CHAPTER 55

Scope of *Lex Situs*

I. CREATION OF REAL RIGHTS BY TRANSACTION

1. Capacity to Dispose and Acquire

THE Anglo-American doctrine has maintained the full dominance of the situs over the capacity of the parties. The *lex situs* determines the ability to convey and to accept or hold an interest in land [1] as well as in a chattel. But the reference of this principle to *movables* has not been so firm, either in England where opinions are divided in the absence of authority, or even in this country.[2] Story held with the great majority of authors of his time that since movables were subject to the personal law of the owner, capacity was also governed by the law of the domicil.[3]

[1] Immovables (constant practice): Birthwhistle v. Vardill (1840) 7 Cl. & Fin. 895; Bank of Africa Ltd. v. Cohen (1909) 2 Ch. 129, 135, 143; on objectionable grounds, see DICEY (ed. 6) 531; CLARENCE SMITH, 1 Int. & Comp. L.Q. (1952) at 470; CHESHIRE (ed. 4) 551.

Scotland: Ogilvy v. Ogilvy's Trustees (1927) Sc.L.T. 83; Black v. Black's Trustees (1950) Sc.L.T. (Notes) 32; DONALDSON, 4 Int. L.Q. (1951) 102.

Canada: Landry v. Lachapelle [1937] 2 D.L.R. 504.

United States: Restatement § 216; 2 BEALE 941 § 216.1; GOODRICH (ed. 3) 148, 474; CLARENCE SMITH, "Capacity in the Conflict of Laws," 1 Int. & Comp. L.Q. (1952) 447, 468.

[2] Movables: United States: Restatement § 255; *cf.*, 2 BEALE § 333.3, 340.1; GOODRICH § 154 n. 83.

England: For *lex situs* also as to movables, WESTLAKE § 150, *cf.*, § 165; FOOTE 279, *cf.*, 251.

For the law of the domicil, except for gifts and commercial transactions, DICEY (ed. 5) 606, rule 151; M. WOLFF, Priv. Int. Law 523 § 499 (generally); (Scotch) Black case *supra:* Lord Mackintosh held a trust settlement of a married woman domiciled in Transvaal invalid under Transvaal law respecting movables everywhere.

[3] STORY §§ 367, 368; 1 FOELIX §§ 61, 87, 92, 93; see CLARENCE SMITH (*supra* n. 1) on Louisiana, Ohio and New Hampshire (*infra* n. 9).

On the Continent, the broad expanse of *lex situs* in transactions involving land has been followed occasionally, notably in France.[4] The present doctrine, however, is entirely fixed in favor of the personal law, that is, the national or domiciliary law.[5] This view is so strong also in Latin America that a provision of the Argentine Code, literally taken from Story, has been explained away.[6]

Apart from the problems concerning corporations,[7] the question has lost much of its practical importance by the emancipation of married women. It is still encountered under numerous systems when a married woman encumbers her land for the benefit of her husband,[8] and of course with respect to the disabilities of lunatics and minors.

In no system is importance attached in principle either to the place where an instrument of conveyance is executed,[9]

[4] France: See on and against the older decisions involved, PRUDHOMME, "De l'application de la loi de l'étranger 'réputé absent' par sa jurisdiction nationale aux immeubles situés en France," Clunet 1932, 53, commenting on Trib. Civ. Seine (April 24, 1931) *ibid.* 83, which opened a path to the personal law.

Austria: WALKER 135 n. 55 cites a similar decision, OGH. (Oct. 20, 1924).

Greece: Cass. (1952 Nr. 323) 5 Rev. Hell. 310: a stock corporation possessed land in Lesbos, now Greek; its right was denied not because it was an alien but because under the former Ottoman law of situs a stock corporation had no capacity to have possessory rights in land.

[5] Louisiana: Augusta Ins. & Banking Co. v. Morton (1848) 3 La. Ann. 417.

France: Cass. Civ. (April 13, 1932) D. 1932.1.89 note Basdevant, S. 1932.1.361 note Audinet, Revue 1932, 549.

Germany: EG.BGB. art. 7.

Switzerland: C.C. Final Disp. art. 7b par. 2: national law governs capacity to dispose of foreign land, whereas for Swiss land capacity according to Swiss law suffices.

[6] Argentina: C.C. art. 10, see the literature in 2 ROMERO DEL PRADO, Manual 255 ff.; this author himself, 272, seems to interpret "capacity of acquisition" as meaning the ability of the thing to be an object of property.

[7] See Vol. II, p. 73.

[8] *Cf.*, Restatement § 225 comment (b); GOODRICH 391; DIENA, Dir. reali 287 § 82.

[9] But see Proctor v. Frost (1938) 89 N.H. 304, 197 Atl. 813; *cf.*, COOK, Legal Bases 274; GRISWOLD, 51 Harv. L. Rev. (1938) 1206; a mortgage on New Hampshire land by a married woman securing her husband's debt is declared valid against the law of the situs according to Massachusetts law, with emphasis on the place of execution, although the court could have better invoked her domicil in Massachusetts; see Note 51 Harv. L. Rev. (1938) 1444. Cook has inspired the editors of DICEY (ed. 6) 531 to original suggestions.

or to the place where the obligatory contract is made, or to any contact of its performance. Civil law, however, has the well-known exceptions enabling foreigners to contract in the forum with the capacity they would have under the domestic law. In Germany, this exception allows a foreigner to dispose of his German immovables or of his movables situated anywhere, though not of his foreign immovables.[10]

Some modern writers, once more, seem dissatisfied, each with the rule of his own country. Cook declared the law of the situs undesirable and seemed inclined towards the law of the domicil,[11] while Niboyet advocates the *lex situs*.[12] Recalling the assumption that the American conflicts rule on capacity to contract is sound in reference to business matters [13] and that for sales contracts respecting land a subsidiary rule should refer to the *lex situs*,[14] it seems consistent to prefer the *lex situs*.

This result cannot be based on a renvoi. Repeatedly scholars have attempted to trace the *lex situs* to a renvoi from the law of the domicil, or vice versa to derive the personal law from a concession by the *lex situs*. Both assumptions are historically unfounded, since both personal and real statutes were the elements of the statutist doctrines. Nevertheless, we may accept determination of capacity by the law of the situation much more easily if at the same time we admit that capacity may alternatively be granted by the law of the domicil, on the basis of a renvoi by the *lex situs*.

[10] Germany: EG.BGB., art. 7 par. 3; RAAPE, D. IPR. 373 f., illustrates. A Hungarian (then held minor at 22 years) sells a painting hanging in Budapest and transfers ownership by contract in Germany; after having brought the chattel to Germany, he tries without success to plead minority.

[11] COOK, 52 Harv. L. Rev. at 1269 n. 48.

[12] NIBOYET, 4 Traité 205 § 1148; 385 § 1196; 5 *id.* 508 § 1531.

[13] *Supra*, Vol. I, p. 195.

[14] *Supra*, Vol. III, p. 104.

2. Form

(a) *Exclusive lex situs.* In the older civilian doctrine,[15] the Anglo-American,[16] and a German-influenced group, [17] *lex situs* exclusively governs the formalities of transactions creating, modifying, or terminating real rights, as opposed to the contract promising a transfer.[18] Hence, compliance with the law where the conveyance is made or a deed delivered is not primarily sufficient. The rule *locus regit actum* is not applicable in this opinion. Accordingly,[19] the courts put it up to the foreign law of the situation, irrespective of the *lex fori,* to prescribe registration,[20] or execution of a mortgage before a court.[21]

In the United States, however, the statutes in a number of states respecting their own land, in turn, recognize a conveyance executed in another state under the form used there,[22] and thus restore to a degree the idea of *locus regit*

[15] Prussian A.L.R., Einleitung § 115, *cf.,* FOERSTER ECCIUS, Pr. PR. 1 (ed. 5) 60 n. 29; 2 FIORE §§ 831-833; DIENA, Dir. reali 152.

[16] England: Adams v. Clutterbuck (1883) 10 Q.B.D. 403; *In re* Hernando (1884) 27 Ch. 284.

United States: Restatement §§ 217, 256.

[17] Czechoslovakia: Priv. Int. Law art. 7, 36.

Germany: EG.BGB. art. 11 par. 2; BGB. §§ 313, 925, *cf.,* 1 BAR 615; 2 ZITELMANN 336; RG. JW. 1928, 2454; KG. (1925) 44 ROLG. 152.

Greece: C.C. art. 12.

Italy: Disp. Prel. (1942) art. 26 par. 2.

Japan: Priv. Int. Law art. 8 par. 3.

Montenegro: Code on Property (1888), art. 799.

Poland: Priv. Int. Law, art. 6, no. 3 (mentioning only immovables).

Also: Montevideo Treaty, art. 26, (1940) art. 32. Cód. Bustamante, art. 140 (semble).

[18] *Supra,* Vol. III, p. 108.

[19] Doe dem. Seebkristo v. East India Co. (1856) 10 Moore P.C.C. 140, sometimes cited as permitting oral transfer, is based on the Hindu law of the grantor rather than the coinciding *lex situs.*

[20] Hicks v. Powell (1869) L.R. 4 Ch. 741; Norton v. Florence Land & Public Works Co. (1877) 7 Ch. 332.

[21] Waterhouse v. Stansfield (1851) 9 Hare 234; (1852) 10 Hare 254.

[22] Restatement (immovables): § 217, comment d.; on the laws extending their compulsory force even to the obligatory contract, see Vol. III, 109.

The states of the Union having such statutes as of 1911 have been noted

actum. In this case a true renvoi is created. The Restatement expressly points to these statutes as an exceptional permission of renvoi with respect to land.[23] They are much less frequent, however, than the analogous concessions respecting formal validity of wills. The civilian laws of this group are more rigorous; the German Code directly excludes the principle of *locus regit actum.*[24]

(b) *The French-influenced group,* however, directly applies the maxim, *locus regit actum,* except when the provisions of the situs are intended to protect third persons or, what is sometimes synonymous, serve the general social interest.[25] It has been concluded that two Italian nationals, by a marriage settlement in England without a public official, may transfer Italian land, and that two foreign nationals may so transact anywhere outside Italy in the form of their national law, in both cases contrary to the municipal Italian rules. On the other hand, by a special express provision of the French code [26] and those following,[27] a mortgage on domestic property cannot be created

by LORENZEN, 20 Yale L.J. (1911) at 433, and see cases in GOODRICH 454 n. 5.

Ontario: *Re* Mills [1912] 3 D.L.R. 614, 3 O.W.N. 1036.

To the same effect among the member states, Cód. Bustamante, art. 136.

[23] Restatement § 8 (1).

[24] EG.BGB. art. 11 par. 2. See also, e.g., the old application of arts. 7 and 10 of the Dutch "General Provisions," Hof Gelderland (May 6, 1856) W. 1765: Dutch law as to Dutch immovables does not admit renvoi.

[25] France: WEISS, 4 Traité 205 and *cit.*

Italy: DIENA, Dir. reali 89 and *cit.* n. 1; 292, 319; but see App. Milano (March 30, 1909) Clunet 1910, 1323 (pledge in France of goods situated in Italy).

[26] France: C.C. art. 2128; followed in The Netherlands, C.C. art. 1218, and the Dutch colonies.

[27] Luxemburg: C.C. art. 2188 and Monaco: C.C. art. 1966.

Netherlands: C.C. art. 1218.

Haiti: C.C. art. 1895.

Dominican Rep.: C.C. art. 2128.

in a foreign country, a rule considered anachronistic and not to be enlarged by analogy.[28]

(c) *Irrespective of the contrast* of doctrines just indicated, whenever at the situs measures of publication—recording in land register, transcriptions or inscriptions, title publication, etc.—are required, they can only be effectuated in the country and district of the thing.[29] The *Código Bustamante,* article 136, states that provisions establishing and regulating registers of property and imposing them as necessary as respects third persons, are "of international public order." More clearly said, according to the universal force of *lex situs,* these provisions are essential for the recognition of real rights in any court.

Another consideration is exemplified by a Swiss decision; a German certificate of mortgage, a negotiable paper, was ineffectually transferred in Switzerland; to transfer the mortgage, the parties should have observed the formalities described in the German code.[30]

[28] In 1894 DIENA, Dir. reali 291 n. 5 cited much literature to this effect; see esp. VALÉRY in Clunet 1928, 926; BEVILAQUA (ed. 3) 346 and §§ 34, 36. The French provision is rejected, e.g., in:
Belgium: Mortgage Law of Dec. 16, 1851, art. 77.
Italy: C.C. (1865) art. 1990; (1942) art. 2837.
Argentina: C.C. art. 3129.
Bolivia: C.C. art. 1475.
Brazil: TENÓRIO 407 § 544 calls the French provision absurd.
Chile: C.C. art. 2411.
Colombia: C.C. art. 2436.
Ecuador: C.C. art. 2430.
El Salvador: C.C. art. 740.
Nicaragua: C.C. art. 3823.
Portugal: C.C. art. 964.
Uruguay: C.C. art. 2324, C.Com. art. 768.

[29] Italy: Disp. Prel. art. 26, par. 2. Of course, an exception is made, e.g., for automobiles registered in Italy under the D.L. March 15, 1927, n. 436/Law Feb. 19, 1928, n. 510, further disposal of which needs inscription in Italy to have effect against third persons in Italy. MORELLI, Elementi 140; BALLADORE PALLIERE DIP 162.

[30] App. Bern (Nov. 19, 1936) 73 ZBJV (1937) 620.

3. Structure of the Right

As the speaker for the unanimous Supreme Court of the United States said in 1869, the law of the situs of land conveniently determines "descent, alienation, and transfer, and . . . the effect and construction of conveyances." [31] Except inheritance and marital property, the same broad rule obtains with respect to all other tangibles.

Hence, the doctrine of all countries agrees [32] that the *lex situs* determines:

whether only certain enumerated proprietary interests are admitted, as in the Austrian and German system *(numerus clausus)*, or parties may create new kinds of interests, as is permitted in common law and is controversial in France;[33]

what intrinsic requirements exist for conveyances, releases, adverse possession, prescription, attachment, etc. This includes also the requisites of consent, delivery of an instrument or a chattel, and good cause *(justus titulus)*, good faith, and other elements of acquisition from a non-owner;[34]

the nature of the interest created;[35]

the construction of a deed, with due consideration of the intention and knowledge of the draftsmen;[36]

whether creditors of the conveyor may attack an alienation outside of bankruptcy proceedings.[37]

[31] Mr. Justice Miller in McGoon v. Scales (U.S. 1869) 9 Wall. 23, 27.

[32] See, for instance, the American cases cited by GOODRICH, "Two States and Real Estate," 89 U. of Pa. L. Rev. (1941) 418; and the German cases in NUSSBAUM, D.IPR. 304.

[33] PICARD in 3 PLANIOL ET RIPERT 54, § 48.

Spain: no *numerus clausus*, according to the dominant opinion, but *contra* Fed. Puis Peña, Tratado der. cio Español III vol. 1 (1951) 20.

[34] Corresponding with Restatement §§ 215, 257.

[35] Restatement §§ 221, 258.

[36] Restatement § 214; but see Taylor v. Taylor (1945) 310 Mich. 541, 17 N.W. (2d) 745, 157 A.L.R., for primary regard to the intention of the parties.

[37] Restatement § 218, comment f.

Illustrations. (i) Floating charges are invalid in Scotland; this covers documents situated in Scotland embodying a part of the charge and the entire encumbrance if the company has its registered office in Scotland.[38]

(ii) In Germany the owner of real property may have a mortgage on his own land, in Switzerland an "open rank" for a mortgage to be given by him, in Austria a right to dispose of a mortgage discharged by him.[39] No applications for registering a different type are accepted.

4. Place

As a rule, the requirements of the *lex situs* may be complied with at any place [40] by an act, which, on the other hand, may mean nothing under the law of such place. This is particularly true of the transfer of movables.[41] Goods stored in Chicago may be transferred by sales contract under common law; the contract may be made anywhere. Thus a transfer of goods stored in Argentina was validly made in New York, without interference by the New York statutory requirement of an inventory for bulk merchandise sales;[42] and goods stored in Brazil were validly transferred in Germany.[43] In both cases the Latin-American laws of property were satisfied by an implied *constitutum possessorium.*[44]

Foreign judgments. Of course, the forum will not recognize a foreign judgment adjudging an interest in an im-

[38] Shop Fronts (Great Britain) Ltd. in Liqu., per Lord Birnam (1950), see DONALDSON, 4 Int. L.Q. (1951) 109.

[39] BGB. § 1163; ZGB. art. 813; Öst. ABGB. § 469 and in case of cancelling the mortgage, a priority for three years III Teilnovelle § 37.

[40] See against former teaching by SAVIGNY 187 f. and 1 BAR 633: 2 FIORE § 832; DIENA, Diritti reali 167; NIBOYET, Acquisition 292.

[41] OLG. Hamburg (May 18, 1894) 5 Z. int. R. 286.

Austria: OLG. Wien (July 15, 1948) Ö.J.Z. 1948, No. 654, Ob. Rückstattungs-Kommission (Feb. 12, 1949) *id.* 1949, No. 355.

[42] Royal Baking Powder Co. v. Hessey (C.C.A. 4, Md. 1935) 76 F. (2d) 645, 648, cert. den. 296 U.S. 595 (Lowendahl v. Hessey).

[43] RG. (Sept. 16, 1911) Bay. Z. 1912, 45.

[44] Argentina: C.C. arts. 2602, 2387.

Brazil: C.C. arts. 675, 620.

movable or movable as of the time when the things were situated in the forum.[45]

II. Special Applications of *Lex Situs*

1. Remedies

Civil law sharply distinguishes right and possession. But also possession, as a legally defined factual situation with determinated legal conditions and effects, is a matter of *lex situs*.[46] Civilian authors, therefore, say that *lex situs* rather than the law governing inheritance decides whether possession ends with death or is a subject of succession,[47]—a point, however, that needs inquiry—and that *lex situs* rather than *lex fori* determines whether possession may be recovered.[48] Certainly, the *lex situs* governs not only the remedies based on ownership or minor interests but, in principle, also the remedies based on possession as such, that is, older or superior possession. At common law, the same result follows as a matter of course from the nature of a real right as a right to possession.

The conflicts situation, however, is overshadowed by the jurisdiction of the court of the situs. "No real action or action to recover possession of a tangible thing, whether land or chattel, can be maintained outside the state where the land or chattel is situated." [49] A similar exclusivity

[45] Canada: Chassy v. May (1921) 68 D.L.R. 427, affirming 29 B.C.R. 83: a judgment in the United States adjudging an interest of a free minor in Canada has no effect; the plaintiff invoking it is not a bona fide purchaser and acquires no title.

[46] Greece: C.C. art. 27.
Italy: Disp. Prel. art. 12.
Egypt: C.C. art. 18.
Poland: P.I.L. § 6 (1).
For the unanimous continental literature, see, e.g., 2 Frankenstein 81; Niboyet, 4 Traité 229 § 1155.

[47] 2 Zitelmann 951. See *infra* Ch. 65.

[48] 1 Bar 626.

[49] Restatement § 613; 3 Beale 1652; Goodrich (ed. 3) 169 ff.

of jurisdictions exists universally by old tradition [50] for actions based on rights in immovables.[51]

As a natural consequence of this attitude, in actions derived from real rights, at least those respecting land, the local court applies its domestic law on a large scale.

Nevertheless, the matter is not quite clear. It would seem that a more exact statement might be as follows:

At common law, *lex fori* applies in the threefold function as procedural law, *lex situs,* and *lex delicti commissi.* (1) As far as remedies are considered a part of procedural law—which traditionally goes a long way—the actions relating to property are subject to the domestic law of the court having jurisdiction *in rem,* irrespective of the whereabouts or residence of the owner. (2) The existence of possession and of real rights depends on the substantive law of the forum, *qua lex situs.* And (3) trespass or dispossession or conversion by severing crops, lumber, minerals, etc., from the land, are governed by the same system as *lex delicti commissi.* (In addition, only recently somewhat challenged,[52] trespass to land produces merely a "local action," exclusively bound to personal jurisdiction at the situs, although the action is merely for damages.) In fact, there does not seem to exist any authority either in England or the United States for the application of a law other than that (of the municipal law) of the situs, to determine the conditions and effects of a real action. Also, respecting

[50] Not by attraction from choice of law, as arguments upon the codes assume, esp. the French literature, lastly BATIFFOL, Traité 700 and citations n. 1. Originally, jurisdiction *in rem* was even the basis for the principle of *lex situs.*

[51] E.g. France: C. Proc. Civ. art. 59 par. 5.
Germany: ZPO. § 24.
Italy: C.P.C. art. 21 par. 1.
Argentina: C.P.C. art. 5.
Brazil: C.P.C. art. 136.

[52] Judicial abandon of the theory in Minnesota and Arkansas: see note, 6 Vanderbilt L. Rev. (1953) 786-789.

such claims as to recover damages for mesne profits, which can be sued upon separately,[53] no doubt about the applicable law has been expressed, to my knowledge; probably the land has always been found to be the place of the wrong. Among the remedies for disturbance and deprivation of the enjoyment of movables, detinue must be separated from trespass and conversion. Presumably, detinue is always considered a part of the procedural law of the forum. More adequately, the same result would be based on the cause of action which is unlawful refusal of restitution, to be localized at the court. Trespass and conversion have retained the character of tort. Here, it may happen that the place of wrong is different from the situs at the time of the action.

The Continental literature, however, differentiates several groups of actions. According to the Romanistic tradition, in a long development from the second century A.D., the petition of recovery *(rei vindicatio)* by which an owner sues a possessing nonowner, covers various claims, distinguishable in conflicts law.[54] As the German Civil Code distinctly expresses the large range of vindication,[55] the owner's action may be analysed as comprising three groups of claims:

(1) The tangible thing and, according to circumstances, the tangible proceeds still existing in their specific form [56] are the direct subject of the proprietary right and clearly governed by *lex situs*.

(2) Proceeds and gains converted into the property of

[53] England: Common Law Procedure Act, 1852, s. 214.

United States: Restatement §222; the case cited *contra* in Illinois Annotations, p. 71, MacDonald v. Dexter, 234 Ill. 517, 85 N.E. 209, has a different subject.

[54] Fundamental, 2 ZITELMANN 237, 303.

[55] BGB. § 985.

[56] §§ 987 par. 1, 990.

the possessor [57] are recoverable by claims derived by law from the objective violation of ownership, but of the nature of obligations; their measure is determined by analogy to unjust enrichment.

(3) Damages for delay in restitution, or compensation for omitted earning of proceeds, or for destruction, deterioration, or other impossibility of restitution by fault,[58] are objects of other obligations *ex lege*.

The claims under (2) and (3), though included in the complex scope of one action *in rem*, are not necessarily governed by *lex situs*. Some writers have applied the tests adopted for extra-contractual obligations.[59] Zitelmann resorted to a renvoi by the personal law of the debtor to *lex situs*.[60] *Lex situs* is right, but for another reason.[61]

As we have found,[62] claims for unjust enrichment should be governed by the law of the underlying relationship, and this is the law of the situs when claims for profit are raised separately as a consequence of transformations such as innocent conversion. These demands are based upon the property right and included in the enlarged scope of the action *in rem*. Convenience, not necessity, directs us to the *lex situs*.

A concurring tort action, of course, is subject to the law of the place of the wrong.

Finally, an analogous rule is commendable for counterclaims of the defendant, which he may be able to oppose to the action for recovery, or which, in some systems, he

[57] §§ 987 par. 1, 988, 993.
[58] §§ 987 par. 2, 989, 990.
[59] 2 FRANKENSTEIN 29; M. WOLFF, IPR. (ed. 3) 179.
[60] 2 ZITELMANN 240.
[61] RAAPE IPR. 382 reaches the same result through emphasis on the identical life relation on which both claims are based.
[62] Vol. III, p. 372 ff.

may use in a separate action, particularly on the ground of expenses incurred for the object of the claim.[63]

In sum, the *lex situs* may well be universally recognized as determining the remedies based on a violation of real rights.

2. Documents of Title

Certain commodity papers contributing to the transfer of title in goods are treated legally in different ways in the several systems. These regard not only the requisites for their recognition but also their effects in the twofold respect: whether the document legally represents the goods, and whether it is negotiable on order or on the bearer. In the English,[64] American,[65] and German [66] jurisdictions, bills of lading,[67] warehouse receipts, air bills, and delivery orders are "documents of title" (German: *Traditionspapiere*), with the meaning that under certain conditions transfer of the paper transfers the ownership in the goods. The French law denies this effect, although practically the transfer of property rights through consent produces similar effects, when parties use such instruments.[68]

What law, however, determines whether issue or endorsement and delivery of the document by themselves transfer the ownership in the goods? And whether by the

[63] 2 FIORE § 788; 2 ZITELMANN 252; DIENA, Dir. reali 337; 2 FRANKENSTEIN 90; GUTZWILLER 1596.

[64] England: (not negotiable); Bowen, L.J., in Sanders v. Maclean (1883) 11 Q.B.D. 327, 341 C.A.: "During this period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol."

[65] Uniform Warehouse Receipts Act. s. 40, 41; Uniform Bills of Lading Act §§ 31, 32; Federal Bills of Lading Act §§ 30, 31; the entire doctrine is unified in the proposed Uniform Commercial Code, s. 7-502.

[66] Germany: Com. C. § 364.

[67] Other functions of bills of lading have been discussed in Vol. III, p. 273 ff.

[68] RIPERT, 2 Droit Marit. § 1910; *cf.*, LYON-CAEN ET RENAULT, 5 Traité §§ 714, 715; RG. (May 7, 1880) 1 RGZ. 415 (Rhineland law).

acquisition of the instrument the holder acquires more right than his predecessor had?

In one view, the law governing the obligation of delivering the goods also governs the quality of the instrument in which the obligation is formally laid down. In the case of a bill of lading, the law of the port of destination has been advocated, under the influence of the German approach.[69] Probably the same result would find sympathy by many friends of *lex loci solutionis*.

But by far the dominant opinion, adopted by the Restatement, predicates that:

"Whether the title to a chattel is embodied in a document is determined by the law of the place where the chattel is at the time when the document is issued." [70]

Illustration. Goods were stored in a bonded warehouse in Scotland; the owner endorsed and delivered in England the warrants as security. The pledgee lost his case to an arresting creditor of the owner. Although under English law the warrant would have represented the goods, under Scotch law, the warehouse keeper should have been notified of the pledge.[71]

Only this view is consistent with the all-inclusive scope of the *lex situs*. It is at the same time in harmony with the advisable choice of law for the contract of transportation, based on the port where the bill of lading is issued.

[69] WOLFF, IPR. (ed. 3) 174. In the Seventh Hague Conference of I.P.L., 1951, (Actes p. 106), Prof. ALTEN (Norway) contended that a bill of lading may be said to embody the claim against the carrier but not the goods. It would not be a universally acceptable proposition that the instrument cannot embody the *property* in the goods.

[70] Restatement § 261 (1).

England: Inglis v. Robertson [1898] A.C. 616, by clear implication, see CHESHIRE (ed. 3) 584; HELLENDALL, 17 Can. Bar Rev. (1939) at 21.

France: NIBOYET, Acquisition 185; 4 Traité 622.

Germany: RG. (Dec. 8, 1927) 119 RGZ. 215 (semble), *cf.*, NUSSBAUM D.IPR. 312 f.

Netherlands: VAN BRAKEL 187 § 143.

[71] Inglis v. Robertson [1898] A.C. 616. Closely analogous, Hallgarten v. Oldham (Mass. 1893) *infra* n. 77.

It must be warned, however, that complications are possible. Transfer of goods *may* be effected through transfer and endorsement of documents, according to the law of the place where the goods are at the time of the issue of the documents. But not even in Germany, where this doctrine is most developed, is transfer disregarding the document excluded.[72] Great doubts, moreover, are caused in common law and French-influenced law by the rôle attributed to the intention of the parties. Does title pass on shipment of the goods to the carrier or on the arrival of the bill of lading to the buyer, bank, or agent? We have encountered this question before.[73] Also the various trade clauses provoke uncertainty.[74] In the normal overseas sale C.I.F., it may be recalled, the American law presumes that the seller contemplates giving up his title by shipping, and preserving merely a "security title," [75] a theory not generally shared.

At this junction, other questions are prominent. If the paper is endowed with the ability of transferring ownership by the law of the place where it is issued, is this law determinative of all subsequent transfers? [76] Or is it true that quite as the *lex situs* of the goods at the time of the issue determines the initial character of the document, the law of the place where the goods are at the time of their ulterior transfer determines the function of the endorse-

[72] RG. (Dec. 8, 1927) 119 RGZ. 215, 217: assignment of claim for possession.

[73] Vol. III, p. 64.

[74] *Cf.*, GORÉ, 45 Rev. Trim. D. Civ. (1947) 169 ff.

[75] The correct American doctrine has now been shortly formulated in opposition to the strange language of the Uniform Commercial Code (Section 2-505 and 2-509) by WILLISTON, "The Law of Sales in the Proposed Uniform Commercial Code," 63 Harv. L. Rev. (1950) 561, 581 ff. The problem, being substantive, will be discussed in another work.

[76] RAAPE, IPR. 377 ff.

ment?[77] The latter theory would gravely impair the usefulness of negotiable instruments and probably has never been adopted in practice. Once a bill embodies the title by the *lex situs* of the goods, it serves internationally until its end. Merely the contract of transfer of a bill as a piece of paper and the form and effect of endorsement must be sanctioned by the law of the place where the paper is situated at that moment.

However, a profound discussion of the nature of bills of lading has been occasioned in Germany by the case where the carrier involuntarily loses possession of the goods or fraudulently alienates them. The courts and the majority of writers assume that the translative effect of the bill depends on the constructive possession of the goods that the holder exercises through the carrier. Deprived of this material power, the holder is limited to the obligatory claim against the carrier and a claim against the possessing third party.[78] Presumably, most systems agree on the result. In any case, despite its theoretical underground, this conception would seem to pertain to the law governing possession of the paper at the time of each transfer.

3. Easements

Restatement § 222. "The creation, transfer and termination of non-possessory interests in land are determined

[77] 2 FRANKENSTEIN 58 restricts the ubiquitous force of the paper to its obligatory effects; HELLENDALL at 23 invokes Holmes, J., in Hallgarten v. Oldham (1883) 135 Mass. 1, 46 Am. Rep. 433. But the decision deals with goods stored in a Boston warehouse at all material times and correctly subjects the effect of the endorsement of the warehouse receipt to Massachusetts law. The problem in question did not turn up.

HELLENDALL 25 n. 44 also cites NIBOYET, Acquisition 195, who does not express the same opinion and in 4 Traité 622 expressly denies it; and BARTIN, 3 Principes 236.

[78] KARL AUGUST ECKHARDT, "Die Traditionswirkung des Konossements," in Rechtswiss. Beiträge zum 25. j. bestehen der Handelshochschule Berlin (1931) 62.

by the law of the state where the land is." Such interests are "easement, profits and licenses in land." Since the interest diminishes the powers of the owner, the law of the servient land is naturally competent to impose the burden.

This, again, is a universal principle and includes contractual as well as legal charges.[79] An illustration of the latter by a Louisiana case has been discussed earlier.[80]

Is this unquestionable rule inappropriate for the purpose, residential or agricultural, for which servitudes are created?[81] No. The needs of the restriction must be recognized by the state of the situation of the land upon which the use shall rest. A view requiring that both laws agree to the restriction[82] is certainly inacceptable.

The scope of the rule includes the permissibility of the charge, the conditions of its creation;[83] its extinction by lapse of time, destruction, or merger of ownership; its transfer, etc. *Lex situs* must also govern legal obligations with which a real interest is burdened, irrespective of tort, such as when a usufructuary has to give security to the owner, or must indemnize him for proceeds unlawfully derived or for illicit changes of the object.[84]

Equally, the *lex situs,* and not the *lex fori,* decides whether an obligation is personal to an individual landowner or runs with the land;[85] whether, vice versa, the

[79] France: Cass. (April 20, 1891) Clunet 1892, 200; DIENA, Dir. reali 203 § 57; 2 FIORE § 853; VALÉRY § 616; WEISS, 4 Traité 230 f.; 2 FRANKENSTEIN 98; GUTZWILLER 1599 c; NIBOYET, Revue Droit Int. (Bruxelles) 1933, 471; MATOS 424; BATIFFOL, Traité 515 § 512.

But see the singular provisions of Código Bustamante arts. 131 ff.

[80] Caldwell v. Gore (1932) 175 La. 501, 143 So. 387, 144 So. 151; *supra* Vol. II, 330.

[81] BATIFFOL, Traité 516 n. 1 § 512.

[82] 2 ZITELMANN 328, 565 n. 258; WOLFF, D. IPR (ed. 3) 180, n. 11. *Contra,* 2 FRANKENSTEIN 98 n. 20; *supra* Vol. II, p. 331.

[83] E.g., whether immovables are created "by destination."

[84] GUTZWILLER 1599.

[85] Restatement § 222, comment b. *Cf. supra,* Vol. III, 110 ff.

successive owners of the serving land have the duty of positive acting, as, for instance, of maintaining a wall or an aqueduct in good repair; and whether a liability to pay money or furnish labor (surviving in modernized form from the old institutions of tithe and peasants socage in many present laws) is merely due as a land charge [86] or implies a personal liability of the successive owner.

4. Encumbrances

(a) *In general.* The authors of Article 9 of the American Uniform Commercial Code have had the felicitous idea of largely unifying, for the purpose of their rules, almost all types of transactions creating collateral rights in chattels as security for debts. Irrespective of their juristic forms, chattel mortgage, trust receipt, conditional sale, bailment-lease in goods and documents, are thus joined in the category of security transactions, superseding the present uniform laws covering parts of the ground. The Code further includes security by accounts and contracts rights. In conflicts law, we ought rather to deal, as with one class, with all transactions providing security by tangible movables.

Whether the creditor immediately acquires possession need not be distinguished fundamentally. But intangibles are different.

Again, the law of the place of the material situation effectively determines the existence of real rights. In the case of any security for a debt, it is universally agreed that *lex situs* decides whether a real right must be accessory to a debt, which it is not in all juristic types of security. The *lex situs,* it is recognized, does not necessarily govern the debt. The debt may be under a different law stipulated by the parties or judicially selected. Also a promise to create or transfer a mortgage may have its own law.

[86] Restatement § 231.

Illustration. A Belgian debtor secured his debt to another Belgian by an act in Belgium, pledging goods which he had in France in custody of a third person. The Belgian court rightly applied Belgian law to the debt, and French law to the pledge and its sale. (French law, by the way, recognizes a pledge made abroad, in contrast to a hypothec.)[87] It had been argued that the creditor possessed the goods through the bailee and the goods were therefore to be considered situated in Belgium. The court rejected this fiction.[88]

Nevertheless, although the obligations may follow a distinct law, when we look for a typical subsidiary rule, contracts promising to convey a charge on land ought to be subjected to the law of obligation prevailing at the situs,[89] quite as other contracts "relating" to land. This is particularly persuasive when the buyer of land assumes the personal debt underlying a mortgage.[90]

(b) *In particular.* The *lex situs* includes the following incidents:[91]

on what objects a pledge may exist;[92]

what is a real right of security; the nature of legal or equitable right, a mortgage, pledge, or lien; or, in other words, the validity and effect of such right;[93]

[87] See also NIBOYET, 4 Traité 453.

[88] Trib. com. Bruxelles (Jan. 29, 1930) Clunet 1931, 452.

[89] France: BATIFFOL, Traité 517.

Germany: KG. (Dec. 21, 1935) JW. 1936, 2466 at 2469 (*supra* ch. 54 n. 83) respecting the personal debt although not very clearly reasoning.

Italy: CAVAGLIERI, Dir. Int. Priv. 165.

[90] Austria: OGH. (June 26, 1930) JW. 1931, 635 (personal debt secured by mortgage on German land and assumed by the vendee of the land as sole debtor; applicability of the German law on revalorization).

Germany: RG. (Jan. 12, 1887) 4 BOLZE Nr. 22, cited by NUSSBAUM 300 n. 5. On necessary application of *lex situs* to the assignment of the debt according to BGB. § 1154, see M. WOLFF, Sachenrecht § 159.

Brazil: BEVILAQUA 346.

[91] See Restatement, statements cited in the following notes, and for liens § 230 and charges § 231.

[92] RG. (Dec. 7, 1921) 103 RGZ. 259.

[93] Restatement §§ 225, 255, 265, 279.

the assignment of such interest and whether a mortgage may be transferred without the debt secured;[94]

the defenses of the owner, as, e.g., referring the creditor to other securities;[95]

the power to redeem mortgaged land, after a foreclosure sale and after limitation of action for the mortgage debt has run;[96]

the discharge of mortgages: whether payment after the maturity of the debt suffices; which satisfaction is needed; whether an attaching creditor may discharge the mortgage.[97]

On these lines it should be settled that any foreign type of security is to be recognized, except in the narrow field of public policy. A "bailment and lease contract" of Pennsylvania must not be construed in Georgia as a sale with reservation of title.[98]

The situation is different when the goods are in the forum and the transaction occurs abroad. The title of three cars, deposited in France, was conveyed by a French company as security for a loan by a Dutch firm, in a transaction in Germany in the German style of a fiduciary transfer of ownership *(Sicherungsübereignung)*, and German law was expressly stipulated. The French Supreme Court rejected the creditor's claim of ownership in the debtor's bankruptcy, because the acquisition by the creditor of the

[94] Restatement § 226.

[95] Austria: Inversely OGH. (Dec. 4, 1906) 43 Gl. U. 612 Nr. 3586 allows an Austrian debtor to refer the creditor to a Swiss mortgage according to Swiss law, which is questionable except where the entire debt was governed by Swiss law.

[96] Restatement § 228.

[97] Restatement § 229.

Austrian OGH. (Jan. 26, 1904) 41 Gl. U. 47, Nr. 2586: who bears the costs of a receipt required for canceling the incumbrance in the land register?

[98] In Motors Mortgage Corporation v. Purchase-Money Note Co. (1928) 38 Ga. App. 222, 143 S.E. 459, this was done merely in the absence of proof of the Pennsylvania law, to satisfy the common law.

cars without judicial formalities would run counter to the prohibition of a *lex commissoria* in contracts of pledge, imposed by the French *lex situs*.[99] The decision has raised a complicated dispute [100] and is questionable. But on the one hand, the foreign transaction, except for the sanction, was recognized as creating a real interest, and on the other hand, the law of the country where the goods are situated at the time of the transaction is indeed entitled to restrict its sanction to those foreign types that correspond to the transactions admitted in the forum. Here, for once, the usual process of assimilation to domestic types is not objectionable.

(c) *Satisfaction.* In the civilian codes, the chapters of conventional securities contain provisions defining their purpose in the case of default. They say whether the creditor may claim possession of a land or chattel serving as security without physical apprehension; appropriate the thing against the debt *(lex commissoria);* appropriate it for a price judicially foreordained; have the thing sold in public auction under or without court supervision, etc. Do these provisions and the analogous customary rules belong to the substantive real relationship or to procedure? The Restatement subjects method and effect of foreclosure, with or without judicial proceedings, to the *lex situs*.[101] The substantive characterization is commonly recognized, but this has sometimes been derived from the obligatory relationship between pledgor and pledgee rather than from the effects of the real interest; therefore *lex loci contractus* would have applied. This is inexact.[102] An obligation,

[99] Cass. req. (May 24, 1933) S. 1935.1.257, Rev. Crit. 1934, 142, Clunet 1935, 381.

[100] See the various arguments by NIBOYET, Rev. Crit. 1934, 143; 4 Traité 454; BATIFFOL, Rev. Crit. 1934, 631; S. 1935.1.257; LIGEROPOULOS, 8 Répert. 520 No. 28 ff.

[101] Restatement §§ 227, 228.

[102] *Cf. infra,* Chapter 56.

whether resting on the pledge contract or on the law, creates merely a "shall," not a "can." *Lex situs* governs these questions with the force of public policy and procedural compulsion, and controls the binding force of the contract and what a former *lex situs* may have permitted. This is evidently the American doctrine,[103] although in one opinion the law of the contract governs the right to redeem a security.[104]

Lex commissoria has been usually prohibited since the Emperor Constantine and therefore is void at the situs as well as, by public policy, in other courts.[105]

(d) *Liens.* There is an abundant and sometimes obscure variety of obligations and real encumbrances going under the names of liens, privileges, and rights of retention. As a principle, it is settled that the *lex situs* decides whether a right has the character of a real interest.[106] An author said even that "it is the *lex rei sitae* that decides and decides alone whether an alien is admitted or not to avail himself of (the privilege) and there is no account of either the law of the state to which the parties belong or that presiding at the origin of the obligation."[107] However, the *lex situs* must not *create* the right, it has merely to control its qualification. As the Institute of International

[103] Annot. 64 L.R.A. 354.

[104] Annot. 57 A.L.R. 707.

[105] OAG. Rostock, Dec. 17, 1857, 19 Seuff. Arch. 651 No. 107; DIENA, Dir. reali 315 § 93.

[106] Restatement § 279 (despite ambiguous drafting); *Cf.* 2 Beale § 230.1.
Belgium: Trib. com. Antwerp (May 10, 1899) Clunet 1900; 1012.
England: London & Provincial Leather Processes Ltd. v. Hudson [1939] 2 K.B. 734.
France: NIBOYET, Acquisition 237.
Germany: 81 RGZ. 283; NUSSBAUM 314 f.; 2 FRANKENSTEIN 91. The liens of innkeepers (BGB. § 704), forwarding agents, warehouses, and carriers (HGB. §§ 410, 421, 440) are legal pledges.
Italy: DIENA, Dir. reali 336; *id.* 3 Dir. Com. Int. 549.
Switzerland: BG. (June 6, 1912) 38 BGE. II 163, 166; (May 13, 1914) 40 BGE. II 203, 208.

[107] WEISS, 4 Traité 267.

Law once formulated the principle, the *lex situs* has the function "to limit or exclude . . . the effects of privileges established by the law governing the legal relationship to which the privilege is attached." [108]

Hence, a privilege, granted at the forum for debts of a certain kind, extends to foreign-governed debts of the same or a comparable kind. But in the most recent French literature, it has been asserted that the priority of enforcement, accorded by the French Civil Code to the fee of a physician who treated a deceased person in his last illness, is not allowed to a Belgian physician whose claim is under the identical Belgian law.[109] The French draft on private international law, article 52, submits privileges to the law of the place where they are exercised by seizure or otherwise.[110] This, except for maritime law, is a step backward.

The Berne Convention on rail transport of goods has adopted an international statutory recognition of the liens of rail carriers. The French text speaks of *"gage,"* which means pledge, but corresponds with a common-law general lien by operation of law. In (my) translation:

Article 21 § 1. The railroad has the right of a lienor upon the goods for the total debt indicated in article 20. These rights subsist so long as the goods are in the possession of the railroad or a third person holding them on its behalf.

[108] Institute of Int. Law, Madrid (1910), 24 Annuaire 394 art. 3, Revue 1911, 573.

France: Trib. com. Seine (Sept. 6, 1906) Clunet 1907, 366; NIBOYET, Acquisition 216.

Germany: RG. (Jan. 10, 1911) 24 Z. Int. R. 322, 324; 2 FRANKENSTEIN 90, 91, 231.

[109] Belg. Trib. Liège (Nov. 14, 1907) Clunet 1908, 565; BARTIN, 3 Principes 257 § 428; NIBOYET, 4 Traité §§ 1183, 1219, especially p. 467, who also insists that a foreign lien must be *identical* with a French type, 472 § 1222.

[110] LOUIS-LUCAS, Rev. crit. 1952, at 59 ff., proposes the law of the obligation to which the lien attaches.

§ 2. The effects of the lien are governed by the laws and regulations of the state where delivery is made.[111]

5. Limitation of Actions

An action to recover land in Manitoba is barred by lapse of time according to the statute of the province of Manitoba, irrespective of the fact that the land patents had been signed in Ottawa.[112] With respect to land, this application of the *lex situs* is naturally universal,[113] since the judicial jurisdiction is generally likewise localized.

Movables, however, though following the *lex situs,* are subject to the principles concerning the change of situs.[114]

III. Intangibles

The old controversy about the situs of debts has its parallel in the question whether "intangible things," *"biens incorporels,"* in general are governed by a law of the place where they would be deemed situated. When the exclusive rights of authors and inventors matured to recognition, it helped them to be labeled literary, artistic, or industrial property, names still in misleading use in many countries.

A more perspicacious analysis has taught, long since, that debts have no situs and lack the all-purpose contact that tangible things have. Copyright and patent rights belong to the large group of rights in incorporeal objects that have been termed *absolute* rights in the German pandectistic theory. They are analogous to rights in tangible objects insofar as they contain dominance over an object and produce actions against any person violating

[111] Convention of Berne of October 23, 1923, art. 25, 77 League of Nations 367 ff., Hudson, 2 Int. Legislation at 1433; Rome draft of Nov. 23, 1933, art. 25, Hudson, 6 Int. Legislation at 548.

[112] Oliver v. The King (1921) 59 D.L.R. 211, 21 Can. Ex. 49.

[113] Treaty Montevideo (1889 and 1940) art. 52; Cód. Bustamante art. 230.

[114] *Infra* Ch. 56; Shelby v. Guy (1826) 11 Wheaton 361; Raape, IPR. (ed. 3) 382; Cód. Bustamante art. 231: the law of the place where the prescription is achieved; Bustamante, 2 DIP. §§ 1303-6; 2 Vico 244.

it. But because the object is imagined rather than real—the work of the mind, the new procedure or product of industrial expertness—it cannot be localized.[115] Furthermore, when these exclusive faculties were created, they were not endowed with the unlimited scope and duration of the age-old rights *in re*. By a compromise between the protection and promotion of the creative human mind and the interests of national culture or economy, the modern laws of copyright, patents, designs, and models, define with more or less generosity the exclusive field of the privilege and its period of time.

On the ground of these facts, the rights in question have been commonly conceived as purely national creatures of territorial sovereignty. Progress in international courtesy has merely been accomplished by extending the enjoyment of this territorial right to foreign subjects, an achievement in the field of the condition of aliens.[116] The vehicles were the treaties, except for two decisions of the Tribunal de la Seine according foreigners the enjoyment of the French copyright laws without a treaty.[117]

In France, however, a theory has been set forth, rejecting the traditional view and contending that intellectual property is as good an object of conflict of laws as any chattel. This implies that the rights are not confined to a territory but are universal, so to speak, of transitory rather than local enforcement. Bartin, undertaking to establish a conflicts rule, speaks of the law of the place of the first publication as *lex rei sitae*.[118] This theory even claims

[115] Vol. III, p. 75, dealing with the contract to transfer it.

[116] See Vol. II, p. 295. This view has been expounded in an excellent article by BOUCHER, Clunet 1932, 26.

[117] (Feb. 14, 1931) Clunet 1932, 113; (Dec. 6, 1933) Clunet 1934, 907, Revue crit. 1934, 420.

[118] BARTIN, 3 Principes 71, 73.

validity for the existing laws.[119] The facts, however, refute this view radically.

If a conflicts rule governed, for instance, copyright, which is not so necessarily territorial as patents and their kind, a French book would enjoy French copyright in the United States. Nothing is farther from the truth. No state allows other than a domestically acquired copyright to be invoked against counterfeiting. The United States, of course, in addition requires special reservations and deposits for such acquisition.

That the international copyright conventions have to select a local contact for extraterritorial protection of authors is true. They have preferred, in case of publication, the place of the first publication to the nationality or the domicil of the author. The reason is certainly not that the manuscript or original is situated there,[120] but the fact that publication is the entry of the work of thought into the external reality.

The Berne Convention takes from the place of publication the condition that the law at this place confers copyright in its own territory, not because this law should govern abroad but because the other states see no cause to protect a work not protected even in its country of origin. And the duration of the right according to the same law is the maximum granted by the other countries, for the same reason and not because the law of origin has a positive extraterritorial effect.

We may, hence, dismiss this subject from the conflict of laws.

The Berne Convention declares in the case of nonpublished works that the country of which the author is a sub-

[119] Thus, most eloquent, BATIFFOL, Traité 531 ff.
[120] As BARTIN, *supra* n. 117 suggests.

ject is the country of origin.[121] This conforms to the conception that the right to publish or of priority is a right of personalty and subject to the personal law.[122]

Aggregates. Commercial enterprises and agricultural estates have been increasingly recognized as units of partially independent existence in the commercial and procedural literature, and form also the subject of various laws. Nevertheless, neither has the recognition become clear and comprehensive enough nor have conflicts rules been prepared giving preference to such parts of enterprises as goodwill or real leasehold right so as to create an exception to the *lex situs* of the immovables or movables with which the enterprise is connected.

[121] Convention of Berne, art. 9, of Berlin and Rome, art. 4. HUDSON, 4 Int. Legislation at 2468.

[122] *Supra,* Vol. I, p. 102.