CHAPTER 38

Sale of Immovables

I. WHAT LAW GOVERNS THE CONTRACT

CONCERNING the characterization as immovable, the old traditional rule that lex situs determines what rights are immovable, continues universally despite the doctrinal objections of a few followers of the "qualification according to lex fori." This auxiliary conflicts rule on characterization promotes uniformity in the domain of property as well as in that of contract.

In other respects, the picture is not so bright, and especially not in the United States. Here, the inconsistency apparent in choice of law for contracts in general, repeats itself in the special field of contractual promises to transfer land or an interest in land. After many vain efforts to extract a coherent law from the decisions, the best way is to recommend the rule approved by the majority of modern legislation and literature.

1 Restatement § 208; Montevideo Treaty on Int. Civ. Law (1889) art. 26, (1940) art. 32 (verbis "as to their quality"); Código Bustamante, art. 112. See Schönenberger-Jaeggli No. 261; Neuner, Der Sinn 130. For the adversaries, see Vol I (ed. 2) p. 58 n. 30 and Vol. IV Ch. 54.

2 "When we look behind the decisions in relation to specific questions for the formulation of a general and comprehensive criterion which will satisfactorily and consistently account for the results actually reached...disappointment generally ensues," Note, "Governing Law of Real Property Contracts," L. R. A. 1916A, 1011 at 1015. "There is confusion in the authorities upon the subject," Goodrich, "Two States and Real Estate," 89 U. of Pa. L. Rev. (1941) 427 at 420 n. 15. To the same effect Herzog, "The Conflict of Laws in Land Transactions: The Borderland Between Contract and Property Matters—A Comparative View," 8 Syracuse L. Rev. (1957) 191, 202, who, on the basis of a comparison between American, French, and Austrian law, reaches the conclusion "(1) that there is a considerable degree of uncertainty as to the law applicable in the case of land transactions, and (2) that this uncertainty exists in various countries, regardless of the method used to transfer title to land."
1. *Lex Situs* Compulsory

In the old doctrine, the law of the place where the land is located, extended to all parts of the transaction by which two parties sold and purchased any interest in land.\(^2\) Story shared in this tradition\(^3\) and his close follower, Foelix, wrote that the *lex rei sitae* governs "the obligations flowing from the sale of an immovable, the causes operating its nullity and its cancellation or rescission."\(^4\)

This clearly was the starting point of English and American conflicts law. Although its influence in the individual cases is difficult to evaluate, the principle is certainly applied when a court construes the contract, termed with characteristic vagueness "relating to land," as a single undivided entity, subject to the *lex situs*. The Iowa court followed this view in a decision discussed in the second volume,\(^5\) as it applied the statute of frauds of the situs without further investigation.

In this country, however, the simplicity of the old doctrine was efficiently shaken by the famous judgment of Holmes, then a Massachusetts judge, in *Polson v. Stewart*.\(^6\) The court recognized as valid a contract made by a married woman in North Carolina, although she promised to convey land in Massachusetts where she lacked capacity. In other words, the state of the situs recognized the obligatory contract of North Carolina as it stood. Theoretically at least, it would seem that at present the ancient doctrine has

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\(^2\) A Turkish court even took the position that it had no jurisdiction in a contract case concerning the cancellation of a sale of immovables in Syria, although the agreement had been made in Turkey; the Court of Cassation (Oct. 28, 1950) Clunet 1957, 1047 rightly rejected this view emphasizing that the contract to sell property must be distinguished from the conveyance.

\(^3\) Story §§ 372 ff.

\(^4\) Foelix (ed. 3) 110 § 60. Similarly, Fiore §§ 215, 224, often criticized in the literature, see as to Italy, Fedozzi 251.

\(^5\) Vol. II (ed. 2) pp. 491 f.

\(^6\) (1897) 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771; Lorenzen, Cases 593.
been abandoned in the United States, as well as in most countries. The Restatement fully recognizes the distinction between conveyance or transfer of land and contract to transfer or to convey land, and submits the validity of the latter promises to the law of the place of contracting.⁸

Remainders exist in Spain⁹ and some other jurisdictions¹⁰ to the extent that the domestic law is prescribed with respect to domestic immovables, in a one-sided public policy. Again, the Treaty of Montevideo reaches the same result as the old doctrine under the theory of lex loci solutionis, forcibly applied to all contracts promising interests in any property.¹¹

2. Lex Loci Contractus

Beale and the Restatement postulate the law of the place of contracting with respect to the validity of the contract,

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⁸ Restatement § 340 and comment.
⁹ See the Note of the Spanish Government to the Sixth Hague Conference, Document 143; cf. also Echávarri, 3 Cód. Com. 465.
¹⁰ Brazil: (Requiring writing and registration, App. Alagōas (March 3, 1944) 27 Direito 404.) Former Introd. C. C. art. 13 § 11. III, cf. 2 Pontes de Miranda 243, criticized by Espinola, 8 Tratado 547 § 157 citing Bevilaqua, 1 C. C. Com. (ed. 6, 1940) 136. The new art. 9 § 1, however, seems to refer only to formalities, cf. Espinola, B. Tratado 1813 § 156.
¹¹ Poland: Int. Priv. Law, art. 6 No. 3. The Polish Draft 1961, art. 13, subjects all transactions relating to immovables, not only those concerning domestic immovables, to the law of the situs, thus completely excluding party autonomy. To the same effect: Czechoslovakian Law of 1948 on private international law, § 44.

Switzerland: SCHOENENBERGER-JAEGER No. 189 and cited authors; 2 Schnitzer (ed. 4) 689 f.; Swiss law is the presumable law of contract, but if another law applies to the contract, Swiss public policy governs the obligatory promise to convey Swiss immovables.

Uruguay: C. C. art. 6; Guillot, 1 C. C. 123.

In Italy, some authors believed that a "vendita immobiliare" as a whole had to be solemn. See Vol. II (ed. 2) p. 492 n. 19, and for an application to the sale of aircraft, Lomonaco 86 § 14. The contrary and correct view has been confirmed by the wording of C. C. (1942) art. 1350, corresponding with old art. 1314 (1865).

¹¹ Montevideo Treaty on Int. Civ. Law (1889) art. 34 par. ún., (1940) art. 38 par. 1 (note the words "En consecuencia").
whereas the *lex situs* operates in matters of performance.\textsuperscript{12} Others have undertaken to harmonize the cases to the same effect by the distinction that “executory contracts” to transfer real property are under the *lex loci contractus*, while executed contracts follow the *lex loci solutionis*.\textsuperscript{13}

Misled by the theory of the last act in completing a contract, a few decisions have applied the law of the place where the deed of conveyance was delivered, determining thereby such problems as the measure of damages for breach of contract.\textsuperscript{14} This seems to mean that the entire obligatory portion of the contract is under this law. It is uncertain whether the same scope was intended in a decision determining the measure of damages for nondelivery of a deed.\textsuperscript{15} The land was in South Dakota but the deed was promised and to be delivered in Iowa. The court applied Iowa law. This could mean a special conflicts rule for the isolated duty of delivering the instrument, but probably does not mean it. According to the Restatement, § 341 (1), the law of the place where a deed of conveyance of an interest in land is delivered determines “the contractual duties of the grantor,” which proposition seems to clash with every other rule respecting contracts recognized in the Restatement. Delivery of the deed is a condition of conveyance. That the place where it is actually made, or for that matter, where it is to occur, should determine the legal effects of a conveyance, partly dislodging the significance of the situs of the land, is a possible idea. But that the place of that delivery should also localize the duty of the seller, to make good a defective title to the land, cannot be reasonably explained. This is a mere product of an obsolete concept of breach of warranty.

\textsuperscript{12} Restatement § 340; 2 BEALE 1190, 1216.
\textsuperscript{13} MINOR 31 § 11; L. R. A. 1916A, 1027; this formulation seems to stem from the wording of STORY § 363, first sent.
\textsuperscript{14} Atwood v. Walker (1901) 179 Mass. 514, 61 N. E. 58.
\textsuperscript{15} Clark v. Belt (C. C. A. 8th 1915) 223 Fed. 573.
These theories share in general the defects of emphasizing accidental localities, and some of them add the disadvantage of splitting title and obligation where no separation is required by the nature of the transaction.

3. Subsidiary Rule of *Lex Situs*

In the opinion prevailing in the world, obligations to transfer land or interests in land are governed by *lex situs*, where no other connection appears definitely required. This law is regarded as presumptively intended by the parties or as the law most naturally competent. This is the undoubted English doctrine; it is taught in France, Italy, and most countries, shared in Germany in consequence of the predominance of the *lex loci solutionis*, and has been adopted by international proposals. There is also American authority for complying with the intention of the parties, for which the location of the land may be important, but classification of the individual cases is difficult.


17 France: Niroyet in 2 Répért. 251 § 63; Lerebours-Pigeonnier, in 2 Repert. 251 § 63; Lerebours-Pigeonnier, Précis (ed. 7) 584 ff.; Batiffol 108 §§ 122 ff., 393 §§ 471 ff.; Batiffol, Traité (ed. 3) 645 § 593. Contra: Barten, 2 Principes 65 n. 5 without argument.

18 The Netherlands: Kosters 756; Mulder (ed. 2) 170.

19 Poland: Int. Priv. Law, art. 8 No. 2.

20 Switzerland: Schoenenberger-Jaeggi No. 261; Becker in 6 Gmür Vorbemerkungen zu arts. 184-186 No. 27.


Contra: Rolin, Revue Dr. Int. (Bruxelles) (1908) 602 (in contrast to leases of immovables).

21 Inst. of Int. Law (Florence), 22 Annuaire (1908) 290 art. 2 (b); Int. Law Ass'n, Vienna Draft 1926, art. 1, A, in 34th Report (1927) 509.

22 Story § 363; Goodrich 394 § 145; II Am. Jur. 325 § 38; Stumberg (ed. 2) 377 ff. and the Restatement (Second), Tent. Draft No. 6 (1960) § 346e.

23 See, to the same effect, Note, L. R. A. 1916A at 1021 ff. The decisions referred to by 2 Bala 1150 § 340, 1 at n. 4 for the *lex situs* mostly concern capacity, although Hamilton v. Glassell (C. C. A. 5th 1932) 57 F. (2d) 1032,
Exceptions to the subsidiary rule of the situs have been claimed, apart from a contrary agreement of the parties, for land situated on a border, and land that is only a small part of an estate. Certainly an exception must also be admitted when both parties are domiciled in the same country and there contract with respect to foreign land.

Illustrations. (i) An English decision applied English law to the purchase of a share in a decedent's estate, including real and personal property in Chile, where the parties were three brothers, all of them domiciled in England, and the purchaser residing in Chile. Presuming that the court correctly found Chilean law unsuitable to the contract, the lex loci contractus had so many relations to the case including the domicil and residence of the vendors, that its application was justified.

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1033 is based on presumed party intention. LORENZEN, 6 Répert. 307 Nos. 129, 130 does not regard lex situs as governing all phases of the contract, as BATIFFOL 110 § 123 has understood; LORENZEN discusses the problem on p. 324 No. 206.

The often cited decision in the New York case, Hotel Woodward Co. v. Ford Motor Co. (C. C. A. 2d 1919) 258 Fed. 322 belongs to the several cases where lex fori coincides with lex loci solutionis; in addition both parties were domiciled in New York. The judge would personally have preferred the law of Georgia where the deed was executed.

The decision of the Supreme Court of the United States in Selover etc. v. Walsh (1912) 226 U. S. 112 only confirms the constitutional power of a state to apply the law of the place of contracting without deciding whether it should do so under a sound conflicts rule.

For an analysis of the American cases under the aspect of the so-called Rule of Validation, see EHRENZWEIG, Conflict 612 ff. § 233 (c) and WILLIAMS, "Land Contracts in the Conflict of Laws—Lex Situs: Rule or Exception?" 11 Hast. L. J. (1960) 159.


United States: Restatement (Second), Tent. Draft No. 6 (1960) § 346e (1) declares the lex rei sitae only applicable "in the absence of an effective choice of law by the parties."


26 M. WOLFF, Priv. Int. Law (ed. 2) 434 § 415.

27 COOD v. COOD (1863) 33 L. J. Ch. (N. S.) 273, 278, criticized by M. WOLFF, supra n. 26.

27a In a case where two Swiss citizens with domicil in Switzerland entered into a contract relating to land in France, the agreement being made with the assistance of a French notary public but the price being fixed in Swiss
(ii) When a contract on the installment plan for the purchase of Colorado land was made in Minnesota and the Minnesota court applied its domestic statute prescribing a certain notice to be given before forfeiture of the paid installment sums, the court invoked the principle that the *lex loci contractus* applies when the price is to be paid in the state. But not only was the seller a corporation chartered and domiciled in Minnesota but the buyer was a citizen of that state. For this reason it was a domestic contract.

(iii) Other cases are more doubtful. Where a contract was made in California for the purchase of mining property in Mexico with the price secured by notes and mortgages in California, the court failed to state that the California connections were strong enough to sustain a tacit agreement for California law. It should, then, not have applied this law to the question of rescission.

Such subsidiary localization of the contract at the situs is preferable to the artificial method of identifying the place of contracting with the situs. An offer for the purchase of land in Maryland was mailed from England and the acceptance mailed back; the deed should have been delivered in England, but was not. The Maryland court invoked the settled method of applying its own law *qua lex situs*, but conceived this as an extension of the real property rule and thought it should corroborate the result by an auxiliary construction in the course of which the place of delivery of the deed was discarded because no English town had been named. Neither approach was correct; the law of

currency, the Federal Tribunal held French law applicable; BG. (Nov. 12, 1956) 82 BGE. II 550, criticized by GUTZWILLER, Schweiz. Jahrb. I. R. 1957, 280. If the court had followed a rule similar to that of the new Restatement, Swiss law would probably have applied; see Restatement (Second), Tent. Draft No. 6 (1960) 93, and REESE in 37th Annual Meeting of the American Law Institute (1960), Proceedings, pp. 542 f.

28 Finnes v. Selover (1907) 102 Minn. 334, 113 N. W. 883.

29 See BATIFFOL 111 ff. on American cases; NUSSBAUM, D. IPR. 232 on certain decisions of lower German courts.

30 Loaiza v. Superior Ct. (1890) 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376. The parties were English and Mexican nonresidents.

31 Latrobe v. Winans (1899) 89 Md. 636, 43 Atl. 829.
the forum could simply be assumed to be the most closely connected law.

In this prevailing view, obligatory and real property transactions are distinguished, not only when they appear in separate agreements or instruments as happens in many countries, but also when they are closely knit together in a deed of conveyance. The obligatory part of the entire transaction depends on the real property law of the situs only insofar as no effect on the title or interests is possible without the consent of the state of situs. The situs prescribes the kind and conditions of the transferable interest, the formalities of the transfer and capacity to alienate and acquire such interest.

*Equitable remedies.* On the other hand, the subject has become slightly complicated in common law because of the intervention of equity jurisdiction.\(^{32}\) The Court of Chancery, by assuming a constructive trust and in other ways, undertook to right wrongs done by an English defendant with regard to foreign land. In particular, the practice has been settled that on a contract for selling or charging land, where the land is outside the jurisdiction of English courts, an action *in personam* is allowed to enforce the execution of a correct sales instrument sufficient under the *lex situs*.\(^{33}\) The *lex situs* is thereby respected to the extent that no interest in the land is deemed to be validly promised that does not conform to the law of the situs. The promise to convey a recognized interest, however, is effective irrespective of the validity of the contract under the law of the situs. No Anglo-American peculiarity of international bearing is noticeable in this practice, as confined to the problems of taking jurisdiction and of administering the local equity procedure. Only when the domestic law is applied despite the closer


\(^{33}\) Lord Cottenham in *Ex parte Pollard* (1840) Mont. & Ch. 239.
connection of the contract with the situs, as has occurred in some cases just for the purpose of taking jurisdiction otherwise not obtainable, do these courts deviate from normal jurisprudence.

II. Form and Capacity

1. Form

Whether a contract promising to transfer an interest in land must be written, authenticated, registered, or in the form of a deed, is usually determined under the general conflicts rules concerning formality. In the doctrine prevailing throughout the world, this means that the contract may comply either with the law of the place of contracting or with the law governing the substance. In this special application, this optional variant of locus regit actum is also recognized in England, if not clearly by judicial authority, at least by the writers. The American approach, uncertain between lex loci contractus and lex situs, would seem to suggest a correction toward the same view. The Treaty of Montevideo, however, applies the lex situs under the guise of lex loci solutionis.

In some countries, the lex situs is applied, either openly or as a matter of public policy, to formalities when domestic immovables are involved.

It will be discussed separately whether these rules extend to the manifold provisions prescribing formalities for

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34 France: Lex loci contractus is emphasized by Cour Paris (June 6, 1889) Clunet 1889, 826; Niboyet 634 § 507, 2, but this can scarcely be meant as a compulsory rule.
Germany: EG. BGB. art. 11; cf. Walker 332 n. 12; see Vol. II (ed. 2) p. 492.
The Netherlands: Offerhaus, 30 Yale L. J. (1921) 117.
Rumania: Plastara, 7 Repert. 77 No. 253.
1 Bar 620; Gierke, 1 D. Privatrecht 231 n. 61; 2 Meili 67.
35 Vol. II (ed. 2) p. 489.
36 Cheshire (ed. 6) 600, referring to In re Smith, Lawrence v. Kitson [1916] 2 Ch. 206; M. Wolff, Priv. Int. Law (2 ed.) 524; Dicey (ed. 7) 817.
37 Goodrich 272 § 106; Batiffol 111 § 125.
38 Supra n. 11.
39 Poland: Int. Priv. Law, art. 6 (3); and others, supra n. 10.
authorizing agents to make a contract for the transfer of land.  

2. Capacity

Although capacity to transfer an immovable, of course, depends on the conflicts law of the country where it is situated, capacity to promise such transfer is distinguishable. It was a question of the capacity of a married woman on which Mr. Justice Holmes formulated the contrast between personal covenants and the incidents of the *lex situs*.  

In conformity with their general attitude, common law courts will prefer the law governing the contract, whereas at civil law the personal law governs. The latter is also sporadically applied in the United States.  

If the promise is valid under the law of the contract, but the promisor is unable to fulfill it because of incapacity under the law of the situs, he at least owes damages for not conveying the interest, except in the state where the land lies and in other states where he is regarded as incompetent.

### III. Covenants for Title

At common law, agreements in deeds of conveyance are distinguished as those “running with the land” and those

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40 *Infra* Ch. 40 p. 175.
41 Polson v. Stewart (1897) 167 Mass. 211, 45 N. E. 737; see Vol. II (ed. 2) p. 492 n. 17.
43 United States: 2 BEALE 1177; GOODRICH 383 § 145; STUMBERG (ed. 2) 241 f.; Restatement (Second), Tent. Draft No. 6 (1960) § 333.
44 Germany: EG. BGB. art. 7. For the authority of guardians, see OLG. München (Sept. 8, 1938) H. R. R. 1939, No. 81.
45 The exceptions for transactions by foreigners who would have capacity under the domestic law, are applicable, whereas they do not apply usually to capacity for disposing of foreign real property by act within the forum. See Vol. I (ed. 2) p. 202; German EG. BGB. art. 7 par. 3; Ital. C. C. Disp. Prel. (1942) art. 17 par. 2, etc.
47 CHESHIRE (ed. 6) 601.
not running. The former category includes promises creating under certain conditions a benefit for, or a burden on, the successors of the purchaser without, however, establishing encumbrances that would benefit or burden any owner of the land in the manner of a *jus in re.* (It is misleading, therefore, to call these agreements "real covenants.") Also the grantee may promise, for instance, restrictions on building binding his successors in title.

Interstate conflicts exist mainly with respect to covenants deemed to be implied in some states but not in others. For instance, some states, by statutory or judicial construction, interpret the words "grant and bargain" used by the grantor as implying promises of good title, quiet enjoyment, and freedom of encumbrances, in favor of the purchaser and all persons acquiring from him through similar conveyances.

In the traditional view, covenants running with the land are governed by the *lex situs.*[^46] Consequently, it is assumed in the Restatement that this law decides whether and under what conditions a covenant runs with the land.

For the agreements not running with the land, opinions are divided. In one view, the *lex situs* again applies.[^47] In another, followed in a series of cases, these agreements being "merely contractual" and without connection with the land, are declared to be governed by the law of the contract, that is, commonly the *lex loci contractus.*[^48] The Restatement places them under the law of the place where the deed of conveyance is delivered.[^49] There is considerable

[^46]: Restatement § 341 (2) and comment; Platter v. Vincent (1921) 187 Cal. 443, 202 Pac. 655; Lorenzen, Cases 587; for other cases, see Goodrich § 146 n. 28, 29, 30; Minor 457 § 185; Leflar, Conflict of Laws 278; 17 L. R. A. (N. S.) 1094; L. R. A. 1916A, 1027 n. 49, and for the municipal doctrine in question, WM. Rawle, Covenants for Title (ed. 5, 1887) 301 § 205.


[^48]: Bethell v. Bethell (1876) 54 Ind. 428, Lorenzen, Cases 585; other Indiana cases, see Goodrich § 146 n. 33; other cases, Note, L. R. A. 1916A, 1027 n. 48; Wharton § 276 (d).

[^49]: Restatement § 341 (1).
opposition to this treatment, though termed logical, on the ground that the distinction is questionable or difficult, or too technical for the purpose of conflicts law. In this view, covenants should fall under one law, the *lex situs*, avoiding the confusion caused by the distinction of groups and division of opinions. \(^{50}\)

There is much force in this proposition but more precision is needed as to the ground and scope of the *lex situs*. Legal history may help. The cases extending *lex situs* to all covenants evidently have been influenced by the old broad scope of that law which comprehended the entire contract by force of sovereignty. If the choice of law resorts to *lex situs* only for convenience, it has to consider any contrary agreement of the parties as well as the special situations in which the contract is centered elsewhere. Do these considerations not apply to covenants running with the land? On the other hand, what is the relationship in nature between covenants for title and veritable *iura in re*, the proper field of *lex situs*?

That so much is unstable and controversial in the matter of covenants for title in common law, in contrast with the romanistic systems which sharply distinguish obligation from right in a thing, must be a residue of legal history. Traditionally, in England, as almost everywhere except in classical Rome and derivative systems, real rights were rights to possession and consisted in the better claim between two persons. The abstract and absolute character inherent in the developed Roman *dominium* and *jus in re aliena* was absent or less marked. Moreover, until the nineteenth century, formal certainty, as assured by public land registers in Central Europe, did not exist, and surrogates were needed, quite as in ancient times. Covenants and title records

are derived in the last instance from the universal custom of *instrumenta antiqua*—so termed by the Roman jurists contemplating the Eastern usages, and by the Italian lawyers in considering the Lombard practice,—a chain of conveyances transmitted from each vendor to his purchaser, together with the deed embodying the actual sale. Each document contained a comprehensive stipulation of warranty against the vendor, his family, and successors infringing the alienation, and promising protection or penalties in case of attacks by strangers.

The usage in England was almost exactly the same, although with great legal elaboration. The extended conveyance clauses beginning to appear in the thirteenth century regularly expressed the promise of warranty to the feoffee, his heirs and "assigns," which granted a remote successor direct claim against the original feoffor. These warranties of title formed the transition from a merely relative concept of a claim to possession to the absolute right in real property. Where a legal system is ready to accord the buyer independent possession and full ownership by derivation from the former owner, there is no necessity for promises of the vendor that he himself or persons on his behalf shall not disturb the buyer's right, although the French Civil Code (article 1628) still contains the doctrine of *fait du vendeur*, and a certain usefulness may be found in it. Clauses covering eviction by third parties on the ground of the vendor's defective title lose importance with the introduction of means providing public knowledge of the true legal situation of the land.

51 See the excellent article by S. J. Bailey, "Warranties of Land in the Thirteenth Century," 8 Cambr. L. J. (1944) 274; 9 id. 82.
52 The present writer has repeatedly dealt with the subject and refers in particular to his book, 1 Haftung des Verkäufers wegen Mangels im Recht (1902) 33 ff. (Roman Law and papyri), 169 ff. (Germanic laws); and various articles, esp. Katagraphe, 54 Zeitschrift der Savigny Stiftung, Rom. Abt. (1934) 189, 198; "Die eigene Handlung des Schuldners und des Verkäufers (Fait du débiteur; fait personnel du vendeur)," 1 Rheinische Z. f. Zivil- und Prozessrecht (1909) 187.
In the light of these short observations, it is instructive to comment on two outstanding judicial statements. 

*Geiszler v. De Graaf.*\(^{58}\) This New York decision describes the nineteenth century distinction between two types of covenants for title. Covenants in which the grantor of land promises quiet enjoyment to the purchaser or declares warranty of title, were distinguished from those in which he declares that he has lawful seisin or the right to convey or that the land is free of encumbrances.

In the former type of covenant, the breach was construed to occur only on eviction, actual or constructive.\(^{54}\) The benefit of this covenant runs with the land and any subsequent purchaser in an uninterrupted chain of conveyances containing such a covenant ("privity of estate") may sue any predecessor for the breach of warranty. A breach of the latter type of covenant occurred, if at all, upon delivery of the deed and therefore the right of the grantee became a chose in action which did not run with the land. This rule, probably based on the ancient impossibility of assigning choses in action was abandoned by the New York court.

With respect to the first group it seems never to have been doubted, either in New York or elsewhere in America, that the traditional stipulations of warranty were within the scope of the *lex situs*, although in Europe this has only been assumed by Foelix and one other writer.\(^{55}\) But this treatment is only convenient, not necessary. Of course, the contractual bond between the parties to each of the successive contracts is insufficient to justify the "running"; there must be an agreement "touching and concerning the land" and "privity of estate."\(^{56}\) Nevertheless, the warranty of

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54 WM. RAWLE, Covenants for Title (ed. 5, 1887) § 202.
55 I FOELIX (ed. 3) 110 § 60; Massé, 1 Droit Comm. (ed. 2) 546 § 637, as cited by 8 LAURENT 222. *Contra:* the editor of FOELIX (ed. Demangeat) loc. cit.; LAURENT loc. cit.
56 CLARK, Covenants 150.
good title or the promise to indemnify the purchaser and his successors, creates a contractual obligation, necessary and significant for the situation. The unconscious reason why this institution is attributed to the law of the situation is the same which once suggested the so-called "jumping recourse." 57 The succession of auctores of old and the series of written documents since the Middle Ages form the mechanism to secure the legal position of the possessor; they furnish the only practical evidence of title, until prescription is realized. Since conflicts law has only to ponder the social importance of local connections, it may reasonably connect the complex of such warranty relations with the situs of the land, which is where the records of title are held and the only fixed contact of the entire chain.

As to covenants of lawful seisin, or right to convey the land, and against encumbrances, since they were said to be broken upon delivery of the deed, they were subjected to the law of the place of this delivery. The modern construction, followed in an English statute of 1881, 58 is now shared by most American courts. In the absence of contrary agreement, the grantor is presumed to give his promise to every successor in the chain so that the right is assigned with the land to the subsequent purchaser. This assignment is independent of any "nominal" breach said to be committed by delivery of the deed with the false statement. Hence, all the mentioned types of covenants run with the land. Presumably they are under the lex situs.

We may, then, finally appreciate the desirability of treating all covenants under the same law, and therefore of determining the nature and effects of the promises by the law of the state where the land is.

But there can be a difference in conflicts law between

57 Haftung des Verkäufers, supra n. 52, 244-249.
58 44 & 45 Vict., c. 41, s. 7.
covenants for title and veritable encumbrances. In the field of obligation, and only in it, the parties enjoy autonomy in the true sense, so that they may at their pleasure vary the qualification of the rights created by their stipulations. They must as well be able to choose the applicable law. Likewise, in a case such as *Cood v. Cood*, where the contract relating to foreign land is made at the common domicil of the parties, the contract is centered there and covers all obligations of warranty.

*Smith v. Ingram.* Another point is illustrated by the doctrine neatly presented in *Smith v. Ingram* and often repeated since. Two effects of covenants of warranty were distinguished. One is that the vendor is estopped from claiming the land against any purchaser in the proper chain of transfers. This effect, subject to the law of the situs, was denied in the instant case under the law of North Carolina where the land was, the seller being a married woman, whose contract was valid under the law of her domicil in South Carolina. The other effect is that an action on the covenant arises for breach of warranty, as a purely personal contact, sounding in damages only, and this would be determined by whatever law governs the obligatory contract.

To a comparatist this reasoning appears very attractive. A parallel may support it and suggest its adoption in civil law courts. In fact, the doctrine of estoppel has produced a perfect analogy to the Roman *exceptio rei venditae et traditae*—not noted thus far by historians, as it seems. In the just-mentioned ancient stipulations, and in later periods by the legal force of sales contracts, the vendor

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59 *Supra* n. 27.

60 (1903) 132 N. C. 959, 44 S. E. 643, 61 L. R. A. 878; Wharton 630 and n. 15 § 276 (d); 17 L. R. A. (N. S.) 1094. The decision in the particular case of *Smith v. Ingram* had an odious result, pointed out in the dissenting vote by Walker, J., but this phase was due to the old doctrine concerning the capacity of married women.

61 I do not mean to say that the Romans knew covenants running with the land; see Buckland and McNair, Roman Law and Common Law (1936) 91.
promised that both he and his successors should not disturb the purchaser and the successors of the latter. Under Roman law, however, where the vendor sold and delivered land (or a slave) to the buyer but either failed to proceed to the formal act (mancipatio) required for transferring the ownership at law (dominium ex jure Quiritium) or had only subsequently acquired the title, the seller was entitled at law to enforce his "Quiritarian" ownership by vindicatio. But because he was obligated to transfer title to the buyer, he encountered the praetorian defense that he had sold and delivered. This exception was a part of the mechanism by which the praetor recognized an interest of the buyer, which under the name of "in bonis habere" closely approached ownership and by the Greek interpreters was called bonitarian ownership. Thus, the purchaser and his successors in title were protected against the owner or one from whom he derived title, on the ground of an obligatory right transformed into a kind of property. This defense against the nominal owner pertains to the law of the situation.

Apart from estoppel, the law of the contract, generally but not necessarily the law of the situs, covers the creation and effect of all covenants. This result is simple and satisfactory.

Our discussion has no bearing on such agreements as a

Just for the historical interest connected with warranty for title, we may note the controversy in the old French doctrine regarding the law determining the vendor's duty to furnish security against possible eviction. Certain post-glossators, reading GAius' Lex si fundus, Dig. 21, 2, 6, interpreted the consuetudo eius regionis in qua negotium gestum est, as the law of the vendor's domicil rather than the lex situs, and BOULENOIS, 2 Traité de la personnalité et de la réalité des loix (1766) 461 explained the former as presumably intended by the parties. In the nineteenth century, this warranty was not distinguished from the other incidents of a sale of immovables, see 8 LAURENT 223 § 153.

The Restatement (Second), Tent. Draft No. 6 (1960) § 346f submits "the contractual duties imposed upon the grantor by a deed of transfer of an interest in land" to the lex rei sitae except if otherwise provided by the parties, and except as to minute details of performance. This rule, which is intended to take the place of original § 341, is said (id. at 100) to have the express support of the first edition of the present book (RABEL, 3 Conflict of Laws
promise to convey, or a promise by the vendor of a manufacturing plant not to enter into competition with the purchaser.

IV. **Laesio Enormis (Inadequacy of Consideration)**

In conformity with French law, the Civil Code of Louisiana allows a vendor of an immovable estate sold for less than half the value, to demand rescission, unless the purchaser chooses to make up the just price and keep the thing sold. This remedy, abolished in Quebec, and most other countries, developed out of an institution going back to the legislation of the early Byzantine Empire. In common law, a shocking insufficiency of valuable consideration in a bilateral agreement is likely to be treated as a presumptive fraud and as such has been paralleled with the *laesio enormis* of civil law.

In conflicts law, the subject has been interestingly discussed, notably by French writers. A number of authors have construed, from a purely French point of view, every *lésion* as a defect of consent and therefore subject to the national law of the damaged party. In another theory, the

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110-17 (1950)). But according to Restatement (Second), Tent. Draft No. 5 (1959) § 222, Comment b, the *lex rei sitae* forcibly determines "whether a covenant runs with the land, and what the effect of its running may have on other interests in the land." Consequently, the scope of § 346f is narrower than that of the rule advocated here.

63 Minor 458 § 185.


65 France: C. C. arts. 1674-1685, "of rescission of the sale on the ground of lesion."

Austria: Allg. BGB. § 934 has preserved the general remedy of lesion.

66 Louisiana: C. C. (1825) arts. 2567-2575; (1870) arts. 2589-2600.

67 Quebec: C. C. arts. 650, 1012. But it still exists in Italy: C. C. (1865) arts. 1529-1537; (1942) art. 1448. On South Africa, see infra ns. 78, 79.

68 Cod. Just. 4, 44, 2, proved to be interpolated by Gradewitz, 2 Bulletin dell'istituto di diritto romano (1889) 14; see Jolowicz, "L'origine de la *laesio enormis*," in 1 Introduction à l'étude du droit comparé (Études Lambert 1938) 185. For the connections between Justinian's compilation and the modern doctrines, see Dawson, "Economic Duress etc.,” 21 Tul. L. Rev. (1937) 345, 364 ff.

69 Coles v. Perry, (1851) 7 Tex. 109, 134.

70 § Laurent 212-216; Bartin, 2 Principes 66 § 243; Audinet in S. 1931.2.145; Lapradelle in Revue 1932, 295.
SALE OF IMMOVABLES

*lex situs* applies directly or as intended by the parties. But the *lex situs* has also been supported on another ground. Maury, after an elaborate historical study, states separate legislative motives for the six different cases of genuine lesion at present founding rescission in French law. With respect to the vendor’s lesion, he discards the idea of deficient assent or moral coercion and he doubts whether the purpose of protecting vendors or owners has been decisive. Finally, accepting the latter idea, he restricts the French provision to French immovables. This places the problem under the *lex situs*. Batiffol objects that the true thought of the French legislator is not so much to care for an American owner of a villa in Cannes on the Riviera, but to favor a French family owning immovables wheresoever. His conclusion is to apply the law of the contract. But Capitant has authoritatively stated that it is impossible to say which among the mingled ideas from the Byzantines to the present can be termed the true foundation of this institution. When Maury replied that “Certainly it is very difficult to choose, but since we place ourselves in the point of view of private international law, we are forced to do it,” Capitant answered: “But this is arbitrary.”

For the law of the vendor as the party possibly obligated, 2 *Bar* 43; 2 *Frankenstein* 302.

The personal law of the vendor in combination with other laws has been advocated by Rolin, *3 Principes* 210.

71 *Cour Paris* (Feb. 9, 1931) D. 1931.2-33, S. 1931.2.145, Clunet 1932, 109, Revue 1931, 348 (*lex rei sitae* for lesion of a contract in Paris for sale of a German immovable, notwithstanding *lex loci contractus* applied to the contract in general); Cass. req. (June 29, 1931) S. 1932.1.289, Revue 1932, 295 (on the ground of a Morocco law); see attempts to harmonize at least the second decision with the theory of *lex loci solutionis* by Batiffol 343 n. 5, 351 n. x. Código Bustamante, art. 182: “territorial law” for rescission in general also seems to mean the *lex situs*. 2 *Brocher* § 185; *Champcommunal*, Revue 1932, 508.


73 Batiffol, Revue 1934, 630 and Batiffol 351 § 405 n. 4.

74 3 Travaux du comité français, *supra* n. 72, 100, 102.
It is not exact that conflicts law should depend on a doubtful intention in the legislative background of the domestic and still less of a foreign legislation. Nor are Maury’s results good enough. He himself notes a “crying injustice” in deducing that when a sale is made under French law with respect to German immovables, French law would not be applicable because it refers to French immovables only, whereas the general remedy of German law against usury, the nullity of a contract violating good morals (BGB. § 138), would not apply because it refers only to contracts governed by German law. Why should a remedy be severed from the contract? The problem is not one of real property although it has been claimed as such most recently by Niboyet. On the other hand, the *lex loci contractus* as such has no more justification than usual. The law of the contract must govern, and this is ordinarily, but not always, the law of the place where the land is.

Illustration. A contract was entered into in the Transvaal Republic for the sale of land situated in the Cape Province. Lesion was a valid defense under Transvaal law, although such defense has been repealed by the law in the Cape Province. The court applied the law of the place of contracting, which was also the law of the forum, on the argument that lesion like fraud must be judged in considering the place where the vendor committed it. In our view the situs of the immovable is not “an immaterial incident,” as the court assumed, but (in the absence of closer connections in particular cases) it is the center of the entire transaction, as it also furnishes the data for appraising the “just price.”

75 Maury, Revue Crit. 1936 at 382.
76 Niboyet, 4 Traité 243 § 1158.
77 Fidoozi-Ceretti 732; 2 Restrepo Hernández 72 § 1112.
78 Lerbourg-Picconnière, Note, D. 1931.2.33; Batiffol 350 § 404.
80 Cape of Good Hope Prov.: Act No. 8 of 1879, § 8.