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TANGIBLE PROPERTY AND THE CONFLICT OF LAWS

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IT IS the purpose of this article to consider some of the conflict of laws problems dealing with movable chattels and perhaps it would be well at the outset to delineate the scope of the examination herein. Parties may enter into contractual relationships concerning tangible chattels under circumstances in which no new property interests in the goods will be created, or there may be situations (contractual or otherwise) as a result of which property rights will be transferred. Of this latter group are considered only those instances in which the parties have entered into an agreement, the effect of which is to transfer some property right in tangible goods,¹ and an examination will be made of some of the most illustrative cases to determine the principles operative in such decisions.

This classification then excludes consideration of property rights arising *post mortem*; the rights of creditors on both involuntary and voluntary transfers of goods; and property rights of spouses in the goods of each other, which are commonly considered under a discussion of matrimonial property. So also are excluded dealings with goods in executory contracts that pass no interests by the law governing the property itself,² which would require a detailed study of the conflict of laws governing contracts.

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¹ Caldwell, P. J., in *Cable Co. v. McElhoe*, 58 Ind. App. 637, 647, 108 N.E. 790, 794 (1915): "Any contract may present itself for construction in either of two aspects, perhaps both. Thus it may involve the personal rights, duties and obligations of the parties to it, under its terms, or it may relate to the title to, or interest in, property transferred or reserved by it. These distinctions are important in determining questions of the conflict of laws."

² See Goodrich, *Conflict of Laws* (1927), 347: "An executory contract regarding a chattel is governed by the law governing the contract, though its effect in creating or transferring an interest in the property is governed by the law of the situs."

Based upon the authority of medieval jurists, Story laid down a rule in these words:

"It follows, as a natural consequence of the rule which we have been considering, (that personal property has no locality), that the laws of the owner's domicil should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be *inter vivos*, or be *post mortem*. And this is regularly true, unless there is some positive or customary law of the country where they are situate, providing for special cases, (as is sometimes done), or from the nature of the property, it has a necessarily implied locality."³

This then is the rule "*mobilis sequuntur personam*."

But if this ever was a rule of law, its basis upon medieval conditions has long been outgrown by circumstances of travel and circumstances of ownership of property in more than one state.⁴ Many practical and theoretical arguments can be advanced for a rule that the law of the state where the property is actually located should be operative in determining interests in goods. Westlake says:

"On the whole, the arguments which have been used in support of the maxim *mobilis sequuntur personam*, understood as regulating dealings with movables by the personal law of their owner, cannot be pronounced satisfactory: and the reader will be prepared to find that in the nineteenth century the current of authority, out of England, has set strongly toward the application of the *lex situs* to movables as well as to immovables, in all cases except those of the so-called universal assignments."⁵

Story himself recognized that there were possible exceptions to the rule "*mobilis sequuntur personam*" and in later editions of his work it was noted that the exceptions had become more frequent than the application of the original rule.⁶

While Wharton disputed his hypothesis,⁷ Story had a great influence

³ Conflict of Laws (4th ed. 1852), § 383.

⁴ Foote, Private International Law (5th ed. 1925), 284:

"Notwithstanding the general principle that movables are governed by the law of the domicil of the owner, it has been already stated that this principle does not apply to the alienation by the owner of movables by transfer *inter vivos*. Such transfers are, in fact, regulated by the law of the place where the movables happen to be (*lex situs*) which is usually also the place where the forms of transfer are gone through."

See also, *Schmidt v. Perkins*, 74 N.J.L. 785, 67 Atl. 77 (1907); *Farmers' & Mechanics' Nat. Bank v. Loftus*, 133 Pa. 97, 19 Atl. 347 (1890).

⁵ Westlake, Private International Law (7th ed. 1925), 193.

⁶ Story, Conflict of Laws (8th ed. 1883), § 382 n. (a):

"The exceptions to the maxim *mobilis sequuntur personam* have become so numerous that it cannot be safely invoked for the decision of any but the simplest cases at the present day; if indeed a case can ever be safely decided upon a maxim. The exceptions would probably be less frequent if the maxim were *lex situs mobilis regit*. But no maxim is needed; any would be apt to mislead."

⁷ Wharton, Conflict of Laws (3d ed. 1905), § 297 *et seq.*

upon the courts and his statements are to be found in many decisions based thereon.⁸ Perhaps the lingering effect of Story's theory has been extended by the cases of distribution of property on testate and intestate succession where the rule is universally stated to be that the law of the domicile of the decedent operates upon movables.⁹ This seems to have resulted from frequent repetition rather than by an analysis of the problem which would indicate, instead of the operation of the law of the domicile, operation of the law of the situs¹⁰ which will be considered presently. A similar treatment of the problem has been found (until quite recently) in the language of the courts regarding matrimonial property rights.¹¹

⁸ See *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636 (1894); *Edgerly v. Bush*, 81 N.Y. 199 (1880); *Farmers' & Mechanics' Nat. Bank v. Loftus*, 133 Pa. 97, 19 Atl. 347 (1890).

⁹ The text writers lay this down categorically. *E.g.*, see Foote, *supra* note 4, 315: "It will have been already gathered from what has been said as to the law which governs the disposition of personal chattels by will, that the same principle of the *lex domicilii* applies to succession to personal chattels *ab intestato*."

Westlake, *supra* note 5, § 59, 109:

"The law of a deceased person's last domicile governs the beneficial interest in the surplus of his personal property, after payment of his debts, funeral expenses, and expenses of administration, that is, of getting in and distributing such property; and this, whether in the case of testacy or in that of intestacy."

Dicey, *Conflict of Laws* (5th ed. 1932), 799, rule 193 (a):

"The succession to the movables of an intestate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where . . . (4) the movables are, in fact, situate at the time of his death."

The Restatement, *Conflict of Laws* (student ed. 1934), §§ 300-303, sounds in domicile; *e.g.*, § 303:

"The movables of one who died intestate which remain in the state after the estate is fully administered are distributed to the persons who are entitled to take by the law of the state of his domicile at the time of his death."

¹⁰ Goodrich, *supra* note 2:

"The devolution of personalty upon the death of the owner, intestate, is governed by the law of the domicile of the decedent at the time of his death. The underlying theory is that the law of the situs of the property in reality controls the devolution, but for convenience the law of the domicile is looked to in order that all the property may pass as one estate." (368). "It is believed that the distribution of the decedent's property is in every case governed by the law of the situs of the property." (371).

¹¹ Harding, *Matrimonial Domicil and Marital Rights in Movables*, 30 Mich. L. Rev. 859, 871 (1932):

"However, an examination of these cases shows that almost all present no conflict between situs and domicile, the two being the same. In the cases where the conflict is actually presented we find confusion. In numbers, the cases following the domiciliary law have a majority. If we omit the cases decided during the uncontested reign of the *mobilia* maxim, say prior to 1865, we find evidence of a tendency toward acceptance of the view herein advanced. About all that can be said of the present state of the law is that it appears to be in a state of transition. The cases are few except in the community property states, where the matter is growing in importance. *It is believed that the rule favoring the law of the situs is both more logical and more convenient, but the force of accumulated precedent must be acknowledged.*" (Italics ours)

In these two instances of rights upon intestate succession and matrimonial property rights the rule is undoubtedly a very convenient one and that fact may induce the courts to continue the principle as a matter of expediency. In the early cases concerning movables a hopeless maze of decisions repeated Story's doctrine as *dicta*, and at the same time decided that the law of the situs, place of contracting, or of the forum governed. In a number of decided cases the property was actually located at the domicile of the owner, leading to a confusion of rules, the courts stating that the maxim *mobilia sequuntur* applied but the actual decisions being consistent with the rule of the situs governing.¹²

As late as 1901, in discussing the operation of the rule of the situs, Raleigh C. Minor wrote:

"... in one New York case it was held that even though the suit was brought in the *locus contractus*, the transfer being valid there, it would not be sustained if invalid by the law of the actual situs of the chattels at the time of the transfer. *This case would seem to go too far in support of the lex situs*. *Guillander v. Howell*, 35 N.Y. 567. Mr. Wharton also goes to great lengths in giving effect to the *lex situs*, claiming that it is the 'proper law.' Whart. Confl. L. §297 et seq. *The true rule is that the law of the actual situs is effective only when it is also the lex fori, the lex loci contractus, or the lex domicilii. Standing alone, it is of no significance.*"¹³ (Italics ours.)

But even at the time that Minor wrote, the cases were beginning to recognize that the rule of the domicile was not the proper rule and now it may unquestionably be stated that tangible personal property has a situs of its own and that, generally, the law of that situs governs. The Restatement of the Law of Conflict of Laws (student ed. 1934) provides that capacity to convey a chattel,¹⁴ the formalities of conveyance,¹⁵ the validity in substance of a conveyance¹⁶ and the nature of the interest created by a conveyance of a chattel¹⁷ are all determined by the law of the place where the chattel is situated at the time of the conveyance—definitely recognizing the effect of the law of the situs of movable property.

¹² E.g., Goodrich, *supra* note 2, 349, cites *Nichols v. Mase*, 94 N.Y. 160 (1883), with this comment:

"the Court stressed the law of the place of contract, quoted approvingly a statement that the domiciliary law governed and rendered a decision which applied in fact the law of the situs of the property."

¹³ Minor, *Conflict of Laws* (1901), 300, n. 9.

¹⁴ § 255. See also Dicey, *Conflict of Laws* (5th ed. 1932), 606:

"Rule 151 (b)-(I). A person's capacity to transfer or assign or to accept the transfer or assignment of a movable or an interest therein is governed, in the case of ordinary gifts and commercial transactions taking place in the country where the movable is situate at the time of the transfer or assignment, by the law of that country (*lex situs*)."

Cf., Dicey, *Conflict of Laws* (3d ed. 1922), 560, where he stated the rule as that of the domicile, but followed it with a question mark.

¹⁵ § 256.

¹⁶ § 257.

¹⁷ § 258.

An application of the modern rule is found in the English case of *Cammell v. Sewell*.¹⁸ There Simpson and Whaplate, of England, purchased a quantity of lumber in Russia for shipment to England on a Prussian ship. The ship put into a Norwegian port due to shifting of cargo and while there drifted from anchor and was so badly damaged as to be beyond repair. The captain, in accordance with Norwegian law, sold the lumber to one Clausen who issued a bill of lading on the goods to the defendant in England in exchange for an advance. The defendant received and sold the lumber and plaintiff, who had insured the cargo for Simpson and Whaplate, sued defendant in trover for the amount of the proceeds. Had the transaction taken place in England, this would not have passed good title to Clausen. The English court held for the defendant, stating that if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere. Dicey approves this result:

"A transfer of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situated at the time of the transfer (*lex situs*), wherever such transfer is made, is valid."¹⁹

As Norway had jurisdiction over the harbor and over the land on which the lumber was unloaded, it is not unreasonable to state that Norway also had jurisdiction over the lumber itself and the English court recognized this in declaring that the law of the situs of the movables governed their disposition.

Suppose, however, the lumber had been damaged by water and that the captain of the Prussian boat felt it for the best interests of the English owners to make a contract with Clausen to complete the transport to England and there deliver the lumber to Clausen? At first this would appear to be a contract only, the validity of which would depend upon the law applicable to the contract—probably England as the place of performance—and therefore Clausen would take nothing when the question was tested in an English court. But this overlooks an important element: What was the effect of this contract in Norway *as passing an interest in the goods*? Whether the question is as to the *capacity* of the ship captain to act in reference to the goods or the *nature of the interest* created in the goods, the Restatement, Conflict of Laws (student ed. 1934) points out²⁰ that the law of Norway must be considered and would control. It is, however, only where Norwegian law would create an interest in the chattels that this law should be operative.

¹⁸ 5 H. & N. 728 (1860).

¹⁹ Dicey, Conflict of Laws (5th ed. 1932), 608, rule 152 (g).

²⁰ (Student ed. 1934), §§ 255-258.

In the *Sewell* case, Cockburn, C. J., felt some of the difficulty in this hypothetical situation. He said:

" . . . If a person sends goods to a foreign country, it may well be that he is bound by the law of that country, but here the goods were wrecked on the coast of Norway, and came there without the owner's consent. Could the arrival of the goods there enlarge the captain's authority?"²¹

And concluded:

"Although the goods in question were at one time the property of English owners, the property in them was transferred to others by a sale valid according to the law of Norway, a country in which the goods were at the time of such sale. . . ."²²

While the decision was for the plaintiff without answering this point, another basis upon which the decision might have been placed is that the goods had been entrusted by the agent of the English owner to the captain of the ship and that the captain had voluntarily brought them within Norwegian territory where the wreck took place. This would be within the agency of the captain and a consent of the owner to the jurisdiction of Norwegian law. This possible explanation of the case would harmonize its conclusion with the rule of a number of states which distinguish between voluntary and involuntary subjection of chattels to the territorial sovereignty of a particular jurisdiction, a theory which will be discussed more fully subsequently.

A similar question arose in *Charles R. Dougherty Co., Inc. v. Krimke*,²³ where plaintiff delivered a diamond to a firm in New York giving authority for sale of the goods. Without the knowledge or consent of the plaintiff the firm pledged the diamond with the defendant in New Jersey. In an action of replevin brought in New Jersey, the trial court instructed the jury to return a verdict in favor of the plaintiff if they found that the transaction between the plaintiff and the New York firm did not constitute a sale. A verdict was returned for the plaintiff. On appeal it was held that the judgment be reversed upon the ground that, under the New York Factors' Act, the firm had the power to make the pledge—thus applying the law of the situs of the transfer between plaintiff and the New York firm in determining the interest created in the goods and the capacity of the taker of the goods to transfer them.

Two early Louisiana decisions may be noticed in which the courts reached results clearly consistent with the law of the situs. In *Olivier v. Townes*,²⁴ a transfer of a part interest in a ship was made in Virginia

²¹ 5 H. & N. 728, 734 (1860).

²² 5 H. & N. 728, 746 (1860).

²³ 105 N.J.L. 470, 144 Atl. 617 (1929); noted in 38 Yale L. J. 988 (1929).

²⁴ 2 Mart. (N.S.) (La.) 93 (1824).

where the owner resided, the ship at the time of the sale being in the port of New Orleans. Before delivery of the boat to the buyer, she was attached by creditors of the seller. By the common law of Virginia a sale of goods might be complete without delivery if delivery was impossible at the time of the contract and was made within a reasonable time after delivery became possible. By the law of Louisiana delivery was essential to vest title in the buyer. The creditors claimed that title was still in the seller, no delivery having taken place, and that they therefore took priority over the buyer, applying the Louisiana law. The buyer claimed that his interest had vested by application of the Virginia law. The court held that since the attaching creditors were residents of Louisiana and would be injured by the enforcement of the Virginia law, the law of the forum must be applied and the attachment sustained.

In *Thuret v. Jenkins*,²⁵ the facts were similar except that the ship was at sea at the time of the sale. Upon reaching port in Louisiana, the ship was attached by creditors of the seller. The court held for the defendant buyer, stating:

" . . . In transferring it, it did not work an injury to the rights of people of another country, it did not transfer the property of a thing within the jurisdiction of another government. If two persons, in any country, choose to bargain as to the property which one of them has in a chattel, not within the jurisdiction of the place, they cannot expect that the rights of persons, in the country in which the chattel is, will be permitted to be affected by their contract. But if the chattel be at sea, or in any other place, if any there be in which the law of no particular country prevails, the bargain will have its full effect *eo instanti*, as to the whole world; and the circumstances of the chattel being afterwards brought into a country according to the laws of which the sale would be invalid, would not affect it."²⁶

Another case which brings out the operation of the rule of the situs, although this principle was not clearly recognized by the court, was *Emery v. Clough*,²⁷ which involved a gift *causa mortis*. A bill was brought for discovery of assets. The defendant and the intestate were domiciled in New Hampshire but were temporarily in Vermont where the intestate became ill. As a gift *causa mortis* he delivered a bond and a sum of money to defendant with instructions to deliver it to third persons after his death, and the delivery was accordingly made. This procedure would have been valid by the law of Vermont but not by the law of New Hampshire, which required a petition to the probate court with the testimony of two disinterested witnesses to the transaction within sixty days after the death of the donor in order to effectuate the transfer.

²⁵ 7 Mart. (La.) 318 (1820).

²⁶ 7 Mart. (La.) 318, 354 (1820).

²⁷ 63 N.H. 552, 4 Atl. 796 (1886).

The court held in favor of the defendant upon these arguments: A gift *causa mortis* is not a testament so title did not vest in the administrator; if it was a contract, in this case it was executed in Vermont in the lifetime of the intestate; if it was not a contract, as the term is commonly understood, it was a gift which received the assent of both parties and nothing remained to perfect the conditional title of the donees before the decease of the donor.

But in reality a gift *causa mortis* is neither a transfer inter vivos nor a testamentary disposition, although it is of the nature of both. The court drew an analogy to contract because a gift *causa mortis* requires consent. But such a transaction is not contractual, since a contract is the result of bargaining, and there was neither knowledge nor consent upon the part of the donees until after the death of the donor. Further, if this were a contract, it is possible that the governing law would be the place of performance by the delivery to the donees—in New Hampshire. Nor does the rule that the goods were governed by the domicile of the owner apply. While the court does not clearly state its position it is apparent that the only operative law which would satisfactorily explain the decision is that the law of the situs of the property, at the time of the creation of an interest therein, governed in the forum. Since the chattel was in Vermont with the owner, his acts there operated according to the law of the situs to pass a defeasible title to a third party, and the delivery to the defendant for transmission to the donee created a relationship analogous to a trust. The law of the situs of the chattel should operate as to the creation of an interest therein and any interest in a chattel, even though defeasible, which is valid by the law of the situs should be recognized in the state of the forum even though the latter is also the state of the domicile.

As Professor Goodrich suggests,²⁸ the clearest type of situation in which to test the inapplicability of the *mobilia sequuntur* rule is one in which none of the parties is domiciled at the actual situs of the goods and a decision of a court of the actual situs is carried to the Supreme Court of the United States upon a constitutional point. Such a case was *Green v. Van Buskirk*.²⁹

Bates in New York owned some safes which were located in Chicago. On November 3d, Bates executed and delivered to Van Buskirk in New York a chattel mortgage on the safes. On November 5th, before the mortgage was recorded and before Van Buskirk took possession of the goods, one Green, also of New York, attached the safes in Chicago for the debt of Bates, service upon attachment being by publication in accordance

²⁸ *Supra* note 2, 350.

²⁹ 5 Wall. (U.S.) 307 (1866); 7 Wall. (U.S.) 139 (1868).

with the Illinois procedure. There was a judgment and a sale to Green under an Illinois statute which provided that no chattel mortgage should be valid as against creditors unless possession were taken by the mortgagee. By the law of New York the mortgagee had a right superior to creditors of the mortgagor. Van Buskirk then sued Green in New York for the value of the safes and Green offered a certified transcript of the Illinois judgment. The courts of New York held that this transaction was governed by the law of New York as the domicil of the owners of the goods (all of the parties being domiciled in New York) and that the Illinois proceedings constituted no defense.

A writ of error being taken, this decision was reversed by the Supreme Court of the United States which held that the question was to be determined by the laws of Illinois, where the property was situated and where the proceedings were held and under which the goods were sold. The Illinois decisions and statute showed the policy of Illinois to take jurisdiction over chattels within its limits and this rule governed. For New York to refuse to recognize the Illinois judgment constituted a denial of full faith and credit thereto. In rendering the opinion Davis, J., stated in part:

"It would seem to be unnecessary to continue this investigation further, but our great respect for the learned court that pronounced the judgment in this case³⁰ induces us to notice the ground on which they rested their decision. It is, that the law of the state of New York is to govern this transaction, and not the law of the state of Illinois where the property was situated; and as, by the law of New York, Bates had no property in the safes at the date of the levy of the writ of attachment, therefore none could be acquired by attachment. The theory of the case is, that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge Story says, 'yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined.' It has yielded in New York on the power of the state to tax the personal property of one of her citizens, situated in a sister state (*People v. Commissioner of Taxes*, 23 N.Y. 225) and always yields to 'laws for attaching the estates of non-residents, because such laws necessarily assume that property has a *situs* entirely distinct from the owner's domicile.' If New York cannot compel the personal property of Bates (one of her citizens) in Chicago to contribute to the expenses of her government, and if Bates had the legal right to own such property there, and was protected in its ownership by the laws of the State; and as the power to protect implies the right to regulate, it would seem to follow that the dominion of Illinois over the property was complete, and her right perfect to regulate its transfer and subject it to process and execution in her own way and by her own laws."³¹

³⁰ *I.e.*, Supreme Court of New York.

³¹ 7 Wall. (U.S.) 139, 149 (1868).

While this decision is binding only in the case of questions involving the full faith and credit clause, and the court expressly excluded other operation of the rule, it does indicate an adherence by the Supreme Court of the United States to the view that the situs should, in general, control. "The rule which looks to the law of the situs has the merit of adopting the law of the jurisdiction which has actual control of the goods and the merit of certainty."³² This rule also avoids determining the problem, frequently difficult, of domicils of conflicting claimants.

Perhaps it may be objected that we have stated too broadly a rule that the law of the situs is everywhere to be given effect. Certainly there are cases in which this rule does not seem to be applied and a further consideration of the problem requires an examination into the fundamental theories of jurisdiction over tangible property. For the purpose of raising this point, let us suppose that property is removed, without the consent of the owner, from one state to another state and there disposed of in accordance with the law of the latter and the goods again come into the state of the original owner; what attitude shall there be taken toward this proceeding? There are two possible angles to such problem: (1) The conflict of laws rule of the forum concerning its own power over the chattel by virtue of the present situs there; and (2) the conflict of laws rule of the forum concerning the jurisdiction of the state to which the goods were removed without the consent of the owner. A typical situation arose in *Edgerly v. Bush*.³³

There one Baker mortgaged a pair of horses to Edgerly in New York, the mortgage being there recorded and containing a clause which gave Edgerly a right to take possession of the horses if Baker should remove them. Apparently New York applied the title theory of mortgages. Baker took the horses without Edgerly's knowledge into Canada where they passed to the possession of a horse trader and from him to the defendant, Bush, who was domiciled in New York. Canadian law treated the transfers as sales in market overt by which the purchasers in Canada would have acquired good titles. Bush left the horses in Canada. When plaintiff learned of the transfer to Bush, he made a demand for the horses and on refusal to deliver brought trover. The court held for the plaintiff, giving several possible reasons for the decision but without specifying which reason governed:

³² Swayze, J., in *Lees v. Harding, Whitman & Co.*, 68 N.J. Eq. 622, 60 Atl. 352, 355 (1905), considered *infra* note 87.

³³ 81 N.Y. 199 (1880). Accord, *Ensley Lumber Co. v. Lewis*, 121 Ala. 94, 25 So. 729 (1899).

"Thus the law of the domicile, and the law of the then *situs* of the property, and the law of the forum in which the remedy is sought, all concur to sustain the right of the plaintiff. The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him. By that law as it exists in this case, the plaintiff became the owner of this property before it was taken beyond its operation. By that law, too, an owner of property may not be divested of it without his consent, or by due process of law; plainly not by a dealing with it by others without his knowledge, assent or procurement. . . .

" . . . We doubt whether in a case like this, where, after a title of property has been acquired by the law of the domicile of the vendor, and of the *situs* of the thing, and of the forum in which the parties stand in a contest between citizens of the State of that forum, it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another State, and a sale of it there under different laws. There are decisions that it has not, however. . . ."³⁴

While the court mentions "domicil," if the decision means to apply the law of the domicil, we have already seen that that rule is inconclusive and erroneous; further, should the domicil of a mortgagor or mortgagee (seller or buyer) govern? Nor is there any sound reason for contending that citizenship, as distinguished from domicil, should enter into a determination; here the point would be immaterial since mortgagor, mortgagee and the purchaser were citizens of New York. Nor should a state, as a matter of conflict of laws, apply its municipal law of sales simply because it happens to be the forum of a proceeding involving a sale. Again, the fact that the law of Canada with respect to the passing of title differs from that of New York is insufficient to justify New York in refusing recognition to a title created by Canadian law.

If however Canada had no *jurisdiction* over the chattel, then no consideration need be given to the effect of a transaction in Canada regarding the goods. Professor Beale, in writing upon this situation, advanced the argument that no jurisdiction existed. Professor Beale argued as follows:

"(1) Ownership is a legalized relationship between a person and a thing. The owner's property does not exist in the thing alone, but in the person of the owner as well. It follows that:

"(2) Jurisdiction over the thing does not necessarily involve jurisdiction over the person or over his interest in the thing. Usually the state in which a chattel is, has jurisdiction over the owner's interest; for in the ordinary case the owner has submitted his interest to the jurisdiction of the state by belonging to or being in the state, or by permitting his chattel to be there, or by confiding it to another who permits it to be there. But if the owner has done nothing to submit his interest to the law of the state where the thing is, there is no jurisdiction in that state to affect the rights of the absent person. The state may, to be sure, exercise jurisdiction over the thing, insofar as the owner's interest is untouched. It may destroy the thing, thus destroying incidentally

³⁴ 81 N.Y. 199, 203, 205 (1880).

the owner's interest in it; but it requires no jurisdiction to do so—a private wrongdoer may do the same. . . .

"(3) If the state where the thing is has no jurisdiction over the absent owner's title, any provision of its law by which his interest as owner is affected, will be given no force abroad."³⁵

This argument was incorporated into section 268 of the Student Edition of the Restatement of the Law of Conflict of Laws³⁶ which reads as follows:

"(1) If, after a chattel is validly mortgaged, it is taken into another state without the consent of the mortgagee, the interest of the mortgagee is not divested as a result of any dealings with the chattel in the second state.

"(2) Dealings with the chattel in a state into which it is taken without the consent of the mortgagee may result in new liens which have preference over the mortgage."

And comment c thereto reads:

"Under the rule stated in this Section, the interest of the mortgagee is not divested by any dealings with the chattel in the second state whether such dealings consist of a sale by the mortgagor to a purchaser for value and without notice or of an attachment or execution levied by a creditor of the mortgagor. It is immaterial that the mortgage has not been recorded in the second state."

The reasoning of Professor Beale and section 268 of the Restatement is predicated upon a differentiation of "jurisdiction over a chattel" into two senses of "jurisdiction over the rights of the owner" and "jurisdiction over the res," contending that mere jurisdiction over the res cannot and does not give the power to pass title as against the interest of the true owner and that such a transfer is entitled to no recognition. It would seem to follow that if the state had no "jurisdiction" in that sense, such transaction should pass no rights as against the first owner *even in the state purporting to exercise jurisdiction*. In that situation it would be necessary either to revise our concept of "jurisdiction," or for that state to change its municipal law by yielding to the argument just advanced, in which case the situation would never again arise.

Suppose that we extend our reasoning upon the soundness of this

³⁵ J. Beale, Jurisdiction over Title of an Absent Owner in a Chattel, 40 Harv. L. Rev. 805, 811 (1927).

³⁶ Compare the terminology of § 268 (Student Edition, 1934) with that of § 288 (Proposed Final Draft no. 2, 1931) which it revised:

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

It is apparent that there has been no substantial modification of the original § 288. See also, § 52 (Proposed Final Draft no. 1, 1930) which was omitted from the final revision.

differentiation by imagining in the *Green v. Van Buskirk* situation that the iron safes had been taken by the mortgagor from New York to Illinois *without the consent of the mortgagee*, assuming that by New York law the effect of a chattel mortgage was to give a title interest subject to defeasance upon performance of the conditions of repayment. Assuming, then, that the creditors of the mortgagor attached the safes in Illinois, notified non-resident parties in interest by publication, and sold the safes to Green; and that suit was brought in New York by the mortgagee against the purchaser, who pleaded the Illinois judgment under the full faith and credit clause—what result? What difference before the United States Supreme Court would the contention make that the removal had been without consent? It is submitted that the result would be the same and the holding would be that Illinois did have *jurisdiction*.

The term "jurisdiction" may perhaps be used in two senses or, rather, as applied to two types of situations. The first sense in which the term "jurisdiction" may be used is within the constitutional law meaning, particularly under the Federal Constitution. The question may arise in one of two ways: (1) Where a state wishes to assume jurisdiction, will the Constitution prohibit it; and (2) where a state wishes to refuse jurisdiction, will the Constitution require jurisdiction.³⁷ The case of *Green v. Van Buskirk* falls within the first aspect if the problem is viewed from the desire of Illinois or of New York to *assume* jurisdiction—as to Illinois, refusing to recognize the interests of the New York mortgagee, and as to New York, refusing to recognize the interests of the Illinois purchaser. If we confine a discussion of the situation in which property has been removed, without the consent of the owner, into a second state which acts through its *judicial machinery* upon the rights of an absent claimant upon such notice as constitutes due process of law, the jurisdiction of the court is not invalid in the constitutional sense and the judgment resulting from the exercise of such power must be recognized by the operation of the full faith and credit clause.

The second use of the term "jurisdiction" is in the conflict of laws sense where a judgment of a court is not involved. The Restatement, Conflict of Laws (student ed. 1934), section 42, topic, Definition and Character of Jurisdiction, states:

³⁷ See E. M. Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 Harv. L. Rev. 533 (1926); G. W. C. Ross, Has the Conflict of Laws Become a Branch of Constitutional Law?, 15 Minn. L. Rev. 161 (1931); Schofield, The Supreme Court of the United States and the Enforcement of State Law by State Courts, 3 Ill. L. Rev. 195 (1908); Cook, The Powers of Congress under the Full Faith and Credit Clause, 28 Yale L. J. 421 (1919).

"As used in the Restatement of this Subject, the word 'jurisdiction' means the power of a state to create interests which under the principles of the common law will be recognized as valid in other states."

While an illustration to section 42 refers to a situation in which a court has rendered judgment, it seems that as used in the conflict of laws sense judgments may be excluded from the second group. Then jurisdiction, in this sense, would be confined to situations in which one state had acted upon rights and, the question arising in a second state, that second state would under its own rules of conflict of laws recognize rights created by the operative factors which had arisen elsewhere.

To repeat, we have already seen from the case of *Green v. Van Buskirk* that the exercise of jurisdiction over a tangible chattel affecting rights of an absent claimant is valid from the standpoint of the due process clause of the Federal Constitution. That decision, holding that the judgment of the Illinois court comes within the purview of the full faith and credit clause of Article IV, Section 1, of the Constitution, may be taken as an application of the theory that physical "power" over the res equals "jurisdiction." As we have observed, although jurisdiction in the foreign judgment sense existed in the Illinois court under the facts of *Green v. Van Buskirk*, the Supreme Court of the United States declined to consider the more frequent type of case, *i.e.*, where no *judicial proceedings* are involved, the court stating:

"We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicil will be respected by the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located has [*sic*] prescribed a different rule of transfer with that of the State where the owner lives."³⁸

Is it not arguable that a state may provide that as to sales within its borders of goods claimed by other persons, the purchaser shall be considered owner; that such a rule does not constitute a denial of due process of law; and that the law of such state has "jurisdiction" over the goods? It seems that in such situation the term "jurisdiction" should be concerned only with the physical control over the res itself, and that this automatically includes jurisdiction over personal rights therein which will be operative *within the borders of that state and within the borders of such other states as recognize this use of "jurisdiction" as a matter of their own conflict of laws principles.*

³⁸ 7 Wall. (U.S.) 139, 150 (1868).

It has, however, been argued that such procedure might be a violation of either the due process clause or the full faith and credit clause of the Constitution.³⁹

A proposition has definitely been advanced that the full faith and credit clause is sufficiently extensive in scope to require extraterritorial recognition of state statutes creating rights;⁴⁰ but in spite of the fact that at least one United States Supreme Court decision⁴¹ so states in *dicta*, we must here omit any discussion of that problem with a suggestion that that does not yet seem to have become settled law.

Another argument, which seems to have as its basis the due process clause, is that a different rule should be applied in conflict of laws cases because, under the "vested rights" theory, an error involves not only local law but "foreign rights." The language of Professor Beale and of section 268 (student ed. 1934) of the Restatement would indicate that the second state into which property was removed improperly, (usually meaning, thereby, without the consent of the "owner" as determined by the law of the first state), had no jurisdiction to deal with the property in such way as to affect the rights of the owner in the first state. This argument proceeds upon the premise that there is always some one, and only one "proper law" which has jurisdiction or power to attach legal consequences to a given situation in the conflict of laws and that when the "appropriate law" has created "rights" their validity cannot be impeached.⁴²

Although there are some decisions, particularly in the field of torts,⁴³ which seem to support such position, it should be borne in mind that it has generally been accepted doctrine of the Supreme Court of the United States that judicial error in the application of conflict of laws rules does

³⁹ For a summary of this position see Dodd, *supra* note 37, 538 *et seq.*

⁴⁰ See Langmaid, The Full Faith and Credit Required for Public Acts, 24 Ill. L. Rev. 383 (1929); Field, Judicial Notice of Public Acts under the Full Faith and Credit Clause, 12 Minn. L. Rev. 439 (1928); Schofield, 13 Ill. L. Rev. 43 (1918) (comment).

⁴¹ Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932).

⁴² The problem has been discussed by a number of writers. See Beach, Uniform Interstate Enforcement of Vested Rights, 27 Yale L. J. 656 (1918); Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale L. J. 457 (1924); Cook, Recognition of "Massachusetts Rights" by New York Courts, 28 Yale L. J. 67 (1918); E. M. Dodd, *supra* note 37; Isaacs, Handbook on the Conflict of Laws, 41 Harv. L. Rev. 108 (1927) (book review); Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 Yale L. J. 736 (1924); De Sloovere, The Local Law Theory and Its Implications in the Conflict of Laws, 41 Harv. L. Rev. 421 (1928); Stumberg, Conflict of Laws. Foreign Created Rights, 8 Tex. L. Rev. 173 (1930); Yntema, The Hornbook Method and the Conflict of Laws, 37 Yale L. J. 468 (1928).

⁴³ E.g., Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198 (1918); Slater v. Mexican Nat. R.R., 194 U.S. 120 (1904). And see Cook, Recognition of "Massachusetts Rights" by New York Courts, 28 Yale L. J. 67 (1918).

not raise a federal question under the due process clause.⁴⁴ The theory of "vested rights" has been subjected to severe criticism⁴⁵ and in its place attention has been directed to what the courts have actually done, and a similar treatment will be followed herein. As has been pointed out by Professors Cook,⁴⁶ Lorenzen⁴⁷ and others, the rules of conflict of laws have developed and today are being applied from the standpoint of local policy and expediency which may result in a court, in a given situation, coming to the conclusion that it should not declare a certain rule of law, *i.e.*, that the court by its law of conflict of laws does not have "jurisdiction." In other words, there is in reality no foreign right enforced or denied by the forum which, for the first time, declares the existence or nonexistence of a right in question creating (in the former case) at once the right and the remedy, rather than enforcing or denying foreign created rights. This approach is altogether different from declaring positive rules of law into principles limiting the *power* of a state to authorize its courts to pass upon rights of individuals in reference to a particular subject matter in controversy; and a consideration of the cases in this field will show that the courts have actually operated in opposition to any supposition that they were in fact without jurisdiction (power) to act.

Our conclusion, therefore, would be that a state having control over tangible property does have jurisdiction to affect interests of foreign

⁴⁴ *Central Land Co. v. Laidley*, 159 U.S. 103 (1895); *Patterson v. Colorado*, 205 U.S. 454 (1907); *Kryger v. Wilson*, 242 U.S. 171 (1916); *Marin v. Augedahl*, 247 U.S. 142 (1918); *Milwaukee Electric Light Co. v. Wisconsin*, 252 U.S. 100 (1920).

There has been an apparent recession from these principles as may be illustrated by *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924), noted in 25 Col. L. Rev. 494 (1925), 20 Ill. L. Rev. 72, 822 (1925, 1926), 38 Harv. L. Rev. 804, 826 (1925), 23 Mich. L. Rev. 643 (1925), 9 Minn. L. Rev. 287 (1925), 3 Tex. L. Rev. 286 (1925); *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544 (1925); *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), noted in 15 Minn. L. Rev. 236, 39 Yale L. J. 422 (1930), 40 Yale L. J. 291 (1930); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932).

Professor Dodd, *supra* note 37, 560, has suggested that "the Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity in the field of conflicts. . . ."

Professor Yntema, however, states: "In these situations, strong economic and governmental motives are in operation behind the formulae, so that from the practical point of view it would at the present time be unsafe and unsound to generalize the dicta in these decisions into a theory of unlimited federal competence in the field of conflict of laws. The point worth noting, however, is that under the vested rights doctrines, there is no logical stopping place short of this result." Yntema, *supra* note 42, 482 (1928).

⁴⁵ See citation of articles *supra* note 42.

⁴⁶ Cook, *supra* note 42.

⁴⁷ Lorenzen, *supra* note 42.

claimants and it would be immaterial whether its law was applied judicially or by the simplest form of dealings with the goods by interested parties. The matter of conflict of laws, then, is a matter of local law of the forum based upon its own ideas of expediency and policy. When the physical control of the res comes before the forum or when it secures personal jurisdiction in a judicial proceeding over interested parties, it seems clear that it may or may not recognize the transfer of interest which has occurred elsewhere; it may, or may not, give effect to the "jurisdiction" exercised by another state in a nonjudicial transfer. It appears, however, that it is improper in such situation to declare that the former state had "no jurisdiction." Another state *may* recognize such jurisdiction although it *need not* do so, as *Edgerly v. Bush*⁴⁸ decided.

Upon that analysis, then, the determination of this question would depend solely upon the conflict of laws principles of each particular forum, and it remains to consider a number of situations in which these principles have been developed. A large number of cases involving the conflict of laws principles as applied to movable property have concerned chattel mortgages and conditional sales, in instances where there has been no compliance with the recording statutes of the state of the transfer or of a state to which the goods were removed and there conveyed to a third party.

Four possible types of situations may arise in reference to recording statutes.

1. Where an interest in goods is created by chattel mortgage or conditional sale in State *A* and the goods are removed to State *B*, both states requiring recordation to protect the interest of the chattel mortgagee or the conditional vendor, and the instrument of transfer is recorded in both states: In such case, no question is likely to arise since, by hypothesis, the law of both states has been complied with.⁴⁹

2. Where neither State *A* nor State *B* requires recordation of the instrument for the protection of the lien claimant: Such situation would present little difficulty. The forum would apply either its own municipal law that recordation was not necessary, or its conflict of laws principles regarding the validity of the interest created in State *A*, and the lien claimant would be protected. Due to the fact that almost all states have statutes requiring recordation no case on this proposition has been found.

⁴⁸ *Supra* note 33.

⁴⁹ It is possible that question might arise in the state of the forum upon the ground that the instrument did not comply with local forms of execution. No case has been found, however, and it is believed that in such situation the interest created in State *A* would be protected.

3. Where the law of State *A* requires recordation and the law of State *B*, to which the goods were removed, does not require recording to protect the interest of the chattel mortgagee or the conditional vendor, and there has been no compliance with the recording statute of State *A*: The rule has been to apply the law of the forum and to protect the chattel mortgagee or the conditional seller. This may be illustrated by two cases.

In *United States Fidelity & Guaranty Co. v. Northwest Engineering Co.*,⁵⁰ machinery was sold upon conditional sale in Wisconsin for immediate shipment to Mississippi for construction work in that state. By Wisconsin statute it was provided that such contract should be void as against attaching creditors without notice unless the instrument was recorded. By Mississippi law recording was not required. A creditor of the purchaser, without knowledge of the reservation of title, attached the property in Mississippi. It was held that the law of the situs of the property governed, and that the vendor's interest was not divested by his failure to record the instrument in Wisconsin. After quoting from *Minor, Conflict of Laws*⁵¹ the court, *per* Anderson, J., stated:

"It will be observed from the author's discussion of the question, and the authorities cited in support of his position, that the recording laws of a state only embrace personal property within that state; that they affect only the rights of persons dealing with property situated in that state, and have no extraterritorial effect when property is taken into another state. There seem to be no cases to the contrary. . . .

"... The parties to the contract were powerless to provide for the application to the contract of the recording laws of Wisconsin in this state, so as to affect the rights of third persons dealing with the machinery after it reached this state. Neither by contract nor comity could the recording laws of Wisconsin be brought into and enforced in this state in this case."⁵²

In *Marvin Safe Co. v. Norton*,⁵³ the plaintiff entered into a conditional sale contract with one Schwartz concerning a safe, reserving title until the purchase price was paid. The vendor resided in Pennsylvania where the contract was entered into and the buyer resided in New Jersey. The goods were taken to New Jersey where the buyer sold them to defendant, a *bona fide* purchaser. By the law of Pennsylvania a *bona fide* purchaser or attaching creditor of the vendee would prevail over the conditional seller unless the conditional sale contract was recorded; by New Jersey law recordation was not necessary to protect the interest of the conditional vendor. The instrument was not recorded in either state. In a proceeding by the conditional vendor against the New Jersey *bona fide* purchaser, it

⁵⁰ 112 So. 580 (Miss. 1927); the case is noted in 26 Mich. L. Rev. 99 (1927).

⁵¹ *Minor, Conflict of Laws* (1901), § 130.

⁵² 112 So. 580, 583, 584 (1927).

⁵³ 48 N.J.L. 410, 7 Atl. 418 (1886).

was held that the law of the situs of the goods governed and that the vendor was protected. The Court, *per* Depue, J., reasoned:

"The public policy which has given rise to the doctrine of the Pennsylvania courts is local, and the law which gives effect to it is also local, and has no extraterritorial effect. In the case in hand, the safe was removed to this state by Schwartz as soon as he became the purchaser. His possession, under the contract, has been exclusively in this state. That possession violated no public policy,—not the public policy of Pennsylvania, for the possession was not in that state; nor the public policy of this state, for in this state possession under a conditional sale is regarded as lawful, and does not invalidate the vendor's title unless impeached for actual fraud. If the right of a purchaser, under a purchase in this state, to avoid the reserved title in the original vendor on such grounds be conceded, the same right must be extended to creditors buying under a judgment and execution in this state; for by the law of Pennsylvania creditors and *bona fide* purchasers are put upon the same footing. Neither on principle, nor on considerations of convenience or public policy, can such a right be conceded. Under such a condition of the law, confusion and uncertainty in the title to property would be introduced, and the transmission of the title to movable property, the *situs* of which is in this state, would depend, not upon our laws, but upon the laws and public policy of sister states or foreign countries. A purchaser of chattels in this state which his vendor had obtained in New York, or in most of our sister states, under a contract of conditional sale, would take no title; if obtained under a conditional sale in Pennsylvania, his title would be good; and the same uncertainty would exist in the title of purchasers of property so circumstanced at a sale under judgment and execution."⁵⁴

In dealing with this type of situation, a note in the Harvard Law Review⁵⁵ suggests that the effect of the recording statute of State *A* be examined to determine the effect in State *B* of non-recording. If the recording statute of State *A* merely gave to the mortgagor or conditional vendee a power to pass the legal title held by the mortgagee or conditional vendor, then such power should not affect transactions in the state to which the chattel was removed, and in which the statute in question does not operate (citing *United States Fidelity & Guaranty Co. v. Northwest Engineering Co.*);⁵⁶ but if by the law of State *A*, the mortgagee or the conditional vendor had only an *equitable interest*, then his failure to record in State *A* operates to bar that equity and effect will be given in State *B* to protect a *bona fide* purchaser.

While a number of cases considered hereinafter are consistent with the rule of protecting a local *bona fide* purchaser, no case has been found in which the court looked to the statute of State *A* to determine the nature of the interest created by the contract and differentiating between a *power* and an *equitable lien*.

⁵⁴ 7 Atl. 418, at 422, 57 Am. Rep. 566, at 570 (1886). Cf. *Southern Hardware & Supply Co. v. Clark*, 201 Fed. 1 (C.C.A. 5th 1912).

⁵⁵ 41 Harv. L. Rev. 779 (1928).

⁵⁶ *Supra* note 50.

It is the converse of the situation presented by the above cases which has caused the most difficulty and on which there is the greatest divergence of authority.

4. Where the laws of States *A* and *B* both require recordation, or where the law of *A* does not and the law of *B* does require it, and where there has been compliance with the law of *A* but not compliance with the registration requirements of State *B*: There are three groups of holdings under this situation.

I. The lien or security of title remains in State *B* whether the mortgagee or conditional vendor has consented to the removal of the chattel or has not consented.

II. The lien or security of title remains in State *B* only if the chattel was removed to that state without the knowledge or consent of the mortgagee or conditional vendor.

III. The lien or security of title is lost as against purchasers or creditors unless the recording statutes of State *B* have been complied with.

I

The holding of this group of cases may be illustrated by the case of *Shapard v. Hynes*.⁵⁷ There a soda fountain and furniture was mortgaged in Texas to one Hynes and the mortgage was there recorded. Thereafter one Cottraux, son of the mortgagor, was given possession as lessee of the mortgagees and he removed the goods to the Indian Territory where they were levied upon by Shapard Grocery Company, a copartnership, to satisfy a debt due from the son. There was no recordation of the mortgage in the Indian Territory, but notice was given to the defendants at the time of the levy, which notice was disregarded. It was held that the mortgage was valid upon the ground that the law of Texas was effectual to create a valid lien which remained good although the property was removed to another state. The court pointed out that a state may, by appropriate legislation, require all mortgages to be recorded, but usually such statutes requiring recordation apply only to mortgages executed within the state.

A number of theories have been advanced for this result. As stated, the reason given in *Shapard v. Hynes* was that the recording statutes of State *B* are considered applicable only to mortgages made within that state upon property there situated and have no reference to personalty brought into the state which was already subject to a valid lien created elsewhere. This presumption may be rebutted by an express provision in the recording statute of State *B* that it shall apply to all property within the state.

⁵⁷ 104 Fed. 449 (C.C.A. 8th 1900).

The California case of *Mercantile Acceptance Company v. Frank*⁵⁸ reached the same result upon the ground the situation was analogous to that upon which the owner of property stolen from him and transported to another state may follow the thief into the latter state and retake possession of the goods wherever found; a state may, it is true, refuse to recognize the rule of comity in such cases but, should it do so, it would become a party to every such fraudulent transaction; it is preferable that an innocent third party suffer loss.

In spite of the fact that there has been considerable criticism of application of the doctrine of comity,⁵⁹ sometimes the above result is achieved through the use of that doctrine; this was, however, applied in a peculiar manner in the Arizona case of *Forgan v. Bainbridge*.⁶⁰ There a chattel mortgage was executed in Illinois upon an automobile which was later removed to Texas without the consent or knowledge of the mortgagee who had recorded the instrument in Illinois. In Texas a mortgage not recorded in that state is inoperative against a *bona fide* purchaser. The mortgagor sold the car in Texas to a *bona fide* purchaser who later removed the car to Arizona. The Arizona rule is that a *bona fide* purchaser takes subject to a mortgage which was recorded in the state where the mortgage was executed. It was held that the Illinois mortgagee prevailed over the Texas *bona fide* purchaser. The reason given was that Arizona gives effect by comity to foreign mortgages. But in choosing between two conflicting and independent titles, comity requires that effect be given to the Illinois title, acquired under a law similar to the Arizona rule, rather than to the Texas title obtained under a rule of law which is not followed in Arizona.⁶¹

Several notes⁶² criticized this decision upon the ground that comity should mean nothing more than the rules of conflict of laws and that if comity is to operate the forum should have no choice of its application.

⁵⁸ 75 Cal. Dec. 352, 265 Pac. 190 (1928), noted in 1 So. Cal. L. Rev. 474 (1928).

⁵⁹ See, in general, the discussion by Professors Cook, Lorenzen, and others, cited *supra* note 42. Also, *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926); *Geiser Mfg. Co. v. Todd*, 224 S.W. 1006 (Mo. App. 1920), noted in 34 Harv. L. Rev. 553 (1921); *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1900); *State v. Nichols*, 51 Wash. 619, 99 Pac. 876 (1909).

Restatement (student ed. 1934) § 6: "Comity. The rules of Conflict of Laws of a state are not affected by the attitude of another state toward rights or other interests created in the former state."

⁶⁰ 34 Ariz. 408, 274 Pac. 155 (1928), noted in 42 Harv. L. Rev. 827 (1929), and 13 Minn. L. Rev. 724 (1929).

⁶¹ See *Union Securities Co. v. Adams*, 33 Wyo. 45, 236 Pac. 513 (1925), noted in 37 Yale L. J. 966 (1928).

⁶² 42 Harv. L. Rev. 827 (1929), and 13 Minn. L. Rev. 724 (1929).

The fact that Texas law is different from that of Arizona should be no ground for refusing recognition of rights there created if principles of comity are really applicable; and clearly by the law of Texas the *bona fide* purchaser there acquired rights in the automobile. A great variety of arguments have been advanced at different times by the courts in support of this general rule and counter-arguments raised by others. Some of the older cases follow the lead of Story in declaring that personal property has no situs,—applying the rule to work out what the forum considered a fair result; others have purported to apply the laws of the situs.⁶³ Others, as pointed out, rested a decision upon the application of comity, or lack of it; still others upon the unsatisfactory and constantly shifting concept of a *lex locus contractus*.

There is no convincing force in a "reason" that a purchaser is put upon constructive notice by a foreign recordation and that it is his duty to investigate at the residence from which his vendor came.⁶⁴ This may be the basis of a rule of local policy in the forum but it should be recognized that the third party frequently will have no actual knowledge and investigation may prove impracticable. Further argument advanced by jurisdictions refusing to follow the lead of this group of courts is that the recording statutes of another jurisdiction, insofar as notice is concerned, do not operate extraterritorially and that the forum cannot allow its own recording machinery to be superseded by recording systems of other states.⁶⁵ Any choice of conflict of laws rules should have no basis upon a fiction of extraterritorial constructive notice.

If it be contended that unless the rule of protecting the conditional vendor or the chattel mortgagee is applied, a mortgage as security would be practically worthless, a contrary argument is that it may be sound policy to protect local *bona fide* purchasers. These considerations do not go to the principle governing recognition from a universal standpoint but only to the local rules of policy and expediency which induce a forum to adopt a particular rule.

⁶³ See, e.g., *Aultman & Taylor Machinery Co. v. Kennedy*, 114 Iowa 444, 87 N.W. 435 (1901); *Holt v. Knowlton*, 86 Me. 456, 29 Atl. 1113 (1894); *Arkansas City Bank v. Cassidy*, 71 Mo. App. 186 (1897); *Boyer v. Knowlton*, 85 Ohio St. 104, 97 N.E. 137 (1911).

⁶⁴ See *Geiser Mfg. Co. v. Todd*, 224 S.W. 1006 (Mo. App. 1920), noted in 34 Harv. L. Rev. 553 (1921). There a chattel mortgage on property in Arkansas was given to plaintiff and duly recorded. The property was removed to Missouri with the consent of the mortgagee and there the mortgagor executed a new mortgage to the defendant, who took in good faith. The defendant foreclosed and the plaintiff brought replevin. It was held that the plaintiff could not recover.

The note writer states that the majority of courts distinguish between removal with and without consent.

⁶⁵ *Corbett v. Littlefield*, 84 Mich. 30, 47 N.W. 581 (1890).

Nor, it is submitted, may a rule that the *lex locus contractus* should prevail over any other law govern, for the term "*lex locus contractus*" may be construed, depending upon the law of the forum deciding the case, as either the law of the place where the contract was entered into, or the law of the place where the agreement was to be performed, or the law of that state which the parties intended to govern the contract. In a case such as *Hervey v. Rhode Island Locomotive Works*,⁶⁶ considered *infra*, it would seem that the phrase "*lex locus contractus*" would mean "*lex solutionis*."⁶⁷

Perhaps a better statement of the general rule is that the local policy of protecting a resident *bona fide* purchaser against secret liens is outweighed by the importance of protecting a conditional seller or chattel mortgagee from a wrongful deprivation of his interest. As will be noticed, this argument applies with fullest force only when the goods have been removed without the knowledge or consent of the interested claimant, and a number of courts make this distinction.

The rule of this group of cases may be summarized by declaring that the law of State *A*, having had jurisdiction over the goods, governed the creation of interests in the goods at that situs; when the goods were thereafter removed to State *B*, that state, now being the *situs*, may apply its own law as to new interests created in those goods by reason of new dealings therein but, as a matter of local policy and expediency, State *B* has adopted a rule of conflict of laws that interests validly created in State *A* will be recognized and protected in State *B*.

This rule has here been laid down categorically without making exception in the case where the goods were removed to State *B* without the knowledge or consent of the claimant in State *A*. So distinctly has the influence of that qualification been felt that no case is an authority for this rule unless the factor of knowledge or consent appeared;⁶⁸ consequently

⁶⁶ 93 U.S. 664 (1877).

⁶⁷ Further, the rule of "*lex locus contractus*" would make no distinction between removal with or without consent and consequently would fail to take into consideration that group of states which makes such distinction.

⁶⁸ In this and the following note no attempt has been made to secure all of the cases in each jurisdiction.

Iowa. Smith & Co. v. McLean, 24 Iowa 322 (1868); First Nat. Bank v. Ripley, 204 Iowa 590, 215 N.W. 647 (1927).

Kansas. Handley v. Harris, 48 Kan. 606, 29 Pac. 1145 (1892).

Maine. Gross v. Jordan, 83 Me. 380, 22 Atl. 250 (1891).

Maryland. Bruce's Admr. v. Smith, 3 Harris & J. (Md.) 499 (1814); Wilson & Co. v. Carson, 12 Md. 54 (1857).

Minnesota. Silver v. McDonald, 172 Minn. 458, 215 N.W. 844 (1927).

Mississippi. U.S. Fidelity & Guaranty Co. v. North West Engineering Co., 146 Miss. 476, 112 So. 580 (1927).

[Footnote continued on following page]

the indication of the position of many courts must be considered from *dicta*,⁶⁹ with the not infrequent result that the courts in the same case give

(But see statutory provisions, *infra* note 98.)

New Hampshire. Goudie v. American Moore Peg Co., 81 N.H. 88, 122 Atl. 349 (1923); Cleveland Machine Works Co. v. Lang, 67 N.H. 348, 31 Atl. 20 (1893).

New Jersey. Parr v. Brady, 37 N.J.L. 201 (1874); Cooper v. Philadelphia Worsted Co. (Lees v. Harding, Whitman & Co.), 68 N.J.Eq. 622, 60 Atl. 352 (1905) (consent implied from knowledge); Lane v. J. E. Roach's Banda Mexicana Co., 78 N.J.Eq. 439, 79 Atl. 365 (1911), (*dictum* that B would govern if plaintiff were a resident of forum).

(But see statutory provisions, *infra* note 101.)

Oklahoma. Greenville National Bank v. Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249 (1900).

(But see statutory provisions, *infra* note 98.)

Vermont. Cobb v. Buswell, 37 Vt. 337 (1864); Barrett v. Kelly, 66 Vt. 515, 29 Atl. 809 (1894).

Wisconsin. Mershon v. Wheeler, 76 Wis. 502, 45 N.W. 95 (1890).

(But see statutory provisions, *infra* note 101.)

United States. Bank of the United States v. Lee, 13 Pet. (U.S.) 107, (1839) (a deed of slaves given in first state by husband to wife; knowledge and consent to removal implied). Alferitz v. Ingalls, 83 Fed. 964 (C. C. D. Nev. 1897); Shapard v. Hynes, 104 Fed. 449 (C.C.A. 8th 1900); Foster v. McAlester, 114 Fed. 145 (C.C.A. 8th 1902).

⁶⁹ *Alabama.* Weinstein v. Fryer, 93 Ala. 257, 9 So. 285 (1891); Teat v. C. D. Chapman & Co., 1 Ala. App. 491, 56 So. 267 (1911).

(But see statutory provisions, *infra* note 98.)

Arkansas. Public Parks Amusement Co. v. Embree-McLean Carriage Co., 64 Ark. 29, 40 S.W. 582 (1897); Creelman Lumber Co. v. Lesh, 73 Ark. 16, 83 S.W. 320 (1904); Wray Bros. v. H. A. White Auto Co., 155 Ark. 153, 244 S.W. 18 (1922); Nelson v. Forbes & Son, 164 Ark. 460, 261 S.W. 910 (1924).

California. Mercantile Acceptance Co. v. Frank, 256 Pac. 259 (Cal. App. 1927), *affd.* 75 Cal. Dec. 352, 265 Pac. 190 (1928); Deposit & Guaranty State Bank v. Hessel Motor Car Co., 90 Cal. App. 428, 265 Pac. 954 (1928).

Colorado. Harper v. People, 2 Col. App. 177, 29 Pac. 1040 (1892), overruled by Turnbull v. Cole, 70 Col. 364, 201 Pac. 887, (1921).

Delaware. Fuller v. Webster, 5 Boyce (Del.) 538, 95 Atl. 335 (1915); *In re Shannahan & Wrightson Hardware Co.*, 2 W. W. Harr. (Del.) 37, 118 Atl. 599 (1922).

(But see statutory provisions, *infra* note 101.)

Florida. Crowell v. Skipper, 6 Fla. 580 (1856).

Idaho. Smith v. Consolidated Wagon & Machine Co., 30 Idaho 148, 163 Pac. 609 (1917).

Illinois. Mumford v. Canty, 50 Ill. 370 (1869); Armitage-Herschell Co. v. Potter, 93 Ill. App. 602 (1900); Bridges v. Barrett, 126 Ill. App. 122 (1906). (The Illinois cases are particularly troublesome because of the presence of a strong rule of policy in the earlier cases, as shown in the discussion of Green v. Van Buskirk and Hervey v. Rhode Island Locomotive Works, *supra*. See also Illinois cases and statute, *infra* note 93.)

Indiana. Ames Iron Works v. Warren, 76 Ind. 512 (1881).

Iowa. Aultman & Taylor Machinery Co. v. Kennedy, 114 Iowa 444, 87 N.W. 435 (1901).

Kansas. Ord National Bank v. Massey, 48 Kan. 762, 30 Pac. 124 (1892).

Kentucky. Jones Stationery & Printing Co. v. Jeffrey, 9 Ky. L. Rep. 148 (1887); Tennessee Auto Corp. v. American National Bank, 205 Ky. 541, 266 S.W. 54 (1924); Fry Bros. v. Theo-

bold, 205 Ky. 146, 265 S.W. 498 (1924); *Shelton's Garage v. Walston*, 212 Ky. 602, 279 S.W. 959 (1926); *Kelley v. Brack*, 214 Ky. 9, 282 S.W. 190 (1926); *Herold Motor Car Co. v. Commonwealth*, 216 Ky. 335, 287 S.W. 939 (1926); *Perkins v. National Bond & Investment Co.*, 224 Ky. 65, 5 S.W. (2d) 475 (1928).

Louisiana. *Overland Texarkana Co. v. Bickley*, 152 La. 622, 94 So. 138 (1922) (removal with consent but dictum local statute was intended to apply only to local transactions).

Massachusetts. *Langworthy v. Little*, 12 Cush. (Mass.) 109 (1853); *Rhode Island Central Bank v. Danforth*, 14 Gray (Mass.) 123 (1859) (controversy between three residents of State A, and property located in forum; held, A governed); *Deyo v. Jennison*, 10 Allen (Mass.) 410 (1865), (question whether property exempt in State A would be recognized as exempt in B, when inducement to removal was fraud of plaintiff; held that the forum, B, would apply the law of State A).

Minnesota. *Keenan v. Stimson*, 32 Minn. 377, 20 N.W. 364 (1884).

Missouri. *Fuert v. Rowell*, 62 Mo. 524 (1876); *Roach v. St. Louis Type Foundry*, 21 Mo. App. 118 (1886); *Lafayette County Bank v. Metcalf*, 29 Mo. App. 384 (1888); *National Bank of Commerce v. Morris*, 114 Mo. 255, 21 S.W. 511 (1893); *Brown v. Koenig*, 99 Mo. App. 653, 74 S.W. 407 (1903); *Jerome P. Parker-Harris Co. v. Stephens*, 205 Mo. App. 373, 224 S.W. 1036 (1920).

Nebraska. *Cool v. Roche*, 20 Neb. 550, 31 N.W. 367 (1887) (removal within the state); *Farmers' & Merchants' State Bank v. Sutherlin*, 93 Neb. 707, 141 N.W. 827 (1913).

New Hampshire. *Dorntee Casket Co. v. Gunnison*, 69 N.H. 297, 45 Atl. 318 (1898); *Davis v. Osgood*, 69 N.H. 427, 44 Atl. 432 (1899).

New Jersey. *Wooley v. Geneva Wagon Co.*, 59 N.J.L. 278, 35 Atl. 789 (1896).

(But see statutory provisions, *infra* note 101.)

New York. *Nichols v. Mase*, 94 N.Y. 160 (1883).

(But see statutory provisions, *infra* note 101, and *cf.*, *Keller v. Paine*, 107 N.Y. 83, 13 N.E. 635 (1887).)

North Carolina. *Anderson v. Doak*, 32 N.C. 295 (1849); *Hornthall v. Burwell*, 109 N.C. 10, 13 S.E. 721 (1891).

North Dakota. *Wilson v. Rustad*, 7 N.D. 330, 75 N.W. 260, (1898); *Warnken v. Chisholm*, 8 N.D. 243, 77 N.W. 1000 (1898) (court talks about "waiver" as a question of fact).

Ohio. *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62 (1857).

Oklahoma. *Kerfoot v. State Bank of Waterloo*, 14 Okla. 104, 77 Pac. 46 (1904).

(But see statutory provisions, *infra* note 98.)

Oregon. *Casner v. Hoskins*, 64 Ore. 254, 128 Pac. 841 (1912), *affd.*, 64 Ore. 254, 130 Pac. 55 (1913), (case turns on question of usury).

(But see statutory provisions, *infra* note 98.)

South Carolina. *Adams v. Fellers*, 88 S.C. 212, 70 S.E. 722 (1911).

Vermont. *Taylor v. Boardman*, 25 Vt. 581 (1853); *Norris v. Sowles*, 57 Vt. 360 (1885); *Dixon v. Blondin*, 58 Vt. 689, 5 Atl. 514 (1886) (court talks about "nothing to estop him").

Virginia. *Craig v. Williams*, 90 Va. 500, 18 S.E. 899 (1894).

(But see statutory provisions, *infra* note 98.)

Washington. *Rodecker v. Jannah*, 125 Wash. 137, 215 Pac. 364 (1923).

(But see statutory provisions, *infra* note 98.)

West Virginia. *State v. Hall*, 91 W.Va. 648, 114 S.E. 250 (1922) (liquor forfeiture case).

(But see statutory provisions, *infra*, note 101.)

Wyoming. *Yund v. First National Bank of Shawnee*, 14 Wyo. 81, 82 Pac. 6 (1905).

United States. *National Live Stock Bank v. First National Bank*, 203 U.S. 296 (1906); *In re Brannock* (*Wickham v. Barlow*), 131 Fed. 819 (D.C.N.D. Iowa 1904); *E. I. Dupont de Nemours Powder Co. v. Jones Bros.*, 200 Fed. 638 (D.C.S.D. Ohio 1912); *Hoyt v. Zibell*, 259 Fed. 186 (C.C.A. 7th 1919); *Walters v. Slimmer*, 272 Fed. 435 (C.C.A. 7th 1921).

dicta in favor of two distinct rules.⁷⁰ Until we have sufficiently examined the cases to enable us to draw an independent conclusion it is sufficient to note that this liberal attitude has been considered⁷¹ the majority rule.

II

A very substantial number of states, however, draw a distinction between the case where the property is removed with consent and where it is removed without the consent of the chattel mortgagee or conditional vendor.

The situation where property is removed without the consent of the foreign mortgagee or conditional vendor was involved in *Edgerly v. Bush*, *supra*, where the argument of Professor Beale that the courts of other states have no jurisdiction to determine ownership of the chattel was incorporated into the Restatement of the Law of Conflict of Laws,⁷² which argument has already been considered. No case has been found in which a court has considered that its state lacked power to affect such title and it is believed that the courts will be reluctant to follow the Restatement on this point.

Suppose, however, that the chattel mortgagee or the conditional vendor knew of the removal and had opportunity to protect himself by recording in the state to which the goods had been removed? Under the view of many courts, which distinguish between consent and lack of consent to removal, the lien remains only if the chattel is removed surreptitiously and if consent was given to the removal of the goods, the lien is lost.

This latter type of situation may be illustrated by *Wray Bros. v. White Auto Co. of Memphis, Tenn.*⁷³ The White Auto Co. sold to one Galloway a Buick automobile taking a chattel mortgage in Tennessee where the transaction took place and recorded the mortgage there. Galloway later took the car to Arkansas without the consent of the mortgagee and the

⁷⁰ *E.g.*, the following cases cited, *supra* note 69 are also cited, *infra* note 90. *Weinstein v. Fryer*, 93 Ala. 257, 9 So. 285 (1891); *Creelman Lumber Co. v. Lesh*, 73 Ark. 16, 83 S.W. 320 (1904); *Wray Bros. v. H. A. White Auto Co.*, 155 Ark. 153, 244 S.W. 18 (1922); *Deposit Guaranty State Bank v. Hessel Motor Car Co.*, 90 Cal. App. 428, 265 Pac. 954 (1928); *Smith v. Consolidated Wagon & Machine Co.*, 30 Idaho 148, 163 Pac. 609 (1917); *Fry Bros. v. Theobald*, 205 Ky. 146, 265 S.W. 498 (1924); *Perkins v. National Bond & Investment Co.*, 224 Ky. 65, 5 S.W. (2d) 475 (1928); *Farmers' & Merchants' State Bank v. Sutherland*, 93 Neb. 707, 141 N.W. 827 (1913); *Warnken & Co. v. Chisholm*, 8 N.D. 243, 77 N.W. 1000 (1898); *Dixon v. Blondin*, 58 Vt. 689, 5 Atl. 514 (1886); *Yund v. First National Bank of Shawnee*, 14 Wyo. 81, 82 Pac. 6 (1905); and *Hoyt v. Zibell*, 259 Fed. 186 (C.C.A. 7th 1919).

⁷¹ *Goodrich, supra* note 2, 354 (note); *Griffin, The Effect of Foreign Chattel Mortgages upon the Rights of Subsequent Purchasers and Creditors*, 4 Mich. L. Rev. 358 (1906).

⁷² (Student ed. 1934), §§ 268-269, 275-278.

⁷³ 155 Ark. 153, 244 S.W. 18 (1922).

car was there attached by creditors, Wray and Vaughn. The mortgage had not been recorded in Arkansas. The White Auto Co. intervened as mortgage claimant and witnesses testified that they had tried to locate Galloway and had not been able to do so until three years after the giving of the mortgage. The plaintiffs testified that they did not know that the car was mortgaged and introduced evidence tending to show that the White Auto Co. knew that Galloway had taken the car into Arkansas. It was held for the claimant, the Court stating:

"There was also evidence to sustain the finding of the circuit court that Galloway had removed the mortgaged automobiles from the state of Tennessee to the state of Arkansas, without the consent of the mortgagee. Under this state of the record the circuit court was right in holding that the mortgage lien of the White Auto Company was superior to the attachment liens of the plaintiffs."⁷⁴

The court placed the decision upon the ground that the chattel was removed without the consent of the mortgagee and indicated that if removal had been with its consent, the decision would be *contra*.

In *Moore v. Keystone Driller Co.*,⁷⁵ the Idaho court declared that by giving consent to the removal the mortgagee negligently placed it in the power of the mortgagor to deceive and defraud innocent people in the state to which the property was taken. Professor Goodrich⁷⁶ questions whether there is more chance for deception in such case than in reference to bailments, in which case the owner's right would not be seriously questioned. Perhaps an analogy may be drawn to the third rule, considered hereafter, by declaring that State *B* may protect a local purchaser from a bailee.

But what constitutes consent? Obviously expressed consent or permission. So also if it is intended or contemplated by the parties that the goods shall be removed to another jurisdiction, or the transfer shows that the goods are to be removed to another jurisdiction, consent is inferred.⁷⁷

Suppose that the transaction concerns an automobile (which is most capable of removal and the use of which seems to contemplate removal from state to state); might it be suggested that tacit consent to removal of the car is given and that the mortgagee is bound to follow the car and comply with local recordation statutes of each jurisdiction through which the car may pass? Or might it be argued that in most cases the removal of the car is but temporary and full application of such rule as that sug-

⁷⁴ 244 S.W. 18, 19 (1922).

⁷⁵ 30 Idaho 220, 163 Pac. 1114 (1917).

⁷⁶ Goodrich, *supra* note 2, 357-8.

⁷⁷ See discussion of *Hervey v. Rhode Island Locomotive Works*, and *Corbett v. Riddle*, *infra* notes 82 and 85.

gested would prevent the use of chattel mortgages in automobile credit financing?

In *Flora v. Julesburg Motor Co.*,⁷⁸ it was known that a motor truck, upon which a mortgage had been given in Nebraska, would make occasional trips across the Colorado line; yet this was held not to be a "removal"⁷⁹ and the failure of the mortgagee to record the mortgage in Colorado did not bar his rights against a creditor of the mortgagor.

A case note suggests that a wrongful transfer amounts to a conversion:

"If the mortgage operates as a transfer of property, then although the mortgagor retains possession, the mortgagee should nevertheless be protected upon the ground that he cannot be deprived of his property without his consent. The mere possession of the mortgagor will not estop the mortgagee. If a mortgagor, contrary to his agreement, removes the mortgaged property into another state, does he not thereby become a converter? When he disposes of the mortgaged property, he is certainly a converter."⁸⁰

The note also suggests that it is an easy and comparatively inexpensive matter to inquire as to incumbrances against property, even in another state; that no one is under the necessity of buying from a stranger, and that in many instances there is some suspicious circumstance to put a purchaser upon notice.

If the "conversion" theory is to be applied consistently it would seem to make no difference whether the removal was with or without consent since, in either case, the mortgagee had not "consented to the conversion."⁸¹

A provision in a contract contemplating removal of goods into another jurisdiction has been construed as a clear indication of consent by the mortgagee or conditional seller that the law of State *B* should operate. The leading case is *Hervey v. Rhode Island Locomotive Works*.⁸² The Rhode Island Locomotive Works transferred a locomotive to Conant & Co., title to remain in the Locomotive Works until payment of the price. The instrument purported to be a "lease." This agreement was entered into by acceptance in New York and provided that the engine was to be used in Illinois. Under the law of New York the agreement would be valid and the Rhode Island Locomotive Works protected from claims of creditors of, or purchasers from, Conant & Co., whether the instrument be con-

⁷⁸ 69 Col. 238, 193 Pac. 545 (1920); 21 Col. L. Rev. 283 (1921) (note).

⁷⁹ As to what constitutes "a removal" see *infra* notes 103, 104.

⁸⁰ 6 Minn. L. Rev. 153, 154 (1921).

⁸¹ *Millar v. Allen*, 10 R.I. 49 (1871). And see *Mercantile Acceptance Co. v. Frank*, 75 Cal. Dec. 352, 265 Pac. 190 (1928); *Studebaker Bros. Co. v. Mau*, 13 Wyo. 358, 80 Pac. 151 (1905), *affd.* 14 Wyo. 68, 82 Pac. 2 (1905).

⁸² *Supra* note 66.

strued as a "lease" or as a "conditional sale." The engine was removed to Illinois and there attached by creditors of Conant & Co. and sold to Hervey, the purchaser at the judicial sale. By the law of Illinois, there could be no severance of possession and title on either mortgage or conditional sale, valid against creditors, unless the instrument was recorded. The Illinois court found that this instrument was a conditional sale and that there had been no compliance with the Illinois recording statute. The Rhode Island Locomotive Works sued out a writ of replevin in the Circuit Court of the United States for the Southern District of Illinois, which gave judgment for the plaintiff, and the defendant procured a writ of error from the United States Supreme Court. Relying largely upon the decision in *Green v. Van Buskirk*,⁸³ the Supreme Court reversed the decision, the Court, *per Davis, J.*, stating in part:

" . . . In the case at bar the agreement contemplated that the engine should be removed to the State of Illinois, and used by Conant & Co., in the prosecution of their business as constructors of a railroad. It was accordingly taken there and put to the use for which it was purchased; but while in the possession of Conant & Co., who exercised complete ownership over it, it was seized and sold, in the local courts of Illinois, as their property. These proceedings were valid in the jurisdiction where they took place, and must be respected by the Federal tribunals.

"The Rhode Island Locomotive Works took the risk of losing its lien in case the property, while in the possession of Conant & Co., should be levied on by their creditors, and it cannot complain, as the laws of Illinois pointed out a way to preserve and perfect its lien. . . ."⁸⁴

The decision in *Corbett v. Riddle*⁸⁵ was largely based upon the cases of *Green v. Van Buskirk* and *Hervey v. Rhode Island Locomotive Works*. In the *Corbett* case a steam shovel was sold upon conditional sale in Pennsylvania, the machine to be removed to Virginia for use in construction work there. The conditional sale was not recorded in Virginia, as provided by its statute. The conditional vendee made an assignment in Virginia for the benefit of creditors and the conditional vendor sued for the return of the shovel. It was held that the sale was subject to the recording laws of Virginia and was therefore invalid as to creditors.

What is the real doctrine of the *Hervey* case?⁸⁶ If title was reserved to

⁸³ *Supra* note 29.

⁸⁴ 93 U.S. 664, 673 (1877).

⁸⁵ 209 Fed. 811 (C.C.A. 4th 1913), noted in 12 Mich. L. Rev. 511 (1914).

⁸⁶ 12 Mich. L. Rev. 511, 512 (1914):

" . . . The principal case [*Corbett v. Riddle*] and the two cases on which it relies, then, may be said to be exceptions to the general rule, or more properly, to lay down a distinct rule, that where the parties reside in one state and the contract is made there, if the property is at that time situated in another state, or taken there by virtue of the contract or with the consent of the mortgagee or conditional vendor, then the law of the latter state applies, and the conditional vendor or mortgagee must comply with the provisions of its laws. This is what the court

the vendor in New York, where the contract was made and was valid under the laws of New York as respects third parties, the courts of Illinois were not bound to recognize the outstanding title as valid, as the contract contravened the policy of Illinois, into which the parties had by their contract contemplated that the goods should be removed, and the law of Illinois, as situs of the property, was controlling. That application of Illinois law did not violate the due process clause of the Federal Constitution. The case is even stronger than *Green v. Van Buskirk* as an indication of the federal rule recognizing the jurisdiction of the situs.

Suppose that the goods were to be used in New York and were then taken, without the consent or knowledge of the conditional vendor, into Illinois. The case does not decide as to the effect of Illinois statutes. There could be no violation of the full faith and credit clause, (a question presented by *Green v. Van Buskirk*), but only the due process clause. It would seem, (although there is no Supreme Court decision), that Illinois need not follow New York law, but might apply its own rule, the only question being whether sufficient *notice* had been given the conditional vendor to appear and defend as would constitute due process of law. If he appeared, those adhering to the so-called majority view would contend that (as a matter of local expediency) Illinois *should* apply a rule which would prefer the conditional vendor over local creditors, but it would seem that *Illinois need not do so*, as a matter of conflict of laws or as a matter of due process of law. Of course, if title to the property was questioned in another jurisdiction (as was done in *Green v. Van Buskirk*) then question would arise regarding application of the full faith and credit clause; as pointed out, *supra*, it would seem that the decision in *Green v. Van Buskirk* would be controlling, in spite of removal of the goods without consent.

A related problem arises in determining whether a given transaction is in fact a conditional sale or some other device, such as a bailment, lease, or an option to purchase. It was seen in the *Hervey* case that Illinois decided for itself that the transaction constituted a "conditional sale."

In *Cooper v. Philadelphia Worsted Co. (Lees v. Harding, Whitman & Co.)*,⁸⁷ one Lees in Pennsylvania executed a "lease" of machinery to the Worsted Co. for use in Pennsylvania and the goods were there delivered. Under Pennsylvania law this agreement would be construed as a lease and valid without recordation. Eighteen months later, with the knowledge but without the consent of Lees, the machinery was removed to New

meant in the principal case when it said, 'Whoever sends property to another state impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides.'"

⁸⁷ 68 N.J.Eq. 622, 60 Atl. 352 (1905).

Jersey and the Worsted Co. there became bankrupt and the property was levied upon by Harding, Whitman & Co., creditors of the Worsted Co. If the transaction had taken place in New Jersey it would have been construed as a conditional sale and recordation required "in the county of the buyer if resident, or county where the property bought shall be if he is non-resident." The controversy was then between Harding, Whitman & Co., as creditors of the Worsted Co., and Cooper, as executor of Lees, claiming title by virtue of the transactions in Pennsylvania. The court held for the executor, pointing out that the New Jersey statute did not apply since it governed only as to mortgages executed within the state. It seems that the result of this case would have been the same whether the removal was with or without consent, since it appeared that Lees had knowledge of the proposed removal and therefore, presumably, might have prevented it. His failure might be construed as consent. It would appear that sections 258 and 260 of the Restatement of the Law of Conflict of Laws (student ed. 1934) are in accord with the view of the *Cooper* case that the law of the situs should control as to the construction of the instrument of conveyance.⁸⁸

As was pointed out at the conclusion of section I, *supra*, due to confusion of the several rules, a clear authority exists for the rule here considered only when facts of knowledge or consent were recognized by the court,⁸⁹ however persuasive oft-repeated *dicta*⁹⁰ may appear.

⁸⁸ See also, *Public Parks Amusement Co. v. Embree-McLean Carriage Co.*, 64 Ark. 29, 40 S.W. 582 (1897); *Gross v. Jordan*, 83 Me. 380, 22 Atl. 250 (1891); *Stern v. Drew*, 285 Fed. 925 (C.A.D.C. 1922).

⁸⁹ (In this and the following note no attempt has been made to secure all of the cases in each jurisdiction.)

Alabama. *Brandon Printing Co. v. Bostick*, 126 Ala. 247, 28 So. 705 (1900).

(But see statutory provisions, *infra* note 98.)

Arkansas. *Summers v. Carbondale Machine Co.*, 116 Ark. 246, 173 S.W. 194 (1915).

Connecticut. *Beggs v. Bartels*, 73 Conn. 132, 46 Atl. 874 (1900); *H. G. Craig & Co. v. Uncas Paper Board Co.*, 104 Conn. 559, 133 Atl. 673 (1926).

[Footnote 89 continued on following page]

⁹⁰ *Alabama.* *Weinstein v. Fryer*, 93 Ala. 257, 9 So. 285 (1891).

(But see statutory provisions, *infra* note 98.)

Arkansas. *Creelman Lumber Co. v. Lesh*, 73 Ark. 16, 83 S.W. 320 (1904); *Wray Bros. v. H. A. White Auto Co.*, 155 Ark. 153, 244 S.W. 18 (1922).

California. *Deposit Guaranty State Bank v. Hessel Motor Car Co.*, 90 Cal. App. 428, 265 Pac. 954 (1928).

Connecticut. *Ballard v. Winter*, 39 Conn. 179 (1872).

Idaho. *Smith v. Consolidated Wagon & Machine Co.*, 30 Idaho 148, 163 Pac. 609 (1917).

Illinois. *Waters v. Cox*, 2 Ill. App. 129 (1878).

Iowa. *Simms v. McKee & Stimson*, 25 Iowa 341 (1868).

Kansas. *Baldwin v. Hill*, 4 Kan. App. 168, 46 Pac. 329 (1896).

[Footnote 90 continued on following page]

[Continuation of footnote 89 from page 375]

Idaho. Moore v. Keystone Driller Co., 30 Idaho 220, 163 Pac. 1114 (1917).

Indiana. Cable Co. v. McElhoe, 58 Ind. App. 637, 108 N.E. 790 (1915).

Missouri. Geiser Mfg. Co. v. Todd, 224 S.W. 1006 (Mo. App. 1920); Adamson v. Fogelstrom, 221 Mo. App. 1243, 300 S.W. 841 (1927).

Nebraska. Bradley v. Kingman Implement Co., 79 Neb. 144, 112 N.W. 346 (1907); Pennington County Bank v. Bauman, 87 Neb. 25, 126 N.W. 654 (1910).

New Jersey. Knowles Loom Works v. Vacher, 57 N.J.L. 490, 31 Atl. 306 (1895), *affd.*, 59 N.J.L. 586, 39 Atl. 1114 (1896).

(But see statutory provisions, *infra* note 101.)

Oregon. Eli Bridge Co. v. Lachman, 124 Ore. 592, 265 Pac. 435 (1928).

(But see statutory provisions, *infra* note 98.)

Tennessee. Newsum v. Hoffman, 124 Tenn. 369, 137 S.W. 490 (1911) (distinguishing case of Snyder v. Yates, 112 Tenn. 309, 79 S.W. 796 (1903) which held that the law of forum applied).

Washington. Jones v. North Pacific Fish & Oil Co., 42 Wash. 332, 84 Pac. 1122 (1906).

(But see statutory provisions, *infra* note 98.)

United States. Hervey v. Rhode Island Locomotive Works, 93 U.S. 664 (1876); *In re Legg*, 96 Fed. 326 (D.C.D. Conn. 1899); *In re Gray*, 170 Fed. 638 (D.C.E.D. Okla. 1908); *In re Wall*, 207 Fed. 994 (D.C.E.D. Okla. 1910); Corbett v. Riddle, 209 Fed. 811 (C.C.A. 4th 1913); Potter Mfg. Co. v. Arthur, 220 Fed. 843 (C.C.A. 6th 1915); *In re Hood Bay Packing Co.*, 280 Fed. 866 (D.C.W.D. Wash. 1922).

[Continuation of footnote 90 from page 375]

Kentucky. Fry Bros. v. Theobald, 205 Ky. 146, 265 S.W. 498 (1924); Perkins v. National Bond & Investment Co., 224 Ky. 65, 5 S.W. (2d) 475 (1928) (no consent to operate as an "estoppel").

Maine. Holt v. Knowlton, 86 Me. 456, 29 Atl. 1113 (1894).

Massachusetts. Hirschorn v. Canney, 98 Mass. 149 (1867) (consent implied).

Mississippi. Harrison v. Broadway Motor Co., 128 Miss. 766, 91 So. 453, 25 A.L.R. 1148 (1922).

(But see statutory provisions, *infra* note 98.)

Missouri. Finance Service Corporation v. Kelly, 235 S.W. 146 (Mo. 1921).

Nebraska. Farmers' & Merchants' State Bank v. Sutherland, 93 Neb. 707, 141 N.W. 827 (1913).

New York. Goetschius v. Brightman, 214 App. Div. 158, 211 N.Y. Supp. 763 (1925), *affd.* 245 N.Y. 186, 156 N.E. 660 (1927).

(But see statutory provisions, *infra* note 101.)

North Dakota. Warnken & Co. v. Chisholm, 8 N.D. 243, 77 N.W. 1000 (1898).

Oklahoma. National Cash Register v. Paulson, 16 Okla. 204, 83 Pac. 793 (1905).

(But see statutory provisions, *infra* note 98.)

Tennessee. Waters v. Barton, 1 Cold. (Tenn.) 450 (1860); Hamblen Motor Co. v. Miller & Harle, 150 Tenn. 602, 266 S.W. 99 (1924).

Texas. Blythe v. Crump, 28 Tex. Civ. App. 327, 66 S.W. 885 (1902); Best v. Farmers' & Merchants' Bank, 141 S.W. 334 (Tex. Civ. App. 1911).

Vermont. Dixon v. Blondin, 58 Vt. 689, 5 Atl. 514 (1886).

Washington. Western Electric Co. v. Norway Pacific Construction & Drydock Co., 124 Wash. 49, 213 Pac. 686 (1923) (case turned on validity of an assignment).

(But see statutory provisions, *infra* note 98.)

Wyoming. Yund v. First National Bank of Shawnee, 14 Wyo. 81, 82 Pac. 6 (1905); Studebaker Bros. Co. v. Mau, 13 Wyo. 358, 80 Pac. 151 (1905), *affd.* 14 Wyo. 68, 82 Pac. 2 (1905).

United States. The Marina, 19 Fed. 760 (D.C.N.J. 1884); Hoyt v. Zibell, 259 Fed. 186 (C.C.A. 7th 1919); Stern v. Drew, 285 Fed. 925 (C.A.D.C. 1922); Anglo-American Mill Co. v. Dinger, 8 F. (2d) 493 (D.C.N.D. Ga. 1925).

III

A third group of cases is that which refuses to recognize, as against local creditors or purchasers, the validity of a foreign interest created by chattel mortgage or conditional sale where the local recording statutes have not been complied with, irrespective of whether the removal of the goods from the state of their former situs was with or without knowledge of the interested claimant. This is an extreme rule but is designed to protect local creditors and purchasers as a matter of local policy. In spite of the view of the Restatement⁹¹ which we have discussed, it seems that a state has the power (jurisdiction) to do this.

This is recognized to some extent by the revisions contained in the Student Edition, particularly:

"Section 271. If after a chattel is validly mortgaged, it is taken into another state *with the consent of the mortgagee*, the interest of the mortgagee is divested by a sale to a purchaser for value and without notice *only if a statute of the second state so provides.*" (Italics ours.)

"Section 278. If, after a valid conditional sale, a chattel is taken into another state *with the consent of the vendor*, whether the interest of the vendor is divested by a sale to a purchaser for value in the second state is determined *by the law of the latter state.*" (Italics ours.)

We have already argued that "the law of the latter state" should be determinative whether the removal was with or without consent and that, consequently, section 278 should not be limited to the consent cases.

As to section 271, it seems erroneous to contend that the law of the second state is operative, even in a consent case, *only if a statute of the second state so provides*. We have the further question as to whether such statute must expressly state that it governs as to foreign-executed mortgages or conditional sales. As we have pointed out, illustrated by the case of *Shapard v. Hynes*,⁹² the usual attitude of courts has been that a recording statute in general terms is construed to apply only to transactions executed within the enacting state and not to embrace foreign-executed chattel mortgages and conditional sales, the courts generally indicating, however, that it is within the province of the legislature to enact specifically that foreign-executed transfers must comply with local registration upon removal of the goods into the state of the forum.

Is it not possible for a state to declare as a matter of local policy and expediency, and without any specific statute designed to cover foreign transactions, that a chattel mortgage creates a lien interest which is valid

⁹¹ § 268 (student ed. 1934), quoted *supra* note 36.

⁹² *Supra* note 57. See also, *Jerome P. Parker-Harris Co. v. Stephens*, 205 Mo. App. 373, 224 S.W. 1036 (1920).

and enforceable in the state where created and that this lien is recognized and enforced without any recordation in the forum, as between mortgagor and mortgagee, but that priority *as to creditors and purchasers* depends upon the law of the forum as the situs where such new relationship arises? A few states have done exactly that.

It has been contended throughout this article that such disposition is within the power of the forum and its exercise, whether authorized legislatively or under common law application, constitutes no violation of the due process clause of the Constitution. As an abstract proposition, one may constitute himself a critic of the result as based upon individualistic ideas of workability, expediency or policy. It remains to see the manner in which some of the jurisdictions have achieved this result and to comment upon it.

There have been three main types of statutes authorizing assumption of local jurisdiction in cases where the chattels were removed without consent. One type has been a statute providing for recordation of chattel mortgages or conditional sales; in opposition to the general rule this group of states⁹³ has declared that the statute applied to all transactions,

⁹³ *Colorado*. *Turnbull v. Cole*, 70 Col. 364, 201 Pac. 887 (1921), noted in 6 Minn. L. Rev. 406 (1922), overruling an earlier Colorado case.

Illinois. *Merz v. Stewart* (memo. op.). 211 Ill. App. 508 (1918) (X, in Illinois, sold a motorcycle to A in Indiana and A there transferred it to B under a conditional sale; B then removed the machine to Illinois and sold it to C, a b.f.p. The conditional sale was valid by the law of Indiana. Held, Illinois protects the b.f.p.); *Judy v. Evans*, 109 Ill. App. 154 (1903), (conditional sale of a team of horses valid in Indiana where made; the conditional vendee removed the team to Illinois without the knowledge of the vendor and the property was levied upon by a creditor; held, the conditional vendor loses).

See Ill. Cahill's Rev. Stat. (1931), c. 95, § 5 to the effect that no mortgage, deed of trust or conveyance of personal property shall be valid as against creditors of the mortgagor unless the instrument shall be filed for record in the proper county within ten days after its execution, and otherwise shall be considered as fraudulent and void. *Quaere* whether the statute is broad enough to cover *purchasers* of property removed to the state?

Michigan. *Montgomery v. Wight*, 8 Mich. 143 (1860); *Boydson v. Goodrich*, 49 Mich. 65, 12 N.W. 913 (1882); *Corbett v. Littlefield*, 84 Mich. 30, 47 N.W. 581 (1890); *Allison v. Teeters*, 176 Mich. 216, 142 N.W. 340 (1913). See Michigan Comp. Laws (1928), §§ 9550, 13424.

Tennessee. *Snyder v. Yates*, 112 Tenn. 309, 79 S.W. 796 (1904). Tennessee was formerly considered to belong in this group, but see *Newsum v. Hoffman*, 124 Tenn. 369, 137 S.W. 490 (1911), distinguishing the *Yates* case and applying the "consent" rule. The *Newsum* case is noted in 25 Harv. L. Rev. 83 (1911).

Texas. *Crosby v. Huston*, 1 Tex. 203 (1847); *Sanger v. Jesse French Piano & Organ Co.*, 21 Tex. Civ. App. 523, 52 S.W. 621 (1899); *Willys-Overland Co. v. Chapman*, 206 S.W. 978 (Tex. Civ. App. 1918); *Chambers v. Consolidated Garage Co.*, 210 S.W. 565 (Tex. Civ. App. 1919), *affd.* 111 Tex. 293, 231 S.W. 1072 (1921); *Farmer v. Evans*, 111 Tex. 283, 233 S.W. 101 (1921). But *cf.*, *Kennedy v. Natl. Cash Register Co.*, 279 S.W. 505 (Tex. Civ. App. 1925), (Texas applied law of Arkansas as place of performance when the case did not involve Texas claimants); *Best v. Farmers' & Merchants' Bank*, 141 S.W. 334 (Tex. Civ. App. 1911) (*dictum* because con-

whether domestic- or foreign-executed. Michigan,⁹⁴ for example, states that it cannot allow its registration system to be subject to a foreign recording statute operating extraterritorially.

To this rule of policy it may be objected that a chattel mortgage and, analogously, a conditional sale creates more than a lien; it is a transfer of the property itself as security for the debt. The minority recognizes this to some extent in holding that the validity of the instrument as between the original parties is determined by the law of the former situs. But validity of title and priority as to claims are inseparable; otherwise there is not a valid title and priority is the very thing contracted for.⁹⁵ The rule of this group of states has this effect: It is possible for a mortgagor to give security and then take the chattel across the state line into a minority jurisdiction and there fraudulently pass title to a *bona fide* purchaser, or theoretically, *even a purchaser with notice* and the mortgagee would have no remedy against the goods.⁹⁶

If the forum desires a policy of preferring local creditors it is not necessary to go to this extreme. For example, Kansas, by statute, gives priority on mechanics' liens for repairs over a mortgage executed in another state as preference to one type of creditor.⁹⁷

A second group of states have enacted statutes specifically covering the case of property mortgaged or conditionally sold in a foreign state and removed to the forum, and provided for registration within the forum within a limited time in order to preserve priority as respects new dealings

sent and negligence were implied from knowledge). See Texas Vernon's Ann. Stat. (1928), art. 5489.

Pennsylvania was formerly in this group before adopting the Uniform Conditional Sales Act. *Armitage v. Spahn*, 4 Pa. Dist. 270 (1895); *Bank v. Carr*, 15 Pa. Sup. Ct. 346 (1900).

⁹⁴ *Corbett v. Littlefield*, *supra* note 93.

⁹⁵ *Griffin*, *supra* note 71, 361.

⁹⁶ *Joseph H. Beale*, *supra* note 35, 810:

"The operation of the Texan doctrine illustrates its inconvenience. It appears to be a regular course of business for a swindler to buy a motor car on credit in California or elsewhere, drive it into Texas, and sell or pledge it there. The original seller is helpless in the face of this practice; and Texas will doubtless continue full of willing *bona fide* buyers. That this result is most unfortunate from the point of view of commercial practice is clear."

⁹⁷ See *Willys Overland Co. v. Evans*, 104 Kan. 632, 180 Pac. 235 (1919). *Contra*, *Baribault v. Robertson*, 82 N.H. 297, 133 Atl. 21 (1926).

See also Uniform Chattel Mortgage Act, § 39 [Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings (1926), 436]:

"1 (a) Chattel liens given by any statute or rule of law against an owner of goods for services or materials necessary to the protection or preservation of the goods, shall attach against the interest of the mortgagee, although the instrument be duly filed or the lienor have notice of the mortgage."

there.⁹⁸ Occasionally the statute provides only for registration of a chattel mortgage but usually by some local rule of construction and conditional sale has been assimilated into the requirements of the statute. We have considered chattel mortgages and conditional sales upon the same principles and it is believed that there is no fundamental distinction between these two types of transactions insofar as our problem has been concerned. Those courts which recognize the interest created by a chattel mortgage recognize also the interest created by a conditional sale; those which apply the doctrine of "removal without consent" are consistent in both cases; the statutes which require recordation of chattel mortgages include therein conditional sales; and the Restatement applies the same general principles.⁹⁹

⁹⁸ To the extent that statutes have been available for examination the following conclusions may be made:

(a) *States in which statutes require recordation within a limited time after removal of the goods into the forum.*

Alabama Civil Code (1910), § 6868, one hundred and twenty days. See also, *Johnson v. Hughes*, 89 Ala. 588, 8 So. 147 (1890) (dictum since compliance with local statute); *Pulaski Mule Co. v. Haley & Koonce*, 187 Ala. 533, 65 So. 783 (1914).

Georgia Civil Code (1910), § 3319, six months. See also, *Cunningham v. Cureton*, 96 Ga. 489, 23 S.E. 420 (1895); *Armitage-Herschell Co. v. Muscogee Real Estate Co.*, 119 Ga. 552, 46 S.E. 634 (1904); *North v. Goebel*, 138 Ga. 739, 76 S.E. 46 (1912); *Burgsteiner v. Street-Overland Co.*, 30 Ga. App. 140, 117 S.E. 268 (1923); *Industrial Acceptance Corp. v. Perry*, 37 Ga. App. 480, 140 S.E. 774 (1927).

Mississippi Harrison Code Ann. (1930), § 2149 (foreign mortgages, deeds of trust or other liens after property is removed to the state, valid as against *bona fide* purchasers or creditors only from the time of recording in Mississippi). See also, *Hernandez v. Aaron*, 73 Miss. 435, 16 So. 910 (1895); *Vines v. Sparks*, 148 Miss. 219, 114 So. 322 (1927).

Oklahoma Comp. Statutes (1921), § 7651, one hundred and twenty days. See also, *Haltom v. Nichols & Shepard Co.*, 64 Okla. 184, 166 Pac. 745 (1917); *Arnold v. Wittie*, 99 Okla. 236, 227 Pac. 132 (1924).

Oregon Olson Laws (1920), § 10179, thirty days.

Virginia Michie Code (1930), § 5179 (on removal of property from another state, must comply with local recording provisions).

Washington Remington's Rev. Statutes (1932), § 3790, ten days.

To this list must be added the states having adopted the Uniform Conditional Sales Act; see *infra* note 101. See also, for decisions in the Federal courts based upon local statutes: *Green v. Van Buskirk*, *supra* note 29; *Hervey v. Rhode Island Locomotive Works*, *supra* note 66; *Potter Mfg. Co. v. Arthur*, *supra* note 89; *Anglo-American Mill Co. v. Dangler*, *supra* note 100.

(b) *States whose local recording statutes are not construed to apply to property removed to the forum, in the absence of consent to the removal.*

Connecticut (date of statute examined, 1930); Illinois (1933) (questionable how far Cahill's Statutes, c. 95, § 5 will be extended); Indiana (1933); Iowa (1933); Kansas (1933); Kentucky (1933); Maine (1933); Minnesota (1933); Missouri (1933); Nebraska (1933); New Hampshire (1926); North Carolina (1933); Ohio (1933); Rhode Island (1923); Utah (1933); Wyoming (1931); and probably Florida, Louisiana, Maryland and Tennessee (1933).

⁹⁹ *Cf.*, §§ 265-271 and 272-278 (Student ed. 1934). *Cf.*, Goodrich, *supra* note 2, §§ 150-151.

The conflict in the cases and the divergence of theory has led to the suggestion of some uniform statutory provision. Several types have been suggested: (1) A requirement that a *bona fide* purchaser must secure exhibition of a bill of sale or purchase at his own risk.¹⁰⁰ (There is here a possibility that the bill of sale may have been forged.) (2) A provision making it a criminal offense to sell a chattel which was subject to a foreign recorded conditional sale or chattel mortgage. (A number of states have this type of statute which is aimed primarily at the seller and gives questionable protection to the chattel mortgagee or conditional vendor.) (3) The Uniform Conditional Sales Act.

The third type of statute is the Uniform Conditional Sales Act¹⁰¹ which contains a provision requiring a conditional vendor (and similar statutes might be extended to cover chattel mortgages as well) to re-record within ten days after knowledge of removal.¹⁰² Section 288 of Proposed Final Draft Number 2 of the Restatement of Conflict of Laws had a similar import by the use of the phrase "a reasonable opportunity to remove the chattel from the second state." The Uniform Conditional Sales Act and similar statutes are construed to mean "permanent removal"¹⁰³ and actual notice thereof¹⁰⁴ to the conditional vendor or chattel mortgagee.

¹⁰⁰ 19 Law Notes 201 (1916).

¹⁰¹ The Uniform Conditional Sales Act has been adopted in Arizona, Struckmeyer Rev. Code (1928), c. 67, §§ 2889-2908; Delaware; New Jersey; New York, Cahill's Consol. Laws (1930), c. 42, §§ 60-80; Pennsylvania; South Dakota Comp. Laws (1929), c. 137, §§ 921-A-921-Z6; West Virginia Michie Code (1932), §§ 4007-4038; Wisconsin; and Alaska. (See Handbook of the National Conference of Commissioners of Uniform State Laws and Proceedings (1932), 588.)

¹⁰² Uniform Conditional Sales Act, § 14:

"Refiling on Removal. When, prior to the performance of the condition, the goods are removed by the buyer from one filing district to another in the state, in which such contract or a copy thereof is not filed, or are removed from another state into a filing district in this state, where such contract or copy is not filed, the reservation of the property in the seller shall be void as to the purchasers and creditors described in § 5, unless the conditional sale contract or a copy thereof shall be filed in the filing district to which the goods are removed, within ten days after the seller has received notice of the filing district to which the goods have been removed."

¹⁰³ Re Frank Bowman (Gardinier v. Mack International Motor Truck Corp.), 36 F. (2d) 721 (C.C.A. 2d 1929) (*dictum*, removal from one filing district to another in same state); Hare & Chase v. Tomkinson, 129 Atl. 396 (N.J. 1925); Flora v. Julesburg, *supra* note 78; Arnold v. Wittie, 99 Okla. 236, 227 Pac. 132 (1924).

¹⁰⁴ Banks-Miller Supply Co. v. Bank of Marlinton, 106 W.Va. 583, 146 S.E. 521 (1929); Bradshaw v. Kleiber Motor Truck Co., 29 Ariz. 293, 241 Pac. 305 (1925), at 306:

"The validity of a conditional contract of sale made in another state is recognized; the only requirement being that it be filed by the seller in the county in this state to which the goods have been removed, within 10 days after he has received notice of such removal. . . . The time for filing runs, not from the removal, but from the seller's notice of the place to which the property has been removed."

It has been inferred¹⁰⁵ that any question of conflict of laws was done away with by the Uniform Conditional Sales Act. A practical operation of this statute is found in a New Jersey case, *Thayer Mercantile Acceptance Co. v. First National Bank*.¹⁰⁶ There plaintiff sold an automobile in New York under a conditional sale contract recorded there. The buyer removed the chattel to New Jersey without the knowledge of the conditional vendor and it was there attached by the defendant, a resident creditor, as property of the buyer. The New Jersey statute (the Uniform Conditional Sales Act) provided that the seller's reservation of title was void as against attaching creditors unless a copy of the contract was filed in New Jersey within ten days after knowledge of the removal. This had not been done. It was accordingly held that the conditional vendor, having had knowledge and having failed to re-record, the local creditor was preferred under the statute.¹⁰⁷

With the foregoing analysis of the cases it is possible to arrive at some fairly definite conclusions in reference to the alignment of the various states upon these propositions. Since a number of jurisdictions have rather recently enacted statutory registration provisions governing foreign-executed transfers and accordingly modified earlier common law rules, we shall reverse the order of classification under which the discussion was followed.

I. This group consists of those states which have by statute (either in general terms, or expressly covering foreign-executed transfers, or by the Uniform Sales Act), provided for the protection of a local *bona fide* purchaser or creditor: Alabama, Arizona, Colorado, Delaware, Georgia, Michigan, Mississippi, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin; total, eighteen.

II. This group consists of those states which have no governing statute and have applied the rule that the foreign transaction will be given effect unless the removal into the forum was with the knowledge and consent of

¹⁰⁵ *Bradshaw v. Kleiber Motor Truck Co.*, *supra* note 104.

¹⁰⁶ 98 N.J.L. 29, 119 Atl. 94 (1922), *affd.*, 98 N.J.L. 907, 121 Atl. 927, noted in 23 Col. L. Rev. 394 (1923); 21 Mich. L. Rev. 699 (1922). See also, *State v. Hall*, 91 W.Va. 648, 114 S.E. 250 (1922).

¹⁰⁷ *Cf.*, *Goetschius v. Brightman*, 214 App. Div. 158, 211 N.Y. Supp. 763 (1925), *affd.*, 245 N.Y. 186, 156 N.E. 660 (1927), (156 N.E. 662):

"It has been held that the positive terms of the statute require the courts to apply the statutory rule, though it defeats a title otherwise valid (*Thayer Mercantile Co. v. First National Bank*, 98 N.J.L. 29, 119 Atl. 94 (1922)) . . . We need not now decide whether, when the question is presented to us, we shall reach a similar conclusion."

the presently interested claimant: Arkansas, Connecticut, Idaho, Indiana, Kentucky, Missouri, Nebraska, and Tennessee, and probably Florida; total, nine.

III. This group consists of those states which have no governing statute and have applied the rule that the foreign transaction will be given effect upon removal of the goods into the forum, even under circumstances of knowledge and consent: Iowa, Kansas, Maryland, Maine, Minnesota, New Hampshire, and Vermont; total, seven.

A number of jurisdictions without governing statutes have not clearly held upon the proposition, and classification under II or III, immediately *supra*, is doubtful; California, Illinois, Louisiana, Massachusetts, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Utah, Wyoming, and the Federal courts which have followed each of the various rules; total, twelve. As to this number, judged upon the presence of rather strong *dicta* therein and the effect felt from other states placing limitations in the case of removals with knowledge and consent, one may perhaps be permitted to guess that most of them will swing toward the adoption of that limitation.

Our conclusion then is that among those states which have apparently settled upon a definite rule the present majority favors the protection of local purchasers and creditors; that the doubtful group of states will reach a choice of statutory regulation or the limitation of recognition to the cases of removal without knowledge and consent.

While the foregoing discussion has concerned itself with the questions of jurisdiction and local rules of expediency leading to conflict of laws principles applicable to chattel mortgages and conditional sales, it has been necessary to exclude considerations of contract rights other than represented by an interest in the chattel. In conclusion perhaps it will be well to point out by two types of situation that these principles may occasionally overlap. The first may be illustrated by the treatment given by courts to bilateral contracts calling for the sale of tangible properties where each party has agreed to perform in a different state. In such case rather than face the problem of deciding which jurisdiction would constitute the *lex loci solutionis* the courts have avoided it by adopting as the governing law the place where the title to the chattel passes.¹⁰⁸

¹⁰⁸ See Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 31 Yale L. J. 53, 60 (1921):

"... With respect to bilateral contracts, in which each party has agreed to perform in a different state, the *lex loci solutionis* cannot be consistently applied at all, for it would logically require that the duties of each party be subject to the law of the place in which he agreed to perform, and thus cause essentially dependent promises to be subject to different laws. Our

The second illustration is offered by the case of *Yousoupoff v. Widener*.¹⁰⁹

There plaintiff and defendant entered into a contract in London concerning the sale of certain pictures to the buyer. As part of the contract of sale it was provided that the plaintiff could repurchase the pictures in Philadelphia provided that he was then financially able to keep the pictures, and should plaintiff thereafter, within the next ten years, again desire to sell them, defendant should have an option to repurchase them. The plaintiff sued in New York to repurchase the pictures although he had already contracted to pledge them for a loan, claiming that the transaction should be construed as a chattel mortgage under the laws of Pennsylvania.

The court held for the defendant upon the ground that since the contract was entered into in London the English law governed and required that all conditions be strictly complied with—thus ruling out the plaintiff's contention that Pennsylvania should control the transaction as a chattel mortgage. However, as pointed out in a note¹¹⁰ to this case, there seems no reason why English law should be applied to all the elements of this contract (even though it was not a chattel mortgage in Pennsylvania), for this offer given by the defendant to allow repurchase by the plaintiff could be accepted only in Pennsylvania, and the law of Pennsylvania, as the place where the plaintiff had accepted the offer of repurchase, should govern upon the theory that the parties had stipulated that the repurchase should take place in Pennsylvania.

Such situations, then, are governed by the law applicable to "Contracts," no interest having been created in the movables themselves.

courts do not seem to have faced this problem, which becomes most acute in the law of sales, and have avoided it in this class of cases by abandoning the *lex loci solutionis* for the law of the place where the title of the chattel passes. . . ."

See also, *Ladd v. Dulany*, 14 Fed. Cas. 920 (C.C.D.C. 1809); *Kline v. Baker*, 99 Mass. 253 (1868); *Clafin v. Meyer*, 41 La. Ann. 1048, 7 So. 139 (1889); *Jaffrey v. Wolf*, 4 Okla. 303, 47 Pac. 496 (1896); *Markey v. Brunson*, 286 Fed. 893 (C.C.A. 4th 1923); *Miles v. Vermont Fruit Co.*, 98 Vt. 1, 124 Atl. 559 (1924); *Montreal Cotton & Wool Waste Co., Ltd. v. Fidelity & Deposit Co.*, 261 Mass. 385, 158 N.E. 795 (1927); *Willson v. Vlahos*, 266 Mass. 370, 165 N.E. 408 (1929).

¹⁰⁹ 126 Misc. Rep. 491, 215 N.Y.S. 24 (1925).

¹¹⁰ 26 Col. L. Rev. 1024 (1926).