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CONFLICTS OF LAW AND PROPERTY

Ian F. G. Baxter*

Introduction

The sale of a chattel may contain relations: (i) between the seller A and the buyer B; (ii) between B and creditors of A, or A and creditors of B; (iii) between B and previous owners.[1] Property rights and obligations may arise through contract and other events, e.g. change of possession or formalities for completion of title. Property law contains the interweaving of legal categories: (a) the contractual relationship between A and B, which (apart from situations such as *jus quaesitum tertio*) involves only these parties; (b) property questions which may or may not depend upon the contract and which may involve third parties.

The ownership of land or a chattel is characterised by the right to enjoy the *res* by possession; other kinds of property may be associated with an "indispensable instrument",[2] of which a bearer

* Professor, Osgoode Hall Law School.

[1] *Cf.* Vinding Kruse (1958) 7 Amer. J. of Comp. L., at p. 500.

[2] See *American Restatement, Security*, s. 1; Paton, *Bailment in the Common Law* (1952), at p. 354. *Cf.* in regard to "titolo di credito", Cavaglieri, *II Diritto Internazionale Commerciale* (1936), at p. 338; "Esse si riconnettono al possesso di un documento che anzichè, com'è di consueto, avere una funzione meramente probatoria et non avere nessuna connessione necessaria col rapporto guiridico, di cui attesto semplicemente l'esistenza, assume funzione costitutiva nel senso che la sua presenza è condizione necessaria per l'esistenza del rapporto stesso. Documento e dirito sono compenetrati; il diritto, per cosi dire, si materializza nel titolo. Chi ha il documenta, et solo chi a il documento, ha il dirritto." See also Pellizzi, studi sui titoli di credito (1960) p. 19 *et seq.* "El título de crédito es un documento que lleva incorporado un derecho, en tal forma, que el derecho va intimamente unido al título y su ejercicio está condicionado por la exhibicíon del documento; sin exhibir el título, no se puede ejercitar el derecho en él incorporado.": Cervantes Ahumada, *Títulos y Operaciones de Credito*, (3rd ed. 1961) at p. 18.

bond or bearer bill of exchange are examples. Other forms of incorporeal property are more loosely associated with physical instruments, or not at all as in the case of a loan of money by oral agreement. Association with a physical thing may be for different reasons — the sale of a car as compared with the transfer of a bearer bond. In the first, possession of the document is an incident in the enjoyment of the property, and may or may not be required for the transfer of title; in the second, delivery is the mode of transfering title. Most legal systems require that property be transferred by some ostensible process, usually involving delivery of the *res* itself, or something which can be associated with it. But in neither case will the physical thing be the essence of the legal concept of property. It has been said that the "object of the law of property is to provide a secure foundation so far as the law can do it, for the acquisition, enjoyment and disposal of wealth." [3] Property of all types should be considered as value.[4] The internal law of a country, for practical reasons, may take into account differences in the physical forms and associations of property, for example, as regards the machinery for transfer of title or the creation of a security. Private international law should be careful not to over-emphasize these differences and should remember the essentially common purpose of property. The Quebec Civil Code states that ownership is the right of enjoying and disposing of things in the most absolute manner, provided that it is lawful, and the French Civil Code defines property as the rights of enjoyment and alienation.[5] According to Maine,[6] the "Roman distinction between the Law of Persons and the Law of Things — though extremely convenient is entirely artificial." The 'materials' of the law are concepts and relations — rights, duties and the like, these being different in content and in scope, some applying vis-à-vis all other

[3] Lawson, *Introduction to the Law of Property,* (1958), at p. 2.

[4] *Cf.* De Castro, *Direito Internacional Privado* (1956), Vol. 2 at p. 143, "*Bens* nao sao as coisas, mas os valores que se podem obter das coisas: bens sao realidades jurídicas. Assim como as pessoas nao existem na realidade material, como sêres vivos, assim as bens sao realidades conceitua is, criacoes do espírito, que se vem superpor a situaçoes realmente existentes."

[5] Art. 406 (Quebec) and Art. 544 (France). The Spanish Civil Code is: "La propriedad es el derecho de gozar y disponer de una cosa, sin más limitaciones que las establecidas en las leyes," Art. 348. Mexican Civil Code, art. 830. Art. 58 of the Soviet Civil Code is comparable: see Gsovski, Soviet Civil Law (1949), Vol. 2, at pp. 69-70. Communist theory regards property as a source of power and command, associating it with public law: Renner, *The Institutions of Private Law and their Social Functions* (Kahn-Freund) (1949) at p. 105 *et seq.*

[6] Ancient Law (1861) at p. 214.

persons, some only to a limited class or to an individual.[7] It has been argued that private international law should emphasize facts, because the conflict problem is to ascertain from them the applicable set of concepts and relations.[8]

The comparative law of property shows variety in principles, concepts and terminology. Concepts may exist in one system and not at all in another. The Common Law mortgage of goods involves a transfer of title in security without necessarily a delivery of possession to the creditor. The law of another jurisdiction may require possession by the creditor for the creation of a security.[9] Public registration or notice of a right may be needed to preserve it against certain parties. There are also variations in terminology. Term X may exist in jurisdiction J_1 but have no equivalent in J_2, or there may be degrees of equivalence. J_2 may have to determine its attitude to a right in J_1.[10] These problems arise mainly in regard to subsequent purchasers and creditors. Terms such as "title", "property", "ownership", "possession" have a more or less universal connotation, but even these can be ambiguous.[11] Quebec law and French law link possession and title.[12] Exchange of possession of a chattel or a document may produce a transfer of title by the law of J_1. Lack of uniformity between legal systems, whether as to modes of acquisition and transfer of rights or as to terminology, is less marked in commercial law than in some other branches. This is due to the historical influence of the law merchant,[13] and the demands of international trade. There have been some attempts at international agreement affecting commercial property.

[7] *Cf.* Falconbridge, *Conflict of Laws* (2nd ed., 1954), at pp. 603-4. *Cf.* Batiffol, *Traité Elémentaire* (3rd ed., 1959), at s. 527; "Une systématisation satisfaisante du droit privé n'oppose pas les 'biens' aux 'personnes' mais *l'objet* des droits au *sujet* des droits."

[8] E. G. Rabel, *The Conflict of Laws* (1945), Vol. 1, at p. 46.

[9] E.g. Scottish law, *Stair's Institutes*, I, 13, 14; see also the French Civil Code, art. 2076; Code de Commerce, art. 92. In s. 92 of the Soviet Civil Code, the transfer of movables to the creditor is contemplated under zalog ("mortgage"), subject to certain exceptions involving identification or earmarking of the security property.

[10] See Rigaux, *La Théorie des qualifications* (1956) at pp. 270-271.

[11] Hume, *A Treatise of Human Nature*, Book 3, Part 2, Sec. 3. Possession is defined in Art. 2192 of the Quebec Civil Code.

[12] Art. 2268, Quebec Civil Code; art. 2279 French Civil Code. The American Uniform Commercial Code (1958), Art. 2, Part 4, sec. 2-401 relates (in general) the passing of title to delivery of the goods or an appropriate instrument.

[13] Some think that a new *ius commune commercium* may develop, at least among the countries of the European Communities: Bärmann (1920) 12 Revue Internationale de Droit Comparé, at p. 50 *et seq.*

Fundamentals of Property

Perhaps the archaic form of property was community ownership.[14] The institution of private property involves the creation of protected interests. "Les hommes donnent à leur vie comme but essentiel la conquête de la richesse et ils s'autorisent de l'incertitude de la morale pour ne pas se préoccuper de la légitimité de la conquête. L'esprit capitaliste marque profondément la société moderne. L'acquisition des biens est pour beaucoup de gens le but exclusif de l'activité." [15] It is necessary to avoid mere repetition of political and legal dogma, for it has happened in this subject, that "writing has been so full of ideological cant (whether capitalist, socialist, or communist in bent) that we do not accurately see whither the law is tending." [16] From the policy point of view, it is a different question if a court of X is asked to consider the claim of A to land in X (as a local law problem), or if the same court has to deal with the recognition of a similar claim in Y, a claim which might or might not be valid by the law of Y. If X has no concept of private ownership of land within its own boundaries, it may yet feel that it can recognize a right of private property in Y, arising by that system. Because X does not have the concept, in its internal system or interprets it differently, it does not follow that it should refuse to recognize its operation with respect to other systems. The policy questions are different.

Examples of Property Situations

Consider some situations regarding property conflict of laws. These tend to group themselves around (a) ownership; (b) possession; (c) rights exceeding those of an ordinary creditor, such as security or "privilège". The original acquisition of ownership is not often of concern in private international law. The typical ingredients for transfer of title are (i) the effect of a sales contract; (ii) delivery of the property or of a document; (iii) the carrying out of prescribed formalities, e.g. registration, endorsement. Policy is concerned that the transfer will not deceive those who may later attempt to deal. The law of X may have to consider, in relation to a sale in Y of goods there, whether it is important that the ingredients which

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[14] Maine, *op. cit.*, at p. 214 says that group ownership is the "really archaic institution". See his discussion at p. 221 of co-ownership in Russian villages, and *Recopilacion de Leyes de los Reynos de las Indias* (1943), Vol. 2, Book 6, Title 4 (Consejo de la Hispanidad) as to South American Indians. See Jolowicz, *Historical Introduction to the Study of Roman Law* (2nd. ed., 1954) at p. 140; and Plato, *Laws*, Book 5, 737 C *et seq.*

[15] Ripert, *Les Forces Créatrices du Droit* (1955), at p. 192.

[16] Paton, *Text Book of Jurisprudence* (2nd ed., 1951), at p. 441.

would have been required by the law of X for such a transfer were not present in all detail, or whether, for example, it should be enough that the law of Y was observed and that it involved publicity to obviate the risk that a prospective subsequent dealer with the property would be misled. On the one hand, the law of X may, in its rules of private international law, limit itself to concepts and modes of transfer of title which are substantially the same as those of its internal law. This does not necessarily mean applying the *lex fori* as such, but it does imply an attitude on the part of X of not wishing to go beyond its (internal) legal ideas. But X may be receptive to the language and ideas of other jurisdictions in appropriate circumstances, for example, by deciding that if events (e_1, e_2 — e_n) happen to a *res* in Y the title is transferred from A to B, although (e_1, e_2 — e_n) would not have had the effect by the internal law of X if the *res* had been located there. Again the internal law of X may require registratioon for effective transfer of title, but X may recognize as valid a transfer in Y, where there is not such registration. For convenience, these two attitudes will be referred to as "exclusive" and "receptive" policies. It has been said that the "primitive idea that jurisdiction implies the applicable law, or in other words that a court can apply only the rules prescribed by its hierarchic superior, universally prevailed in ancient times, until about 1200 the genial equitable conception was introduced that the more convenient and useful law should furnish the rule of decision conformably to the nature of the case... In formal theory, the notion that a local court is confined to its domestic legislation for international as well as domestic purposes reverts in this respect to the *status quo ante* 1200." [17] On this view, the private international law of X should be generally receptive to legal events and solutions elsewhere. It might be argued that X is one of an "ordre de systèmes"; and should have regard to this in its private international law.[18]

Possession enters into property law as a mode of enjoyment and as a factor in relationships such as transfer of title or the creation

[17] Yntema (1957), 35 Can. Bar Rev. at pp. 721-2.

[18] *Cf.* Anzilotti, *Scritti de Diritto Internazionale Privato* (1960), Vol. 3, at p. 227, "Cosicchè, le regole di diritto internazionale privato, che troviamo sancite dalle leggi dei singoli stati, non hanno, in sè considerate, nè una ragion d'essere nè un valore intrinseco eguale alle regole di diritto interno; perchè, mentre queste trovano nell' organo da cui derivano la ragione necessaria e sufficiente dell' esser loro, quelle sono semplicemente una parte di un ordine giuridico più vasto, e non si possono intendere ed ammettere se non in relazione a questo ed al suo processo storico di, formazione," *Cf.* Batiffol, *Aspects Philosophiques du Droit International Privé* (1956), sec. 7 *et seq.*

of a security. Conflict of laws is mainly concerned with the second. The difficulties in defining possession are much the same everywhere.[19] We are more concerned with title or security than with pure questions of possession.

Security Rights

Some security rights are founded on title and some on possession, some on contract, some arise by force of law, some give priority over all unsecured creditors, some only over certain creditors, some affect the title of subsequent purchasers, and so on. There are transactions which are not securities in form, but are commonly used for financing.[20] There are two types of problem: (i) the claims and priorities of creditors, (ii) A buys property on which B has already a security interest. Most countries give A some protection, if he gave value and was in good faith, but the kind of protection may vary.[21] The distinction between the two situations may be more in form than in substance. A claim for priority in a particular asset may be made by D as a security holder or as purchaser in good faith, there being a practical difference where the asset is greater in value than the secured debt. The important question is the priority standing of a given security — holder or subsequent purchaser, against other claims. In the security situation, the court may have to ascertain priorities as between different interests; some of these interests may have been created outside the jurisdiction and have no counterpart in the law of the forum. The questions which arise may be described as "single interest problems" and "multi-interest problems", and policy considerations may not be the same for the two types.

[19] Consider for example, the completion by delivery of a transaction on a bill of exchange, when the bill is lost after posting. See Falconbridge, *Banking and Bills of Exchange* (6th ed., 1956), ch. 41, as to the Canadian and English position. In the Common Law systems, the concept of possession relates to physical things: *Brown on Personal Property* (2nd ed., 1955), at p. 19 *et seq.*, Paton, *op. cit.*, at p. 9, see footnote 2. But in some Civil Law systems, the meaning appears to be wider, including "...la jouissance... d'un droit..."; French Civil Code, art. 2228; *Cf.* the Spanish Civil Code, art. 430. See, however, the Swiss Civil Code, art. 919. *Cf.* Plato, *Theaetetus*, 197B as to possession of things and qualities.

[20] The conditional sale, in North America, for example, is in the form of a sale with reservation of title until payment of the price — analogous to the hire-purchase in Britain. See Brown, *op. cit.*, at p. 246 *et seq.*, footnote 19.

[21] *Cf.* French Civil Code, art. 121; Morandière, Rodière and Houin, *Droit Commercial* (1959), Vol. 2, at p. 43, and the anglo-saxon conception of purchaser for value in good faith and without notice; Falconbridge, *op. cit.*, at p. 622 *et seq.*, se footnote 7.

Contract and Property

An inherent difficulty in this branch of private international law is the over-lap between the law of contract and the law of property.[22] Contract helps to create many property rights. It may be difficult, if not impossible, to separate the contractual and property aspects. Since all contracts do not involve property issues and vice versa, the tradition has been for the private international law of the two areas to develop separately. In contracts, the proper law is frequently used and in the case of property the law of the *situs*. The characterization ("qualification") of such problems can be intrinsically difficult. There is an over-lap of a similar kind in the validity of marriage, since the status arises from exchange of promises, and here the answer has been to set up special rules.[23] Some matters affecting sale transactions are associated with the agreement as well as with the property — e.g. recission, implied terms, conditions and warranties, passing of risk.[24] Cheshire has stressed the contractual aspects, applying the *lex actus* to a variety of situations.[25] Others have distinguished between contract and property; for instance, an agreement to transfer title as compared with the transfer itself.[26] In certain situations, the title of the transferee may be determined by the contract.[27] It may not be an adequate solution to say that the rules of contract shall apply when the problem is mainly concerned with the contractual aspects — for these aspects may be too interwoven. The transfer of certain abstract property may be, in substance, only an agreement, or a declaration by a transferor, — there being no physical property or indispensable instrument.[28] Even here, there are questions more connected with property than contract, e.g. priorities, execution.[29] The traditional theory is to have to determine

[22] *Cf. French Civil Code*, arts. 1101 and 544. It has been suggested that French writers, because of the nature of French internal law, do not always distinguish the contract-property duality. Zaphiriou, *Transfer of Chattels in Private International Law* (1956), chap. 5.

[23] See Baxter, (1961) 39 Can. Bar Rev., at p. 311 *et seq.*

[24] Zaphiriou, *op cit.*, chaps. 9 and 10 pp. 94-96 and 141, considers that these should be governed by the proper law of the sale agreement, but not so the rights of an unpaid seller. See *Re Hudson Fashion Shoppe* [1926] 1 D.L.R. 199 at p. 203 per Riddell J. A. to the effect that the "*lex loci contractus* governs as to goods sold in one country and taken into another so far as the ownership of property and its results are concerned."

[25] *Private International Law* (5th ed., 1957), at p. 438 *et seq.*, 446.

[26] Rabel, *op. cit.*, at p. 34, see footnote 8.

[27] *Cf.* French Civil Code, art. 1138

[28] For example, an equitable assigument for a debt or a declaration of trust in the anglo-saxon systems.

[29] Dicey, *Conflict of Laws* (7th ed., 1958), at p. 557, and Rules 90-92.

with which category the issue is most closely connected. In a matter of any complexity (because there are many of border-line cases) this process is unsure.

It may be argued that there should be rules for different issues and different kinds of contracts.[30] On this basis there could be special rules for sales contracts or for all contracts related to property. The difficulty would be that a large group of contracts would be exceptions to the general rule. A connecting factor in the "property rules" (for example, the *situs* of the goods) might be an element in the determination of the proper law.

In the English case of *Kahler* v. *Midland Bank*[31] "contract rules" were applied rather than "property rules". In 1938, the plaintiff made a bailment of bearer securities with the Zivnostenka Bank in Prague, for safe custody. England was the *situs* of the securties. In 1939 the Czechoslovakian bank wrote to the defendants in London asking them to accept custody of the securities and not mentioning the title of the plaintiff. The plaintiff, to facilitate his departure from Czechoslovakia at the beginning of the war, signed documents depositing the securities in the control of the Bohemian Bank (which succeeded to the rights of the Zivnostenka Bank). To the plaintiff's claim for delivery, the defendants replied that they held the securities for the Bohemian Bank and that by the currency legislation of Czechoslovakia it would be illegal for that bank to release them to the plaintiff since he was a "currency foreigner". This defence succeeded in the House of Lords, because "the proper law [of the contract between the plaintiff and the Zivnostenka Bank] is the law of Czechoslovakia" and "the court of this country [England] will not compel the performance of a contract if by its proper law performance is illegal. And it follows that it must be admitted as a good defence in an action of detinue that the bailor, whose bailee is sued, is entitled to deny possession to the plaintiff because it is illegal to give him possession."[32] The basic issue was whether under the contract "the appellant had against the Bohemian Bank an immediate right of possession, or whether his right of possession was governed by the Czech currency restriction laws..."[33] The title of the plain-

[30] *Cf. Ehrenzweig* (1959) 59 Col. L. Rev. at pp. 773, 1171. Where the parties have not made an explicit choice, different presumptions may affect the determination of the proper law. See Baxter (1957) 35 Can. Bar Rev. at p. 698.

[31] [1950] A.C. 24; Mann, *The Legal Aspect of Money* (2nd ed., 1953), at p. 374 *et seq.*, Nussbaum, *Money in the Law* (1950), at pp. 467 and 542; Zaphiriou, *op. cit.*, chap. 8, footnote 23.

[32] At p. 27 *per* Lord Simonds. There was found to be no contract between Kahler and the Midland Bank.

[33] At p. 35 *per* Lord Normand.

tiff was not challenged, only his right to recover possession from a sub-bailee.[34] The result was that, because of restrictive legislation in Czech law (the proper law of the original bailment) an English court refused to allow the owner of property in England to regain possession of it from an English sub-bailee holding it for safe custody. If the issue had been regarded as concerned with "property" rather than with "contract", the applicable law would, no doubt, have been English law as the law of the *situs*, and the Czech legislation being no part of that law, would not have barred an immediate right to possession. The House of Lords held that the Bohemian Bank could not lawfully deliver, *ergo* neither could its bailee, the Midland Bank. It is true, of course, that where a chattel has been bailed for safe-keeping, re-delivery to the bailor will represent performance of the agreement. But bailment is an operation on property.[35] There may be no consideration; and if so, there is no contract in the Common Law systems. The transaction has an irresolvable duality.[36] How can a selection be made? in *Kahler* it was done by neglecting the property aspects.

The loan of a book on an understanding that it will be returned before a certain date, involves property and contract. The lender can enforce the agreement and claim damages for non-fulfilment, or the borrower (founding on possession) can sue a third party for damage to the book.[37] The disposal of a case may depend on the classification of rights and obligations — this classification is an exercise in definition and grouping. Suppose the forum applies the proper law to contract questions and the *lex situs* to property questions. The proper law of the sale agreement is Soviet law and the goods are located in France. Is the accidental loss of the goods to be grouped with the rights and liabilities of the "contractual" set or the "property" set? The passing of risk may be agreed *inter partes* and is also related to the property. The goods are at someone's risk even when the sale agreement is invalid. The risk when determined by the agreement affects the rights of the property owner. It is a situation where simultaneous inferences can be made and logic does not prefer one inference to another.

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[34] Paton, *op. cit.*, at pp. 45-47, footnote 2.

[35] "Possession is essentially an interest in the law of property — indeed from a purely analytical point of view, bailment is more analogous to a lease than a contract, in the sense that a property interest less than ownership is transferred." Paton, *op. cit.*, at pp. 30-31, footnote 2.

[36] See p. 46 *per Lord Reid.*

[37] *The Winkfield,* [1902] p. 42.

Property and Choice of Law

Characterization as "contract" or "property" saves the rules from being ineffective. Historically, apart from use of the *lex fori*, one of the earliest ideas in the western systems, was to refer property matters to a personal law.[38] The principle has still some vigour at the present time.[39] The original meaning of "property" was something "proper" to a person.[40] In a property matter, the law of the place where the person came from might be applied.[41] By the exclusion of foreigners from the *ius civile*,[42] everyone was subject to a law with which he should have been familiar.[43]

Supplementary rules or a supplementary system have attractions where a cosmopolitan empire, a community of states or a federation of one sort or another is involved. In a dispute between A and B about title, let the rule of the forum X be that questions on title are decided by the personal law. The personal law of A is Y and B is Z. A supplementary rule might be (i) to prefer Y to Z or vice versa for some reason; (ii) to apply a different conflict rule where Y and Z differ; or (iii) to use a system of internal law to which both parties are subject only when X does not equal Y. Most of these methods involve the application of a law with which at least one of the parties has a connection. The choice of the *lex situs* may be artificial. Consider, for example, a sale of goods made in London between an English and Danish firm.[44] The goods are raw materials due to be processed in Denmark and sold in the United States. The sellers are

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[38] See, for example, Dicey, *op. cit.*, at p. 456 *et seq.*, footnote 29; Zaphiriou, *op. cit.*, chap. 4, footnote 23; Lalive, *The Transfer of Chattels in the Conflict of Laws* (1954), chap. 3; Story, *Conflict of Laws* (8th ed., 1883), chap. 9; Lando, (1957) 6 Am. J. of Comp. L. at p. 1; Espinola, *Do Direito Internacional Privado Brasileiro* (1943), Vol. 2 at s. 172; Cavaglieri, *op. cit.*, at p. 341, footnote 2; *The Commercial National Bank of Chicago* v. *Corcoran* (1884), 6 O.R. 527; Castel, *Private International Law* (1960) at p. 161; Cheshire, *op. cit.*, at p. 438, footnote 25; *Sill* v. *Worswick*, (1791) 1 H.B. 1, 690; Lorenzen, *Selected Articles on the Conflict of Laws* (1947) at pp. 144-5; Ehrenzweig, *Conflict of Laws* (1962), at p. 617 *et seq.*

[39] *Cf.* The Spanish Civil Code, art. 10; "Los bienes muebles están sujetos a la ley de la nación del proprietario."

[40] *Cf.* Muñoz, *Comentario al Código Civil de España* (1953), at p. 346. The Greeks used the same word for being and property: Jones, *The Law and Legal Theory of the Greeks* (1956), at p. 202.

[41] See Niederer, (1960) 49 Rev. Crit., at p. 147 *et seq.*; Yntema, (1953) 2 Amer. J. of Com. L. at p. 300 *et seq.*

[42] Buckland and McNair, *Roman Law and Common Law* (1952, ed. Laws on) at p. 25.

[43] *Cf.* Baxter, (1961) 39 Can. Bar Rev., at p. 347.

[44] *Cf. J. H. Rayner and Co.* v. *Hambro's Bank*, [1943] K.B. 37.

produce dealers who bought the consignment of goods in Hamburg from a German merchant whose agents in India had acquired them in connection with the insolvency of an Indian producer. The goods have been loaded on a Greek ship at an Indian harbour. An action is brought in an English court as to who has title.

Personal or Territorial Approach

The main objection to personal law as a general choice of law rule in property matters, is that in certain cases it must be supplemented to make it work and cannot solve the problem with one "bite of the cherry". If we pass from a "personal" rule to a "territorial" rule, a person's whole property may not be located in one jurisdiction. Choice of law which depends on the personal law of an individual is not enough in a dispute between people with different personal laws. If choice of law depends on location, this will lead to an "atomised" set of answers where a man's property is in various jurisdictions, or to uncertainty where goods are in transit. There are three means of escape from the dilemma: (i) to be wholly "personal" and to introduce supplementary rules or a supplementary system where necessary; (ii) to be "territorial" for transactions other than general transfers of property, for example, on death or bankruptcy and in these cases to be "personal"; (iii) to be neither "personal" nor "territorial" but to use some other basis. In modern times, the prevailing answer is the second — *uti singuli* being related to the *lex situs* and *uti universitas* to the personal law (nationality or domicile). Story favoured the view that movable property should be governed by the personal law of the owner. He contended that the *lex situs* would produce difficulties in regard to things in transit and also " — any sale or donation might be rendered inoperative from the ignorance of the parties of the law of the actual *situs* at the time of their acts." [45] He thought that the doctrine was created for reasons of utility, although he admitted that it had many exceptions.

Is *situs* easier to ascertain than personal law? In regard to immovables, location will be in no doubt — unless the land is across a jurisdictional boundary. The location of a tangible movable is normally clear, but a chattel in transit will be indefinite as to *situs*. It may be possible to associate the *situs* of an intangible with a tangible, e.g. a document. Otherwise the *situs* of an intangible will be an artificial extension of the meaning of the term. The personal

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[45] *Op. cit.*, at p. 537, footnote 38. The modern law in the United States favours the *lex situs* even reference capacity; see 15 Corp. Juris Sec., s. 16d.

law varies between jurisdictions, (a) some use nationality and some domicile: (b) these concepts have various interpretations, e.g. the English Common Law theory of domicile as compared with the continental European or United States' theories.[46] The weakness of the personal law, for *uti singuli*, is its lack of uniformity and its insufficiency.

There is substantial agreement in modern systems in favour of the *lex situs* as the principle choice of law rule in regard to *uti singuli.* This applies to Civil Law systems, including Latin America, and Common Law systems.[47] Similarly, the rule as to general transfers of property, for example, on death or bankruptcy is the *lex personalis.* The location of the *situs* is determined by the *lex fori.*[48] Article 6 of the Quebec Civil Code applies the laws of Lower Canada to immovables in the jurisdiction and the law of the domicile of the owner to movables, subject to certain qualifications in favour of the laws of Lower Canada. An argument for the *lex situs* is that it provides a focal point upon which to base choice of law. A property question may involve not only immediate parties but creditors and subsequent purchasers. It may be thought desirable, therefore, to relate the conflict rule to something more objective than the personal law of the purchaser.[49]

"Specialization" and Choice of Law

If *lex situs* is the general rule, does it apply to capacity? The Common Law approach seems to be to regard capacity as an aspect of validity, whereas the continental European countries treat it

[46] See discussion of this in (1961) 39 Can. Bar Rev. at p. 304, *et seq.*

[47] *In re Anziani,* [1930] 1 Ch. 407, 420; Dicey, *op. cit.,* at p. 495 *et seq.,* footnote 29; Falconbridge, *op. cit.,* chap. 9, footnote 7; Niboyet, *Traité de Droit International Privé Français,* Vol. 4 at s. 1191; Espinola, *op. cit.,* at s. 174 footnote 38, for a comparative survey; Arce, *Derecho Internacional Privado* (3rd ed., 1961), at p. 182; Savigny, *Private International Law* (Tr. Guthrie) (1880, 2nd ed.), at p. 174 *et seq.;* Rabel, *The Conflict of Laws* (1958), Vol. 4 at p. 30; Lalive, *op. cit,* at *p.* 90; Italian Civil Code, Art. 12; Greek Civil Code, Art. 27; Corpus Juris Sec. s. 18. *Cf.* the new Polish *Projet de loi sur le droit international privé* (1961), (1962) 51 Rev. Crit. at p. 189. As to the Russian position before and after the revolution, see Makarov, *Précis de Droit International Privé d'après la législation et la doctrine Russe* (1932), at pp. 271-277. Ehrensweig, *op. cit.,* footnote 38, at p. 607 *et seq.* As to the dilemma of determining whether Article 6 of the Quebec Cicil Code is to be interpreted literally or whether there is room for application of the *lex rei sitae* to moveables, see Johnson, *Conflict of Laws* (2nd. ed., 1962), chap. 14; Castel, *Private International Law* (1960), p. 161.

[48] Dicey, *op. cit.,* at p. 502, footnote 29.

[49] *Cammell* v. *Sewell,* (1860) 5 N. & H. 728; *Blenaim* v, *Debono,* [1924] A.C. 514.

mainly as an aspect of status governed by the *lex personalis*.[50] To refer capacity to the *lex personalis*, and other questions on validity to the *lex situs*, would seem to increase the complexity of the choice of law rules without compensating gain. In framing choice of law rules, it is important to consider how far specialization should be introduced — "is it desirable to subject a transaction to a single law as regards all its aspects or is it preferable to split the transaction into various questions and subject these various questions to different laws." [51] Generally, in the interests of simplicity, it is desirable to keep to a minimum the number of rules in a set of choice of law rules governing a class of transaction. "Specialization" multiplies the chances of doubt in regard to placing issues in conceptual categories — for example, whether an issue relates to "capacity" or to "validity". It should be avoided unless there are strong counter reasons based on justice or public policy.

Acquired Rights

The English rule seems to be that validity, whether related to form or to substance, is governed by the *lex situs*. There may be involved (a) the creation of a right or (b) the content and incidents of a right. If a *res* is moved from X to Y, there are various alternatives, for example, (i) that the property right is terminated, perhaps because the law of Y regards its creation as invalid; (ii) that the right continues, but the meaning and consequences are now given by the law of Y; (iii) that the property right is not terminated and the meaning and consequences remain those given by the law of X. These alternatives may arise whether X or Y or neither is the forum.

There is a general feeling that property rights acquired in one country should be respected in another. As a theory, this has been criticized on the ground that it is uncertain; that it tends to rigidity because the consequences of a juridical situation would remain subject to the law under which it occurred, thus taking insufficient account of future events; that respect for acquired rights should be an outcome of the application of conflict rules and not an independent, fundamental principle of private international law.[52] The Montevideo Congress adopted a principle that rights acquired in one country should be respected in another to which the property has been moved, subject to compliance in the second country with any

[50] Zaphiriou, *op. cit.*, at p. 75, footnote 23; *American Restatement* at s. 255.
[51] Zaphiriou, *op. cit.*, at pp. 66-67.
[52] *Cf.* Batiffol, *op. cit.*, at s. 318, footnote 7, on the theory of Pillet.

conditions of substance or form required by its law for the acquisition or conservation of the rights in question.[53] Niboyet states that "Lorsqu'un meuble a été acquis dans un certain pays en vertu des dispositions de la *lex sitae*: et qu'il vient ensuite à être transporté dans un autre pays, on doit reconnaître les droits de l'acquéreur, dès l'instant où, d'après cette *lex sitae*, il a obtenu un droit incommutable. Le principe de l'efficacité des droits, bien connu de nous veut qu'il en soit ainsi." [54] It has been said that respect for acquired rights is a corollary of the theory of sovereignty and is based on fairness and justice.[55] There are at least overtones of acquired rights theory in Common Law systems and writings.[56] It has been said of the *American Restatement* in this field that it "purports to be a system, and as such has a theory, viz., that the conflict of laws exists for the recognition and enforcement of foreign-created rights; and from that theory it deduces most of its specific rules." [57] Respect for foreign rights seems to show a desire for something with more moral appeal than the mathematical objectivity of some choice of law theories.

The Situs of an Intangible

Intangibles may be divided into those which have an indispensable instrument and those which do not.[58] Certain of the former resemble chattels in that operations on the title are performed by doing something with the physical instrument. So, by an extension of reasoning, the *situs* of the property can be taken as the *situs* of the instrument. In dealing with other kinds of intangibles, the fiction is more strained.[59] Certain kinds of shares are of this kind, made out to a

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[53] Espinola, *op. cit.*, vol. 2 at s. 183, footnote 38, expresses a preference for the rule formulated by a meeting of the Institute of International Law at Madrid in 1911: that acquired rights should be respected on the movement of property, but that, for reasons of public policy, the second country might require compliance with certain conditions having regard to the interests of third parties.

[54] *Op. cit.*, at s. 2279, footnote 47; *Cf. Cours de Droit International Privé Français* (2nd ed., 1949) secs. 611-2.

[55] "Le respect des droits acquis s'impose donc en droit international comme corrolaire du respect des souveraines étrangères. Il ne s'impose pas moins au nom de la sécurité des particuliers. Il ne faut pas compromettre la situation des titulaires de droits en remettant sur le tapis des questions déjà liquidées. S'il en était autrement, la société deviendrait un nid à chicane." Savatier, *Cours de Droit International Privé* (2nd ed., 1953) at sec. 304.

[56] Falconbridge, *op. cit.*, chap. 2, footnote 7.

[57] Willis, (1936) 14 Can. Bar Rev. at p. 2.

[58] Footnote 2 *supra*.

[59] It has been extended by the curious doctrine that the status of marriage "savours of a res"; *Salvesen* v. *Administrator of Austrian Property*, 1927, S.C. (H.L.) 80, 92; [1927] A.C. 641, 662.

named party and not to bearer, the title being completed, for example, by registration in the books of the company. What meaning is to be given to the location of such a share? In *New York Life Insurance Company* v. *Public Trustee*[60] the court approved Dicey's statement that "Debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced." According to Atkin L. J. in the same case, although a debt, for example, "is not a matter of which you can predicate position; nevertheless, for a great many purposes it has to be ascertained where a debt or chose in action is situated, and certain rules have been laid down in this country which have been derived from the practice of the ecclesiastical authorities in granting administration, because the jurisdiction of the ecclesiastical authorities was limited territorially."[61] The fictional *situs* of an intangible is, therefore, a concept of greater generality than an aid in solving choice of law problems.

Intangibles vary considerably in type. It is proposed in Dicey that an ordinary debt due should be located where the debtor resides and so where it can be enforced; a debt due on a deed or other specialty is situate at the place where the deed itself is from time to time; a judgment debt is located where the judgment is registered; bearer securities where the document is to be found; shares "where, as between the owner for the time being and the company, they can be effectively dealt with according to the law under which the company is incorporated"; rights of action in contract or tort where the action to enforce can be brought; interests in estates and trusts, where the trustees reside, since it is there that the rights can be enforced; a share in a partnership where the business is located.[62] In *Brown, Gow, Wilson* v. *Beleggings*,[63] wartime decrees of the Netherlands Government declared that property of German nationals belonged to the state. By this law the ownership of shares in a company

60 [1935] 2 Ch. 101, 109.

61 *Ibid.*, at p. 119.

62 *Op. cit.*, at pp. 504-8, footnote 29; *Royal Trust Company* v. *Atty.-Gen. for* Alberta, [1930] A.C. 144, 150. As to application of the *lex solutionis* to cheques, Niboyet, *op. cit.*, at s. 1306, footnote 47; Batiffol, *op. cit.*, at s. 549, footnote 7; Cavaglieri, *op. cit.*, at p. 380, footnote 2; Arminjon, *Précis de Droit International Privé Commercial* (1948), at s. 142; Falconbridge, *op. cit.*, at pp. 498-505, footnote 7. *Cf.* article 1152 of the Quebec Civil Code as to the place of payment of debts. Rivard, *Le droit sur les successions dans la Province de Québec* (1956), p. 149 *et seq.*, considers this article consistent with the rule that an ordinary debt is located where the debtor resides. The table as to the *situs* of various choses in action at p. 182, *op. cit.*, is similar to the Common Law rules.

63 [1961] O.R. 815.

incorporated and situate in the Netherlands, which were held in trust for Germans, was transferred to the Netherlands Government, and the bearer certificates, located in Ontario, were ordered to be cancelled. The question was whether Ontario should recognize this transfer and what was the applicable law. It was decided that the Netherlands had the right to expropriate the shares, because it was there that the company was incorporated and had its "siège social".[64] The question of *situs* may require a different approach depending on the kind os issue involved, e.g. tax, succession, expropriation.[65] The judgment in the *Brown, Gow* case stressed that a distinction should be made between a share as an abstraction and the related instrument or certificate. The transfer of a bearer share requires (i) delivery of the associated instrument and this must be effected where it is located; and (ii) the right to dividends and participation in the free assets on dissolution are logically associated with the seat of operations. Some characteristics can be associated with one jurisdiction — the location of the instrument — and the rest with another — the siège social. So, the validity of the transfer of a bearer security might not be dealt with in the same way as expropriation.

The Concept of Situs

Situs can be given a meaning for any kind of property, by thinking of it, not as the location of an object, but as the place where property rights can be enjoyed or made effective. With this meaning a *res* may have more than one *situs* at the same time.

A *"lex proprietatis"* would be similar (in certain respects) to the proper law of a contract, if where the parties have not indicated a choice of proper law if the selection is made on the basis of the system most closely associated with the contract and the issue before the court. In the case of property, we would seek the "centre of gravity" of a set of rights and obligations — i.e. where they have functional effect. A set of property rights may have more than one *locus* — e.g. a document or physical object for transfer; a "siège social" for expropriation. Determination of the *lex proprietatis* means the establishment of sub-categories — and the introduction of "specialization".[66]

The *lex situs* was originally associated with jurisdiction, and there an important question is whether the court can make an

[64] Baxter, (1962) 40 Can. Bar Rev., at p. 193.

[65] [1961] O.R. 815, 833 *et seq.*, see footnote 63.

[66] Footnote 51.

effective judgment: There are opportunities for this if the defendant or property relevant to the action are within its territory. It is often suggested that the *lex situs* is convenient and logical as a choice of law rule because the property is within the territory and control of the courts of the *situs*.[67] Let X be the *situs* of a chattel and let two issues arise about it, one in the courts of X and one in the courts of Y. Both X and Y decide that they have jurisdiction. Y should have other means of making its judgment effective than by territorial control of the chattel (if its decision to assume jurisdiction has been reasonable) and so whether the law of X or some other law is applied in Y to determine the issue, Y should still be able to make some effective judgment. There has not been much attention given either by the courts or in the literature to clear and logical policy reasons for the *lex situs* in choice of law. The influence of jurisdictional considerations has been great. In the example given, the best way to obtain possession of the chattel would be to raise an action in X. A successful action in Y may give a remedy other than delivery of the chattel. Solutions may be possible in Y which are not possible in X — for example, the defendant may be resident in Y and have no connection with X, except by reason of the *situs* of the chattel. It depends on the jurisdictional rules of X and Y and the effective operation of their courts in the situations in which they find themselves.[68] The territorial influence is strong in land law, and historically, land law has had great effect on the development of all branches

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[67] *Cf.* Goddrich, *Handbook of the Conflict of Laws* (3rd ed., 1949), at p. 153.; "The goods which are the subject of the transaction are within the territorial jurisdiction of a certain state; its law should control dealings with them." *In Re Schneider's Estate* (1950), 96 N.Y.S. (2d.), it was said of the *lex situs* rule that, "The primary reason for its existence lies in the fact that the law-making and law-enforcing agencies of the country in which the land is situated have exclusive control over such land." If another court "is thrust into a position where it is obliged to adjudicate the same questions concerning the title to that land — it should be guided by the methods which would be employed in the country of *situs*."

[68] The general propositions are that the laws of a country have effect only within its boundaries; and that no country by its laws can directly bind property out of its territory, or bind persons not resident therein: *Companhia de Mocambique* v. *British South Africa Company*, [1892] 2 Q.B. 358, 395. *Cf. French Civil* Code, arts. 14 and 15; *Bourdon* v. *Oris*, Cours d'appel de Roüen (2d. ch. civ.) 3rd March, 1961, (1962), 51 Rev. Crit, 127.

of property law.[69] For this and other reasons, substantial weight seems to have been given to the element of control over the property.[70]

If certain solutions of a property issue can only be made effectively in X (the *situs*), what influence should this have on Y's choice of law policy? What would be the advantages of adopting there the *lex situs* as a basic choice of law rule? If this were done, the solution in Y should be the same as the solution in X. There are two possible benefits from this: (i) uniformity of solutions, and (ii) a party who had obtained a favourable decision from a court in Y may wish to bring further claims or seek other remedies. A party may find it convenient to have a title recognized not only by the country of the forum, but also by the country of the *situs*. It may be desired to use the title in the latter country at a future time. These ideas are connected with a general policy in favour of "international" uniformity of title. Again, the influence of land law has been considerable, for if a person litigates in Y in regard to land in X, the most useful decision, from his point of view, might be one in which the courts of X would acquiesce.[71]

Decisions of the Courts

The English cases show conflicting preferences for the *lex situs* and the *lex actus*. "As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicile of the owner, but upon the law of the country in which the transfer takes place." [72] The illustrations to support this were (a) the execution in England of the goods of a foreigner in a house in England tenanted by an Englishman; (b) the sale of goods of a foreigner in England in market overt. In both cases, it was said, an English court would apply English law, which is not merely the *lex actus* but also the *lex situs* and the *lex fori*. The underlying policy is not clear — it may be only a preference by an English court for English law.

[69] *Cf.* Falconbridge, *op. cit.*, at p. 611, footnote 7: "It is only a court of the country in which land is situated that can effectively grant any remedy enforceable *in rem* or give a judgment or make an order directly affecting the title to land or the possession of land; and while it is not clear that there is any rule of international law by which a court having jurisdiction over the defendant would be prevented from entertaining proceedings with respect to foreign land merely on the ground that the procedings would be ineffective as regards the land, English courts do not assume jurisdiction to deal directly with the title to or the possession of foreign land, and do not, or ought not to, adjudicate on any matter with regard to which they cannot give an effective judgment."

[70] In some cases (e.g. shares in companies) the residence of the defendant and the *situs* as place of incorporation and the siège social may coincide.

[71] The courts of Y should not accept jurisdiction in a dispute about foreign land.

[72] *Alcock* v. *Smith*, [1892] 1 Ch. 238. 267.

There are statements that a good title acquired in one country should be good anywhere; [73] that a valid disposition of a movable by the law of its location at the time should be universally recognized.[74] In *Cammell* v. *Sewell*, *Cockburn*, C.J. based his judgment on there having been a good contract to transfer, valid in the foreign jurisdiction, and no good reason present for not recognizing its validity.[75] It is difficult to know whether the foreign acquired rights were recognized because there seemed no reason not to, or whether they were recognized because they had been acquired as a result of applying a conflict rule.[76] In the second alternative, the choice of law rules ought to have independent policy justification.

In his dissenting judgment, Byles J. said, "I admit, if there be a judgment *in rem* founded on a recognized law, and pronounced by a competent tribunal of the country where a movable chattel then is, that that judgment determines and changes the property everywhere and between all persons ..." [77] This involves the question of recognition of at least some of the effects of a foreign judgment, in this case the transfer of title. The theory seems to be that legal issue should be allocated out "internationally" from the point of view of the conflict rules of the forum. English law has been attracted by this concept.[78] French and other European systems concentrate on linking issue and applicable law. The recognition of a foreign acquired right, such as a title, and the recognition of a foreign judgment on title, are different questions, and their superposition can lead to curious results. Suppose that a transfer of title is valid by the law of J_n, (the nationality of the transferee). This transfer is recognized in J_p, where the choice of law rule is the national law of the transferee. A judgment is now given by a court in J_s (the *situs* of the property) that the transfer of title was invalid. J_p considers J_s to be the competent jurisdiction and it recognizes the foreign judgment. So a title once valid in J_p becomes invalid there. This is due to the use of both a choice of law principle and a jurisdictional principle.[79]

[73] *Simpson* v. *Fogo*, (1862) 1 H & M. 195, 222.

[74] *Cammell* v. *Sewell*, (1860) 5 H & N. 728, 744-5.

[75] *Cf.* with the principle of "efficacité des droits acquis." Footnote 54.

[76] *Cf. Dicey*, (6th ed., 1949) at p. 11.

[77] At p. 751.

[78] Baxter, (1961) 39 Can. Bar Rev.. 301 at pp. 323-325.

[79] Similar confusion can arise in the recognition of annulment decrees in the anglo-saxon systems. The validity of a marriage depends on choice of law rules, whereas the recognition of a foreign annulment is said to depend on a jurisdictional principle. Kennedy (1957) 35 Can. Bar Rev., at p. 647. So a marriage formerly regarded as valid in one country by the choice of law rules, may later be invalid there by the recognition of a foreign judgment in a court of competent jurisdiction.

Change of Situs

A sale by A to B of property in X which is valid there, may be invalid in Y where the property is later moved, or vice versa. Sometimes a non-owner may effect a transfer of title — for example, in regard to the doctrines of holder in due course, mercantile agent or market overt. These hold in certain jurisdictions but not in others, or there may be different forms of the doctrine. Which *lex situs* should govern in these cases, the *situs* at time T_1 or the *situs* at time T_2? The title to goods may pass at different times in different jurisdictions on the same facts. In the English Sale of Goods Act, in the case of specific or ascertained goods, the title passes when the parties intend it to do so, the intention being derived from the terms of the contract, the conduct of the parties and the circumstances of the case.[80] In an unconditional contract for the sale of specific goods in a deliverable state, the title will pass when the contract is made, even if neither delivery nor payment have taken place.[81] There is a comparable situation under article 1472 of the Quebec Civil Code and article 1583 of the French Civil Code.[82] Sale of goods legislation in the Common Law systems does not provide that "En fait de meubles, la possession vaut titre." [83] Italian law connects the passing of title and the completion of the contract.[84] In other European continental systems, delivery is necessary for the passing of title.[85]

A transfer of property is a combination of, (a) an agreement to change the ownership, creating rights *inter partes* and (b) a transfer

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[80] Halsbury, 3rd ed., Vol. 34, Part. 3.

[81] *Cf.* Sale of Goods Act, R.S.O. 1960, c. 358, s. 19.

[82] See also article 1138. *Cf.* Swiss Code des Obligations, art. 185. According to art. 377 of the Mexican Commercial Code, the passing of risk is linked to the completion of the contract (see Rodriguez), *Derecho Mercantil,* (4th ed., 1960), Vol. 2, at p. 15; in the Greek Civil Code, it is linked to delivery, art. 522. As to the Brazilian position see de Oliveira Andrade, *Da Compra e Venda,* (1960), Part 1, Chap. 3.

[83] French Civil Code, art. 2279.

[84] Civil Code, art. 1470; "La vendita è il contratto che ha per oggetto il trasferimento della proprietà di una cosa o il transferimento di un altro diritto verso il corrispettivo di un prezzo." In Belgian Law, "Par le seul fait du consentement des parties, le transfer de propriété est accompli. Tel est du moins le cas, lorsque la chose vendue est un corps certain." Frédéricq, *Traité de Droit Commercial Belge* (1947), Vol. 3, at p. 65; Belgian Civil Code, art. 1583.

[85] *Cf.* Lalive, op. cit., at p. 91, footnote 38. The difference originated, no doubt, in the Roman distinction between contracts *consensu* and *re.* Buckland, *Manual of Roman Private Law* (1928), 251; Jolowicz, *Historical Introduction to Roman Law* (2nd ed., 1954), 298; *Gloag on Contract* (2nd ed., 1929), 14. In Communist systems there is a tendency to say that property does not pass in transactions analogous to sale but only the management of the publicly owned article of property: Gsovski, *op. cit.*, Vol. 1 at pp. 448, *et seq.*, footnote 5.

of title affecting the interests of third parties. It is desirable that third parties can ascertain the time of passing of title with reasonable certainty.[86] If this time derives from a contract, a third party may be uncertain. Some systems emphasize the contractual element in transfer of ownership: others emphasize the property element. The difference between the points of view is not so radical as might appear. The main consideration in any system is that the passing of title should be regulated in a simple, clear and reasonable fashion. This may be achieved by making it depend on the intention of the parties; on a physical act of delivery; or on other things. Uniformity in solving these problems has not been achieved, and so, from the conflict standpoint, we acquire a *modus vivendi.* If P acquires title by the law of X, which is the *lex situs,* will that title be retained on the acquisition of a new *situs* in Y, if the facts which led to title in X would have been insufficient for transmission of title by the law of Y? Will Y recognize a title validity acquired by the *lex situs* but based on different rules and policy from those applicable in the internal law of Y? If so, it should be because other policy considerations override the effect of the ordinary (internal) thinking on sale and property matters. The resulting solution is produced by a policy which is partly "internal" and partly "private international". The converse situation is where no title passes by the *lex situs,* but would have passed by the other system. One way of resolving this question is to apply the *lex situs* both in time and in space — if a *res* has a *situs* in X from time T_1 to time T_2 and in Y from time T_2 to time T_3, the law of X can be applied to events in the interval (T_1 - T_2) and the law of Y to events in the interval (T_2 - T_3).[87] Extension of the conflict rule to time as well as to space reduces the certainty of its operation because there may be doubt not only as to the spatial *situs* but also, in regard to continuing events which do not fall exclusively within either (T_1 - T_2) or (T_2 - T_3). Any such rule will be subject to public policy.[88]

86. See comparative discussion by Vinding Kruse, footnote 1, on the English rules and the American Uniform Commercial Code.

87 The Polish *Projet de loi sur le droit international privé* (1961), art. II (2) provides "La création, le transfert ou l'extinction des droits réels sont soumis à la loi de l'Etat sur le territoire duquel le bien sur lequel ils portent se trouvait au moment où s'est produit le fait entraînant les effets juridiques en question": (1962), 51 Rev. Crit., at p. 191. The Polish Private Interprovincial Law of 1926, art. 8, merely provided that possession and *iura in rem* should be determined by the law of the place where the property is situated.

88 "En principe, c'est la loi de la situation du meuble à la date où s'est produit une cause d'acquisition qui détermine les effets de cette opération. Encore faut-il que cette loi n'ait pas un caractère politique contre lequel nous serions fondé à réagir pour la défense de la morale ou de notre ordre public": Lerebours-Pigeonnière (7th ed., Loussouarn, 1959), s. 472.

Acquisition of Title

In the Scottish case of *Todd* v. *Armour*,[89] it was said that a "bona fide purchaser for value is an especial favourite of the law, and the utility and policy of the rule that protects his possession are particularly applicable when the purchase is made openly in the ordinary course of business, and with due circumspection, of any common article of commerce." An Irish farmer sued a farmer in Scotland for delivery of a horse, alleging that it had been stolen. The defender had bought the horse in Scotland from a man who had purchased it in Ireland in market overt. By Irish law, this title was good unless there had been prosecution of the thief to conviction within six months, which had not been done. By Scots law, theft was a *vitium reale* which could not be removed. The court decided in favour of the defender. A similar question arose in the English case of *Cammell* v. *Sewell*.[90] A cargo was shipped by Russian merchants on a Prussian ship to England. There was a shipwreck in Norway and on the recommendation of surveyors the cargo was sold there in the best interests of ship and cargo. The purchaser acquired a good title by Norwegian law. The court recognized this title as valid in England. In both cases, a title had been acquired by the *lex situs* when the *res* was there, and the new location recognized the title. The protection of buyers in good faith and for value involves a distribution of loss between two parties both in good faith — for example, in a purchase from a thief or in a purchase from someone who appears to have authority to sell.[91] Some systems emphasize protection for the innocent buyer: others support the original owner. In the two cases mentioned, and in many others, "internal" policy is offset by a "private international" policy which is, in general terms, a wish to avoid "limping" titles.[92] A comparable situation is where S sells goods in Germany, but delivery has not been given. The goods are transferred from Germany to France where title would pass by French law. The law of the *situs* at the time of the alleged transfer,

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[89] 1882, 9 R. 901, 907 *per* Lord Young. See also *McKenna* v. *Prieur and Hope*, [1925] 56 O.L.R. 389, 2 D.L.R. 460; *Phoenix Assurance Co.* v. *Laniel*, (1926) 59 O.L.R. 55.

[90] (1860) 5 H. & N. 728.

[91] E.g. the mercantile agent: Baxter, *The Law of Banking* (1956), at pp. 218-222.

[92] By analogy with term "limping" marriage (*matrimonium claudicans*) as used in family law.

i.e. German law, can be applied rather than French law, on the basis that the *lex situs* should be applied in time and space.[93]

A disputed question in French law is the application of articles 2279 and 2280 of the Civil Code. "Considérons, par exemple, un meuble acquis à l'étranger a non domino qui n'est pas devenu d'après la loi étrangère la propriété de l'acquéreur. Celui-ci l'introduit en France: il pourra opposer en revendiquant la règle française 'en fait de meubles possession vaut titre.' ... En effet la loi française attache des conséquences de droit au seul fait de la possession: il suffit donc que la possession soit exerçée en France pour que la loi française joue: c'est l'application de la loi nouvelle aux faits postérieure à son entrée en vigueur." [94] On this view, the "internal" policy has the strong influence.[95] The policy considerations may be different where the purpose of the sale is to transfer goods from one country to another.

Choice of Law and Situs

In the Common Law systems, the endorsement and delivery of a bill of lading effects symbolic delivery of the goods to the endorsee or the bearer, if the endorsement is in blank.[96] The settlement of an export-import transaction such as a c.i.f. sale, is by a sale of documents, and a credit is usually available against an acceptance or payment.[97] Other documents, "receipts", "warrants" and the like may be negotiable (or quasi-negotiable) in some jurisdictions.

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[93] *Cf.* Falconbridge, *op. cit.*, at p. 454 *et seq.*, footnote 7; Zaphiriou, *op. cit.*, at p. 164, footnote 23, and at p. 175: "The acquisition of a proprietary right is governed by the *lex situs* of the chattel at the time of the alleged acquisition but if this chattel is removed to another country and is there further transferred the validity of this further transfer is governed by the *lex situs* of the chattel at that time"; Niboyet, *Traité*, Vol. 4, at p. 373; Batiffol, *op. cit.*, at ss. 504-506, footnote 7, uses the phrase, "conflits mobiles". *Cf.* as to analogous questions on bills of exchange, Cavaglieri, *op. cit.*, at p. 347-8, footnote 2. *Cf. Re Hudson Fashion Shoppe Ltd.*, (1926) 7 C.B.R 68, 80, [1926] S.C.R. 26; *Cline* v. *Russell* (1908) 2 Alta. L.R. 76; *Century Credit Corp.* v. *Rickard,* (1962) 34 D.L.R. (2d) (on Dicey's Rules 86 and 88).

[94] Batiffol, *op. cit.*, at s. 505, footnote 7.

[95] See, however, Niboyet, *Traité*, Vol. 4, at s. 1209. See generally on this subject, Ehrenzweig, *op. cit.*, footnote 38, at pp. 626-634.

[96] Falconbridge, *Banking and Bills of Exchange* (6th ed., 1956), at p. 175. Baxter, *op. cit.*, at pp. 190-1, footnote 91; as to the position in French Law, see Niboyet, *Traité*, Vol. 4, at s. 1308 *et seq.*

[97] See Baxter, *op. cit.*, chap. 16, footnote 91, and authorities referred to there: as to French law see Stoufflet, *Le Crédit Documentaire* (1957), at p. 17 *et seq.;* Marais, *Du Crédit Confirmé* (2nd ed., 1953), at p. 15 *et seq.;* Cordier, *Traité documentaire et crédit documentaire* (1959), at pp. 62-63.

In an international sale, the *situs* may be transitory. The goods may be in J_1, the seller, the bill of lading and the confirming bank may be in J_2 and the buyer in J_3, the purpose being to ship the goods to J_3 for processing and distribution there. J_1 may have a different type of legal system from J_2 and J_3, yet if the law of the *situs* at the appropriate time is applied, the validity of the buyer's title may depend on the law of J_1, although all the operations determining the transfer of title (apart from the issue of the bill of lading) have taken place in J_2 or J_3. The English rule, as stated by Dicey, is that the transfer of a tangible movable which is valid and effective by the proper law of the transfer (*lex actus*) and by the law of the place where the movable is at the time of the transfer, is valid and effective in England.[98] If there is invalidity by both of these laws, the transfer is invalid in England. Where the *lex actus* and the *lex situs* do not coincide, the *lex situs* is preferred, except perhaps where the *situs* is casual or unknown. There is a possible ambiguity in the meaning of *lex actus;* it may refer to the proper law of the contract to transfer or to the proper law of the operations for the transfer of title. In the example, the question of transfer of title might be said to have closest connection with J_2, (a) because the seller was a national resident there; (b) because the bill of lading was located there and also the machinery for financing the sale. J_2 might be regarded as the proper law of the transfer from the property point of view. But J_3 might be the proper law of the sale contract (perhaps because it had been made there).[99] In an export-import transaction possession may pass while the goods are in transit on board ship, and the sale may be completed (by transfer of documents against price) after the goods have perished.[100] So the movement of title, or the completion of the sale may have little or no contact with the *situs* of the goods. There are various possibilities for choice of law in the case of a *res* in transit, such as the place of dispatch, the locus at the time of change of title, the law of the flag; the destination; the place of major contact (i.e. the *lex actus* of the transfer).[101]

The situs of a chattel as the physical locus at a point of time is attractive because it can often be ascertained simply and precisely. On the other hand, apart from possession, it may not have much

[98] *Op. cit.*, Rule 87, footnote 29.

[99] The validity of the bill of lading would be another issue.

[100] *Manbre Saccharine Company, Ltd.* v. *Corn Products Company Ltd.*, [1919] 1 K.B. 198.

[101] Zaphihiou, *op. cit.*, ch. 8, footnote 23; Niboyet, *Traité*, Vol. 4, at s. 1307, *et seq.*

connection with the legal relations and concepts of internal law. The delivery of a chattel, on a sale or gift, and recovery or enforcement in the case of an intangible — are main operations in the transition of legal rights. Hence, there is an argument for a homogeneous concept of *situs* applicable both to tangibles and intangibles. This concept would be that the *situs* of a *res* is the place where it is able to be possessed, if capable of enjoyment by possession, or if not, where it is lawfully recoverable or able to be enforced. With such a definition (in a sale or a gift) the situs is usually the place of exercise of the fundamental use or enjoyment of the property rights, which nearly always coincides with the physical locus in the case of a chattel — the differences being where the physical locus is casual, or in transit, and in these cases, the *situs* would be the place of destination. The change, however, introduces into the theory of *situs* a cohesion that is lacking at the present time.

Assignments and Bills of Exchange

On choice of law for assignments Dicey distinguishes, (i) assignability, (ii) intrinsic validity, (iii) priorities, (iv) attachment or garnishment.[102] The first two should be governed by the proper law of the assignment, the third by the proper law of the debt, and the fourth by the *lex situs* of the debt. An assignment is valid as to form if valid by the *lex actus*.

The English Bills of Exchange Act, 1882 contains special rules on conflict of laws.[103] Formal validity depends on the law of the place of issue or the place where the supervening contract was made.[104] The interpretation of the drawing, endorsement or acceptance is determined by the law of the place where the contract was made. The duties of the holder as to presentment for acceptance or payment and as to protest or notice of dishonour "are determined by the law of the place where the act is done or the bill is dishonoured."[105] So the *lex actus* is the basic principle as to operations of a bill of exchange.[106] There have been discussions as to whether one should distinguish as to choice of law rules, between nominate and bearer

[102] Rules 89-92, footnote 29.

[103] Falconbridge, *op. cit.*, chap. 14, footnote 7.

[104] S. 72 (1).

[105] S. 72 (3).

[106] *Simile* the Bustamente Code and the Italian view.

negotiable instruments, and analogize the latter with chattels.[107] A bearer instrument is never quite a chattel. Subject to proof, the obligation continues if it is lost or destroyed. But this does not happen on the loss or destruction of a chattel.

Negotiable instruments of commerce should have certainty *ex facie*. "The reason is — and it is equally applicable to all negotiable instruments — that it would greatly perplex the commercial transactions of mankind, and diminish and narrow their credit and negotiability, if paper securities of this kind were issued out into the world encumbered with conditions, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would be reduced to a certainty." [108] This principle has a wider application than the mode of payment to which it referred. It is a major attraction of such instruments that the legal obligations can be ascertained from inspection. A bill of exchange may circulate and a present holder may be in doubt as to where a previous contract was made. The interpretation or validity of the bill is then doubtful unless investigation is made into the history of the instrument.

A Canadian or an English bill of exchange need not specify a geographical location in order to comply with the minimum requirements.[109] It must name or indicate the drawee with reasonable certainty.[110] Some legal systems require specification of place of

[107] "Per quanto riguarda invece la trasmissione dei titoli al portatore, il Diena ravvisa quell' incorporazione del titolo coll' obbligazione, che consentirebbe paragonarlo ad una cosa mobile e quindi di dichiarare che la legge competente a regolarne i modi di trasferimento sarà quella stessa che vale a disciplinare la trasmissione dei diritti reali sulle cose mobili, cioé la *lex rei sitae*. Alla stessa legge fa capo l'Arminjon, derivano dalla natura dei titoli al portatore la loro soggezione alla legge della situazione per cio che concerne i diritti, di cui possono essere l'oggetto, e la trasmissione di tali diritti salva una certa parte da fare alla legge del domicilio del debitore per le stesse ragioni, per cui questa legge va applicata in materia di mobili *uti singuli*." Cavaglieri, *op. cit.*, at p. 341, footnote 2. *Cf.* Arminjon, *Précis de Droit international Privé Commercial* (1948), 269: "Pour justifier l'application de cette dernière loi, M. Diena observe que l'obligation représentée par le titre s'y incorpore de sorte que la revendication du titre peut être assimilée à celle d'un meuble corporel, opinion que nous avons réfutée. Si toutefois, ajoute cet auteur, entre le moment où le porteur a acquis le titre et celui où il exerce l'action en revendication, le titre a été transporté sur un autre territoire, l'action ne pourraît être intentée que si elle est admise par la loi du lieu où l'acquisition a été faite et en vertu de laquelle le porteur peut invoquer un droit acquis."

[108] Story, *Bills of Exchange* (3rd ed., 1853), at s. 46.

[109] Bills of Exchange Act, R.S.C. 1952, c. 15, s. 27; Bills of Excbange Act, 1882, s. 3.

[110] S. 6. (U.K.), sec. 20 (Can.).

payment.[111] There has been some support for the place of payment as a choice of law determinant, for example, in the Geneva Conventions and in French law, and in appropriate systems this would produce greater simplicity and precision than *locus regit actum*.[112] The main argument in favour of the latter is based on the theory of the independence of the contracts on a bill of exchange. On the other hand, it is in connection with the payment and enforcement of negotiable instruments that most questions arise. Also by application of the *lex actus*, different contracts (e.g. endorsements) on the same bill might have to be dealt with by different systems of law. Formal requirements are usually referred to the *lex actus* — on the footing that parties will execute an instrument in J_1 according to the law of that place, and it would be illogical to examine the form by the internal rules of J_2.[113] According to Falconbridge, "In the case of documents such as bills and notes, the negotiability of which may depend on their form, and which are likely to be transferred to subsequent holders who may be ignorant of the circumstances in which they were originally signed and issued, or transferred to earlier holders, a conflict rule referring all matters of formalities to the place of issue, or the place of making of each subsequent contract on the bill or note, would seem to be justifiable. In the case of other commercial contracts, however, it is not so clear that formalities should be governed exclusively by the law of the place of contracting." [114] But a person interested in a bill which has been in circulation, may not be able, by inspection, to determine where a particular contract was made and so, whether it is valid. These considerations do not apply to an ordinary commercial contract where the document does not circulate as property.

There is substantial uniformity in the laws of different countries on bills of exchange, cheques and promissory notes, although there

[111] For example, France, Code de Commercé, art. 110(5); Switzerland, Code des Obligations, art. 991(5); Federal Republic of Germany, Bills of Exchange Act, art. 1 W.G.; Spain, Codigo de Comercio, art. 444; Mexico, Ley General de Títulos y Operaciones de Credito, art. 76(5); Brazil, Lei No. 2044 of 31st December, 1908, art. 3 requires only designation of the person who is to pay: See Mendonça, *Tratado de Direito Comercial Brasileiro* (6th ed., 1960), Vol. 5, s. 616; Belgium, a bill of exchange may be invalid for failure to mention the place of payment, (Fredericq, *op. cit.*, Vol. X, s. 33, footnote 84); Portugal, Codigo Comercial, art. 282, Coelho, *Liçoes de Direito Comercial* (1943), Vol. 2(2), s. 22; U.S.S.R., Gsovski, *op. cit.*, Vol. 1 at p. 475, footnote 5.

[112] Batiffol, *op. cit.*, at s. 549, footnote 7.

[113] *Cf.* discussion on the analogous question of the formal validity of a marriage; Baxter, (1961) 39 Can. Bar Rev. at p. 314 *et seq.*

[114] *Op. cit.*, at p. 322, footnote 7, *Cf.* as to assignments: *Republica de Guatemala* v. *Nunez*, [1927] I K.B. 669; *Re Anzioni*, [1930] 1 ch. 407.

are some differences.[115] By the Canadian and English statutes a bill "of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof." [116] There is no theory of "provision" as in French law.[117] Nor is the theory of the aval developed in the Common Law as in the Civil Law systems.[118] The anglo-saxon concept of a holder in due course is not identical with the French rules which exclude personal defences against a remote party "à moins que le porteur, en acquérant la lettre, n'ait agi sciemment au détriment du débiteur." [119] In the Common Law system a forged or unauthorized endorsement does not transmit title.[120] But in French law, a title may be obtained in such a case, for example, by virtue of art. 120 of the Commercial Code, if there is a continuous chain of endorsements. In the United States and in other jurisdictions, the certified cheque has an explicit place in the legislation; in Canada it is freely employed in practice but ignored in the legislation; in Great Britain, this kind of cheque is obsolete. These differences are most likely to be critical in regard to payment or enforcement of the instrument.

A remote party should be able to take a negotiable instrument and rely upon it *ex facie* for information as to his rights. In particular, he should be able to know by examination if, and how, he can obtain payment. The *lex situs* could be applied to bills of exchange as a choice of law rule if *"situs"* is refined (as suggested above) as the place where the property is intended to be possessed (if capable of enjoyment by possession) or otherwise, where it is lawfully recoverable or able to be enforced. On this basis, the *lex situs* would be a general rule for all property *(uti singuli)*, formal validity being an exception since people normally follow the local formalities of the place of creation or execution and it might be inconvenient to apply the rules of another jurisdiction. In the case of bills of exchange, cheques and promissory notes, the *lex actus* could be applied to formal validity where the instrument indicates the place of making the contract or obligation; otherwise the *lex situs*.

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[115] Rabel, *op. cit.*, Vol. 4, at pp. 132-3, footnote 47, for a summary of the main differences.

[116] S. 127 and S. 53(7) respectively: see Baxter (1953) 31 Can. Bar Rev. 1131.

[117] French Commercial Code, art. 116.

[118] *Gallagher* v. *Murphy*, [1929] S.C.R. 288.

[119] Art. 121; Cour de cassation (Chambre commerciale) 26th June, 1956 (J.C.P. 1956, II 9600, note Roblot).

[120] Canadian statute, ss. 49 and 50; English statute, s. 24.

The "Multi-Interest" Problem

Emphasis so far has been on "single-interest" problems. "Multi-interests" may not all have the same *situs.*

In *North Western Bank* v. *Poynter, Son and Macdonalds,*[121] the pledgors of a bill of lading contracted to sell a larger quantity of like goods to third parties and the pledgees returned the bill of lading to obtain delivery of the goods and to sell on their behalf. An action of multiple-poinding was brought as to the proceeds of sale. The fund was in Scotland and the parties were domiciled in England. In the circumstances, the pledge was lost in either system of law. Lord Watson said "when a movable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is *prima facie* one of English law, and ought to be so treated by the courts of Scotland." [122] Lord Herschell, L.C. said, "A transaction between a merchant in England and a bank in England, and the rights which arise out of that transaction, cannot, as it seems to me, fall to be determined by anything but the law of England ..." [123] This is a fairly old case, perhaps overemphasizing domicile, but it can be argued that English law was the system most closely connected with the pledge and the law by which the parties would have wished the distribution of the fund to be governed. By English law a pledgee obtains "a *special property* in the *res* pledged", i.e. a right of possession coupled with a power of sale on default.[124] There is no implied right of sale by Scottish law.[125] A pledge is a security interest, constituted by delivery of a bill of lading or of the goods, and in the present case the issue was between the financing bank and a general creditor of the pledgor as to the proceeds of sale due by the purchaser. The issue was one of priorities, the "multi-interests" all belonged to English firms.

In *Simpson* v. *Fogo,*[126] a British ship was mortgaged in England and remained in possession of the mortgagor who sent her to New Orleans. There the ship was attached by another creditor of the mortgagor. A Louisiana court refused to recognize the title of the British mortgagee. The ship was later bought to England where the Louisiana judgment was disregarded and the mortgagee was allowed to assert his claim. The plaintiff had a good title by the *lex loci contractus,* the *lex fori,* and the law of the domicile of the parties.

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[121] 1894, 22 R. (H.L.) 1; [1895] A.C. 56.

[122] At p. 12 and p. 75.

[123] At p. 6 and p. 66.

[124] Paton, *op. cit.*, at p. 353, footnote 2.

[125] Bell, *Principles*, at s. 207; *Duncan* v. *Mitchell*, 1893, 21 R. 37.

[126] (1863) 1 H. & M. 195.

By "comity of nations" the title of the mortgagee had universal recognition — although a security where the debtor remained in possession was not possible by the local law of Louisiana.[127]

Whereas in *Fogo* the ship was brought to England, in *Liverpool Marine Credit* v. *Hunter*[128] the issue was an order in equity restraining creditors from suing on bonds by mortgagees to release a ship in Louisiana. Lord Chelmford, L.C. considered that transfer of personal property should be governed by the law of the owner's domicile.

In "multi-interest" issues two questions are not always distinguished. Suppose the forum has to consider claims by creditors, C_1, C_2 — C_m. C_p has a valid security S_p by the law of J_q, and C_q has a security S_q by the law of J_q. Will the forum recognize S_p and S_q as effective security rights? If the forum recognize both S_p and S_q, the next question is — what are the priorities between S_p and S_q. The forum may recognize foreign security rights which do not exist in its local law. Then it may have to adjudicate priorities involving "alien" securities.

In Quebec, the "privilège" is a preference which a creditor has over other creditors, and according to the French Civil Code it may be of a personal nature or it may attach to property.[129] Niboyet tends to the view that a security right should be territorial, at least where there is a strong connection between it and execution.[130] "Aucun privilège ne peut naître sur un meuble situé en France en dehors de ceux que reconnaît la loi française, et sans que ne soient satisfaites les conditions qu'elle impose, soit en qualité de loi applicable au régime des biens, soit en tant que loi de police destinée à protéger le commerce juridique ou les intérêts des tiers. La compétence de la *lex sitae* est un véritable dogme en cette matière.[131] According to Lerebours-Pigeonnière "Ne sera pas sanctionné dans le pays de la situation actuelle le droit réel acquis à l'étranger qui ne reconnaît pas la loi de la nouvelle situation, ou que la nouvelle loi subordonne à des conditions permanentes qui ne se trouvent pas remplies. Ainsi une

[127] Pp. 222-3. *Cf.* Ehrenzweig, *op. cit.*, footnote 38, at p. 623.

[128] (1867) L.S. 4 Eq. 62, L.R. 3 Ch. 479. See also *Hooper* v. *Gumm*, (1867) L.R. 2, Ch. 282.

[129] The Quebec Civil Code, art. 1983 *et seq.*, and the French Civil Code, art. 2100 *et seq.* Art. 2102(4) of the French Code gives a "privilège spécial" to an unpaid seller while the goods are in possession of the buyer, and a right to retake the goods in certain circumstances. As to the general subject of security rights in Quebec, see Castel, *The Civil Law System of the Province of Quebec* (1962), pp. 138-142 and bibliographical references therein.

[130] *Op. cit.*, Vol. 4, s. 1194, footnote 47.

[131] S. 1219. Also ss. 1218, 1220 and 1221.

hypothèque mobilière constituée à l'étranger ne pourra être exercée sur le meuble en France." [132]

Unwillingness to recognize foreign acquired security rights may be more than nationalistic emphasis and distrust of other ideas. The idea of title is universally understood (in substance), but foreign security rights may be obscure to the forum, and priorities difficult to assess.

Are there underlying similarities among security concepts which would provide a basis for understanding, sufficient for recognition and general rules of priority assessment? The maxim *qui potior est tempore, potior est iure* can be applied whether or not the securities were all created within the jurisdiction. The *lex situs* when the security was constituted can be applied to ascertain validity. If these were the only rules, there would be no real difficulty in working out priorities among a mixed set of foreign and local security interests. There are situations, however, which call for qualification of the time — priority rule. Otherwise, there would be opportunities for concealing the existence of securities to the detriment of subsequent purchasers or borrowers. If A is negotiating for a loan from B and offers a chattel X which is then in the possession of C, it is apparent that C may have a security over X. Various steps are taken (by internal law) to prevent a debtor from appearing to hold an unencumbered title by being in possession. One way is to permit only securities accompanied by a change of possession or transfer of documents of title (and to exclude the mortgage). In Common Law countries, in the case of the mortgage and the conditional sale (or the hire-purchase agreement), subsequent purchasers and lenders are protected by laws regarding public registration or the like. Questions of policy are involved, and the protection of subsequent parties. The significant time may be the registration of the security interest — so that there is a mixture of public policy and statutory formalities. These aspects will be related either to the law of the forum, as regards policy — a forum will normally use its own principles of public policy — or to the *lex actus* in regard to whether formalities, such as registration, have been carried out in a valid manner. It is not logical for the forum to attempt to apply the public policy of a foreign jurisdiction, or for it to apply to a question of formal validity, the law of a jurisdiction other than the *lex actus*. Formalities such as registration may have a bearing on priorities, and failure to register may result in reduction to the status of an ordinary creditor or loss of preferential rights.

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[132] *Op. cit.*, s. 472.

Can the Lex Fori Be Used
As a Basic Choice of Law Rule?

Would a conflict rule that the validity of a security interest should be determined by the *lex fori* be unjust or inconvenient? As far as land is concerned, because of jurisdictional rules, almost inevitably the forum will be the *situs* and the place where a security has been created and where registration, etc., must be carried out. In commercial transactions regarding movables, A on taking a security over a chattel in one jurisdiction might be surprised to find that another jurisdiction (where the chattel has been brought) did not recognize the security. On the other hand, B, also dealing with the chattel, may be aggrieved to find the chattel subject to a security that does not exist in his law.

There are reasons, in the property field as in others, why the *lex fori* should be preferred as a choice of law rule. It is the law best known to the court. A judgment by the *lex fori* is likely to be more in conformity with the spirit of the local law. Public policy is a final check on solutions of conflict problems, and a solution by the conflict rules which is unacceptable to the public policy of the forum can be rejected, and the *lex fori* applied in lieu.[133] This is an indirect corrective — the principles of public policy are usually not too clearly defined and there may be a tendency towards a frequent application of public policy, indicating really a preference for the local law as against foreign law selected by the choice of law rules. Bias toward the *lex fori* is not narrow-minded, nationalistic or parochial, as it is described by protagonists of "internationalism" in private international law. It is based on common sense. A judge applying foreign law is groping in a strange system — with experts pulling him different ways. These difficulties may not trouble text writers, but they are important in the just disposal of cases. A court should apply the *lex fori* unless there is a sound reason based on justice and common sense for choosing the law of a foreign country. Somewhat different considerations apply if the issue is whether to recognize a foreign judgment, because there, the court must decide whether it will "bend" its own internal solution into line with the foreign judgment — or whether it will reject the foreign judgment —the main reason in favour of "bending" being the desirability of uniformity and the avoidance of "limping" titles.

Can the *lex fori* be applied to all questions in property conflicts? Such a principle would be easily understood; any dispute would be

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[133] Baxter, (1961) 39 Can. Bar Rev., at pp.307-311.

settled by the local law of the court where the action was raised, by judges trained and experienced in that law. It would avoid the arid formalism of traditional choice of law rules. If we were to begin with a *tabula rasa*, a case could be made for the *lex fori*. The arguments in favour of the *lex situs* as a choice of law rule, are related to jurisdictional considerations.[134] Let A raise an action against B in J_f involving a question of title to a *res* situated in J_s. J_f should not assume jurisdiction unless it can give some remedy effective within its own boundaries. It does not follow that because the judgment in J_f was not in accordance with the law of J_s, that it will not be recognized in J_s. There is a failure by writers in this field, and by the courts, to distinguish clearly between four questions to which different principles and policy may apply, namely (a) jurisdiction; (b) choice of law; (c) recognition of foreign judgments; (d) uniformity of laws. Questions as to formalities, ceremony, requirements as to execution, registration, etc., by their nature, may be beyond the scope of the *lex fori*. Parties in J_1 cannot always be expected to observe forms required by the law of J_2. Apart from resort to the *lex actus* on these grounds, it is possible for J_p to apply its own concepts and principles (wherever the facts may have occurred) to determine if there has been a valid sale, gift or security interest (as the case may be). Then, if A bought a *res* in J_1 *and* brought it to J_f, the questions for J_f would be (i) did A observe any formalities required by J_1 as to transfer of title; (ii) does the transaction (otherwise than as to form) give A a title by the rules and policy of J_f? Application of the *lex situs* does not of itself prevent "limping" titles. The incidence of "limping" titles is decreased by uniformity among legal systems.

Reduction of Limping Titles

The relevant conflict rules are part of the commercial law, and although merchants nowadays may not expect that law to be such as they themselves can understand and apply, they expect that their legal advisers will give (in most cases) a direct and confident opi-

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[134] "In the last resort only officials appointed by the *lex situs* can lawfully deal with the *res litigiosa*, and therefore any adjudication by other courts which purported to affect proprietary rights therein would be a *brutum fulmen*." Dicey, 6th ed., p. 562.

nion.[135] It is in the interests of business that (in general and subject to exceptions such as forgery) it should be possible to take documents of title, negotiable instruments, etc., at their face value and that a title once validly acquired, be valid everywhere. In particular, the business man will wish to avoid the necessity of making a tedious, difficult and sometimes impossible investigation into the prior history of the title — such as the circumstances under which a previous holder acquired a negotiable instrument.

"Limping" titles would be avoided if all countries had the same relevant rules of law. Many of the differences in the commercial field are not large, but represent tenaciously held policy attitudes. With goodwill and common sense, a "world" commercial code developed from existing systems should not impose substantial changes on business life, after an initial period of adjustment. The benefits of a universal code would be great and in keeping with the concept of the law merchant. The obstacles depend almost entirely on the prejudice of lawyers and politicians for their own systems. Sensible yielding is required by local policy that has hardened through the ages, but which on dispassionate examination may not be so vital. But as things are, we cannot anticipate elimination of "limping" titles by a dramatic increase in uniformity of law.

"Limping" titles could be reduced by greater uniformity of choice of law rules; so that if J_1, J_2 — J_n all apply the *lex situs* to the validity of title, and have a similar interpretation of *situs*, there will be a high probability that validity of title will be decided in the same way in the 'n' jurisdictions. Many countries now use the *lex situs* as a fundamental choice of law rule in property conflicts. *Situs* has attained a special place as a choice of law determinant, not so much due to its intrinsic merits, as to history aided by frequent repetition of often superficial arguments by textwriters and judges, and by its embodiment in codes. So, the question is not simply: which choice of law determinant would be most reasonable and just in a particular jurisdiction? We have in existence a uniformity of law situation with regard to property choice of law rules, and since inter-

[135] "If all lawyers were made doctors overnight, they would flock to the dissecting rooms, for I am sure that they would prefer corpses to live patients. The lawyer starts, for example, by telling himself that he construes contracts so as to ascertain the intentions of the parties; but before long he has invented canons of construction and other rules which make things easier for himself but much more difficult for the parties who do not know the rules. The Sale of Goods Act is, I suppose, the custom of merchants as developed by lawyers, but developed to such an extent that most of it is now as strange to the average business man as the laws of contract bridge would be to the player who first thought of whist." Devlin, J., (1951) 14 Mod. L. Rev. at p. 251.

national security of titles is a desirable objective, we should take this into account. At this stage in the historical development of private international law, it is reasonable to take advantage of the uniformity which exists in the use of *situs*. On the other hand, were it ever decided by all countries to adopt a private international code for property, formulated, e.g. by a Commission of the United Nations, the *lex fori* might be preferred. At present, the best policy is to anchor choice of law rules to *situs*. It is not a delicate, metaphysical theory that is needed, but clear and sensible rules, so that lawyers can advise their clients with accuracy and confidence.

Conclusion

What code of private international law for *uti singuli* would one suggest for country J? *Situs*, as the basis for single interest problems, should be given a special definition (consistent with the true nature of property as value, enjoyment and use). It should be taken as the place where a function can be performed, namely the taking of possession where appropriate, or the exercise of the relevant rights, such as the receipt of interest, the transfer of title, the redemption of a bond, the presentation of a promissory note for payment. A title or an interest should be valid, if valid at the material point of time by the law of a *situs*.[136] Supplementary rules will be needed to cover the exceptional case where two or more parties to a dispute have (simultaneously) a valid title at the material time by the law of a *situs*. The supplementary rules can be based on "centre of gravity". The valid execution of formalities such as registration would be referred to the law of the place where the formalities were attempted. Having regard to what has been said above, because of the difficulties of assessing priorities among a mixed collection of interests, security rights should be recognized if validly created by the law of a *situs* unless public policy provides a good reason for rejection in a particular case, and determination of priorities should be by the *lex fori.*

Consider an intangible which is enforceable in more than one jurisdiction, for example, an international bond issue by country J_3

[136] An attempt has been made in the American Uniform Commercial Code, ss. 9-102, 103, to give precision to the idea of *situs* by rules governing property such as book-debts, mobile goods (e.g. cars owned by a car rental agency), "incoming goods already subject to a security interest," and "general intangibles." The result is a rather artificial scheme which may be justified in the circumstances, because the main interest is inter-state conflicts and the Code is premissed on uniform acceptance of its provisions. If an adaptation of Section 9 of the Code were developped in a Canadian province, the pre-existence of a large regional uniformity to the south might justify acceptance of the substance of ss. 9-102 and 103 in the Canadian province.

where the bonds are redeemable in J_1, J_2, or J_3, at the option of the holder. The question may be whether a statute of J_7 affecting property in that jurisdiction, will apply to these bonds, and this may really amount to an interpretation of the J_1 statute — what property was intended to come within its scope. Suppose it to be a taxing statute: did the legislators in J_1 intend to bring within the taxation net a bond issued in J_3, let us say to a national of J_2 domiciled there, the bond being redeemable in J_1, J_2, or J_3? This problem is not really one of choice of law, but of statutory interpretation.[137] It is possible to have a choice of law problem, where, (with our definition) the *situs* is in J_1 and J_2. Let the issue be whether there has been a transfer of title A-B of a *res*, having a *situs* both in J_1 or J_2. It would seem reasonable (as indicated above) for J_f to consider a transaction valid if it is valid by the law of a *situs*.

Both contract and property issues may be involved simultaneously and there may be no obvious way of preferring one set of rules to the other. Let the issue be whether a sale contract is valid and (depending on this) whether the A-B transfer of title has occurred. Assume, this time, that J_1 is the proper law of the contract, that J_2 is the *situs*, and that the contract is invalid in J_1 but the title transfer is valid in J_2.[138] One approach would be for J_f to devise rules of characterization to cover this situation, such as that the court should classify the issue as "contract" if the contract aspect seem to be more dominant than the property aspects, or something of that sort. A simpler way is to apply the same kind of reasoning as for multi-valued *situs* problem. There are two available solutions (in J_1 and J_2) one for and one against validity. We can, again, prefer the "valid" solution. Supplementary rules are only needed for the exceptional case of a simultaneous plurality of valid titles among the disputants. This very unusual siutation can again be solved by "centre of gravity" rules.

For reasons that have been discussed, it does not seem necessary or logical to have general recognition of foreign property judgments. If events happen which give rise to a property issue, this produces

[137] This was made clear in *Smith* v. *Lévesque* [1923] 3 D.L.R. at p. 1063. Duff, J. referred to the question of determining *situs* for the purpose of probate jurisdiction and considered the essential element to be that the "subjects in question could be effectively dealt with within the jurisdiction." This was quoted with approval by Lord Dunedin in the Privy Council: *Brassard* v. *Smith,* [1925] A.C. 371, 376, [1925] 1 D.L.R. 528 at p. 532 and in *Brown, Gow, Wilson* v. *Beleggings,* [1961] O.R. 815, at p. 833. See also *Industrial Acceptance Corporation* v. *LaFlamme,* [1950] O.R. 311; *English* v. *Donnelly,* [1958] S.C. 494.

[138] In practice, the proper law will often be either the *lex loci contractus* or the *lex loci solutionis*. With the definition of *situs* used here, the *lex situs* and the *lex loci solutionis* will tend to coincide.

(at least theoretically) an immediate "attitude" in all jurisdictions. If we have jurisdiction J_1, J_2, J_n and an event with property implications, then when that event happens, by the law of each of the J's, legal consequences (variation of legal rights) have or have not taken place. At this stage we do not have a judgment of a court, but we can form an opinion on the law. Later, there may be a judgment in one of the foreign jurisdictions, but the forum should abide by its own solution of the problem (determined according to the applicable choice of law rules).

In so formulating our code for a hypothetical jurisdiction, we arrive at fairly simple rules. We distinguish between single-interest and multi-interest problems, so that, for example, in a question as to the validity of A's title, the *lex situs* is applied, whereas in an assessment of priorities (including consideration of foreign security interests) the applicable law is the *lex fori*. The concept of *situs* is defined in the way that has been indicated. The formal validity is according to the law of the place of execution or attempted execution. Some will find this scheme over-simple. But the purpose of law is to solve disputes, not to give intellectual pleasure.