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CONTRACT AND CONVEYANCE IN THE CONFLICT OF LAWS

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PART TWO

IV. BORDER LAND BETWEEN CONTRACT AND CONVEYANCE

i. Lex Situs Different from Proper Law

Stated broadly, the problem now to be discussed is, what is the result if a transaction contains both contractual and conveyancing elements,1 and the proper law of the contract is the law of one country and the law governing the conveyance of the chattel (the lex situs) is that of another country? The solution of the problem, broadly stated, would appear to be that the contractual effect of the transaction is governed by the proper law of the contract and the property effect by the lex situs; and that in case of conflict the former law must yield to the latter, or, in other words, the contractual rights and liabilities of the parties under the proper law of the contract can be enforced only in so far as they are consistent with the recognition of the property rights existing or created under the lex situs.

Under the Conflict of Laws Restatement, if the contract is made in one country and relates to a chattel situated in another country, the proper law of the contract is necessarily different from the law governing the property in the chattel. In stating this I am assuming that Sections 353 and following of the Restatement, which provide that the validity and effect of a contract are governed by the law of the place of making, apply to a contract relating to a chattel. Sections 372 and following specifically provide for a contract relating to land as distinguished from a conveyance of land, and, in the absence of corresponding provisions as to a contract relating to a chattel, it may be presumed that such a contract is governed by the rules applicable to contracts generally.2

So, under English law, if a chattel is situated in one country and a contract relating to it is made in another country, it may happen (depending on the other circumstances) that the proper law of the contract is different from the lex situs. On the other hand, under English law, but not under the Restatement, if the contract is made in one country and relates to a chattel situated in another country, the proper law of the contract is necessarily different from the law governing the property in the chattel. In stating this I am assuming that Sections 353 and following of the Restatement, which provide that the validity and effect of a contract are governed by the law of the place of making, apply to a contract relating to a chattel. Sections 372 and following specifically provide for a contract relating to land as distinguished from a conveyance of land, and, in the absence of corresponding provisions as to a contract relating to a chattel, it may be presumed that such a contract is governed by the rules applicable to contracts generally.

1 As to contract and conveyance in the conflict of laws, see the references in Part One, published last month, at 662n. In the course of the present section reference will be made also to some writers of continental Europe.

2 It would seem to be far-fetched to argue from § 226A ("as used in the Restatement of this subject, property denotes rights in relation to a thing")1 that a contract relating to a chattel (and therefore creating "rights in relation to a thing") is intended to be included under property rather than contract. In fact the expression "property" simply (as defined by § 226A) is almost immediately abandoned in favor of "rights in" land (§§ 228A, 229A), "property in" a thing (§§ 230A, 231) and "rights in" a thing (§§ 232, 233, 234), and the sections with regard to conveyance do not refer to property or to rights in relation to a thing, but refer to the conveyance of an "interest in" land (§ 236 ff.) and to the conveyance of a chattel or to an "interest in" a chattel or the "title to" a chattel (§ 275 ff.).
statement rule, if the situs of the chattel and the place of making of the contract are the same, it may conceivably happen that the proper law of the contract is different from the lex situs. And what may happen under English law may of course happen under the law of a state of the United States if effect is not there given to the Restatement rule.

If, for example, a chattel is situated in one country, and an offer with regard to it is accepted in another country, the lex situs and the proper law of the contract will necessarily be different under the Restatement rule, and may be different under the English rule. Again, if the situs and the place of making of the contract are one country, but delivery and payment are to be made in another country, the law of the former country will under the Restatement rule govern both property and contract, whereas under English law it is probable that the proper law of the contract will be held to be different from the lex situs.

2. Transaction in one Country and Recognition of its Effect in Another Country

As regards the property effect of a transaction the Conflict of Laws Restatement, Section 280, provides:

Title to a chattel acquired in accordance with the law of the state in which the chattel was situated at the time when the title was acquired is recognized in a state into which the chattel is subsequently brought.

Returning to the broad statement already made that the law governing the conveyance of property (the lex situs) must prevail over the proper law of the contract, if they conflict, we may attempt to classify the situations in which the conflict between the two laws may arise. We may suppose a transaction taking place in X between A, the owner of a chattel situated there, and B, omitting for the moment any question of a further transaction between B and a third person, C. (1) If by the lex situs, the effect of the transaction between A and B is that the property in the chattel passes absolutely to B, then B has a good title elsewhere, without regard to the effect of the transaction by the proper law of the contract. (2) So, if by the lex situs, the property passes to B in some qualified sense or subject to some property right on A's part, again it would seem that whatever may be the property rights which A and B respectively retain or acquire, those property rights are entitled to recognition elsewhere, without regard to the effect of the transaction by the proper law of the contract (even if by that law an absolute title or no title, as the case may be, passes to B). (3) Lastly, if by the lex situs the transaction is regarded as purely contractual, transferring no property right of any kind to B, it would seem that effect must be given to the negation of B's title by the lex situs without regard to the effect of the transaction by the proper law of the contract (even if by that law B
would otherwise get either a qualified or an absolute title). In any of these cases, however, effect is to be given to the proper law of the contract so far as that is consistent with recognition of the title of A or B, as the case may be, existing or created under the *lex situs*; though it may be conceded that the distinction between the property effect and the contractual effect of the transaction between A and B usually becomes important only by reason of some other transaction between A or B, as the case may be, and some third party who claims to have acquired or retained the title. Furthermore, the reported cases usually relate only to the property aspect, if there is one, either because it happens that the contractual aspect is clear, or because, as so often happens when two innocent parties are claiming the ownership of one thing, the intermediate party who has dealt with both of them is financially worthless, so that the contractual rights of either of them against him are not worth litigation.

There may of course be various kinds of reasons why under a contract of sale or other transaction between A and B no title will pass to B. If the *lex situs* is English law or a law based upon English law, the reason why no title passes to B under a contract of sale may be that the subject matter is not in existence (*e.g.*, a chattel to be manufactured by A for B: future goods), or that the subject matter is not specific (*e.g.*, a contract for sale by description: unascertained goods), or that the subject matter is not owned by A (whether it is a case of future goods—a chattel to be procured by A—or simply a case of A's purporting to sell a chattel which he does not own); or the reason why no title passes to B may be that even though the subject matter is specific and is owned by A (conditions precedent to the passing of the title to B), the contract is executory in its nature (*e.g.*, a conditional sale or other contract to sell) and is not a present sale. If the *lex situs* is not English law or a law based on English law, there may be still other and different reasons why the title does not pass, (as, for example, that there has been no delivery of possession, and therefore that the transaction operates by way of contract only and not as a conveyance). We are not, however, concerned with the reasons, but must accept whatever the *lex situs* tells us is the property effect of the transaction.

Conversely, the transaction between A and B may be a contract of sale under which by the law of X, where the chattel is situated, the property passes at once to B without formal conveyance and without delivery of possession; or the transaction may be one by which A, retaining possession of the chattel, transfers under the law of X a special or qualified property in it, as, for example, by way of security or for some special purpose.

If we now suppose, in any of the situations just outlined, that the chattel is removed from X to Y, and consider further the question of the recognition in Y of the property effect of the transaction which took place in X, two possible limitations should be mentioned.
(a) If, for example, by the law of X the property or some partial or qualified property right has passed from A to B, without delivery of possession of the chattel, the ordinary operation of the rule that B's title is entitled to recognition in Y may be prevented by the fact that the transfer of the title in the circumstances would not only be ineffective if the transaction had taken place in Y, but by a rule of public policy of Y is also regarded as ineffective even in the case of a transaction which took place in X while the chattel was situated there.\(^3\) The commonest example of the foregoing limitation on the recognition in Y of a title acquired in X is the case of a chattel mortgage validly created in X without delivery of possession, and the subsequent removal of the chattel to Y, the law of which refuses to recognize the mortgagee's title.\(^4\)

(b) In the converse case it has been said that the recognition in the new situs of a property right established under the law of the former situs is subject to a limitation, namely, that if the conditions required by the law of the former situs for the constitution of a property right have not been completely fulfilled at the time of the change of situs, it is the law of the new situs which decides what effect is to be given to the state of facts existing at the time of the change.\(^5\) Consequently, if a transaction takes place in X relating to a chattel situated there, and if by the law of X the title does not pass from A to B, then when the chattel is removed to Y, the law of Y becomes applicable so as to cause the title to pass to B, if by the law of Y a similar transaction taking place in Y would have had the effect of conferring the title on B.

It is submitted, however, that the limitation just stated cannot be admitted. If, for example, by the law of X the effect of a transaction which takes place between A and B relating to a chattel situated there is that no property passes to B, that is to say, if the transaction is regarded as being purely contractual or executory by the law of X, and under the law of X the property in the chattel is still in A, it seems clear that A's property right established by the law of X is entitled to recognition in Y, and consequently that the denial of B's property right by the law of X is entitled to recognition in B. If, according to the suggested limitation now under discussion, the mere contract under the law of X were transformed into a conveyance of the chattel under the law of Y upon the removal of the chattel to Y, on the ground that the law of Y becomes applicable for the purpose of defining the property effect of the transaction, and that under the law of Y a similar transaction would have the effect of a conveyance, the

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\(^3\) See also infra p. 827 et seq.
\(^4\) See case (A2) infra p. 833.
result would be that contrary to principle the law of Y would refuse to recognize A's property right retained or established under the law of X. When the law of X says that the property has not passed from A to B, it necessarily says that the property remains in A, and this ascertainment of the ownership of the chattel by the then lex situs would seem to be as much entitled to recognition in Y, as, admittedly, the title ascertained by the law of X would be entitled to recognition in Y in the converse case of the transaction being regarded by the law of X as a conveyance from A to B. It would seem also to follow that if by the law of X the transaction has the effect of transferring to B some partial or qualified title, the respective property rights of A and B ascertained by the law of X are entitled to recognition in Y.

3. Effect of Subsequent Transaction in New Situs

We may next suppose that the transaction between A and B is followed by a transaction between A or B on the one part, and C, on the other, under which C claims to have acquired the property in the chattel. If at the time of both transactions the chattel is situated in the same country, the result is comparatively simple; the lex situs governs the property effect of both transactions. If, however, the situs of the chattel is changed in the interval between the two transactions, being in X at the time of the first transaction and in Y at the time of the second transaction, the situation is more complicated. The first transaction is governed as to its property effect by the law of X, and as to its contractual effect by the proper law of the contract, and the second transaction is governed as to its property effect by the law of Y (subject to the possible modification already discussed in case the chattel has been removed from X to Y without the owner's consent), and is governed as to its contractual effect by the proper law of the contract. Full recognition must be given to the property effect of the second transaction under the law of Y, and if that law gives a good title to C, his title is entitled to recognition in X notwithstanding that he would not have got a good title by the law of X in the event of both transactions being governed by the law of X. In other words, a title acquired or retained under the law of X by virtue of the first transaction may be defeated or rendered nugatory under the law of Y by the second transaction. The law of X which was the governing law so long as it was the lex situs and by virtue of its being the lex situs, obviously must yield to the law of Y with regard to the property effect of any transaction which has taken place since the removal of the chattel to Y.  

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6. See Part One, published last month, at 675 ff.

7. The same principle prevails, broadly speaking, in other systems of conflict of laws. See, e.g., Niboyet, Manuel de Droit International Privé (Paris, 1928); § 511, at 668; Lewald, supra note 5, at 373, § 282; and in Das Deutsche Internationale Privatrecht (1931) 185, § 247.
The conditional sale and chattel mortgage cases afford of course the widest variety of illustration of the operation of the rules just stated, but those cases are so varied that they give rise to situations which require further subdivision and classification. They are therefore reserved for separate subsequent consideration. In the meantime an attempt will be made to illustrate the operation of the rules by other cases.

4. Particular Situations

(a) Sale and Agreement to Sell

In *Cammell v. Sewell*, already cited, goods were shipped on a Prussian ship at a Russian port for delivery to an English firm. The ship was wrecked on the coast of Norway, and the cargo was discharged and sold by the master in Norway. It was held that the buyer got a good title by the law of Norway and therefore a title entitled to recognition in England. It appeared that even by the law of Norway the master could not, as between himself and the owners of the ship or the owners of the cargo, justify the sale, and that he remained liable to them, but as the only question in the case was the validity of the buyer's title, the contractual aspects were not further discussed, and it was not necessary to decide whether the proper law of the contract or any of the contracts with regard to the ship or the cargo was Russian, Prussian or English.

In the Ontario case of *McKenna v. Prieur and Hope*, already cited, a motor car was sold by one McDermott, a dealer in second-hand cars carrying on business at Montreal in the Province of Quebec, to the defendant Hope, a dealer carrying on business at Alexandria in the province of Ontario. It transpired subsequently that the car had been stolen from the plaintiff in Rhode Island, and action was brought by him in Ontario against Hope and one Prieur to whom Hope had resold the car. Owing to the fact that, in accordance with the agreement of the parties, delivery of the car was made by McDermott in Ontario and payment made there by Hope, it is probable that under the English rule the proper law of the contract was Ontario law, but the bargain was made in Quebec, and under the Restatement rule the proper law of the contract would be Quebec law. Inasmuch, however, as the plaintiff was clearly entitled to assert his title to the car under either Rhode Island or Ontario law, the only real question was whether the effect of the Quebec transaction was to negative or qualify his right to assert his title, and from this property point of view the governing law would be the *lex situs* and not the proper law of the contract. While only one member of the court (Smith, J. A.) mentioned the applicability of the *lex situs* as

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such, several of the judges expressed their views as to the effect of the Quebec law (in the light of the evidence of a Quebec advocate), assuming in favor of the defendants that that was the governing law. Two judges considered that under either Quebec or Ontario law the contract was intended to be executory, the title not to pass until delivery of the car in Alexandria, and consequently that Hope acquired no property right by the transaction in Quebec. The other judges discussed the effect of Article 1489 of the Civil Code of Lower Canada, which states an exception to Article 1487. It being assumed that McDermott was a trader within the meaning of Article 1489, the question remained whether Hope acquired any property right which he was entitled to assert against the plaintiff in Ontario. One judge held that there was no "sale" to Hope in Quebec, but merely an executory contract outside of the terms of Article 1489. The chief justice held that Hope acquired no property right, but merely a possessory lien, which would have enabled him to hold the car against the plaintiff until reimbursement by the plaintiff of the amount paid by Hope to McDermott, if Hope had not lost his lien by giving possession of the car to his sub-buyer Prieur. The remaining judge (Smith, J. A.) agreed with the chief justice that Article 1489 did not operate to transfer any title to Hope, but, differing from him, held that the operation of the article was not to confer a possessory lien on Hope, but to restrain the owner from claiming his chattel till he reimbursed Hope, a restraint which was independent of possession, but unavailing against the plaintiff in Ontario. In other words this restraint was not a property right, and was outside the rule that the lex situs governs the creation of real rights in a chattel.

If in the foregoing case we supposed that by the law of Quebec (the lex situs) the buyer got a valid title, and that by the law of Ontario (the proper law of the contract) the buyer did not get a good title, the buyer's title would be entitled to recognition in Ontario. As it was, once it was established that by the lex situs the buyer acquired no real right in the chattel, there was no difference between the laws of Ontario and Quebec as to the recognition of the title of the owner from whom the car was stolen.

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20 "1489. If a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it."

21 "1487. 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. The buyer may recover damages of the seller, if he were ignorant that the thing did not belong to the latter." In addition to art. 1489, already quoted, the exceptions are: "1488. The sale is valid if it be a commercial matter, or if the seller afterwards become owner of the thing"; and "1490. If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed." Art. 1488, which at first reading might seem to be important, has been held in Quebec to be limited in its effect to the parties to the sale and not to affect third parties. Tremblay v. Mercier & Lachaine, Q. R. 38 Super. Ct. 57 (Que. 1909). In any event art. 1488 has no bearing on the case of a lost or stolen thing (specially provided for in art. 1489) and it was not relied on in McKenna v. Prieur & Hope.

An interesting question is whether an unpaid seller's right of stoppage in transitu, or his right of dissolution for non-payment of the price, as the case may be, is a contractual right (jus ad rem) or a property right (jus in re). Each of these rights appears in some of the cases to have been regarded as depending on the proper law of the contract of sale rather than the lex situs, and therefore as being contractual rather than proprietary.

As contrasted with the right of stoppage of goods in transitu given to an unpaid seller by English law in the event of the insolvency of the buyer, and recognized by the Sale of Goods Act, in force in all the common law provinces of Canada, but not part of the law of sale of goods of the province of Quebec, the Civil Code of Lower Canada contains the following:

1538. The judgment of dissolution by reason of non-payment of the price is pronounced at once, without any delay being granted by it for the payment of the price; nevertheless the buyer may pay the price with interest and costs of suit at any time before the rendering of the judgment.

1543. In the sale of movable things the right of dissolution by reason of non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer; without prejudice to the seller's right of revendication as provided in the title Of Privileges and Hypothecs. [Added by 48 Vict. c. 20, § 1 (1885), as amended by 54 Vict. c. 39, § 1 (1891): In cases of insolvency, such right can only be exercised during the thirty days next after the delivery].

A comparison of the English and French versions of the articles just quoted shows that the word "dissolution" is a translation of the French word "résolution", the use of which would seem to indicate that a sale of goods is regarded as a sale defeasible at the seller's instance upon fulfilment of a resolutive condition or condition subsequent (namely, upon non-payment of the price), subject to the right of the buyer to pay the price, interest and costs prior to judgment of dissolution.\[13\] The word "resiliation" also occurs, instead of "dissolution", in some of the reported cases.

The next following cases are examples of situations arising out of a change of situs from a country by the local law of which an unpaid seller has a certain one of these rights to a country by the local law of which he has not that right, but as the contest in each case was between the law of the

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\[13\] It might therefore be argued that the right of dissolution is a proprietary right, but in Quebec there has been some difference of opinion on this point. See e. g., Hart v. Goldfine, In re Rosenzweig, Q. R. 31 K. B. 558, 70 D. L. R. 174, 2 Can. Bkptcy. Rep. 255 (1921). While the common law rules as to stoppage in transitu do not prevail in Quebec, the seller might bring an action for dissolution of the contract and revendication of the goods, and might obtain a conservatory attachment of the goods; or, if he alone were named in the shipping contract, or if he were able to deliver up the bill of lading (or both or all the counterparts, if more than one), he might give directions to the carrier. Acme Glove Works v. Canada Steamship Lines, Q. R. 36 K. B. 487, [1925] 4 D. L. R. 494 (1925).
new situs and the law of the old situs, which was also the proper law of the contract, the cases may not be decisive of the question whether the right should be classed as contractual or proprietary.

Thus, in the Quebec case of Rogers v. Mississippi and Dominion Steamship Co.,\textsuperscript{14} a Quebec firm ordered goods from the plaintiffs, an English firm, who shipped them by the defendant company's steamship from Liverpool to Quebec, consigning them to the buyers and forwarding the bill of lading to them. Before the goods were delivered by the defendant to the buyers, the latter became insolvent and the plaintiffs, by notice to the defendant, stopped the goods in transit. The curators of the buyers' insolvent estate claimed the goods by virtue of Article 6 of the Civil Code of Lower Canada which provides, \textit{inter alia}, that "the law of Lower Canada is applied whenever the question involved relates to the distinction or nature of the property, to privileges and rights of lien [\textit{privileges et droits de gage}, in the French version], contestations as to possession;" and contended that any right of dissolution which the plaintiffs might have had under the law of Quebec was taken away by the concluding words of Article 1543, added by 48 Vict. c. 20, s. 1: "In cases of insolvency, such right can only be exercised during the fifteen days next after the delivery." It was held, however, that "delivery" meant delivery by the carriers to the buyers (and this delivery had not taken place), and that in any case the right of stoppage \textit{in transitu} was not a lien (\textit{droit de gage}) within the meaning of Article 6, so as to be governed by Quebec law, but was a right governed by the law of England—apparently because it was the proper law of the contract—and that the plaintiffs were entitled to succeed.

Again, in Rhode Island Locomotive Works v. South Eastern Railway Co.,\textsuperscript{15} a sale and delivery of two locomotives had been made in Rhode Island and the seller took an attachment in revendication in Quebec, where the locomotives then were, claiming resiliation of the sale for non-payment of the price. It was held that under Article 8 of the Civil Code of Lower Canada the contract was governed by the law of the place where it was made, Rhode Island, in the absence of circumstances showing that any other law was intended to apply, and since the law of Rhode Island did not give the seller any right of resiliation or any such remedy as that of attachment in revendication, the proceedings were dismissed. It was also held that Article 6 did not apply so as to create, on movables brought into the province, a privilege or recourse which did not attach to them before their removal.

\textsuperscript{14} 14 Quebec L. R. 99 (Super. Ct. 1888).
\textsuperscript{15} 21 Lower Can. Jurist 86 (1886): followed in \textit{Re Hollinger, Ex parte Appenzeller Wettstein & Co.}, 8 Can. Bkpty. Rep. 174 (1927), a case in which a seller under a contract of sale made in Switzerland, having no right of resiliation by the law of Switzerland, was held in Quebec to have no right of resiliation against the buyer, domiciled in Quebec, to whom the goods had been delivered.
Again, in the Ontario case of *Re Hudson Fashion Shoppe* \(^{16}\) Quebec sellers were held entitled to exercise against an Ontario buyer a right of resiliation conferred by the law of Quebec and unknown to Ontario law. An order was taken in Ontario for certain goods, deliverable f. o. b. Montreal, the order being subject to the approval of the sellers at Montreal, a card being subsequently sent by the sellers to the buyer acknowledging receipt of the order and saying, "Same will have our prompt attention." It was held that whether the card was or was not a notification of the necessary approval by the sellers at Montreal so as to amount to an acceptance there, the delivery of the goods f. o. b. Montreal completed the contract, and that the contract was a Quebec contract. It followed that on the buyer's failure to pay and bankruptcy the sellers were entitled to rescind, although the goods had been delivered to the buyer and therefore, if Ontario law had been the governing law, the unpaid sellers' last chance of preventing the goods from going into the mass of the bankrupt's stock for the benefit of all the creditors would have been lost upon the termination of the transit. If we were to vary the facts of the case by supposing that the contract provided for delivery and payment in Ontario, the proper law of the contract would probably be Ontario law, and, if the right of resiliation is a contractual and not a proprietary right, the sellers would have had no remedy except to claim as ordinary creditors of the bankrupt estate. The fact that the *lex situs* of the goods at the time of the making of the contract was Quebec law would have been of no assistance to them. On the other hand, if the right of resiliation is a proprietary right, so that the buyer gets, not the property in the goods in an absolute sense, but only a modified kind of property—as the court in *Re Hudson Fashion Shoppe* seemed to think—the governing law would be the *lex situs* of the goods at the time of the contract of sale, without regard to the proper law of the contract—inconsistently with the court's decision that the proper law of the contract determined whether the sellers had a right of resiliation, but consistently with the actual result of the case, because Quebec law was both the *lex situs* and the proper law of the contract.

It is perhaps of interest to note the fact that the Ontario legislature subsequently passed a statute requiring a seller who has a right of revedication for nonpayment of the price under a contract of sale made outside

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\(^{16}\) 58 Ont. L. R. 130, [1926] 1 D. L. R. 199, 7 Can. Bkptcy. Rep. 68 (1925). In the recent case of Commercial Corporation Securities v. Nichols, [1933] 1 W. W. R. 484 (C. A. Sask.), a conditional sale of a motor car was made in Saskatchewan and the car was delivered there. On default by the buyer, the car was seized and sold in Alberta, in accordance with Saskatchewan law, but not in accordance with Alberta law. The seller then brought an action in Saskatchewan against the buyer for the deficiency. It was held that the seller was entitled to succeed, the proper law of the contract being Saskatchewan law. The situs of the car at the time of the contract of conditional sale was also Saskatchewan, but there was no suggestion in the judgments that the *lex situs* as such might be applicable. Any such suggestion would have opened up the question whether the right of action in Saskatchewan was dependent on the validity of the resale in Alberta in accordance with the *lex situs* at the time of the resale, regardless of the question whether the contract of conditional sale was governed by the law of Saskatchewan as the *lex situs* or as the proper law of the contract.
of Ontario to file the contract or a caution relating thereto in the same manner and within the same time after the goods are brought into Ontario as a conditional sale agreement is required to be registered.\textsuperscript{17} The result is of course to overrule the case of \textit{Re Hudson Fashion Shoppe} in its particular application in the province of Ontario, without, however, affecting in other respects the application of the general principle of conflict of laws which the case has been used to illustrate. Piecemeal legislation of this kind, avoiding the local application of a general rule of conflict of laws in a special kind of case, is hardly to be commended. The effect of the general rule was of course to give a Quebec seller in certain circumstances a privilege which would be unavailable to an Ontario seller in like circumstances, and the true remedy might be to amend the local law of Ontario as to an unpaid seller's rights and to adopt what even some common lawyers have considered the more just provisions of the civil law.\textsuperscript{18}

\textbf{(c) Substantial Validity}

The validity of a conveyance of a chattel alleged to be void between the parties for illegality of the transfer or illegality of the consideration or other reasons, or alleged to be voidable between the parties for fraud or other cause, is determined by the law of the state where the chattel is situated at the time of conveyance.\textsuperscript{19} Similarly, the question whether a contract is void or voidable between the parties is determined by the proper law of the contract.\textsuperscript{20} If a transaction contains both contractual and property elements, theoretically the proper law and the \textit{lex situs} would respectively be applicable, but usually the property effect of the transaction would be more important than its contractual effect, and in any event the proper law of the contract would have to yield so as to allow full operation to the property effect in accordance with the \textit{lex situs}.


\textsuperscript{18}Cf. Inglis v. Usherwood, 1 East 515, 524 (K. B. 1801) (Lord Kenyon, C. J., quoted in \textit{Re Hudson Fashion Shoppe}). In Inglis v. Usherwood itself, the unpaid seller's right to retake possession of the goods was held to be governed by Russian law, but it is not clear whether that law was applied because it was the \textit{lex situs} of the goods when they were shipped or because it was the proper law of the contract of sale. \textit{Cf. Westlake, op. cit. supra note 8, at § 150 (notes).}

\textsuperscript{19}Comment (a) on \textit{Conflict of Laws Restatement} § 277. \textit{Quere} whether, for the present purpose, any useful distinction can be drawn between a conveyance voidable for fraud or other cause and a sale dissoluble under Quebec law by reason of the non-payment of the price. See \textit{supra} note 13.

\textsuperscript{20}Cf. \textit{Conflict of Laws Restatement} § 376B; (1904) 64 L. R. A. 827.
If a transaction is alleged to be void or voidable because entered into in fraud of creditors, practically it is only the property effect which is of importance; and even as to the contractual effect of the transaction it would appear difficult to apply a proper law ascertained by considerations personal to the parties to the transaction when the ground of alleged invalidity is the protection of the interest of third parties. At least as to the property effect of the transaction, the question is one of the validity in substance of the conveyance of a chattel and is governed by the *lex situs* of the chattel at the time of conveyance.\(^{21}\)

(d) **Pledge and Lien**

Westlake says:\(^{22}\) "Questions as to the transfer or acquisition of property in corporeal movables, or of any less extensive reight in them, as pledge or lien, are generally to be decided by the *lex situs*.”

As regards pledge, the matter is comparatively simple from the point of view of conflict of laws. A bailment of a chattel by way of security is known to most systems of law, and, as delivery of possession is an essential part of the transaction, not only must the pledge necessarily be made in the country of the situs of the chattel, but the question of the recognition of its validity in another country is free from the difficulty which sometimes arises in the case of a chattel mortgage,\(^{23}\) namely, that the law of the other country may refuse to recognize the validity of a mortgage unaccompanied by delivery of possession. A pledge, at least in English law, gives the pledgee some kind of proprietary right, sometimes called a special property, in the chattel, and the case falls clearly within the general conveyancing rule and is governed by the *lex situs*.\(^{24}\) But it has been said that the question whether a pledgee may redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge, those parties having a common domicile in a country different from the situs of the goods, is determined by the law of the domicile, as governing the transaction between them or as affecting title to goods admittedly belonging to one or other of them.\(^{25}\)

The case of a lien, mentioned in Westlake's Section 150, is not quite so simple. If what is meant is some kind of charge upon a chattel not depending on possession, the case is within the general conveyancing rule and

\(^{21}\) See *Conflict of Laws Restatement* § 277; see also the illustrations following comment
(a) on § 286; (1908) 11 L. R. A. 1007.
\(^{22}\) *Op. cit. supra* note 8, at § 150.
\(^{23}\) See case (A2), infra p. 833.
\(^{25}\) *North Western Bank v. Poynter*, [1895] A. C. 56; *Westlake, op. cit. supra* note 8 (notes). As was pointed out in *Inglis v. Robertson*, supra note 24, the goods in the Poynter case were part of a ship's cargo and their situs, which was said to be different from the country of domicile, was their situs only in the sense that it was the port of destination of the ship.
is governed by the *lex situs*, but if the lien is valid by that law without delivery of possession and if possession is not in fact given, the recognition of the validity of the lien in another country might encounter the difficulty already indicated in connection with a chattel mortgage. If what is meant is a possessory lien, that is, a right to retain possession of another person’s chattel, not necessarily or usually involving any property right on the part of the lienholder, such a right could hardly be asserted anywhere except in the country of the situs and could not be successfully asserted in defiance of the *lex situs*, but it is not clear that the *lex situs*, as such, should be the governing law. In the case of the lien of the repairer or improver of a chattel, the proper law of the contract between the parties would usually if not necessarily be the same as the *lex situs* of the chattel. In the case of an unpaid seller’s lien under a contract of sale, however, the proper law of the contract might be different from the *lex situs* of the chattel, and it may be that the right to the lien ought to be regarded as a contractual right, governed by the proper law of the contract, not a property right, governed by the *lex situs*. The Conflict of Laws Restatement, however, provides simply (Sec. 299) that the “validity of a lien on a chattel is determined by the law of the state where the chattel is situated at the time when the lien is created.”

(e) Some Continental Views

The broad distinction between the contractual and the property effects of a transaction is stated clearly by Niboyet, the intrinsic validity and effect of the transaction being governed by the law appropriate to obligations as regards any *jus ad rem*, and by the *lex situs* as regards any *jus in re*.

The distinction is well stated, and its consequences are discussed with an admirable combination of conciseness and detail by Gutzwiller. As he says, the *lex situs* governs all questions of real rights (*alle sachenrechtlichen Fragen*), but it governs only questions of real rights, and it does not govern the contractual effects (*die obligationenrechtlichen Wirkungen*) which result from the transaction either in the place of real effects or in addition to its real effects.

A difficulty may arise, however, as between two countries which have widely different systems of local law. When we pass beyond the case of the property *simpliciter* in a chattel, something which is recognized gener-

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28 A good example of the application of the *lex situs* to a repairer’s lien is Willys-Overland Co. v. Evans, 104 Kan. 562, 180 Pac. 235 (1919), cited by Beale, *Progress of the Law, 1918-19* (1919) 33 Harv. L. Rev. 1, at 15, 16.
27 Cf. (1904) 64 L. R. A. 831-832.
ally in different systems of law, we may find it difficult to apply to particular or special real rights in a chattel the rule that such rights are governed by the *lex situs* and that if valid according to that law they are entitled to be recognized elsewhere. In order that a real right in a chattel created under the law of X may be effectually recognized in Y, it is necessary that there be some category of the law of Y in which the real right created under the law of X may be placed. Even though the category of the law of Y need not be identical with that of the law of X, there must be some measure of analogy between the two categories in order that the real right may be recognized in Y without doing undue violence to the legal system of Y. If the divergence between the legal systems of X and Y is so great as to preclude the recognition in Y of the right created in X, we have an example of a rule of public policy (*ordre public*) of Y which interferes with the application of the general rule.80

V. CONDITIONAL SALES AND CHATTEL MORTGAGES

I. General Principles

To a certain extent conditional sale agreements and chattel mortgages may be discussed together because they produce similar situations for the present purpose. If A, the owner of a chattel, makes with B a conditional sale agreement whereby the title to the chattel is reserved to A until payment in full by B, but under which possession is given to B; or if B, the owner of a chattel, conveys it to A by way of mortgage, B retaining possession; in either case, A is the true owner of the chattel, or at least has some property in the chattel, and B is the possessor and the ostensible owner.31 In either case, both in Canada and the United States, the prevailing tendency of legislation is to require some filing or recording of a document evidencing the title of A, who is not in possession, in order that that title shall not only be good against B, but also be unimpeachable at the suit of innocent third parties who deal with B on the faith of his ostensible title.

If the chattel is situated in X, and the conditional sale agreement or the chattel mortgage is made there, and the chattel is subsequently removed

80 Lewald, *supra* note 5, at 373, § 281, and in *Das Deutsche Internationale Privatrecht*, 184, § 248; cf. Niboyet, op. cit. *supra* note 7, §§ 512, 513, at 639. The point has already been mentioned in § iv, 2, *supra*; as to chattel mortgages, see also case (A2), infra p. 833.

31 It has been suggested that a conditional sale is in effect a completed sale with a mortgage back to secure the payment of the purchase price. WILLISTON, SALES OF GOODS (2nd ed. 1924) §§ 304, 330, 337. But the two transactions are not always treated in the same manner. Note (1928) 41 Harv. L. Rev. 779, n. 1. From the point of view of English law, or Anglo-American law generally, the two transactions produce essentially equivalent situations as regard the conflict of interest between A and a subsequent buyer, pledgee or mortgagee from B, but for the purposes of conflict of laws it is important to note that some systems of law will more readily recognize the validity of a reservation of title without retention of possession than the validity of a chattel mortgage without delivery of possession. See case (A2), *infra* p. 833. See also (1933) 81 U. of Pa. L. Rev. 628.
to $Y$ at least two questions of conflict of laws arise,\(^2\) namely, (1) whether $A$'s title will be recognized in $Y$, in the absence of a subsequent dealing there with the chattel between $B$ and a third party, $C$; and (2) whether, if the chattel is, in $Y$, sold, pledged or mortgaged by $B$ to $C$, who takes without notice of $A$'s title, $A$'s title will be there recognized as against $C$.

In order to present for consideration as many situations as possible arising from the similarity or variance, as the case may be, of the laws of $X$ and $Y$ respectively, and to classify as far as possible the problems resulting from the removal of a chattel from $X$ to $Y$, it is proposed to state (A) the case of $A$'s title being good by the law of $X$, not only as against $B$, but also as against third parties, (B) the case of $A$'s title being by the law of $X$ good as against $B$, but impeachable by third parties, and (C) the case of $A$'s title being either void ab initio by the law of $X$ or actually avoided under that law; and in connection with each of these cases to consider various alternative hypothetical provisions of the law of $Y$.

No attempt will be made here to make a new review or classification of the multitude of reported cases in the United States or even of the comparatively small number of Canadian cases. All that will be attempted is to state various situations and to suggest the principles of law which ought to be applied to the conflict of interests arising from each situation, without any implication that every suggested solution could be supported by the citation of a reported case or is in accordance with the current of authority.

2. Particular Situations

(A) Reservation of Title or Chattel Mortgage Valid by Original Lex Situs

We suppose, in the first place, either that $A$, the owner of a chattel situated in $X$, makes there a conditional sale agreement with $B$, reserving the title to $A$ until payment in full, and giving possession to $B$ there, or that $B$, the owner of a chattel situate in $X$, conveys it there to $A$ by way of mortgage, $B$ retaining possession; and we suppose that by the law of $X$, $A$'s title, reserved in the one case and conveyed in the other, is valid not only as against $B$, but also as against third parties, either because no filing is required by the law of $X$ or because the filing requirements of the law of $X$ have been complied with.

If we further suppose that the chattel is removed by $B$ to $Y$, and that $B$ there purports to sell, pledge or mortgage it to $C$, who takes for value, in

\(^2\) See, generally, Williston, op. cit. supra note 3\(^1\), § 339, at 799 ff. (conditional sales); Goodrich, Conflict of Laws (1927) 353 ff. (conditional sales and chattel mortgages); Marley, Conflict of Laws as to Sale of Live Stock in one State Held under Chattel Mortgage in Another (1902) 54 Cent. L. J. 443; Note (1928) 41 Harvard L. Rev. 779; Comment (1928) 37 Yale L. J. 966; see Notes (1904) 64 L. R. A. 833; (1912) 35 L. R. A. (n. s.) 385; L. R. A. 1917D 942; (1923) 25 A. L. R. 153; (1904) 64 L. R. A. 353; (1912) 35 L. R. A. (n. s.) 385; (1928) 57 A. L. R. 702. As to a change of situs of the chattel without the consent of the owner, see Part One, published last month, at 675 ff. and infra p. 839 et seq.
good faith and without notice of A's title or B's want of title, the nature of
the problems that may arise may be made clearer by a statement of possible
alternative provisions of the law of Y.

On the principles already discussed, applicable to the conveyance of
a chattel, and apart from any statute of the situs of the chattel which fur-
nishes a rule of conflict of laws, as distinguished from a rule of local law,
it would seem (1) that the nature and validity of A's title under the con-
ditional sale agreement or chattel mortgage must be governed solely by
the local law of X, even after the removal of the chattel to Y, and (2) that
the validity and effect of a conveyance, pledge or mortgage by B to C must
be governed solely by the local law of Y.

By way of parenthesis it should be noted that it is impossible to state
the cases in which creditors are protected within the classification of cases
in which subsequent purchasers, pledgees or mortgagees are protected. Cred-
itors of B (even attaching creditors, that is, creditors who by legal process
obtain a lien or charge on B's chattels) are not in the position of purchas-
ers for value without notice from him, and as a rule stand in no better
position than B with regard to a chattel in B's possession, but owned by
A, unless the law of the situs confers on them some real right in the chattel,
valid against A. In other words, creditors are not entitled to claim a
chattel by virtue of a rule of the lex situs relating to dispositions by a per-
son who is in possession of a chattel without title, but by virtue of a special
rule, usually statutory, of the lex situs relating to the protection of cred-
itors.

We must now consider various alternative provisions of the law of Y.

(A i). The law of Y may by statute require, as to a conditional sale
agreement made in X, or a chattel mortgage made in X, that, in order that the
transaction shall be valid in Y as against third parties, a document evidenc-
ing the transaction be filed in Y within a specified period after the condi-
tional seller or the mortgagee has notice of the removal of the chattel to Y; or
the law of Y may even require registration within a specified period after
the removal of the chattel to Y, regardless of the knowledge of the condi-
tional seller or mortgagee.

In this case, which for convenience of reference we may call Case (A i),
that is, if there is a statute in force in Y of the kind just indicated, the stat-
ute furnishes a rule of conflict of laws applicable to the situation in question,
as distinguished from the local law of Y relating to conditional sale agree-

33 See supra p. 831.
36 As to conditional sale agreements, the supposed law of Y is the law in any state
which has adopted the American Uniform Conditional Sales Act, or in any province which
has adopted the Canadian Uniform Conditional Sales Act.
CONTRACT AND CONVEYANCE IN CONFLICT OF LAWS

ments and chattel mortgages, or the local law of Y relating to dispositions by persons in possession of chattels but without title to them, and cadit quaestio. The general principles which would otherwise have applied to the situation must yield to the statute, the courts of Y being of course bound by the statute of Y.37

Rightly or wrongly, the statute of Y settles the matter so far as a court of Y is concerned, and if the chattel is still situated in Y when any question of property rights in the chattel arises in a court of X or in a court of Z, practical necessity compels the acceptance in X or Z of the result which has been or would be reached in the court of Y.38 If, however, the chattel is no longer situated in Y, it does not follow that the statutory rule of conflict of laws of Y should be applied in X or Z. On the contrary, on principle, the court of X or Z should apply its own rule of conflict of laws, which would normally involve the application of the local law of Y, and the non-application of the rules of conflict of laws of Y, as to dealings in Y with the chattel while it was situate in Y. In the United States and Canada, as between states (or provinces) in which a uniform conditional statute is enacted containing a provision for filing of a conditional sale agreement in the state (or province) to which a chattel is removed, the tendency may be to adopt the provision as a rule of conflict of laws even in the state (or province) from which the chattel is removed.39

(A 2). The law of Y may refuse to recognize the validity of a reservation of title under a conditional sale agreement without retention of possession, or the validity of a chattel mortgage without delivery of possession.

In this case, which we may call Case (A 2), that is, if there is a rule of local public policy of Y which prevents the recognition of A's title, even though acquired or retained in X, this rule prevents the normal application of principles of conflict of laws relating to the acquisition or retention of title. But whereas in Case (A 1) the statute which furnishes a rule of conflict of laws is binding in Y regardless of principle, the propriety of the rule of local public policy in Case (A 2) is open to discussion, and if found to be in contravention of principle should be rejected by any court which is not bound by previous decisions. The mere fact that the local law of Y does not, as to transactions in Y, recognize the validity of a chattel mortgage or a reservation of title unaccompanied by possession is of course not a sufficient reason why the validity of a title acquired or retained in X should not

37 For examples of the application of a statutory provision of this kind, see WILLISTON, op. cit. supra note 31, at 802; (1923) 25 A. L. R. 1157 ff. (conditional sales); (1928) 57 A. L. R. 722 ff. (chattel mortgages). In the absence of an express statutory provision, the majority rule in the United States is that filing is not required in the state to which the chattel is removed: cf. (1928) 57 A. L. R. 711 ff.

38 See Part One, published last month, at 681 ff.

39 It is not intended to be suggested by this statement of a possible tendency that comity or reciprocity is a justifiable basis for the application of a foreign law.
be recognized in Y. If the law of Y regards the local rule as a rule of public policy, a court of Y is bound by the rule, but a court of X or Z may disregard it, unless the fact of the actual situation of the chattel in Y compels the court of X or Z to accept the result of a decision of a court of Y.

Examples of a rule of public policy of the kind stated in Case A(2) may be found in the laws of France, Germany, and, possibly, Quebec and some of the states of the United States.40

(A 3). The local law of Y may require filing of a conditional sale agreement if possession is given to the buyer, or of a chattel mortgage if possession is retained by the mortgagor, in order that the transaction may be valid as against third parties.41

In this case, which we may call Case (A 3), the statutory provisions of the kind just stated are strictly part of the local law of Y; and (it being assumed that the statute does not by its terms apply to a conditional sale agreement or a chattel mortgage made in X, so as to bring the case within Case (A 1)), such provisions have no bearing on the question of conflict of laws now under discussion. Prima facie such provisions relate only to conditional sale agreements or chattel mortgages made in Y, and this limitation of the operation of the statute is usually a necessary consequence of the requirements as to filing in the particular district in which the chattel is conditionally sold or mortgaged.

The case is a common one, and generally speaking the result is clear, namely, that A's title, validly acquired or retained under the law of X, is recognized in Y, and there being no provision of the law of Y that prevents his asserting that title in Y, a subsequent sale, pledge or mortgage by B to C is invalid.42

40 As to France, see Pillet, Traité Pratique de Droit International Privé (Paris 1923) 736-737; NiBeyet, op. cit. supra note 7, § 513, pp. 639-640 (gage). As to Germany see Lewald, supra note 5, at 373, § 281, and in Das Deutsche Internationale Privatrecht § 246, pp. 184-185.

In Quebec, as in the other provinces of Canada, the validity of a pledge depends on possession of the creditor or a third party (CIVIL CODE OF LOWER CANADA, art. 1970), but the law of Quebec, differing from that of the other provinces, provides (id. art. 2022) that "moveables are not susceptible of hypothecation, except as provided in the titles Of Merchant Shipping and Of Bottomry and Respondentia." A gage or chattel mortgage unaccompanied by possession is invalid (Payenneville v. Prévost, Q. R. 25 K. B. 246 (Que. 1916)); Desjardins v. Methot, 17 Quebec P. R. 454 (1916)), and it would appear probable that this rule of Quebec law is so strongly held that a Quebec court would refuse to recognize the validity of such a mortgage made elsewhere upon a chattel subsequently removed to Quebec. On the other hand, Quebec law recognizes the validity of a reservation of title without retention of possession. Bernier v. Durand, Q. R. 25 K. B. 461, 32 D. L. R. 768 (1916).

As to Pennsylvania and, formerly, Louisiana, see the special note to § 287 of the CONFLICT OF LAWS RESTATEMENT. See also Turnbull v. Cole, 71 Colo. 364, 201 Pac. 887 (1921), and annotation in (1923) 25 A. L. R. 1140, at 1157. The general rule in the United States appears to be that a title validly reserved in X will be recognized in Y notwithstanding that the local law of Y as to conditional sales is different from that of X. Cf. Goodrich, op. cit. supra note 32, at 354: Williston, op. cit. supra note 31, at 800.

41 If Y is a province of Canada or a state of the United States, its law would usually so provide.

42 See, e. g., Goodrich, op. cit. supra note 32, at 354, 357; (1928) 57 A. L. R. 711 ff.
A good example is the Canadian case of *Bonin v. Robertson*. A resident of Minnesota, owner of a span of horses situated there, mortgaged them to a bank there in the form and under the conditions required by the law of Minnesota to constitute a valid mortgage as against subsequent purchasers from the mortgagor. The mortgagor (whether with or without the mortgagee's consent does not appear) took the horses to South Edmonton, then in the North West Territories of Canada, and sold them to the plaintiff, a purchaser for value, in good faith and without notice. The horses having been afterwards seized by the defendant, a bailiff acting for the mortgagee, the plaintiff brought action in the Territorial Court. The action was dismissed, notwithstanding that the mortgage had not been filed in the registration district at Edmonton, as would have been required in the case of a chattel mortgage made there upon chattels situated there, but as was not provided for in the case of a mortgage made elsewhere on a chattel situated elsewhere. Admittedly the mortgagee had a good title to the horses when they were taken to the North West Territories and neither at common law nor by virtue of any ordinance of the Territories, could the mortgagor, a person in possession with the owner's consent, but without title or with merely a limited title or right to redeem, give a good title even to an innocent purchaser.

(A 4). The local law of *Y* may recognize the validity of the reservation of title by a conditional seller without either retention of possession or filing, or the validity of the conveyance to a mortgagee without either giving of possession or filing.

As we have seen, the statutory provisions of the law of *Y* stated in Case (A 3) have no bearing on the question of conflict of laws under discussion, and *a fortiori* the condition of the law of *Y* stated in the present case, which we may call Case (A 4), has no bearing on that question, though that condition of the law may make the courts of *Y* more inclined than they would otherwise be to uphold *A*'s title.

For example, while a mortgage of a chattel without delivery of possession is unknown to the law of Quebec, that law allows a valid reservation of title to be made without retention of possession and without filing, and therefore would have no difficulty in recognizing a reservation of title validly made under a foreign law. Thus, where the title was validly reserved in Ontario, and the buyer took the chattel to Quebec and there sold it to an innocent third party, the original seller was held entitled to revindicate the chattel in Quebec without reimbursing the second buyer.

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43. 2 Terr. L. R. 21 (1893). followed in a Saskatchewan conditional sale case, Sawyer v. Boyce, 1 Sask. L. R. 230, 8 Western L. R. 834 (1908).
44. See references under case (A 2) in the present section, supra note 40.
45. Williams v. Nadon, Q. R. 32 Sup. Ct. 259 (Que. 1907): a conditional sale of a piano bearing the name of the seller-manufacturer, and therefore not requiring filing under the Ontario statute.
(A 5). The local law of Y may recognize the validity of a sale, pledge or mortgage by a person who is in possession of a chattel without title to it, in the particular circumstances.

The branch of the law of Y just stated, in what we may call Case (A 5), is of course the branch of the law of Y with which we are chiefly concerned, and it is normally the only branch of the law of Y which has any bearing on the question of conflict of laws under discussion. In other words, unless the law of Y contains, as in Case (A 1), provisions for the filing in Y of a conditional sale agreement or mortgage made in X, or, as in Case (A 2), a rule of local public policy which prevents the recognition of A's title, retained or acquired under the law of X, we are concerned only with the law of X, and not at all with the law of Y, relating to conditional sale agreements or chattel mortgages, up to the moment when B purports to sell, pledge or mortgage the chattel in Y, and then we are concerned only with the law of Y, and not at all with the law of X, relating to dispositions by a person in possession by the consent of the owner but without title.

When it is said that the validity of the transaction in Y depends solely on the law of Y, this means the law of Y as applied to the disposition made in Y by a person who has obtained possession by virtue of the transaction in X. In other words, the facts of the transaction in X may be an essential part of the case which has to be decided by the law of Y, because it may be material, in order to decide whether the disposition by B to C is valid by the law of Y, to know in what circumstances B has obtained possession.

The circumstances in which the law of Y will recognize the validity of a disposition by a possessor who is not the owner will of course differ according as Y happens to be a country, such as England, where a thief can give a good title by sale in market overt, and a person who has sold goods and who remains in possession, or a person who has bought or agreed to buy goods and who obtains possession with the consent of the seller, can give a good title by sale, pledge or other disposition to an innocent third party, or happens to be some other country the law of which is less generous to the innocent third party, or, in other words, protects purchase rather than title.

It follows that in essentially the same situation the result of the sale, pledge or mortgage made to C in Y by B, who admittedly has no title by

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46 _Cf_. _Sale of Goods Act_, 1893, 56 & 57 Vict. c. 71, § 22, subject to the revesting of the title if the thief is prosecuted to conviction (§ 24).
47 _Factors Act_, 1889, 52 & 53 Vict. c. 45, §§ 8, 9; _Sale of Goods Act_, supra note 46, § 25. The statement in the text is of course not intended to be a complete statement of the cases in which by English law a person in possession of a chattel with the owner's consent can give a good title to a third party without the owner's consent.
48 The law of Ontario, like that of most if not all of the other provinces of Canada, is slightly less generous, because the law of market overt is inapplicable.
49 See Part One, published last month, especially notes 66-69.
the law which governs the property effect of the transaction between \( A \) and \( B \) (the law of \( X \)), will vary according to the degree of protection given to innocent third parties by the law which governs the property effects of the transaction between \( B \) and \( C \) (the law of \( Y \)). The difference of result is, of course, inevitable so long as different countries have different local systems of laws; and it is not remediable by any system of conflict of laws, and does not affect the generality of the application of the rules of conflict of laws already stated. There is, for example, no inconsistency from the point of view of conflict of laws in saying that in Case (A 3) the effect of the local law of \( Y \) as to filing conditional sales agreements or chattel mortgages has usually no bearing on the validity of \( A \)'s title retained under a conditional sale agreement or acquired under a chattel mortgage made in \( X \), even if the chattel is removed to \( Y \), and in saying that in Case (A 5) the local law of \( Y \) as to the validity of dispositions made by persons in possession without title is usually decisive of the validity of \( A \)'s title as against \( C \), who takes under a sale, pledge or mortgage made by \( B \) in \( Y \). As Williston says,\(^{50}\) the circumstances of the case which may estop \( A \) from asserting his title as against \( C \) exist in \( Y \), and the question whether they are sufficient to estop \( A \) must be decided by the law of \( Y \).\(^{51}\)

(B) Reservation of Title or Chattel Mortgage Voidable by Original Lex Situs

(C) Reservation of Title or Chattel Mortgage Void by the Original Lex Situs\(^{52}\)

As under heading (A), we again suppose either that \( A \), the owner of a chattel situated in \( X \), makes there a conditional sale agreement with \( B \), reserving the title to \( A \) until payment in full, and giving possession to \( B \) there, or that \( B \), the owner of a chattel situate in \( X \), conveys it there to \( A \) by way of mortgage, \( B \) retaining possession; but, differing from the cases considered under heading (A), we now suppose that by the law of \( X \), either (B) \( A \)'s title is valid as against \( B \) but, by reason of the failure to file the agreement or mortgage or otherwise, is impeachable by third parties in certain circumstances; or (C) \( A \)'s title is strictly void, that is, as against anyone \( A \) has ineffectually attempted to reserve a title or to obtain a title by way of mortgage.


\(^{51}\) The learned author seems to state the cases which have been decided in favor of the innocent purchaser as inconsistent with those which have been decided in favor of the conditional seller, but it is not clear whether the difference of result is due to the application of different rules of conflict of laws or merely to the application of different local rules of law.

\(^{52}\) For reasons which will be apparent from the discussion which follows, headings (B) and (C) are here placed together without any intervening comment and are not followed, as heading (A) is, by a statement of alternative provisions of the law of the new situs. See (1925) 25 A. L. R. 1168 ff. for a collection of cases in which by the law of the original situs the conditional seller did not effectively reserve the title as against third parties; cf. Goodrich, op. cit. supra note 32, at 355, n. 83.
We further suppose, as under heading (A), that the chattel is removed by B to Y and that B there purports to sell, pledge or mortgage it to C, who takes for value, in good faith and without notice of A's title or B's want of title.

Subject to certain limitations to be mentioned presently, the cases coming under heading (B) would appear to resemble the cases coming under heading (A) rather than those coming under heading (C). That is to say, if under a conditional sale by A to B or a chattel mortgage from B to A, A has a title good *inter partes* and existing, though voidable, as against third parties, it would seem to follow that A's title should be recognized in Y, and that the consideration of the validity of any subsequent transaction between B and C in Y should begin with the lack of title of B. Broadly speaking therefore the conclusions reached in cases (A i), (A 2), etc., should be applicable to the parallel cases (B i), (B 2), etc.

The generality of the foregoing statement must, however, be somewhat modified when we consider exactly what is meant by A's title being voidable by the law of X. If the law of X makes A's title impeachable only by subsequent purchasers, etc., in X, and his title has not in fact been impeached in X, then it is right to say that the result of the subsequent transaction in Y between B and C will be governed by the law of Y as applied to a case which has as its starting point the validity of A's title by the law of X. If, on the other hand, the law of X makes A's title impeachable by subsequent purchasers, etc., anywhere, whether in X or elsewhere, then it may happen that the subsequent transaction in Y is within the protection of the law of X, that is, that even by the law of X the subsequent transaction gives a good title to C as against A. In this event, if the question of the title arises in Y, the case would be free from the difficulty of B's lack of title, and the effect of the transaction between B and C would be governed by the ordinary local law of Y, as applied to a case which has as its starting point the validity of B's title. The case would in fact be essentially similar to the cases coming under heading (C), that is, cases in which A's title is void by the law of X.

Again, if a chattel is delivered by A to B in X under a conditional agreement for the purpose of resale in the ordinary course of B's business, and the law of X recognizes B's power to give a good title to C, who deals with B in the ordinary course of B's business, notwithstanding the reservation of title as between A and B, and whether the agreement is filed or not, the case is only nominally one in which A has a voidable title by the law of X. In effect, so far as resale in the ordinary course of B's business is concerned, B has an effective title, or at least an effective power to transfer the title, and, except in the unlikely contingency that the law of X limits its protection to persons who buy from B in X, the case would in substance resemble the cases coming under heading (C), and not those coming under
heading (B). In the event of a subsequent transaction between B and C in Y no difficulty arises by reason of B's lack of title.

Again, if A's title, originally voidable by the law of X, has been declared void prior to the transaction between B and C in Y, the case would come under heading (C) rather than heading (B). Clearly so, as regards A's title; but if A's title has been declared void at the instance of B's creditors or a buyer, pledgee or mortgagee from B, there would probably be little interest in the chattel left which might be the subject of any subsequent transaction in Y between B and C.

In addition to the cases just mentioned of a title originally voidable by the law of X, but in effect void as regards a subsequent transaction in Y, we may imagine cases of title originally void by the law of X, that is, cases strictly coming under heading (C).

If the law of X refuses to recognize, even inter partes, the validity of a reservation of title under a conditional sale agreement without retention of possession, or the validity of a chattel mortgage without delivery of possession, we have the converse of Case (A 2), already discussed, in which we supposed the law of Y to be as just stated, as applied to a case of a chattel removed to Y by B, and there made the subject of a transaction between B and C notwithstanding that A had previously validly reserved or obtained a title in X. If it is the law of X which refuses to recognize the validity of A's title, the case is comparatively simple. B, having the title by the law of X, may remove it to Y and there deal with it in accordance with the local law of Y.

So, if the law of X makes absolutely void a conditional sale agreement unless there is either retention of possession of the chattel by the seller or filing of the agreement, or a chattel mortgage unless there is either delivery of possession of the chattel or filing of the mortgage, and the provisions of the law are not complied with, we have another comparatively simple case, in which B may remove the chattel to Y and there deal with it in accordance with the local law of Y.

3. Conflict of Laws Restatement

The Conflict of Laws Restatement (Proposed Final Draft No. 2), relating to conditional sales and chattel mortgages, presents certain features which seem to be difficult to reconcile with the classification of situations above outlined and with some of the conclusions reached with regard to them. This is so quite apart from the fact that the Restatement, having already adopted the view that some modification of the general rule that the lex situs governs the conveyance of a chattel should be admitted in cases in

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63 Conditional sale and chattel mortgage statutes sometimes use the word "void", but they are usually construed as making transactions merely voidable.
which the chattel has been removed without the consent of its owner,\textsuperscript{54} necessarily recognizes that similar modifications should be admitted in the conditional sale and chattel mortgage situations. But, as already pointed out, whereas the compilers of the Restatement have considered that the general conveyancing rule is sufficiently modified by a special limitation as to jurisdiction, they have in the case of conditional sale and chattel mortgages dealt with a similar kind of question in the text of the property sections themselves. The matter of the consent or want of consent of the owner to the removal of a chattel is indeed so interwoven with the other elements of the Restatement solution of conditional sale and chattel mortgage problems that they cannot be entirely separated in the present discussion.

In the following analysis of the Restatement provisions, the parallel sections relating to chattel mortgages and conditional sales of chattels respectively are grouped together for the purpose of comparison. The provisions fall into four groups.

(1) Provisions which restate, as applied to the particular cases of mortgages and conditional sales, the general conveyancing rule that the governing law is the \textit{lex situs} of the chattel at the time of the transaction in question.\textsuperscript{55}

286. The validity and effect of a mortgage of a chattel is determined by the law of the state where the chattel is situated at the time when the mortgage is executed.

292. Whether a sale of a chattel under which possession is delivered to the vendee and the title is to vest in the vendee at a subsequent time upon the payment of a part or all of the price, or upon the performance of any other condition or the happening of any contingency, is effective to retain title in the vendor depends upon the law of the state where the chattel is situated at the time of the sale.

(2) Provisions as to the recognition in \textit{Y}, to which the chattel has been removed, of \textit{A}'s title validly acquired in \textit{X} under a chattel mortgage from \textit{B} or retained in \textit{X} under a conditional sale to \textit{B}.

287. If a chattel is validly mortgaged in accordance with the law of the state where it is situated at the time of the execution of the mortgage and is thereafter taken into another state, the mortgagee's interest in the chattel is recognized in the second state.

293. If by the law of the state where a chattel is situated at the time of a conditional sale the title remains in the vendor, his title will be recognized in another state into which the chattel is subsequently taken although by the law of the latter state a vendor under a conditional sale does not retain title.

\textsuperscript{54} See Part One, published last month, at 675 ff.

\textsuperscript{55} See Part One, published last month, at 673 ff.
Presumably the words "although by the law of the second state a mortgagee of a chattel acquires no interest in the chattel" might be added to Section 287, by analogy to the concluding words of Section 293, without any change in the meaning of Section 287.

(3) Provisions as to the recognition in Y of the invalidity of A's title attempted to be acquired under a chattel mortgage or to be retained under a conditional sale in X.

287A. If an attempt is made to mortgage a chattel, but the mortgage is invalid when executed, or thereafter becomes invalid, by the law of the state where the chattel is situated, the mortgage acquires no validity by removal of the chattel to another state.

294. If by the law of the state where a chattel is situated at the time of a conditional sale the title does not remain in the vendor, it will be recognized in another state into which the chattel has been removed that the vendor has no title, although by the law of the latter state the vendor under a conditional sale retains title.

Presumably the words "although by the law of the latter state a mortgagee of a chattel acquires an interest in the chattel" might be added to Section 287A, by analogy to the concluding words of Section 294, without any change in the meaning of Section 287A.

The two groups of sections numbered (2) and (3) just quoted are in accordance with the classification of situations already suggested, but only on the assumption that a title acquired under a mortgage in Section 287, and a title retained under a conditional sale in Section 293, includes a title valid inter partes and voidable at the instance of third parties, but not yet actually avoided, and that the invalidity of the title of the mortgagee or of the conditional seller in Sections 287A and 294 means that the title is void ab initio or has been actually avoided. In passing it may be noted that Section 287A expressly provides for the case of subsequent avoidance, while Section 294 does not do so.

On the assumption just made Sections 287A and 294 do not require to be (and are not in fact) supplemented by any further provisions relating to the effect on the title of A (chattel mortgagee or conditional seller) of subsequent dealings between B (mortgagor or buyer) and C after the removal of the chattel to Y. B, having the title by the law of X, can give a good title to C in Y in accordance with the law of Y relating to the conveyance of chattels by an owner in possession. On the other hand, Sections 287 and 293 require to be supplemented by further provisions, and are in fact so supplemented, namely, Section 287 by Sections 289, 290 and 291, and Section 293 by Sections 295, 296 and 297.

\(^{62}\) See supra pp. 831-839.
If, however, we look at some of the comments and illustrations appended to the sections, some doubt seems to be cast on the accuracy of the assumption made above. The illustration given of Section 287 is that of a mortgage duly recorded in X of a chattel subsequently removed to Y. Now, if it is borne in mind that usually under Anglo-American law a chattel mortgage is valid inter partes and that the chief object of a statutory requirement as to filing is to protect third parties who deal in good faith and without notice with a mortgagor who is in possession and is therefore the ostensible owner, the illustration seems to suggest that what is meant by a "valid" mortgage is a mortgage which is not only good inter partes but also good against third parties. Consequently an "invalid" mortgage under Section 287A would include not only a mortgage invalid ab initio even inter partes or a mortgage subsequently declared invalid, but also a mortgage good inter partes, but, by reason of the failure to file it, voidable (though not yet avoided, at the instance of third parties. Again, the first illustration under Section 288 refers to a chattel mortgage duly recorded in X. This illustration seems to suggest that "validly" mortgaged in Section 288 means mortgaged in compliance with the law of X so as to be good even against third parties, so that an invalid mortgage in Section 287A would include a mortgage good inter partes, but, by reason of failure to file it, voidable as against third parties. Again, the illustration of Section 292 refers to a conditional sale agreement recorded in X, but not in Y. This illustration seems to suggest that what is meant by a title being effectively retained by the conditional seller is that the retention of title is good not only inter partes but also against third parties, and if the same meaning is given to the title which in Section 293 "remains" in the seller, then the negative expressions "does not retain title" and "does not remain" which occur in Sections 293 and 294 would include not only a reservation of title which is void ab initio or subsequently declared void, but also a reservation of title which is valid inter partes but voidable (though not yet avoided) at the instance of third parties.

We must, presumably, disregard the suggested implications of the illustrations, because if Sections 287A and 294 were applicable to cases in which A has a voidable title, not yet avoided, under a chattel mortgage from B or under a conditional sale to B, in X, we should be obliged to say that no provision is made by the Restatement for the case in which the chattel to which A has a voidable title is removed to Y and there disposed of by B to C. There would be an important lacuna in the Restatement; B's power to give a good title in Y would be left unprovided for, and there would be no provision making any distinction between removal with the consent of

57 As under the former Louisiana law and the present Pennsylvania law mentioned in the special note to § 287—there supposed to be the law of Y, but which might be supposed to be the law of X—or under a law like that of France or Quebec, which refuses to recognize the validity of a gage or chattel mortgage unaccompanied by possession. See supra note 40, case (A2).
A and removal without the consent of A, such as is made in Sections 288-291 and 295-298—all *ex hypothesi* inapplicable, because they would all be predicated on the validity of A's title.

It is respectfully submitted that the text of the relevant sections of the *Restatement* might be improved if it were made clear exactly what is meant by a valid mortgage as distinguished from an invalid mortgage, and what is meant by the title being retained by the conditional seller as distinguished from the title not being retained, and/or that the comments and illustrations should be revised strictly in accordance with the distinctions made in the text of the sections.

The provisions of the *Restatement* which require further mention in the present discussion are as follows:

(4) Provisions as to the effect, on a title validly acquired by A in X under a chattel mortgage from B or validly retained by A in X under a conditional sale to B, of a subsequent transaction between B and C in Y, to which the chattel has been removed.

288. If a chattel is validly mortgaged in accordance with the law of the state where it is situated at the time of the execution of the mortgage and is then taken into another state without the consent of the mortgagee, the interest of the mortgagee is not thereby divested, nor is it divested as a result of any dealings with the chattel in the second state until the mortgagee has had a reasonable opportunity to remove the chattel from the second state or until the period of adverse possession in the first state has elapsed.

Section 295, which is the corresponding provision relating to a conditional sale, supposes that a seller under a conditional sale retains title in accordance with the law of the state where the chattel is situated at the time of the sale and the chattel is then taken into another state without the consent of the vendor, and the section provides exactly the same solution as that provided by Section 288.

The two sections are to be read subject to the observations already made as to the meaning of a valid mortgage or an effective retention of title. They are of course especially notable because of their modification of the general rule that the *lex situs* governs the conveyance of a chattel.\(^5\) As already noted, this modification is not expressed in terms of jurisdiction in the chattel mortgage and conditional sale sections of the *Restatement*. The first comment which follows Section 288 contains, however, a reference to Section 52 and a summary statement of the limitations stated in Section 52 upon the jurisdiction of a state to divest the interest of the owner of a chattel. Then follows, in effect, a statement that even in the cases in which under

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\(^5\) This modification has been already discussed in Part One, published last month, at 675 ff.
Section 52 the state into which a chattel is brought without the mortgagee's consent has jurisdiction to divest the mortgagee's interest, it does not exercise that jurisdiction at common law. A cross-reference under Section 295 makes the foregoing comment applicable also to Section 295. The net result seems to be that in the chattel mortgage and conditional sale cases the want of consent of the mortgagee or conditional seller to the removal of the chattel to another state is in itself a sufficient reason for not allowing his title to be divested by a dealing with the chattel in that state, while in all other cases it is only in certain circumstances defined by Section 52 that the want of consent of the owner to the removal of the chattel to another state prevents a dealing in that state from divesting his title. On what principle this distinction is made does not appear.

The Restatement provides by a series of sections for the case of the removal of a chattel from $X$ to $Y$ with the consent of $A$. The sections relating to chattel mortgages may be usefully compared with those relating to conditional sales.

289. If a chattel is validly mortgaged in accordance with the law of the state where it is situated at the time of the execution of the mortgage, and is then taken into another state with the consent of the mortgagee, the interest of the mortgagee is not thereby divested, but any dealing with the chattel in the second state may create new interests in the chattel in accordance with the law of the second state.

Similar provision is made by Section 296 in the case of retention of title under a conditional sale.

Subject to the observations already made as to what is meant by a valid mortgage or a valid retention of title, and as to the limitation created by the words "with the consent of" the mortgagee or conditional seller, Sections 289 and 296 would seem to state succinctly the principle that I have already attempted to state,69 namely, that when a chattel has been mortgaged or conditionally sold in $X$, and is then removed to $Y$, and there dealt with, we are ordinarily concerned only with the law of $X$ relating to chattel mortgages or conditional sales up to the time of the subsequent dealing in $Y$, and then only with the law of $Y$ relating to the kind of dealing which takes place in $Y$.

Section 289 is followed by this comment: "The state into which the chattel is removed has jurisdiction to create new interests in the chattel. Instances of the exercise of such jurisdiction are found in Sections 290 and 291." A similar comment following Section 296 refers to Sections 297 and 298.

When we turn to the next following sections, in which we should expect to find merely examples, so to speak, of the operation of the general rule

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69 See case (A5), supra p. 836.
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stated in Sections 289 and 296, we encounter some curious differences of wording. The clearest and a usual example of a dealing in the new situs which may create new interests in the chattel is a sale there by the mortgagor or conditional buyer, in possession, but _ex hypothesi_ without title, to a third party. In the case of a conditional sale it is provided by Section 298, strictly in accordance with Section 296, that "whether the interest of the vendor is divested by a sale to a purchaser for value in the second state is governed by the law of the latter state." On the other hand, in the case of a chattel mortgage, it is provided by Section 291 that "the interest of the mortgagee is not divested by a sale to a purchaser for value and without notice unless a statute of the second state so provides,"—a provision which does not correspond with Section 298 relating to an analogous situation and is not an application of the principle of Section 289, as we were led to expect by the comment which follows Section 289, already quoted. It would appear from the comment in question that it was intended that Section 291 should provide in terms somewhat similar to Section 298 that the effect of a sale in the new situs of the chattel should be governed by the law of that situs, but obviously Section 291 does not do this. And it would appear from the comments following Section 291 that the attention of the draftsman of that section was directed to another phase of the subject, and that in providing for that phase he has omitted to provide for, and indeed negated, the application of the general principle expressed in Section 289. The comments last mentioned all relate to the recording statute of the second state as applied to a chattel mortgage made in the state from which the chattel has been brought. According to the particular terms of a recording statute, it may or may not apply to a chattel mortgaged elsewhere and subsequently brought into the state. If it does so apply, and the mortgage is not filed within the state in accordance with the statute, _cadit quaestio_ so far as that state is concerned; the statute has furnished a rule of conflict of laws which the courts of the state must obey, whatever might have otherwise been their views as to the effect of a sale within the state of a chattel validly mortgaged elsewhere before it was brought into the state. If, however, there is no statute of the second state providing for filing in the case of a chattel mortgaged elsewhere and subsequently brought into the state by the mortgagor and there sold to a purchaser without notice, the effect of the sale ought on principle to be governed by the then _lex situs_ relating to dispositions by persons in possession without title. If by the _lex situs_ the effect of the sale is to divest the mortgagee's interest, the interest of the mortgagee is divested by the sale notwithstanding that there is no statute so providing; but Section 291 contradicts all this by saying that the interest of the mortgagee is not divested "unless a statute of the second state so provides."

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60 As to recording statutes of the kind now in question, see case (A1), _supra_ p. 832.
As to both Sections 291 and 298, it is rather curious that the sections provide for the case of a sale made by the mortgagor or conditional buyer, as the case may be, but do not provide for the case of a pledge or mortgage by him, notwithstanding that it appears from the reported cases that a person in possession of a chattel without the title to it is just as likely to use his ostensible ownership for the purpose of raising money on the chattel as for the purpose of selling the chattel outright. In the case of conditional sales it does not matter much whether we say that the case of a pledge or mortgage falls under Section 296 or under Section 298, because both sections state the same principle, but in the case of a chattel mortgage Sections 289 and 291 are, as we have seen, different in their effect. Presumably, as neither a pledge nor a mortgage is a sale, a pledge or mortgage by the mortgagor would be governed by Section 289 and not by Section 291, although on principle there seems to be no reason why a pledge or mortgage by the mortgagor should be governed by a different rule from that which governs a sale by him. It is true that Section 300 says that a pledge of a chattel is determined by the law of the state where the chattel is situated at the time when it is pledged, but presumably this provision has no bearing on the validity of a pledge by a mortgagor or conditional buyer who is in possession of a chattel, or, in other words, it is not intended that a pledge by a mortgagor or conditional buyer shall be governed solely by the lex situs without regard to the distinction made in earlier sections between cases in which the mortgagee or conditional seller has consented, and those in which he has not consented, to the removal of the chattel to another state. In any event Section 300 would not cover the case of a mortgage by the mortgagor or conditional buyer.

Two sections of the Restatement remain to be noted in the group of provisions now under discussion: 61

290. If a chattel is validly mortgaged in accordance with the law of the state where it is situated at the time of the execution of the mortgage, and is then taken into another state with the consent of the mortgagee, the interest of the mortgagee is not divested by an attachment of execution levied by a creditor of the mortgagor in the second state unless a statute of the second state so provides.

In the corresponding conditional sale situation it is provided by Section 297 that:

. . . the interest of the vendor is not affected by an attachment or a levy on execution by a creditor of the vendee unless by the law of the latter state a creditor of a conditional vendee can reach the thing, although the vendee had no title.

61 As to the position of creditors, see supra notes 34 and 35.