or of the knight and the serfs. All these possessions and the respective present or future rights are naturally included in the concept of immovable right.

On the other hand, in the opinion of Dumoulin and his followers, which has been adopted by the interpreters of the French Civil Code, the last domicil of the deceased governs the inheritance in all movables, not as the personal statute but as the fictitious situation of the things. This position again required the law at the true situation to determine what are movables; if the local statute classified a thing under the *statute real*, the domicil had nothing further to say.

The old writers give sufficient illustrations. Boullenois borrows from another author the case of a testator, domiciled in Paris, who left a hereditament in Normandy. Fruits and grains were deemed to be movables under the Coutûmes of Normandy from the day of Saint-Jean, but under the Coutûme of Paris only when they were cut. The right opinion looks to the situs to determine the rights not only of the legatees but also of the heirs among themselves:

The domicil affords the rule of the distribution, and for this reason everything reputed to be movable at any place must be distributed according to the law of the domicil; but it does not regulate the nature and the quality of the property. Bouhier determines immobilization of movables serving an estate by the owner “under the Coutûme where these estates are situated” and knows that all writers are of the same opinion. Conversely, the situs decides whether

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54 2 LAINÉ 233 ff., 261, and for the last French doctrine before the Code, DELAUME, Les Conflits de Lois à la veille du Code Civil (1947) 180, 316.
55 The following is taken from the admirable report by 2 LAINÉ 256 ff.
56 BOULLENOIS, I Personnalité et réalité des lois 841, quoting Basnane against Béraut.
57 BOUHIER, Observations sur la coutume de Bourgogne, ch. 21 No. 173.
immovables in the natural meaning are assimilated to movables, as buildings (cateau) in Artois, Lille, and Saint-Pol, and even, whether and to what extent the heir to whom they devolve must support the debts burdening the movables.

Very clearly all of this doctrine has been adopted by Story:

“So that the question, in all these cases, is not so much what are or ought to be deemed, ex sua natura, movables or not, as what are deemed so by the law of the place where they are situated. If they are there deemed part of the land, or annexed (as the common law would say) to the soil or freehold, they must be so treated in every place in which any controversy shall arise respecting their nature and character. In other words, in order to ascertain what is immovable or real property, or not, we must resort to the lex loci rei sitae.”

This passage has been quoted time and again, but evidently not always with perception of its full meaning.

(b) The common-law rule. The Continental rule was applied in the first half of the nineteenth century in England and the United States without difficulty. A problem arose when chattels real were to be subordinated to movables or immovables. Considering that terms of years had been kept outside the feudal system and were still ranked with movables in the “personalty,” that is, the

58 2 Lainé 258.
59 2 Lainé 259.
60 Story § 447.
61 England: A series of decisions dealing with the character of Scotch heritable bonds, immovable under Scotch law: Johnstone v. Baker (Ch. 1817) 4 Madd. 474 note; Jerningham v. Herbert (Ch. 1828) 4 Russ. 388, 391; Allen v. Anderson (Ch. 1846) 5 Hare 163; cf. In re Fitzgerald [1904] 1 Ch. 573; Train v. Train [1899] 2 Sess. Cas. 146.
62 On the important reasons, see particularly 2 Pollock and Maitland 570 ff.; cf., Holdsworth, 3 Legal History 182 ff. Not much credence is due to a theory deriving the phenomenon from the undisputed fact that the
assets not included in the succession by the heir, it would have been possible to argue that leaseholds in English land of a French deceased would follow the law of the French domicil. But the English courts decided otherwise. In fact, the memory of Sir Edward Coke’s statement was vivid:

“Now goods or chattels are either personal or real . . . Real, because they concern the realty, as terms for years of land or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by elegit and such like.”

The courts, therefore, did not hesitate to classify a leasehold, though personalty in the view of English law, along with real property as immovable for the purpose of applying the international rule of characterization. The consequence in the law of succession, however, until the reform of 1925-1926, was that the movables of a decedent domiciled abroad formed one inheritance, while his lands and leaseholds in England constituted two further masses subject to different principles of transfer and liability for debts.

These decisions on leaseholds go back to 1873; however, it is most interesting that New York and Maryland have

original purpose of English “real actions” was to provide recovery in kind. This theory, by T. CYPR. WILLIAMS, “The Terms Real and Personal in English Law,” 4 L.Q.R. (1888) 394, has been followed by HERBERT TIFFANY, I Real Property (1939, 3d ed. by Basil Jones) 5 § 3; but see 2 POLLOCK AND MAITLAND 181.

63 Coke on Littleton 118b.

64 The distinction has retained its significance, when realty and personalty is disposed of separately by will and for tax purposes. SNELL, Principles of Equity (1939, 22nd ed.) 267.


66 England: Freke v. Lord Carbery per Lord Chanc. Selbourne (1873) L.R. 16 Eq. 461, 466; Duncan v. Lawson (1889) 41 L.R. Ch. D. 394; and others, see DICEY (ed. 6) 525 n. 24.

Ireland: In the Goods of Gentili (1875) Ir. R. 9 Eq. 541. DeFogassieras v. Duport (1881) 11 LRI 123.

United States: Restatement § 208, Special Note.
subordinated leaseholds as personalty to the decedent's domiciliary law. The most frequent cases concerning chattels real have been testamentary trusts whereby land should be sold (equitable conversion) and the proceeds used in favor of certain persons. In municipal Anglo-American law, the equitable interest of the beneficiary so created is personalty. But for the purpose of conflicts law the courts have stressed the immovable nature of the land when not yet sold or reconverted at the death of the beneficiary, and depending on construction of a British legal provision, even beyond this time limit.

_Mortgage._ Another particularly important example, in addition to rent charges, is the right of a mortgagee in land.

Mortgage as a "right in re" is naturally an immovable. This is recognized in all jurisdictions. The French Civil Code aroused doubts in this respect, since article 526 enumerating _droits réels_ fails to mention the _hypothèque_; the corresponding characterization of the latter as movable by

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68 Following the lead of the Irish judge Andrews in Murray v. Chumpernowe (1901) 2 L.R. 232; _In re Berchtold_ (1923) 1 Ch. 192.


United States: Clarke v. Clarke (1899) 178 U.S. 186; Ford v. Ford (1888) 70 Wis. 19, 33 N.W. 188; Norris v. Loyd (1918) 183 Iowa 1056, 168 N.W. 557; _cf._, Paul's Estate (1931) 303 Pa. 330, 154 Atl. 503. A wrong turn was taken in _McCaughna v. Bilhorn_ (1935) 10 Cal. App. (2d) 674, 52 Pac. (2d) 1025, where, as a first step, the land was construed as personalty; see _Note_, 50 Harv. L. Rev. (1937) at 1152.


older writers has continuously misled German authors. Yet the present French civil law writers declare article 526 to be incomplete and "certainly susceptible of generalization."

The debt, secured by mortgage, in itself, is, of course, a movable, and its validity is governed by the international private law of obligations. However, whenever the economic value of a mortgage is involved,—and this counts decisively in the distribution of inheritance—a sane view will include the debt in the assets of the mortgagee, and subject both to the *lex situ*. Anglo-American courts have not doubted this conception, except in isolated Canadian cases and decisions of New Zealand and Australia, all of which mistakenly have applied precedents respecting taxation rather than conflicts law. A holographic will executed in Louisiana, therefore, cannot dispose of a mortgage interest in Ontario.

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71 See, e.g., BOUHIER, Obs. sur la coutume de Bourgogne, ch. 25 §§ 9, 19; 29 § 36.
72 KAHN, I Abhandl. 81 took this from LAURENT 7 Dr. Civ. 268 § 152, followed by LEWALD 175; WOLFF, Priv. Int. L. § 482, ill. p. 512, and others. But Laurent emphasized nevertheless the Belgian contrary characterization and advocated the *lex situ* for determining whether a hypothec is immovable, or whether there is a chattel mortgage (449 § 385).
73 COLIN ET CAPITANT I (ed. 11) 747 § 931; PICARD in 3 PLANIOL ET RIPERT (ed. 2, 1952) § 93.
74 This is also recognized in the United States, 2 BEALE 946 n. 2 s. 225.1; 11 Am. J. 337 § 39.
The same result seems certain in French conflicts law; as early as 1837, the Court of Cassation defined the scope of the *lex situs*, according to article 3, paragraph 2, C.C., to "embrace in its generality all rights of ownership and other real rights, claimed on these [French] immovables." It is true that express confirmation by the writers is scarce. Similarly, *les situs* applies in Quebec, Austria, Brazil, and probably commonly.

Only in Germany are the authors unsure, due to an article in the Civil Code (§ 1551, paragraph 2), prescribing that in a marital community of acquests and gains a hypothec is to be counted among the moveables belonging to the community property. Although this rule has been said to contain a conflicts rule, it would seem to be applicable only as a part of German substantive law and perhaps merely to the mentioned species of community property. There is authority for considering a hypothec and a land charge as subject to *lex situs*.

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78 Cass. civ. (March 14, 1837) P. 1837.1.211, S. 1837.1.195.
79 It has been given by BARTIN, 3 Principes 197 for the "constitution of the right *in re* itself," as contrasted with the contract. But we understand to the same effect LEREBOURS-PIGEONNIÈRE (ed. 5) 464 § 353; BATIFFOL, Traité § 537.
80 JOHNSON 308, 331.
81 WALKER 339. In domestic Austrian law the contrary view is followed in Klang's Komm. 1178.
83 M. WOLFF, D. IPR (ed. 3) 171 applies this rule to foreign land of either spouse. In his first edition, 106 § 30, this legal characterization seemed to be used for all regimes of matrimonial property but only to be referred to German land.
84 RG. (Dec. 7, 1921) 103 RGZ. 259 invoked the *situs* of mortgaged land only as an additional criterion for the purpose of jurisdiction over the mortgage right. Yet KG (Dec. 21, 1935) JW 1936, 2466, at 2469, Nouv. Rev. 1937 98 (supra Vol. I, p. 531 n. 55) infers therefrom that a mortgage is a right in land subject to *lex situs* and concludes a fortiori that a land charge (Rentenschuld, BGB. § 1199) abstracted from any obligation by the German legislature—although movable according to § 1551—is likewise characterized, and an object of foreign "special provisions" on land reserved in EG. art. 28. Also RAAPE D. IPR. (ed. 3) 407 expresses the same view as our text.
If so, the German treatment of a German hypothec in a German-governed marital case would resemble the Anglo-American solution in succession cases. As soon as a British or American court finds that a mortgage on English, Canadian, or American land is an asset in a succession, it applies the law of the situs; but since under the substantive law involved mortgage is personalty, it may be treated differently from real estate law. The differences have been largely reduced in England since the land law reform of 1925 and in most American states. Nevertheless, it is still stated, at least in case a testator has established different dispositions for realty and personalty, that the mortgaged premises and the thereby secured debts are "personal assets in the hands of an executor or administrator, to be administered and accounted for as such," viz., administered and distributed as personalty, although rules of administration for real property apply in case of sale and other dispositions.

It must be taken in this sense when it is said that English law looks primarily at the debt, not the charge.

It should be noted that the courts in these cases have been compelled to create a new category of interests. The statutist rule rests on the automatic separation of immovables by the individual territorial organization; what is immovable in Austria is immovable in the meaning of any inheritance law, and subject to the normal Austrian succession in land. What, then, is the criterion for selecting English or American immovables that are not "real property"?

85 WILLIAMS, Executor. (ed. 13, 1953) 303 § 527; supra n. 64.
86 Restatement § 225 ff.; Ohio Gen. C. Ann. (Page 1938), § 10509.68; Wisconsin St., 1951 § 312.10; Minnesota St. 1947, § 525.38. Model Probate Code § 127.
The English courts have obscured their position by explaining that they had to make a concession to international comity and therefore determine the question in conformity with the Continental division of movables and immovables. An English judge, taking this motivation too seriously, concluded that with respect to mortgages situated in Ontario, no such resort to categories other than personal and real property was needed.\(^88\) He has been criticized because there should not be in England different systems for common-law countries and for the rest of the world.\(^89\) But the result was obviously right, although it should not have been based on terminology and alleged concessions, but simply on the fact that characterization in Ontario was identical with the English in all points.

What the English courts really intended, in using (as they had done before) the continental distinction of immovables and movables and applying it to chattels real, was rather unfavorable to the alien laws. English leaseholds of a French deceased were excluded from the French succession, although they could not be treated as devolving to the heir, and had to form a third object of successions. Since the land laws of 1925, of course, inheritance to chattels real and movables differs only in minor respects.

The clearly formulated view of Beale, shared by many writers, is also misleading:

"Leasehold interests"—"are immovable, since they are interests in land and cannot be removed from the power of the land prevailing at the \textit{situs} of the land." (If positive law decides otherwise, it does so only after it has been found applicable under the Conflict of Laws principle.)\(^90\)

\(^88\) Farwell, L.J., in \textit{In re} Hoyles [1911] 1 Ch. 179.

\(^89\) ROBERTSON, Characterization 200 f.

\(^90\) 2 BEALE 932 f., but 937 § 209.1 recognizes correctly that the \textit{lex situs} decides the question whether land to be converted into personalty is a "movable."
Thus, the criterion would be natural irremovability, reviving the original distinction of the Romans between *res immobiles* and *res quae moventur aut sese movent*. This, however, contradicts Story and would never conform to the old rule, established upon the legal concept of an immovable interest that varies from territory to territory. And it does not suffice.

In fact, the characterization of equitable conversion has proved a matter of statutory interpretation, and has accordingly been made dependent on the *lex situs*.

*Illustration.* A testator, dying domiciled in Illinois, established a trust of California land to be sold and the proceeds to be applied to the purposes of the trust. The will, holographic, was bad in Illinois but valid in California. Since California shares the theory that the interest of the beneficiary was in the land, the will was valid.

The same is true, as a matter of course, for the classification of fixtures which, for all purposes—including eminent domain, mortgage, conditional sale, bankruptcy, and taxation—are judged according to the local rules of their situation. Modern laws, it is true, tend to emphasize

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91 ROBERTSON, Characterization 206, 211, on this assumption, suggests "that the nature of tangible property as movable or immovable should be determined by the objective test of what the property in fact is."

92 Bates v. Decree of Judge of Probate (1932) 131 Me. 176, 183; Restatement § 209; Iowa Annot. §209 cites two decisions for but one against *lex fori*; New York Annot. § 209: "Unsettled." Cf., GOODRICH (ed. 3) 509 § 166.


physical movability more than use in defining fixtures.\(^95\)

British and American courts, therefore, have not generally deviated from the universal exclusive characterization of immovables by the *lex situs*. They have had to modify a long-accepted property categorization into a more natural conception of certain interests, producing surprising results for foreign courts applying the common-law principles of inheritance. But this development also has evolved within the national law and may and does vary among the common-law jurisdictions.

(c) *The lex fori theory.* Bartin, one of the two inventors of "qualification" according to the *lex fori*, initially recognized as an exception the distinction of movables and immovables in view of the indisputable advantage of determination by the *lex situs*.\(^96\) Niboyet has opposed even this isolated exception.\(^97\) More recently, both these writers and an increasing number of others\(^98\) have compromised on a doctrine proposed long ago by the German writers Bar, Stobbe, and Kahn:\(^99\) where the choice of law refers to the *lex situs*, the applicable internal law of the situation should distinguish as it pleases. But when a conflicts rule of the forum or a foreign conflicts rule applied by renvoi distinguishes between movables and immovables, the *lex fori* or the foreign domestic rule, respectively, characterizes the nature to be attributed to property.

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\(^{95}\) Picard in *3 Planiol et Ripert* (ed. 2, 1952) § 64, states that present French law stresses merely movability. The German practice (*BGB* §§ 93-97) is more complicated.

\(^{96}\) Bartin, *Études* 52 sub II.

\(^{97}\) Niboyet, Manuel § 418, and 2 Répert. 411 n. 27.


\(^{99}\) Kahn, *1 Abh.* 82, agreeing in part with the theory of 1 *Bar* 622; Stobbe I § 32, 63.
Our problem lies with the second part of this theory, namely, the interpretation of the conflicts rules which commonly, except in a few treatises, do not specify what they mean by distinguishing movables and immovables. This omission is very easily explained. Before the new learned assault, nobody doubted that the *lex situs* decides this question; the treaties have sometimes expressly said so. The new theory itself seems to leave a broad avenue for a renvoi from the *forum* to the *situs*.

Why must the *lex fori* qualify in the first instance? Usually, no other justification is offered than a brief reference to the self-constituted theory of *lex fori* qualification.

Niboyet adds his endeavor to protect domestic conceptions from corruption:

“If, to ascertain whether property situated outside France is movable or immovable, we consult the law of the situation, we depend on a foreign law for the operation of our own system of solving conflicts. If it proclaims immovable property that in France would be movable, this is enough to exclude French law, applicable to succession in movables, and inversely. There is, hence, an effacement that nothing justifies and a contradiction with the very foundation of the entire theory of qualifications. . . . It is inadmissible that the foreign law should consider things movable which for us are not so . . .”

These lines are reproduced to show with what narrow-minded arguments the development of conflicts law, or for that matter, of any international order, has to cope. To satisfy the mentality of the distinguished, though ill-advised, adversaries of the old rule, we may, in their own style, advance a triple battery of “arguments,” historical, logical, and practical.

History: what justification is there to reverse a century-old rule, one of very few that are universally recognized,

100 NIBOYET, 3 Traité 365-6, 366-7.
a rule adjusting the differences between the various systems, once of feudal states and now of national laws? The very principle of *lex situs*, which no one appears to wish destroyed, is inevitably connected with the auxiliary rule in question. When a French court leaves the devolution of English land to English law, it means immovables recognized as such in England. Otherwise, there would be an English succession to movables, considered immovable in France, and a French succession to interests situated in England and there considered immovable. Such a jumble was unheard of in the old times.

Logic: Why is it so plain that a reference to the English law of immovables may concern things which are not immovables in England? What logic requires, furthermore, that an English immovable must be held a movable because, if *French*, a like thing would be so considered?

Practicability: The writers here discussed have induced the German Reichsgericht to render the first decision ever made in their favor;¹⁰¹ it is now constantly invoked as support.

A Czechoslovakian national dying with domicil in his country left a factory in Saxony, Germany. Under the Austrian Civil Code, § 300, then in force in Czechoslovakia, immovables are devised and distributed according to the law of their situation. The court concedes that the Austrian literature construes this as leaving characterization to the *situs*; this would be the German law. But it prefers to look for the Czechoslovakian determination, approves the finding of the lower court that under the Czechoslovakian law (for some not reported reason) the German factory is a movable, and attributes it to the foreign succession.

¹⁰¹ RG. (July 5, 1934), 145 RGZ 85, IPR spr. 1934, 13, Nouv. Revue 1935, 82, with an excellent criticism by Mezger of the specious arguments by which the court has been diverted from previous better solutions.
Granted for the sake of argument that a Czechoslovakian factory would be a movable under the analogous circumstances in Czechoslovakia—why should § 300 A.BGB. not be construed as referring to the *lex situs* to determine its character—as the Austrian and world tradition has assumed? What sense, also, does it make to consider a German factory left by a Czechoslovakian citizen as a movable, although it would be an immovable when belonging to a German? And what should an American court do to accommodate this situation? Here, the primary rule subjects the factory situated in Germany to German inheritance law. The entire meaning of the principle would be shattered.

Suppose an English leasehold in a German succession. Must the German court declare the English interest movable because, there being no such type in Germany, a German lease is movable? Should the English court for this reason renounce English inheritance law for immovables? It will do nothing of the sort, and harmony is destroyed once more, for the sake of scholastic speculations.

In fact, a Hungarian author declares that a Hungarian court should treat an English lease as movable and an English court a Hungarian lease as immovable. Correctly, on the other hand, in Austria, where a lease of land may be transformed into a real right by public recording, the *lex situs* is recognized as decisive.

If a mortgage in Michigan for the purpose of German marital property really should be regarded in Germany as movable, the mortgagee's interest is most certainly an immovable for any American court.

It is submitted that the old rule, practiced in England and the United States, is superior in all respects.

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102 See contra Stubenrauch, 1 Comm. (ed. 8) 371 n. 2; but Klang's Komm. 1178 is very vague.

103 Arato, 17 Z. ausl. PR. (1952) 10.

104 Bolla 85.
III. Lex Rei Sitae

1. The Rule

It is at present the universal principle, manifested in abundant decisions and recognized by all writers, that the creation, modification, and termination of rights in individual tangible physical things are determined by the law of the place where the thing is physically situated. The rule relates to the physical things in which the real right in question exists. The law of the place of ‘the keys of a house, the stones of a dry wall and the detached or duplicate por-

105 Legal Provisions:
Quebec: C.C. art. 6.
Brazil: Ley Introd. art. 10.
China: Int. Priv. Law, art. 22.
Egypt: C.C. art. 18.
Greece: C.C. art. 27.
Japan: Int. Priv. Law, art. 10.
Liechtenstein: C.C., Property Law, art. 11.
Poland: Int. Priv. Law, art. 6.
Syria: C.C. art. 19.
Argentina, Paraguay, Brazil, Uruguay with the restrictions supra n. 39, 44.
Treaty of Montevideo (1889) art. 26, (1940) art. 33.
Código Bustamante, art. 105, 112, 113.
By Practice:
England: Westlake (ed. 1, 1859) c. VIII; Cammell v. Sewell (1858) 3 H. & N. 617; (1860) 5 H. & N. 728, Exchequer Chamber, and prevailing opinion at present.
Austria: OGH. (Feb. 8, 1926) 10 SZ. 57 No. 26.
Belgium: Pouille, §§ 265, 268 f.
Germany: ROHG. (Sept. 5, 1873) 11 ROHGE. 22 N. 7; RG. (Oct. 20, 1882) 8 RGZ. 110; (Feb. 15, 1884) 11 RGZ. 52, Clunet 1886, 608 and constantly; RG. (Oct. 8, 1921) 103 RGZ. 30, 31 (movables); RG. (Oct. 18, 1935) 149 RGZ. 93 (immovables).
The Netherlands: Hooge Raad (June 22, 1934) W. 12815, N.J. 1934, 1493;
1 Van Haselt 140, cf., 134.
Switzerland: BG. (Jan. 21, 1910) 36 BGE. II 6; (June 6, 1912) 38 BGE. II 166; (June 26, 1912) 38 BGE. II 198 and constantly. For Swiss immovables belonging to a Swiss national domiciled abroad the special provision, art. 28 NAG. refers to the law and tribunal of his canton of origin as opposed to the lex situs, but the result is at present simply Swiss property law.
tions of machines,"¹⁰⁶ not the place of the house, wall, or the machine, is decisive for the characterization of fixtures;¹⁰⁷ whether an easement exists depends on the law of the place where the land to be charged is.

The rule, furthermore, is primarily concerned only with the problems of property law, not of obligations. Opposition by a few very isolated scholars has never carried much weight. A new theory, dividing the cases between the *lex situs* and a "*lex actus,*" established by the English writer Cheshire, must be likewise rejected.¹⁰⁸

The quasi unanimity in this field is easily understandable, since here sheer territorialism is assumed even in the most modern systems. In the relevant part, the American Restatement, with its strong and consistent emphasis on the legislative and judicial power of the state where the land or chattel is situated, expresses a universal doctrine. Contrary to a confusing reference to party autonomy, still appearing in the Chilean code,¹⁰⁹ the parties cannot determine the applicable law.

The supporting reasons are no longer speculations on the status of things nor on sovereignty as was still the fashion in the nineteenth century, with occasional remainders in backward theory. No more is the idea, popular with certain French authors, that the "organization of the property régime" is necessarily exclusive and its territorial expression in law must be a "*loi de police et de sûreté,*" unconditionally imperative, entirely acceptable. As a consequence of

¹⁰⁶ Encyclopedia Britannica, Fixtures (ed. 11, 1910-1911) 451, cited by Falconbridge, Conflict of Laws n. (g.).

¹⁰⁷ 2 Zitelmann 303.

¹⁰⁸ Cheshire (ed. 3) 563 (somewhat corrected in ed. 4, 435 ff.) asserts that the *lex situs* is not the appropriate system in every case, but the proper law for the transaction postulated by him is not neatly distinguished from the assignment or other transfer, supra Vol. III, p. 78. Cheshire's theory is continued by Schmitt Hoff (ed. 1) 190, cf., 185. An exhaustive refutation is now given by the editors of Dicey (ed. 6) 561 ff.

¹⁰⁹ Chile: C.C. art. 16: an exception to *lex situs* is made if the contract determines otherwise, but as a subexception Chilean law applies where the contract should have effect in Chile.
this idea, it has been recently asserted that in a French court a contract made abroad, transferring land situated in France, is void, if a "cause" in the French meaning is missing, or if the property is inalienable under French law.\textsuperscript{110} But if so, it would be due to the conflicts rule rather than to an automatic effect of an imperative territorialism. The only necessary effect of the French territorial law is that of excluding foreign transfers from enforcement. Whether an obligatory sales contract or even an assignment of the ownership has some effect in foreign countries, should not be a concern of French territorial law; French \textit{public} law is certainly not interested at all in foreign obligatory contracts, French \textit{domestic private} law merely has to deny effect in France to the contract and to the transfer, while it is the province of French and foreign \textit{conflicts} law to state that the French regulation deserves preference with respect to the property, though not necessarily the contract, aspect of the transaction.

For conflicts law, however, it may well suffice that an old and unchallenged tradition has resulted in a universal principle, natural in view of the physical and economic integration of the property in the territory and affording the easiest available certainty to the state of the situation, to all interested parties, and to prospective successors and creditors.

Justifications of the principle by individual writers have produced an inclination to admit exceptions in situations where the reason alleged by the individual writer for the \textit{lex situs} does not apply, as for instance, in the case of voyaging goods. The \textit{lex situs}, however, would lose much of its practical reliability if it were subjected to any exceptions at all, especially if it allowed party autonomy as has repeat-

\textsuperscript{110} Niboyet, 4 Trait\texté 199, 255.
edly been suggested. That there is no law at the place where
the thing is—as in the waves of an ocean—or that this
place is unknown, or casual and temporary, constitute no
exceptions to the rule, but instances where it cannot be rea­
sonably applied in fact. And that transfer of title may be
defferred or conditioned purely according to the intention of
the parties, is a part of Anglo-American and Latin domestic
laws, but not of their conflicts rules.

If the law of the place of situation forms an ordinary
conflicts rule (though universally applied and therefore
most precious), no mystery inherent in “laws of surety and
police” is implied. The municipal systems mutually con­
cede, by the conflicts rule, exclusive control of private rights
in the immovables and movables situated in their territories,
on the understanding that the effects of private transactions
complying with the actual law of the situation are recog­
nized so long as the location lasts and, when the location of
movables changes, so long as the new location does not
require a modification of the legal condition.

Our task is much simplified by this statement, since we
may attribute to the lex situs indiscriminately all the domes­
tic rules regarding the existence of rights of private law in
immovables and movables, whether these rules, in the last
resort are intended to serve public or private interests. At
a later juncture, of course, we shall have to survey the con­
flicts rules regarding territorial change of the locality of
tangible movables.

“Situation.” It must be noted that movables have not
always been deemed “situated” for the purpose of conflicts
law wherever they may be found at a certain moment.
Occasionally, temporary location has been considered im­
material so as to favor a foreign situs; removal to another

111 Infra Ch. 56.
state without the consent of the owner has been ignored in the United States;\textsuperscript{112} and ships and travelling goods are objects of a comprehensive controversy.\textsuperscript{113}

While, for the application of the ordinary conflicts principles regarding a tangible chattel, Savigny and his school required that it should have a permanent location, the word "permanent" should not be taken literally. Neither do we require more than a merely physical location.\textsuperscript{114}

2. Property and Contract

Transfer of title. Speaking of the scope of conflict rules on contract, and especially sales of goods, we have had the opportunity to state that at present, almost unanimously, transfer of title is sharply distinguished from promises to transfer title.\textsuperscript{115} This distinction is also made in countries where property can be transferred through mere consent as at common law and in the large family of systems following the French Civil Code. The contract containing the promise is governed by its specific law,—for instance, the law stipulated by the parties or the law of the place where the parties are domiciled and contract. But the problems regarding transfer of property,—such as those of the time when, or the conditions under which, the transfer becomes effective; of whether acquisition from a nonowner has effects, and, in the common-law system, of the capacity to alienate and acquire—depend on the law where the thing is at the critical time.

Transfer of movables. While the contractual part of a

\textsuperscript{112} \textit{Infra} Ch. 56.

\textsuperscript{113} \textit{Infra} Ch. 57.

\textsuperscript{114} RAAPPE, D. IPR. (ed. 3) 372, against Niboyet.

transaction respecting movables is commonly recognized, the part governed by the *lex situs* has been often overlooked and, in recent times, doubted by some courts and writers. Imagining that in English or French law property passed by "contract," they would extend the proper law of the contract beyond its obligatory effects. Thus, Cheshire contends that if two Englishmen make a contract in London, whereby goods lying in Paris are sold, English law determines not only whether the goods are fit and merchantable but also whether the transaction is formally valid and whether a right of property has passed to the buyer; a title to goods claimed to have been derived from one of the parties to a transfer must be determined by the *lex actus* of the original transfer.116 No proof is adduced for this mixture of obligation and ownership.

The question has been more thoroughly investigated with respect to the Code Napoléon. Bufnoir117 recalled and Josel Kohler 118 in an erudite study confirmed how, starting from Celsus' construction of the *constitutum possessorium,*119 practitioners have continuously worked to replace the transfer of physical possession as part of a conveyance by less cumbersome formalities and finally by mere consent. The Postglossators, the Italian and French documents, the great wealth of French *coutumes* and from the sixteenth century authors such as Tiraquellus120 and Ricard,121 drew attention to various contractual clauses in deeds, such as the clauses of usufruct, lease, *precarium, constitutum simplex,* or simply the "*clause de dessaisine saisine."" These clauses early became "*de style*" and were presumed to be implied when they

116 Cheshire (ed. 4) 437.
117 Bufnoir, Propriété et Contrat (1900) 39 ff., especially 42, 45.
119 Dig. 41, 2, 18 pr.
120 Tiraquellus, De iure constituti, IV limitatio 31; Kohler loc. cit. 37.
were missing. The Code, after different projects, adopted the traditional conception. Immovables as well as movables are considered transferred when a contract of sale, exchange, or donation is made and the parties do not indicate that they postpone the transfer of the title. Literally, the text of article 1138, setting the transfer on the time for which it is promised, says just this; the current construction also reaches the same result. The clauses of divestment and vestment, substituting the effective surrender of possession, have always been a part of the conveyance, not of the obligatory contract. The same is obvious for their legal implication.

The consequences for their classification in conflicts law are now realized in France. Passing of title depends on the respective agreement of the parties, which regards the property, not the obligation, but is ordinarily to be ascertained from the clauses or circumstances of the contract. If no other clue emerges, title passes instantly by virtue of the implied clause, or better, the subsidiary legal rule. All this is naturally governed by *lex rei sitae*, which must prevail in case it is different from the law governing the obligatory contract, as may happen even in case of sale of immovables.

Also under the light of rational analysis, the effect of a party agreement on the passing of title is a question of property and not of obligation. Therefore, we may disregard the opposite view, even though English judges may have erroneously adhered to it, which has not been proved.

*Lease of land* in Roman and modern German law is a

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122 Bufnoir, *supra* n. 117; Desbois, Clunet 1931 at 292; Arminjon, 2 Précis (ed. 2) 116 § 28; Picard in 3 Planiol et Ripert (ed. 2) 628 § 620.

123 Niboyet, *Acquisition* (1923) 124 ff. and repeatedly since; Pillet, 1 Traité §§ 33, 352; 359-366; Picard, *loc. cit.*

124 Recently, Göré, 45 Revue Trime. D. Civ. (1947) 161, discusses the French opinions for the various situations involved, but seems to tread on thin ice.
mere contract producing obligations;¹²⁵ this is also true of French law, although the tenants of commercial premises and of rural land have been protected in various respects.¹²⁶ At common law, however, leasehold, conceived as an estate, a real right created by a conveyance, in strict opposition to contract, ¹²⁷ constitutes a *jus in re*. Correspondingly, lease on the Continent is subject to the conflicts rules concerning contracts, whereas at common law the law of the situs alone is traditionally called in to function, and this is the rule of the United States, as alleged by Beale.¹²⁸ In this matter, it is the contractual element of the agreement that was neglected.

However, American courts have stressed the contractual character of those party obligations that do not touch the use of the premises.¹²⁹ The duty to pay rent and damages for anticipated breach of contract by the tenant was early recognized as an exception to the prevalence of *lex situs*.¹³⁰ Thus, rights *in rem* under a lease are governed by *lex situs*,

¹²⁵ BGB. §§ 535, 581.
¹²⁶ See in particular the laws on *propriété commerciale*, last décr. July 1, 1939; and the postwar legislation, Ord. of Oct. 17, 1945 and Law, April 13, 1946, on rural leases.
¹²⁷ See Burby, Real Property 143; Williston, 53 Harv. L. Rev. (1940). 896.
¹²⁸ 2 Beale § 222.1. Of his seven citations, however, two are against him; in four, situs and place of contracting were identical, as Beale concedes p. 1216 when talking of obligations; only in Galleher v. O'Grady (1917) 78 N.H. 343, 100 Atl. 549, *lex situs* is applied without mentioning the place of contracting; in this case the issue was the existence of the (principal) debt to pay rent after a partial eviction, clearly a contractual problem.

The same simple application of the law of the situation occurs again in Hotz v. Fed. Reserve Bank of Kansas City (1939) 108 F. (2d) 216. In Richardson v. Neblett, 122 Miss. 723, 84 So. 695, 10 A.L.R. 272, the problem is different, viz. whether a domiciliary administrator of an estate may collect rent as personal property. See also recently McCraw v. Simpson (1944) 141 F. (2d) 789.
¹²⁹ 15 A.L.R. (2d) 1199-1209.
¹³⁰ 1 Wharton, Ch. VII and § 276 ff.; Burby, loc. cit.; 15 A.L.R. (2d) 1203.
but as far as payments and mutual rights under covenants are concerned, *lex loci contractus* applies.\(^\text{131}\)

Similarly, when a landlord in Chicago leased local premises to a shoe store firm of Baltimore which became bankrupt, the federal judge held that although any rights *in rem* created by the lease were governed by the *lex situs* (Illinois), any rights *in personam* created by virtue of its covenants were subject to the law of the place of contracting (Maryland).\(^\text{182}\)

Hence, the "contract" also covers the landlord's failure to make repairs, covenants to pay taxes, rights of warranty for fitness, etc.\(^\text{183}\)

However, this does not exclude situs as a subsidiary contract in cases not distinguished by party choice of law\(^\text{184}\) or special circumstances. Such a special case occurs where both parties have their domicil in one state, in which they also negotiate and conclude the lease; the law of this state applies even though the object be foreign land.\(^\text{185}\) On the other hand, when the lease is "made" or "executed" or "delivered" in the state where the land lies, American courts have not hesitated to apply the law of that state,\(^\text{186}\)

\(^{131}\) *In re* Barnett (1926) 12 F. (2d) 70, 77, cert. den. 273 U.S. 699, not mentioned by Beale; here the second Circuit Court reversed the decision cited by 2 *Beale* 943, n. 7 in favor of *lex situs* (12 Fed. (2d) 70); followed in U.S. v. Warren R. Co. (1952) 127 F. (2d) 136 with respect to "the contractual rights and obligations created by the leases."

\(^{182}\) *In re* Newark Shoe Stores, Inc. (D. C. Md. 1933) 2 F. Supp. 384.

\(^{183}\) 15 A.L.R. (2d) 1205 ff.

\(^{184}\) France: Trib. Seine (June 1, 1926) Clunet 1927, 400; See also *Donnedieu de Vabres* 629 on the presumption that the parties had the *lex situs* in mind.


even though one party signs elsewhere.\textsuperscript{137} In a recent \textit{obiter dictum}, it is true, the place of contracting was preferred to that of the land, but this would have been a meager ground; the decision finally was rested upon an express and clear clause of the contract.\textsuperscript{138} In Eurpose, \textit{lex situs} furnishes the subsidiary rule\textsuperscript{139} in the same manner as for sales of immovables, although the situs may be confused with the place of contracting.

\textit{Conditional sales}. It needs only a brief reminder that the usual conditional sale combines two distinguishable transactions, a sales contract and a conditional transfer of the title. The mistake of subjecting both elements to a contractual test such as the law of the place of contracting occurs in American courts\textsuperscript{140} and abroad.\textsuperscript{141}

\textit{Co-ownership} likewise, in any of its forms, as a real right is subject to \textit{lex situs}, in distinction to the contract for creation of the right.\textsuperscript{142}

\textsuperscript{137} Cassidy's Lt. v. Rowan (1917) 163 N.Y. Supp. 1079, 51 C.J.S. 810 § 205 n. 44. The Canadian corporation signed in Canada but received the completed instrument ("delivered") in New York.

\textsuperscript{138} Lee Wilson & Co. v. Fleming (1941) 203 Ark. 417.


Austria: OGH. (Oct. 11, 1934) 10 Z. ausl. PR. (1936) 790.


Germany: RG (Nov. 11, 1891) 3 Z. int. R. 157; (Oct. 14, 1897) JW. 1897, 581 No. 57; (Apr. 29, 1901) JW. 1901 452; (Dec. 7, 1920) 101 RGZ. 64; 2 BAR 108; NUSSEBAUM D. IPR. 232.

Poland: Int. Priv. Law. art. 8 (2).


Switzerland: 2 MEILI 77; 2 SCHNITZER (ed. 3) 621.


\textsuperscript{141} Even 2 FRANKENSTEIN 65, who stresses the importance of \textit{lex situs}, declares that reservation of property belongs to the obligatory contract. See 2 GOLDSCHMIDT 166 ff. against Cód. Bustamante, art. 118 ff.; 2 BUSTAMANTE (ed. 3) 113 § 931.

\textsuperscript{142} 2 ZITELMANN 330, cf. 363; NIBOYET, 4 Traité 231 § 1156.
3. Right of Stoppage in Transitu

This right of an unpaid seller, as developed in England since 1690 and stated in the Sales of Goods Act, 1893, results in a lien in case of the buyer's insolvency. The seller does not cancel the sales contract: he simply recovers possession. But in most systems, bankruptcy of the buyer is required; in certain systems, goods may be recovered although transportation to the buyer has been completed before the commencement of bankruptcy, or even after it; and particulars vary especially with respect to the rights of a bona fide holder of a document or title, who has purchased from the buyer. In addition, there are different theories within the same system:

The nature of this right of recovery is very controversial everywhere; some consider it a right in rem (cancelling the transfer?) making possible to sue a third acquirer not protected by good faith; others recognize but an obligatory claim unsuitable against third acquirers. Some teach that the claim is intended to retransfer the goods to the seller; the demand of separation would dissolve the sales contract as an effect of non-payment. Others assert that the sales contract is not affected; the claim would merely result in the retransfer of the goods, the re-establishment of things as they would have been without the delivery, so as to put the seller again into a position to exercise his right of retention; not ownership but possession would be revindicated.

Since the systems differ so widely and especially on the proprietary or merely contractual character of the right, the entire solution evidently must be left to the law indicated by the territorial situation of the goods. This, it would seem, points to the law of the place where the goods are at the time of stoppage.

143 §§ 44-46; United States, Uniform Sales Act, §§ 57-59.
144 Dölle, "Konkurs," Rechtsvergleichendes Handwörterbuch, 137.
145 Infra 100.
In *Inglis v. Usherwood* stoppage was obviously permissible according to Russian law, as against the English law of the buyer's domicile, since the contract was made in Russia between the seller and the buyer's local agent and the goods were still in the Russian port of departure. The decision, therefore, has been regarded as reconcilable with the *lex situs* theory in general, although it is not conclusive for it. No case better in point seems to be known.

Illustration. Cheshire, to demonstrate his singular theory of *lex actus*, submitted the following example:

"An English merchant, by a contract made in London, sells to a Swedish buyer copper stored in a warehouse in Antwerp. He draws on the buyer for the price and transmits the bill of exchange and the bill of lading to the buyer to secure acceptance. The buyer destroys the bill of exchange, but delivers the bill of lading to X in Stockholm without receiving value from him. The seller stops the copper in transit before it reaches Stockholm. Let us further suppose that the stoppage is unlawful by Swedish law."

Supposing with Cheshire that the sales contract is under English law, we cannot take for granted, nevertheless, that "the right to stop the goods is an incident of the original transaction." This would be true for English law; but whether English contracts law is applicable to the right of stoppage, and furthermore to the conflict between the seller and the holder of the bill of lading, cannot be simply decided under the law of the sales contract. If the stoppage is localized in Sweden, stoppage in itself is certainly permissible so long as the goods have not reached the buyer.

146 (*1801*) 1 East 515.
147 Against CHESHIRE'S ed. 3 579 see editor of DICEY (ed. 6) 561-562.
148 CHESHIRE (ed. 3) 581. I have to note, however, in the proofs, that this passage is omitted in Cheshire's fourth edition.
149 Sweden: Sales Law § 39.
But of course, the right of the seller has no effect against bona fide purchasers having acquired under Swedish law.\textsuperscript{150} English law has nothing directly to say about all this, although it does decide what the effect on the contract is.

The following chapters will first deal with the application of the principle to rights in immovables and in movables insofar as they are thought to remain in one jurisdiction (Chapter 55). Thereafter, the problems raised by removal of a chattel to another jurisdiction, that is, by the change of \textit{lex situs}, will require separate discussion (Chapter 56).

\textsuperscript{150} Sweden: Marit. Law § 166; 1 Tore Almén, Skand. Kaufrecht, 653, Anhang zu §§ 39-41, n. 21-28b.