CONTRACT AND CONVEYANCE IN THE CONFLICT OF LAWS

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I. Characterization of Property

The title of this article has been borrowed from the heading of one of the sections of Goodrich on the Conflict of Laws,1 and it may seem unnecessary, if not foolhardy, on my part to venture to traverse the same ground—impar congressus Achilli. It is, however, always possible that a restatement of some of the situations arising in the border land between contract and conveyance may be of interest, at least by way of suggestion, and that an attempt, made originally in connection with English and Canadian cases, to formulate and apply some working rules, may contain something of value from the point of view of comparative law.²

Some reference to the American Law Institute Conflict of Laws Restatement is inevitable in any discussion of a problem of conflict of laws from the point of view of comparative law. If I may be so bold as to state a general impression without attempting at the present time to prove that it is well-founded, it would appear probable that this Restatement, prepared with so much care and skill for the primary purpose of rendering uniform the rules of conflict of laws within the limits of the United States, can hardly fail to enlarge the cleavage existing between the rules of conflict of laws prevailing in the United States and those prevailing in England and generally in the British Dominions, and, a fortiori, will make more remote any rapprochement between the rules prevailing in the United States and those prevailing in countries outside the Anglo-American legal system. Just because some of the rules contained in the Restatement may be peculiarly appropriate to conflicts of laws between states so closely related as are the different parts of the United States, they may be less appropriate to conflicts of laws in a wider field.²

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1 (1927) 347 ff., followed, as in the present article, by a discussion of the conditional sale and chattel mortgage situations; cf. id. at 336 ff., as to conveyances of land and contracts relating to land. See also (1904) 64 L. R. A. 823 ff.; (1908) 11 L. R. A. (N. S.) 1007 ff. As to conditional sales and chattel mortgages, see the further references in § v, i, and note 32, in the installment to be published next month.

2 The contrast between contract and conveyance is discussed briefly in footnote, Private International Law (5th ed. 1925) 284-286, 357, 446 ff. Cf. Westlake, Private International Law (7th ed. 1925) §§ 155, 172, 216; Dicey, Conflict of Laws (5th ed. 1932) rules 150-154, 163 and 164. The contrast is pointedly discussed by some continental writers, cited in § iv, in the installment to be published next month.
I am of course especially diffident about expressing any adverse criticism of the way in which lawyers of the United States are attempting to solve their own domestic problems, but I may perhaps be permitted to state my respectful agreement with some of the things which some of them have said in criticism of an excessively nationalistic attitude towards the solution of problems of conflict of laws, and to express my view that it is regrettable if the adoption of that attitude leads to increasing diversity of different systems of conflict of laws.

In the present article the discussion will be confined, so far as may be practicable, to personal chattels or tangible movables, and will omit consideration of intangible movables (including negotiable instruments) as well as immovables of all kinds. Even within this limited sphere the distinction between a contract relating to a thing and a conveyance of a thing presents itself as a matter of characterization of the subject or question—a matter which must be decided by a court as a necessary preliminary to the court's selection of the proper law, that is, the law to be applied by the court in deciding the main subject or question.

Preliminary even to the characterization of the subject or question which is before the court is the characterization of the thing itself, if the subject or question is one of property or relates to a thing. On this point the Conflict of Laws Restatement (Proposed Final Draft No. 2) contains the following sections:

227A. Whether property is real or personal is determined by the law of the state in which the thing is situated.

228A. Whether rights in land are to be treated as equitably converted into personal property depends upon the law of the state of situs of the land.

229A. Whether personal property is to be treated as equitably converted into rights in land depends upon the law that governs transfer of the personal property.

The second and third of these sections are quoted, not because they are relevant to the subject of the present article, but because they may help to make clear one ground of criticism of the language of Section 227A. If it may be assumed that the Restatement is not intended to be limited in its application to cases of conflict of laws arising between states of the United States or between countries the laws of which are based upon English law, it is submitted that its primary classification of property ought not to be based upon the distinction between real and personal property, a distinction

See Yntema, The Hornbook Method and the Conflict of Laws (1928) 37 Yale L. J. 468, especially at 474, par. b).

In Falconbridge, Law of Mortgages (2d. ed. 1931) 734, I have already suggested characterization as the equivalent of the French word qualification, which is unsuitable for transliteration into English because the English word qualification already has several meanings, different from that of the French word.
peculiar to Anglo-American law; but ought to be based upon the distinction between immovable and movable property, which is not merely the technical distinction prevailing in other systems of law, but one which corresponds with the natural difference between land and other things. If English law, or Anglo-American law generally, regards leasehold estates in land as personal property, and if, for certain purposes, it regards real property subject to a trust for sale as notionally converted, and therefore personality, or conversely regards money subject to a trust for investment in real property as notionally converted, and therefore realty, it is nevertheless true that a leasehold estate in land is just as immovable in character as a freehold estate, and that the real property not yet sold is still immovable, and that the money not yet invested is still movable.

It should here be pointed out, by way of parenthesis and to avoid misunderstanding, that if a statute uses the expression "personal property", instead of "movable property", in a rule of conflict of laws, effect must, at least in England and in Canada, be given to the statute according to its terms. Lord Kingsdown's Act,\(^6\) for example, authorizes a will of personal property of a British subject to be made abroad in accordance with the forms of any one of several specified laws; and as a leasehold estate in land is personal property, a will of a leasehold estate is within the statute,\(^6\) and for a similar reason a will of the testator's beneficial interest under a trust for sale of real property is within the statute,\(^7\) but in neither case is the subject matter movable property. A court which is bound by the statute must give effect to it, but with regard to any question of conflict of laws relating to the same subject matter which is not covered by the statute the court must apply whatever law is applicable to it by virtue of its being immovable property.\(^8\)

In other words, if property has to be characterized as one of the preliminary steps in the selection of the proper law, that is, the law which gov-

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\(^6\) *The Wills Act, 1861, 24 & 25 Vict. c. 114 (1861) (so cited by virtue of *The Short Titles Act, 1896, 59 & 60 Vict. c. 14 (1896)), re-enacted, mutatis mutandis, in some of the provinces of Canada.*

\(^6\) *In re Grassi, Stubberfield v. Grassi, [1905] 1 Ch. 584.*

\(^7\) *In re Lyne's Settlement Trusts, [1919] 1 Ch. 80.*

\(^8\) We thus get the anomalous and patchwork result, which is not susceptible of being defended on principle, but which is inevitable by reason of the terms of the statute, namely, that (1) a will of a freehold estate in land is governed as to both form and substance by the *lex situs*; (2) a will of a leasehold estate (or any other interest in land which is regarded by English law as personal property) is governed as to both form and substance by the *lex situs*, except that as to form a British subject may use one of the alternative options afforded him by Lord Kingsdown's Act; and (3) a will of movable property or pure personalty is governed as to both form and substance by the law of the last domicile of the testator, except that as to form a British subject may use one of the alternative options afforded him by Lord Kingsdown's Act. See annotation in [1932] 1 D. L. R. 53, 55. It is not surprising that sometimes even very learned continental writers have misunderstood the English decisions and have confused personal property with movable property. See, *e. g.*, I KAHN, ABHANDLUNGEN ZUM INTERNATIONALEN PRIVATRECHT (Leipzig, 1928) 38, 80-83; I FRANKENSTEIN, INTERNATIONALES PRIVATRECHT (Berlin, 1926) 287; RAPPE, EINFÜHRUNGSGESETZ, 6 STAUDINGERS KOMMENTAR ZUM BGB (Berlin, 1931) 700.
erns the subject or question which is before a court for decision, the property should be characterized as immovable or movable, and not as real or personal. I am of course aware that the main division of the subject of property in Topics B and C of the chapter on property in the Conflict of Laws Restatement is based on the distinction between immovables and movables, and not upon the distinction between reality and personalty. My first point of criticism is precisely that in Topic A of the same chapter there is no section which deals with the fundamental distinction between immovables and movables, or states what law determines whether property is immovable or movable, whereas great emphasis is laid upon the secondary distinction between real and personal property. So far the criticism might be dismissed somewhat lightly, as being merely an objection to the Restatement as being artistically incomplete, but it is submitted that the Restatement is not only inartistic, but misleading. In their present form Sections 227A, 228A and 229A suggest that the distinction between realty and personalty has some bearing upon the choice of the proper law, and they do not suggest that the distinction between immovables and movables lies at the base of that same choice.

The right method of approach, it is submitted, is that which is indicated in the case of In re Berchtold, namely, that for the purpose of the selection of the proper law, property must be characterized as immovable or movable according to the lex situs, and that the distinction between reality and personalty becomes material only when the proper law has been selected, and of course only if that law happens to be a law which distinguishes reality from personalty. In other words, the distinction between real and personal property is immaterial for the purpose of the choice of the proper local law, but may be a material aspect of the proper local law, when that law has been chosen. In the case cited the succession of a person who had died intestate, domiciled in Hungary, was in question in an English court.

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9 The distinction seems to be stated only in the comments appended to certain sections (e.g., §§ 47, 226A, 227A), and not in the text of any section.

10 [1923] I Ch. 192; cf. Falconbridge, op. cit. supra note 4, at 736-737.

11 In the Berchtold case the lex situs of the land happened to be the same as the lex fori. Even in the more difficult case of a movable thing which is alleged to be immovable by annexation or by its relation to land, and which is in fact removed to some country other than that of the situs of the land, the English view appears to be that its character as movable or immovable should be determined by the lex situs of the land. For example, a Scotch heritable bond, though situated in England, has been held to be immovable because the lex situs of the land upon which it creates a charge so regards it. In re Fitzgerald, Surman v. Fitzgerald, [1904] I Ch. 573, 588; Dicey, op. cit. supra note 2, at 580-581, notes to his rule 149. It would be going too far afield to discuss here the question whether the characterization of property by the lex situs is justifiable as an exception to the rule that generally characterization is determined by the lex fori or by virtue of some different rule as to characterization. V. BARTIN, PRINCIPES DE DROIT INTERNATIONAL PRIVE (Paris, 1930) § 88, at 236, admits characterization of property by the lex situs as the sole exception to the general rule of characterization by the lex fori. NIBOYET, MANUEL DE DROIT INTERNATIONAL PRIVE (Paris, 1928) §§ 418, 419 at 507 ff., § 508 at 636, does not admit even this exception. As to the general subject of characterization or qualification, much has been written in recent years in various countries of continental Europe.
and one of the assets of the estate was the beneficial interest under the will of the grandfather of the *de cujus*, by which freehold land in England had been devised to English trustees upon trust to sell the land and pay the proceeds to the father of the *de cujus*. The land being still in the hands of the trustees, unsold, and the father of the *de cujus* having died intestate, the question was whether English law or Hungarian law should govern the distribution. It was held that the beneficial interest in the freehold land must first be characterized as either immovable or movable, without regard to the distinction between realty and personalty. Although the beneficial interest would, by virtue of the doctrine of conversion, be considered personalty if English law should be held to be the governing law, it was nevertheless immovable for the purpose of conflict of laws. Hence, the question being one of succession to immovables, the *lex situs* of the land was the governing law. Therefore the property was to be distributed, as personalty, among the next of kin according to English law, and not as realty. If, on the other hand, the beneficial interest under the trust had been characterized as movable by English law, the law of Hungary would have been the governing law as to the distribution and the distinction between realty and personalty would not have arisen for consideration.

II. Proper Law of a Contract

As regards the proper law of a contract only some observations on the differences between English and American rules of conflict of laws will be necessary for the purposes of the present article.

1. Conflict of Laws Restatement

By the terms of Sections 353, 354 and 355 of the *Conflict of Laws Restatement*, the law of the place of contracting is declared to be the governing law with respect to the capacity to make a contract, the formalities required for making a contract, and generally all matters of what is usually called intrinsic or essential validity, including the "nature and extent of the duty for the performance of which a party becomes bound (though not the manner of performing that duty)." The reservation as to "the manner of performing that duty" is amplified in Section 385, which provides that that duty will be discharged by compliance with the law of the place of performance of the promise with respect to (a) the manner of performance, (b) the time and locality of performance, (c) the person or persons by whom or

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2 It would appear that property must be characterized as movable or immovable in its actual condition at the material time. If the land has been actually sold under a valid trust for sale, the proceeds of the sale are movable property. *In re Piercy, Whitwham v. Piercy*, [1895] 1 Ch. 83. If under a trust to raise a sum of money the trustees may raise it without selling or mortgaging immovable property, the beneficiary is entitled, not to an interest in land, but merely to a chose in action which must be treated as possessing the character of a movable. *In re Anziani, Herbert v. Christopherson*, [1930] 1 Ch. 407.
to whom performance shall be made or rendered, (d) the sufficiency of performance, and (e) the breach of the contract.

2. Some Comparisons

From the point of view of comparative law, several matters may be at least noted.

The distinction drawn between the initiation and obligation of a contract on the one hand and its performance on the other hand is of great interest, though the application of the lex loci celebrationis to the former and the lex loci solutionis to the latter must sometimes raise difficult questions as to the point at which initiation ends and performance begins or, in other words, as to the extent to which performance can be regulated by one law without in effect making a material change in the original obligation created under another law.13 It is of course clear that to the extent that performance of a contract is illegal by the law of the place of performance at the time for performance, there is no obligation to perform so long as the illegality continues;14 but it would appear that English courts reach this conclusion, not by saying that the lex loci solutionis governs performance generally, but by saying that notwithstanding that the proper law of the contract as a whole is English, English law will not render one of the parties liable for not doing an act which cannot be lawfully done at the place of performance, even though the act could have been lawfully done if England had been the place of performance.15 Thus, it would appear that, generally speaking, when the proper law of a contract has been ascertained by reference to the terms and circumstances of the contract at its inception to be some law other than that of the place of performance, English law applies that proper law to such matters as excuses for non-performance or breach of the contract without regard to the law of the place of performance, provided that the act of performance is not strictly illegal or prohibited by the latter law.16 Similarly, the right to damages for breach

13 See the comments on §§ 353 and 385 of the Restatement; cf. Lorenzen, Validity and Effects of Contracts in the Conflict of Laws (1920) 30 Yale L. J. 555, 654, (1921) 31 id. 53, 66 ff.
15 Ralli Brothers v. Compania Naviera Sota y Aznar, [1920] 2 K. B. 287. This case is to be distinguished on the one hand (1) from a case in which, as in Robinson v. Bland, 2 Burr. 1077 (K. B. 1760), the proper law of a contract is English law because it is to be entirely performed in England, though made elsewhere, and consequently the contract as a whole is void because it is illegal, or based upon a consideration which is illegal, by that law; and on the other hand (2) from a case in which, as in Foster v. Driscoll, [1929] 1 K. B. 470, the proper law of a contract is English law, and the contract is to be partly performed in England, but the contract is void in England because its object is to break the law of another country.
16 Jacobs, Marcus & Co. v. Credit Lyonnais, 13 Q. B. D. 589 (1884). There are some reservations in the judgment in favor of the view that the parties to a contract might not unreasonably be assumed to have intended that the "mode" of performance of that part of the contract which was to be performed abroad was to be governed by the lex loci solutionis, but the court refused to say that impossibility of performance by reason of an insur-
of contract would appear to be regarded as a creature of the law which created the contract, so that the measure of damages is governed by the proper law of the contract. 17

Again, under the Restatement the lex loci celebrationis is made applicable to questions of the formal validity of a contract as well as to questions of its intrinsic validity, and therefore so far as the Restatement is concerned it is unnecessary to decide whether the lex loci celebrationis is to be applied to formalities by virtue of its being the proper law of the contract or by virtue of an independent rule, or, in other words whether Lorenzen is right when he makes the following statement: 18

“Whenever the formalities of a legal transaction are regarded in Anglo-American law as pertaining to the ‘substance’ of a legal transaction, instead of relating to ‘procedure,’ they are deemed to belong to the operative facts which go to make up the validity of the legal transaction, and are governed by the law determining the validity of the legal transaction in general. No special rules have been developed relating to ‘formalities’ in general.”

Presumably “Anglo-American law” in the foregoing quotation must mean the common law as developed in the United States, and does not include the common law as developed in England or elsewhere in the British Dominions. In any case it would appear to be reasonably clear that English law has evolved a special rule as to formalities in general, 19 and this is still important with regard to contract because by English law the proper law of a contract may be different from the law of the place of contracting.

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19 Formalities of making of a will of movables are by exception governed by the law relating to succession to movables; and as to wills of movables, apart from Lord Kingsdown’s Act, it is accurate in English law to say that formalities “are deemed to belong to the operative facts which go to make up the legal transaction, and are governed by the law determining the validity of the legal transaction in general.” Similar observations would be applicable to a will of immovables, governed as to both form and substance by the lex situs.
Westlake states no modification of the rule that the formalities required for a contract by the law of the place where it is made, the *lex loci contractus celebrati*, are sufficient and necessary for its external validity in England, except that a contract, although externally perfect according to that law, cannot be enforced in England unless evidenced in such manner as English law requires.  

Even Dicey, who states several exceptions, begins his comment on the main rule by saying, "The one principle of English law with regard to the law regulating the form of a contract, or the formalities in accordance with which a contract is made, is that the form depends, both affirmatively and negatively, upon the law of the country where the contract is made." The exceptions stated by Dicey either are of so special a character or are so doubtfully expressed that they merely serve to emphasize the general rule. Apart from the cases relating to contracts in the ordinary sense, the English cases relating to the formalities of celebration of marriage are clear in themselves, and even though in some cases it is difficult to say whether the question is one of formalities or one of capacity or legality, even in these cases the rule that the *lex loci celebrationis* governs formalities is clear, and it would appear from the judgments that as a matter of course the same rule applies to contracts.

Lastly, as to the intrinsic or essential validity of a contract, the *lex loci celebrationis*, which is declared by the *Restatement* to be the governing law, has, or has had, two formidable competitors in American case law, namely the *lex loci solutionis* and the law intended by the parties. Whatever may

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20 Westlake, *op. cit. supra* note 2, §§ 207, 208 and 209; see to the same effect, Foote, *op. cit. supra* note 2, at 338.

21 Rule 159. The author's comment includes the quotation of Westlake, *op. cit. supra* note 2, §§ 207 and 209.

22 Exception 1 relates to a contract with regard to an immovable. Exception 4, relating to an unstamped bill of exchange, is statutory.

23 Exception 2, relating to a contract with regard to a movable, contains the words "may possibly be invalid," and is rendered even more dubious by some possible confusion between a contract as to a movable and the conveyance of a movable. As to a conveyance, the formalities may be as essential a part of the transaction governed by the *lex situs* as any other part of the transaction. See section iii, infra. Exception 3, relating to a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, "may be valid," etc., merely reproduces a suggestion of Nelson, *Private International Law* (1889) 257-8, not directly supported by any English authority.


25 For example, Ogden v. Ogden, [1908] P. 46, and the cases there discussed. For a review of these cases, see a report on conflict of laws relating to the formation and dissolution of marriage, prepared by me for the International Congress of Comparative Law at The Hague, 1932, in part published under the title *Conflict of Laws as to Nullity and Divorce*, [1932] 4 D. L. R. 1, 9 ff.

26 It would be beyond the scope of the present article to review the American cases, even if I thought that I could usefully add anything to what has been already written on the subject. See Beale, *What Law Governs the Validity of a Contract* (1909) 23 Harv. L. Rev. 1, 79, 194, 260, concluding in favor of the *lex loci celebrationis* as sound theoretically, and practical in operation; Lorenzen, *supra* note 13, at 657 ff., 673, stating objections to the *lex loci celebrationis* as an exclusive rule, and advocating the adoption of an alternative rule,
be said from the theoretical point of view, the Restatement rule has the practical advantage that the place of making of a contract is usually easy of ascertainment. Occasionally the convenience of certainty may be offset by some inconvenience and a total frustration of the intention of the parties, in a case in which the place of making is purely casual or accidental, having no substantial connection with the residence or place of business of the parties or the object of the contract or the place of its performance; but it must be admitted that the same objection would apply to the fairly rigid, but widely accepted, rule that the lex loci celebrationis governs formal validity. Again, while the exclusive application of the lex loci celebrationis to intrinsic validity may be a convenient and suitable rule to apply within the limits of the United States, if it is generally adopted there as a rule of conflict of laws, it is not so clearly a convenient or suitable rule to be applied to cases of conflicts arising between a state of the United States and some other country where a different rule of conflict of laws prevails and the contract law of which may be substantially different.

3. English Rule

The English doctrine as to the selection of the proper law of a contract is of course very different from the Restatement rule. It is more flexible, less certain and far less easy to state.

The fashionable way of stating the English rule is that the proper law of a contract is the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed, and it must be admitted that this mode of expressing the doctrine of the proper law finds some sanction in the words of Lord Mansfield and in the language of judges of the highest courts in more recent times.

As to the relative importance of the place of making, the place of performance and other circumstances, for the purpose of ascertaining the proper law of a contract, perhaps the passage most frequently cited in English judgments is the following: so as to combine certainty with elasticity; Goodrich, Conflict of Laws (1927) 228 ff.; Lorenzen in 6 Répertoire de Droit International (Paris, 1930) 373 ff. See also, from the point of view of comparative law, A. Bagge, Les Conflits de Lois en Matière de Contrats de Vente de Biens Meubles Corporels (1928, V) 25 Recueil des Cours, Académie de Droit International, 125 (discussing the subject in its contractual aspects, including the transfer of the risk, but referring only incidentally to the transfer of the property in the goods).

27 DicEY, op. cit. supra note 2, rule 155.
28 Robinson v. Bland, supra note 15. This case is still the leading English authority for the doctrine that if a contract made in one country is to be entirely performed in another country, its validity is governed by the law of the place of performance. The result, namely, to make English law applicable to a bill of exchange accepted in France, but payable in England, was reached more easily because the bill was itself in English form.
29 See, for example, Hamlyn & Co. v. Talisker Distillery, [1894] A. C. 202; Spurrier v. LaCloche, [1902] A. C. 446.
"It is, however, generally agreed that the law of the place where
the contract is made, is *prima facie* that which the parties intended, or
ought to be presumed to have adopted as the footing upon which they
dealt, and that such law ought therefore to prevail in the absence of
circumstances indicating a different intention, as, for instance, that the
contract is to be entirely performed elsewhere, or that the subject-
matter is immovable property situate in another country, and so forth;
which latter, though sometimes treated as distinct rules, appear more
properly to be classed as exceptions to the more general one, by reason
of the circumstances indicating an intention to be bound by a law differ-
ent from that of the place where the contract is made; which intention
is inferred from the subject-matter and from the surrounding circum-
stances, so far as they are relevant to construe and determine the char-
acter of the contract."

This intention doctrine nevertheless "bristles with difficulties, theoret-
cal and practical"; and has been the subject of much criticism. Perhaps
the gravest objection to the intention doctrine is that a proper law which is
identified with the law intended by the parties fails to perform the real
service that might be expected of any reasonably useful proper law. It is
about as useful as the corporation sole, because just when it is sought to be
used in order to determine the intrinsic validity or non-validity of a contract,
it refuses to operate.

As regards interpretation or construction in a narrow sense there is no
difficulty about giving effect to any express or implied intention of the par-
ties, if it can be ascertained, even to the extent of incorporating in the con-
tract the law of some country with which the contract has otherwise no
connection; but when we are looking for a law by which to test the intrinsic
validity of a contract, to know whether it is legally binding or not, whether
it is or is not effective according to its terms, it is only within narrow limits
that we can admit the intention of the parties as the controlling element.
We might let the parties choose between the laws of two countries each of
which has some real connection with the contract, but we cannot let them
go far afield so as to make applicable the law of any foreign country which
happens to be favorable to their views as to the conditions of a valid con-
tract, and so as to substitute by a quasi-legislative act some foreign law for
the law which otherwise ought to govern the contract. Dicey, the most
enthusiastic exponent of the intention doctrine, is of course obliged to admit
that if the legality of the contract is in question, the arbitrary intention of

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31 Goodrich, *op. cit. supra* note 26, at 232.
32 In addition to the articles by Beale, *supra* note 26; and Lorenzen, *supra* notes 13 and
18; see Footz, *op. cit. supra* note 2, at 397-8; Westlake, *op. cit. supra* note 2, observations
preceding § 212.
33 Cf. the abeyance of the freehold when there was no parson, which caused Maitland
to say: "Thus, so it seems to me, our corporation sole refuses to perform just the first
service that we should require at the hands of any reasonably useful *persona ficta.*" 3 MAIT-
LAND, COLLECTED PAPERS (1911) 239.
the parties cannot be allowed to control the decision of the question, and so he adds that the intention must be a "bona fide" one, and, having already by definition identified the proper law with the law intended by the parties, is driven to the desperate expedient of saying that the essential validity of a contract is governed "indirectly" (whatever that means) by the proper law, and to qualify even this by the addition of wide exceptions. Westlake rightly submits that if the legality of the contract is in question, either the intention element is excluded or a fictitious intention is substituted for the real intention, and states that "it may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection". As Williston says, with regard to an analogous point, "it seems unfortunate as a matter of terminology to put in the form of a fiction matters which may be stated accurately".

4. Provinces of Canada

The foregoing observations as to the proper law of a contract have been limited to the purpose of pointing out certain differences between the rules prevailing in the United States and those prevailing in England or to the purpose of furnishing a basis of comparison with the rules to be discussed in the next section of this paper.

Inasmuch as English rules of conflict of laws prevail also in all those provinces of Canada in which the law is based upon the common law of England, it is not necessary here to lay stress on the fact that each province of Canada is a separate "country" as regards the conflict of laws; and therefore I have, for the sake of simplicity of statement, spoken throughout of "English" rules of conflict of laws, except when there appears to be.

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81 Whereas the proper law in its natural sense means the law which for any reason is the governing law, SALMOLD AND WINFIELD, LAW OF CONTRACTS (1927) 530. The editor of the latest edition of DICEY, op. cit. supra note 2, at 628, has apparently missed the point of the objection to Dicey's definition of the proper law.

82 See DICEY, op. cit. supra note 2, rules 155, 160, 161, and app. note 22, "What is the Law Determining the Essential Validity of a Contract?" The word "indirectly" formerly appearing in rule 160 has been omitted as "needless" by the editor of the latest edition (pp. 965-966).


84 SOUTH AFRICAN BREWERIES CO. v. KING, [1899] 2 Ch. 173, aff'd, [1900] 1 Ch. 273.

85 2 WILLISTON, CONTRACTS (1924) § 615, at 1189; WILLISTON, FREEDOM OF CONTRACT (1921) 6 CORN. L. Q. 365, reprinted in SELECTED READINGS ON THE LAW OF CONTRACTS (1931) 100, 106. A good recent example of a wholly fictitious intention used as a basis for the selection of the proper law is The Torni, [1932] P. 27. The case of IN RE MISSOURI STEAMSHIP CO., 42 Ch. D. 321 (1889), there cited, may be usefully compared with Liverpool & G. W. Steam Co. v. Phenix Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469 (1889) (sub nom. The Montana in the Missouri Steamship Co. case). See also Note (1932) 48 L. Q. Rev. 6 referring to the Adriatic, [1931] P. 241 (1931).

some difference between the English rules and those prevailing in a Canadian province.

Special mention must, however, be made of the province of Quebec. Its law of property and civil rights, derived chiefly from French law, was codified in 1866 under the title of the Civil Code of Lower Canada. This code, unlike the French Civil Code, contains a comprehensive series of provisions relating to the conflict of laws, of which Articles 7 and 8 are as follows:

7. Acts and deeds made and passed out of Lower Canada are valid, if made according to the forms required by the law of the country where they were passed or made.

8. Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place; in any of which cases, effect is given to such law, or such intention expressed or presumed.

III. LAW GOVERNING THE CONVEYANCE OF A CHATTEL

I. General Rule

In accordance with the view generally adopted in other systems of conflict of laws, the general rule would appear to be well established in Anglo-American law that the transfer of the property in tangible movables or of any less extensive real rights in them, or, more broadly, the creation, dis-

40 As the official English version quoted in the text is neither artistic nor exact, the French version is quoted here: “7. Les actes faits ou passés hors du Bas Canada sont valables, si on y a suivi les formalités requises par les lois du lieu où ils sont faits ou passés.”—“8. Les actes s'interprètent et s'apprécient suivant la loi du lieu où ils sont passés, à moins qu'il n'y ait quelque loi à ce contraire, que les parties ne s'en soient exprimées autrement, ou que, de la nature de l'acte, ou des autres circonstances, il n'apparaisse que l'intention a été de s'en rapporter à la loi d'un autre lieu; auxquels cas il est donné effet à cette loi, ou à cette intention exprimée ou supposée.”

41 The rule is clear in France. NiBOYET, op. cit. supra, note II, § 506, at 633. Also in Germany (where Wächter and Savigny exercised a dominating influence in favor of the recognition of the lex situs as against the lex domicilii). Lewald (1930) 7 RÉPERTOIRE DE DROIT INTERNATIONAL, 367. The case of Italy is especially interesting, because the lex situs is there applied to questions of property rights in movables, notwithstanding the ambiguity of the relevant statutory text. Udina (1930) 6 RÉPERTOIRE DE DROIT INTERNATIONAL, 508-509. In Quebec, art. 6 of the Civil Code of Lower Canada provides, subject to certain exceptions, that “movable property is governed by the law of the domicile of the owner,” and it is impossible to say definitely how far this will prevent the courts of Quebec from following the modern jurisprudence of France in favor of the application of the lex situs. Cf. LAFLUR, CONFLICT OF LAWS (1899) 112, 123-124, where the question is very slightly discussed. It has been held that the title to a stolen horse acquired by purchase in market overt in Ireland is entitled to recognition in Scotland, notwithstanding that by Scottish law a sale of a stolen horse in Scotland would not confer a good title; the vitium reale which is indelible by Scottish law is purged by the sale in Ireland. Todd v. Armour, 9 Sess. Cas. 901 (Scot. 1882). So, there is no reason to doubt that a title validly acquired by purchase in market overt in England or Ireland would be recognized in Ontario, notwithstanding that the Ontario Sale of Goods Act provides that “the law relating to market overt shall not apply to any sale of goods which takes place in Ontario.” ONT. REV. STAT. (1927) c. 163, § 23.
memberment, or extinction of the property in tangible movables, is governed by the *lex situs*. The rule necessarily applies to any essential requirements of the *lex situs* as to formalities of conveyance as well as to any questions of the essential validity of the conveyance.

In England the rule has been clear since 1860. In 1858 there was published the first edition of Westlake on *Private International Law*, of which Chapter VIII (Movables) contained an exposition for English readers of the views of Savigny and Foelix, and Westlake's own argument in favor of the application of the *lex situs* of the movable as against the *lex domicilii* of the owner. In the same year (1858) the Court of Exchequer decided the case of *Cammell v. Sewell*, and its judgment was in 1860 affirmed by the Court of Exchequer Chamber. The case was that of the sale of certain timber, the cargo of a ship which had been wrecked on the coast of Norway. The sale of the timber in Norway by the master of the ship was held to be valid in England because it was valid by Norwegian law. The place in which the sale took place happened to be the same as the place in which the goods were situated, and in some English cases the rule has been stated that the transfer is governed by the law of the place of transfer, but the rule approved by the Court of Exchequer Chamber in *Cammell v. Sewell* is that a disposition made in accordance with the law of the place where the goods are is binding everywhere, and it seems clear that if the place of transfer differs from the situs of the goods, it is the *lex situs* which governs.

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42 The discussion is of course confined to transfer *inter vivos* by particular, as distinguished from universal, assignment.
43 Cf. *Dicey*, op. cit. supra note 2, exception to his rule 154. In the rule itself, stated somewhat doubtfully, it is submitted that the author is unduly conservative, and fails to recognize sufficiently the trend of the modern decisions in favor of the *lex situs*. Cf. *Goodrich*, op. cit. supra note 26, at 350.
44 It is interesting to compare this somewhat argumentative chapter with c. vii of the more recent editions, in which the rule is stated as being settled. See also *Foote*, op. cit. supra note 2, 284 ff.
45 3 H. & N. 617 (Eng. 1858).
46 5 H. & N. 728 (Eng. 1860). In the Court of Exchequer the judgment was based upon the fact that the sale in Norway had been confirmed by the judgment of a Norwegian court, but in the course of the argument Pollock, C. B., put the case simply on the ground of a sale valid by the *lex situs* and therefore valid elsewhere; and in the Court of Exchequer Chamber this *dicitum* of Pollock, C. B., was adopted as the ground of decision. Westlake's book was cited in argument in the Exchequer Chamber, and we may conjecture that Westlake probably exercised an important influence in favor of the *lex situs* as against the *lex domicilii*, but the report of *Cammell v. Sewell* does not furnish us with precise evidence on this point.
47 Although the contest was between the English consignees and the Norwegian buyer, the timber had been shipped in Russia, upon a Prussian ship, and as pointed out by Cockburn, C. J., there was no evidence that the sale would have been invalid by either Russian law or Prussian law.
49 Cf. *Maugham*, L. J., in *In re Anziani, Herbert v. Christopherson*, supra note 12, at 420: "I do not think that anybody can doubt that with regard to the transfer of goods, the law applicable must be the law of the country where the movable is situate. Business could not be carried on if that were not so." See also *Beale*, *Living Trusts of Movables in the Conflict of Laws* (1932) 45 Harv. L. Rev. 969, at 970.
50 Cf. *Foote*, op. cit. supra note 2, at 293, 294; *Dicey*, op. cit. supra note 2, notes to his rule 152, is to the same effect, notwithstanding that, somewhat oddly, he incorporates in his text
In the United States also it would seem to be clear that the modern rule is that the law governing the creation and transfer of interests in tangible movables is the *lex situs*, notwithstanding occasional recognition of an older view, approved by Story, that the governing law is the *lex domicilii* of the owner.51

The *Conflict of Laws Restatement (Proposed Final Draft No. 2)* of the American Law Institute provides in clear and unqualified terms that the capacity to make a valid conveyance of a chattel (Sec. 275), the formalities necessary for the validity of a conveyance of a chattel (Sec. 276), the validity in substance of a conveyance of a chattel (Sec. 277), and the nature of the interest created by a conveyance of a chattel (Sec. 278), are all determined by the law of the state (place, Sec. 278) where the chattel is situated at the time of the conveyance. It is not obvious why the general rule, thus so clearly stated in its relation to chattels, should have been partially stated in an earlier section (Sec. 233) in its relation to “a right in a thing which exists in fact”—partially, because the comments appended to Section 233 contain a cross-reference to Sections 277 and 278 which would seem to indicate that “validity and effect” in Section 233 correspond with “validity in substance” (Sec. 277) and “nature of the interest created” (Sec. 278), and are not intended to cover “capacity” (Sec. 275) or “formalities” (Sec. 276).

On the other hand, another comment, as well as two illustrations, appended to Section 233, relate to capacity and would seem to indicate that “validity and effect” in Section 233 include capacity to convey.

2. Change of Situs without Consent of Owner

The general conveyancing rule just stated involves as its ordinary consequence that a title to a chattel acquired under the law of X, where the chattel is situated, is entitled to recognition in Y, subject to any inconsistent rule of public policy of Y, but that the title so acquired may be overridden by a title validly acquired under the law of Y, after the removal of the chattel to Y.52

Although it is established that as a general rule the *lex situs* of a chattel governs all matters as to the conveyance of the chattel or of any real right in it, troublesome questions arise as to possible exceptions to the general

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52 See § iv, 2, 3, in the installment to be published next month.
rule,\textsuperscript{53} and in particular the question whether any modification of the rule should be recognized if a chattel is removed from one country to another without the express or implied consent of the owner.

The sections already cited from the \textit{Restatement} state no modification of the general rule that the conveyance of a chattel is governed by the law of the state where the chattel is situated at the time of the conveyance. Comment (a) appended to Section 275 does, it is true, state that "a chattel is situated in a state where it physically is, unless it is brought into the state without the consent of the owner (see Section 52), or unless it is customarily located outside the state and is only temporarily within the state (see Section 54)"; but this comment is not literally supported by Sections 52 and 54. These sections do not purport to define the word "situated", or to alter its natural meaning. They relate to the jurisdiction of a state over chattels, and are part of a title relating to jurisdiction over things in general. Both sections contain provisions which are presumably intended to modify Sections 275 to 278, though, with the exception of sub-section 3 of Section 52, they are expressed in terms of jurisdiction, that is, they say what a state may do or may not do in relation to a chattel, and they do not seem to be very aptly phrased if they are intended to embody rules as to the choice of the governing law. The arrangement of the \textit{Restatement} is all the more strange in this respect because when the rules of conflict of laws relating to chattel mortgages and conditional sales are stated, and it becomes necessary to provide for the case of a chattel removed from one state into another without the consent of the owner or mortgagee, the appropriate provisions occur in the chapter on property and not in the chapter on jurisdiction, and are not expressed in terms of jurisdiction.\textsuperscript{54}

In the earlier \textit{Tentative Draft Restatement} No. 2, Section 52 appeared in the following comparatively simple form: "If a chattel belonging to a person who is not a citizen of or domiciled in the state, is brought into the state without his consent, the state has no jurisdiction over his title to the chattel until he has had a reasonable opportunity to remove it or until the period of prescription in the state has run." By Section 43, "jurisdiction" means

\textsuperscript{53} It is not intended to discuss the case of ships, or goods in course of transit. As Westlake says in his comments on his § 150, it would be pedantic to apply the general doctrine so as to bring in the law of a casual and temporary situs, not contemplated by either party in the dealing under consideration. Goods in course of transit give rise to particularly difficult problems the discussion of which is outside the scope of this article. The most recent attempt to solve these problems is expressed in the draft of an international convention concerning conflict of laws relating to the transfer of property in goods under contracts of sale, prepared by a committee of the International Law Association and discussed at the meeting of the Association held at Oxford in August, 1932. Two classes of cases as to goods in transit have to be considered, namely, (1) goods which are in transit from seller to buyer, pursuant to a contract of sale, giving rise to the question what is the law governing the passing of the property under that contract, and (2) goods which while they are in transit are the subject of a subsequent transaction. Cf. Lewald, supra note 41, at 375, referring specially to Nitoye, \textit{Des Conflits de Lois relatifs à l'Acquisition de la Propriété et des Droits sur les Meubles Corporels} (Paris, 1912) 55 ff.

\textsuperscript{54} See § v, 3, in the installment to be published next month.
the power of a state to create rights which under the principles of the common law will be recognized as valid in other states.

In the Proposed Final Draft No. 1, Section 52 appears in a more elaborate form—the negation of the jurisdiction of the state to which the chattel is removed without the owner's consent being further limited by specific exceptions which are not material for the present purpose, and a provision (subsec. 3) being added that "if by the law of the state from which the chattel is taken title would pass as the result of a transaction in another state, the title will pass though the chattel has been taken into the other state without the consent of the owner."

In the commentaries accompanying Tentative Draft No. 2, it is said that Section 52 states a proposition of law which is not generally recognized and is not supported by a great weight of authority, and that some of the advisers have serious doubts as to the correctness of the section as a statement of present law. In the annotated edition of Tentative Drafts Nos. 1, 2 and 3 published by the Michigan State Bar Association it is said that Section 52 represents the opinion of a considerable majority of the advisers, though some of them dissent from it, and that though the section is not supported by a great weight of authority, there is no authority against it.

The great persuasive authority of Beale can be invoked in favor of both the general principle of Section 52 and the expression of that principle in terms of jurisdiction. The case of Edgerly v. Bush apparently is, he says, the only direct authority for the proposition that if A is owner under the law of state X of a chattel situated there, and the chattel is taken to state Y without the express or implied consent of the owner, state Y has no jurisdiction to divest the owner's title in favor of a purchaser or mortgagee there. In the case mentioned the plaintiff, a mortgagee, had a good title to a span of horses by the law of New York. The horses were then taken by the mortgagor to the province of Quebec, without the consent of the plaintiff and in breach of the contract between the parties. They were subsequently sold in Quebec by a "regular trader, dealing in horses" to a purchaser in good faith and without notice, and later were resold to the defendant. In an action brought in New York for conversion, it was held that if the law of

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55 The decisions which are cited as involving the principle of § 52 are Edgerly v. Bush, 81 N. Y. 190 (1880), and Taylor v. Boardman, 25 Vt. 581 (1853) and reference is made to the language of Cockburn, C. J. in Cammell v. Sewell, supra note 46, at 735, in argument: "If a person sends goods to a foreign country it may well be that he is bound by the law of that country; but here the goods were wrecked on the coast of Norway, and came there without the owner's assent. Could the arrival of the goods there enlarge the captain's authority?" See, however, to the contrary, the language of Crompton, J. (delivering the judgment of the majority of the court, in which Cockburn, C. J. concurred).

56 It is added, however, that the principle stated in § 52 is inconsistent with the result of the decision in Boydson v. Goodrich, 49 Mich. 65 (1882).

57 Beale, Jurisdiction over Title of Absent Owner in a Chattel (1927) 49 Harv. L. Rev. 805; cf. Note (1911) 24 Harv. L. Rev. 567.

58 Supra note 55. I have stated the proposition broadly in my own words, without mentioning the exceptions contained in § 52.
Quebec were the governing law the defendant would have a good title, but that effect would not be given in New York to the law of Quebec so as to divest a title lawfully acquired and held under the law of New York, in a case in which the chattels had been removed to Quebec without the consent and against the will of the owner. "We doubt," said the court, "whether . . . it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another State, and a sale of it there under different laws."  

Beale further says that "the only authority which could control this question would be a decision of a court of a third state refusing to give effect to legal rights acquired under a rule like the Texas rule". If in Edgerly v. Bush the horses, after being sold in Quebec, had been taken to Maine, and a court of Maine had refused to recognize the divesting effect of the Quebec transaction upon the New York title, we should of course have a disinterested authoritative statement of the Maine view as to the true conflict of laws rule on the question now under discussion, but, after all, we should still have only the view of the court of one state on a highly debatable question.

The doctrine which underlies the particular form of statement contained in Section 52, (that is, the lack of jurisdiction or power of a State to affect or divest a title validly created under the law of some other State which in the circumstances is regarded as being the sole law governing the title) has been the subject of some criticism. If valid, the doctrine seems to involve some possible consequences peculiar to the constitutional law of the United States. Upon all this I do not venture to express any opinion.

It is of course another question whether the principle of Section 52, regardless of its particular mode of expression, is socially desirable, that is, whether the rule that the lex situs governs the conveyance of a chattel ought to be qualified in the case of a chattel which has been taken from one country to another without the owner's consent, and dealt with in the latter country.

As to the effect of art. 1489 of the Civil Code of Lower Canada, in question in Edgerly v. Bush, supra note 55, see McKenna v. Prieur and Hope, 56 Ont. L. R. 389 (1924), [1925] 2 D. L. R. 460, in § iv, 3, of the installment to be published next month, from which it appears that the sale by the trader in Quebec would not convey to the purchaser any proprietary right as against the true owner. Under art. 1489 "the sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles.

At 205 I have omitted some other grounds of decision mentioned in the judgment, all eliminated as untenable by Beale in the article cited supra note 57.

Texas is apparently the happy hunting ground of dishonest sellers of other men's chattels and of "willing bona fide buyers." See, e. g., Consolidated Garage Co. v. Chambers, 111 Tex. 293, 231 S. W. 1072 (1921).

"Disinterested" is merely figurative. It is not meant to be suggested that a court would mould its rules of conflict of laws so as to protect unduly a title originating in its own state.

See especially Comment (1928) 37 Yale L. J. 966, and the articles there cited.

Note (1928) 41 Harv. L. Rev. 770; Comment, supra note 63 at 969-971.

The desirability of some qualification of the rule seems to be approved in the articles already cited. See Beale, supra note 57, at 810; and Comment, supra note 63, at 971. Good-
The question may be regarded as the conflict of laws phase of the ancient question upon which different systems of local laws have taken different views, namely, where the line is to be drawn between the protection of the interest of an owner out of possession and the protection of the interest of an innocent purchaser from the possessor. If the desirability of the proposed qualification of the conveyancing rule in the conflict of laws is tested by reference to the policy of the common law with regard to local transactions not involving any foreign element, the proposed qualification may be said to be in accord with the traditional policy of the common law to protect the owner rather than the innocent purchaser, as contrasted with the policy of the civil law to protect the purchaser rather than the owner. It may be remarked, however, that the pronounced tendency of modern English legislation has been to extend the cases in which protection is given to the innocent purchaser at the expense of the owner, and in the United States and Canada the general object of chattel mortgage and conditional sale legislation is to give to an innocent purchaser a larger measure of protection than the common law gave him. Some of the cases, not yet remedied by legislation, in which title rather than purchase is still protected by the common law, are hard to justify on principle, as contrasted with other cases in which purchase is protected rather than title.

Even if, as is not certain, there appears to be some balance of convenience or justice in favor of the principle of Section 52 of the Restatement, the benefit of the principle depends to some extent on its being generally adopted as a rule of conflict of laws. Within the limits of the United States the condition of the benefit may in time be fulfilled by the general acceptance of the Restatement in the United States, but it is unlikely to be fulfilled as between a state of the United States and some other country. On the contrary, if the principle is not adopted in other countries, it would appear that the result of its adoption in the United States will be to accentuate the difference between the rules of conflict of laws prevailing in the United States and those prevailing elsewhere.

The extreme case of removal without the owner's consent is the case of a stolen chattel, and the question might be put in this form: If a chattel

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Rich, op. cit. supra note 26, at 351-353, mentions some analogies pro and con, and is inclined to doubt the existence of the suggested exception to full control by the law of the situs, but expresses no opinion as to its desirability.

*See, e.g., Franklin, Security of Acquisition and of Transaction: La Possession vaurt Titre and Bona Fide Purchase (1932) 6 Tulane L. Rev. 589.

*As expressed bluntly, but too broadly in Edgerly v. Bush; supra note 55, at 204 "Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title."

*See the successive Factors Acts of 1823, 1825, 1842, 1877 and 1889; the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, § 25 (1893). The Factors Act, 1889, 52 & 53 Vict. c. 45 (1889) and the Sale of Goods Act have been re-enacted in all the common law provinces of Canada.

*Cf. Franklin, supra note 66, at 594-595.
were sold in market overt in England, would it make any difference to the validity of the buyer's title that the chattel had been stolen by the seller in Scotland or France? If not, a fortiori, if a sale is made in England by a person who is in possession of a chattel with the owner's consent, and in such circumstances that by English law he can give a good title as against the owner to a third party, it would make no difference that the chattel had been removed to England without the owner's consent. In any event the question is of course not merely whether the sale is valid in England, but whether the sale in England is entitled to recognition elsewhere.

While the question does not seem to have been specifically discussed in the English and Canadian cases, it seems to have been taken for granted that the validity of a conveyance by the lex situs is not affected by the fact that the chattel has been taken to the place of transfer without the consent of the owner. The leading case of Cammell v. Sewell, already cited, is perhaps not conclusive on this point, because there the master of the ship, though not of course authorized to wreck the ship in Norwegian territorial waters and to sell the cargo there, did have authority to take the ship and cargo from the port of shipment in Russia to the port of destination in England, and the possibility that the ship might be wrecked in Norwegian waters and that the cargo might consequently be landed in Norway and there sold in accordance with Norwegian law might be considered as one of the risks which the owners must have assumed. However that may be, Crompton, J., delivering the judgment of the majority of the Court of Exchequer Chamber, said, "And we do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that the goods which were wrecked here would, on that account, be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owners did not foresee that they would come to England." 71

We have in the English case of Embiricos v. Anglo-Austrian Bank 72 the extreme case of a cheque drawn by a Roumanian bank in Roumania upon an English bank, stolen in Roumania, taken to Austria by the thief, and there cashed by a bank in good faith and without gross negligence so as to confer a good title by Austrian law upon the cashing bank. It was held by the Court of Appeal that the title so acquired was entitled to recognition in England. In other words, the court held that the rule that the validity of the transfer of a chattel is governed by the lex situs applies to the trans-

70 Supra note 46.
71 Supra note 46, at 744-745. In a Nova Scotia chattel mortgage case, Singer Sewing Machine Co. v. McLeod, 20 Nova Scotia L. R. 341, 344 (1888), there is an obiter dictum that if the chattel is removed to another country without the owner's consent, the title will not be affected by subsequent dealings there.
72 Supra note 48.
73 Stated in one passage in the judgment as "the law of the place where the transfer takes place." The looseness of this expression is immaterial in the particular circumstances, the place of transfer of the cheque being necessarily the same as the situs.
fer of a cheque, and no difficulty was made on the ground that the cheque had been taken to the place of transfer without the consent of the owner.

Again, in the Ontario case of McKenna v. Prieur and Hope a motor car was stolen in Rhode Island, and after adventures of which we have no record was the subject of a contract of sale in the province of Quebec and was subsequently delivered to the buyer in the province of Ontario and there resold by him. The Ontario court discussed the effect of the Quebec transaction, and while it was assumed that by the law of Rhode Island, as by the law of Ontario, a thief cannot give a good title, there was no suggestion that the law of either Rhode Island or Ontario could be applied if it should appear that the Quebec buyer got a good title by the law of Quebec.

It would appear that in France the lex situs will be applied to determine the property in movables actually situated in France, without regard to the reasons why they are so situated, whether as the result of force majeure or without the consent of the owner or otherwise. So, also in Germany.

3. Renvoi

The disturbing effect of the doctrine of the renvoi has hitherto been less felt in the United States than in England and other countries. Whereas on the continent of Europe the doctrine has become one of capital importance, the pros and cons of which are vigorously discussed in every modern treatise on private international law, the only case in which the renvoi has been specifically discussed in the United States was decided adversely to the application of the doctrine to succession to movables, and, in accordance with what appears to be the dominant opinion of writers on conflict of laws in the United States, the American Law Institute, in its Conflict of Laws Restatement, has pronounced against the acceptance of the doctrine except in certain limited cases.

The problem, stated in the broadest terms, is this: "When the conflict of laws rule of the forum refers a jural matter to a foreign law for

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Supra note 59.
To be further discussed in § iv, 3, in the installment to be published next month.

Niboyet, op. cit. supra note 11, § 569, at 637; Lorenzen, supra note 18, at 173.

2 FRANKENSTEIN, op. cit. supra note 8, at 42, par. (b); Lewald, supra note 41, at 369, § 267.


"The general rule is stated in § 7 of the Restatement, and the exceptional cases, to be further mentioned below, are dealt with in § 8.

*Quoted by Goodrich, op. cit. supra note 26, at 24, from the Schreiber article, supra note 80, at 525.
decision, is the reference to the corresponding rule of the conflict of laws of that foreign law, or is the reference to the purely internal rules of law of the foreign system, that is, to the totality of the foreign law, minus its conflict of laws rules?"

I have elsewhere submitted, with especial reference to succession to movables on death, that the supposed authorities in favor of the renvoi in English law are, to say the least, singularly weak, and that any advantages which are supposed to result from the application of the doctrine either disappear on examination or are outweighed by the disadvantages, and that any statutory rule of conflict of laws, such as is contained in Lord Kinnerton's Act or the Bills of Exchange Act should be construed as a reference to the local law of a given country. In the case of marital status, the Conflict of Laws Restatement, goes, in my opinion, further in the direction of recognizing the doctrine of the renvoi than the English cases go or are likely to go.

In the case of title to land, also, the Restatement (Sec. 8) recognizes the doctrine of the renvoi, in the sense that a court determines the existence of the title to land situated in another country as its existence would be determined on the same facts by a court of the country of the situs; and the comment which follows Section 8 indicates that the propriety of the rule is obvious.

On the other hand, the Restatement (Sec. 7) rejects the renvoi in the case of title to a tangible movable and in other cases not falling within Section 8; and, to say the least, the practical necessity which exists in the case of land, of submitting to whatever may be laid down by the lex situs and whatever may be decided by the courts of the situs, does not always exist in the case of a thing which by its nature may be removed to another situs.

It might indeed be argued that the admission of the renvoi as regards title to land is a logical consequence of the rule that the characterization of property as immovable or movable should be made by the lex situs. So,
by analogy, it might be argued that the admission of the renvoi as regards title to land is logically in accord with the accepted doctrine as to the effect of a judgment in rem of a court of the situs. The arguments would, however, prove too much, because the same reasoning would lead to the admission of the renvoi as regards title to tangible movables. If we fall back on the argument based upon the practical necessity which in the case of land compels a court to determine the existence of the title as a court of the country of the situs would determine it on the same facts, we cannot say broadly that the same practical necessity is absent in all cases of title to tangible movables. The situs of the land never changes, and the practical necessity always exists, whereas the situs of a movable may change and the practical necessity may or may not exist. In other words, as regards movables we may have to draw a distinction between a case in which the foreign lex situs which is in question is the law of the present actual situs and a case in which it is merely the law of a former situs. For example, if the question of the title to a chattel arises in a court of Y and the chattel is actually situated in X, it would seem that the court of Y must determine the title as it would be determined by a court of X; but if the chattel was in X when it is alleged that a title was acquired under the law of X, but is now in Y or in Z, and a court of Y has to apply the law of X in order to adjudicate upon the property effect of the transaction which took place when the chattel was situated in X, there is no practical necessity compelling the court of Y to do anything but apply its own rules of conflict of laws in the light of the local law of X.\footnote{Cammell v. Sewell, supra note 45, is consistent with this suggestion. One of the expert witnesses (3 H. & N. at 626-629) gave as his opinion that the sale of the cargo situate in Norway was valid by [local] Norwegian law, but that the rules of Norwegian law ought not to be applied to the case of a Prussian ship coming from a Prussian [sic, read Russian] port to England and wrecked upon the coast of Norway. The case is not decisive, because no notice was taken of this point in the judgments and it is not clear what the opinion of the other witnesses was on the point.}

It may be further remarked that whereas the title to land situated in one country will rarely have to be determined by a court of another country,\footnote{The English rule is that a court will not exercise jurisdiction in a case which directly requires an adjudication upon the title to foreign land or in which the cause of action involves an adjudication upon the title. British South Africa Co. v. Companhia de Moçambique, [1893] A. C. 602. See also the recent judgment of the Supreme Court of Canada in Duke v. Andler, [1932] S.C. 734, [1932] 4 D. L. R. 529.} it may more frequently happen that a court has to determine the title to a chattel which is, or was, situated in another country.

As regards the contractual effects of a transaction relating to a chattel, it hardly seems open to doubt that when the conflict of laws rule of one country refers to the law of another country as the proper law, the reference ought to be to the local law of that country without regard to its rules of conflict of laws.

(Editor's Note: Part II, concluding this article, will appear in the May issue.)