CHAPTER 57

Ambulatory Chattels

I. GOODS IN TRANSIT

IN accordance with Savigny's theory,[1] a well-considered doctrine assumes that the reasons for allowing the law of the situation to decide on the rights in a thing presuppose a stable localization and do not include "chattels in transportation" *(res in transitu)*.

In order that a tangible movable should be subject to the law of a territory, it must have a permanent location, its place of destination. This relationship is missing if a chattel from the viewpoint of its destination touches a territory but temporarily, such as merchandise dispatched, the baggage of a traveler, land and water vehicles and vessels.[2] Before carriage, goods sold are no longer included in this exceptional group;[3] these are discussed above.[4] The question is what law governs when ownership is transferred during the time a chattel is in transit.

Despite the many opinions expressed on this subject, it would seem that the doubt inherent in this question should be further reduced in scope. Goods in transit, if stopped intentionally at a specified place for a sufficient period, may be seized;[5] they may also become subject to a lien of the carrier. There is no doubt that *lex situs* applies in such

[1] SAVIGNY § 366 (tr. Guthrie) 179; ROHG., (Apr. 26, 1872) 6 ROHGE. 80, No. 14, 28 Seuff. Arch. No. 2.

[2] REGELSBERGER, Pandekten 172.

[3] Thanks to NIBOYET, Acquisition 70. They still appear in Brazil: Lei Introd. 1942, art. 8 § 1, but ESPINOLA, Lei Introd. 470 § 210 seems to restrict the new version of the article to chattels of uncertain situation.

[4] *Supra* 40.

[5] NIBOYET, 4 Traité 622; VALÉRY 898; 2 FRANKENSTEIN 50.

cases. Moreover, in maritime transportation, goods are regularly transferred through endorsement of the bill of lading, the law of the place of the document prescribing the requisites of transfer of the paper. Transactions affecting a ship or aircraft are commonly considered to be governed by the law of the flag.[6]

The needed emergency solution, hence, is restricted to chattels during interstate rail or truck transportation, when their temporary place is casual or unknown to the parties. This group, however, includes transshipment. Writers have advocated the domicil of the owner,[7] the ordinary *lex situs*,[8] the law of the contract,[9] and strangely, choice of law by the parties;[10] the two last opinions, deserting the principle of real rights, are prejudicial to third persons.[11] The law of the place of destination [12] or delivery is especially favored,[13] justifiedly insofar as it is the first securely foreseeable point and evidently preferred by the courts when they are thus enabled to apply their own law.[14]

[6] BATIFFOL, Traité 508, 509 § 503; for aircraft, LEMOINE, Traité de droit aérien (1947) 175 *contra* RIESE, Rev. franç. droit aérien (1951) 131, 143.

[7] SAVIGNY (Guthrie) 185; 1 WHARTON § 301; WESTLAKE, 14 Revue Dr. Int. (Bruxelles) 287; 2 FIORE § 834;

Argentina: C.C. art. 11.

Brazil: Lei Introd. 1942, art. 8.

Siam: Priv. Int. L. art. 16(2).

[8] 1 BAR 608; NUSSBAUM, D. IPR. 311.

[9] Cases cited by 1 WHARTON 736; *cf.*, CHESHIRE (ed. 2) 438. ASSER ET RIVIER 99; WEISS, 4 Traité 205.

[10] M. WOLFF, IPR. (ed. 3) 174.

[11] HELLENDALL, "Res in Transitu in the Conflict of Laws," 17 Can. Bar Rev. (1939) 7, 33.

[12] SURVILLE ET ARTHUYS 232 § 176; NIBOYET, Acquisition 107; 2 FRANKENSTEIN 54; LEWALD 191; decisions and authors cited 9 Répert. 236, Nos. 108 ff.; LEREBOURS-PIGEONNIERE § 355; 2 SCHNITZER (ed. 3) 526; BATIFFOL, Traité 507 § 502.

Germany: RG. (Sept. 16, 1911) Recht 1911 No. 3476, Z. f. Rechtspflege in Bayern 1912, 45: stones sent from Brazil on their way to Germany.

Treaty of Montevideo on Int. Civ. Law (1889) art. 28 (cargo on high seas).

[13] Int. Law Ass. Oxford draft 1932, art. 4.

[14] RABEL-RAISER, 3 Z. ausl. PR. 64 f. For the same reason, BARTIN, 3 Principes 231.

Such an idea may account for the provision in the draft of a Uniform Chattel Mortgage Act § 43, 3, that chattel mortgages should normally be registered at the place of situation, but:

"Where at the time a mortgage is given, goods covered thereby are in transit or are intended to be and within a reasonable time actually are put in transit, such goods are to be taken for purposes of this section as located at the place of destination." [15]

While the place of destination of goods transported is not usually also the place of their permanent location, this solution may suffice to cover the gap in which fall the narrow group of cases indicated above. A subcommittee of the Seventh Hague Conference discussed a more complicated solution on the basis of the laws of the place whence the goods are sent and where they are delivered;[16] the committee did not agree on this point.

II. Rights in Ships in General [17]

1. Present Theories

A confusing variety of opinions on the subject of real interests in seagoing vessels is not surprising in view of the unlimited, even chaotic, condition of the maritime laws, but it contrasts with the dearth of conclusive judicial authority. The older doctrine treated ships like any other chattels, referring to the law of the temporary situation whenever one could be ascertained.[18] Voluntary transfer

[15] Handbook of the National Conference of Commissioners on Uniform State Laws (1926) at 440.

[16] Actes de la Septième Conférence 1951, p. 92 art. 5, 101 art. 5. For the place of dispatch, also Arminjon, 2 Précis (ed. 2) 126 § 31; Balladoro Pallieri, DIP. 220; Monaco, Efficacia 213 § 115.

[17] Hellendall, supra n. 11, at 109 ff.; Niboyet, 4 Traité 476 ff., 538 ff.; Abraham, Die Schiffshypothek im deutschen und ausländischen Recht (Überseestudien, Heft 20), (1950) 302 ff.

[18] RG. (Feb. 5, 1913) 81 RGZ. 283; and still in England, The Jupiter No. 3 [1927] P. 122; in France, Trib. civ. Tarascon (March 27, 1931) Clunet 1932, 423.

of a ship while it was on the seas did not suggest a special conflicts rule but was allowed to take place by consent without delivery, as it is still provided (although now requiring registration), even in Germany,[19] as an exception to the principle of tradition.

This doctrine is not so improper as often believed, insofar as the rules prevailing for the removal of a chattel are certainly applicable in principle also to ships. For instance, the old case of *Hooper* v. *Gumm* would have to be decided likewise today under analogous circumstances. A mortgage was validly constituted in the United States under American law without being registered in the ship's papers. The vessel was then sold in England for value to a purchaser without notice. The mortgage would have been recognized and held superior to the English purchaser but for the estoppel, incurred by the mortgagee consenting to the concealment of his mortgage.[20] A maritime hypothec validly created in Rotterdam was subordinated to a subsequent mortgage acquired by an innocent mortgagee when the vessel was registered in Germany.[21]

The basic conception of vessels as objects of rights, however, has changed. On the one hand, registration has obtained an ever increasing importance. On the other hand, the modern literature continuously emphasizes the special nature of ships,[22] and declares the principle that all transactions affecting interests in a ship are governed by the law of the place of registration, and its representative, the law of the flag.[23]

[19] Germany: Law on Ship Registration, (Nov. 15, 1940) § 2 par. 1, for registered ocean vessels; C. Com. § 474 for nonregistered ocean vessels.

[20] (1867) L.R. 2 Ch. 282.

[21] RG. (June 14, 1911) 77 RGZ. 1.

[22] France: Cass. civ. (June 24, 1912) S. 1912.1.433: ships are taken out of the group of regular movables.

[23] United States: 1 WHARTON 784 § 356.
England: WESTLAKE § 150; DICEY (ed. 5) 996.

However, neither principle satisfies all needs. The writers, therefore, make tentative distinctions, according as the ship is on the high seas or in territorial waters;[24] transactions occur in the country of registration or abroad;[25] or there is title transfer, creation of liens, or seizure.[26] Occasionally, there has been resort to the *lex loci contractus* or *actus,* or even to the intention of the parties,[27] disregarding situs and flag. Certain courts disregard everything but their own law.

The courts are largely uncertain or vague. It is claimed that English courts apply the law of the flag [28] as well as the *lex situs,* at least if the ship is not on the sea.[29] German courts are often believed by foreign writers to adhere to the *lex situs* [30] and by recent German authors to follow the law of the flag.[31] In the United States, a foreign

France: The great majority of all writers sustain the general rule of the law of the flag. LYON-CAEN, Clunet 1877, 479; NIBOYET, Acquisition 114; *id.,* Manuel 646; PILLET, 1 Traité 742; RIPERT, 1 Droit Marit. (ed. 3) 502 § 436; VALÉRY 1315; LEREBOURS-PIGEONNIÈRE (ed. 6) 241 § 229; NIBOYET, 10 Répert. 11 No. 27. *Contra:* Weiss, 4 Traité 310 ff.

Germany: Citations in MELCHIOR 493 n. 1; LEWALD 192; M. WOLFF, IPR. (ed. 3) 174; NUSSBAUM 313.

Italy: C. Navig. art. 6; ownership, the other real rights and the rights of security in vessels and aircraft, as well as the form of publicity for the acts of creating, transferring, and extinguishing such rights, are regulated by the national law of the vessel or aircraft.

Portugal: C. Com. art. 488.

Institute of Int. Law, 8 Annuaire (1885) 126.

[24] WHARTON AND WESTLAKE, *l.c.,* MELCHIOR 492 f.; 2 FRANKENSTEIN 475; HELLENDALL, *supra* n. 11, 111.

[25] HELLENDALL, *supra* n. 11, 115.

[26] NUSSBAUM, D. IPR. 314; LEWALD 192 f.

[27] United States: See decisions *infra* n. 34.

The Netherlands: App. Den Haag (June 30, 1916) W. 10085, Clunet 1921, 280.

Germany: LEWALD 193 f.; Obergericht für die Britische Zone (July 7, 1949) 2 N. Jur. Woch. 784.

[28] E.g., WESTLAKE 202 § 150: the personal law of the owner.

[29] HELLENDALL, *supra* n. 11.

[30] E.g., NIBOYET, 10 Répert. 16 No. 70; GRIFFITH PRICE, The Law of Maritime Liens (1940) 213.

[31] LEWALD, NUSSBAUM, M. WOLFF, *supra* n. 23.

authority apparently has found total inconsistency.[32] Assuredly, the only known decision of the Supreme Court in 1873 [33] recognized assignment of a ship forming part of an insolvent estate to the assignee in insolvency under the law of Massachusetts, the state of both the domicil of the owner and the port of registration. Similar coincidences occur in other cases.[34] It may be conceded that the decisions neglect the scope of the problem and are not too well-considered. But they can be reconciled.

River boats. Despite the frequent assertion that fluvial navigation is an internal subject for the country of navigation,[35] its principles have been laid down in a European convention of 1930, providing satisfactory rules on the basis of registration in one country.[36] This accomplishment suggests a basis for improvement as respects maritime vessels.

Distinguishing the various situations, we may discover somewhat more agreement in this important and never constructively summarized international matter.

In the first place, it is agreed that the law of the place

[32] NOLDE, 22 Revue Dor. (1930) 36.

[33] Crapo v. Kelly (1873) 16 Wall. (83 U.S.) 610, 630, 638.

[34] In Koster v. Merritt (1864) 32 Conn. 246, the situs coincided with the *locus actus.*

Lex loci actus was asserted in Thuret v. Jenkins (1820) 7 Mart. (La.) 318, but the ship was also registered at that place. In Southern Bank v. Wood (1859) 14 La. Ann. 554 and Moore v. Willett (1862) 35 Barb. S.C. 663, the *locus actus* was also the residence or domicil of the ship owner. This has been noted by HELLENDALL, *supra* n. 11, 117.

[35] Germany: Prussian Ob. Trib. (Nov. 13, 1868) 24 Seuff. Arch. No. 102; ROHG. (April 26, 1872) 6 ROHGE. No. 14. But the German delegation proposed at the Geneva Conference (*infra* n. 36) the principle of *lex situs,* see Vogels, 5 Z. ausl. PR. (1931) 311.

The Netherlands: Rb. den Bosch (March 7, 1919) W. 10497, N.J. 1919, 461.

[36] Convention of Geneva, 1930, on the registration of inland vessels, rights *in rem* over such vessels, and other cognate questions. L. of N. Off. Publ. 1931, VIII, 2-5, Conf. U.D.F. 57-60; HUDSON, 5 Internat. Legislation No. 276; comment by NIBOYET, Revue Dr. Int. (Bruxelles, 1931) 303 and in 4 Traité 569 ff.

of registration exclusively decides whether a ship is sea-going.[37]

We shall deal presently with ownership and mortgage, created by agreement, in ships. The conflicts rules concerning ship mortgages were doubtful for a long time, quite as their operation was precarious. But most countries have introduced ship mortgage legislation in increasing detail, and in the Brussels Convention of 1926 (*infra* n. 54), a unitary law, that of the flag, has been established for mortgages, hypothecations, and other similar charges. Since then, there has been a common and growing inclination to apply to ship mortgages the same principles as apply to ownership. The great hopes with which these reforms were adopted, however, are acutely impaired by the absence of international uniform preference of liens in ships. Although foreign ship mortgages are readily recognized, their enforcement depends on the competition of other more or less privileged actions against the ship, which must be discussed separately (*infra* III, 2).

2. Situations: (a) The ship is in home waters

As long as a vessel finds itself in the country where it is also registered, the law of this country clearly governs the real rights.[38]

(b) The ship is on the high seas

Voluntary alienations. Probably all laws intend to impose compulsorily observance of their own respective provisions on domestically registered vessels. Thus, registration and other formalities of the home port especially are required for sales, conveyances, and mortgages. This is

[37] 1 VAN HASSELT 357.

[38] This is the case envisaged by British Merchant Shipping Act, 1894, s. 24.

certain for numerous countries.[39] Any transfer within the country is included. A transfer made in another country, at least to a national of the home country, without complying with the formalities would either be held entirely invalid or ineffective against third purchasers in good faith registering in the home state.[40]

However, if the vessel is not registered in the country where the transfer occurs, the law of the flag is indispensable to avoid an impossible legal situation in third jurisdictions.[41] The home port is, moreover, the one to which the ship will regularly return and where it takes more than a casual or temporary stay.[42]

Nevertheless, the question exists whether mortgages may also be established and transferred under the local law of a foreign port with full effect, without registration at the

[39] United States: Ship Mortgage Act of June 5, 1920, c. 250, § 30, subsec. c. 41 Stat. 1000, 46 U.S.C.A. 614 § 921.

England: British Merchant Shipping Act, s. 1 and 265.

France: Laws of July 10, 1885, art. 33, July 5, 1917, requiring registration in France for mortgages constituted abroad on French ships; WEISS, 4 Traité 310 ff.; NIBOYET, 4 Traité 498 § 1229.

Germany: Now: Law on Ship Registration (Nov. 15, 1940) § 1 par. 2 (acquisition and loss of ownership in a vessel entered in a German ship register is determined by the German law). Previously: OLG. Düsseldorf (Nov. 23, 1909) 108 Rhein. Arch. 187, aff'd, RG. (June 14, 1911) 77 RGZ. 1; BAR, Int. Handelsr. 423. An express statutory rule for mortgages is missing, ABRAHAM (*supra* n. 17) 305.

[40] France: Cass. civ. (June 24, 1912) S. 1912.1.433, Clunet 1913, 147.

Germany: 77 RGZ. 1, *supra* n. 38; under § 1, par. 2 of the Ship Registration Law; WÜSTENDÖRFER, Neuzeitl. Seehandelsrecht (1947) 75, states that the case of a transfer abroad to a foreigner is doubtful.

[41] United States: Crapo v. Kelly (1872) 16 Wall. (83 U.S.) 610, concurrent opinion by Mr. Justice Clifford at 639: "as if the ship was moored at her wharf."

Scotland: Schultz v. Robinson and Niven (Court of Session, 1861) 24 Sess. Cas. 120: Prussian ship sold by a bill of sale while on the high seas; title passed under Prussian law, although under Scottish law entry in the beil brief would have been necessary. Applicable in English courts, according to DICEY (ed. 5) 997.

France: Common opinion, *supra* n. 23.

Germany: WÜSTENDÖRFER, *supra* n. 40, p. 75.

Italy: C. Navig. art. 6, 13.

[42] 2 FRANKENSTEIN 471.

home port. The negative answer will follow from later discussion.

(c) The ship is in foreign waters.

Involuntary assignments. Despite occasional deviations,[43] it may be assumed that attachments, seizures, and judgments *in rem* by a legitimate territorial authority, accompanied by sale of a vessel, are internationally recognized.[44] A justifiable exception has been made in the country of registration, when the foreign court disregards a previous transaction valid by the law of the forum;[45] this exception should even enjoy extraterritorial force.

Unjustifiedly, however, the French Court of Cassation, in its only decision in point, has proclaimed that a mortgage in a French vessel cannot be purged by a foreign sale of the ship, but only by application of the French procedure, that is, in a French court.[46]

Voluntary alienation. Transfer of title and mortgaging

[43] England: The Segredo, otherwise "Eliza Cornish" (1853) 1 Spinks Ecc. & Ad. 36: British ship, because of unseaworthiness sold under the law of Fayal; sale not recognized under "general maritime law;" but the decision is overruled by Cammell v. Sewell (1860) 5 H. & N. 728, as interpreted in subsequent cases. See HELLENDALL, *supra* n. 11, 114 f. against DICEY (ed. 5) 999.

[44] United States: Olivier v. Townes (La. 1824) 2 Mart. (N.S.) 93; Green v. Van Buskirk (1866) 5 Wall. (72 U.S.) 307, (1868) 7 Wall. 139; dictum in Crapo v. Kelly (1872) 16 Wall. 610, 622 respecting assignment and insolvency; *cf.*, KUHN, Comp. Com. 240.

England: Cammell v. Sewell (1860) 5 H. & N. 728; Castrique v. Imrie (1870) L.R. 4 H.L. 414, per Lord Blackburn: British ship sold upon a competent foreign judgment; The Jupiter No. 3 [1927] P. 122.

The Netherlands: 1 VAN HASSELT 359.

[45] England: Simpson v. Fogo (1863) 1 Hem. & Mill. 195 repudiates a judgment of the Supreme Court of Louisiana for the sale of a British ship; the Louisiana court had discarded a mortgage given on the high seas valid under English law.

[46] France: Cass. civ. (June 24, 1912) S. 1912.1.433 rejects a judicial sale of a French ship in England, because an attaching French maritime lien could not be extinguished without French formalities. The case is thus decided contrarily to the House of Lords in Castrique v. Imrie, *supra* n. 44, and to the German decision, LG. Schwerin (Jan. 10, 1910) Leipz. Z. 1911, 52.

is the center of controversy. If a ship lies in a foreign port, should such contract comply with, and the effect be governed by the local law,[47] or the law of the flag (place of registration)? [48]

A compromise attempted by Dutch courts points primarily to the "personal law" of the ship, i.e., of the port of registration, but concedes minor consideration to the nationality of the transferor and the place of the transaction.[49] However, in the only decision of the Dutch Supreme Court, registration of a sale and conveyance in Belgium was respected, although the ship was being built in a Dutch dockyard, with the result of preferring the foreign buyer to domestic creditors.[50]

French doctrine inclines to the largest scope of the law of the flag, advocated by the authors. Nevertheless, certain decisions have repudiated formless transfer of ownership of a British ship from one Englishman to another, because the French requirement of publicity was not satis-

[47] England: Hooper v. Gumm (1867) L.R. 2 Ch. 282, with respect to a mortgage on an American ship registered in the United States, *cf.*, CHESHIRE (ed. 3) 591. *Cf.* The Jupiter No. 3 [1927] P. 122; Russian flag immaterial for subjection to Soviet nationalization.

France: WEISS, 4 Traité 310 ff. against the dominant opinion.

The Netherlands: H.R. (Jan. 22, 1934) *infra* n. 50.

Colombia: C. com. marit. arts. 15, 19, 34. 1 RESTREPO-HERNANDEZ 159 § 365.

[48] England: DICEY (ed. 5) 996: "the balance of reason is in favor of making the law of the country to which the ship belongs decisive as to voluntary transfers of ships."

France: See *supra* n. 22.

Germany: Law of the flag of foreign ships, WÜSTENDÖRFER, *supra* n. 39 at 75.

Italy: C. Navig. art. 6.

The Netherlands: VAN BRAKEL 189 § 146.

Spain: C. Com. arts. 17, 573, and Regulation of the Mercantil Register, arts. 149, 152; with primary effect of private law, GARRIGUES, 2 Curso de Der. Merc. (1940) 626 f.; *cf.*, 1 GAMECHOGOICOECHEA, 2 Trat. de Derecho Marítimo Español (without year) 59 ff. For mortgages, C.C. art. 1875 and Law of August 21, 1893, art. 14, GARRIGUES, *ib.* 622.

[49] 1 VAN HASSELT 357.

[50] H.R. (June 22, 1934) W. 12815, N.J. 1934, 1493, 1 VAN HASSELT 426.

fied.[51] Niboyet also contends that for the same reason sales of German vessels in France should comply with French publicity requirements, whereas German courts should observe French law in disposing of French vessels.[52] This goes too far. But it is a well-known valid argument in favor of the law of the place of registration that third parties should be informed by a decent record at the home port. Indeed, the Convention of Geneva of December 9, 1930, generally speaking of all voluntary transfers of fluvial vessels, provides:

Voluntary transfer *inter vivos* of the rights of ownership in a vessel shall be governed by the law of the country of registration if that law requires as a condition for the transfer, or at least for the effect of this transfer as to third persons, either the inscription in a register for the publicity of the rights, or the transfer of possession to the acquirer.[53]

Voluntary securities. The same idea that sufficient public registration in the home port is required in principle, underlies the Brussels Convention of 1926 for the Unification of Certain Rules of Law relating to Maritime Mortgages, and Liens,[54] the first significant step toward a firm international recognition of rights in vessels. Yet this convention has been adopted neither by the Anglo-American nor

[51] App. Rouen (July 31, 1876) Clunet 1877, 428, simulation suspected without proof; Trib. Saint-Malo June 27, 885) Clunet 1886, 196; approved by NIBOYET, Acquisition 514 and 4 Traité 501 n. 1. *Contra:* LYON-CAEN, Clunet 1877, 481.

Also the German Reichsgericht once rejected a Russian hypothec filed with the ship documents only, RG. (Oct. 2, 1912) 80 RGZ. 129, *contra,* 2 FRANKENSTEIN 478.

[52] NIBOYET, 10 Répert. 12 Nos. 39, 43.

[53] *Supra* n. 35, art. 20 (1).

[54] Convention pour l'unification de certaines règles de droit relatives aux privilèges et hypothèques maritimes, signée à Bruxelles, le 10 avril 1926, 120 L. of N. Treaty Series No. 2765; HUDSON, 3 Int. Legislation No. 155; BENEDICT, 6 American Admiralty 78; 2 Recueil Niboyet et Goulé 464. In force among 17 states. Comments: RIPERT, Précis de droit maritime 153; BRUNETTI, 1 Dir. marittimo 561; SMEESTERS and WINKELMOLEN, 1 Dr. marit. et dr. fluvial 50.

the Central European countries, although France participates in it.

Voluntary securities obligating the ship may be of two classes. Loans secured by bottomry in cases of proved emergency during a voyage are evidently recognized, if they comply with the local law. The case has become rare, but should a real emergency occur requiring such a loan without giving the shipowner an opportunity to act at home, recognition is due.[55]

Longer standing credit is provided by means of ship mortgages (hypothecs). Recognition of a foreign ship mortgage, or any conventional conveyance of real security in ships, now is universal as an institution, since the great majority of states interested in seafaring have introduced this type of rights into their municipal laws. The governing law cannot yet be said to be clearly settled everywhere. But it would seem that the principle of the Brussels Convention is actually followed, to the effect that a mortgage complying with the law of the port of registration of the vessel is likely to be recognized not only in France [56] but in any country,[57] although no holding squarely in point

[55] DICEY (ed. 6) 666.

[56] See NIBOYET, 4 Traité 538 ff.

[57] England: Hooper v. Gumm (1887) L.R. 2 Ch. 282; American mortgage, not recognized because the action was defeated by estoppel; The Colorado [1923] P. 102: French mortgage; The Zigurds [1932] P. 113: Latvian equitable assignment.

Germany: Oberapp. G. Oldenburg (May 18, 1861) 17 Seuff. Arch. Nr. 111: Hanover mortgage; RG. (Feb. 9, 1900) 45 RGZ. 276, 278: Dutch mortgage; "No doubt, the vessel at the time of the creation of the mortgage, belonged to an owner domiciled in Holland from where the vessel was also managed."

Italy: C. Navig. art. 6; formerly Cass. Turin (Dec. 10, 1906) 22 Revue Autran 714: English mortgage; recognized despite the Italian prohibition of forfeiture *(pactum commissorium)*.

The Netherlands: VAN OPSTALL, Scheepshypotheek, (Thesis, Leiden 1932) 305.

Norway: Law of May 31, 1929.

Portugal: C. Com. art. 488.

Sweden: Law of May 18, 1928.

exists in the United States.[58]

That mortgagees registered at one port lose their priority, where registration is transferred to another country and purchasers or creditors are recorded in the new register,[59] accords with the general principles.

Other events. Illustration. On a German ship, leaving New York and sailing in the harbor between New York and New Jersey, a steward found in a stateroom a roll of banknotes. The German court defined the rights of the finder under the identical laws of New York and New Jersey. If the discovery had been made later on the high seas, German law would have been applied.[60]

Conclusion. International law concedes many and important prerogatives to the state whose flag a ship flies. Prevailing opinion even recognizes a real right under public international law of the state in whose ports private ships are registered.[61] In accordance with this fact, the existing laws and conventions and the general impression conveyed by the literature allow a reasonable way out of the present unsettled doctrine. The law of the flag is indispensable during the time a vessel is on the high seas. It is the most suitable law for the creation and transfer of real rights by voluntary private transactions also when the ship is in foreign territorial waters. In view of the advantages of the publicity obtained by central registration in the home port and of the considerations of public policy familiar to

[58] United States: The Secundus (D.C.N.Y. 1927) 15 F. (2d) 713, 1927 Am. Marit. Cas. 641, contains only an indication that a French preferred mortgage would receive the preference given to it by French law, ROBINSON, Admiralty 435 *in fine.*

[59] RG. (June 14, 1911), Ned. Scheepsverband M. v. Coblenzer Volksbank, 77 RGZ. 1. On recognition of unregistered foreign mortgages, see ABRAHAM (*supra* n. 17) 313.

[60] OLG. Hamburg (May 14, 1904) Hans. GZ. 1904, Beiblatt no. 122, citing 2 BAR 609, 614.

[61] This theory has been eruditely supported against adversaries by UBERTAZZI, Studi sui diritti reali nell'ordine internazionale, Milano 1949.

some countries, it is highly advisable for such voluntary transactions to give normally exclusive force to the law of the place of registration.

On the other hand, the law of the port where the ship lies must have competence to regulate involuntary assignments and in emergency cases securities established by special agreement.

III. Maritime Liens (Privileges by Law)

Anglo-American admiralty law recognizes charges upon ships for services done to the ship or injury caused by it, accruing by law and enforceable by an action *in rem*. English writers in the nineteenth century developed various theories as to the nature of these liens, among which that of Marsden [62] was adopted in the English courts. This so-called "procedural theory" regards the lien as "a form of proceeding to compel an appearance" by the owner of the vessel. In consequence, the vessel is not liable if the owner is not personally liable, and if he is, his responsibility is unlimited.[63] The American courts since 1809 have followed the "personification theory," later expounded by Holmes,[64] regarding the ship as liable, and alone liable, without personal obligation of the owner; this lien remains "indelible" irrespective of a change of ownership.[65]

The theory of Holmes and of the American courts corresponds with the medieval institution of *"fortune de mer,"* one of the applications of pure liability of a thing *(Sachhaftung)*. The premise of the procedural theory that

[62] Marsden, "Two Points of Admiralty Law," 2 Law Q. Rev. (1886) 357; *id.* Select Pleas in the Court of Admiralty, vol. 1 (London 1894).

[63] Hebert, "The Origin and Nature of Maritime Liens," 4 Tul. L. Rev. (1930) 381, 385.

[64] Holmes, Common Law 25 ff.; The City of Athens (1949) 83 F. Supp. 67, 1949 Am. Mar. Cas. 582, aff. (C.C.A. 4, 1949) 177 F. (2d) 961, 1950 Am. Marit. Cas. 282.

[65] Mayers, Admiralty Law and Practice 8.

the owner is personally liable cannot be maintained in case of a new owner.[66] And practically, to dispense with the idea of a proprietary right, as the procedural theory now pretends, or to merge maritime liens with the obscure category of actions *in rem,* confuses the international situation which requires recognition of foreign-created rights, even though foreign privileges of priority may be rejected.

The Continental laws in part rest upon the same foundation of the ship's obligation, as in particular does the German system, but, including the common law, there are at least five different systems of allowing privileged rights in the case of a judicial sale of a vessel. They are based upon heterogeneous ideas, granted to very different classes of creditors, and differ greatly in regulating the rank for satisfaction by the proceeds of the sale.[67] The task of finding suitable conflicts rules for this matter, after strenuous efforts, was given up by the numerous successive international conferences. In the 1920's, unification of the substantive rules was believed easier. But the resultant unifications by both the Brussels Convention on liens and mortgages of 1926 and the Geneva Convention on ships registration of 1930 had to leave a multitude of minor liens to the pleasure of the *lex fori.*[68]

The Brussels Convention, however, for the limited domain of its member states, enumerates five types of privileged liens enjoying priority over registered mortgages, while the national laws may grant other liens rank-

[66] The Bold Buccleugh (1851) 7 Moo. P. C. C. 267.

[67] See in the first place, RIPERT, 2 Droit Marit. (ed. 3) 119 ff. §§ 1157-1160; for the Anglo-American laws, ROBINSON, Admiralty 363 ff., 434 § 62; GRIFFITH PRICE, The Law of Maritime Liens (London 1940) with comparative surveys which seem somewhat questionable; for Germany, WÜSTENDÖRFER, Neuzeitliches Seehandelsrecht (1947) 118 ff.

[68] PLAISANT, Les règles de conflit de lois dans les Traités (1946) 141; also with comment on the effects of bankruptcy on the choice of law according to the existing conventions.

ing after those first two groups.[69] Among other provisions, a somewhat vague uniform rule is established, requiring preliminary notice of "a sale" to the register office, in order that privileges should be extinguished by the sale.

Jurisdiction to enforce foreign-created liens may at times be absent, particularly in English courts. But this is a rare case in other countries and scarcely occurs in the United States.

Recognition and priority must be strictly separated in regard to liens; the question of rank affects also conventional securities.

1. Recognition of foreign-created liens

The great majority of the decisions refer to those liens which arise by force of law from services rendered to the vessel.

(a) *Repair and supply.* It is perfectly settled that persons acquiring a lien on the ship or the cargo by furnishing repairs or "necessaries" under the law of the place where the services are rendered are protected in other countries.[70] In the usual conflicts terms, the applicable law is characterized as *lex loci contractus* or as *lex situs*.[71] The law

[69] Brussels Convention, cited *supra* n. 54, art. 2, liens privileged in cases of certain expenses, employment, salvage, etc., accidents of navigation, and necessary contracts of the master.

[70] United States: Mills v. The Scotia (D.C.N.Y. 1888) 35 Fed. 907, 909, "the law of the place of transaction;" 1 WHARTON §§ 322, 358.

Canada: Sir Douglas Hazen, L.J.A., in Marquis v. The Astoria [1931] Ex. C.R. 195, 199: "where the services are rendered" quoting The Scotia; and since, usual formula in Canada; the remarkable decision, Harney v. Terry [1948] 1 D.L.R. 728 uses the term *lex loci contractus.*

Scotland: Constant v. Klompus (1912) 50 Scot. L. Rep. 27. For more details see GRIFFITH PRICE, 57 L.Q.L.R. (1941) 409.

[71] United States: The Graf Klot Trautvetter (1881) 8 Fed. 833; The Olga (1887) 32 Fed. 329; The Scotia (1888) 35 Fed. 907; The Kaiser Wilhelm II (1916) 230 Fed. 717; The Woudrichem (1921) 278 Fed. 568; The City of Atlanta (1924) 17 F. (2d) 308, 1924 Am. Marit. Cas. 1305, 9 Revue Dor (1925) 396: *(lex loci contractus);* The Northern Star (1925) 1925 Am. Marit. Cas. 1135, 12 Revue Dor (1925) 238.

of the flag has been sharply rejected in this country.[72]

Illustration. Necessaries were supplied to an American ship in Boston. American law grants a maritime lien, while in Canada merely a statutory lien of much minor importance exists. Canadian courts, nevertheless, recognize the American lien, arguing that otherwise they would promote fraudulent removal of lien-bound American ships to Canadian ports.[73]

Italian conflicts law applies the law of the flag also to maritime privileges.[74] Therefore, two American decisions have resorted to renvoi. When a German ship had taken bunker coal in an Italian port, the Italian reference led to German law, under which no lien existed, because the supplier knew that the charterer rather than the owner had to pay.[75] This clear and reasonable adoption of the theory

England: The Colorado [1923] P. 102.

Scotland: Constant v. Klompus (1912) 50 Scot. L. Rep. 27.

Canada: Sup. Ct. in The Strandhill v. Walter W. Hodder Co. [1926] S.C.R. 680, 4 D.L.R. 801; Harney v. M.V. "Terry" (Ex. Ct. of Can. 1947) [1948] 1 D.L.R. 728.

France: Trib. civ. Tarascon (March 27, 1931) Clunet 1932, 423, where the editor protests that the fictitious situation of a ship is the place of its matriculation.

Germany: RG. (Feb. 10, 1913) [The Colorado] Warn. Repr. 1913, 302 No. 254, citing 1 BAR 613, 651; EMIL BOYENS, 1 Das deutsche Seerecht (1897) § 22e; OLG. Stettin (Sept. 29, 1931) IPRspr. 1932, 120 No. 55.

Greece: App. Athens (1933 No. 1095) Clunet 1934, 1053; it is true that the flag coincided with the place of the accident.

The Netherlands: 1 VAN HASSELT 359.

But see also *infra* n. 85.

[72] United States: The Kaiser Wilhelm II, *supra* n. 71.

[73] See the citations *supra* n. 70, Canada.

[74] Italy: Now, likewise, Dis. Prel. C. Navig. arts. 6, 13.

[75] Cilento v. S.S. Rickmers (1924) 1924 Am. Marit. Cas. 971, 8 Revue Dor 198, applying §§ 486, 531 of the German Commercial Code. Under similar facts, Società Anon. Ricardo Ganlino v. S.S. Coastwise (1923) 1923 Am. Marit. Cas. 942, 6 Revue Dor. 357. On knowledge of the supplier, see the analogous provisions of the American Ship Mortgage Act of June 5, 1920, 46 U.S.C.A. §§ 971-973; see, e.g., The Kongo (1946) 155 F. (2d) 492, 174 F. (2d) 67, 1946 Am. Marit. Cas. 1200; Univ. Nat'l Bank v. Home (1946) 65 F. Supp. 94, 1946 Am. Marit. Cas. 585.

of renvoi seems to have escaped the attention of the many writers clinging to the unfortunate Talmadge case.[76]

A foreign writer believed, in 1930, that the American decisions on the subject commonly adopted American maritime law.[77] This does not square with the decisions.[78]

(b) *Wages of master and crew.* A decision by the famous admiralty Judge Brown, of 1887, held that even the priority of liens arising for the wages of crew and master ("those on board") "among themselves" should be determined by the law of the flag, although the rank of liens arising from the contracts concluded by the master followed the law of the place of contracting.[79] An old English case concerning the wages of a master of a foreign vessel was decided under the *lex fori*.[80] More recently in *The Tagus* (1903), the Argentine law of the flag was applied, but the privilege of the master was extended, by British law of the forum, from the last voyage to all back salary.[81] Recently, however, the Canadian Court of Exchequer in a learned judgment applied the general theory that liens follow, according to their contractual or delictual occasion, the law governing the contract or the tort.[82] Claims for wages of master and crew consequently fall under the law of the flag.

[76] See, ultimately, Note, 48 Mich. L. Rev. (1950) 702.

[77] BARON NOLDE, 22 Revue Dor (1930) at 50 f.

[78] See also PRICE (*supra* n. 29, 67) 212. In The Hoxie (1923) 1923 Am. Marit. Cas. 937, the supplier was deemed to be an American mother company of the Danish firm; in The Lydia (1924) 1924 Am. Marit. Cas. 1001, the court recognizing foreign liens as arising under general maritime law explained that English law was not pleaded and that the decision was based on conversion in the United States; in The Coastwise (1923) 1923 Am. Marit. Cas. 942, American law was applied as law of the flag by renvoi from Italian law, *supra* n. 75. Other cases must be explained by historical development, as especially in respect to priority, *cf., infra* n. 88.

[79] The Olga (1887) 32 Fed. 329; The Angela Maria (1888) 35 Fed. 430; The Belvidere (1898) 90 Fed. 106.

[80] The Milford (1858) Swabey 362.

[81] The Tagus [1903] P. 44.

[82] Harney v. M.V. "Terry" (1947) [1948] 1 D.L.R. 728.

(c) *Injury.* Under the same theory, emphasizing the substantive character of the problem, *lex loci delicti* applies in tort cases. A stevedore, injured through the fault of those in charge of unloading chemicals from a Norwegian ship in Victoria, British Columbia, was denied recovery in the United States, because no maritime lien existed in the Canadian province.[83] In the case of collision on the high seas where no place of wrong exists, American courts apply the Act of March 30, 1920, concerning "Death on the High Seas by Wrongful Act." [84]

(d) *Carrier's default.* Still in the same order of ideas, passengers, mistakenly left ashore by a Rumanian steamer, were allowed to sue *in rem* against the vessel only after the law of Rumania was found to justify such action, since that country was the place where the contract of carriage was entered and the voyage was to be ended.[85]

With respect to the existence of a right to sue *in rem* against the vessel, based on a lien, the fairly settled present English, Canadian, German, and American doctrines thus may be summarized as follows: The law of the flag is resorted to insofar as wages of seamen are concerned and as a substitute for the ordinary applicable territorial law, in the case of events on the high seas. Normally, a lien, presupposing a contract, is connected with the port where the ship is situated at the time of the contract, and a lien protecting a tort claim with the territorial waters in which the wrong was committed.

[83] The Cuzco (1915) 225 Fed. 169, The Apurimac (1925) 1925 Am. Marit. Cas. 604, 11 Revue Dor 224: American law was preferred to the Peruvian law of the flag, respecting injury to a seaman aboard a Peruvian vessel in an American port, caused by the vessel's unseaworthiness, following The Scotland (1881) 105 U.S. 24; Koziol v. Fylgia, 1953 Am. Marit. Cas. 220: injury on the high seas, Swedish law of the flag.

[84] The Buenos Aires (C.C.A. 2 1924) 5 F. (2d) 425.

[85] The Constantinople (D.C.N.Y. 1935) 15 F. (2d) 97, as commented upon by ROBINSON, Admiralty 439.

These, indeed, are the firmest connections available in this matter. Whether the lien or privilege is recognized in the domestic law of the forum is entirely immaterial.[86] Over this point, it is true, isolated decisions, particularly older ones, have stumbled. And French objections on the ground of public policy may be possible.[87]

2. Priority

In a line of older American decisions, the application of foreign law to mortgages and liens was extended to the question of their precedence in the distribution of the proceeds in an executory sale.[88] Such generosity is no longer displayed anywhere in the world. Eminent writers have urged in vain uniform treatment of recognition and priority of liens, now basing their doctrine, in contrast to the former emphasis on the situs as of the time of the creation of the right, rather on an all-embracing dominance of the law of the flag.[89]

Quite commonly the priority between mortgages and liens and among liens is determined according to the law of the forum.[90] For justification, it is ordinarily contended that,

[86] See, e.g., the Canadian decisions *supra* n. 70, and the Reichsgericht (Feb. 10, 1913) cited *ibid.*, against OLG. Rostock (July 7, 109) 65 Seuff. Arch. No. 34.

[87] *Cf.*, NIBOYET, 4 Traité 547 ff.; RIPERT, 2 Droit Marit. (ed. 3) §§ 1161 ff.

[88] The Velox (1884) 21 Fed. 479; The Olga (1887) 32 Fed. 329; The Angela Maria (1888) 35 Fed. 430; The Belvidere (1898) 90 Fed. 106.

[89] Particularly forceful, RIPERT, 2 Droit Marit. 124 ff. §§ 1161-1164.

[90] United States: Brown, J., in The Scotia (1888) 35 Fed. 907, 911, citing STORY §§ 323, 423 b, d.; The Oconee (1922) 280 Fed. 927; ROBINSON, Admiralty § 62; Note, 26 Harv. L. Rev. (1913) 358.

England: WESTLAKE § 351; The Colorado [1923] P. 102.

Canada: Sir Douglas Hazen, L.J.A., in Marquis v. The Astoria [1931] Ex. C.R. 195, 199.

Scotland: Robert Clark v. Bowring & Comp. (1908) S.C. 1168, rejecting the claim of an American firm for monies paid in New York.

France: see for citations, RIPERT, 2 Droit Marit. 131 § 1168.

Denmark: Comm. and Admir. Court (March 21, 1939) U.F.R. 1939, 589; (Jan. 3, 1950) S.H.T. 1950, 46; Clunet 1954, 502.

Germany: RG. (Nov. 25, 1890) 1 Z. int. R. 365; (Feb. 9, 1900) 45 RGZ. 276, 281, 10 Z. int. R. 472; (Feb. 5, 1913) 81 RGZ. 283; and others; 2 BAR. 199.

Netherlands: H.R. (June 15, 1917) W. 10139, N.J. 1917; 812.

although foreign-created rights are recognized, their rank is a matter of procedure. This is an untenable assertion.[91] Enforcement presupposes a substantive quality of the right to be enforced. It should also not be believed that executive sales proceedings, frequent as they are, furnish the only situation in which the order of the rights is important. Clearly, priority pertains to the substantive part of the law.

Nevertheless, this does not decide the conflicts problem. When courts and writers have considered the advantages and disadvantages of *lex fori* and the law of the flag, there are arguments for either. The resort to the domestic law of the casually competent court rewards the shrewdest creditor choosing the place of attachment. Where the law of the flag determines the existence of the right, its coexistence with the *lex fori,* governing the priority, is a source of conflicts.[92] The judicial sale, for instance, purges rights, irrespective of the law of the flag. On the other hand, it must be conceded that unity of treatment for rights originating all over the world under disparate laws can be guaranteed by the *lex fori* as well as by the law of the flag which would logically require (and has been said to establish) a total subjection of all these rights to the unitary law of the home state. In this matter, the law of the forum agrees too well with the usual conceptions of admiralty judges, to be erased for reasons of theoretical elegance, or even convenience.

It can be better understood than in other matters, that a court would think as a Dutch judge has said, in pondering the virtues of the law of the forum and the law of the flag for distributing proceeds of an executive sale of a vessel: A Dutch judge cannot be forced to recognize privileges of

[91] 2 FRANKENSTEIN 491.
[92] NIBOYET, 10 Répert. 17 No. 84, 18 No. 93.

enforcement not existent in our country to the detriment of our own subjects.[93]

Normally, and in this matter with better foundation than ordinarily, the courts analyze foreign rights and equalize them with a type provided from those available in the domestic law.[94] It may happen that a French ship mortgage thereby gains a better position in England than at home,[95] and a Dutch ship mortgage has a preference over liens in Germany which it does not have in the Netherlands,[96] which shows an unhappy method of comparative research by legislators.

Again, if the law of the forum is not explained by a non-existent procedural character of priority, it may rather be based on the emergency function of this device, an idea that may have practical consequences. The older American cases, mentioned before, applied the various foreign laws governing the individual rights. This, in application to recognition, though not to priority, is also the dominant attitude of the present courts, as demonstrated above. It follows that whenever these laws produce identical results of rank, they should prevail over the *lex fori*. In fact, such an exception has been made by the Dutch district court of Rotterdam. When the laws governing the competing

[93] Rb. Rotterdam (Dec. 2, 1927) W. 11817, N.J. 1928, 127, 1 VAN HASSELT 399.

[94] United States: The Graf Klot Trautvetter (1881) 8 Fed. 833.
England: The Zigurds [1932] P. 113.
Canada: Harney v. M.V. "Terry" (1947) [1948] 1 D.L.R. 728.
Germany: RG. (Jan. 20, 1913) 57 Gruchots Beitrage 1037; OLG. Hamburg (Jan. 30, 1894) and (Feb. 25, 1899) Hans. GZ. 1894, Hbl. No. 32 and Hans. GZ. 1899, Hbl. No. 65; FRANKENSTEIN 493 n. 90.
The Netherlands: Rb. Rotterdam (Jan. 20, 1937) W. 1937, no. 879; Hof den Haag (Feb. 5, 1937) W. 1937 no. 875.

[95] The Colorado [1923] P. 102.

[96] RG. (Feb. 2, 1900) 45 RGZ. 276, with the curious observation, p. 283, that the Dutch mortgage is not lesser in value because there the privileges are of prior rank; does, thus, the mortgage gain "in value" if invoked in Germany?

claims, such as a mortgage contracted in Norway and an English lien for supply, agree on their rank, the *lex fori* is disregarded.[97] Thus, the emergency function of the domestic law of the court is perceived and adequately limited. Assuredly, the court for this purpose had to solve a difficult task of comparison.

IV. Rights in Aircraft

1. Municipal Laws

Although the national statutes relating to rights in air vehicles, despite some growth, are comparatively few, they have gone in different directions, making the sorely needed unification very difficult. A convention of 1948 had to be reduced for the most part to uniform rules stating requirements for extraterritorial recognition. Even so, of the nineteen signatories, the United States is the only major power that thus far has ratified the Convention.[98]

The cardinal differences [99] turn around the nature of airplanes as simple chattels or special objects of rights; the existence and function of registers for private law purposes; the types of security for financing the acquisition of rights;[100] and the treatment of the valuable engines, accessories, and spare parts.

[97] Rb. Rotterdam (May 5, 1924) W. 11245, N.J. 1925, 907, 1 VAN HASSELT 381; accord, same court (Feb. 23, 1928) W. 11822, N.J. 928, 778, 1 VAN HASSELT 402, *cf.*, p. 359.

[98] Convention on Rights in Aircraft, Geneva, June 19, 1948, 1948 U.S. Av. R. 554; 4 Schweiz. Jahrb. Int. R. (1947/48) 297, ratified by the United States and Pakistan; ratifications by Chile and Mexico were declared inacceptable by the United States because of their reservations.

[99] See especially LEMOINE, Traité de droit aérien (Paris 1952); OTTO RIESE, Luftfahrsrecht (Stuttgart 1949); A. RABUT, Le transfer de propriété des aéronefs, Rev. franç. de droit aérien (1950) 10; GAY DE MONTELLA, Principios de derecho aeronautico (Buenos Aires 1950); MOLINA, Nociones de derecho aeronautico (Tucumàn 1951); SHAWCROSS AND BEAUMONT, On Air Law (London 1951); M. DE JONGLART, Traité élémentaire de droit aérien (Paris 1952).

[100] See especially WILBERFORCE, "The International Recognition of Rights in Aircraft," 2 Int. L. Q. (1948) 421.

In a development analogous to that of maritime law, aerovehicles are still regarded in some countries as ordinary chattels subject to *lex situs*,[101] but the corresponding modes of transfer of title and constitution of rights in aircraft are progressively being replaced by registration, not requiring a transfer of possession.[102] The Convention of 1948, though not in force, exercises some influence in this respect. Very few states, however, have a register specially designed for private law transactions; the others use the register of immatriculation, created for purposes of public law and police, if they have such. Also in the United States the register of the Civil Aeronautic Authority serves for recording title and security transactions,[103] although particular state statutes provide for recording of liens.[104]

Effect of Recording. The American federal statute expressly states that registration with the Civil Aeronautic Board, though mandatory for the operation of an aircraft, does not furnish conclusive evidence of ownership in a law suit.[105] It has been held, in consequence, that a conditional sale without registration is not void.[106] A comprehensive decision [107] explains that recording with the Civil

[101] England: SHAWCROSS AND BEAUMONT, *l.c.* § 507A.
Switzerland: BGes. Dec. 21, 1948; GULDIMANN, 10 NF. Z. Schw. R. 19 ff.; RIESE ET LACOUR, Précis de droit aérien (Paris 1951).

[102] France: LEMOINE, *l.c.*, 173 states that airplanes are *meubles par nature*, but deviate in seven points from the principle; likewise:
Italy: C. Navig. art. 861 concerning title; but arts. 1022-1037 regulate the hypothec completely.
Cf., Uruguay: Law Dec. 3, 1942 § 8.

[103] Civil Aeronautics Act (June 23, 1938) 49 U.S.C. §§ 521, 522, 1948 U.S. Av. R. 554, 577; Act June 19, 1948, on recordation of ownership of aircraft, aircraft engines, and spare parts, 49 U.S.C. § 523, 1948 U.S. Av. R. 578.

[104] *Infra* 118.

[105] 49 U.S.C. § 521(b).

[106] Bishop v. B. S. Evans East Point Inc. (1949) 80 Ga. App. 324, 56 S.E. (2d) 134.

[107] Jack Marshall v. Bardin (Kansas 1950) 216 P. (2d) 812, 1950 U. S. Av. 292.

Aeronautic Board is only necessary "to enable the purchaser to operate the aircraft legally or to deal with the title as by a new sale or pledge;" that is, the protection is given to persons "who have dealt on the faith of the recorded title and to whom it would be a fraud to give effect to unrecorded titles to their detriment." Hence, an attachment obtained by a money creditor of the recorded owner who had sold the plane by an unrecorded sale, was disapproved. As, however, this creditor was also said to have had knowledge of the sale, the theory of the case is difficult to define.

Recording is considered an essential requisite of a purchase in Italy,[108] Spain, and other countries;[109] much debated, this view seems finally to prevail also in France.[110]

Likewise parallel to the progress in maritime law, the creation of true rights *in re* has been reached in various forms through the medium of registration: hypothec,[111] chattel mortgage, conditional sale or hire purchase, equipment trust, and fleet mortgages. On the other hand, these types have very different characteristics, and more than any others, the question of separate security transactions concerning accessories has divided the views. While motors

[108] Italy: former law Aug. 20, 1923, art. 7; Cod. Navig. art. 865: For the effects provided for by the Civil Code, the acts, constitutive, translative, or extinctive of title or other rights *in re* aeromobiles, or quotas thereof, are made public by transcription in the national aeronautic register, etc.

[109] Spain: see *supra* n. 48.

Uruguay: Law Dec. 3, 1942.

Venezuela: Law July 14, 1941.

[110] France: Law May 31, 1924, arts. 11 and 12: *"L'inscription au régistre vaut titre,"* is interpreted very differently, but RIPERT, 1 Dr. Marit. (ed. 3) § 430, states filing brings certainty as one in the German *Grundbuch,* followed by RABUT, *l.c.* 16; JONGLART, *l.c.* 94 § 84.

[111] HOFSTETTER, L'Hypothèque aérienne (thèse Lausanne 1950).

France: Law of May 31, 1924, art. 14, prescribes analogy to the fluvial hypothèque (Loi of July 5, 1917), a much criticized solution, see LE GOFF, *l.c.* 541 § 1075.

Italy: C. Navig. arts. 1022 ff.

permanently connected with planes are incapable in many civil law countries of forming an independent object of security,[112] the American statute admits liens on aircraft engines, propellers, appliances, and spare parts by mere recording.[113] This contrast seems to be among those fatal to unification.

2. Conflicts Rules

The Convention of 1948, by making international recognition dependent on recording, intended to encourage the establishment of registers of any kind, if only available to record private rights. The eligible types of rights for which this protection was provided were enumerated in a broad catalogue. But the text failed to define the validity of the acquisition of the rights. It is therefore controversial what law governs the conditions and effects of the conveyance as contrasted with the conditions of recording.

The question has been discussed in connection with the problem of the nationality of aircraft which was doubtful[114] but is increasingly fixed by the immatriculation. Nevertheless, in conflict law the significance of *situs* or flag,[115] as well as of the place of contracting or of the parties' intention,[116] are not favored. While the American delegate to the 1948 Convention, Calkins, thinks the courts would prefer the law of the place where the plane is habitually held,[117] the question must be regarded as unsettled. Evidently the necessary experience is not yet available.

[112] But see for Germany § 93 BGB.; RIESE, Luftfahrsrecht 259.
[113] 49 U.S.C. §§ 522, 523.
[114] LE GOFF, Traité de droit aérien (1934) 183 § 339.
[115] RIESE, Luftrecht 280; RIESE ET LACOUR 121 § 128.
[116] WILBERFORCE, *l.c.* 426.
[117] CALKINS, "Creation of International Recognition of Title and Security Rights in Aircraft," 15 J. Air L. and Comm. (1948) 156, 160, citing N.W. Airlines v. Minnesota (1943) 322 U.S. 292 .

A peculiar situation exists in the United States in the federal-state relation.

Recording with the Civil Aeronautic Board is insufficient to create recognition of a chattel mortgage in New York, where compliance with the local lien law is indispensable.[118] A state lien is also needed when a chattel mortgage has been defectively described at the federal level.[119] On the other hand, a chattel mortgage recorded under the federal regulation has been held to enjoy priority over a state lien for repair.[120]

[118] Aviation Credit Corp. v. Gardiner (N.Y. Sup. Ct. 1940) 4 Misc. 798, 22 N.Y. S. (2d) 37, 1948 U.S. Av. R. 633. This would be changed by U.C.C. sec. 9-302, 2(a).

[119] United States v. United Aircraft Corp. (1948) 80 F. Supp. 52, 1948 U.S. Av. R. 473.

[120] Veterans and Express Co. (1948) 76 F. Supp. 684, 1948 U.S. Av. R. 178.