CONDITIONAL SALES AND THE CONFLICT OF LAWS

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In a federal State like Canada with ten constituent territories, each of which is competent to legislate in matters of civil law and property rights[1] and where movement between one province and another is a commonplace, conflicts between the laws of the several provinces in matters concerning instalment sales are inevitable. Moreover, while the registration requirements of the common law provinces are reasonably similar, there are strong divergencies in the statutory provisions regulating the rights of the buyer and seller *inter se*. Finally, to complicate the picture still further, there are some fifty odd jurisdictions in close physical, commercial and social proximity to the Dominion whose laws also exhibit the widest possible measure of variety. For all these reasons, a study of the applicable principles of the conflict of laws relating to conditional sales is both a practical necessity and intellectually rewarding.[2]

Every conditional sale involves rights *in rem* and right *in personam* and since the two are governed by different conflict of laws rules it is essential to keep them separate,[3] although, as will be seen in due course, the task of characterizing the rights involved in a

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[1] British North America Act, 1867, 30-31 Vict., c. 3, s. 92(13). Canada, of course, unlike the United States and Australia, has no "full faith and credit" clause, but in practice this seems to make very little difference.

[2] There is considerable literature on the property aspects of conditional sales in the conflict of laws but very little on the contractual aspects. This is no doubt because the number of reported cases so far has been small. Hence the second part of this article is largely exploratory.

[3] *Cf.* Falconbridge, Conflict of Laws (2nd ed., 1954), ch. 19, s. 3; Lalive, The Transfer of Chattels in the Conflict of Laws (1955), ch. 7; Rabel, The Conflict of Laws: A comparative Study, Vol. III (1960), ch. 37, s. 1.

particular dispute is by no means always an easy one. In the ensuing discussion, however, in order to focus attention on the commercial and social issues as a group, a slightly different method of classification has been adopted, namely (1) those conflict of laws questions arising out of the seller's reservation of title, and (2) the determination of the applicable law governing the rights *inter se* of the buyer and seller.[4]

I. *The Seller's Rights Against Third Parties.*[5]

Although some of the early Canadian cases,[6] and even more recent ones,[7] have couched the question in contractual or domiciliary terms, the overwhelming consensus today is that the validity of the seller's reservation of title is governed by the *lex situs* of the movables at the time of the conditional sale.[8] For this purpose

[4] No attempt will be made to discuss separately wholesale conditional sale agreements as distinguished from retail agreements, or possible conflict problems arising out of the assignment of conditional sale agreements. Conflict problems involving promissory notes are unlikely to arise since the federal Bills of Exchange Act applies to the whole Dominion.

[5] Among the voluminous literature on the subject, the following may be consulted. Canada: Falconbridge, *op. cit.*, footnote 3, ch. 19, s. 4; Comments in (1954), 32 Can. Bar Rev. 900, 1174, 1181, and (1956), 34 Can. Bar Rev. 323; U.S.A.: Lee, (1942-3), 41 Mich. L. Rev. 445; Carnahan, (1935), 2 Univ. Chi. L. Rev. 345, esp. at p. 361 *et seq*; Stumberg, (1942), 27 Iowa L. Rev. 528; Vernon, (1962), 47 Iowa L. Rev. 346, and Grant Gilmore, Security Interests in Personal Property (1965), pp. 599-628, 1264-1281. England: Lalive, *op. cit.*, footnote 3, esp. ch. VIII; Zaphiriou, Transfer of Chattels in Private International Law (1956), esp. chs. XVI and XVII; Goode & Ziegel, Hire-Purchase and Conditional Sale: A Comparative Survey of Commonwealth and American Law (1965), Part V. Professor Gilmore's study came to hand too late to enable me to discuss his stimulating views in the text and I have therefore confined myself to some footnote references. The Quebec conflict of laws rules in this branch of the law differ substantially from those applied in the common law jurisdictions (though the practical results are often much the same) and no attempt has been made to discuss them in this article. For this purpose see, Johnson, Conflict of Laws (2nd ed., 1962), chs. XIV and XXIV and Ziegel, The Recognition of Extra-Provincial Security Interests in Moveables, Meredith Memorial Lectures, April 1966 (Publication pending).

[6] *E.g., Ross* v. *Henderson* (1909), 11 W.L.R. 656 (Man.); *McGregor* v. *Kerr* (1896), 29 N.S.R. 45; *Singer Sewing Machine Co.* v. *McLeod* (1885), 20 N.S.R. 341. *Cf. Bonin* v. *Robertson* (1894), 2 Terr. L.R. 21.

[7] *Hannah* v. *Pearlman*, [1954] 1 D.L.R. 282, at p. 284 (B.C.); *McAloney & McInnis* v. *G.M.A.C.* (1955), 37 M.P.R. 131, at p. 133 (N.S.). In all these cases, however, the *lex situs* and the proper law of the contract appear to have been the same.

[8] Dicey's Conflict of Laws (7th ed., 1958), Rule 57 (Rule 56 appears to be redundant); Falconbridge, *op. cit.*, footnote 3, p. 44; Goodrich, Conflict of Laws (4th ed., 1964), p. 303. These texts state the general rule relating to the transfer of property rights in movables, of which, of course, the conditional sale is merely one example. Restatement of the Law of Conflict of Laws Second, Tent Draft No. 6 (1960), § 272; *Cammell* v. *Sewell* (1858), 147 E.R. 615; *McGregor* v. *Kerr, supra,* footnote 6, per Weatherbe J.; *Bonin* v. *Robertson, supra,* footnote 6; *Century Credit Corp.* v. *Richard* (1962), 32 D.L.R. (2d) 291 (Ont. C.A.).

the relevant point in time is not when the agreement is concluded but when the goods are actually or constructively delivered to the buyer or to a carrier on his behalf,[9] and the reference to the *lex situs* includes a reference to its conflict of laws rules.[10] The principle is illustrated by a leading American case, *Green* v. *Van Buskirk*,[11] which dealt with the analogous position of a chattel mortgage. A gave B in New York a chattel mortgage on goods situated in Illinois. Before the document had been registered in Illinois, as required by the laws of that State, the goods were seized by a creditor of A in Illinois and sold by judicial proceedings. The goods were later brought to New York and the mortgagee asserted his title to them. The mortgage was valid according to New York law. Both A and B were domiciled in New York and New York law, *semble,* was the *lex actus* of the transfer, that is, the law which had the closest contact with the contract between the parties. It was held that the law of Illinois, as the *lex situs,* determined the validity of the transfer of the goods from A to B and therefore that the judicial proceedings in Illinois were entitled to "full faith and credit".

The *lex situs* principle is also adopted, expressly or by necessary implication, in the Canadian and American legislation. Section 3 of the original Canadian Uniform Conditional Sales Act provides for example, that after possession of the goods has been delivered to the buyer a copy of the conditional sale agreement shall be filed in the registration district in which the goods are delivered to the buyer as well as in the district in which he resides, where the two differ, or only in the district in which the delivery takes place where the buyer resides outside the province.[12] It is clear, therefore, that these provisions do not apply at all unless the goods are within the province at the time of the conditional sale.[13] Again, article 9-102 of the Uniform Commercial Code declares, ". . . this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state", although, as will be seen, a later section introduces some important exceptions to the general rule. Both the

[9] *E.g., Ross* v. *Henderson, supra,* footnote 6; *McGregor* v. *Kerr, supra,* footnote 6; *Singer Sewing Machine Co.* v. *McLeod, supra,* footnote 6. *Cf. Bonin* v. *Robertson, ibid.*; Goode & Ziegel, *op. cit.*, footnote 5, p. 209, n. 4.

[10] Dicey, *op cit.*, footnote 8, p. 541.

[11] (1866), 5 Wall 307, (1868), 7 Wall 139.

[12] The converse situation, where the goods are delivered outside the province and the buyer resides or intends to use the goods within the province, is considered *infra.*

[13] *Cf. McGregor* v. *Kerr* and *Singer Sewing Machine Co.* v. *McLeod, supra,* footnote 6.

Canadian and American provisions reflect, of course, the widely held belief that it is in the jurisdiction where the goods are located that the appearance of ownership is normally created.

What is the position where the parties contemplate that after delivery the buyer will promptly remove the goods into another jurisdiction? In Canada[14] this has never been held to make any difference. In the United States, on the other hand, some writers[15] interpret the law as being that in such a situation the second *lex situs* will determine the validity of the reservation of title to the exclusion of the first *lex situs*. However, the authorities[16] which are cited by them do not go this far and all that they decide is that the seller must comply with the registration requirements of the second *lex situs*. In fact there are decisions[17] which have faulted the seller where he has failed to comply with the registration requirements of the first *lex situs*, even though those of the second had been satisfied. On principle the first *lex situs* cannot be ignored since dealings in the goods between the buyer and third parties may have occurred before they were removed into the second jurisdiction; logically the effect of such dealings should be governed by the first *lex situs*, especially since the third party may not be aware that the goods are to be removed into another jurisdiction.

What the position is under the Uniform Commercial Code is not at all clear. Article 9-103(3) provides, in part, that:

> . . . if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this state and it was brought into this state within 30 days after the security interest attached for purposes other than transportation through this state, then the *validity* of the security interest in this state is to be determined by the law of this state.[18]

"Validity" is not defined but presumably it does not include attachment and perfection of the security interest.[19] If this is correct, are

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[14] See the cases cited in the previous note.

[15] *E.g.*, Beale, The Conflict of Laws (1935), § 272.5; Goodrich, *op. cit.*, footnote 8, p. 310.

[16] *Potter Manufacturing Co.* v. *Arthur* (1915), 220 F. 843; *E.I. Du Pont de Nemours Powder Co.* v. *Jones Bros* (1912), 200 F. 638; *contra, Cleveland Machine Works Co.* v. *Lang* (1892), 31 A. 20 (N.H.).

[17] *E.g., In re Steen* (1958), 257 F. 2d. 297.

[18] Emphasis added. The Ontario Draft Bill on Security in Personal Property does not contain this provision. Unless otherwise indicated, all references are to the 1966 version of the Bill as appended to Report No. 3A of the Ontario Law Reform Commission on Personal Property Security Legislation. For an account of the history and contents of the Bill see Ziegel (1966), 44 Can. Bar Rev. 104.

[19] *Cf.* Uniform Commercial Code (hereinafter cited UCC) 9-103, Comment 7.

we to assume that the attachment and perfection of such a security interest are to be governed by the *first lex situs*? It would be strange if the validity of the security interest was to be governed by the *second lex situs* but not these other elements. These and related aspects of article 9-103(3) do not appear to have been fully thought through.

Another exception to the *lex situs* rule recognized in the Code involves goods of a type which are normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes and the like) if such goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others. The rule adopted with respect to such collateral[20] is that the law (including the conflict of laws rules, where the law is that of a non-Code State) of the chief place of business of the debtor shall govern the validity and perfection[21] of the security interest. Justifiable and necessary though this special rule is, because of the nature of the collateral, it is not free of difficulty. Suppose mobile goods which are subject to a security interest are attached by a creditor of the debtor in State A, which is not the debtor's chief place of business, and that the law of State A accords priority to the attachment over the security interest because the security interest was not perfected in State A. Will a Code State recognize the attachment? The Code does not deal with this question and an answer either way may create hardships for an innocent party.[22] Ultimately the success of the rule enshrined in article 9-103(2) will depend on its general adoption by non-Code as well as Code States.

Apart from these accepted or doubtful exceptions, then, the *lex situs* will determine what conditions the seller will have to comply with in order validly to reserve his title, and in practice this will mean compliance with some sort of registration or marking requirements. The *lex situs* will also determine the effect of non-compliance, that is, whether it makes the reservation of title void or voidable. It is further submitted that it is the *lex situs* which

[20] UCC 9-103(2). *Cf.* Ontario Draft Bill, s. 5(2).

[21] Professor Gilmore, *op. cit.*, footnote 5, pp. 320-321, 324, expresses the opinion that the words "validity and perfection" were in fact intended to embrace all aspects of the regulation of the security interest. He attributes the infelicitous language to the human frailties of the draftsmen!

[22] Presumably counsel for the secured party would argue that the intention of UCC 9-103(2), though not spelled out in so many words, is that the debtor's chief place of business is to determine all questions of priorities and that the *lex situs* as such should be completely ignored. For a similar problem in a somewhat wider context, see *infra*.

will have to determine whether the transaction, though called a conditional sale, is a chattel mortgage or lease agreement, or *vice versa,* and therefore governed by other registration laws, or even none.[23] Likewise, if the goods have become attached to realty, it is the *lex situs* which will determine whether the goods have become part of the realty or whether they have retained their original identity as movables.[24]

However, it does not follow that because the *lex situs* is competent to legislate that it will necessarily exercise its power, or that it may not discriminate between different types of conditional sale agreements and even refer to the law of another jurisdiction to determine the validity and status of the security interest. Such is the case, as we have seen, with respect to mobile equipment and inventory under the Uniform Commercial Code. Thus if in a non-Code State which does not recognize the rule in article 9-103(2) the question arises as to the validity or perfection of a conditional sale relating to trucks purchased by a trucking company at a time when the trucks were situated in a Code State, the answer may well have to be sought by referring to the laws of a third State, that is, the State in which the debtor has his chief place of business. Or again the Code State may refer the question back to the law of the forum. Clearly the forum should accept such an *envoi* or *renvoi,* as the case may be, by the *lex situs.*[25]

Next, we must consider the position where the goods, with or without the seller's consent, are removed by the buyer into another province. Here a distinction must be drawn between several possible situations which may arise. Thus, A, the seller may validly have reserved his title by the law of the original *lex situs* or, B, he may not, in which case (it will be assumed) he has only a "voidable" title or, more accurately, an unperfected security interest. Again, (1) no new dealings or acts—using these terms in the broadest sense to include both consensual and non-consensual transactions—involving the goods may have occurred in the new *situs,* or (2) there may have been such dealings or acts. Other

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[23] There does not appear to be any reported case in point, but Zaphiriou, *op cit.,* footnote 5, p. 62, n. 8, refers to *Gross* v. *Jordan* (1891), 22 Atl. 250 (Me.). In that case, however, the *lex situs* and the proper law were the same. *Youssoupoff* v. *Widener* (1927), 247 N.Y. 174, although it did not involve third parties, is an excellent illustration of the type of problem which may arise.

[24] *Cf. Dominion Bridge Co.* v. *British American Nickel Co. Ltd.,* [1925] 2 D.L.R. 138 (Ont.).

[25] *Cf.* Dicey, *op. cit.,* footnote 8, p. 541, last two sentences.

possible variations will also be considered under their appropriate headings.

A(1). *Removal of the goods into another jurisdiction in which no new dealings take place.* Assume X buys, for example, an automobile conditionally from Y in Ontario and X subsequently removes the car to British Columbia, where he wrongfully sells it to Z. It is generally agreed that in such circumstances a court which applies the *lex situs* rule will, in seeking to resolve the conflicting claims of Y and Z, completely ignore the laws of Manitoba, Saskatchewan, and Alberta through whose territories the car will have travelled en route to British Columbia. If, according to Saskatchewan law, the original conditional sale agreement should have been re-registered in that province or if (let us assume) Saskatchewan would not have recognized Y's title at all, however binding these domestic rules may be on a Saskatchewan court they will be ignored by every other. This conclusion, which appears never to have been challenged in any reported case,[26] rests on the ground that a title validly acquired or retained in one country is entitled to recognition in every other until by the law of a new *situs* Y's title has been divested as a result of some new dealing with the car.[27] In our hypothetical case no such dealings occurred in Saskatchewan, and it follows that as of the moment when the automobile first entered British Columbia, the court of British Columbia (and the courts of every other jurisdiction which respect the *lex situs* rule) will regard Y as having a validly reserved title in the vehicle. The only question which will concern the British Columbia courts is the effect upon Y's title of the subsequent dealing with the goods in British Columbia.

A(2). *Removal of the goods into another jurisdiction in which new dealings do take place.* In this situation we must distinguish between the international competence, in the Anglo-Canadian conflict of laws sense, of British Columbia, as the new *lex situs* of the car, to apply its own domestic rules to resolve the conflicting claims of Y and Z on the one hand, and the solution which the courts of British Columbia will in fact choose to apply on the other. British Columbia's international competence follows logically from the *lex situs* rule, for just as Y looked to the law of Ontario to tell him whether he could validly reserve his title there,

[26] But see the apprehensions, unfounded it is submitted, expressed by Krause in (1960), 15 Bus. Lawyer 654.

[27] Dicey, *op. cit.*, footnote 8, Rule 88, pp. 544-545; Restatement of the Law of Conflict of Laws (1934), §273.

so the purchaser from X in British Columbia relies on the law of that province to furnish him with a rule as to whether or not he may safely treat X as the owner of the car.

We have used the example of a consensual transaction occurring in British Columbia. The same rule applies if the claim made against the goods in the second *situs* is of a non-consensual character,[28] such as the lien of an execution creditor,[29] repairman,[30] a landlord's right of distress,[31] or a lien claimed by a public authority in respect of arrears in taxes.[32] Again, if the goods have been affixed to realty, it is for the second *lex situs* to determine whether they have become fixtures and, if so, how this affects the original seller's rights.[33] All these examples illustrate the fundamental rule that persons dealing with the goods in any capacity in the second *situs* are entitled to guide themselves by the law of that *situs*. Any other rule would lead to grave uncertainty and defeat the purpose for which the *lex situs* rule was designed. It is encouraging, therefore, to note that in practice the Canadian or American courts have not drawn any distinction between consensual and non-consensual acts in the second *situs*.

It has, however, been suggested at various times that the binding character of the new *lex situs* is subject to a number of qualifications, and these must be briefly considered. The first suggested limitation is that the conditional seller must have consented to, or at least have known of, the removal of the chattel into the second *situs*. The limitation finds support in some early American decisions[34] and in the *Restatement*,[35] and it was strongly approved by Beale,[36] but it has never found a foothold in England or Canada,

[28] *Cf.* Lalive, *op. cit.*, footnote 3, p. 157 *et seq.*; Goode & Ziegel, *op. cit.*, footnote 5, pp. 215-217.

[29] *Cf. Sawyer-Massey Co.* v. *Boyce* (1908), 8 W.L.R. 834 (Sask.). The writer does not read Falconbridge, *op cit.*, footnote 3, p. 474, as implying a different rule, although the passage is a little ambiguous.

[30] *Cf. Universal Credit Co.* v. *Marks* (1932), 163 A.810 (Md.).

[31] *Cf. Cammell* v. *Sewell, supra*, footnote 8.

[32] *Cf. First Nat. Bank of Valentine, Neb.* v. *Peterson* (1940), 293 N.W. 530 (S.D.), with *W.C.B.* v. *U.S. Steel Corp.* (1956), 5 D.L.R. (2d) 84 (Alta).

[33] *Cf. Dominion Bridge Co.* v. *British American Nickel Co. Ltd., supra*, footnote 24.

[34] *E.g., Edgerley* v. *Bush* (1880), 81 N.Y. 199. The question was left open by the New York Court of Appeals in the leading case of *Goetschius* v. *Brightman* (1927), 156 N.E. 660. It should be carefully noted that the question presently under consideration is quite different from another question which will be discussed later, namely, whether as a matter of policy or statutory construction the domestic recording laws of the second *lex situs* apply to security interests created in the first *situs* while the goods were located there.

[35] *Op cit.*, footnote 27, § 268.

[36] See (1926-7), 40 Harv. L. Rev. 805.

whether in the Anglo-Canadian legal literature on the subject[37] or in the numerous Canadian cases in which goods were surreptitiously removed from one province to another.[38] The few judicial dicta are indeed opposed to any such limitation.[39] Moreover, even in the United States it has for some time been impliedly rejected in various State provisions[40] and it is now rejected in the Uniform Commercial Code. Article 9-103(3) provides that if goods which are subject to a perfected security interest are brought into the Code State, the security interest must also be perfected in the new *situs* within four months of the removal.[41] A more stringent rule is adopted if the security interest was not perfected in the original *lex situs*.[42] In both cases, it will be observed, the seller's knowledge of the removal is an immaterial factor.

The second qualification to the general rule is urged in *Dicey* by Dr. Morris.[43] His reasoning appears to be that since a title validly acquired or reserved in State X (the original *lex situs*) is entitled to recognition everywhere else, State Y's refusal to accord that recognition need not be heeded by an English court. Hence, if the reason why C in State Y is deemed to have acquired a good title to B's car is because State Y does not recognize the validity of B's reserved title, according to Dr. Morris, if the car were subsequently to be brought to England B could successfully set up a claim to the vehicle. It is not clear whether State Y's refusal to recognize Y's title must be based on a particular ground—Dr. Morris refers only to a refusal based on grounds of public policy, as, for example, the refusal of the Louisiana court in *Simpson* v.

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[37] See, *e.g.*, Lalive, *op. cit.*, footnote 3, pp. 175-184; Falconbridge, *op. cit.*, footnote 3, pp. 445-451.

[38] Indeed the point has never been argued, although it would clearly have been relevant in such recent cases as *Hannah* v. *Pearlman, supra,* footnote 7 and *Traders Finance* v. *Dawson Implements* (1958), 26 W.W.R. (N.S.) 561 (B.C.).

[39] *Cf. Cammell* v. *Sewell, supra,* footnote 8, per Crompton J., at pp. 744-745.

[40] *E.g.*, those of Alabama, Georgia, and Oklahoma. They require foreign security interests to be filed in the State within a given number of days following the removal of the goods into the State, whether or not the secured party was aware of the removal. For further particulars, see Vernon, *loc. cit.*, footnote 5, at pp. 367-369.

[41] *Cf.* Ontario Draft Bill. s. 7. The Saskatchewan Conditional Sales Act, R.S.S., 1965, c. 393, s. 8, only allow a thirty days' grace period. The longer period in the Code was apparently adopted in order to exclude chattels which were removed only temporarily into the Code State. See Vernon, *loc. cit., ibid.*, at pp. 376-377.

[42] In this case no grace period is allowed at all and the security interest is deemed unperfected in the Code State until it has been perfected.

[43] *Op. cit.*, footnote 8, p. 547. His views are expounded at greater length in (1945), 22 Br. Y. Int. L. 222, esp. at p. 239 *et seq.*

Fogo[44]—but presumably, as a matter of consistency, it must extend to any ground.[45] If this is so, an issue which might otherwise be only of theoretical interest (since all the Canadian provinces recognize the validity of conditional sales) may well assume practical importance. This is because of some of the choice of law provisions in the Code. As has already been noted, article 9-103(2) provides that in the case of mobile equipment the law of the debtor's chief place of business shall govern the validity of the security interest. A further exception to the *lex situs* rule will be found in the next subsection, which provides that where the parties to the transaction understood at the time that the security interest attached that the property would be kept in the Code State, and it was brought into the State within thirty days after the security interest attached, the validity of the security interest is to be determined by the law of the latter (Code) State.

Suppose now a construction company whose chief place of business is in New York (a Code State) purchases a bulldozer situated in Delaware (a non-Code State) under a conditional sale agreement with S. The agreement is valid in Delaware but not in New York, because a financing statement has not been filed in the latter State. The bulldozer is subsequently brought to New York, where the debtor wrongfully resells it to C, an innocent purchaser. The machine eventually finds its way into Ontario, and both S and C claim to be entitled to it. Under the law of New York C's title will prevail. If Dr. Morris is right, however, the Ontario court would have to disregard C's acquisition of title in New York, even though it was the *lex situs* at the time, because of that State's failure to recognize the validity of S's security interest.

It is submitted that both on principle and on the balance of the authorities the suggested limitation is unsound. The learned general editor of *Dicey* cites no decision which supports it, but presumably had *Simpson* v. *Fogo* in mind.[46] That case, however, is now largely discredited.[47] For a long time Texas and a number of

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[44] (1863), 1 H. & M. 195.

[45] Dr. Morris would even appear to extend it to a case where State Y's refusal to recognize B's title is due to B's failure to re-register the agreement in State Y. He suggests, *loc. cit.*, footnote 43, at p. 243, n. 1, that the New York Court of Appeal's failure in *Goetschius* v. *Brightman, supra,* footnote 32, to apply s. 14 of the American Uniform Conditional Sales Act supports his position, but, with respect, the learned author overlooks the fact that s. 14 was not in force in New York at the material time.

[46] This inference may be drawn from Example 8, on p. 549, *op. cit.*, footnote 8.

[47] See Lalive, *op. cit.*, footnote 3, pp. 161-162.

other American States refused to recognize validly created liens on goods surreptitiously brought into their States if the liens were not re-recorded in the second *situs*. At first the reaction of some of the "orthodox" States was to retaliate by refusing to recognize Texas created liens, but latterly a more sensible attitude has prevailed. In *Hart* v. *Oliver Farm Equipment Sales Co.*[48] the court said, "We are unable to see how the adoption of a rule of retaliation could in any way protect our citizens". This observation would also appear opposite with respect to Dr. Morris' views. The purpose of the *lex situs* rule is to facilitate security in transactions, but if exceptions are to be engrafted on it its value will be much diminished. It is true, of course, that the rule militates against the seller's interests, insofar as by the surreptitious removal of the goods to another State his security may be endangered, but Dr. Morris' limitation will not change this: at best it will merely slightly reduce the danger at the cost of creating a great deal of new uncertainty.

The third alleged limitation on the competence of the second *lex situs* is put forward by Falconbridge,[49] and would appear in part to lead to the same result as Dr. Morris' views, although Falconbridge's reasoning is different. As will be seen,[50] the Canadian Condition Sales Acts generally provide that where goods subject to prior conditional sale agreement are brought into province Y a copy of the agreement must be registered in Y within a prescribed number of days following the seller's knowledge of the removal. Falconbridge characterizes such a statutory rule as a conflict of laws rule of province Y and, he argues, such a rule should be ignored by another jurisdiction if the goods are subsequently again taken out of Y. Jurisdictions other than Y, he maintains, should apply their normal conflict of laws rules and only apply the domestic law of Y. It is not easy to follow this reasoning. Even if it be conceded that the statutory rule in question is a conflict of laws rule, surely a reference to the *lex situs* includes a reference to its conflict of laws rules?[51] Falconbridge might reply that this is only true where the *lex situs* does not retroactively seek to alter the effect of a transaction which occurred in a prior *situs*. Assuming this is what he meant to say, the answer is that Y is only seeking to regulate the conditions for the *continuing* validity (or perfection) of the seller's lien in Y, and this should be a matter

[48] (1933), 21 P. 2d. 96 (N.M.).
[49] *Op cit.*, footnote 8, pp. 474-475.
[50] *Infra.*
[51] See *supra.*

peculiarly within Y's competence. Common sense rejects the suggestion that a State is competent to regulate a purely domestic transaction, but not one which has some foreign elements in it. Fortunately Falconbridge's views have not been followed in any reported Canadian decision.

Having discussed, in the context of our hypothetical example, the general question of British Columbia's competency, we must now see how a British Columbia court would deal in fact with the conflicting claims of the original seller and the innocent purchaser from the buyer. What a British Columbia court will do is, of course, only treated as illustrative of what any other Canadian common law court would do under similar circumstances. The first question which arises is whether British Columbia will refuse to recognize the seller's Ontario title on the grounds of public policy, although it was validly reserved under the then *lex situs*. The question was raised for the first and only time in Canada in *Bonin* v. *Robertson*,[52] a decision of the North-West Territories, and emphatically answered in the negative. The familiar facts were that goods which had been validly mortgaged in Minnesota were surreptitiously brought by the mortgagor into the North-West Territories and there fraudulently sold by him to an innocent purchaser. The Bills of Sale Ordinance of the Territories, as it was framed at the time, did not apply to extra-provincial mortgages, but it was argued that the court was not obliged to recognize the Minnesota mortgage and that it should not do so if it would result in an injustice to its own citizens. The argument was convincingly rejected by McGuire J. in a passage which is worth repeating. He said:[53]

> Even agreeing for the moment with the proposition that it is only out of regard for the comity of nations that the laws of a foreign state will be given effect to, we do not agree that the laws of Minnesota in this behalf are such that it would be inequitable and unjust to treat the mortgage here as valid and effective . . . . It was not contended that this mortgage was not perfectly good as between the parties to it even here. If so, up to the moment of the completion of the sale to the plaintiff (the innocent purchaser) it is conceded that the bank was the owner of the horses . . . . To say, then, that the only remedy the mortgagees had was to seize the horses, before the mortagor could effect a sale or disposal of them, would be to place foreigners at a very great disadvantage as compared with our own citizens for whose benefit we have made provision by the Ordinance in question. It would be very hard indeed for us to say to a foreigner, we recognize you as owner of

[52] *Supra*, footnote 6.

[53] *Ibid.*, at p. 26.

certain chattels but we will make it possible for you to be deprived of your property by an act of the mortgagor, because you have not complied with an Ordinance which we have in advance so framed that it was impossible for you to comply therewith.[54]

The next question which must be considered is whether the provisions of the British Columbia Conditional Sales Act or of some similar statute apply, so as to protect the innocent purchaser in British Columbia. Here two issues must be distinguished: (a) in the absence of a positive statutory direction does the legislation apply to exterritorial transactions? and (b) is there anything in the legislation which affects the answer to the first question one way or the other? With respect to the original Conditional Sales and Chattel Mortgage Acts, both questions were answered negatively in a consistent line of cases and, until the legislation was amended, it was well settled law that these statutes were only intended to apply to intraprovincial conditional sales or chattel mortgages.[55] Moreover, insofar as the registration provisions were such (they have now been changed) that they could only be complied with if the goods were within the jurisdiction at the time of the sale or mortgage, this supported the answer to the first question.[56] These rules were applied even where both parties at the time of the original transaction contemplated the removal of the goods into the second province.[57]

In this respect the approach adopted by the American courts differs markedly from that of the Canadian courts. In the absence of compelling statutory provisions the American courts draw a sharp distinction between a situation in which the goods are removed into the second *situs* without the knowledge or consent of the secured party and a situation where such removal was con-

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[54] For a comparable leading American judgment, see *Goetschius* v. *Brightman, supra,* footnote 32.

[55] *Goslin* v. *Dunbar* (1894), 32 N.B.R. 325 (Full court); *McGregor* v. *Kerr, supra,* footnote 6; *Nat. Cash Register Co.* v. *Lovett* (1906), 39 N.S.R. 540 (en banc); *Sawyer-Massey Co.* v. *Boyce, supra,* footnote 27; *Cline* v. *Russell* (1909), 10 W.L.R. 666 (Alta); *Cormier* v. *Coster* (1914), 19 D.L.R. 701 (N.S.). *Cf. C. E. B. Draper & Son Ltd.* v. *Edward Turner & Son Ltd.,* [1964] 3 All E.R. 148 (C.A.). As noted, *supra,* in some of these cases contractual and property questions were confused and the courts mistakenly attached importance to the fact that the security agreement had been concluded outside the province. This factor is of course irrelevant—the *situs* of the goods at the time of the agreement should be the sole criterion.

[56] See *Bonin* v. *Robertson, supra,* footnote 6; *McGregor* v. *Kerr, ibid.,* per Henry J., at pp. 50-51. *Contra, ibid.,* per Weatherbe J., at p. 55 and Graham E.J., at p. 57.

[57] *McGregor* v. *Kerr, ibid.; Nat. Cash Register Co.* v. *Lovett, supra,* footnote 55.

templated or subsequently consented to or learned of by him before further dealings with the goods occurred in the second *situs*. In the first situation, in the overwhelming majority of States his security interest will be held to prevail over the rights of even innocent purchasers in the second *situs*, whereas in the second situation his failure to register the agreement in the second *situs* will be treated as amounting to a waiver of his lien rights.[58] In reaching this conclusion the American courts have consistently shown a greater interest in protecting the position of innocent parties in the second *situs* than in grappling with the legal niceties of statutory construction. In fairness to the Canadian courts it must be added, however, that legislation in Canada dealt with the problem of interprovincial movement in goods subject to security agreements much sooner than in most of the American States, so that the rigidity of the Canadian judicial approach never became too obvious.

The Canadian courts' treatment of the question of the applicability of the original security Acts to exterritorial transactions invites a further word of comment. It is usually couched in territorial language—that is, the courts have applied the general canon of construction that a statute only applies to transactions occurring within the borders of the enacting province. This approach does no harm in the case of the transfer of movables because the *lex situs* rule is itself a territorial rule. But in other cases it could easily lead to wrong results. The correct approach, it is submitted, is for a court to ask itself: "According to the appropriate conflict of laws rule is this transaction governed by the law of this province? If so, our conditional sales legislation will apply, otherwise not, unless our legislation indicates a different choice of law rule."[59]

Even if the *lex situs* rule points to the applicability of a given statute it may still be a difficult question of interpretation whether or not the legislature intended it to apply to a transaction which

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[58] For a detailed discussion of the American common law rules, see *e.g.*, Beale, *op. cit.*, footnote 15, §§ 275.2, 276.1 and 278.1; Vernon, *loc. cit.*, footnote 5, at p. 350 *et seq;* Lalive, *op. cit.*, footnote 3, pp. 175-184. In a typical judgment, the court in *Moore* v. *Keystone Driller Co.* (1917), 163 P. 1114, said at p. 1115: "By such consent [*sc.* by the mortgagee to the removal of the goods] the mortgagee negligently places it in the power of the mortgagor to deceive and defraud innocent people in that State into which the property is taken. He should be and is deemed to have waived his lien against such innocent parties upon the principle that where one of two persons must suffer by reason of the wrongful act of a third, the injury must be borne by him by whose conduct the wrongful act has been made possible."

[59] *Cf.* Dicey, *op. cit.*, footnote 8, pp. 757-758, and *passim*, Morris, The Choice of Law Clause in Statutes (1946), 62 L. Q. Rev. 170.

contains foreign elements. In *Traders Finance Corp.* v. *Dawson Implements,*[60] for example, the conditional buyer surreptitiously brought the car from Alberta into British Columbia and sold it there. At the time of the resale the Alberta seller was not in breach of any of the provisions of the British Columbia Conditional Sales Act. However, in 1958 there was still a conflict between section 32(2) of the British Columbia Sale of Goods Act[61] and the province's Conditional Sales Act,[62] in so far as the former invested the buyer in possession with an ostensible title to the goods in every case whereas the latter act only avoids the seller's reservation of title where he has failed to register the conditional sale agreement. Whittaker J. held that section 32(2) had not been overridden by the Conditional Sales Act and he therefore applied it in favour of the purchaser in British Columbia. But as a matter of construction was he correct in doing so? The point does not appear to have been argued. The difficulty is that section 32(2) contemplated two separate events,—the original transfer of possession to the buyer and the subsequent tortious resale of the goods by him to an innocent purchaser, of which only the second occurred in British Columbia. Did the section therefore still apply to the resale in British Columbia? A persuasive argument could be made either way, though consistency would suggest that if the security acts are given a strictly territorial application a similar construction should be placed on section 32 and the equivalent provisions in the other provincial sale of goods acts. Similar problems of interpretation arise with respect of the "trader's section"[63] in the Conditional Sales Acts.[64]

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[60] *Supra,* footnote 38. The decision was approved and followed in *Century Credit Corp.* v. *Richard, supra,* footnote 8. *Cf. Reid* v. *Favor,* [1953] Que. S.C. 370.

[61] R.S.B.C., 1948, c. 294. S. 32(2) reads: "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person . . . of the goods or documents of title under any sale, pledge, or other disposition thereof . . . to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." See now R.S.B.C., 1960, c. 344, s. 31(2), and also Ziegel, (1963), 28 Sask. Bar Rev. 90 and Comment (1965), 43 Can. Bar Rev. 639.

[62] The Sale of Goods Act was amended in 1959 so as to resolve the conflict. See now R.S.B.C., 1960, c. 344, s. 31(3).

[63] *Cf. Delaney* v. *Downey* (1912), 2 W.W.R. 599, 4 D.L.R. 474 (Sask.), where the court applied general estoppel principles to protect a purchaser from a trader, the goods at the time of the conditional sale to the trader having been situated in another province.

[64] See Ziegel, (1963), 41 Can. Bar Rev. 54, at p. 83 *et seq.*

The judicial determination that extra-provincial sales were not caught in the registration statutes led to the eventual adoption of remedial legislation. The original provisions were both simple and, from the conflict of laws point of view, impeccably correct. Thus section 3(5) of the first Uniform Conditional Sales Act provided:

> If the goods, having been delivered at a place outside this province, are subsequently brought into the province by the buyer, the writing or a true copy thereof shall be filed in the registration district to which the goods are removed, within twenty days after such removal has come to the knowledge of the seller.[65]

Unfortunately, for reasons which the writer has explained elsewhere,[66] these lucid provisions were gratuitously altered in the 1947 Revised Act, which deleted section 3(5) and replaced it with a new section 7.[67] This reads, *inter alia,* as follows:

> Where goods are brought into the province and are subject to an agreement *made or executed outside the* province . . . then unless . . . a copy of the agreement is filed with the proper officer of the registration district into which the goods are brought . . . the seller shall not be permitted to set up any right of property . . . .

The words which have been underlined by the writer may lead to at least three possible lines of argument. First, a court reading the section literally may come to the conclusion that no registration is necessary where the original contract was executed in the province to which the goods were subsequently taken. Alternatively, the court may spell out the implied proposition that an agreement is registrable in the province in which the contract was made, even though the goods were then situated and delivered to the buyer outside the province. In the third place, it may be argued that section 7 supports the view that, contract is not registrable under the earlier provisions of the Act[68] unless the contract is both made and the goods are situated in the province, the reasoning being that if the place of contracting were an irrelevant factor the section would not have mentioned it. Any of these interpretations would be equally unfortunate from the point of view of innocent third parties and for a sound and consistent development of the *lex situs* rule which is so important in this branch of the law.

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[65] For the comparable provisions in the American Uniform Conditional Sales Act, see s. 14. For the meaning of "removal", see *Reick* v. *Neeb,* [1948] O.R. 459 and *cf. G.M.A.C.* v. *Prophet* (1959), 29 W.W.R. 44 (Alta.).

[66] (1961), 39 Can. Bar Rev. 165, at pp. 203-207.

[67] The section is re-enacted in the 1955 Revised Act, s. 6(1).

[68] *I.e.,* s. 4 in both the 1947 and 1955 Revised Acts. The section is silent as to the place of contracting.

That the fears which have been expressed have a solid foundation may be seen from the Ontario experience. Section 12 of the present Ontario Act reads in part:

> When a contract has been made out of Ontario with reference to goods not then in Ontario which if made in Ontario and with reference to goods in Ontario would come within this Act . . . and the goods are brought into Ontario, the contract is subject to this Act, but the period for registering in the office of the clerk of the county . . . in which the purchaser resided at the time of the sale is within twenty days after the date on which the goods are brought into Ontario . . . .

In *I.A.C.* v. *La Flamme*[69] a car was conditionally sold and delivered in Quebec to a buyer who was domiciled and resident there. The buyer subsequently brought the car to Ontario and sold it. Schroeder J., applying section 11 (as it then was) literally, held that no registration of the agreement was necessary in Ontario since the buyer was not resident in Ontario at the time of the original sale. Is is hardly necessary to point out that this interpretation of the section, correct and perhaps even inescapable as it may be, leaves the innocent purchaser in Ontario without protection in the majority of cases where goods subject to a conditional sale agreement are brought into the province for the first time.

Fortunately the Ontario Draft Bill has avoided these drafting errors. The Bill indeed slightly improves upon the protection given third parties in the second *situs* under the existing provisions. Section 7 reads as follows:

> (1) A security interest in collateral already perfected under the law of the jurisdiction in which the collateral was when the security interest attached and before being brought into Ontario continues perfected in Ontario for four months and also thereafter if within the four-month period it is perfected in Ontario.
>
> (2)Notwithstanding subsection 1, where the secured party receives notice within the four-month period mentioned therein that the collateral has been brought into Ontario, his security interest in the collateral ceases to be perfected in Ontario unless he registers the security agreement covering the collateral within fifteen days from the date that he receives such notice or upon the expiration of the four-month period, whichever is earlier.
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> (3) A security interest that has ceased to be perfected in Ontario may thereafter be perfected in Ontario, but such perfection takes effect from the time of its perfection in Ontario.[70]

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[69] [1950] 2 D.L.R. 822 (Ont.), foll'd and app'd in *United Acceptance Corp'n* v. *Harker*, [1958] O.W.N. 157 (C.A.).

[70] Ss. (1) and (3) are based on UCC 9-103(3). Ss. (2) is new. The Law Reform Commission made some highly objectionable changes to the original bill, but fortunately they have now been dropped. See Ziegel, *loc. cit.*, footnote 18, at pp. 134-135, and Report No. 3A, May 18th, 1966, of

Thus it will be seen the secured party's knowledge of the removal is no longer necessary in two situations, namely: (a) where the secured party has not perfected his security interest in the first *situs*; and (b) where he has perfected it but more than four months have elapsed since the goods were first brought into Ontario.

It may be questioned whether even these provisions go far enought to protect innocent third parties in the second *situs*. If the reported cases are any guide, the overwhelming number of chattels (usually vehicles) which are surreptitiously removed from one province into another are wrongfully disposed of in the second *situs* before the end of four months, so that from the practical point of view third parties are no better off than they are under the existing provisions. And these provisions too are inadequate because the goods are usually sold or mortgaged before the secured party has notice of their removal. A thirty day cut-off period, such as is prescribed in the Saskatchewan Conditional Sales Act,[71] is no doubt more satisfactory, although even it does not protect innocent parties in the case of intermediate transactions. The real issue in all such cases is whether it is the secured party or third party who can best assume the burden of loss resulting from the debtor's wrongful action, and there is much merit in the suggestion of a learned American writer[72] that it is the secured party—at any rate where the third party is a private purchaser who cannot be expected to be conversant with conflict of laws rules and would not ordinarily think of searching title in the first *situs*.[73] In the case of motor vehicles, the best solution would be the adoption of a well drafted uniform certificate of title act, which would make it impossible for a vehicle to be registered in another province without the production of the existing certificate of title.

B. *The effect of an imperfect reservation of title under the*

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the Ontario Law Reform Commission. The serious weakness about the Code provisions is that the four months' perfection period applies even though the secured party has received notice of the removal before the period has expired. If the goods are "consumer goods" the position of a private purchaser in the Code State may be more favourable. See further, Lee, *loc. cit.*, footnote 5, at pp. 376-379.

[71] S.S., 1957, c. 97, s. 8. The thirty day period applies, *semble*, even though the seller learns of the removal before that time. The section, in common with the other Canadian provisions, draws no distinction between a secured interest which has been perfected in the first *situs* and one which has not.

[72] See Lee, *loc. cit.*, footnote 5, at pp. 361-367.

[73] Two American States, Mississippi and Virginia, have or had such an absolute filing requirement, though neither of them draws any distinction between private and other purchasers or third parties. See further, Lee, *op. cit., ibid.*, pp. 372-373.

original lex situs. Thus far our sailing has been in relatively calm waters. These, however, we must now abandon for more troubled seas. The problem subsumed under the above heading is this: if the seller has not perfected his security in accordance with the original *lex situs,* what effect will this have on his security in the new province? There are four possible answers. The first is that the seller will lose his privileged position if the third party comes within one of the protected classes created under the original *lex situs.* This is the rule favoured by the *Restatement of the Law of Conflict of Laws*[74] and adopted in a substantial number of American cases.[75] The second answer, advocated, *inter alios,* by Dicey[76] and Falconbridge,[77] is that it depends on the construction of the statute. If its provisions are only intended to protect a subsequent dealing or act occurring while the goods are still in the original *situs* the purchaser in the second province (British Columbia, in our earlier example) will not be protected, but if no such limitation is to be read into the statute he will be. Although the interpretative method has been used in the majority of Canadian cases which deny exterritorial effect to the laws of the original *situs,* it is not clear, as will be seen, whether this is their sole ground of decision. The third possible answer is that if the seller has complied with the re-registration requirements of the new *situs,* he is deemed to have a perfected security interest there whatever the original *lex situs* may say about his position. Although surprisingly this approach is not discussed in the existing literature on the subject or in the decided cases, it is justified, it is submitted, by an enlightened reading of the relevant provisions in the acts and, indeed, is now expressly supported in the Code. The final possible answer is that, irrespective of what the first *situs* says, its registration laws ought not to be given exterritorial effect *as part of the conflict of laws rules* of the second *situs,* though the non-compliance may have a bearing on its domestic policies. This position is adopted by Goodrich[78] and, *semble,* Ehrenzweig,[79] and in a number of Ameri-

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[74] *Op. cit.,* footnote 27, ss. 272, 265.

[75] *E.g., Chas. T. Dougherty Co.* v. *Krimke* (1929), 144 A.617 (N.J.); *Internat. Harvester Co.* v. *Holley* (1939), 18 N.E. 2d 484 (Ind.); *North American Acceptance* v. *Meeks* (1945), 20 N.W. 2d 504 (Neb.); *Associates Discount* v. *McKinney* (1949), 55 S.E. 2d. 513 (N.C.); *In re Steen, supra,* footnote 17, dist'd in *In re Princeton Rubber Co.* (1959), 272 F.2d 197, and noted in (1960), 15 Bus. Lawyer 654.

[76] *Op. cit.,* footnote 8, p. 548.

[77] *Op. cit., ibid.,* pp. 482-483.

[78] *Op. cit., ibid.* (3rd ed., 1959), pp. 477-478.

[79] Ehrenzweig, A Treatise on the Conflict of Laws (1962), § 239, 240.

can[80] and, possibly, Canadian cases.[81] It is also the view which the writer has ventured to espouse elsewhere.[82]

Before examining the case law it may be helpful to discuss the principles on which the first, second and fourth answers are premised. The third will be discussed later. The argument in favour of giving exterritorial effect to the original *lex situs* is that since that law controls the validity of the original conditional sale it must also be entitled to attach whatever conditions it sees fit to the recognition of the seller's reserved title. It will be seen therefore that the only theoretical difference between the first and second answers is that the supporters of the second have added a refinement which logically follows from the premise and which, quite possibily, those favouring the first would also concede. The opposing argument is that, correctly analysed, conditional sales legislation falls into the same category as other "estoppel" legislation or rules of law and that it is not really concerned with the seller's title but simply states when it may be overridden in favour of third parties, and that the determination of such overriding events is a question for the *lex situs* which is mostly closely concerned with them—that is, the *situs* in which they actually take place.

Since the use in the registration statutes of such phrases as "shall be void"[83] is apt to mislead, the following example, not related to any registration requirement, may help to crystallize the opposing views of the two schools. A sells B a piano[84] situated in France on conditional sale terms. B brings the piano to England

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[80] *Marvin Safe Co.* v. *Norton* (1886), 7 A. 418 (N.J.); *Weinstein* v. *Freyer* (1891), 9 So. 285 (Ala.); *Public Parks Amusement Co.*, v. *Embree-McLean Carriage Co.* (1897), 40 S.W. 582 (Ark.); *U.S. Fidelity & Guarantee Co.* v. *N.W. Engineering Co.* (1938), 112 So. 580 (Miss.); *C.C.C.* v. *Colando* (1940), 15 A. 2d 762 (N.J.).

[81] See particularly, *Jones* v. *Twohey* (1908), 1 Alta L.R. 267; *Russell* v. *Cline* (1909),10 W.L.R. 666.

[82] See (1954), 32 Can. Bar Rev. 900.

[83] A typical section reads as follows: "Where possession of goods has been delivered to a buyer under a conditional sale, unless the conditional sale is evidenced and is registered in accordance with, and within the times limited in, Section 4, every provision contained therein whereby the property in the goods remains in the seller is void as against a creditor, and as against a subsequent purchaser or mortgagee claiming from or under the buyer in good faith, for a valuable consideration, and without notice; and the buyer shall, notwithstanding such a provision, be deemed as against the seller to be the owner of the goods." See Revised Uniform Conditional Sales Act, s. 3.

[84] A piano rather than an automobile has been chosen as an example because special statutory provisions now exist in France with respect to transfers of vehicles by non-owners. See Amos and Walton, Introduction to French Law (2nd ed., 1961), pp. 112-115.

and wrongfully sells it to C. Ignoring any provisions of English domestic law, could C, in an action against him by A, successfully invoke the rule of French law that "en fait de meubles, possession vaut titre"?[85] Surely not. Yet if the views of Dr. Morris and Dr. Falconbridge are to be applied consistently he should be, since under French law the seller also only has a "voidable" title, in the sense that B's tortious action can deprive him of his property rights. The only difference between the French seller and the Canadian seller is that whilst the latter can "perfect" his security interest by complying with a registration statute, no such opportunity is, generally speaking, afforded the French seller. In both cases the buyer has the power, but not the right, to transfer a good title to a third party. To take another example. X, a New York factor, is entrusted with some diamonds in New York. He is expressly forbidden to pledge them. X comes to Ontario and does pledge the jewels. Under New York law a mercantile agent has ostensible authority to pledge his principal's goods, but not (let us assume) under Ontario law. Should the Ontario court apply New York law and find in favour of the Ontario pledgee? It is submitted not.[86] Since the pledging took place in Ontario, the law of that province should determine to what extent the unauthorized act of an agent binds his principal. Here again, however, according to the original *lex situs* the true owner only has a "voidable" title[87] or, to phrase it more accurately, his agent is invested with an ostensible authority to transfer a good title.

[85] Code civil, art 2279.

[86] See *Janerich* v. *George Attenborough and Son* (1910), 102 L.T.R. 605; Dicey, *op. cit.*, footnote 8, Rule 171; and *cf. Chas T. Dougherty Co.* v. *Krimke, supra,* footnote 75. In *Janerich's* case the plaintiff entrusted a necklace to G, his agent, in Paris. G pledged the necklace to the defendants in London without the plaintiff's knowledge or authority. Under French law the pledge was binding on the plaintiff. Held, English and not French law governed the validity of the transaction in England. Per Hamilton J., at p. 607: "It is true that the contract between the plaintiff and G would be governed by French law, but the validity of the transaction which subsequently took place when G delivered possession of the necklace to the defendants must depend on English law."

[87] It may be objected that the writer has used "voidable" in an abnormal sense, and that there is a clear distinction between the seller or a principal losing his title because he has failed to comply with the registration requirements of the original *lex situs* on the one hand, and because the original *lex situs* has adopted a section similar to section 25 of the English Sale of Goods Act or some form of factors legislation on the other. The answer is twofold. In the first place, neither the cases nor writers in the conflict of laws draw any distinction between the two types of situations. Thus in *Krimke's case, supra,* footnote 75, the New Jersey court gave exterritorial effect to the New York factors legislation on facts identical except for place names with those related in the text, and this case is cited with approval by Dr. Morris in Dicey, *op. cit., ibid.,* pp. 549-550, Example

These examples would appear to suggest that a distinction should be drawn between an inherent defect in the seller's title which, according to the *lex situs* of the original sale, deprives him of his reserved title *altogether* (as, for example, a failure to reduce the security agreement to writing under the Code)[88] and a local rule of law which merely *estops* him from setting up an otherwise validly reserved title in certain circumstances, the former being governed by the original *lex situs* and the latter by the law of the *situs* where the "estopping" events have taken place. Speaking of the latter situation, Judge Goodrich wrote,[89] "Whether or not *bona fide* purchasers and others similarly placed are to be protected seems to be a matter of policy for each State to handle for itself, and where no right of the type that a foreign statute intended to confer has been acquired (*sc.* in the foreign *situs*), the State of the *situs* should apply its own law." The suggested distinction is also drawn in the Uniform Commercial Code. The first sentence of article 9-103(3) provides that the "validity" of a security interest is to be determined by the law of the jurisdiction where the property was when the security interest attached, but its "perfection" is governed, as will be seen presently, by compliance with the domestic rules of the Code State into which the goods are subsequently brought.[90] "Validity" is not defined, but its juxtaposition with "perfection" shows that it does not include compliance with registration requirements; it would appear therefore to be restricted to the legality and enforceability of the security interest.[91] It does not follow, however, that because the second *lex situs* is not *bound* by a correct interpretation of the applicable conflict of laws rule to enforce the perfection requirements of the first *lex situs,* that it may not wish to do so in appropriate circumstances as a matter of *domestic* policy. Clearly that is its privilege. Again, there may be sound policy reasons for the second *lex situs* giving a preferred status, as does the Code,[92] to a security interest which has been perfected in the first *situs* as compared to a security interest

10, and by Dr. Lalive, *op. cit.,* footnote 3, pp. 184-185, under the headings of "void" and "voidable" titles. In the second place, there is no distinction because the conditional sales acts themselves use "void" and "voidable" in an abnormal sense.

[88] See UCC 9-203.

[89] *Op. cit.,* footnote 78, pp. 477-478.

[90] But if the parties intended that the goods shall be kept in the forum the second sentence of UCC 9-103(3) will apply, and the law of the forum will determine the validity as well as the perfection of the security interest.

[91] *Cf.* Gilmore, *op. cit.,* footnote 5, § 10.9, p. 320.

[92] See UCC 9-103(3) and *cf.* Ontario Draft Bill, s. 7(1).

which has not. Such a policy is particularly cogent where the first *situs* has a central registration system and it would be reasonable to expect a prudent third party in the second *situs* to search for encumbrances in the first *situs* before consummating any transaction with the debtor. These considerations should especially be borne in mind in reading the American cases.

With these preliminary observations, let us turn to the case law. The earliest reported, but frequently neglected, Canadian case is *Jones* v. *Twohey*,[93] an Alberta decision. Here a mortgage had been executed on goods in Saskatchewan. Subsequently the mortgagor surreptitiously removed the goods into Alberta and there fraudulently sold them to the defendant. In an action in conversion brought against him by the mortgagee the defendant argued, *inter alia,* that as the registration requirements of the Saskatchewan Bills of Sale Act had not been complied with with respect to some of the goods the plaintiff was not entitled to succeed. Beck J., in an able judgment, rejected the argument, saying:[94]

> These statutes were effective only within the territory over which the legislature which enacted them had jurisdiction, and it seems to me were obviously and necessarily intended to protect creditors and subsequent purchasers seeking to enforce their claims within the same judicial territory; and hence that such registration is not necessary in order to preserve the validity of the mortgage as against creditors and subsequent purchasers seeking to enforce their claims in other jurisdictions.

Although, on the face of it, Beck J. would appear to have approached the problem solely as one of ascertaining the intention of the Saskatchewan legislature, his reference to such American cases as *Marvin Safe Co.* v. *Norton*[95] would suggest that he would have reached the same conclusion whatever the Saskatchewan statute had said.

Jones v. *Twohey* was followed a year later in another Alberta decision, *Cline* v. *Russell*,[96] which involved a conditional sale. The original *lex situs* was Washington, but that State's registration requirements had not been complied with. As in the earlier case, the goods were subsequently brought into Alberta and sold there. The Washington statute provided that in default of registration possession of the goods by the conditional buyer "shall be absolute as to the purchasers and incumbrancers and creditors in good faith". Harvey J. refused, however, to give exterritorial effect to these provisions, saying:[97]

[93] *Supra,* footnote 81.
[94] *Ibid.,* at p. 270.
[95] *Supra,* footnote 80. The case is discussed below.
[96] *Supra,* footnote 55.
[97] *Ibid.,* at p. 668.

> It is an elemental rule that statutes are to be construed as applying only to persons who are subjects (general or temporary) of the statute. It appears to me that it is on this principle that it is proper to conclude that our own Ordinance respecting Conditional Sales does not apply to the transaction in question. Applying the same principle to the consideration of the cited provision of the Washington Code, it appears to me clear that the term "purchasers" does not include any purchaser outside of the state of Washington . . . .

Earlier, speaking of the benefit which a filing in Washington would have conferred on the purchaser in Alberta, the learned judge remarked, it "might as well have been done in South Africa as in the State of Washington".[98] It is to be noted that no evidence was called to show whether a Washington court would have given exterritorial effect to the Washington statute nor is it clear whether an affirmative answer would have influenced Harvey J. one way or the other.

The point at issue did not arise again before a Canadian court until 1954, when Wilson J. of the British Columbia Supreme Court decided *Hannah* v. *Pearlman*.[99] In this case the original *lex situs* was Manitoba and the subsequent re-sale occurred when the goods were in British Columbia. The seller's name had not been affixed to the goods (an automobile) as required by the Manitoba Lien Notes Act.[100] Wilson J. therefore held that the seller's claim was defeated.[101] The decision, however, was unsatisfactory for several reasons. First, because Wilson J. applied Manitoba law because it was *the proper law of the contract* rather than the *lex situs* of the car at the time of the original sale; hence the learned judge never really appreciated the true nature of the problem. Secondly, because his attention was apparently not drawn to the contrary decisions in *Jones* v. *Twohey* and *Cline* v. *Russel*. Thirdly, because he did not consider the question whether a Manitoba court would have given exterritorial effect to the Manitoba Act, and, finally, because he ignored the fact that the seller had complied with the registration requirements in the British Columbia Act, although, admittedly, the registration did not take place until after the buyer had already resold the vehicle.

The soundness of Wilson J.'s decision was soon challenged. In

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[98] *Ibid.*, at p. 667.

[99] *Supra*, footnote 7, discussed in (1954), 32 Can. Bar. Rev. 900, 1174, and 1183.

[100] Dicey, *op. cit.*, footnote 8, p. 548.

[101] The badly drafted section actually says that the reservation of title "shall only be valid" if the marking requirements of the Act have been complied with, but this has been interpreted to mean "shall be voidable" against an as yet undefined class of persons in which subsequent purchasers are included. See *Cox* v. *Schack* (1902), 14 Man. R. 174.

McAloney & McInnis v. *G.M.A.C.*[102] the original sale occurred in British Columbia and the subsequent resale took place in Nova Scotia. There had been imperfect compliance with the British Columbia registration requirements. Those of Nova Scotia had been observed, although too late to be of any use to the Nova Scotia purchaser. Doull J. held that no exterritorial effect was to be given to the British Columbia Act,[103] but again it is not clear whether this conclusion was reached solely as a matter of construction of the statute. He distinguished *Hannah* v. *Pearlman* on the ground that the effect of non-compliance with the Manitoba Act might be to avoid the seller's title altogether.[104] Finally, reference must be made to an Alberta appellate decision, *Rennie's Car Sales* v. *Union Acceptance Corp.*,[105] which was rendered in the same year as *McAloney* v. *McInnis*. In this case a car mortgaged in Ontario was surreptitiously removed to Alberta and successively sold there to a number of innocent purchasers. In an issue between the mortgagee and the ultimate purchaser the latter argued that the Ontario registration requirements had been imperfectly complied with. Mr. Justice Johnson, speaking for the court, doubted whether this was the case, but in any event rejected the major premise saying:[106]

> I think the case of *Cline* v. *Russell* (1909), 10 W.L.R. 666 is applicable. Applying the reasoning of Harvey J. (later C.J.A.) the subsequent purchasers and mortgagees as against whom the mortgage is null and void must be taken to be subsequent purchasers in Ontario and not those who acquired their interest in this province.

In all these majority decisions, it will be observed, the courts approached the question of the effect of non- or imperfect compliance with the perfection requirements of the first *lex situs* solely in terms of conflict of laws principles or as a matter of construction of the territorial reach of the statute in question. Its possible impact on the domestic policies of the forum was not discussed at all. The courts may have felt that if the results were unsatisfactory it was for the legislatures to amend the law. In any event, it is probably too late in the day for the Canadian courts to change their approach now. In point of fact no demonstrable injustice was done.

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[102] *Supra*, footnote 7.

[103] Like Wilson J., however, he wrongly applied British Columbia law because it was the proper law of the contract.

[104] This was not the ground of Wilson J's decision, and is not the construction placed on the Act by the Manitoba courts. See *supra*, footnote 101.

[105] [1955] 4 D.L.R. 822, noted in (1956), 34 Can. Bar Rev. 323.

[106] *Ibid.*, at p. 825.

In none of the cases was evidence adduced to show that the third party who had dealt with the chattel in the second *situs* had been mislead by non- or imperfect compliance with the registration requirements of the first *situs*.

To turn now to the American authorities. No purpose would be served by examining all of them, since they all turn around the same problem, but three may usefully be referred to as sufficiently indicating the divers approaches. In the leading case of *Marvin Safe Co.* v. *Norton*,[107] a safe was conditionally sold in Pennsylvania and delivered there by the seller to a carrier for transmission to the buyer's residence in New Jersey. The buyer subsequently resold the safe in New Jersey without disclosing his lack of title. The Pennsylvania registration requirements had not been complied with and those in the New Jersey Act were held to be inapplicable. Thus it might be supposed that the New Jersey Supreme Court was confronted with a strong temptation to give exterritorial effect to the Pennsylvania doctrine. The temptation was resisted. In the course of a unanimous judgment the court wrote:[108]

> 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 exterritorial effect. In the case in hand, the safe was removed to this State by [the conditional buyer] as soon as he became the purchaser. His possession, under the contract, has been exclusively in this State . . . . 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 on the same footing. Neither on principle nor on considerations of convenience or public policy can such a right be conceded.

In a later passage, in summarizing the essential issue, the court further observed: "The title was in the Safe Company when the property in dispute was removed from the State of Pennsylvania. Whatever might impair that title . . . occurred in this State. The legal effect and consequences of those acts must be adjudged by the law of this State."[109]

The decision was surely a just one. The safe was only temporarily in Pennsylvania after the sale, and no registration there could have been of the slightest use to the innocent purchaser in New Jersey. He was prejudiced because of the restricted nature of the then New Jersey registration laws. Hence the correct solution was

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[107] *Supra*, footnote 80. [108] *Ibid.*, at p. 422. [109] *Ibid.*

to broaden them.[110] *Marvin's* case is explained by Dr. Morris[111] and Dr. Lalive[112] on the ground that on its true construction the Pennsylvania law was not intended to have any exterritorial effect, but the above quoted passages do not support such an interpretation, quite apart from the fact that the New Jersey court evinced no apparent interest as to how a Pennsylvania court would have construed its own statute.

With *Marvin's* case should be compared the later decision of the same court in *Chas T. Dougherty Co.* v. *Krimble,*[113] which involved not a conditional sale but the pledging of jewellery by a mercantile agent. The goods were entrusted to the agent in New York and were pledged by him in New Jersey. Under the then New York Factors Act a mercantile agent had ostensible authority to pledge as well as to sell the goods entrusted to him, but under the New Jersey law his authority was confined to a sale. In an unsatisfactory judgment,[114] the court applied the New York law and distinguished *Marvin's* case on the ground that whilst in that case the seller retains title to the safe, in the instant case the agent was deemed to be the owner (*sic*) of the goods under New York law. This, of course, was a non-existent distinction and begged the essential question. Moreover, the court made no attempt to determine whether a New York court would have given exterritorial effect to the New York statute. If the question be viewed as one of policy, it is obvious that the New Jersey pledgee would have relied on New Jersey rather than New York law to guide him in his dealings with the agent, especially since he probably was not even aware that the jewellery had been entrusted to the agent in New York.[115] Finally, it may be noted that *Krimke's* case is in conflict with the English decision in *Janerich* v. *George Atten-*

[110] As does the Code. See UCC 9-103(3), discussed *supra.*

[111] Dicey, *op. cit.,* footnote 8, p. 548.

[112] *Op. cit.,* footnote 3, pp. 185-186.

[113] *Supra,* footnote 75.

[114] For a fuller analysis of the judgment, see (1954), 32 Can. Bar Rev. 900, at pp. 908-910.

[115] See also Goodrich's criticism of the decision, *op. cit.,* footnote 78, pp. 477-478. The learned editor of the fourth edition (1964), at pp. 306-307, attempts to reconcile the two decisions by arguing that the *Marvin Safe* case involved the sale of an article for use, in which case "the policy of promoting consumer credit places the risk of loss upon the purchaser from the casual owner", whereas in *Krimke's* case the transaction was one which contemplated resale and in which "commercial policy shifts the risk to the one using a factor as a means of transacting business". The distinction, even if it is a valid one, has little to do with the main issue, which is whether it is the first or the second *lex situs* which is to determine the effect of the transaction in the second *situs.* Surely it is only logical to apply the domestic policy of the second *lex situs* in both cases?

borough & Son,[116] with the reasoning of the New York Court of Appeals in *Zendman* v. *Harry Winston, Inc.,*[117] and with the general rule of the conflict of laws that it is the proper law of the transaction between the agent and the third party which determines the scope of the agent's authority and the effect of the transaction upon the parties' rights.[118]

In the third case, *In re Steen,*[119] tyre moulds were conditionally sold in Texas by S to B, whose business was in Illinois. At the time of the sale the moulds were located in Texas and they were subsequently shipped by common carrier to Illinois. B became bankrupt before the goods had been paid for. The seller had complied with the Illinois registration requirements but not with the Texas requirements. Thus the facts were very similar to those in *Marvin's* case, but even more favourable to the seller since he had given constructive notice to B's creditors of his security interest in the goods. Nevertheless, in a very short judgment, the Fifth Circuit Court of Appeals still applied the Texas statute. Again no attempt was made to see what the Texas courts would have done under similar circumstances nor did the federal court consider what was the effect, under Illinois law, of the seller's compliance with the registration requirements of the Illinois statute. Viewed in a practical context the decision makes no sense. B's creditors could not posssibly have been prejudiced by the absence of filing in Texas since they would have had constructive notice of the lien through the Illinois filing.[120]

It is to the significance of the filing requirements of the second *lex situs* concerning foreign security interests that we must now direct our attention. It might be argued that since the original *lex situs* determines the validity and perfection of the conditional sale, the law of any subsequent *situs* of the chattels cannot retroactively alter this position. This argument would be a logical corollary of Dr. Morris' thesis that a title validly retained or acquired under the

[116] See *supra,* footnote 86.

[117] (1953), 111 N.E. 2d 871. The facts here were similar to those in *Krimke's* case, save that the agent sold rather than pledged the jewellery in New Jersey and that this time New Jersey as well as New York law protected the innocent purchaser. The court expressly held that New Jersey and not New York law governed the validity of the sale in New Jersey. See especially the judgment at p. 873, n. 1.

[118] See Dicey, *op. cit.,* footnote 8, Rule 171, and Comment, pp. 876, 880.

[119] *Supra,* footnote 17.

[120] Professor Gilmore, *op cit.,* footnote 5, § 22.5, p. 613, describes the decision as "remarkably unimaginative"; it "outrages common sense". What makes *In re Steen* particularly bizarre is the fact that both parties contemplated the removal of the moulds into, and their use in, Illinois.

original *lex situs* must be respected everywhere else. If we are right, however, in our submission that the subsequent *lex situs* is omnipotent with respect to all dealings with the goods which occur within its jurisdiction, then it follows that it is entitled to respect the seller's security interest and to confer on it a perfected status even when the original *lex situs* would not have done so. In fact this is clearly the position under the Uniform Commercial Code. Article 9-103(3)[121] provides, *inter alia,* that if the security interest has not been perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into the Code state, it may be perfected in the new *situs*. Suppose there is a conditional sale of goods situated in New York which is invalid as to third parties because the New York registration requirements have not been complied with. The goods are subsequently brought to Massachusetts (a Code State) where the buyer wrongfully sells them to C. Prior to the resale the original conditional sale agreement was filed in Massachusetts. C brings the goods to Nova Scotia and the seller there claims them as his. It is submitted that in these circumstances, and quite apart from the question whether the New York registration laws should be applied exterritorially, the seller's superior position under the law of Massachusetts should also be respected by the Nova Scotia court. C never acquired a valid title in Massachusetts and the court should not look beyond this issue.

It is true that the registration provisions in the Canadian statutes concerning goods brought into the province for the first time are not as clear as those in the Code. They do not say that after registration (or during the period before the seller acquires notice of the removal of the goods) the seller shall be deemed to have a perfected security interest in the province, but this would appear to be their necessary intent. Otherwise one might have a situation where, assuming that *Hannah* v. *Pearlman*[122] were good law, the seller might concurrently have to comply, and continue to have to comply (for example, with respect to renewal requirements), with the registration provisions of the original *situs* as well as those of the new *situs*. Such a result would be repugnant alike to sound principle and the object of registration statutes.

To sum up, with the exception of *Hannah* v. *Pearlman* the Canadian decisions refuse to grant exterritorial effect to the provincial registration statutes, although whether this refusal is based

[121] *Cf.* Ontario Draft Bill, s. 8. [122] *Supra,* footnote 7.

on rules of statutory construction or on the principles of private international law is not clear. The Canadian courts have shown no disposition to apply domestic policy considerations in dealing with this question, and it is probably too late for them to do so now. The American courts are divided, but it is thought that if those courts which presently extend exterritorial recognition to the perfection requirements of the original *lex situs* were to examine the intended scope of the registration statutes they would arrive at the same conclusion as the Canadian cases.

On the other hand, it is quite possible that under the guise of purporting to apply conflict of laws principles these courts have been following domestic policy considerations. This probably explains why they have shown no apparent interest in the construction question. The Code has now adopted a series of intelligible rules which, while rejecting the notion of the supremacy of the original *lex situs,* nevertheless confers a preferred status on a security interest which has been perfected in the original *situs* and thus provides an incentive to the secured party to comply with its provisions. It is further submitted that a proper construction of the Canadian registration provisions concerning extra-provincial security interests would also show that they were intended to supersede the filing requirements of the original *lex situs.* So far, however, the point does not appear to have been taken in any reported case. If the resulting position is regarded as too favourable to the seller, the solution lies in tightening the registration requirements of the second *situs* (as, for example, Saskatchewan has done) or in adopting provisions similar to those in article 9-103(3) of the Uniform Commercial Code or, preferably, in combining the first two solutions. In any event, the position should be clarified by legislation.

II. *The Law Governing the Rights Inter se of the Buyer and Seller.*

The general rule is that the rights and duties of the parties to a contract are governed by the proper law of the contract, but in the case of conditional sales the problem is much complicated by the fact that the personal rights of the parties may also impinge on property rights and *vice versa* so that a conflict may arise between the *lex situs* and the proper law where the two differ, as they may well do. Additional conflicts may also be encountered between the proper law and the *lex fori* regarding matters of procedure. For the moment, however, we shall confine our attention to the prob-

lems concerning the selection of the proper law—in themselves sufficiently numerous—and then return to the other problems later.

The weight of Anglo-Canadian judicial opinion would still seem to favour the "subjective" or "intention" theory of the proper law of the contract,[123] that is, the theory that the parties are free to select the law by which they wish their contract to be governed and that, in the absence of an express choice, the court must search for the parties' presumed intention. In the field of instalment sales, where States are now increasingly regulating the rights of the contracting parties, both limbs of the intention theory, if not drastically modified, will give rise to acute difficulties in application.

If the parties were really free to select their "own" proper law the seller would frequently be able to evade the provisions of burdensome statutes with impunity. It is true that in the case which represents the high-water mark of the intention theory[124] Lord Wright added[125] the much discussed qualifications that the parties' choice must be *"bona fide* and legal" and not objectionable "on the grounds of public policy", but even if one interpreted these observations to mean[126] that the choice must not be an arbitrary or capricious one or made with the intention of evading an otherwise applicable law the gap would still not be closed. In *English* v. *Donnelly*,[127] for example, a hirer who resided in Scotland made a hire-purchase proposal through a Scottish trader to an English finance company which had its head office in England. The proposal was accepted at the head-office and the instalments were payable there. The hire-purchase agreement provided that English law was to be the proper law of the contract. It will be seen therefore that there was nothing arbitrary or capricious about the selection of the proper law; nevertheless, had it been upheld, Scottish social policy in this important sphere would have been effectively undermined. In the instant case the Scottish Court of Session was able to avoid such a result by holding that the provisions of the Scottish Hire-Purchase Act were mandatory in character and

[123] See Dicey, *op. cit.*, footnote 8, Rule 148, and the cases on both sides collected in Webb & Brown, A Casebook on the Conflict of Laws (1960), p. 333.

[124] *Vita Food Products Inc.* v. *Unus Shipping Co.*, [1939] A.C. 277 (P.C.).

[125] *Ibid.*, at p. 290.

[126] As does Dicey, *op. cit.*, footnote 8, p. 759. *Cf.* Cheshire, Private International Law (3rd ed., 1947), p. 329 *et seq;* Falconbridge, *op. cit.*, footnote 3, pp. 412-413.

[127] [1959] Sc. L.T.2.

therefore superseded the general rules of private international law. It would seem that had the facts been reversed the court would have been quite prepared to give effect to the choice of law clause.[128] This would indeed have been unfortunate since it would lead to an unjustifiable discrimination between the public policy of the forum and the social policies of other States. The truth of the matter is that in the realm of adhesion contracts the public interest everywhere in the protection of the weaker bargaining party is so strong that there is little scope for a proper law based on purely subjective considerations.[129]

Choice of law clauses are not usual in Canadian agreements[130] and there is no reported Canadian case of the parties having endeavoured to contract out of an otherwise applicable law.[131] The

[128] In *Kay's Leasing Corp. Pty. Ltd.* v. *Fletcher*, [1964] S.R. (N.S.W.) 195, the Supreme Court of New South Wales actually gave effect to such a choice of law clause. In this case the hirers resided, and the hire-purchase proposal was made, in New South Wales but the offer was accepted in Victoria where the hire-purchase company had its head office. The agreement provided that it was to be governed by the law of Victoria. The agreement violated various provisions of the New South Wales and Victoria Hire-Purchase Acts, but the remedies available to the hirer for the breaches were more extensive under the New South Wales Act than under the Victoria Act. The Supreme Court of New South Wales applied Victoria law as being the proper law of the contract selected by the parties. The decision was affirmed on appeal by the High Court of Australia ([1965] A.L.R. 673) on the narrow ground of construction that the New South Wales Act applied only to hire-purchase agreements concluded in New South Wales. The court also held, however, that in construing the applicability of an Act of this character, the normal choice of law rules must yield in favour of the mandatory provisions of the statute. See esp. the judgments of Barwick C.J., at pp. 676-677 and Kitto J., at pp. 682-683. The court did not indicate what its position would have been if the action had been brought in Victoria.

[129] *Cf.* Ehrenzweig, *op. cit.*, footnote 79, §§ 172, 204 and (1953), 53 Col. L. Rev. 1072. The Restatement, *op. cit.*, footnote 8, §332a, lays down the following rule: "The validity of a contract is determined by the local law of the State chosen by the parties for this purpose, unless (a) the choice of law was obtained by unfair means or was the result of mistake, or (b) the contract has no substantial relationship with the chosen State and there is no other reasonable basis for the parties' choice, or (c) application of the chosen law would be contrary to a fundamental policy of the State which would be the State of the governing law in the absence of an effective choice by the parties." Under (a) are included choice of law clauses in adhesion contracts: *ibid.*, pp. 20-21, illustration 7. See further Reese (1960), 9 Int. and Comp. L.Q. 531.

[130] But a number of Australian cases with choice of law clauses were referred to in the New South Wales Parliamentary Debates on the Uniform Hire-Purchase Bill, and their existence was given as one of the reasons for the desirability of a uniform law: see N.S.W. Parl. Deb., 39th Parl., 2nd Sess'n (1959/60), pp. 3878, 3391, 3866 and 3952. The Australian Constitution, unlike the British North America Act, has a "full faith and credit clause". See Commonwealth of Australia Constitution Act., 63-64 Vict., c. 12, s. 118.

[131] There are no reported American cases either, but the problem has frequently arisen in the analogous field of small loans and usurious con-

problem therefore which will normally confront a Canadian court is to determine the "centre of gravity" of a given instalment sale, either because the parties have expressed no choice themselves or in order to test the *bona fides* and legality of their choice. If the tribunal merely searches for the presumed intention of the parties and looks at such traditional connecting factors as the place of contracting, of performance, of payment, or the *situs* of the movable, it may well arrive at a result which conflicts with the social interests of that province which has the closest connection with the contract.[132] And that province, generally speaking, is the province in which the buyer resides at the time of signing the agreement. Hence, it is submitted, this connecting factor ought always to be given the greatest (though not exclusive) weight. In the leading case of *Auten* v. *Auten*,[133] a decision of the New York Court of Appeals, the question arose as to the proper law of a maintenance agreement between husband and wife. In holding that it was English law the court reasoned as follows:[134]

> There is no question that England has the greatest concern in prescribing and governing these obligations, and in securing to the wife and children essential support and maintenance . . . . It is still England, as the jurisdiction of marital domicile and the place where the wife and children were to be, that has the greatest concern in defining and regulating the rights and duties existing under that agreement . . . .

It is submitted that the same reasoning applies, *mutatis mutandis*, to a retail instalment sale.

It does not follow that other connecting factors can be safely ignored, for although the province of the buyer's residence may be deemed to have the closest social interest, another province may have a strong commercial and administrative interest which is equally deserving of consideration. To take a common example, B, a resident of Hull, Quebec, purchases a refrigerator from a

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tracts. For further details, see Ehrenzweig, *op. cit.*, footnote 79, § 182; Goodrich, *op. cit.*, footnote 8, § 111; and Restatement, *op. cit.*, footnote 8, § 332a, Reporter's Note on Comment (g).

[132] *Cf. Vanston Committee* v. *Green* (1946), 329 U.S. 156, at pp. 161-162: "In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the States with the most significant contacts in order best to accommodate the equities among the parties to the policies of those States." The issue before the court was whether a bankruptcy court should allow the claim of bondholders for interest on unpaid interest. The court found it unnecessary to resort to conflicts principles in order to answer the question, and the above passage is only a dictum.

[133] (1954), 124 N.E. 2d 99. [134] *Ibid.*, at p. 103.

dealer in Ottawa, Ontario.[135] The payments are to be made in Ottawa but the dealer knows that B is a Hull resident and in fact delivers the appliance to his home there. In these circumstances Quebec and Ontario could lay equally strong claims to be considered the proper law of the contract: Quebec, because it is the province where the buyer lives and where, in social terms, the effect of his purchase will be most keenly felt; Ontario, because it is the province where the trader has his place of business and where the contract was made. It would be an imposition, it may be felt, to expect a retail merchant to acquaint himself with the instalment laws of the place of residence of every buyer who enters his shop, especially where those laws differ markedly from his own.[136] The hardship would be even greater if Ontario had mandatory provisions of its own—such as minimum downpayment and licensing requirements or maximum rate regulations—so that if Quebec law were deemed to be the proper law of the conditional sale the shopkeeper would find himself in the impossible position of having to comply with two probably conflicting sets of laws. Where such a conflict between commercial and social considerations arise, it is suggested that the latter must yield to the former. There is a further factor which also militates in favour of Ontario as the choice of the proper law. If the province had legislation of the kind alluded to (it has none at the moment), it would be in the interest of effective law enforcement and uniform administration of the regulations in Ontario that the legislation should be held to apply without exception to all sales occurring in the province.[137]

The conflicting interests of the two provinces could possibly be reconciled by splitting the proper law of the contract into several parts. Ontario law, for example, could govern all matters involving the formation of the contract and Quebec law could

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[135] The two cities adjoin each other.

[136] One could arrive at the same result by arguing that a buyer who deliberately travels to another province to make his purchase cannot reasonably expect the laws of his own province to protect him. This was precisely the approach taken in *Cook and Sons Equipment, Inc.* v. *Killen* (1960), 277 F.2d 607, discussed *infra.* This approach is a little too beguiling. A resident of Saskatoon who travels unsolicitedly to Toronto and purchases a vehicle there for much less than he would pay in Saskatchewan scarcely merits the protection of the Saskatchewan consumer laws, but what if he were a resident on the Saskatchewan side of Lloydminister and travelled a mere one-half mile into Alberta in response to a dealer's advertisement in a local newspaper?

[137] A similar reasoning led the High Court of Australia to conclude in *Kay's Leasing Corp.* v. *Fletcher, supra,* footnote 128, that the New South Wales Hire-Purchase Act was only intended to apply to contracts concluded in New South Wales.

govern questions involving the enforcement of the contract. Since enforcement action would normally have to be taken in Quebec anyway, the seller would not really be prejudiced by such a solution. It is true that scission of the proper law of the contract is not favoured by the courts or by legal scholars,[138] but retail instalment sales should be treated differently and the concurrent interests of two or more jurisdictions in the same contract be given recognition.

The Canadian and American cases are still too few in number to offer any authoritative guidance as to which connecting factors the courts will prefer in selecting the proper law or laws of the contract. In *Commercial Corporation Securities Ltd.* v. *Nichols*[139] the sale took place in Saskatchewan, the goods (an automobile) were delivered there, and the buyer resided in the province. The buyer removed the automobile to Alberta and it was there seized and *semble,* sold by the seller when the buyer defaulted in his payments. The seller now sued for the deficiency in the purchase price. The buyer resisted the claim on the ground that the seizure and sale violated Alberta law. The Saskatchewan court held that the rights in question were contractual in character[140] and that, applying the presumed intention of the parties, Saskatchewan law was the proper law of the contract. The defence therefore failed. Clearly, from the contractual point of view, all the relevant connecting factors were in Saskatchewan and Saskatchewan also had the closest connection with the deficiency claim, so that the court's conclusion can be justified whichever theory is adopted for selecting the proper law. The same is true of the two more recent cases, *Canadian Acceptance Corporation Ltd.* v. *Matte*[141] and *Traders' Finance Corporation Ltd.* v. *Casselman,*[142] in which the proper law had to be determined.

Two leading American cases appear to have offered slightly more scope for the exercise of judicial discretion, although in both instances the real issue was whether the *lex situs* or the proper law of the contract governed a buyer's redemption rights.[143] In *Thomas*

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[138] See Dicey, *op. cit.*, footnote 8, p. 782.
[139] [1933] 3 D.L.R. 56 (Sask. C.A.).
[140] This aspect of the decision is discussed further, *infra.*
[141] (1957), 9 D.L.R. (2d) 304 (Sask. C.A.).
[142] (1957), 22 W.W.R. 625 (Monnin J.), rev'd on other grounds (1959), 25 W.W.R. (N.S.) 289 (Man. C.A.), aff'd (1960), 22 D.L.R. (2d) 177 (S.C.C.). See also *Union Acceptance Corp.* v. *Stefaniuk* (1965), 54 D.L.R. (2d) 550 (Sask.).
[143] This aspect of the decisions is discussed *infra.*

G. Jewett Jr. Inc. v. *Keystone Driller Co.*,[144] B, a Massachusetts corporation, purchased some industrial equipment from S, a corporation whose usual place of business was in Pennsylvania. The contract was made in Massachusetts but the equipment was delivered in New Hampshire, where it was used by B for a few days and then stored there until its seizure by S's agent. The majority of the Massachusetts Supreme Judicial Court held that B's redemption rights were governed by the law of Massachusetts because it was the *lex loci contractus* and therefore the law which determined the parties' rights and duties. The court's conclusion that the proper law was Massachusetts was reasonable, although its reasons for arriving at that conclusion may be open to objection. In the second case, *Shanahan* v. *George B. Landers Construction Co. Inc.*,[145] industrial equipment again formed the subject matter of the sale. The buyer was a New Hampshire corporation having its head-office in that State and its portion of the original contract and conditional sale agreement was executed in New Hampshire. The seller was a Massachusetts corporation and executed its portions of the two agreements in Massachusetts. The equipment was delivered to the buyer in Vermont, where it was used on a construction job. It was then taken to New Hampshire and employed on other projects until seized by the seller. The buyer alleged that the seller had breached the Vermont Conditional Sales Act concerning the repossession and resale of the goods, and the issue before the court was whether Massachusetts or Vermont law governed the exercise of these rights. The First Circuit Court of Appeals, sitting in Massachusetts, followed *Jewett's* case and held that New Hampshire law was the applicable law. The reasons the court gave for this conclusion[146] were that, while in *Jewett's* case the chattels were only located in New Hampshire, in the instant case the buyer actually had its place of business and the contract was executed[147] in that State.

In the light of our earlier discussion about the choice of law problem in instalment sales, two observations deserve to be made about these decisions. The first is that the fact that industrial

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[144] (1933), 185 N.E. 369, 87 A.L.R. 298.

[145] (1959), 266 F.2d 400. See also *Pioneer Credit Corp.* v. *Morency* (1962), 177 A.2d 120 (Vt.).

[146] *Ibid.*, at p. 405. *Cf.* Cavers, (1960), 35 N.Y.U.L. Rev. 1126, at p. 1131.

[147] *Quaere* whether this was in fact so, since presumably there was no binding contract until S accepted B's written offer and that acceptance appears to have taken place in Massachusetts.

equipment rather than consumer goods is involved in a sale does not necessarily mean that the State of the buyer's place of residence or business ceases to have any interest in the contract. As Professor Cavers has pointed out,[148] a State's policy may be to protect all conditional buyers (at least so far as redemption rights are concerned) and that policy would be defeated if other States were not to respect it. The second observation is that in neither case was there any genuine conflict between a policy of commercial convenience as represented by the *lex loci* and a policy of protection for the buyer as represented by the law of his residence, since in both cases the place of contracting and of the buyer's residence were, or were treated as being, the same. Moreover, it may be argued that a seller of industrial equipment does not look to the law of the place of contracting (which may be quite accidental) to determine the parties' rights to anything like the same extent as a small retail merchant. However, this must necessarily depend on the extent to which the seller's instalment sales are mandatorily regulated by the *lex loci,* and if a given act draws no distinction between commercial and consumer sales, then, from the seller's point of view, they may well have to be treated alike. Finally, it should be emphasized that the courts in *Jewett's* case and *Shanahan's* case were only dealing with the seller's foreclosure and resale rights. There is nothing in the judgments to indicate that the courts would necessarily have applied the same laws to other aspects of the parties' personal rights. To this extent it may be said that these cases lend some support to the notion that more than one proper law may govern the parties' relationship in an instalment sale.

So far it has been assumed that the instalment sales legislation of the *lex fori* has no choice of law clause, either as to the type of contracts subject to its provisions or as to the proper law to be applied generally. That assumption must now be further examined. The only express choice of law causes appear to be found in the Saskatchewan Agricultural Machinery Act[149] and in the Uniform Commercial Code. The former provides that where an implement is sold the contract shall be in writing in accordance with Form "A" in the schedule.[150] That the sale contemplated is a sale in Saskatchewan is clearly indicated by such sections of the Act as

[148] *Loc. cit.*, footnote 146, at p. 1140.
[149] R.S.S., 1965, c. 232. For the history and structure of the Act, see Ziegel, (1962), 14 U. Tor. L.J. 143, at pp. 149-150.
[150] *Ibid.*, s. 19.

sections 7[151] and 11[152] and by several clauses in Form "A". The penultimate clause in Form "A" further reads:

> This contract shall be deemed to be made in Saskatchewan and in any action which may be brought hereunder or by reason hereof shall be interpreted and enforced according to the laws of Saskatchewan.

There can be little doubt, therefore, that, so far as a Saskatchewan court is concerned, Saskatchewan law must be considered the proper law of the contract and the parties cannot select any other law.[153] In practical terms this means that Saskatchewan is prepared to protect any buyer of agricultural machinery in her province, although his connection with Saskatchewan may otherwise be non-existent. Conversely even a Saskatchewan resident will not be protected by the Act if he purchases his equipment outside the province, and though Saskatchewan law is in fact the proper law of the contract. The Act is therefore given a strong territorial bias. Whether another provincial court will respect the choice of law clause in Form "A" is, of course, another question, but for the reasons which have been given earlier there are persuasive reasons why it should do so, at any rate where Saskatchewan has the closest commercial and social links with the transaction.

Article 1-105(1) of the Uniform Commercial Code allows the parties to a transaction to select the law of any nation or state which bears a reasonable relation to the transaction. By virtue of the next subsection this general rule is made subject, *inter alia,* to the express provisions in article 9-102. This section provides that, subject to certain exceptions in article 9-103 (which may be ignored for our purposes), article 9 shall apply, so far as concerns any personal property and fixtures within the jurisdiction of the Code State, to any transaction which is intended to create a security interest in personal property and fixtures.[154] A State has

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[151] This provides, *inter alia,* that every manufacturer selling implements in Saskatchewan shall be represented by one or more general provincial distributors in Saskatchewan and that each year every general provincial distributor shall file with the Director of the Agricultural Machinery Administration a list of every vendor who obtains implements from the distributor.

[152] This provides, *inter alia,* that all provincial distributors selling large instruments in Saskatchewan shall file with the director each year a list of the large instruments offered by them for sale in Saskatchewan.

[153] This is perhaps only saying expressly what the courts in *English* v. *Donnelly, supra,* footnote 127 and *Kay's Leasing Corp.* v. *Fletcher, supra,* footnote 128 held the Scottish and New South Wales Acts said impliedly.

[154] Article 9 does not provide any general rules as to when personal property is deemed to be within the jurisdiction of the Code State (presumably it was thought unnecessary) but some specific rules with respect to debts, other intangible property, and certain types of movable property

jurisdiction over the movables situated within its borders[155] and it follows that generally speaking, article 9 applies to all the variety of goods usually subject to instalment sales. What is significant, however, about article 9-102 is that it does not restrict the applicability of article 9 to questions involving the validity and perfection of security interests but, by necessary implication, also extends it to the rights and duties of the parties under Part V of the article. Since Part V deals primarily with foreclosure proceedings and redemption rights, this means that the *lex situs* rather than the proper law will determine this aspect of the personal relationship of the buyer and seller. Whether this is a satisfactory solution to what is a difficult problem will be discussed presently.

Apart from such express choice of law clauses, the language of the statutes may also yield an indirect rule for the selection of the proper law. The task of construction, however, must be approached with care. It is clear, for example, that section 26 and following of the Alberta Seizures Act[156] which deal with repossession and foreclosure proceedings can only apply to goods situated in Alberta, since the court's powers under section 29 are not set in motion until the goods have been seized by the sheriff. Are we to assume, therefore, that, so far as an Alberta court is concerned, these provisions are not to be applied unless, apart from all other connecting factors, the goods were also located in the province at the time of the sale? Suppose at the time of the original sale the goods were in British Columbia and were then subsequently brought to the buyer's residence in Alberta, will the provisions of the Seizures Act still not apply? Alternatively, must the Act be read as meaning that its provisions are to apply whenever the goods are repossessed in Alberta, even though the proper law of the contract is not Albertan? Again, even assuming that the Act can be said to yield a choice of law rule, must the same construction be placed on section 19 of the Alberta Conditional Sales Act[157] which limits the seller's choice of remedies in case of the buyer's default? The answer must surely be no; and, if so, it shows that even the forum may have to be prepared to apply more than one

are stated in UCC 9-104. S. 2 of the Ontario Draft Bill is differently worded. It provides that "Except as otherwise provided in subsection 1 of section 3, this Act applies, (a) to every transaction . . . that in substance creates a security interest . . .". Presumably, however, the opening words of UCC 9-102 are to be implied.

[155] See Dicey, *op. cit.*, footnote 8, Rule 24, and *cf.* UCC 9-104(3).

[156] R.S.A., 1955, c. 307, as am. For the history and content of these provisions, see Ziegel, *loc. cit., footnote* 149, at pp. 150-151.

[157] R.S.A., 1955, c. 54, as rep. and subst. by R.S.A. 1965, c. 15, s. 3.

proper law in order to determine the parties' personal rights and duties.[158]

Similar problems of interpretation will arise, for example, with respect to the Saskatchewan Limitation of Civil Rights Act[159] and the English Hire-Purchase Act.[160]

Having posed the questions, we should perhaps offer our own answers. The actual method of repossession involves the *lex situs*, and hence that law should always be heeded. The history of the Seizures Act shows that the Alberta Legislature was concerned to avoid possible breaches of the peace and therefore conferred the sole right of seizure on a public official. The court's power to defer a foreclosure on terms was only added later and, therefore, there are sound historical as well as legal reasons for saying that the method of repossession and the law governing foreclosure rights should be considered separately.[161] These points appear to have been overlooked by the Saskatchewan Court of Appeal in *Commercial Corp'n. Securities Ltd.* v. *Nichols*,[162] which has already been referred to earlier. In that case, it will be recalled, the buyer resisted a deficiency claim on the grounds that the seller had repossessed and resold the goods in Alberta, and in so doing had violated the provisions of the Alberta Seizures Act.

The court held that, as Saskatchewan law was the proper law of the contract, the seller was under no duty to comply with the Alberta Act, although Mackenzie J.A. added that had the action been brought in Alberta he might have taken a different view. The court may have been right in classifying foreclosure rights as belonging to the proper law, although this point, too, is controversial, but it erred in ignoring Alberta law as to the *method* of repossession. This, at any rate, is more than a question of contract.

It may, however, be argued that the Alberta provisions regarding repossession procedures and foreclosure rights are so closely interwoven that they can no longer be segregated: hence one may be driven to the conclusion that either they must be applied *in toto*

[158] *Cf. supra.*

[159] R.S.S., 1965, c. 103, s. 19 *et seq.*

[160] Hire-Purchase Act, 1965, 1965, 13-14 Eliz. II, c. 66, Part III.

[161] *Cf. Cook & Sons Equipment, Inc.* v. *Killen supra,* footnote 136, at pp. 611-612: "Alaska does have a substantial interest in regulating the manner in which property within its borders may be repossessed. Public policy, therefore, persuades us to apply § 29-2-16 of the Alaska Conditional Sales Act which states the conditions under which property may be retaken without legal process. There is no contention that appellant violated that section of the Alaska Act. The redemption provision of the Alaska Act does not regulate the manner in which property is to be retaken, however, but creates a substantive property in the buyer."

[162] *Supra,* footnote 139.

or not at all. If these are the only alternatives, as they may well be, then it is submitted that the second alternative will do less injustice to a non-Albertan seller. Suppose a car is sold in Ontario to an Ontario resident, Ontario law being the proper law of the contract. The buyer subsequently removes the car to Alberta without the seller's consent. The buyer is in default and the seller seeks to repossess. The seller may well have fixed his finance charges and the other terms of the contract on the assumption that Ontario law will govern his foreclosure rights. An Alberta court should therefore be slow to subject the seller's rights to Alberta law, especially where, as in the present case, the Act is ambiguous. In other words, the writer's submission is that if the normal conflict of laws rule of Alberta is that foreclosure rights in movables are governed by the proper law of the contract or the original *lex situs* the Seizures Act[163] ought not to be treated as spelling out a different choice of law rule simply because the act apparently only applies to goods situated in the province at the time the seller wishes to repossess.

Having determined the proper law of the contract, further difficulties may then confront the court in giving effect to it. Several such possible difficulties may be mentioned.

1. The Quebec Civil Code provides[164] that if the seller fails to comply with its provisions concerning the minimum down-payment and maximum maturity periods and the form and contents of the contract[165] he shall lose his title in the goods. Clearly this sanction involves a question of property rights, which is goverend by the *lex situs*. If the goods are situated in Quebec at the time of the original sale no problem will arise, since in that case the *lex situs* and the proper law of the contract will coincide. If, however, at that time the goods are situated elsewhere, the penal clause may be a *brutum fulmen*. The correct solution would appear to be for the forum to refer to the *lex situs* at the time of the sale to see whether or not it is prepared to give effect to the penalty. The general rule of the conflict of laws is that an English court will not enforce the penal laws of another State.[166] The rule however does not apply to penalties of a private nature,[167] that is, those which enure for the benefit of an aggrieved individual, so that there is nothing to

[163] *Supra,* footnote 156. On this question, see further *infra.*
[164] Art. 1561*i*. See also *Goldbach* v. *Solomon,* [1957] R.L. 317.
[165] Art. 1561*a-e*.
[166] Dicey, *op. cit.*, footnote 8, Rule 21, p. 159.
[167] *Huntingdon* v. *Atrill,* [1893] A.C. 150 (P.C.); Dicey, *op. cit., ibid.*, p. 162.

prevent the *lex situs* from endorsing the penalty if it wishes. Although the penalty is of an unusual nature, it would in principle appear to be no different than a provision common in American statutes,[168] entitling the buyer to recover the finance charge or part of the purchase price because of the seller's breach of an applicable statute. Since the one would presumably be enforced exterritorially, so should the other.

2. A similar conflict arises where a provision similar to section 5(1) of the English Hire-Purchase Act, 1965, is adopted. This provides that if the requirements of that section are not complied with the seller shall not be entitled to enforce the agreement or to recover the goods from the hirer.[169] Here again the *lex situs* will have to be consulted in order to see how far it is prepared to give effect to this provision of the proper law.

3. The English,[170] Alberta,[171] and Saskatchewan Acts,[172] each to a greater or lesser degree, regulate the seller's rights of repossession and confer a wide discretion on their courts to defer repossession on terms. Assuming that these provisions are substantive and not procedural in character,[173] two difficulties may arise with respect to them. On the one hand, if an application for repossession is brought by the seller in a jurisdiction other than that of the proper law, the *lex fori* may refuse to apply the proper law on the ground that it has no machinery for exercising the type of judicial discretion created by that law. On the other hand, the courts of the proper law may also decline jurisdiction either on the ground that the act envisages the presence of the goods within the forum or because the court's order could not be effectively enforced. Thus the parties may find themselves shunted from pillar to post. Further difficulties would arise if, after the court has assumed jurisdiction and made some kind of a conditional order, the goods were subsequently taken out of the jurisdiction. All these problems

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[168] See Goode & Ziegel, *op. cit.*, footnote 5, ch. 13.

[169] See *Eastern Distributors Ltd.* v. *Goldring*, [1957] 2 Q.B. 600 (C.A.).

[170] Hire-Purchase Acts, 1938-1954, s. 11 *et seq.* See now Hire-Purchase Act, *supra*, footnote 160, s. 35 *et seq.*

[171] The Seizures Act, *supra*, footnote 156, s. 25 *et seq.*

[172] The Limitation of Civil Rights Act, R.S.S., 1965, c. 103, s. 19 *et seq.* For further particulars of these provisions, see Goode & Ziegel, *op. cit.*, footnote 5, ch. 11.

[173] There appears to be no direct authority on the point, but since the provisions affect the right to repossess and not merely the form of repossession the better view would appear to be that they are of a substantive character. *Cf. Canadian Acceptance Corp.* v. *Matte*, *supra*, footnote 141; *German Savings Bank* v. *Tetrault* (1904), 27 Que. S.C. 447; and Restatement, *op. cit.*, footnote 27, § 618.

are problems of first impression and the answers to them are necessarily of a speculative nature.

As to the first problem, it may be suggested that, as courts are frequently called upon to enforce foreign rights unknown in their own law, the mere fact that in this case they involve the exercise of a judicial discretion ought not to deter the forum, unless there are insuperable procedural obstacles (and there may well be)[174] or unless the remedy is one wholly unknown to the forum.[175] As for the second problem, if the presence of the goods in the jurisdiction is a statutory condition, express or implied, *cadit questio;* but failing such a requirement, since (as we have thus far assumed) the court is primarily concerned with rights *in personam,* the absence of the goods ought not to deter it from exercising jurisdiction. The third problem is perhaps the easiest to solve. Normally the question is whether the court had jurisdiction at the commencement of the proceedings,[176] subsequent alterations in the jurisdictional factors being regarded as immaterial. There does not appear to be any compelling reason why, in our assumed case, the ordinary rule should be departed from.

Thus far it has been assumed that the relationship between the buyer and the seller is always governed by the proper law of the contract, on the assumption that only personal rights are involved, and the possibility of conflicts between the proper law and the *lex situs* has only been touched upon incidentally. Both these questions must now be examined more fully. At the outset, however, we must emphasize once again the dual character of the conditional sale as involving both rights *in rem* and rights *in personam,* since it is this fact alone which justifies the *lex situs* being consulted when the rights *inter se* between the seller and buyer are being considered.

To begin with, conflicts may arise between the two laws because under one or the other law the buyer lacks capacity to enter into the agreement or the agreement is otherwise deemed invalid. For

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[174] Because substance and procedure is so closely interwoven in each of the three provisions that it is well nigh impossible to separate them.

[175] In *Phrantzes* v. *Argenti,* [1960] 2 Q.B. 19, Lord Parker C.J. refused to entertain an action by a daughter to compel her father to conclude a dowry contract with her husband in accordance with her rights under Greek law on the grounds that the relief sought involved the exercise of a large measure of judicial discretion and that it was unknown to English law. So far as the first ground is concerned, it appears to be inconsistent with what Farwell J. actually did in *Kornatzki* v. *Oppenheimer,* [1937] 4 All E.R. 133. So far as the second is concerned, the court did not explain convincingly why an order for specific performance made against the father would have been so alien to English law.

[176] *Cf.* Dicey, *op. cit.,* footnote 8, p. 176.

example, the Uniform Commercial Code requires every security agreement to be in writing[177] but the Canadian conditional sales statutes generally do not. Or again, as in the case of the New South Wales Hire-Purchase Act,[178] the proper law may require both spouses to sign the agreement, but the *lex situs* may not. Where such a conflict arises it is generally agreed that the proper law must yield to the *lex situs* of the goods at the time of the original contract.[179] If, therefore, the *lex situs* says the conditional sale is invalid,[180] the proper law must accept this fact and then consider what effect this has on the contract itself.[181] An even more difficult situation will arise if the transaction is valid according to the *lex situs,* but invalid according to the proper law. In that case the *lex situs* will prevail as to the validity of the security agreement,[182] but it would seem, on principle, that the seller ought not to be able to enforce the buyer's personal obligations, these being still governed by the proper law of contract. If this conclusion is correct—there is no Anglo-Canadian case law on the point—then presumably it will be for the *lex situs* to consider whether the seller is entitled to terminate the conditional sale[183] or whether he is entitled to some form of quasi-contractual remedy.[184]

Another potential source of conflict resides in the fact that the *lex situs* and the proper law may attach different proprietary effects

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[177] UCC 9-203(1); Ontario Draft Bill, s. 10.

[178] Act No. 33, 1960, s. 45.

[179] Falconbridge, *op. cit.,* footnote 3, p. 452; Rabel, *op. cit.,* footnote 3, s. 1; and see also the authorities cited, *supra,* footnote 3.

[180] It may do so either because of some domestic rule of law or because the conflict rule of the *lex situs* refers to some other law which is not the same as the proper law. *Cf.* Lalive, *op. cit.,* footnote 3, pp. 134-135.

[181] *E.g.,* whether the contract is therefore frustrated. *Cf. Ralli Bros.* v. *Compania Naviera Sota y Aznar,* [1920] 2 K.B. 287, and Dicey, *op. cit.,* footnote 8, Rule 153, Exception B.

[182] *Cf.* Lawrence L.J. in *Republica de Guatemala* v. *Nunez,* [1927] 1 K.B. 669, at p. 697: "In my opinion, the learned judge was wrong . . . in holding that the validity of the assignment . . . depended upon the existence of a prior valid contract to assign . . . ."

[183] German law apparently entitles the seller to ask for a retransfer of the property: Zaphiriou, *op. cit.,* footnote 5, p. 86, citing M. Wolff, Private International Law (2nd ed., 1950), p. 499. Lalive, *op. cit.,* footnote 3, p. 136, n. 2, cites *Bollinger* v. *Wilson* (1899), 77 Am. St. R. 646, where the *lex situs* enforced a claim for payment, even though the contract was illegal according to the proper law. The decision is difficult to justify.

[184] There is some doubt about the quasi-contractual position. Dicey, *op. cit.,* footnote 8, Rule 179, p. 927, favours (1) the proper law of the contract, if the claim arises out of contract (2) the *lex situs,* if the claim arises in relation to an immovable; and (3) the proper law of the country where the enrichment occurs, where the claim arises in any other circumstances. The present case would appear to fall within (3); it cannot come within (1) since, ex hypothesis, there never was a contract and, moreover, the enrichment occurred solely by virtue of th *lex situs* of the goods.

to a conditional sale or indeed even disagree as to its basic classification. In Canada the conditional sale is still treated for many purposes as an executory agreement to sell whereas under the American Uniform Conditional Sales Act, and now of course under the Code, it is regarded as a full-fledged security agreement.[185] It would seem, therefore, that if at the time of the sale the goods are situated in an American State which has adopted either of these laws, or has developed a similar conception of the conditional sale of its own, the American classification of the transaction ought to prevail even though the proper law of the contract may be Canadian. This may have important repercussions on the parties' personal rights, which are admittedly governed by the proper law, for the nature of those rights depends almost entirely on whether or not the conditional sale is regarded as a security agreement. It should be borne in mind, however, that a reference to the *lex situs* always includes a reference to its conflict of laws rules, and in this way some rather undesirable results may be avoided.

A conflict between the *lex situs* and the proper law can also frequently be avoided if for this purpose the court regards the *situs* as being the place where the goods are intended to be kept or used by the buyer or, in the case of mobile equipment, where the buyer has his chief place of business, rather than the fortuitous place of delivery of the goods. The former test will enable the forum more easily to find that the *lex situs* and the proper law are one and the same. If these devices fail to resolve the conflict the court will have to face the fundamental issue whether or not to recognize the supremacy of the *lex situs*—a question to which we shall have to revert again. Surprisingly, although goods subject to conditional sale agreements are frequently imported into Canada from the United States, the question of the characterization of the agreement has never been raised in any reported case.[186]

A further question of classification of great practical importance turns around the buyer's redemption rights. Although the English courts, in relation to mortgages on land, have frequently classified the mortgagor's equity as a personal right,[187] the better view would appear to be that it has a double aspect and involves rights *in rem*

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[185] Goode & Ziegel, *op. cit.*, footnote 5, ch. 14.

[186] For an arresting example of its practical importance in the analogous field of chattel mortgages, see *Youssoupoff* v. *Widener supra*, footnote 23, discussed in Cheshire, *op. cit.*, footnote 126, p. 579 *et seq.*

[187] See, e.g., *Toller* v. *Carteret* (1705), 23 E.R. 916; *Paget* v. *Ede* (1874) L.R. 18 Eq. 118; *In re Hawthorne* (1883), 23 Ch. D. 743.

as well as *in personam*.[188] Consequently it would seem, in accordance with the general principle of the supremacy of the *lex situs* in property matters, that where the proper law and the *lex situs* differ as to the nature or extent of the buyer's right of redemption after default, the *lex situs* must prevail. This is the view of the *Restatement*,[189] and of a number of writer[190] (though by no means all),[191] and, as we have seen,[192] the *lex situs* appears to have been adopted as the governing law in the Code, at any rate where the goods are situated in the Code State at the time of the foreclosure proceedings.

The difficulty about this rule, however, which has so far persuaded the majority of American courts to reject it,[193] is that the *lex situs* at the time of the original sale may have only the most tenuous connection with the whole transaction. In the leading case of *Thomas G. Jewett Jr. Inc.* v. *Keystone Driller Co.*,[194] which has already been referred to in another connection,[195] the equipment was delivered by the seller in New Hampshire, where it was only used for a few days, but neither party had its place of business in that State and the contract was made elsewhere. The majority of the Massachusetts court did not directly advert to the problem of classification but applied Massachusetts law to determine the buyer's

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[188] *Cf.* (1933-34), 43 Yale L.J. 323, at p. 324: "The power of redemption is a contractual right, since it is available to one party against another by virtue of a contract between them. At the same time it is a property interest in the chattel, in that its exercise enables the vendee to acquire the right both to possession and to title after default." It seems hardly correct to call the power of redemption a contractual right, since, in the case of conditional sales, it is given by statute and does not exist at common law.

[189] *Op. cit.*, footnote 27, s. 281: "The power to foreclose a mortgage, lien or pledge on a chattel and the right to redeem are determined by the law of the state in which the chattel was at the time of the mortgage, lien, or pledge."

[190] *E.g.*, Goodrich, *op. cit.*, footnote 78, pp. 485-486; but *cf.*, *op. cit.*, footnote 8, pp. 311-312. Rabel, *op. cit.*, footnote 3, pp. 83-84.

[191] See, *e.g.*, Cavers, *loc cit.*, footnote 146; Gilmore, *op. cit.*, footnote 5, §44.10, and comments in (1933-34), 43 Yale L.J. 323 and (1933), 33 Col. L.R. 1061.

[192] See *supra*.

[193] See *Gross* v. *Jordan*, *supra*, footnote 23; *Franklin Motor Co.* v. *Hamilton* (1915), 92 A. 1001 (Me.); *Stevenson* v. *Lima Locomotive Works* (1943), 172 S.W.2d 812, 148 A.L.R. 370 (Tenn.); *Magoon* v. *Motors Acceptance Corp.* (1941), 298 N.W. 191 (Wis.). In all these cases, although the courts applied the proper law of the contract, the proper law and the original *lex situs* were the same. *Thomas G. Jewett Jr. Inc.* v. *Keystone Driller Co.*, *supra*, footnote 144; *Shanahan* v. *George B. Landers Construction Co.*, *supra*, footnote 145; *Universal C.I.T. Credit Corp.* v. *Hulett* (1963), 151 So.2d 705 (La.); *Cf. Budget Plan* v. *Sterling A. Orr, Inc.* (1956), 137 N.E.2d 918, at p. 920, n. 1; and *Cook and Sons Equipment, Inc.* v. *Killen*, *supra*, footnote 136.

[194] *Ibid.*

[195] See *supra*.

redemption rights because it was the proper law.[196] The original *lex situs* as the governing law was also rejected in *Shanahan* v. *George B. Landers Construction Co.*[197] and the court observed that, under circumstances like the present, to apply the law of the place where the chattel is at the time of contracting might well produce the incongruous result of applying the law of some State with which neither the parties nor the transaction had any substantial contacts whatever.[198] In both these cases, it should be emphasized, the issue was between the buyer and the seller or the seller's finance company, no rights of any other third parties being involved.

The only reported Canadian case in which the question has arisen is *Commercial Corp'n Securities Ltd.* v. *Nichols.*[199] Here, it will be recalled, the seller failed to comply with the foreclosure provisions in the Alberta law, Alberta being the *situs* of the goods at the time of the seller's repossession. The proper law and the original *lex situs* were the same, namely, Saskatchewan law. The court applied Saskatchewan law to determine the buyer's redemption rights on the ground that it was the proper law. The court, however, does not appear to have appreciated the classification problem. The value of the decision is therefore limited.

Dean Falconbridge has criticized[200] it on the ground that the court should have applied Alberta law, the inference being that it is the *lex situs at the time of repossession* which should determine the seller's foreclosure rights, and as a similar rule appears to find some support in the Code[201] it may be well to consider its merits. It appears to have few. The seller's foreclosure rights may be regarded either as part of the contract between him and the buyer, in which case they are governed by the proper law, or they may be seen as involving the extinction of the buyer's property rights in certain goods. In that case the process should be governed by the

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[196] Lummus J. dissented, saying *inter alia*: "This case does not relate to the formation, the nature, the validity, the interpretation or the performance of the contract . . . . This case turns upon the *situs* of the shovel and of the relationship of conditional seller and conditional buyer with regard to it, and upon the application of State laws to a chattel and to a relationship having that *situs*." *Supra*, footnote 144, at p. 372.

[197] See *supra*, footnote 145.

[198] *Ibid.*, at p. 404.

[199] *Supra*, footnote 139.

[200] See (1933), 11 Can. Bar Rev. 352, at p. 353.

[201] *I.e.*, in the case of goods subject to a security interest which are brought into the Code State for the first time. This interpretation of UCC 9-102 is supported by Comment 7 (penultimate paragraph) to UCC 9-103. Professor Cavers appears to have overlooked this Comment in his conclusion that, in this situation, Article 9 prescribes no choice of law rule. See Cavers, *loc. cit.*, footnote 146, at p. 1142 *et seq.*, and *cf.* Gilmore, *op. cit.*, footnote 5, § 44.11, esp. p. 1276.

law which gave the buyer those rights in the first instance, that is, the original *lex situs*. The *lex situs* at the time of repossession satisfies neither of these tests. The most one can say in its favour is that the community in which the goods are situated has an interest in its peaceful transfer, but this merely affects the *mode* of repossession and not the *right* to repossession.[202] To overcome these objections one would have to argue that all foreclosure rights are procedural in character, but this is plainly an untenable proposition. Moreover, it is significant that a tentative rule in one of the early drafts of the first *Restatement*[203] to the effect that the *lex situs* at the time of repossession should govern redemption and foreclosure rights was not adopted in the final version.

Professor Cavers, if the writer understands him correctly,[204] appears to favour a slightly different rule, namely, that the law of the State at the time of repossession where the goods are normally kept or where the buyer has his residence or place of business should be applied. His reasoning appears to be: 1. That rules with respect to the repossession, removal and disposition of goods affect the orderly enjoyment and peaceful possession of property within the community, and 2. That once the buyer has changed his place of residence or permanent place for keeping the chattel he has surrendered his right to the enjoyment of the protective laws of his former residence, at any rate where they are more extensive than those of his new residence. There is something, and perhaps much, to be said for this point of view, but it suffers from at least one important defect. It ignores the *contractual* nature of a conditional sale and the seller's reasonable expectations. The seller is entitled to know at the time of the sale which law will regulate his foreclosure rights, and he is entitled to expect that a buyer, simply by changing his State of residence, cannot improve his position and, conversely, injuriously affect the seller's[205] There may perhaps

[202] *Cf. supra,* footnote 161.

[203] *Op. cit.,* footnote 8, s. 302, Proposed Final Draft No. 2 (1954).

[204] My interpretation of his views is based on a combined reading of *loc. cit.,* footnote 146, at pp. 1141 and 1144-1145.

[205] Professor Cavers does not go quit this far. He simply argues, *loc. cit., ibid.,* at p. 1145, that once the buyer has changed his place of residence he loses the right to rely on the *more protective* provisions of the law of the first residence. He therefore implies that the law of the new residence will only apply if it is no more favourable to the buyer than the old law. This introduces an illogical distinction. If the law of the buyer's residence at the time of the repossession should be applied because it has the closest interest in protecting the buyer, why should it make any difference that the buyer has changed his residence since the time of the original sale?

Professor Gilmore, *op. cit.,* footnote 5 § 44.10, pp. 1272-1273, reaches a result which is diametrically opposite Professor Cavers'. He reasons,

come a time when retail instalment contracts will be deemed to be so deeply affected with a public character that they will be treated as part of the personal law of the buyer, but that time has not yet come.[206]

If the foregoing reasoning is sound, then the choice of the applicable law would still appear to be between the original *lex situs* of the goods and the proper law of the contract.[207] A recent

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basing himself in part on the Louisiana decision in *Universal C.I.T. Corp.* v. *Hulett*, *supra*, footnote 193, that the law of the State where the security interest first has to be perfected (that is, the debtor's place of residence or business or where the goods are to be kept, if it differs from the first two) should govern the secured party's enforcement rights because that is the law the parties themselves are most likely to have in contemplation. If the secured party subsequently consents to the goods being removed into another State, then, argues Professor Gilmore, its law should be applied because the centre of gravity of the transaction has changed; *aliter*, if the secured party never consented or acquiesced to the change in *situs* of the goods. In the latter event presumably the law of the State of first perfection will continue to apply. It will therefore be seen that Professor Gilmore is much more concerned with finding a predictable result that is likely to appeal to both parties than with upholding the public policy of the forum where the debtor happens to establish his residence. Apart from this aspect of his reasoning it is difficult to reconcile with the provisions of UCC 9-102 and 9-103(3), though Professor Gilmore tries hard.

[206] Professor Cavers' views were impliedly rejected in *Cook and Sons Equipment, Inc.* v. *Killen*, *supra*, footnote 136. In this case a truck was sold and delivered in California to a buyer who resided in Alaska and who, with the seller's consent, immediately removed the car to Alaska. Upon the buyer's default the seller repossessed the vehicle in Alaska without complying with the Alaska provision concerning repossession and foreclosure. This action was authorized by California law. In an action for damages by the buyer's assignee, the federal court held that the law of California applied because it was the *lex situs* of the original transaction and because *(semble)* it had the closest connection with sale. After referring to the Alaska provision, the court observed (*ibid.*, at p. 612): "That provision does reflect a public policy in favor of protecting consumers in financial difficulty, but we don't [*sic*] believe that this policy, in its application to consumers who choose to travel 4,000 miles to California to make purchases, is strong enough to require us to refuse recognition to a property right the seller had under the laws of California."

[207] Professor Cavers also argues *loc. cit.*, footnote 146, at pp. 1131-1133, that an "incidental" or "preliminary" question involving a choice of law arises in this way. The aggrieved buyer brings an action in conversion for the wrongful repossession and resale of the goods by the seller. Such an action sounds in tort and is therefore governed by the *lex loci delicti*. Whether a tort has been committed under that law will depend on which law it applies to determine the validity of the repossession and resale. The forum must therefore decide whether it will adopt the choice of law rule of the *lex loci* or whether it will apply its own rule. As Professor Cavers notes, the incidental question was not raised in any of the reported cases, but it is submitted that it does not really arise. The real issue is one of classification of the buyer's action. Though it sounds in tort it belongs more properly to the contractual sphere or to the property sphere or, simply, to the law which governs the parties' redemption and foreclosure rights. There is therefore no justification for referring to the *lex loci* at all, unless it is alleged that the *method* of repossession was tortious by that law, and the courts in *Jewett's* case and *Shanahan's* case were right in their approach to the question.

draft of the *Restatement Second*[208] has offered a compromise solution by providing in section 218 (which deals with the law governing redemption and foreclosure rights) that a reference to the original *lex situs* means a reference to the "totality" of that law, that is to say, as including a reference to its conflict of laws rules. The value of the compromise has been questioned by Professor Cavers.[209] In the first place, this learned author has pointed out, it does not tell the *lex situs* which law it should apply to a case with foreign elements, and therefore it is likely to leave the situation exactly as it was under the first *Restatement.* His second criticism is that if it is the reporters' opinion that the proper law of the contract (or some other law) should govern the redemption and foreclosure rights of the parties, it would be better to say so directly.

The conventional objection[210] to applying a law other than the original *lex situs* to determining the parties' foreclosure and redemption rights is that these rights are property rights and that one cannot have more than one law governing the creation and extinction of property rights in the same chattel without sowing the seeds of confusion and uncertainty. These objections, however, seem to be more theoretical than real. In the first place, in none of the reported cases in which the courts have applied a law other than the original *lex situs* have the dire consequences predicted by the strict adherents of the *lex situs* theory been realized. Secondly, the objections misconceive the true function and proper scope of the *lex situs* rule. The legitimate function of the rule, so far as instalment sales are concerned, is to promote security in transactions by enabling a third party to determine whether he may safely treat the person in possession of goods as the owner of them and by helping him to establish his status on the totem pole of priorities where there are conflicting claims. This reasoning has no application where the sole issue is between the buyer and the seller and no third party rights are involved and are never likely to arise. No considerations of commercial convenience arise in such a case. Thirdly, the Uniform Commercial Code has itself introduced some important qualifications[211] to the *lex situs* principle

[208] Tentative Draft No. 5 (1959).

[209] *Loc. cit.*, footnote 146, at p. 1136.

[210] See *e.g.*, Lalive, *op. cit.*, footnote 3, pp. 74-83; Zaphiriou, *op. cit.*, footnote 5, pp. 31-38. *Cf. Cheshire, op. cit.*, footnote 126 (5th ed, 1957), pp. 443-445.

[211] *Viz.* (a) where the goods are of a type which are normally used in more than one jurisdiction; (b) where the parties to the transaction under-

even where the rights of third parties are involved. That these qualifications are justified can hardly be gainsaid. The truth of the matter is that when one is dealing with highly mobile chattels in a federal system of government, or even between contiguous autonomous States, the notion of an inflexible *lex situs* rule is repugnant alike to common sense and those interests which the rule is intended to promote. Finally, a significant advantage of applying the personal law of the parties to determine their redemption and foreclosure rights is that it makes it easier to apply a single law to govern their relationships and therefore facilitates the fluent conduct of retail instalment sales.

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stood that the property would be kept in the Code State and the property was brought into the Code State within thirty days after the security interest attached; and (c), cases not falling under (b), where the property was brought into the Code State subject to a prior security interest. See UCC 9-103(2)-(3) and *supra*.