

Removal of Chattels

I. PRINCIPLES

AFTER considerable international discussion in the civil law countries, agreement has been reached on the basic principles suitable to movables changing their position. The American doctrine is consistent with these principles, although the courts are not always conscious of rules transcending "comity." The English opinions seem slowly to accept the same standards.

For the sake of simplicity, acquisition of real rights will be primarily envisaged; but modification and termination of such rights follow the same principles.

A chattel, subject to real rights in one territory (X), is moved to another territory (Y), hence to a new *lex situs*. The situations are conveniently distinguished by the authors, according to the criterion whether a transaction intending the acquisition of a right prior to removal of the chattel has been completed in the jurisdiction of X, with success or without success, or has been left uncompleted when it is moved to Y.

1. Successfully Completed Acts

Real rights in a movable, validly created under the law of one state, X, persist with extraterritorial effect after the movable has been transported into another state, Y. It does not matter that the same right could not have been created in Y, whose law has more exacting conditions.¹

¹ WAECHTER, 25 Arch. Civ. Prax. 387; DIENA, Diritti Reali 163 ff.; NIBOYET, Acquisition 81 and 4 Traité § 1194.

England: *Cammell v. Sewell* (1860) 5 H. & N. 728, LORENZEN, Cases

When, for instance, title in a piano, exhibited in a show-room in New York, passes to a buyer by consent, the ownership of the buyer remains intact if the piano is brought to Argentina, the law of which requires delivery for transfer of title. Recognition is given as well in the United States as in Argentina and in third countries.²

A German farmer once bought a horse in Mainz where French law was in force; when the horse arrived on the Rhine bridge, it hit a passerby. He was liable for the injury as owner, even though the horse had already reached the territory of Roman law.³

Thus, the universally recognized working of the law of the situation, most remarkable in itself, is extended to the period of time subsequent to that situation. The effects of the former *lex situs* include formalities, consent, and all other intrinsic requirements of conveyances, except, in the civil law courts, capacity of the parties.⁴

Recognition, however, does not include the capacity or incapacity of the chattel to be transferred when it is removed to another jurisdiction. Although the domestic law of the situs determines for its own purposes whether a thing is alienable at all (*in commercio*) and the specific person who may acquire, other jurisdictions are not committed to recognition. Thus, slaves serving on an estate in Kentucky and considered immovable were held to lose this

(ed. 4) 613; *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677; DICEY (ed. 5) 608; *FALCONBRIDGE*, 81 U. of Pa. L. Rev. (1933) at 820.

United States: *Rabun v. Rabun* (1860) 15 La. Ann. 471; *Sleeper v. Pennsylvania R.R. Co.* (1882) 100 Pa. 259; *GOODRICH* (ed. 3) 475 n. 88.

France: App. Rouen (Jan. 28, 1878) S. 1878.2.54.

Germany: OLG. Hamburg (Nov. 11, 1892) 49 Seuff. Arch. 208 No. 118 (although speaking of *lex loci contractus* instead of *lex situs*); OLG. Hamburg (May 18, 1894) 5 Z. Int. R. (1895) 286; and subsequent common practice.

Greece: App. Patras (1904) 16 Themis 347, Clunet 1907, 1197.

² See cases cited by *GOODRICH* 475 n. 87.

To analogous effect: RG. (Sept. 16, 1911) Bay. Z. 1912, 45.

³ OLG. Darmstadt (Dec. 31, 1897) 29 Puchelt's Z. franz. C.R. 688.

⁴ Switzerland: App. Bern (June 22, 1926) 62 ZBJV. (1926) 474.

character when brought to Missouri.⁵ The analogous decision of a French court that a Spanish church chalice, *res sacra* and "extra commercium" in Spain, and carried to France, where Baron Pichon, a collector, purchased it, was transferable,⁶ has won notoriety in the conflicts literature. The modern cases of "nationalization" and confiscation, however, have been the subject of fundamental controversy far beyond the realm of private international law.

Ordinarily, when we apply a foreign law to an act we also apply subsequent changes in this law. But can *lex situs* X, having created a property right, abolish it subsequently although the chattel meanwhile has been removed from X? This is claimed for the French annulment of acquisitions during the German occupation of chattels later deported from France, notwithstanding the expectation that other states would not recognize such destroying effect.⁷ Primordial political reasons may justify exorbitant exceptions. The rule must be that the power of *lex situs* is exclusively exercised during the period in which the thing is situated in the territory.

Indeed, the power of the actual situs is unlimited. Normally, it modifies the incidents of the right, replacing the creating law, for instance, as to the legal restrictions to the exercise of ownership, or the period of time allowed to an usufruct. It decides whether a pledgee is entitled to self-appropriation of a pledge in case of default of redemption, although this is not merely a procedural question, etc.⁸

But though the new law is sovereign, international life requires restraint. That the present situs should not rec-

⁵ *Minor v. Cardwell* (1866) 37 Mo. 350, 356, 90 Am. Dec. 390.

⁶ Trib. civ. Seine (April 17, 1885) Clunet 1886, 593.

⁷ NIBOYET, 4 *Traité* 372 f., § 1193 n. 1.

⁸ *Supra* Ch. 55, p. 17.

France: BATIFFOL, Note to Cass. req. (May 24, 1933) S. 1935.1.257.

ognize foreign-created rights when their kind is unknown to the forum, is untenable as a general proposition. Even where the types of admitted real interests are exclusively enumerated and regulated, as in Germany, the consequence is merely that foreign created rights are assimilated to domestic categories.

Nonrecognition generally is to be encountered only on the ground of repugnance to specific institutions, as when the transaction lacks necessary publicity or is usurious in the eyes of the forum. This is public policy in its ordinary aspect.⁹

Defenses. Since an interest acquired in X has international effect, equal effect must be attributed to certain restrictions and objections acquired under a law which at the time was the *lex situs*. This is normally the time when the defendant acquired possession. If such defenses are based on substantive grounds under the law of the place where the defendant acquired the object and the defense thus was created opposable to every holder of the interest, they are protected everywhere.¹⁰

An outstanding example is the right of a bona fide purchaser to reimbursement of the price paid by him, under rules going back to the thirteenth century,¹¹ and adopted in the former Prussian *Landrecht*, the French and many other codes, including that of Louisiana.¹² There is also a cor-

⁹ *Infra* II.

¹⁰ RG. (Nov. 14, 1891) 28 RGZ. 109, 111 (place of pledging); App. Bern (June 22, 1926) 62 ZBJV.474 (action of the dispossessed owner of securities against the purchaser); DIENA, *Dir. Reali* 167; 1 MEILI 395; NIBOYET, *Acquisition* 297 n.; 2 FRANKENSTEIN 71, n. 106.

Egypt: C.C. art. 18.

Czechoslovakia: *Priv. Int. L.* § 39.

¹¹ For France, see PICARD in 3 PLANIOL ET RIPERT (1952) 393 § 394 n. 3.

¹² Prussia: A.L.R. part. 1, Title 15, § 26, French C.C. art. 2280; Louisiana C.C. (1870) art. 3507; Netherlands B. W. art. 637; Italy former C.C. (1865) art. 709; Switzerland C.C. art. 934 par. 2. *Cf.*, Austria: ABGB. § 331.

responding rule in England and New York.¹³ The French provision allows the owner of a "stolen" or lost movable to sue a possessor who purchases at a fair or market or in a public sale or from a merchant dealing with similar goods, provided that he reimburses the price paid. The German courts have construed this provision as granting a substantive right, though it can be used merely as a dilatory defense. This construction is reasonable. Whereas some laws permit the owner in such cases to recover without compensation, and others do not allow any recovery, the solution in question is a compromise of old date. This defense ought to be placed on the same plane of property rights as the results of the more extreme provisions.

Therefore, since the purchaser of a stolen car in a French public sale does not acquire ownership (before completing adverse possession in three years, article 2279 paragraph 2) but acquires a counterclaim for recovery of the price against an action by the owner, he may assert it in any country.¹⁴ It does not matter under what law the plaintiff acquired his title (unless he acquired title afterwards in good faith free from previous encumbrances), or whether the *lex fori* includes a similar provision.

It has been held, however, in an old German case that the possessor cannot transfer his protected position when he conveys the chattel to a third person in a state permitting the owner unconditional recovery.¹⁵ This is in-

¹³ Viz., where an apparently authorized selling agent transfers title through a commodity paper:

New York: Factor's Act, Pers. Prop. L. s. 43, ss. 3: nothing shall prevent the true owner of a merchandise from demanding or receiving merchandise upon prepayment of the money advanced.

¹⁴ Common opinions: OLG. Hamburg (Jan. 19, 1894) 49 Seuff. Arch. 386 No. 229: a diamond pin stolen in the domain of the Prussian Code which permits unconditional recovery, was sold to a bona fide purchaser in Hamburg requiring compensation of expenses; Hamburg law applied. Accord: 1 BAR 633 f.; KOSTERS 715; 1 MEILI 396; WALKER 365; see DUDEN 43.

¹⁵ RG. (March 19, 1898) 41 RGZ. 152, Clunet 1900, 635; approved by LEWALD 183 § 243, but *contra* RAAPE IPR. 384 referring to BGB. § 986.

acceptable. The owner, in the case involved, lost possession of securities by theft in Hamburg. The securities were sold in Paris between bankers; hence, the owner could recover them only against payment of compensation. Should the same owner acquire more rights by a new change of hands between other persons, this time in Germany, only because German substantive law allows full recovery of stolen goods? This result is inconsistent with the undisputed transferability of ownership acquired in one country to successors in other countries. Under all the laws mentioned, the right to reimbursement ought to be conceived as a proprietary right exercisable as a defense.

2. Defective Acts

If an acquisition was attempted in X but failed to be effective through absence of a required element, the deficiency cannot be cured merely by removal of the chattel to another territory.

Illustrations. (i) To vary a well-known American case,¹⁶ a diamond entrusted to a broker in New Jersey and there pledged by the latter to an innocent purchaser, is not effectively pledged. The result is not changed if the stone is brought to New York, under whose Factors' Act an innocent pledgee prevails over the owner.

(ii) In the old English case of *Inglis v. Usherwood*,¹⁷ delivery on board a chartered ship in the port of lading, Petersburg, under English law would have been equivalent to delivery to the English buyer. But under the Russian *lex situs*, the transfer was cancelled by repossession of the goods in the port. The English court recognized this after the goods had been landed in England.

¹⁶ *Charles T. Dougherty Co. v. Krimke* (1929) 105 N.J. Law 470, 144 Atl. 617, LORENZEN, Cases (ed. 4) 616, mistakenly decided the case by extending New York law to a pledge in New Jersey, *cf.*, 38 Yale L.J. (1929) 988; STUMBERG (ed. 2) 394; GOODRICH (ed. 3) 477.

¹⁷ (1801) 1 East 515.

(iii) Acquisition in Berlin of securities to bearer by a banker operating as commission agent made him the owner, although under the law of Hanover the principal domiciled there would have directly acquired title.¹⁸

By consequence, mere removal to another state also does not help the creditors of the acquirer.

The scope of this rule, however, will be better tested in connection with the effects of the new *lex situs*.

3. Events in the Second Territory

The law of the second situs, state Y, determines the effect of new events, such as a sale, a pledge, adverse possession, seizure, and legal liens.¹⁹

Illustrations. (i) In the English leading case of *Cammell v. Sewell*²⁰ the title acquired by sale of the cargo on board a Russian ship by the master in a Norwegian port, the actual situs, was sufficient to defeat the English owners, suing for conversion, although the sale would not have been valid in England.

(ii) Horses were sold by a conditional sale in Hesse, under German common law, and validly acquired by an innocent purchaser while situated in Prussia.²¹ Instruments to bearer, stolen in Germany, were sold at the London stock exchange and validly acquired by English law.²² Most American courts decide in the same manner.²³

(iii) Under Austrian law the cars of an Austrian railroad were included in a mortgage (immobilized, "hypothecated"), but while, in Bavaria, unless such mortgage was recorded, they could be seized as independent movables,

¹⁸ RG. (Feb. 15, 1884) 11 RGZ. 52.

¹⁹ Switzerland: BG. (June 26, 1912) 38 BGE. II 194, 198: lien of the Swiss carrier on goods sent from London and Brussels.

²⁰ *Cammell v. Sewell* (1860) 5 H. & N. 728, 157 Eng. Rep. 1371.

²¹ OLG. Frankfurt (July 5, 1890) 4 Z. int. R. (1894) 148.

²² RG. (Oct. 6, 1897) JW. 1897, 573.

²³ See *infra*.

subject only to rights of pledge.²⁴ Seizure by a creditor was therefore allowed.

An example of a special situation has been furnished by the persistence of the common law hostility against security arrangements where the creditor is deprived of possession. Thus, a horse was mortgaged in Maryland by recordation without delivery of possession, third persons being charged with knowledge of the incumbrance. But brought to Pennsylvania, the horse was acquired by a bona fide purchaser, because under the law of this state chattel mortgages were ineffective against third persons.²⁵ Conversely, title was retained in a conditional sale in Pennsylvania of a safe and valid only between the parties. But when the safe was subsequently removed to New Jersey, under the law of the new situs, the title of the owner became superior to the right of a thereafter attaching creditor of the buyer.²⁶ The creditor's objection in this case is interesting, as it seems theoretically well to describe the plaintiff's title as originating in Pennsylvania in the character of a right too weak to resist a judgment and execution or claims of other new acquisitions. But the court replied elegantly; also under this original law the buyer had no right to sell and make title to a purchaser under all circumstances. In fact, acquisition of rights defeating the reserved title depended on the *lex situs* of the time of acquisition, that is, New Jersey law. The law of Pennsylvania subsequently has become the same, although under the Uniform Act conditional sales and under a special

²⁴ Bay. ObLG. (Nov. 11, 1882) 38 Seuff. Arch. 213; analogous Oberapp. Ger. Köln (Jan. 4, 1834) 19 Rhein. Arch. 234, see ROBERTSON, Characterization 211; OLG. Karlsruhe (Dec. 12, 1892) 25 Puchelt's Z. französ. Civilrecht 46: cabs "immobilized" and mortgaged in Basle, validly seized in Baden by the owner's creditor.

²⁵ MacCabe v. Blymyre (1872) 9 Phila. 615.

²⁶ Marvin Safe Co. v. Norton (1886) 48 N.J. Law 410, 7 Atl. 418. Similarly about a bailment Cooper v. Phil. Worsted Co. (1905) 68 N. J. Eq. 622, 60 Atl. 352 (under different name).

act²⁷ chattel mortgages were effective when recorded in the state, and therefore the courts no longer consider chattel mortgages repugnant to the domestic public policy.²⁸

An excellent exception to the effect of the second situs has been established in various American cases. When a chattel is removed to another jurisdiction by force or fraud in favor of a creditor so that he may attach the chattel at the new location, this situs is disregarded and jurisdiction denied.²⁹ The Ontario court similarly has released a seizure obtained by a creditor who cunningly induced a friend to bring a boat from the Detroit side of the bordering river to Windsor.³⁰

It does not seem, however, to be a basic idea of the American decisions that consent of the owner to a removal, as such, exposes him to the effect of disposals by other persons in another state. This would amount to a waiver where no such intention can be presumed.³¹ What the courts in increasing cases have done, is to stigmatize wrongful removals, assuredly also in pursuance of the common law attitude protecting titles. This current is openly displayed when recordation in Y is omitted (*infra*, III, 4).

4. Incomplete Legal Situations

More controversy is encountered in the cases where an act in X has not ripened either to failure or to success.

²⁷ Act of July 15, 1936, First Ex. Sess. P.L. 47 (21 P.S. § 842).

²⁸ Kephart, J., in *McCurdy's Est.* (1931) 303 Pa. 453, 154 Atl. 707; Baldrige, J., in *Personal Finance Comp. of New York v. General Finance Co.* (1938) 133 Pa. Super. Ct. 582, 587.

²⁹ *Timmons v. Garrison* (Tenn. 1843) 4 Humph. 148; *Deyo v. Jennison* (Mass. 1865) 10 Allen 410; *Sea-Gate Tire & Rubber Co. v. Moseley* (1933) 161 Okla. 256, 18 Pac. (2d) 276 (all dealing with deceit); *cf.*, the English decision *Hooper v. Gumm* (1867) L.R. 2 Ch. App. 282, concealment of the mortgage by the mortgagee.

³⁰ Canada: *Houghton v. May* (1910) 22 Ont. L. R. 434, *aff'd* 23 *id.* 252.

³¹ But *GOODRICH* (ed. 3) 483, 487 f., criticizing the role given to the consent, and also *MORRIS*, 22 Br. Y. Int. L. 245, expound different points of view.

The most discussed instance is sale and dispatch of goods from a country, where delivery is required to pass the title—Argentina, Germany, Switzerland—to another jurisdiction considering consent sufficient to do so—United States, France, Italy. Does title pass on the border? Before the first World War, German shippers sent goods to English buyers, and the goods arrived in England but, whether lost or seized, were never received by the consignees. Had the title passed? Two opposite opinions have been advanced.

(a) Since the requirements for transfer of ownership are unfulfilled so long as the goods are in territory X, the seller remains the owner until in Y a new act, such as an agreement or adverse possession, complying with the law of Y, transfers the title, without regard to what happened in X.³² For adherents of the vested rights theory, it is obvious that no such right existed in X.

The Anglo-German Mixed Arbitral Tribunal gave this logically indisputable conclusion an unnatural twist in contending that the intention of transfer required by the English Sales of Goods Act was missing, because German merchants had contrary intentions suggested by the German code.³³ This is a fictitious assumption of an intention, extending German legal conceptions of property questions to English territory, whereas the merchant mind is notoriously indifferent to these questions.³⁴

(b) In the contrary view, the facts existing at the moment when the situs changes are evaluated under the

³² BARTIN, 3 *Principes* 233; DESBOIS, *Clunet* 1931, 309 at 315 requires that the title must be based on the *lex situs* as of the time of its alleged acquisition; NIBOYET, 9 *Répert.* 231, Nr. 57; 104 *Traité* 374 (requiring a new sale in France); FALCONBRIDGE, *Conflict of Laws* 390.

³³ *E. Lüttges & Co. v. Ormiston & Glass, Ltd.* (1926) 6 *Recueil trib. arb. mixtes* 564; *Büsse v. British Manufacturing Stationery Co.* (1927) 7 *id.* 345.

³⁴ RABEL AND RAISER, 3 *Z. ausl. PR.* (1929) 62, 67; RAAPE, *IPR.* 381, 394 n. 36. An anticritique by HELLENDALL, "Res in Transitu, etc.," 17 *Can. Bar Rev.* (1939) 7 at 17 misses the point.

new law.³⁵ A sales contract and goods dispatched in Germany, at the moment when the goods cross the frontier to France become sufficient operating facts to exercise the same effect as if they had occurred in France or England.³⁶ However, the justification of this result varies somewhat.³⁷ Either the rule of article 2279: *En fait de meubles, possession vaut titre*, is interpreted as protecting the transaction between the possessor and a purchaser in good faith; this transaction is construed from the facts that took place abroad. Or the great principle of article 2279 is understood broadly to protect possession as such, rather than the transaction, against the claim of ownership; hence the buyer, as soon as he possesses through the railway or the forwarding agent, acquires title.

Conforming to the latter variant, when a chattel is innocently purchased from a nonowner in England where no title is acquired, and thereafter imported into France, the purchaser may now enjoy the French usucapion of three years (article 2279 paragraph 2).³⁸ It seems surprising that article 2279 should operate without regard to article 1138. But it does have its peculiar history.³⁹ Yet respecting conflicts law, both opinions are inexact, because the entire question is exclusively concerned with the municipal

³⁵ OLG. Zweibrücken (July 13, 1898) 10 Z. int. R. 220, S. 1901.4.25; RG. (May 7, 1880) 1 RGZ. 415; 2 ZITELMANN 337.

³⁶ DIENA, *Diritti Reali* 175 ff.; 2 FIORE § 818; 4 WEISS 212; 8 LYON-CAEN ET RENAULT § 1291; see cases in NIBOYET, *Acquisition* 397 ff.; and *id.* 9 Répert. 230 §§ 49, 51; 2 FRANKENSTEIN 69.

³⁷ LEWALD 187, § 248; RAAPE, *IPR.* (ed. 3) 393 f. (apparently in contrast to p. 381); BATIFFOL, *Traité* 511 n. 1.

³⁸ Cass. civ. (March 14, 1939) S. 1939.1.182; LEREBOURS-PIGEONNIÈRE § 355; SURVILLE § 174; BATIFFOL, *Traité* 510.

³⁹ See the valuable study by WALTER MERK, "Die Entwicklung der Fahrnisverfolgung im französischen Recht," 7 *Rhein. Z. f. Zivil. u. Prozessrecht* (1914) 81, 173, at 218 ff.

law of the new situs.⁴⁰ In conflicts law, the second situs has to work with its own system and with the facts occurring during its own reign. True, it must not be required that all party declarations should be faithfully recited on the territory of Y as if a void sales contract were to be cured. We understand well what the parties intend. But as the ways of the law go, this continued intention ought to be in some manner manifested. Receipt by the buyer's forwarding agent or by the railway, if considered the buyer's agent, suffice for this purpose.⁴¹

II. LOCAL PUBLIC POLICY

I. New York

While we shall have to note remarkable exceptions accorded by American courts to foreign-created security interests (*infra* III), exceptional favor has been shown sporadically to the law of the forum. In litigation between citizens of New York, the New York Court of Appeals has restored property rights when chattels were removed from the forum without the owner's consent and the rights were lost abroad under the foreign law.⁴²

In *Edgerly v. Bush*,⁴³ two horses were mortgaged in New York State, then taken by the mortgagor to Quebec and sold by a trader to a bona fide purchaser who, as the

⁴⁰ *Contra*: BATIFFOL, *Traité* §§ 505, 506, who bases his position on his theory that our problem should be solved in analogy to a (questionable) intertemporal doctrine distinguishing between the regime of subjective rights (which is the new statute) and the procedure of acquiring these rights (governed by the old statute). *Cf. infra* n. 53.

⁴¹ RABEL-RAISER, 3 *Z. ausl. PR.* 67; in this conclusion followed by HELLENDALL, *supra* n. 34 at 18.

⁴² BEALE, "Jurisdiction over Title of Absent Owner in a Chattel," 40 *Harv. L. Rev.* (1927) 805 against the *Edgerly* case. Note, "Jurisdiction over Movable Property Brought into a State Without the Owner's Consent," 24 *Harv. L. Rev.* (1911) 567.

⁴³ *Edgerly v. Bush* (1880) 81 N.Y. 199.

court understood it,⁴⁴ acquired title according to Quebec law. When the horses were sold another time to the defendant, a resident of New York, but remained in Canada, the mortgagee sued with success for conversion. The court recognized that the defendant acquired title in Canada although he knew of the mortgage, but as the property was taken out without the consent of the plaintiff, the foreign rule was overcome by the domestic policy.

*Wylie v. Speyer*⁴⁵ was suggested by the preceding decision. Railway bonds were stolen from the plaintiff's New York bank deposit; coupons from them were bought after maturity validly at a German stock exchange by the bank of Speyer & Co., who sent them to their New York affiliate for collection. Under New York law the coupons, acquired after maturity, were ordinary property to which the court declared the law of the forum applicable as against the former German *lex situs*.

The arguments employed in the two decisions have been refuted by Beale and Goodrich.⁴⁶ The first decision was the more shocking as the chattels had remained outside New York and even in the very jurisdiction in which the recognized acquisition had occurred. The Restatement has refrained from formulating a general preference of older rights in case of removal without the consent of the entitled person, although it adopted such rules in favor of chattel mortgage and conditional sale.⁴⁷ But it apparently discourages the state into which the chattel is brought without

⁴⁴ Wrongly, see Quebec C.C. art. 1489 and FALCONBRIDGE, *Conflict of Laws* 381 n. (f).

⁴⁵ *Wylie v. Speyer* (N.Y. 1881) 62 How. Pr. 107. GOODRICH (ed. 3) 479, n. 102 observes that in both cases the court maintained the domiciliary law of the owner and did not mention the removal without the consent of the owner.

⁴⁶ GOODRICH *supra* n. 45.

⁴⁷ Restatement §§ 268, 275.

the consent of the owner from taking "jurisdiction,"⁴⁸ which is a very strange idea.

Neither in England nor Canada, nor in any civilian country, have such unprincipled singularities been known.⁴⁹ It seems promising that these decisions have not been followed, although the New York court has not yet clearly abandoned its special favor for its domiciliaries. What would become of the universal rules, included in the *lex situs*, if every court were to protect only its own citizens, flouting rights acquired abroad?

2. France

A law of 1872 bars the acquisition of lost or "stolen" instruments to bearer, registered in a "*bulletin des oppositions*," under the assumption that the mere fact of publication in the bulletin destroys any purchaser's good faith. The courts have applied this exclusion of bona fide purchase in the widest sphere, even to foreign-created securities and to foreign thefts or losses. Registered instruments are therefore always recoverable in France, irrespective of any interest created abroad at a temporary situs.⁵⁰

This ruthless practice, fully inconsistent with the cherished doctrine of vested rights, has been analyzed and severely criticized in the older French literature and in other countries.⁵¹ Present French writers tend to excuse this defiance of international order as a legitimate exercise

⁴⁸ Restatement § 49, Caveat and Comment to Caveat.

⁴⁹ FALCONBRIDGE, *Conflict of Laws* 384 f.

⁵⁰ French Laws of June 15, 1872, Feb. 8, 1902, March 8, 1912, and special laws concerning losses during the wars. Banknotes and French governmental securities, excepting railway bonds, are excluded (art. 16). The bar to circulation does not affect separate coupons of interest or dividend (art. 2 par. 7, of 1872).

⁵¹ LYON-CAEN, 19 *Annuaire Inst. Int. Law* (1902) 159; PILLET, 1 *Traité* 778 § 375 and *Principes* 564 § 314; DUDEN, "Der Rechtserwerb vom Nichtberechtigten," 8 *Beitr. Ausl. PR.* 92 ff. and in 8 *Z. ausl. PR.* (1934) 642.

of territorial power.⁵² After several other lame explanations, a distinguished author asserts that the intertemporal principles serve as analogy and that the question is one of domestic rather than of conflicts law.⁵³ I must disagree on both counts. It is certainly a conflicts problem whether foreign-acquired rights are to be enforced against domestic interests; and respect for an intervening foreign law may be due even though an analogous new domestic regulation was and ought to be deprived of retroactive force.

In Germany⁵⁴ and Switzerland,⁵⁵ the courts have stated that a banker acts with gross negligence if he fails to organize and supervise a continuous and exact list of lost or stolen securities notified by the police or other authorities. But for international needs it is not helpful to dictate to the world. What is required is a reliable network of international notification. Although at present bank deposits and safes operate as preventives of theft, an international convention for co-operation is recommendable.

III. SECURITY INTERESTS⁵⁶

The American courts agree with the civil law doctrine on the principles described above, but have developed some special rules respecting conditional sales and chattel mortgages. This requires a discussion of the security interests in tangibles, in which we include all legal forms of transactions intended to procure security to a creditor for satisfaction of his claim by providing him with a true real right in a tangible movable thing.

The transactions creating such rights also comprise obliga-

⁵² NIBOYET, 4 *Traité* 432.

⁵³ BATIFFOL, *Traité* 512, *cf. supra* n. 40.

⁵⁴ 37 RGZ. 71; 41 *id.* 207; 28 *id.* 109.

⁵⁵ BG. (Nov. 24, 1899) 25 BGE. II 840, 846 f.; Trib. com. Bern (Sept. 17, 1946) 83 ZBJV. (1947) 79.

⁵⁶ See *supra* Ch. 55, III.

tions and are connected with procedural steps. Nevertheless, primary importance prevailingly attaches to the measure of recognition a security enjoys at a new situs as respects attaching creditors and bona fide purchasers.

Using the American statutory terminology,⁵⁷ we may speak of "creditor" and "debtor" to indicate generally the parties to a security agreement.

The fact that in American law no certain line divides mortgages and pledges from privileges in execution and therefore "title" and "lien" doctrines are in strife, has increased the uncertainty in this field. The draft of a Uniform Commercial Code—"Secured Transactions"—claims to be independent of this controversy. Whether or not this draft deals exclusively with true "interests in goods," these must be here our primary object. The so-called liens, hence, are included, if under the competent law they are real rights. But this restriction does not seem very important respecting liens created in the United States. Here it may be assumed that liens are presumptively real interests.

At the outset, it should be remembered that under all circumstances a security interest must have been validly created under its *lex situs* of the time.⁵⁸ Reservation of title in Louisiana,⁵⁹ or if not recorded in Switzerland,⁶⁰ is void; hence, the buyer's title is considered absolute also after removal to another jurisdiction.⁶¹ Moreover, it may be important whether in the state where it is originally created, e.g., a conditional sale protects the seller against bona fide

⁵⁷ Uniform Conditional Sales Act, § 58. The Draft, Uniform Commercial Code, 9-105 ss. 1, d. i, etc., speaks of "secured party" and "debtor."

⁵⁸ Restatement §§ 272, 280, comments. See *supra* 70 ff.

⁵⁹ *Motors Securities Co. v. Duck* (1939) 198 Ark. 647, 130 S.W. (2d) 3.

⁶⁰ Swiss C.C. art. 715; *cf. infra* n. 89.

⁶¹ A different theory once obtained in Germany with respect to a prohibition by the law of Oldenburg, RG. (Feb. 28, 1893) JW. 1893, 207; (July 7, 1899) *id.* 1899, 581.

purchasers or an execution creditor (as in the great majority of American states) or not (as in Illinois⁶²).

1. Normal Principles

A validly established interest persists despite any change of situs, but the new situs governs new acquisitions by third persons, detrimental to that interest. A purchaser in good faith or (in the Romanistic tradition) a buyer at a public auction, if protected by the property law of Y, prevails over the creditor invoking the law of X, according to universal conflicts law. As a rule, in Continental laws attaching creditors of the debtor or purchasers in bad faith have no more rights than the debtor; the prior creditor's real right is superior.⁶³ However, state Y may accord priority to certain liens acquired at the new situs over the old title.⁶⁴

Thus, in civil law jurisdictions, state Y applies its own rules on the acquisition of real rights on its own territory. If these rules confer on a bona fide purchaser a title free from previous charges, a foreign security interest perishes exactly like a domestic one.⁶⁵

At common law, the general conflicts rule leaves state Y equally free to determine priority,⁶⁶ but in the American courts conflicts law and municipal law are mingled through an interpretation of the internal statutes, which produces

⁶² *Western Union Cold Storage Co. v. Banker's National Bank* (1898) 176 Ill. 260, 52 N.E. 30.

⁶³ FALCONBRIDGE, *Conflict of Laws* 405.

⁶⁴ E.g., *Universal Credit Co. v. Marks* (Md. 1932) 163 Atl. 810, *cf.*, 87 A.L.R. at 1312.

⁶⁵ Germany: OLG. Frankfurt (July 5, 1890) 4 Z. int. R. (1894) 148 (horses sold conditionally in Hesse, but sold in Prussia; the bona fide purchaser wins).

The Netherlands: Hof Amsterdam (May 8, 1930) W. 12150, *aff'd.*, HR. (March 27, 1931) W. 12311, N.J. 1931, 701 (instruments mortgaged in Holland but sold abroad, foreign purchaser wins).

⁶⁶ Restatement §§ 269, 276; MORRIS, 22 B.Y. Int. L. at 238 ff.

varying results. Two currents have been in opposition. It is the "traditional policy of the common law to protect the owner rather than the innocent purchaser."⁶⁷ Hence, sometimes we find attaching creditors of the buyer—who enjoy publicity rights—and bona fide purchasers, despite the property law of Y, subordinated to the foreign-created security right.⁶⁸ On the other hand, there exists authority to the effect that an attaching creditor is preferred over a vendor, bailor, conditional vendor, or mortgagee, if the law of the situs of the chattel at the time so provides.⁶⁹

In view of the prevailing confusion, it should be remembered that all these tendencies are to be regarded as exceptions to the rule that (1) the law of X creating a security interest is respected in Y, subject to the extent that (2) *new* events exercise their influence according to the *general* law of property of Y. To stress this rule is important, if for no other reason, because decisions in Y conforming to this rule are assured interstate and international force. Not every fancy solution of a court of Y would be entitled to recognition, and we know of retaliation even in an American sister state.⁷⁰

⁶⁷ FALCONBRIDGE, *Conflict of Laws* 383.

⁶⁸ This seems to be the basis of the doctrine respecting removal without consent, *infra* sub 4. But *Olivier v. Townes* (La. 1824) 2 Mart. N.S. (La.) 93 is no support, as Stumberg (ed. 1) 359, 361 seems to think. The Louisiana court failed to recognize the sale of a ship on the high seas which was correctly perfected without delivery, because the court unjustifiedly applied Louisiana property law. It did not decide that Louisiana creditors have precedence over foreign vested rights.

⁶⁹ STUMBERG (ed. 1) 361, black letters. The text of ed. 2 has been changed at page 393 to make clear that this is a minority view. For a more detailed survey, see STUMBERG, "Chattel Security Transactions and the Conflict of Laws," 27 Iowa L. Rev. (1942) 528.

⁷⁰ Retaliating against the former rule of Texas (*infra* n. 81), *Union Securities Co. v. Adams* (1925) 33 Wyo. 45, 236 Pac. 513, 50 A.L.R. 23; *Forgan v. Bainbridge* (1928) 34 Ariz. 408, 274 Pac. 155 much criticized, see GOODRICH (ed. 3) 487 § 158. *Contra*, *Arkansas, Hinton v. Bond Discount Co.* (1949) 214 Ark. 718, 218 S.W. (2d) 75 refused to retaliate, as also *New Mexico and Louisiana*. See 13 A.L.R. (2d) at 1319.

Approaching the restrictions on the two parts of this rule, the first objection to the extraterritorial effect of the interest conferred by X may be based on disapproval in Y of the law of X.

2. Public Policy

Foreign security rights have been disregarded because their creation under the law of X did not comply with the publicity requirements of Y. Thus, recognition has been denied to mortgaging⁷¹ or retaining of title⁷² without surrender of physical possession to the mortgagee or a third person. Also, the new situs has been said to reject a rule of X that the pledgee retains his right when he loses possession against his will.⁷³ General legal hypothecs of the former German common law and of French law have been refused enforcement in other territories where mortgages must be charged upon specific objects.⁷⁴ Emphasis in such decisions is due to a strongly felt public policy rather than to the mere *lex situs*, which in itself must not defeat the foreign-created right.⁷⁵

It so happens, by the inscrutable wisdom of national law-making, that Louisiana rejects conditional sales executed

⁷¹ England: *Liverpool Marine Credit Co. v. Hunter* (1867) L.R. 4 Eq. 52, (1868) L.R. 3 Ch. App. 479 H.L.: English mortgages on a ship ineffective in Louisiana.

France: Cass. req. (March 19, 1872) D. 1874.1.465, S. 1872.1.238; (May 24, 1933) Rev. Crit. (1934) 142.

Austria: A.B.G.B. §§ 451, 452.

⁷² Germany before the Civil Code: RG. (Nov. 25, 1895) 6 Z. int. R. 424; OLG. Braunschweig (Sept. 20, 1894) *ibid.* 510.

⁷³ French C.C. art. 2076 extinguishes a pledge in every case where the creditor loses the pledge; German C.C. § 1253 par. 1 only where the creditor voluntarily returns it.

⁷⁴ Oberapp. Ger. Jena (July 7, 1853) 16 Seuff Arch. 1; Prussia: Ob. Trib. (April 8, 1875) 31 *id.* 257 No. 194.

⁷⁵ 1 WHARTON 709, § 317 b.

Germany: RG. (Feb. 28, 1893) JW. 1893, 207, 3 Z. int. R. 622.

The Netherlands: Rb. Maastricht (June 26, 1930) W. 12354, N.J. 1931, 8.

in the forum ⁷⁶—seller's credit—but the Supreme Court and recent legislation permit chattel mortgages—banker's credit—while Switzerland after much struggle has admitted reservation of title under recording, but strictly disapproves of trust receipts ("Sicherungs-Übereignung"), though recently with weakening vigor.⁷⁷

Under no policy should a court deny recognition in principle to a foreign incumbrance on movables brought to the forum, merely because the type is alien to the domestic law, as has occurred in a few American decisions.⁷⁸

3. Recording

The precarious legal situation of a chattel on which a mortgage or a vendor's title has been validly constituted, is intended to be stabilized by the machinery of public recording. This protection, of course, ought to cease when a dealer, especially of an automobile, is permitted by his mortgagee or conditional seller, to resell. The American courts try to cope with this complication, either by assuming that in such case recording of the reserved right is not constructive notice to a purchaser for value or its effect is counteracted by estoppel or waiver.⁷⁹ In other cases, difficulties arise where recordation is required at the new situs

⁷⁶ Louisiana: *Barber Asphalt Paving Co. v. St. Louis Cypress Co.* (1908) 121 La. 152, 46 So. 193. Conditional sales executed in other states are recognized; see Note 13 A.L.R. (2d) 1325. A similar tendency is ascribed to the Supreme Court of Colorado by MACDONALD, "Enforcement of Foreign Conditional Sales in Colorado," 6 Rocky Mt. L. Rev. (1934) 221, 222.

⁷⁷ Switzerland: The Federal Tribunal has recently—BG. (July 5, 1946) 72 BGE. II 235, 35, Praxis 1946, No. 146—made it clear that a fiduciary transfer to a creditor, well-known also in that country, is a good title for ownership, and what it objects to is merely transfer without real surrender of possession, or, perhaps even merely transfer by *constitutum possessorium*, as GUHL, 183, Z. Bern J.V. 489 suggests; see also OFTINGER, *Zürcher Komm. Abt. IV* (1952) 2(c).

⁷⁸ See 2 BEALE § 273.1 n. 3.

⁷⁹ See 136 A.L.R. (1942) 821, under III discussing the effect on creditors of the dealer.

but the creditor does not comply with the formalities. In the strictest view, the situs applies its ordinary requirement to all chattels situated in the forum irrespective of their original location.⁸⁰ In the United States formerly the courts of Texas drew this consequence,⁸¹ and other states, notably Colorado,⁸² showed or show an analogous attitude⁸³ which, once, was eloquently expounded by the Supreme Court of the United States.⁸⁴ Statutes in increasing number expressly announce that all chattels brought into the state must be recorded to preserve previous security titles.⁸⁵ Since a French law of 1934, automobiles must be registered in France with their foreign-created

⁸⁰ This is also the effect of not utilizing the very strong protection afforded by registration in Peru L. 6565 of March 12, 1929, on which see DELGADO, *Compendio* (1938) 41.

⁸¹ Texas: *Consolidated Garage Co. v. Chambers* (1921) 111 Tex. 293, 231 S.W. 1072, 1074 (conditional sale, Cal.); *Farmer v. Evans* (1921) 111 Tex. 283, 233 S.W. 101 (chattel mortgage, Okla.). But contrary, exempting foreign executed and recorded mortgage liens from the Texan Certificate of Title Law: *Bank of Atlanta v. Fretz* (Tex., Sup. Ct. 1950) 226 S.W. (2d) 843.

⁸² Colorado: *Commercial Credit Co. v. Higbee* (1933) 92 Colo. 346, 20 Pac. (2d) 543 (domestic attaching creditor preferred over a Californian conditional vendor); *American Equitable Assurance Co. v. Hall Cadillac Co.* (1935) 93 Colo. 186, 24 Pac. (2d) 980; *Castle v. Commercial Investment Trust Corp.* (1937) 100 Colo. 191, 66 Pac. (2d) 804 (local buyer against foreign conditional vendor). See MACDONALD, *Conditional Sales*, 6 *Rocky Mt. L. Rev.* (1934) 221.

⁸³ Alabama: *Pulaski Mule Co. v. Haley & Koonce* (1914) 187 Ala. 533. Maryland: *Universal Credit Co. v. Marks* (1932) 164 Md. 130, 163 Atl. 810 (conditional sales).

Mississippi: *Patterson v. Universal C.I.T. Credit Corp.* (Miss. 1948) 37 So. (2d) 306.

⁸⁴ *Hervey v. Rhode Island Locomotive Works* (1876) 93 U.S. 664, *LORENZEN*, Cases 685.

⁸⁵ 13 A.L.R. (2d) 1320; 1341 adding Kentucky, North Carolina and West Virginia. On New Mexico Law 1947, see *Cheatham Cases* (1951) 613 n. 2. These statutes oppose the inclination of many courts to exempt conditional sellers' rights from the duty of recording; see HONNOLD, *Cases and Materials on Sales and Sales Financing* (1954) 408.

But see despite the Michigan Statute Comp. L. 1948 § 566, 140, St. Ann. (1953) § 26929, the majority in *Metro-Plan v. Kotcher-Turner Inc.* (1941) 296 Mich. 400, 296 N.W. 304.

pledges or title conditions, lest they be considered free of charges.⁸⁶

The Uniform Conditional Sales Act, however, allows ten days after the entry of the chattel in Y for recording of the rights acquired in X.⁸⁷ When this period elapses, subsequent recording still provides priority over later charges.⁸⁸

The Swiss view is similar. A reservation of title (*Eigentumsvorbehalt*) must be recorded at the domicile of the purchaser and is maintained in case the latter changes his domicile, only if recorded again at the new place.⁸⁹ No such delay is actually granted in case the object is imported by a Swiss purchaser. Thus, a conditional sale made in Germany informally, under German law, is ineffective as soon as the car enters Switzerland. It has been said that if the movable returns to Germany, the reserved title revives, although conflicting interests created in the meantime enjoy priority.⁹⁰ This would be an unwarranted breach of principle. The efficacy of the *lex situs* should not be split and limited to territorial effects.

In all these cases, the right of the debtor is deemed ab-

⁸⁶ Law of December 29, 1934, D. 1936.4.898; NIBOYET, *Rev. crit.* 1935, 545; LEREBOURS-PIGEONNIÈRE (ed. 5) 467 § 355 n. 1. If a chattel mortgage registered in France is lost abroad to a purchaser in good faith, it does not revive according to the just opinion of NIBOYET, *l.c.*; *Contra*, LEREBOURS-PIGEONNIÈRE, *l.c.* (note omitted in ed. 6), followed by BATIFFOL, *Traité* 511 par. 505 n. 2.

⁸⁷ Sec. 14; *cf.*, BOGERT, 2a U.L.A. 129.

⁸⁸ *Bent v. H.W. Weaver, Inc.* (1928) 106 W. Va. 164, 145 S.E. 594; *White v. E.C. McKallor Drug Co.* (1933) 239 App. Div. 210, 268 N.Y.S. 371.

⁸⁹ Swiss C.C. art. 715; BG. (Jan. 21, 1910) 36 BGE. II 1; (March 30, 1916) 42 BGE. III 173; App. Bern (Dec. 12, 1913) 50 ZBJV. 560.

Liechtenstein: C.C., Property, art. 175.

⁹⁰ BATIFFOL, *Traité* 511 n. 2; 2 SCHNITZER (ed. 3) 520. By an analogous conclusion, in case of an automobile, hypothecs registered in France under the law of Dec. 29, 1934, are said to have precedence over pledges subsequently created abroad if the car returns to France; LEREBOURS-PIGEONNIÈRE (ed. 5) 467 n. 1. *Contra*, M. WOLFF, *Sachenrecht* § 159, in case a product of a land included in a hypothec in X is removed to Y where it becomes free from the incumbrance; it remains so when returning to Y.

solute for the benefit of new purchasers and attaching creditors.⁹¹

Interesting American decisions except a chattel, mortgaged⁹² or bought under conditional sale,⁹³ from the requirement of recordation if it is only temporarily present in the forum. One might say, the chattel is treated as a *res in transitu*. But a much more intensive exception to all these systems exists in the United States in the following case.

4. Removal Without the Creditor's Consent

Outside of the United States, no example is known in which the domestic formalities of Y for security interests are differently construed for domestic and foreign-created security interests.⁹⁴ This, however, happens in the great majority of American courts, and has been proclaimed by the Restatement and a few statutes. If the removal to Y is wrongful against the creditor, he maintains his rights even without the prescribed registration in Y.⁹⁵ If the creditor has consented to the removal, in the prevailing opinion, the new *lex situs* exercises its normal effect, that

⁹¹ *Supra* n. 61.

⁹² *Flora v. Julesburg* (1920) 69 Colo. 238, 193 Pac. 545; as noted *supra* n. 76, MACDONALD observes that the Colorado Court favors chattel mortgages, in contrast to reservation of title.

⁹³ *Universal C.I.T. Credit Corp. v. Walters* (1949) 230 N.C. 443, 53 S.E. (2d) 520, 10 A.L.R. (2d) 758. See 13 A.L.R. (2d) 1346.

⁹⁴ FALCONBRIDGE, *Conflict of Laws* 384 f.

⁹⁵ *Edgerly v. Bush* (1880) 81 N.Y. 199; Restatement §§ 268, comment c, 275; Mich. Comp. Stat. 1948, § 566, 140a; Virginia Code 1950, § 55-99; GOODRICH § 157; Note, 87 A.L.R. 1314; 13 A.L.R. (2d) 1318. BEALE, "Jurisdiction over Title of Absent Owner in a Chattel," 40 Harv. L. Rev. (1927) 805, and the Restatement, Caveat to §49 and Comment, even assert that under common law a state does not exercise jurisdiction over a chattel brought into the state without the consent of the owner. See *contra* Note, 37 Yale L.J. (1928) 966, and *cf.*, Note, 41 Harv. L. Rev. (1928) 779; WATSON, 7 Tul. L. Rev. (1933) 451, 452; GOODRICH § 156; FALCONBRIDGE, *Conflict of Laws* 381.

For Louisiana see DAINOW, 13 La. L. Rev. (1953) at 235.

is, "any dealings with the chattel in the second state"⁹⁶ create the same effect as under domestic law. A small group of abnormal decisions destroying the interest in the case of consent to removal is erroneous.⁹⁷ Consent could have such effect only if it were a waiver.

The highest New York court has invoked common law against its own statutory provision for registration.⁹⁸ An automobile was bought in California, brought without the consent of the seller to New York, and sold there to an innocent purchaser. The court explained that in California the seller still had a right superior to a subsequent bona fide purchaser from the buyer, and that this law agreed with the New York common law. Conforming to the ancient rules of narrow statutory construction, the court restricted the recording statute so as not to affect common law and the right acquired in California. This was based on the text of the Uniform Conditional Sales Act, but the futility of the reasoning makes it clear that the traditional superiority of the legitimate owner is favored, although the result is directly opposed to the abnormal preference for domiciliaries of New York.

The American exceptional favor for foreign-created conditional titles and mortgages is unique. It seems to me that it belongs to the considerable group of tolerance rules arising in the American interstate sphere;⁹⁹ as such it is a remarkable phenomenon. So long as no uniform law for the nation organizes a reasonable system of measures by which a creditor can safeguard himself with ordinary diligence, the courts are anxious to protect legitimate credit against

⁹⁶ Restatement §§ 269, 276.

⁹⁷ GOODRICH (ed. 3) 483. Cf. *supra* n. 31.

⁹⁸ Lehman, J., in *Goetschius v. Brightman* (1927) 245 N.Y. 186, 156 N.E. 660.

⁹⁹ See Vol. I, 340 (married women's capacity); II, 412, 427 (usury), 565 (Sunday contracts), III, 177 (liquor sales).

dishonest frustration unknown to the creditor. Their remedy, however, endangers quite similarly legitimate interests of other persons dealing in good faith and unable to guess the origin of the transferor's possession. That they may believe themselves well protected by the recording statute of the forum makes the legislative situation still worse.

5. The Concept of the First Situs

In a line of American decisions, the principles are modified by submitting a conditional sale not to the *lex situs* of the goods at the time of the contract but to the law of the place whereto the parties intend the goods to be sent by the seller. The alleged reason is ordinarily that the transaction is not completed until delivery,¹⁰⁰ by analogy to the theory of the last act completing a contract and fixing the place of contracting.¹⁰¹ But the conditional agreement occurs while the goods are not yet delivered; delivery, on the other hand, does not transfer the title until payment. Any analogy to the unfortunate theory of the last act is thereby excluded.

However, a court tending to confuse in the conflicts field property and contracts theories and mingling *lex situs* and *lex contractus*, approaches nevertheless the correct result when it identifies delivery to the carrier in X for shipment to Y with "performance" and applies the law of X as the state of both contracting and performance.¹⁰² The situs

¹⁰⁰ See 2 BEALE 1002 n. 4.

¹⁰¹ Knowles Loom Works v. Vacher (1895) 57 N.J. Law 490, 31 Atl. 306; GOODRICH 484.

¹⁰² E.g., Marvin Safe Comp. v. Joshua Norton (1886) *supra* n. 26, at 48 N.J. Law 415. The problem of stating at what phase a conditional sales contract is "executed" is serious, for instance, in the case of bankruptcy or insolvency of either party, a question much discussed in Germany. See RÜHL, "Die Vergleichsordnung und der Verkauf unter Eigentumsvorbehalt," 56 Zeitschr. f. Deutschen Zivilprozess (1931) 154, who found no help in foreign laws, p. 165.

of the thing at the time of the contract should simply be respected, without opportunistic exceptions.

It is true that Stumberg has suggested that the place where the chattel in the contemplation of the parties is to be habitually used, should be considered the most substantial connection of both obligation and security.¹⁰³ This, however, is an unnecessary exception to the settled significance of the situs, substituting to a certain territorial place an uncertain place dependent on party intention.

American legislation. Evidently conflicts law has very inadequately dealt with the problems of credit by sellers and bankers within the states of the United States, not to speak of international relationships, once more to be qualified as desperate. In the case of automobiles sold by conditional reservation of title in the United States, even the domestic situation of retail dealers between the wholesale dealers or manufacturers retaining title but allowing sales and the buying public is a source of contradictory judicial opinions.¹⁰⁴ With a view to the interstate complications,

¹⁰³ STUMBERG, "Chattel Security Transactions and the Conflict of Laws," 27 Iowa L. Rev. (1942) 528, 536 and n. 11.

¹⁰⁴ Note, "Record of Chattel Mortgage on, or Conditional Sale of an Automobile," 136 A.L.R. (1942) 821; see also Note, 88 U. of Pa. L. Rev. (1940) 367.

And see on the doubts relating to liens, FALCONBRIDGE, Conflict of Laws 401; cf., BEALE, 33 Harv. L. Rev. (1919) 815 f. and now in particular HONNOLD, Cases (*supra* n. 84) 573, who states the usual preference given the conditional seller over the repairman, at least where the seller retained the certificate of title. The decision in *Willys-Overland Co. v. Evans* (1919) 104 Kan. 623, 180 Pac. 235, emphasizes the local policy of protecting the workman repairing a transient car. What about the carrier's lien confronting a conditional seller's title? The Uniform Commercial Code refrains from a provision (sec. 9-104c), although it gives priority to the lien acquired for services of material (sec. 9-310) in the line of the decisions, and by generalizing privileges accorded in the Uniform Trust Receipts Act. The German courts recognize the priority of a carrier's or forwarding agent's lien acquired in good faith (on the current transportation only) over a conditional seller's title. See KARL JOSEF PARTSCH, *Zurückbehaltungsrecht* (Diss., Würzburg 1938) 47.

No doubt, a carrier assuming transportation in Y has as extensive a

the Uniform Conditional Sales Act and the special state statutes on recording and certificates of automobiles have tried at least four different methods for reconciling the legitimate interests of an unpaid seller and an innocent purchaser. But in a recent study it has been demonstrated that the "skip-state" operator, buying a car on a down payment in X and reselling it for full value in Y or Z, is blooming despite all these laws.¹⁰⁵ Evidently, the proposal in the Uniform Commercial Code prolonging the time for recording at the new situs from ten days to four months¹⁰⁶ would be a strangely one-sided reform. Only consistent regulation, with stricter supervision of recording and reciprocal official information, as Leary proposes, would furnish an adequate remedy.

On the international plane, neither the present attempts nor the advocated reforms provide a serious hope of reconciliation.

Effective universal help is merely available in the sphere of facts rather than that of the rules. Careful methods of issuing certificates of registration, a duty of careful investigation of the secondary seller's title by the buyer, and conscientious inquiries by the responsible officers in execution sales, may help to educate all concerned and minimize the conflicts.

statutory or conventional lien as state Y grants him. But if the carrier loads the goods in X and delivers them in Y, which law decides on his right and priority in the absence of interstate and international regulations?

¹⁰⁵ LEARY, "Horse and Buggy Lien Law and Migratory Automobiles," 96 U. of Pa. L. Rev. (1948) 455. See also the survey of recent court decisions on the dubious effect of certificates of title of motor vehicles "showing or not showing liens," 13 A.L.R. (2d) at 1326-1329.

¹⁰⁶ October 1949 Revision, sec. 8-109, CCU. sec. 9-103(3). The text speaks merely of two jurisdictions involved: that "in which it was last situated" and "this state." The number of states possibly involved is, of course, unlimited.

IV. ADVERSE POSSESSION

If a title is acquired by completed adverse possession under the law of the *lex situs*,¹⁰⁷—or a permanent defense against any aggressor or certain persons—it is recognized wherever the chattel is subsequently brought.¹⁰⁸ The older literature, however, split into a variety of opinions respecting the case where the period of acquisition by lapse of time has merely begun to run in X and a new *lex situs*, Y, prescribes a different period.¹⁰⁹ The Restatement takes up one of these old and long refuted ideas.¹¹⁰ From the conception of the statute real, it was deduced that each of several subsequent situations should be considered as effecting a part of the acquisition. In one view, hence, the necessary period of possession should have been computed in proportion to the several spaces of time during which the chattel has been possessed under the several territorial laws.¹¹¹ Instead of this impossible method, the Restatement proposes the application of the longest period required by any one of the states in which the chattel has been. Confessedly,¹¹² no American decision has authorized this arbitrary solution.

An unfinished period as such does not generate any effect. In the only view consistent with the principles, therefore,

¹⁰⁷ It would seem that a minor effect of adverse possession, as occurs in common law respecting land, must be characterized as extinctive limitation of action. The English Limitation Act, 1939, Sec. 3(1)(2), now recognizes extinction of the title.

¹⁰⁸ Universally settled. Restatement par. 259 comment a; GOODRICH (ed. 3) 478 n. 98. In England it is said that "positive or acquisitive prescription" that transfers ownership goes to the substance of a transaction, CHESHIRE (ed. 4) 641 f.

¹⁰⁹ See SAVIGNY 186; 1 WHARTON 821 f.; 1 BAR 637 § 237; ARMINJON, "L'usucapion, etc.," 1 Mélanges Pillet 19; NIBOYET, 10 Répert. 289.

¹¹⁰ Restatement § 259, comment b.

¹¹¹ 1 MEILI 397.

¹¹² Restatement, Tentative Draft No. 3 (1927) § 279, Special Note.

the law of the last situs decides exclusively. This opinion is universally dominant.¹¹³

Illustration. If X requires four years and Y three years, the Restatement requires four years,¹¹⁴ and the prevailing opinion three years.¹¹⁵

The prevailing theory must be followed to the extent that the factual requirements for adverse possession are indicated by the property law of the last situs. At the same time, it will ordinarily be true that a time of possession exercised under a previous *lex situs* is good enough to satisfy the last law, so that the past periods of possession may be counted in the required period. Consequently, acquisition may be completed at the crossing of the frontier if Y has a shorter period than X.¹¹⁶

In a more precise elaboration of this reference to previous law, where no acquisitive prescription in stolen chattels is permitted in X, it has been said that adverse possession under the law of Y, not knowing such restriction, merely runs from the removal to Y.¹¹⁷ Also suspension and interruption are governed by the new law.¹¹⁸

¹¹³ E.g., SAVIGNY 186; 1 WHARTON 821; DIENA, *Dir. Reali* 136, 174; *cf.*, 23 *Annuaire* (1910) 246; 2 FIORE § 818; 2 ZITELMANN 347; WEISS, 4 *Traité* 208, 212; NIBOYET, *Acquisition* 329; 2 FRANKENSTEIN 78; 2 SCHNITZER (ed. 3) 522.

Japan: *Int. Priv. Law*, art. 10 (semble);

Liechtenstein: C.C., *Property Law*, art. 13, par. 1.

Rumania: C.C. art. 33;

Nicaragua: C.C. art. VI 18, 19;

Montevideo Treaty, art. 55;

Código Bustamante, arts. 227 f.

¹¹⁴ Expressly so, Restatement illustration, § 259, comment b.

¹¹⁵ See also WATSON JR., "The Doctrine of Adverse Possession," 7 *Tul. L. Rev.* (1933) 451, 454.

¹¹⁶ DIENA, *Dir. Reali* 171, 175; 2 ZITELMANN 348; DESPAGNET 1186 § 420; (order public territorial); SURVILLE § 174; VALÉRY 896 § 622; 2 FRANKENSTEIN 79; 2 ALCORTA 469 f.; MATOS 422 § 302.

¹¹⁷ WEISS, 4 *Traité* 212; M. WOLFF, *IPR.* (ed. 2) 156. The application to France depends on the controversial interpretation of C.C. art. 2279.

¹¹⁸ See 2 ROMERO DEL PRADO, *Manual* 281 on the civil law reference to the personal law for determining capacity to sue.

In a weak middle solution, advanced in the Austrian draft and adopted in Poland, the possessor has an option between the old and new laws of situs.¹¹⁹

The dominant opinion is no doubt preferable.

¹¹⁹ Poland: Int. Priv. Law, art. 6 par. 2; Czechoslovakia: Int. Priv. Law § 49.