# THE RES IN TRANSITU AND SIMILAR PROBLEMS IN THE CONFLICT OF LAWS*

*B.—Stoppage in Transitu.*

Many legal systems confer a right upon the vendor of goods to stop them in transitu,[1] if the buyer becomes insolvent while the goods are being sent to him.[2] The contents of such right, however, vary in different legal systems. According to English law this right is not a right to regain the property, but merely a right to recover possession until the price is paid, and the sale is not cancelled by the exercise of this right.[3] It is defeated by a transfer of documents of title to a bona fide purchaser for value.[4] Other legal systems provide that under such circumstances a seller has a right to regain the property, and that the sale itself is rescinded by the exercise of such right.[5] In some legal systems the right of stoppage is thus regarded as a right of property, in others as a mere contractual right.[6]

Suppose a contract for the sale of goods is made between A (seller) and B (buyer) while the goods are situate in Utopia. By the law of Utopia A has a right to repossess himself of the goods even after delivery of documents of title by B to a bona fide purchaser. (It may also be assumed that according to the law of Utopia possession of the goods passes by delivery of the documents of title.) It is further assumed that the proper law of the contract is English law. After the endorsement of the documents of title to a bona fide purchaser (C), but before the goods have left Utopian territory, B becomes insolvent. A purports to exercise a right of stoppage in transitu.

* The first part of the present article appeared in the January issue of the REVIEW at pp. 7 - 36.

[1] It should be emphasized again that goods which are in transitu so as to establish a right of stoppage need not necessarily be in transitu from the point of view of private international law. A right of stoppage may be exercised while the goods are situate within a certain jurisdiction: *Inglis* v. *Usherwood* (1801), 1 East 515.

[2] *Cf.* Sale of Goods Act, 1893, ss. 44 *et seq.*

[3] CARVER-HENDERSON, CARRIAGE OF GOODS BY SEA, 1925, p. 697.

[4] Sale of Goods Act, 1893, s. 47; similarly French law: Art. 576 of the Code de Commerce, German law: sec. 44 Konkursordnung.

[5] RECHTSVERGLEICHENDES HANDWORTERBUCH, vol. 5, p. 137.

[6] By the law of Quebec where the right of stoppage in transitu is unknown the seller has a right of revendication in respect of the goods sold in case of non-payment of the purchase price (Art. 1543 Civ. C). It does not appear to be settled whether this right is a proprietary or contractual right. For conflicts of laws arising from the difference between the law of Quebec and the common law see Falconbridge, *Contract and Conveyance in the Conflict of Laws* (1933), 81 U. of Penn. L.R. at pp. 824 - 827.

Before it can be said which law applies to the question whether A has such a right, it must be determined according to some system of law whether the right of stoppage is a proprietary or a contractual right.[7]

In the case of *Inglis* v. *Usherwood* (1801), 1 East 515, a right of stoppage was exercised by a seller in Russia after the delivery by the consignor of the goods on board a ship chartered by the consignee. If English law had governed the question, the right of stoppage would have been extinguished at the moment of delivery on board the ship. According to Russian law the right of the buyer to repossess himself of the goods could even be exercised after such delivery. The Court determined the question whether the seller could exercise a right of stoppage according to Russian law, but did not state whether it resorted to Russian law as the proper law of the contract for sale, or as the *lex situs* of the goods. As both laws coincided, there was no necessity to decide the question which law determined the legal character of a right of stoppage.[8]

It would seem that, in accordance with the system outlined by Dean Falconbridge,[9] the three stages of an inquiry into a problem of conflict of laws should be carefully distinguished: 1. *Characterisation:* the definition of the "juridical nature of the subject of question upon which adjudication is required". 2. The *selection of the proper law:* the law indicated by the appropriate rule of the forum "as being the law which ought to govern the decision upon the subject or question already characterized" by means of the connecting factor (Anknüpfungsbegriff) — the element which connects the factual situation with a particular country. 3. *The application of the proper law* to the factual situation for the purpose of deciding the legal consequences of the situation.

It would seem that the present problem turns entirely upon the solution of the first question. If after determination of question 1 it is found that the right of stoppage is a contractual right, the proper law will be the proper law of the contract between buyer and seller; if it is found to be a

[7] This problem has been recognised as a problem of characterization by Falconbridge, *Conflict of Laws, Examples of Characterisation* (1937), 15 Can. Bar Rev. 215 at p. 238.

[8] In an old decision of the German Supreme Commercial Court, R.O.H.G. vol. 6 p. 298, the question of characterisation and the question which law applied to the right of stoppage were held to be governed by the *lex situs* at the time of the exercise of the right. But it should be noted that in that case *lex situs* and *lex fori* coincided.

[9] Falconbridge, *Characterisation in the Conflict of Laws*, (1937), 53 L.Q.R. pp. 235 *ff.*, at p. 236.

proprietary right, the proper law will be the *lex situs* at the time when it was alleged to have been created. In stage 3, the contents of the right will be determined in accordance with the proper law found in stage 2.

Dean Falconbridge suggests that the question whether a right of stoppage is a proprietary or a contractual right must be determined in accordance with the *lex situs* "in order to give effect to the main rule that the *lex rei sitae* governs rights in things".[10] It would seem, therefore, that in the case of proprietary interests, Dean Falconbridge proposes that the process should be reserved. According to his scheme, it is first ascertained that the law governing proprietary relationships is the *lex situs* (Stage 2). This law is then used to determine whether the right claimed is a proprietary right at all. Is it possible to refute Dr. Cheshire's argument:[11] "If the law which is finally to regulate the matter (*i.e.*, the *lex causae*) depends upon classification, how can classification be made according to that law?" It can be assumed that Dr. Cheshire, although he does not discuss this particular problem would regard it as a question of "primary classification", as "allocation of the issue to its correct legal category", and thus determine it according to the *lex fori*.[12] According to this theory the question whether the right of stoppage is a proprietary or a contractual right would be decided by an English court in accordance with English law and thus characterised as merely contractual.[13] This solution may lead to the result that according to the law of the country where the goods were situate at the time of the transaction, the seller had a right which even an English court would characterize as proprietary, and that nevertheless the English court would refuse to recognise this proprietary interest. It is submitted, therefore, that this solution cannot be accepted as it would be contrary to the principle of effectiveness and would lead to the undesirable result of a "limping title", a title to property recognised in one and not recognised in another country at the same time.

It is submitted that a solution slightly different from that suggested by Dean Falconbridge may solve the dilemma; it

[10] (1937), 53 L.Q.R. 543; 15 Can. Bar Rev. at p. 235, *Cf.* also the discussion of a similar problem by Dean Falconbridge, *viz.*, the question whether a transaction similar to a donatio mortis causa may be characterised as a proprietary transaction or a question of administration or succession, and by what law this question is decided; see (1938), 16 Can. Bar Rev. pp. 145 *et seq.*

[11] PRIVATE INTERNATIONAL LAW, 2nd ed. 1938, p. 34.

[12] *Op. cit.*, pp. 35 - 37.

[13] *Cf.* Sale of Goods Act, 1893, s. 47.

is settled law that the question whether a person has a proprietary right to a tangible movable is governed by the *lex situs*,[14] and the principle of effectiveness demands that no other law can determine questions of proprietary rights to tangible movables. If, therefore, A has a proprietary right to the movable at all, it must be conferred by the *lex situs*.

Although to apply the *lex situs* to the question of characterisation *because* it is the proper law of the transaction (as ascertained in Stage 2 of Dean Falconbridge's scheme) would seem to be begging the question, it is submitted that nevertheless the principle of effectiveness which is manifested by the rule that the *lex situs* governs rights in things demands that the provisions of the *lex situs* should be taken into consideration for the purposes of characterisation. On the other hand the principles of characterisation adopted by the *lex fori* must be referred to. The starting point of any matter of conflict of laws, the principal notions governing the "allocation of the issue to its correct legal category",[15] the "definition of the juridical nature of the subject",[16] must be determined in all cases coming before a certain court by one system of jurisprudence. As long as there is no unified system of characterisation, this system can only be the *lex fori*.

It is, therefore, submitted that the following process should be adopted: The court having once found by the use of the notions of the *lex fori* that the problem of conflict of laws at issue contains the question whether the right claimed by the plaintiff is a proprietary or a contractual right, should consult the *lex situs* with a view to ascertain what rights A has, under the assumption that the whole factual situation is governed by the *lex situs*. If it is found that A has a claim, the provision of the *lex situs* on which the claim would be based should then be characterized by the principles of the *lex fori*. If A's claim is characterized as proprietary by the *lex fori*, Stage 2 of Dean Falconbridge's scheme will follow: The proper law selected for the transaction will be the *lex situs* which in Stage 3 will be applied to determine the contents of the plaintiff's claim. If, however, A's claim, as it would arise under the *lex situs* would not be characterised as proprietary by the *lex fori*, the principle of effectiveness has no further say in the matter. The factual situation should then be characterised by the *lex fori* and the

[14] *Cf.* pp. 7 *ff.*, ante.
[15] CHESHIRE *op. cit.* pp. 35.
[16] Falconbridge (1937), 53 L.Q.R. 236.

proper law of the transaction be found in accordance with Dean Falconbridge's general scheme.

It is submitted that this method would not amount to a *petitio principii*. When the *lex situs* is referred to for the purposes of characterisation, it is not consulted as the *lex causae* or the possible *lex causae*. It is referred to as a part of the factual situation, *viz.*, the law of the country which has effective control over the chattel. The fact that the same principle — the principle of effectiveness — may subsequently lead to the application of the *lex situs* as the proper law of the transaction (in the sense defined by Dean Falconbridge) does not prove that the *lex situs* is consulted, *because* it is the *lex causae*. It may be said that the principle of effectiveness as applied to our question has two results: 1. It leads to the consultation of the *lex situs* for the determination of questions arising prior to the characterisation of the factual situation, 2. It leads to the application of the *lex situs*, if the transaction has been characterized according to the method outlined above. Against Dr. Cheshire's argument it may, therefore, be submitted that, if one principle leads to two results, this does not mean that the second result has caused the first result.

It should be noted that the situs relevant for the purpose of determining the question of characterisation is the situs at the time the right is alleged to have been created, *i.e.*, usually the time of the creation of the contract of sale. If at that time the goods are in transitu from the point of view of private international law one would have to refer to the *lex loci expeditionis* instead of the *lex situs*.[17]

*C.—Ships and Other Means of Transport.*

Ships and other means of transport may be distinguished from other movables in that they are in transit from one country to another in more or less regular intervals, and not only under exceptional circumstances. They return periodically to a fixed place, their place of registry or immatriculation. It has been suggested that for this reason particular principles must be found by which the title to these movables should be

[17] According to STORY, COMMENTARIES ON THE CONFLICT OF LAWS, 1835, s. 402, the *lex loci contractus* should govern the validity of a right of stoppage irrespective of the character of the right of stoppage conferred by the *lex situs*. According to WHARTON, CONFLICT OF LAWS, 3rd ed. 1905, p. 778, the law of the vendor's domicile should govern "when from that domicile the goods are forwarded". CHESHIRE, *op. cit.*, p. 425, is in favour of the application of the *lex actus*. None of these learned authors discuss the preliminary problem of characterisation involved in this question.

governed.[18] Thus it has been submitted that irrespective of all circumstances the title to ships should be governed by the law of the port of registry.[19]

It is submitted, however, that, provided no binding authority can be established, the mere fact that ships and other means of transport are more frequently in transitu than other movables does not warrant an exception from the principles outlined before. Ships might have a fixed situation in a country other than that of their flag or their port of registry, and although ships are personified for certain purposes of the English law of procedure, this fact does not imply that they are treated in any way different from ordinary movables, as far as proprietary relationships are concerned.

1.—*English Law.*

In English conflict of laws, a separate treatment has been suggested only in respect of ships.[20] There is no authority or suggestion whatever for any special rules with regard to other means of transport, such as motor-cars, aeroplanes, railway carriages etc.[21] It is submitted that the title to these chattels should be governed by the same rules which apply to other

[18] NIBOYET, DES CONFLITS DE LOIS RÉLATIFS À L'AQUISITION DE LA PROPRIÉTÉ ET DES DROITS SUR LES MEUBLES CORPORELS À TITRE PARTICULIER, 1912, pp. 57 *ff.*, pp. 95 *ff.*

[19] NIBOYET, *op. cit.*, pp. 111 *ff.*

[20] DICEY, CONFLICT OF LAWS, 5th ed. 1932, pp. 996 *ff.*

[21] The doctrine prevailing in some states of the U.S.A. which is also laid down in the RESTATEMENT, secs. 268, 275, according to which dealings subsequent to a removal of a chattel to another state without the consent of the owner cannot divest this person of his title, unless these dealings are valid by the *lex situs* before the removal might be considered as an instance of *res in transitu* in the sense suggested by Niboyet; most decisions from which this principle is derived are cases of the title to means of transport, particularly motor-cars. See *Flora* v. *Julesburg Motor Co.* (1920), 69 Colo. 238, 193 Pac. 545; *Wray Bros.* v. *White Auto Co. of Memphis* (1922), 155 Ark. 153, 244 S.W. 18; *Goetschius* v. *Brightman* (1927), 245 N.Y. 186, 156 N.E. 660. Although in none of these cases the fact that the movables in question were means of transport was stressed, this exception from the *lex situs*, rule might be explained by the flexibility of motor-cars etc. Motor-cars have a kind of situation *matériel-juridique* (NIBOYET, *op. cit.*, p. 74) at the place of their registration, which will in most cases be also the country from which the chattel was wrongfully removed, and it might be difficult to change this legal situs as opposed to an actual situs. It might be contended that this theory affords a more satisfactory explanation for the exception from the *lex situs* principle which seems to be necessitated by the particular conditions of inter-state relations in the U.S.A. than the usual interpretation based on the fiction of the voluntary submission of the owner to the *lex situs*. It should be noted, furthermore, that this exception is only applied in some American States; see reviews on the American case law in Carnahan, *Tangible Property and the Conflict of Laws*, (1935), 2 Univ. of Chicago L.R. p. 367, note 68, p. 375, notes 89 - 90. The exception has been criticised by GOODRICH, CONFLICT OF LAWS, 1927, pp. 352 - 353; STUMBERG, PRINCIPLES OF THE CONFLICT OF LAWS, 1937, p. 365.

movables. If they have a fixed situs, they should be governed by the *lex situs*, if they are in transitu, the suggested rules in respect of *res in transitu* should apply. Thus the validity of a transfer of railway carriages, aeroplanes etc. while on a journey from one country to another will be governed by the law of the country of their last fixed situation. This will usually be the law of the country where they are "domiciled", *e.g.*, the home-station of a railway carriage, the home-port of an aeroplane, the place of registration of a motor-car. Insofar, but only insofar, Niboyet's suggestion[22] that the law of the "situation *matériel-juridique*" should govern the title to means of transport might be accepted. It seems to be useful to repeat that according to our submission the in transitu quality comes to an end as soon as some legal contact has been established with the place where the vehicle is actually situate.[23]

With regard to the title to ships it has been suggested that "the balance of reason is in favour of making the law of the country to which the ship belongs decisive as to voluntary transfers of ships and that it is difficult to see any ground on which this principle can be impugned".[24] In this statement Dicey does not make any distinction whether a British ship or a foreign ship is transferred, and whether the ship is situate in a harbour or on the high seas. It seems, however, to be necessary to investigate whether and how far this submission is in accordance with the decisions of the English courts.

It would appear to be preferable to treat the question of the title to British and to foreign ships separately, as it will be shown that the principles governing the title to foreign ships are to a certain extent settled by the decisions of the courts, whereas the authority in respect of the title to British ships is rather scanty.

In *Hooper* v. *Gumm* (1867), L.R. 2 Ch. 282, it was held that the transfer by sale of an American ship taking place at a time when the vessel was situate in England was governed by English law, the *lex situs*, and not, as had been contended by counsel for a mortgagee, by American law, the law of the flag. The title of the English purchaser thus prevailed over that of a previous American mortgagee whose mortgage had not been registered in accordance with the law of England. Dicey's

[22] *Op. cit.*, pp. 104, 115, note 3.

[23] Thus the question whether an innkeeper has a lien on a motor-car for his claim against a lodger would be determined by the *lex situs*, a legal contact having been established by the contract between the lodger and the innkeeper by which the car was subjected to such lien.

[24] DICEY, *loc. cit.*

explanation[25] of this case, that the mortgagee could not recover, because he had not acted bona fide, does not seem to be convincing. The Court could only arrive at this decision after the preliminary question of which law should be applied had been answered in favour of the *lex situs*, and it should be noted that both judgments of the Court of Appeal in Chancery, that of Lord Chelmsford L.C. as well as that of Turner L.J. proceed in that way. Notions of bona fides, and fraud prevailing at the *lex situs* can only be material if the *lex situs* applies at all.

In *The Jupiter* (*No. 3*), [1927] P. 122, it was held that a Russian confiscation decree did not affect a Russian ship which was outside the territory over which the Soviet Government exercised de facto control at the time when the decree was issued. The judgment of the Court was based on the principle that "undoubtedly property passes according to the law of the place where it is situate",[26] and that, as there was not even a suggestion by counsel that ships were to be governed by any principles other than those applicable to other chattels, the title to the ship could not be affected by a confiscation decree which came into force when the ship was not on territory controlled by the Soviet Government. Thus it was held that the law of the flag, Russian law, was immaterial to the decision, although the Soviet Government was recognised as the de jure government of Russia at the time of the decision.

In the cases of *The Colorado*, [1923] P. 102, and *The Zigurds*, [1932] P. 113, the principle that the incidents of property are governed by the present *lex situs* was applied to ships, although the law of the flag was French in the first and Latvian in the second case.[27] Another case quoted by Dicey[28] in favour of the application of the law of the flag is the case of *Schultz* v. *Robinson and Niven* (1861), 24 D. 120, decided by the Scottish Court of Session. There a Prussian ship had been sold by a bill of sale while it was on the high seas. When the ship arrived in Scotland, but before the sale was entered into the beil brief, the ship was arrested by a creditor of the

[25] *Op. cit.*, at p. 998. This explanation is followed by CHESHIRE, *op. cit.*, p. 435.

[26] At p. 139.

[27] As the writer intends to set out in a subsequent article, the rule that the question of priorities of several proprietary rights in ships is governed by the *lex fori* is only an instance of the more general principle that the incidents of property are governed by the law of the present situs as opposed to the question of acquisition of property which is governed by the law of the situs at the time of acquisition.

[28] *Op. cit.*, at p. 997.

transferor. According to Scottish law, the title did not pass without such entry in the beil brief, whereas according to Prussian law the title passed with the execution of a bill of sale. It was held that Prussian law, the law of the flag applied; accordingly it was held that the title had passed before the arrestment, and the arrestment was, therefore, recalled. It is submitted that on a true construction the decision in this case does not contradict the decisions arrived at by the English courts and may be distinguished from the English cases previously quoted. In the Scottish case the ship was on the high seas at the time when the transfer took place, whereas in the English cases the vessel had always been in the territory of a given state at the time of the creation of the proprietary right.

It is accordingly submitted that the principles governing the title to foreign ships prevailing in English and Scottish courts may be stated as follows :

1. If the creation, acquisition or transfer of a proprietary right takes place while the vessel is situate within the territorial limits of a certain country, the validity of such a transaction is always governed by the *lex situs*, whether the transaction is voluntary[29] or involuntary.[30]

2. If the vessel is on the high seas, voluntary transactions in respect of the title to the ship will be governed by the law of the flag.[31] It is still unsettled whether an act of a sovereign power can have any effect on the title to a ship — or the cargo — while a vessel is on the high seas, even if the ship sails under the flag of the state exercising that power.

As far as British ships are concerned, the position does not seem to be so well settled as it is with regard to foreign ships. It has been suggested by Dicey,[32] that a sale of British ships wherever situate is void if it does not comply with the rules referred to in the Merchant Shipping Act, 1894, s. 44 (11). There is, however, no authority for the proposition that this or any other section of the Merchant Shipping Act, 1894, dealing with the transfer of ships contains a provision of private international law. It is submitted that the rules laid down in ss. 24 *et seq.* can be regarded as mere rules of municipal law of the British Empire, and that the question, under what

[29] *Hooper* v. *Gumm* (1867), L.R. 2 Ch. 822.
[30] *The Jupiter* (*No. 3*), [1927] P. 122.
[31] *Schultz* v. *Robinson and Niven* (1861), 24 D. 120.
[32] *Op. cit.*, at p. 997.

circumstances this act applies in the international sphere, particularly whether it applies to the transfer of British ships irrespective of their situation, is not determined by the Act.

As far as can be ascertained, there is no reported case of a voluntary transfer of a British ship situate abroad. The only reported cases dealing with the transfer of British ships abroad are transfers of ships pursuant to judgments,[33] or to administrative acts.[34]

In *The Segredo otherwise "Eliza Cornish"* (1853), 1 Spinks Eccl. & Adm. 36, a British ship which had been forced to land in Fayal was sold there by a decree of the directors of the customs authorities, in accordance with the law of Fayal, but contrary to the law of England. It was held that the validity of that sale must be tried by the general maritime law, *i.e.*, English law, and that the provisions of the general maritime law must prevail over those of the *lex loci contractus* (and apparently also over those of the *lex situs*), as far as the transfer of ships is concerned. The opinion of the Court on which this decision was based, was laid down by Dr. Lushington (at p. 57): "I know of no right which a purchaser of a ship in a foreign country such ship not belonging to a subject of that country has to call for the interposition of the *lex loci contractus*, save, indeed, in one case only where the title is derived from a decree of a competent court administering the law of its own jurisdiction, and by its decree conferring a title. Had the ship been purchased under a decree of a Court of Admiralty directing her to be sold in a case within its jurisdiction, or the law of a court resembling our own Court of Exchequer, I should have hesitated long before I disputed the title."

It would seem, however, that the substance of this judgment has been overruled by the subsequent decision in *Cammell* v. *Sewell* (1860), 5 H. & N. 728. Crompton J. said with regard to the case of *The Segredo:* "If this case be an authority for the proposition that a law of a foreign country . . . . . is not to be regarded by the courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with this decision. We do not feel bound by it when sitting." It is submitted that the argument that *Cammell* v. *Sewell* was a case of the title to goods, not to a ship,[35] does not carry sufficient weight against

[33] *Simpson* v. *Fogo* (1863), 1 Hem. & M. 195; *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414.
[34] *The Segredo* (1853), 1 Spinks Eccl. & Adm. 36.
[35] DICEY, *op. cit.*, p. 999.

this dictum in view of the interpretation which *Cammell* v. *Sewell* has received by the House of Lords in *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414. There it was pointed out that the rule that a judgment in rem affecting movable property is binding everywhere, is only a branch of the *lex situs* principle, as laid down in *Cammell* v. *Sewell*.[36] In *Castrique* v. *Imrie* this rule was applied to the transfer of a British ship situate in France by a judgment of a French Court. The judgment in *Castrique* v. *Imrie* seems to be based on the assumption that the principle of *Cammell* v. *Sewell* applies to ships irrespective of their nationality.[37] Although the immediate issue decided in this case was whether a French judgment in rem in respect of the title to a British ship then situate in France was recognised in England, it is submitted that the reasons of the decision support the proposition that all dealings in respect of the title to British ships situate in a foreign port are governed by the *lex situs*, whether such dealings take place by way of a voluntary transaction or by way of an administrative act of the authorities of such foreign port. It is furthermore submitted that the judgment in *The Segredo*, although there is no decision to the contrary on the same facts — transfer by an administrative act of the authorities of a foreign port — would not be followed in view of the subsequent decision in *Cammell* v. *Sewell* as applied by the House of Lords in *Castrique* v. *Imrie*.

The case of *Simpson* v. *Fogo* (1863), 1 Hem. & M. 195, cannot be quoted against this proposition and in favour of an application of the law of the flag irrespective of the situation of the ship at the time of the transaction. There a transfer of a British ship situate in Louisiana effected by a judgment of the Supreme Court of Louisiana was not recognised in England, because the English Court was of the opinion that the judgment was contrary to English public policy, and, therefore, the original title of the British owner was held to survive. It is submitted that English public policy was the only reason for not recognising the Louisiana judgment.

[36] Per Lord Blackburn at p. 429.

[37] Dicey's submission (*op. cit.*, at p. 997) that the British nationality of a ship cannot be altered until a transfer has been duly carried out in the terms of the Merchant Shipping Act, 1894, only covers those cases where the ship is situate in a British port, as was the case in *Granfelt* v. *Lord Advocate* (1874), 1 R. 782, or if the vessel is on the high seas and British law governs the transfer for this reason. It is submitted that a transfer of a British ship situate abroad to a foreigner in accordance with the *lex situs* at the time of the transfer would also change the nationality of the ship, because a foreigner cannot be owner of a British ship, wherever he may have acquired it and irrespective of the method of acquisition (Merchant Shipping Act, 1894, s. 1).

On the other hand, there is no reported case, as far as can be ascertained, referring to a transfer of a British ship while on the high seas. It is submitted, however, that by analogy to the case of *Schultz* v. *Robinson & Niven* (1861), 24 D. 120, the law of the flag would be held to govern. It may be mentioned here that the English municipal law with respect to the transfer of British ships is contained in the Merchant Shipping Act, 1894, ss. 24 *et seq.*, an act which — subject to alterations by the legislature of any British possession—applies to all British possessions.[38] Thus it would seem that once it is ascertained that the law of the flag applies, and the flag is British, there is no question as to the law of which British possession should apply.

For these reasons it is submitted that the following principles can be derived from decided cases :

1. A transfer of a British ship in a British port is governed by British law, particularly the rules laid down in the Merchant Shipping Act, 1894, ss. 24 *et seq.* This seems to be firmly established.

2. A transfer of a British ship in a foreign port is valid, if it complies with the *lex situs*, and such a transfer is recognised after a removal of such a ship to England provided the transfer did not infringe a rule of English public policy.[39] This proposition is settled law as far as the transfer has been carried out pursuant to a judgment of a competent court of the situs,[40] but it would seem that the same principle would apply to all transfers, voluntary or compulsory.

3. A transfer of a British ship situate on the high seas is valid, if it takes place in accordance with British law, *i.e.*, Merchant Shipping Act, 1894, ss. 24 *et seq.*

2.—*American Law.*

In the United States only a few cases are reported which deal with the question of the transfer of property in ships from the point of view of private international law. Most of these cases are cases of inter-state conflict, and the question of the law of the flag could, therefore, not arise. The rules applying to the transfer of ships do not appear to be the same in all states, but it seems to be undisputed that the transfer of a ship

[38] Merchant Shipping Act, 1894, s. 735. *Cf.* TEMPERLEY, THE MERCHANT SHIPPING ACTS, 1922, Note b to s. 735. As to British Dominions see: Statute of Westminster, 1931, ss. 1, 2 and 5.

[39] *Simpson* v. *Fogo* (1863) 1 Hem. & M. 195.

[40] *Castrique* v. *Imrie* (1870) L.R. 4 H.L. 414.

situate in a harbour is governed by the *lex situs*, wherever such transfer takes place.[41] On the other hand the authorities are not very clear in respect of the transfer of ships situate on the high seas. In some cases the *lex loci contractus* has been applied,[42] but it should be noted that in none of these cases the law of the place where the contract had been made was adopted only for that reason. Either the previous owner was resident or domiciled in the *locus contractus*,[43] or the vessel was there registered.[44]

It should also be noted that in the earlier cases no reference was made to the place of registration of the vessel, probably because the place of registration coincided with the domicile or the residence of the owner. The importance of the place of registration was stressed in the only reported decision of the Supreme Court of the United States on this subject, the case of *Crapo* v. *Kelly* (1873), 16 Wall. 610, 83 U.S. 430. The Court of Massachusetts on the bankruptcy of the owner of a vessel registered there gave title to several persons as assignees in insolvency of the bankrupt. A vessel belonging to the bankrupt which had been on the high seas at the time of this assignment was attached by an unsecured creditor of the bankrupt on its arrival in the port of New York. The Supreme Court of the United States, on appeal from the Supreme Court of the State of New York had to determine whether the creditor had a right to attach the vessel when it arrived in New York, or whether he was debarred from doing so by virtue of the assignment decreed by the Court of Massachusetts. The majority of the United States Supreme Court held that the effect of the assignment on the title to the ship had to be governed by the law of Massachusetts. The main reason for this judgment was that the owner was domiciled in Massachusetts. It should be noted, however, that the vessel was also registered in Massachusetts, and that the assignment had been decreed by a court of that state. It should also be noted that this case was not a case of individual assignment, but a case of an assignment on bankruptcy; thus it seems to be very difficult to forecast whether the principles laid down

[41] *Olivier* v. *Townes* (1824), 2 Mart. (N.S.) 93; *Crapo* v. *Kelly* (1873), 16 Wall. 610, 83 U.S. 430 at p. 438. The case of *Koster* v. *Merritt* (1864), 32 Conn. 246 was decided on the basis of the *lex loci contractus* which, however, coincided with the *lex situs* at the time of the transaction; *cf.* also MINOR, CONFLICT OF LAWS, 1901, p. 273.

[42] *Thuret* v. *Jenkins* (1820), 7 Mart. 318; *Southern Bank* v. *Wood* (1850), 14 La. Ann. 554; *Moore* v. *Willett* (1862), 35 Barb. 663.

[43] *Southern Bank* v. *Wood*, *supra*; *Moore* v. *Willett*, *supra*.

[44] *Thuret* v. *Jenkins*, *supra*.

in that case will be followed in a future case of a voluntary transfer of a ship situate on the high seas. The only point which seems to be well established is that the law of the place of the destination of the ship on the particular journey during which the transaction takes place, is of no importance at all.[45] Apart from that it seems to be uncertain whether the *lex loci contractus*, the *lex domicilii* or the law of the port of registration will be applied by the American courts to the voluntary transfer inter vivos of the title to ships on the high seas.

3.—*Law of the European Continent.*

On the continent of Europe there seems to be a considerable difference of opinion as to whether the ordinary rules governing tangible movables should apply to the title to ships, or whether this is governed by any special rules.

v. *Bar*[46] maintained that according to the law as it stood at the time when his book was written (1889), the title to ships was governed by the general principles applying to tangible movables, *i.e.*, by the *lex situs*. v. Bar maintained that an acquisition of title to a ship in compliance with the *lex situs* at the time of acquisition must be recognised after the removal of the ship to the port of registry, even if the title had not been acquired in accordance with the law of the place of registry. For the purpose of future enactment (*de lege ferenda*) v. Bar suggested the following rules with regard to the validity of mortgages of ships:[47] (a) Mortgages created in accordance with the law of the port of registry (Heimatrecht) will be recognised everywhere, and laws of a subsequent situation which do not recognise mortgages of ships cannot apply, if the mortgage has been entered into the ship's papers; (b) Mortgages of ships may be created in accordance with the *lex situs* at the time of the creation of the mortgage, but they must be entered in the ship's papers. They become ineffective if the formalities of the port of registry are not complied with within a certain period from the return of the vessel to the home port.

von Bar's suggestions have remained theory. The law of Germany in this respect seems to be unsettled, and the views of the textbook writers disagree. Wolff[48] suggests that the law

[45] *Thuret* v. *Jenkins, supra; Crapo* v. *Kelly, supra; Southern Bank* v. *Wood, supra; Moore* v. *Willet, supra.*

[46] THEORIE AND PRAXIS DES INTERNATIONALEN PRIVATRECHTS, vol. 2, p. 190.

[47] *Op. cit.*, vol. 2, p. 198.

[48] INTERNATIONALES PRIVATRECHT, 1933, p. 108.

of the flag[49] applies to the creation and extinction of rights in ships. He does not distinguish as to whether the vessel was situate in a harbour or on the high seas at the time of the transaction. Nussbaum[50] applies the law of the flag to transfers and mortgages of ships irrespective of their situation at the time of transaction, whereas liens of "ship's creditors" (claims of necessaries men etc.) are said to be governed by the *lex situs* which applies as an "exception". On the other hand, Frankenstein[51] submits a solution which comes nearer to the principles applying in the English courts. According to Frankenstein a transfer or a mortgage of a ship is governed by the *lex situs*, if the ship is situate in a port, and the law of the flag governs if the ship is situate on the high seas at the moment of the transaction. If, however, the geographical position of the vessel at the time of transaction cannot be ascertained, the law of the place of destination applies. Statutory liens (Gesetzliche Pfandrechte), such as claims of necessaries men and other "ship's creditors" are said to be governed by the *lex situs* exclusively.

The German Supreme Court has dealt with the question of the title to ships on several occasions. But all these cases were cases of mortgages and charges on ships, and there seems to be no reported case of a transfer of a ship by sale. In the first of the cases,[52] it was held that a mortgage of a ship which had been created in accordance with the law of Prussia (the law of the flag and the *lex situs* at the time of the creation of the mortgage) could be enforced by way of interpleader proceedings against a judgment creditor who had levied execution upon the ship in Saxony. It is submitted that this case is rather more an instance of the recognition of title validly acquired abroad (in accordance with the *lex situs* and the law of the flag which coincided) than an authority for the propo-

[49] Some writers distinguish between the law of the flag and the law of the port of registry, and point out that these two laws need not necessarily be identical. According to this view (*cf.* NIBOYET, *op. cit.*, pp. 114 *ff.*; FRANKENSTEIN, *op. cit.*, vol. 2, p. 466) the law of the flag is a conception of public international law which is of no importance in private international law, at least as far as transactions of private individuals in respect of the property are concerned. In questions of this kind, it is the law of the port of registration that matters. In English case laws and literature this distinction has never been drawn, but it should be noted that, whereas the flag is apparent to reveyone, the port of registration is not, and that for reasons of security the law of the flag would seem to be preferable.

[50] DEUTSCHES INTERNATIONALES PRIVATRECHT, 1932, pp. 313-314. Substantially the same solution is suggested by LEWALD, DAS DEUTSCHE INTERNATIONALE PRIVATRECHT, 1931, pp. 192-193.

[51] *Op. cit.*, vol. 2, p. 475.

[52] ENTSCHEIDUNGEN DES REICHSOBERHANDELSGERICHTS, vol. 6, p. 80, sec. BEALE, CASES, vol. 2, p. 97.

sition that the creation and transfer of titles to ships is governed by the law of the flag, as suggested by Niboyet.[53] In another case, it has been held that the validity of a mortgage of a share in a ship (Schiffspart) is governed by the law of the flag, but the report does not give any reference as to whether the vessel was situate at the port of registry at the time of creation of the mortgage.[54] In another case where it had to be determined how far a mortgage of a Dutch ship created in accordance with the law of Holland could be recognised after a removal of the vessel to Germany,[55] it was held that the question of the validity of the mortgage was governed by Dutch law, "because the vessel belonged to an owner domiciled in Holland at the time of the creation of the mortgage, and because it was operated from a Dutch port". It was held further that its removal to Germany did not by itself affect the validity of the mortgage. It should be noted that although it was not expressly mentioned it seems to appear from the facts that the vessel had been situate in Holland at the time of the creation of the mortgage. For this reason it seems to be doubtful how far this decision establishes an exception from the general application of the *lex situs* to the title to movables, so far as ships are concerned.

In a later case a mortgage of a ship created in Holland in accordance with Dutch law was recognised after a removal of the ship to Germany and the registration of the ship in the German registry.[56] But the decision does not set out whether Dutch law was applied to that mortgage, because it was the *lex situs* at the time of the creation, or because the vessel had originally been registered in Holland. In a subsequent case the German Supreme Court had to decide by which law it had to be determined whether a necessaries man who had supplied coal to the Captain of a German ship in Copenhagen had acquired a lien on the ship.[57] The Court held that the opinion that German law (the law of the flag) determined the acquisition of a proprietary right to a German ship was incorrect "There is no reason for establishing an exception from the application of the recognised rules of private international law in respect of proprietary rights in movables, as far as the

[53] *Op. cit.*, at p. 99, note 1.
[54] R.G.Z., vol. 14, p. 14.
[55] R.G.Z. vol. 45, p. 276.
[56] R.G.Z. vol. 77, p. 1. The question of priority of this mortgage over another mortgage subsequently created in accordance with German law was, however, determined by German law.
[57] R.G.Z. vol. 81, p. 283.

conditions and effects of proprietary rights in maritime vessels are concerned." It was further held that if, according to Danish law the proper law of the contract, a proprietary right had been created by the transaction, "a proprietary right had been acquired in fact, because the vessel was situate in Copenhagen, and thus the proper law of the contract was at the same time the *lex situs*, the law applicable to the creation of proprietary rights". For these reasons Danish law was held to govern the question.

It should be noted that in the only case where a conflict arose before the German Supreme Court, as to whether the *lex situs* or the law of the flag should apply to proprietary rights in ships the *lex situs* was applied, and not the law of the flag. According to the tenor of the judgment, it seems to be doubtful whether the German Supreme Court will apply the law of the flag, if in future cases the creation of a mortgage, or a transfer by sale is at issue, and not the claim of necessaries men.

In France the balance of authority seems to be in favour of the application of the law of the flag to questions of title to ships whether situate in a harbour or on the high seas,[58] although the older doctrine seems to have favoured a view more in accordance with the view prevailing in England.[59] So Weiss suggests that the *lex situs* should apply to the title to vessels situate in a port, and that the application of the law of the flag or of the law of the port of registry should be restricted to those cases where the ship was situate on the high seas at the moment of the transaction. Weiss, though admitting that the French Code does not decide the problem in either way points to the fact that French municipal law expressly declares that sea-going vessels have to be regarded as movables,[60] and apart from other more theoretical considerations he submits that this is a strong authority for the proposition that vessels should also be treated as movables in private international law.

The French Supreme Court, the Cour de Cassation, has not followed this argument. Two earlier cases decided by the Cour de Cassation can not be regarded as a definite authority either way. The first case[61] was decided in 1872, *i.e.*, before

[58] NIBOYET, *op. cit.*, pp. 114 *ff.*; NIBOYET, MANUEL DE DROIT INTERNATIONAL PRIVÉ, 1928, p. 646; PILLET, *op. cit.*, pp. 742 *ff.*; LEREBOURS-PIGEONNIÈRE, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ, 3rd ed., 1937, p. 260; VALÉRY, MANUEL DE DROIT INTERNATIONAL PRIVÉ, 1914, p. 1315.

[59] WEISS, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT INTERNATIONAL PRIVÉ, vo. 4, p. 310 *ff.*

[60] Art. 531, c. civ., Art. 190 c. comm.

[61] SIREY, 1872 - 1 - 238.

the French Act governing mortgages of ships came into force. There a mortgage of a British ship created in England[62] was held to be void as against the creditors of an Englishman resident in France who was adjudicated bankrupt in France. This judgment seems to be based on reasons of public policy which at the time of the judgment did not permit any charge on ships without transfer of possession to the chargee. In a second case, decided after the passing of the above-mentioned Act,[63] a mortgage of a Greek ship executed in Greece was recognised in France, and it was held that it was not necessary for such a mortgage to comply with the formalities provided for in Art. 6 of the above-mentioned Act, as long as it "is validly executed according to the law of the state to which the vessel belongs". By this dictum the Court seems to have expressed an opinion in favour of the application of the law of the flag.[64] But it should be noted that in this case the ship was situate in Greece at the time of the creation of the mortgage, and that there was, therefore, in fact no conflict between the *lex situs* and the law of the flag. A case decided by the Cour de Cassation in 1912 is of more definite authority.[65] There the facts were similar to those in *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414. A French ship had been mortgaged in France to a Frenchman. It was seized and sold to another Frenchman in pursuance of a judgment of the English Court obtained by several insurance companies against the mortgagor for the payment of premiums. According to English law the French purchaser would have acquired a title free from incumbrances. It was held, however, that French law applied to the effect of the sale by the English Court and in accordance with French law the mortgage had not been extinguished under the circumstances. The decision draws a distinction between the form and the substantive effect of an execution in respect of a ship, or what would be called a judgment *in rem* in English legal terminology. According to the decision, the form of such a judgment *in rem* can only be governed by the *lex actus*, whereas the substantive effect, the question whether the title to the ship has passed in pursuance of such a judgment must be determined by the law of the flag.[66] Thus the doctrine laid

[62] The report does not disclose where the ship had been situate at the time of the creation of the mortgage.

[63] SIREY, 1880 - 1 - 257.

[64] This view has been stressed in a note to this case by LYON-CAEN, SIREY, 1880 - 1 - 257.

[65] Sirey 1912 - 1 - 257.

[66] See also a note on this case by LYON-CAEN, SIREY, 1912 - 1 - 433.

down by the House of Lords in *Castrique* v. *Imrie* has not been adopted by the Cour de Cassation. It should not be overlooked, however, that this judgment concerned a French ship, and that it is not settled whether the Cour de Cassation would adopt the same attitude in the converse case, a judgment *in rem* given by a French Court with respect to a foreign ship. In such a case the French Court might refuse the application of foreign law on reasons of public policy.[67] French law, therefore, seems to be settled, insofar as the title to French ships wherever situate is governed by French law, whereas it may still be regarded as an open question which law applies to the title to foreign ships whether situate in a port or on the high seas.[68]

4.—*Proposed Conventions.*

The uncertainty which exists in the conflict of laws relating to the title to ships may create serious hardship. The fact that this branch of the law can hardly be regarded as settled in any of the legal systems which have been the object of this investigation may considerably affect the chances of obtaining credit for those persons whose principal assets are ships. For this reason it is not surprising that it has been attempted to settle and unify this branch of the law by way of international conventions. Thus, as early as 1885, the Institut de Droit International in its Brussels Conference suggested in a project *de réglement international des conflits de lois en matière de droit maritime*[69], that the law of the flag should govern all questions of title to a ship. This solution had been previously suggested by a congress on Maritime Law held in Antwerp in 1885.[70] After the war an international convention for unifica-

[67] See *supra*.
NIBOYET, MANUEL, at p. 646, points out that in previous decisions the French Court had refused the application of foreign law to the title to ships on reasons of public policy; see SIREY, 1872 - 1 - 238.

[68] Decisions of other continental courts: Court of the Hague, CLUNET, 1921, p. 280. Held that a transfer of a Belgian ship situate in Holland by a Belgian to an Italian which was effected by a transcript of the bill of sale in the Chancery of the Italian Consul at Rotterdam was valid, because the parties had the intention to submit the transaction to Italian law, although such transfer was neither valid according to the *lex situs*, Holland, nor according to the law of flag, Belgium. Court of Athens: CLUNET 1934, p. 1053. This decision seems to be in favour of the *lex situs*. It was held that a lien in a Turkish ship arising in consequence of a collision which occurred in Turkish waters was governed by Turkish law. The reason for this judgment was that apart from the general principle of Greek private international law according to which rights arising in connection with ships are governed by the law of the flag, the lien represented a proprietary interest in the ship which was situated in Turkey when the accident happened.

[69] ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 1885 - 86, p. 124.

[70] CLUNET, 1885, p. 631.

tion of certain rules relating to maritime privileges and mortgages was arrived at in Brussels which laid down that maritime privileges and mortgages created in accordance with the law of the port of registration would be regarded as valid and respected by all contracting states.[71] A similar convention in respect of river navigation was arrived at in 1930 by a conference of numerous European nations held in Geneva. This convention provided that the transfer and mortgage of river-boats should be governed by the law of the place of registration.[72]

None of these conventions, however, has been ratified by the contracting states, and for the time being the unsatisfactory position with regard to the title to ships in private international law continues to exist. It seems to be desirable that a convention on the lines of the Brussels and Geneva Conventions should be put into force by the most important maritime nations in order to overcome the insecurity prevailing in respect of proprietary rights in ships. It would appear that from a point of view of legal policy, as opposed to the law as it stands, the application of the law of the flag would afford the most satisfactory solution of this problem, as a vessel generally returns to its home port at periodical intervals, and therefore, the connection with the law of that country is greater than the connection with any port of call. Apart from this, the flag can easily be ascertained by any intending purchaser. This solution can only be satisfactory, however, if it is adopted by the most important maritime nations. If the law of the flag is applied merely in some countries, whereas others retain the *lex situs* principle, the application of the *lex situs* in these countries will practically supersede the law of the flag, whenever a transaction affects the title to a ship situate in such a country. It would seem that the application of the law of the flag or of the port of registration by the court of a country other than that of the situs becomes more or less fictitious, if the ship is still situate in the first country or in another country which applies the *lex situs*. It becomes unjust if the acquisition of a proprietary interest valid by the law of the country where the ship was situate at the time of the transaction (where the *lex situs* is applied) is subsequently impeached by the removal of the ship to another country where the law of the port of registration

[71] Art. 1 of the Convention (see FRANKENSTEIN, *op. cit.*, vol. 2, p. 483, note 58).

[72] See VOGELS, ERGEBNIS DER GENFER KONFERENZ ZUR VEREINHEITLICHUNG DES BINNENSCHIFFAHRTSRECHTS, ZEITSCHRIFT FÜR INTERNATIONALES UND AUSLÄNDISCHES PRIVATRECHT, vol. 5, pp. 308 *ff.*; KUHN, COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW, 1937, pp. 236 *ff.*

or the law of the flag prevailed. Thus, although it is desirable that the law of the flag should be applied, if it could be applied universally, it would seem that as long as no unification of this branch of the law is achieved, the solution at present adopted by the English courts is more realistic and more practical.

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