

IMMOVABLES IN THE CONFLICT OF LAWS *

§ 4. THE DOCTRINE OF THE RENVOI

At this point, before the discussion passes from the topic of succession on death to that of transfer *inter vivos*, it seems appropriate to mention the doctrine of the *renvoi*, which has been invoked most frequently, though not exclusively, in connection with succession. The problem arises from the fact that in a given situation connected with two or more countries, the laws of those countries may be different not only as regards their domestic rules, but also as regards their conflict rules.

If a court in X, in accordance with a conflict rule¹ of the forum, has selected the law of some other country, Y, as the proper law with regard to a particular juridical question arising from the factual situation, and arrives at the stage of applying the law of Y,² the court might do any one of three things. Firstly, it might reject or ignore the doctrine of the *renvoi* and apply simply the domestic rules³ of the law of Y, without regard to the conflict rules of that law, that is, without regard to any possible reference back (*renvoi*) from the law of Y to the law of X or forward to the law of a third country, Z. Secondly, it might adopt a theory of partial *renvoi*, that is, it might apply the conflict rules of the law of Y to the extent of accepting a reference back from the law of Y, and consequently apply the domestic rules of the law of X, without considering what, if any, theory of the *renvoi* prevails in the law of Y. Thirdly, it might adopt a theory of total *renvoi*, that is, it might apply the conflict rules of the law of Y, including whatever theory of the *renvoi* prevails in the law of Y, and therefore apply whatever domestic rules would be applied by a court of Y, as, for example, the domestic rules of X if the law of Y rejects the doctrine of the *renvoi*, and the domestic rules of Y, if the law of Y adopts a theory of partial *renvoi*.⁴ This theory of total *renvoi* has been in effect expounded in several decisions of single judges in England⁵ in variants which may be conveniently described as

* The first part of this article appeared in the January issue, *supra*, pp. 1-27.

¹ Various called a rule of conflict of laws or private international law, a choice of law rule or an indicative rule.

² As to the three stages of the characterization of the question, the selection of the proper law and the application of the proper law, see § 2, *supra*, p. 6.

³ Various called also local, internal, municipal, territorial or dispositive rules of law.

⁴ These three theories of the *renvoi* are discussed by me in *Renvoi and the Law of the Domicile* (1941), 19 Can. Bar Rev. 311.

⁵ The leading modern cases are *In re Annesley*, [1926] Ch. 692, *In re Ross*, [1930] 1 Ch. 377, and *In re Askew*, [1930] 2 Ch. 259, all relating to

the *ping-pong* or *lawn tennis* theory, the *foreign court* theory and the *acquired rights* theory.⁶ It does not appear that the judges have adequately considered the difficulties inherent in the doctrine of the *renvoi* or have even been fully aware of their existence. Various cross-currents of confusion have occurred both on the question whether the doctrine is applicable at all to a given kind of situation and, assuming that it is applicable, on questions arising in the course of its application.

In the course of applying the doctrine of the *renvoi*, the efforts of English judges to decide questions in accordance with the conflict rules of foreign countries have been frustrated, for example, by misunderstanding as to the meaning and effect of foreign conflict rules referring to the "national law" of a British subject domiciled abroad.⁷

As regards the applicability of the doctrine to various kinds of cases the judges have failed to distinguish between a question of formal validity of a will of movables and a question of intrinsic validity of a will or succession to movables on intestacy, and have transformed a formula which in its original application was merely a device for upholding a will of movables in point of formalities if it complies with either the domestic rules or the conflict rules of the law of the domicile⁸ into a general principle that the law of the domicile means whatever a court of the domicile has decided or would decide with regard to the intrinsic validity of a will of movables or succession to movables. Again, the judges have failed to observe that in the case of succession to movables the movables which have to be dis-

the application of the law of the domicile in matters of succession. The later case of *In re O'Keefe*, [1940] Ch. 124, is discussed in the article cited in the preceding note; cf. comment by J.H.C.M. (1940), 56 L.Q.R. 144. Mention should be made here of the recent decision of the Privy Council, on appeal from the Supreme Court of Palestine, in *Jaber Elias Kotia v. Katr Bint Jiryes Nahas* ((1941), 57 Times L.R. 619, 165 L.T. 401, [1941] 3 All E.R. 20. The case is a plain one because the Palestine Succession Ordinance explicitly directs a Palestine Court (and consequently the Privy Council on appeal from Palestine) to refer to the national law of the *de cuius* and to accept a reference back from that law to the law of Palestine. That is to say, there is in Palestine a statutory theory of partial *renvoi* (such as exists in German law: cf. *In re Askew*, *supra*). The decision is consequently inapplicable in any country in which there is no corresponding statute, and in that sense is not of general interest. The judgment of the Privy Council contains, however, some confusing *obiter dicta* as to what an English court would or should do. See fuller comment (1941), 19 Can. Bar Rev. 682; cf. Goadby (1941), 23 Jo. Comp. Leg. 189.

⁶ Cf. my *Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 369, at pp. 378 ff., where the practical and theoretical difficulties involved in each theory are discussed.

⁷ (1941), 19 Can. Bar Rev. 315-329.

⁸ *Collier v. Rivaz* (1841), 2 Curt. 855; cf. *In re Lacroix* (1877), 2 P.D. 94; *Ross v. Ross* (1894), 25 Can. S.C.R. 307; discussed (1941), 19 Can. Bar Rev. 329-332, with reference to earlier writings.

tributed in one country in accordance with its conflict rules are different movables from those which have to be distributed in a foreign country in accordance with its conflict rules, and that the situation is therefore not analogous to the recognition in one country of a title to a specific thing acquired in accordance with the conflict rules of the law of its foreign situs. It is submitted that there is no justification for the adoption of the doctrine of the *renvoi* as a general principle applicable indiscriminately to all kinds of cases.⁹

The strongest case for the recognition of a title acquired under a foreign *lex rei sitae* is the case of land situated abroad.¹⁰ On principle similar recognition should be accorded to the title to a tangible movable (chattel) acquired by transfer *inter vivos* under the law of its foreign situs, although the practical necessity which compels the recognition of the title to land acquired abroad in accordance with the *lex rei sitae* may, in the case of a movable, cease to exist because the situs may change, and of course the title acquired under the law of the foreign situs of a movable may be overridden as the result of a subsequent transaction under the law of its new situs.¹¹ By analogy,¹² there is much to be said in favour of the view that if a status (other than a status dependant merely upon the validity of a marriage) is acquired under its foreign proper law, including the conflict rules of that law, the existence of that status, as distinguished from the incidents or consequences of the status and from the capacity of the person whose status is in question, should be recognized elsewhere.¹³

It is generally agreed, as regards the title to land, that is, the property in an immovable thing, not only that the governing

⁹ In the present article, which relates to immovables in the conflict of laws, it is unnecessary to enter into a fuller discussion of the objections to the *renvoi* in some other fields of law, and for the sake of brevity I have confined the references to earlier articles of my own, in which will be found references to other writers. It would seem to be peculiarly unjustifiable to import the doctrine into the field of commercial contracts; see my comment on *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433, in *Bills of Lading: Proper Law and Renvoi* (1940), 18 Can. Bar Rev. 82-86; cf. (1941), 19 Can. Bar Rev. 334.

¹⁰ Cf. note 65 in § 3, *supra*, p. 16.

¹¹ Cf. (1937), 15 Can. Bar Rev. 237-238.

¹² The analogy between the acquisition of the title to a specific chattel under the law of its actual foreign situs and the acquisition of a specific status under its proper law, i.e., the law of its legal foreign situs (cf. *Salvesen or von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641, at pp. 655, 662) is at least plausible. On the other hand, if movables situated in one country are to be distributed on the owner's death in accordance with the law of a foreign domicile, there is no question of recognizing a title to those movables acquired under either the domestic rules or the conflict rules of the law of their foreign situs.

¹³ See § 7, *infra*.

law is the *lex rei sitae*,¹⁴ but also that the *lex rei sitae* means whatever law a court of the situs would apply, whether that be the domestic law of the situs or any other law selected in accordance with the conflict rules of the situs.¹⁵ The principle just stated applies by virtual necessity to matters of either formal or intrinsic validity of wills of immovables, succession to immovables on intestacy, and to transactions *inter vivos*. Even the American Law Institute Restatement of the Conflict of Laws, which in § 7 rejects the doctrine of the *renvoi* and states a theory of characterization in accordance with the *lex fori*,¹⁶ says in § 8(1) that all questions of title to land are decided in accordance with the law of the state where the land is, including the conflict of laws rules of that state.¹⁷ Owing to the fact that courts in one country are inclined to refuse to exercise jurisdiction with regard to the title to land situated in another country,¹⁸ it does not often happen that a court is concerned with the *renvoi* as regards the title to land,¹⁹ but, on the other hand, courts are perhaps too much inclined to exercise jurisdiction *in personam* on the ground of a contractual obligation binding the defendant, and relating to land situated abroad, and come perilously close to adjudicating on the title to the land inconsistently with the *lex rei sitae*.²⁰

It would seem that § 8(1) of the Conflict of Laws Restatement, quoted above, states a rule only for a court other than that of the situs of the land. For this purpose a reference by a conflict rule of the forum to the *lex rei sitae* indicates whatever domestic rules would be applied by a court of the situs by virtue of the conflict rules of the *lex rei sitae*. On the other hand, a court of the situs will of course apply the conflict rules of the *lex rei sitae*, and a reference by a conflict rule of the *lex rei sitae* to the *lex rei sitae* necessarily indicates the domestic rules of the *lex rei sitae*. Whether the case is one in which the relevant conflict rule of the *lex rei sitae* does or should refer to

¹⁴ Including the question whether the interest claimed is an interest in an immovable: see § 2, *supra*, p. 6.

¹⁵ Cf. (1937) 15 Can. Bar Rev. 234-235; (1939) 17 Can. Bar Rev. 392.

¹⁶ Inconsistently with the theory of acquired rights or jurisdiction to create rights stated in various sections of the RESTATEMENT: cf. (1939) 17 Can. Bar Rev. 387-388.

¹⁷ As to this provision of the RESTATEMENT, see further observations in the present § 4, *infra*.

¹⁸ See § 6, *infra*.

¹⁹ A rare example of a court directly adjudicating on the title to land situated abroad is the case of *In re Ross*, [1930] 1 Ch. 377, in which the *lex rei sitae* (Italy) is itself a rare example of a law containing a conflict rule referring not to the *lex rei sitae*, but to the *lex patriae*, even as regards succession to immovables.

²⁰ See § 8, *infra*.

the domestic *lex rei sitae* or to some other domestic law, is another question, and a court of the situs sometimes applies the domestic rules of the *lex rei sitae* without sufficient or any consideration of this question. The fact that it commonly happens that the domestic rules of the *lex rei sitae* are rightly applied should not be allowed to obscure the possibility that the case is one to which under the conflict rules of the *lex rei sitae* the domestic rules of some other law should be applied.²¹

§ 5. TITLE TO AND POSSESSION OF LAND

The general conflict rule that questions of the creation, acquisition, transfer and extinction of interests in land (immovable things) are governed by the *lex rei sitae*, that is, the law of the situs of the land, has been already discussed with particular reference to succession on death.²² The general rule applies also to transactions *inter vivos*, and it remains to discuss the scope of the rule dissociated from considerations peculiar to succession on death.

In the present § 5 it is assumed that the characterization or classification of interests in things is governed by the *lex rei sitae*, including the question whether an interest claimed is an interest in land,²³ and that it is only the distinction between movables and immovables that is material for the purpose of the selection of the proper law,²⁴ and that the distinction between personal property and real property is immaterial for the purpose of the selection of the proper law, but that when the proper law has been selected, and that law draws the distinction between personalty and realty, this distinction may be material in the application of that law.²⁵ It is also assumed in the present section that for a court of a country other than that of the situs the *lex rei sitae* means whatever law, whether conflict rules or domestic rules, has been or would be applied by a court of the situs.²⁶ A court of the situs would of course apply whatever law is applicable under the conflict rules of the forum.

²¹ Cf. Cook, 'Immovables' and the 'Law' of the 'Situs' (1939), 52 Harvard L.R. 1246, at pp. 1258 ff. See, further, the discussion of *Landreau v. Lachapelle*, [1937] O.R. 444, [1937] 2 D.L.R. 504, in § 7, *infra*.

²² See § 3 (2), *supra*, p. 16.

²³ See § 2, *supra*, p. 6.

²⁴ In the case of succession on death, see § 3 (2), *supra*, p. 21. In the case of transfer *inter vivos* even this distinction may be immaterial, because the *lex rei sitae* is the governing law both as to movables and immovables.

²⁵ It is less likely in the case of transfer *inter vivos* than in the case of succession (as to which see § 3 (2), *supra*, pp. 16, 21) that the distinction between personalty and realty will be material.

²⁶ See the concluding passages of § 4, *supra*.

A court in one country should not and usually will not entertain proceedings which purport directly to affect the title to (the property in or an interest in) land situated in another country, and cannot give an effective judgment with regard to the title to that land or the possession of it.²⁷ So far as the *forum rei sitae* is alone competent, it follows that the conflict rules of the *lex fori* (*lex rei sitae*) will be exclusively applied, and as a general rule those conflict rules will make applicable the domestic rules of the *lex rei sitae*. There may, however, be questions relating to land which are not characterized as questions of title (property, interest) and as regards which some law other than the *lex rei sitae* is or may be the proper law, and as regards which a court in a country other than that of the situs has or may assume jurisdiction. Questions of this kind will be discussed in subsequent sections,²⁸ and it remains to discuss the scope of the general rule stated at the beginning of the present § 5.

Dicey²⁹ says :

Rule 150.—All rights over, or in relation to, an immovable (land) are (subject to the exceptions herein mentioned) governed by the law of the country where the immovable is situate (*lex situs*).

Westlake, having pointed out that the principle of the *lex situs*, or of the real statute, was eagerly seized on in England in its application to land, and that the principle received there its utmost development,³⁰ states :

§ 156. All questions concerning the property in immovables, including the forms of conveying them, are decided by the *lex situs*.

As to the form of a conveyance of any interest in land, the rule is settled that the *lex rei sitae* must be complied with. The rule clearly applies to any case in which the priority or validity of the interest of a grantee or mortgagee depends on his having the legal estate, that is, the title to or property in the land, strictly speaking.³¹ Equally clearly, so far as priority or validity depends upon registration under any system of registration of instruments relating to land, the *lex rei sitae*

²⁷ See § 8, *infra*.

²⁸ See § § 6, 7 and 8, *infra*.

²⁹ CONFLICT OF LAWS. The exceptions to Dicey's rule, so far as they need be mentioned at all in the present article, relate to matters discussed in § 3 (2), *supra*, p. 16, and in § § 6, 7 and 8, *infra*.

³⁰ PRIVATE INTERNATIONAL LAW (7th ed. 1925) 216.

³¹ *Adams v. Clutterbuck* (1883), 10 Q.B.D. 403; *Re Mills* (1912), 3 O.W.N. 1036, 3 D.L.R. 614; *cf.* FOOTE, PRIVATE INTERNATIONAL LAW (5th ed. 1925) 250 ff.; DICEY, CONFLICT OF LAWS (5th ed. 1932) 586-587

must be complied with as regards formalities.³² A *fortiori*, in the case of land subject to a system of registration of titles, an instrument must in point of form comply with the *lex situs* of the land, because it must be in registrable form according to that law, and it must be registered, in order that it may be fully effective so as to pass an estate or interest in the land as against a transferee in good faith. It is true that unregistered or so-called equitable interests may be created, but persons claiming such interests must, in order to protect themselves, comply with the *lex situs* as to the registration of caveats, cautions, etc., and, generally speaking, the importance of unregistered instruments is, under the land titles system, reduced to a minimum.

Almost all the incidents which arise in connection with land are governed by the *lex rei sitae*. Thus, the liability for deterioration or waste, though it may by accident be enforceable in another country *in personam*, is to be decided and measured by the *lex rei sitae*.³³ Restraints imposed by the *lex rei sitae* on the transfer of land are binding elsewhere, and conversely restraints imposed by the law of one country on the transfer of land are not applicable to land in another country.³⁴

Westlake³⁵ also states :

§ 157. Interests in land which are limited in duration, whether for terms of years, for life, or otherwise; interests in land which are limited in their nature, as legal (*ex jure Quiritium*—Gaius) or beneficial (*in bonis*—Gaius); servitudes, charges, liens, and all other dismemberments of the property in land; are immovables as well as the land itself.

If, instead of the concluding words "are immovables as well as the land itself," we read "are property in immovables within the meaning of § 156,"³⁶ confusion between the land and the property in land will be avoided, and Westlake's meaning will be made clearer because the concluding words of § 157 will be brought into accord with their immediate context ("dismember-

³² Cf. *Hicks v. Powell* (1869), L.R. 4 Ch. 741; *Norton v. Florence Land and Public Works Co.* (1877), 7 Ch. D. 332. See also *Bank of Africa v. Cohen*, [1909] 2 Ch. 129, in § 7, *infra*.

³³ Cf. FOOTE, *PRIVATE INTERNATIONAL LAW* (5th ed. 1925) 243, citing *Batthyany v. Walford* (1886), 36 Ch. D. 269.

³⁴ Cf. FOOTE, *op. cit.*, p. 252. See also *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461 (trust for accumulation contrary to the Thellusson Act); *In re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179, (gift of mortgage to a charitable use), cited in § 3 (2), *supra*, p. 17.

³⁵ *PRIVATE INTERNATIONAL LAW*.

³⁶ § 156: "All questions concerning the property in immovables . . . are decided by the *lex situs*."

ments of the property in land") and with § 156—the intention of the author obviously being to define in § 157 what is included in "property in immovables" in § 156.

It thus appears that the concept of property in land or an interest in land within the meaning of the general conflict rule stated at the beginning of the present § 5 is a wide one, including equitable interests or other interests which are not exactly equivalent to the property in land in the strictly legal sense.

Similarly, in connection with the same general conflict rule stated in a series of rules in the Conflict of Laws Restatement of the American Law Institute, the concept of interest is a wide one, as explained in the following passages.³⁷

The word "interest" is used in the Restatement of this subject both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them (comment b on § 42).

The word "interest" is used throughout the Restatement of this subject as indicating the normally beneficial side of a legal relation as a right, power, privilege or immunity. The word "property" is used throughout the Restatement as a synonym for interest as thus explained. It may, therefore, be used to denote a single interest as the right under a contract for the payment of money. Normally, however, throughout the Restatement, it is used to designate a group of two or more interests with regard to a particular thing, as a piece of land, a chattel, a chose in action. The word "property" is never used to indicate a thing in regard to which the interest exists; that is, it is never used as a synonym for land or chattels. The word "thing" is used with broadest connotation, to include not only tangible but intangible things. An intangible thing may exist independently of law as, for example, the good will of a business, a literary idea or a trade secret. On the other hand, certain other intangible things are created by the law as, for example, a contract or other legal obligation. (Introductory note to chapter 7, Property).

With particular reference to equitable interests, the Conflict of Laws Restatement, consistently with the general rule now under discussion, contains the following sections :

§ 239. Whether a person has an equitable interest in land is determined by the law of the state where the land is.

§ 240. A court of one state cannot by its decree create an equitable interest in land in another state.

§ 241. The validity of a trust of an interest in land is determined by the law of the state where the land is.

³⁷ The PROPERTY RESTATEMENT, promulgated by the American Law Institute in 1936, two years after the promulgation of the CONFLICT OF LAWS RESTATEMENT, contains an orderly and detailed analysis of the concepts of property and interests, and definitions of right, power, privilege and immunity.

The comments appended to § 239 include the following :

An equitable interest in land is to be distinguished from a right against the owner for a conveyance of the land by him, which may be enforced by a court of any state by ordering the owner to convey the land; but this order will have no effect upon any interest in the land if made by a court outside the state where the land is. The interests will be affected only if the owner transfers them in pursuance of the order.

Whether the beneficiary of a trust of land has an equitable interest in the land as contrasted with a merely personal claim against the trustee is determined by the law of the state where the land is.

At this point we are on the verge of problems for which it is difficult to find entirely satisfactory solutions. In particular, it is difficult to reconcile the general rule which has been the subject of the proceeding discussion with what the courts have frequently done when they have entertained claims, alleged to be personal in character, relating to land situated abroad. Some of the points of difficulty will appear in the following discussion.³⁸

§ 6. CONTRACT OR EQUITY RELATING TO LAND

Although it is almost universally stated that questions of the creation, acquisition, transfer and extinction of interests in land (immovable things) are governed as a general rule by the *lex rei sitae*, that is, the law of the situs of the land,³⁹ it has sometimes been held and more frequently assumed that questions arising from contracts relating to land or questions of equities relating to land may be governed by some other law, without sufficient or indeed much consideration of the difficulties inherent in the alleged distinction between interests in land and contractual or personal rights relating to land, or without much or sufficient consideration of the possible conflicts between the rights of the parties existing under the *lex rei sitae* and the rights of the parties as declared by a court in an action in a country other than that of the situs of the land.⁴⁰

³⁸ See especially §§ 6 and 8, *infra*.

³⁹ See § 3 (2) and 5, *supra*.

⁴⁰ As to the "possibilities of confusion" arising from the difficulty of distinguishing between matters of contract and matters of title or interest, see e.g., STUMBERG, CONFLICT OF LAWS (1937) 345 ff. The validity of the distinction is doubtful; cf. Corry (1933), 11 Can. Bar Rev. 211, at p. 213. The doubt as to the validity of the distinction, and the difficulty inherent in its application, seem to support the view stated at the conclusion of the present § 6.

As distinguished from a conveyance of land or a legal mortgage of land or other dealing which directly affects the title to land, the transaction in question may be a contract relating to land or a transaction which gives rise to an equity relating to land, and it has been held that the contract may be governed by its own proper law distinct from the *lex rei sitae*, or the equity may owe its existence to, and be governed by, some law other than the *lex rei sitae*. In any event, however, it would appear that the contract or equity must in its performance or enforcement comply with the *lex rei sitae* or at least not be repugnant to the *lex rei sitae*. Examples of transactions relating to land which may be governed by some law other than the *lex rei sitae* are a contract for the sale of land, a contract to make a mortgage, or any other form of equitable mortgage operating, by way of contract or executory assurance or otherwise, as an equitable charge on land.

In *Polson v. Stewart*⁴¹ Holmes J. said: "It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the *res* . . . But the same reason inverted establishes that the *lex rei sitae* cannot control personal covenants not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it."

In the Conflict of Laws Restatement it is said, in a comment on § 340 :

There is a distinction between a contract to transfer an interest in land and the transference of the interest. The latter is governed by the law of the state where the land is. A contract to transfer land may, it is true, operate as a transfer of an equitable interest. Whether it so operates depends upon the law of the state where the land is.⁴² Thus, a contract to transfer an interest in land may be valid as a contract but inoperative as an actual transfer; and the fact that it is so inoperative does not affect its validity as a contract.

In *Ex parte Pollard, In re Courtney*⁴³ the title to certain land in Scotland was vested in one George Courtney, but the land was held by him as partnership property on behalf of a firm of which he was a partner. The firm, being indebted to one George Pollard, and in consideration of further credit to be given by him, deposited with him the title deeds and signed

⁴¹ (1897), 167 Mass. 211; LORENZEN, CASES ON THE CONFLICT OF LAWS (4th ed. 1937) 593.

⁴² See § 239, quoted in § 5, *supra*.

⁴³ (1840), Mont. & Ch. 239. See also *Ex parte Holthausen, In re Scheibler* (1874), L.R. 9 Ch. 722.

and delivered to him a memorandum declaring that they gave him a lien upon the land, agreeing that he should stand as an equitable mortgagee of the land, and undertaking on demand to do all such acts as should better secure the money advanced. There was a finding, stated in a special case, that by the law of Scotland the deposit and memorandum did not create any lien or equitable mortgage upon the land. The firm having become bankrupt, and there being a contest between Pollard and the assignees in bankruptcy on behalf of the unsecured creditors, it was held by Lord Cottenham L.C., reversing the Court of Review, that effect should be given to the equitable mortgage, there being no competitors claiming a title to the land by the law of Scotland, and the only parties resisting the claim being the assignees, who were bound by all the equities which affected the bankrupts. The transaction was, it was held, one of which the court might have decreed specific performance and completion in accordance with the forms of the law of Scotland, without violating any rule of that law.

In the case just mentioned Lord Cottenham said that according to the finding as to the law of Scotland it must be understood merely that the law of Scotland did not permit the deposit and agreement to operate *in rem*, and not that they might not give a right to relief *in personam*; and he added:⁴⁴

If indeed the law of the country where the land is situate should not permit, or not enable, the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

It follows that if the *lex rei sitae* positively excludes the operation of the equitable doctrine on which the court is asked to act *in personam*, the court will decline to interfere;⁴⁵ in other words, a court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign court, and which in the country in

⁴⁴ *Ex Parte Pollard, In re Courtney* (1840), Mont. & Ch. 239, at p. 250; cf. WESTLAKE, PRIVATE INTERNATIONAL LAW, § 172; DICEY, CONFLICT OF LAWS, notes to rule 150.

⁴⁵ Cf. FOOTER, PRIVATE INTERNATIONAL LAW (5th ed. 1925) 230.

which the land is situated would probably be treated as a *brutum fulmen*.⁴⁶

The decision in *Ex parte Pollard* appears nevertheless to be open to criticism, at least from the point of view of modern English and Canadian bankruptcy law. That law distinguishes between secured creditors and unsecured creditors and crystallizes their respective rights at the time when the declaration of bankruptcy, or, alternatively, in Canada, when the authorized assignment, becomes effective. At that time the creditor had no interest in the land by the *lex rei sitae*, although he had the right by the law of England and by the law of Scotland to relief *in personam*, and by the law of England had a present equitable mortgage. It would seem that he ought not to have been allowed to rank as a secured creditor because at the material time he was not such by the *lex rei sitae*. It is true that there was no competing creditor claiming a charge on the same land, but there were presumably other unsecured creditors who were prejudiced by the allowance of the claim. If the debtor had not been declared a bankrupt, the decision would be unobjectionable.

In *British South Africa Co. v. DeBeers Consolidated Mines*⁴⁷ Cozens-Hardy M.R. said :⁴⁸

In my opinion an English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the *lex situs*, is a contract to give a mortgage which—*inter partes*—to is be treated as an English mortgage and subject to such rights of redemption and such equities as the law of England regards as necessarily incident to a mortgage.

The contract in question provided for loans to be made by the defendant to the plaintiff, on the security of a floating charge contained in debentures to be issued by the plaintiff. The loans having been advanced and having subsequently been repaid, the plaintiff sued for a declaration that a certain clause (by which the plaintiff undertook to grant to the defendant an exclusive license to work all diamondiferous ground to which the plaintiff was or might be entitled in certain territory) was not binding on the plaintiff on the ground that it was a clog on the equity of redemption. It was held by the Court of Appeal that the proper law of the contract was English, it hav-

⁴⁶ *Norris v. Chambres* (1860), 3 DeG. F. & J. 584, at p. 585, Lord Campbell.

⁴⁷ [1910] 2 Ch. 502.

⁴⁸ [1910] 2 Ch. 502, at p. 515; cf. Kennedy L.J. at p. 524. Both passages were cited with approval by Eve J. in *In re Smith, Lawrence v. Kitson*, [1916] 2 Ch. 206, at p. 209. See also *In re The Anchor Line*, [1937] Ch. 483.

ing been made in England in English form, relating to land in England as well as land in South Africa, notwithstanding that the clause in question was invalid by English law⁴⁹ and perhaps valid by South African law. Even as to the land in South Africa it was held that the contract was governed by English law because it did not create a real right, but merely a personal right which an English court might enforce *in personam*.

Westlake⁵⁰ states that "contracts relating to immovables are governed by their proper law as contracts, so far as the *lex situs* of the immovables does not prevent their being carried into execution." This doctrine, including its saving clause, is supported by the cases already mentioned, which presuppose that the law governing a contract relating to land may be different from the *lex rei sitae*. Conveyances of land are of course outside the scope of Westlake's rule, as he makes clear in another rule.⁵¹ Furthermore, the proper law of a contract relating to land is generally the same as the *lex rei sitae*, either because the parties generally intend the contract to be governed by the *lex rei sitae*,⁵² or, better, because the country of the situs is generally the country with which the transaction has the most real connection.⁵³

In *Bradburn v. Edinburgh Assurance Co.*⁵⁴ an application for a loan was made in Ontario to the local solicitors of a company having its head office in Scotland, and the loan was approved by an advisory committee in Ontario, and the application was then forwarded to and accepted by the directors in Scotland, the applicant being notified of the acceptance by cablegram. The money was then advanced in Ontario upon the security of a mortgage of land situated in Ontario, the mortgage containing a proviso for defeasance on payment of the principal and interest at a specified bank in England, and a provision

⁴⁹ The judgment was reversed by the House of Lords on the ground that the stipulation for a license was severable from the mortgage transaction and therefore was not a clog on the equity of redemption: *De Beers Consolidated Mines v. British South Africa Co.*, [1912] A.C. 52.

⁵⁰ PRIVATE INTERNATIONAL LAW, § 216. See DICEY, CONFLICT OF LAWS, appendix, note 20, for a discussion of Westlake's proposition, and the alternative doctrine that the *lex rei sitae* is the governing law.

⁵¹ See § 5, *supra*, and Westlake's § 156 there quoted.

⁵² Dicey's rule 163, stating that the proper law is generally, though not necessarily, the *lex rei sitae*, must be read along with his rule 155, defining the proper law as the law by which the parties intended, or may fairly be presumed to have intended, the contract to be governed. This "intention doctrine" is stated in an extreme form by Lord Wright in *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433; cf. my comment, with references to the views of various writers, in *Bills of Lading: Proper Law and Renvoi* (1940), 18 Can. Bar Rev. 86-96.

⁵³ WESTLAKE, *op. cit.*, § 212.

⁵⁴ (1903), 5 O.L.R. 657.

that payment might be made by bank draft on London, England, payable to the mortgagee, and either delivered to the Ontario agent of the mortgagee or posted in Ontario addressed to the specified bank and duly registered. It was held that the law of Canada governed the contract and its incidents. The question being whether the Dominion Interest Act applied, it was not necessary in the circumstances to distinguish between the law of Ontario and that of any other province.

As regards the formal validity of a contract relating to land, the governing law is the *lex rei sitae*, if the contract includes, or forms part of, an instrument intended to convey an interest in land.⁵⁵ If, however, no conveyance is in question, some law other than the *lex rei sitae* may apply, and this must inevitably be the case as to a contract which creates an equitable mortgage of foreign land where this kind of mortgage is not recognized by the *lex rei sitae*.⁵⁶ The general rule being that the formalities of a contract are governed by the *lex loci celebrationis*, it would seem that this is the law which should govern the formal validity of a contract relating to land if the *lex rei sitae* is inapplicable, but there is some support⁵⁷ for the view that the governing law should be the proper law of the contract. In any event it must rarely happen that the proper law of a contract relating to land is neither the *lex rei sitae* nor the *lex loci celebrationis*.

From a practical, if not theoretical, point of view, it would appear to be desirable that, apart from questions of procedure, a court, if it does not decline jurisdiction altogether,⁵⁸ ought to apply the *lex rei sitae*, so far as the circumstances permit, to the enforcement of any contract relating to land. It is of course impossible for a court in one country to give a judgment which will be effective *in rem* as regards a thing situated in another country, and when a court grants relief *in personam* in accordance with some law other than the *lex rei sitae*, there is always the danger that the court may create rights and liabilities inconsistent with the real relation of the parties *inter se* as regards the land, and perhaps inconsistent with the rights and liabilities of the parties as they may be subsequently declared by a court of the situs.

⁵⁵ As to the formal validity of a conveyance of an interest in land, see § 5, *supra*.

⁵⁶ DICEY, *CONFLICT OF LAWS* (5th ed. 1932) 586-588; cf. the cases already cited in the present § 6.

⁵⁷ Cf. DICEY, *op. cit.*, rule 163.

⁵⁸ As to jurisdiction, see § 8, *infra*, where it is suggested that courts should be cautious with regard to adjudicating on claims relating to foreign land.

§ 7. CAPACITY, AUTHORITY AND POWER.

As regards a contract made or other act done by an agent (A) on behalf of a principal (P) the distinction between A's authority (which is coextensive with the assent of P to A's acting for him), and A's power to bind P or change the legal relations between P and a third party (TP) (a power which may be and frequently is wider than A's authority or even than his apparent authority), is fundamental in the domestic law of agency.⁵⁹ It is submitted that this distinction between authority and power also deserves more attention than it has hitherto received in agency problems in the conflict of laws. Broadly speaking, the construction and scope of the authority given by P to A would seem to be a matter which is primarily governed by the proper law of the contract or other transaction between P and A, this proper law being the law of the country with which the transaction is most closely connected, due consideration being given to the place in which the transaction between P and A is entered into, the place or places in which P and A reside or carry on business, the place or places in which it is intended that the authority shall be exercised, etc. On the other hand the power of A to bind P or to change the legal relations of P and TP would appear to be a matter which is governed primarily by the law of the country in which the transaction between A and TP takes place, clearly if P has assented to the authority being exercised there, and perhaps also if he has merely failed to limit the exercise of the authority so as to exclude the country in which A acts. On this principle, P should be bound by A's acts if the law of that country confers on A in the particular circumstances the power to bind P, whether that power is based on authority or apparent authority or is a power wider than either authority or apparent authority.⁶⁰

If A purports to transfer or otherwise affect P's interest in land, it is clear that A's power to bind P must be governed by the *lex rei sitae*, whereas A's power to impose a personal duty on P may be governed by some other law.⁶¹

⁵⁹ See, e.g., *Law of Agency* (1939), 17 Can. Bar Rev. 248, with regard to the distinction between authority and power, with references to cases, important extra-judicial discussion by Seavey and C. A. Wright, and the AGENCY RESTATEMENT of the American Law Institute.

⁶⁰ Cf. my comment (1939), 17 Can. Bar Rev. 672, on *Sinfra Aktiengesellschaft v. Sinfra*, [1939] 2 All E.R. 675, with some discussion of *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, and *Ruby Steamship Corporation v. Commercial Union Assurance Co.* (1933), 150 L.T. 38, 39 Com. Cas. 48, 46 Ll. L. Rep. 265.

⁶¹ This may involve the difficult distinction discussed in § 6, *supra*.

If a mortgagee of land situated in Ontario dies, it would appear that his personal representative must obtain a grant of probate or letters of administration from an Ontario court in order to enable him to give a valid release or discharge of the mortgage. It is clear that a foreign administrator cannot validly discharge a mortgage without a local grant of administration,⁶² but in the case of an executor who proved the will in another country, and registered the will and the foreign probate in the registry office in Ontario in which the mortgage was registered, it was held that he could give a valid discharge of the mortgage without proving the will in Ontario or having the probate resealed in Ontario.⁶³ The decision with regard to the foreign executor appears, however, to be of doubtful authority⁶⁴ and would seem to be wrong on principle. A certificate of discharge of mortgage which on registration will operate as a discharge of the mortgage and as a conveyance of the land must be given by the mortgagee, by his executors, administrators or assigns, or by such other person as may be entitled to receive the mortgage money and to discharge the mortgage. It is submitted that in the case of the mortgagee's death the personal representative who can give a valid discharge must be one duly appointed according to the *lex situs* of the land (there being no difference in this respect between an executor and an administrator), and that a conveyance by the personal representative is governed by the same principle.^{64A}

In *Re Landry and Steinhoff*⁶⁵ a woman domiciled in Louisiana, holding a mortgage of land situated in Ontario, but not owning any other property there, made a holograph will, valid in Louisiana, giving her whole estate to her sister and appointing her executrix. The will was admitted to probate in Louisiana and ancillary probate, limited to personal property, was granted to the executrix in Ontario. The executrix subsequently brought an action in Ontario and obtained a final order of foreclosure. It was held that she could not convey a good title to the land to a purchaser. The will was inoperative by the

⁶² *In re Thorpe* (1868), 15 Gr. 76.

⁶³ *Re Green and Flatt* (1913), 29 O.L.R. 103, 13 D.L.R. 547.

⁶⁴ *Re McKay* (1920), 18 O.W.N. 101.

^{64A} *Re Green and Flatt* was followed in *Re National Trust Co. and Mendelson*, [1941] O.W.N. 435, [1941] 1 D.L.R. 438, and, without any reference to the Devolution of Estates Act, R.S.O. 1937, c. 163, s. 20, sub-s. 7, was applied to a conveyance of real property by an executor without local grant of probate. A comment on the latter case will appear in the next issue of the REVIEW.

⁶⁵ [1941] O.R. 67, [1941] 1 D.L.R. 699 (with my annotation at pp. 703-707).

lex rei sitae as regards any interest in land in Ontario, and therefore the executrix could not rely on the provision of the Ontario Devolution of Estates Act that "where an estate or interest in real property is vested . . . by way of mortgage in any person solely the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his executor or administrator in like manner as if the same were personal estate vesting in him."⁶⁶ The result is relatively clear when it is borne in mind that succession to any interest in immovables is governed by the *lex rei sitae* even though that interest is classified as personal property, but in the reasons for judgment the result is obscured by the fact that it is stated that succession to personal property is governed by the *lex domicilii*, but that by way of exception this rule does not apply to a chattel interest in land or to the interest of a mortgagee of land. The testatrix was not a British subject, and therefore the executrix could not rely on Lord Kingsdown's Act, which if the testatrix had been a British subject would have rendered the will formally valid as regards personalty, including the interest of a mortgagee of land.⁶⁷

A further question is whether a foreign personal representative may in any circumstances be entitled to enforce or to receive payment of the mortgage debt so as to be able to give a valid receipt to the mortgagor and consequently be able to execute a valid discharge of the mortgage.⁶⁸ At least in the case of a registered mortgage executed under seal, the situs of the debt would be the same as the situs of the land,⁶⁹ and therefore the mortgage debt would be part of the assets to be administered by the personal representative appointed in the country in which the land is situated, and would be outside the scope of the grant of probate or administration made by the court of any other country. It would seem clear in such a case that a payment made to a foreign personal representative would not afford any defence to the person paying as against a personal representative appointed in the country of the situs.⁷⁰

⁶⁶ R.S.O. 1937, c. 163, s. 7.

⁶⁷ As to Lord Kingsdown's Act, see § 3 (2), *supra*, pp. 19, 20.

⁶⁸ Cf. *Whyte v. Rose* (1842), 3 Q.B. 493, at p. 509; *White v. Hunter* (1841), 1 U.C.R. 452; *Fidelity Trust Co. v. Fenwick* (1921), 51 O.L.R. 23, 64 D.L.R. 647; *Crosby v. Prescott*, [1923] S.C.R. 446, [1923] 2 D.L.R. 937, [1923] 2 W.W.R. 569.

⁶⁹ *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, 46 D.L.R. 318, [1919] 2 W.W.R. 354.

⁷⁰ See DICEY, *CONFLICT OF LAWS* (5th ed. 1932) 519-520; FOOTE, *PRIVATE INTERNATIONAL LAW* (5th ed. 1925) 324-326; cf. WESTLAKE, *PRIVATE INTERNATIONAL LAW*, § 98.

As regards a person's capacity to bind himself by contract or otherwise or to effect a change in his status or in his legal relations with other persons or to transfer or affect an interest in land or in movable things, confusion is likely to result in the conflict of laws from the failure to characterize exactly the question arising for adjudication. A question of status must be distinguished from a question of the incidents or consequences of status and from a question of capacity.⁷¹ Again, a question of capacity cannot be characterized in the abstract as a single question governed by the law which governs a person's status or any single law. Capacity is not an independent concept which can be divorced from the particular kind of transaction in which the question of a person's capacity may arise. We must distinguish between and treat as different questions capacity to marry (characterized as a matter of intrinsic validity of marriage), capacity to succeed to immovables or movables on the owner's death (characterized as a matter of succession), capacity to make a marriage contract or settlement (characterized as a matter of intrinsic validity of either contract or conveyance), capacity to make a commercial contract (characterized as a matter of intrinsic validity of contract), and so on.⁷²

The capacity of a beneficiary to give a valid receipt for his share of the estate of a deceased person may be governed by the law of his domicile or, if the matter is regarded as one of succession, by the law which governs the distribution of the beneficial interest on succession, that is, in the case of movables, the *lex domicilii* of the deceased person,⁷³ or, in the case of immovables, by the *lex rei sitae*. A person who is capable of taking and holding land by his personal law may nevertheless in a country in which he is an alien be incapable of doing so by the *lex rei sitae*.⁷⁴

As a general rule capacity to marry is governed by the domiciliary law of the parties. This rule applies at least to bilateral incapacity, as, for example, if both parties are within

⁷¹ See Allen, *Status and Capacity* (1930), 46 L.Q.R. 277, at pp. 293 ff.; Falconbridge, *Characterization in the Conflict of Laws* (1937), 15 Can. Bar Rev. 240 ff., 53 L.Q.R. 544 ff.; ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940) 145; Taintor, *Legitimation, Legitimacy and Recognition in the Conflict of Laws* (1940), 18 Can. Bar Rev. 589, at pp. 591-592, 691-694; Falconbridge (1941), 19 Can. Bar Rev. 42-43.

⁷² Cf. (1937), 53 L.Q.R. 544-545; (1937), 15 Can. Bar Rev. 243.

⁷³ *In re Hellmann's Will* (1886), L.R. 2 Eq. 363; *In re Schnapper*, [1928] Ch. 420. BRESLAUER, *PRIVATE INTERNATIONAL LAW OF SUCCESSION* (1937) 103-104, submits that it was not the capacity of a minor as legatee that was important in each of these cases, but that the question was one of administration in England as regards a minor who was capable by the law of his domicile.

⁷⁴ Cf. CHESHIRE, *PRIVATE INTERNATIONAL LAW* (2nd ed. 1938) 540, citing STORY, *CONFLICT OF LAWS*, § 431.

the prohibited degrees of consanguinity or affinity by the law of their domicile or the laws of their respective domiciles.⁷⁵ The case of unilateral incapacity, as, for example, if only one of the parties is within the prohibited degrees by the law of his or her domicile, gives rise to difficulties which have not been adequately considered by English courts.⁷⁶ In the case of a requirement as to parental consent to the marriage of minors there arises the difficult question whether the requirements should be characterized as a matter of capacity to marry or as a matter of formalities of celebration.⁷⁷

It would appear that capacity to make a marriage contract or settlement is governed, as a general rule, by the law of the domicile of each party,⁷⁸ but it has been suggested that the governing law should be the proper law of the contract, which would usually be the law of the matrimonial domicile,⁷⁹ and, subject to some observations to be made later, it would seem to be clear that to the extent that the transaction involves the conveyance of an interest in immovables or movables, the governing law is the *lex rei sitae*.⁸⁰

It is fairly clear that the law governing capacity to make an ordinary commercial contract is not the law of the domicile, and a preference has been expressed in favour of the law of the place of contracting.⁸¹ It would seem, however, that capacity to contract is a phase of the intrinsic validity of a contract, and should therefore be governed by the proper law of the contract⁸² in the sense of the law of the country with which the contract is most closely connected.⁸³

⁷⁵ *Brook v. Brook* (1861), 9 H.L.C. 193; *Sottomayor v. DeBarros* (No. 1) (1877), 3 P.D. 1; *In re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481; *In re Bozzelli's Settlement, Husey-Hunt v. Bozzelli*, [1902] 1 Ch. 751.

⁷⁶ *Mette v. Mette* (1859), 1 Sw. & Tr. 416; *Sottomayor v. Debarros* (No. 2) (1879), 5 P.D. 94; cf. my article *Conflict of Laws as to Nullity and Divorce*, [1932] 4 D.L.R. 12-16; *In re Paine*, [1940] Ch. 46, and comments (1940), 56 L.Q.R. 22, 18 Can. Bar Rev. 220.

⁷⁷ I have discussed this matter in *Characterization in the Conflict of Laws* (1937), 53 L.Q.R. 247 ff., with particular reference to *Ogden v. Ogden*, [1908] P. 46; cf. *Chetti v. Chetti*, [1908] P. 67.

⁷⁸ Cf. *Cooper v. Cooper* (1888), 13 App. Cas. 88.

⁷⁹ *Morris, Capacity to Make a Marriage Settlement in English Private International Law* (1938), 54 L.Q.R. 78; cf. CHESHIRE, *PRIVATE INTERNATIONAL LAW* (2nd ed. 1938) 233 ff.

⁸⁰ As to the conveyance of an interest in land, see § 5, *supra*, and the later discussion in the present § 7, as to the distinction between contract and conveyance, see § 6, *supra*.

⁸¹ *Male v. Roberts* (1800), 3 Esp. 163, 170 E.R. 574, 6 R.R. 822, approved by DICEY, *CONFLICT OF LAWS* (exception 1 to rule 158), followed in *Bondholders Securities Corporation v. Manville*, [1933] 4 D.L.R. 699, [1933] 3 W.W.R. 1 (C.A. Sask.).

⁸² Cf. CHESHIRE, *PRIVATE INTERNATIONAL LAW* (2nd ed. 1938) 217, pointing out that in most cases the proper law would be the law of the place of contracting.

⁸³ At least as regards capacity to contract, it would seem to be clear

Great difference of opinion exists with regard to the intrinsic validity of, including the capacity to make, an assignment of a non-negotiable chose in action.⁸⁴ The least defensible view is that the assignment is governed by its own proper law; a better view is that the proper law of the assignment is the same as the proper law of the assigned chose in action;⁸⁵ and perhaps the best view is that the assignment should be governed by the law of the situs of the chose in action so far as a situs can be attributed to a chose in action.⁸⁶ The chose in action being a thing in which a person may have an interest, the transfer of that interest should, in accordance with the general rule, be governed by the *lex rei sitae*.⁸⁷

As regards the transfer *inter vivos* of an interest in land, and as regards a will of an interest in land, it would seem to be clear that the capacity of the transferor or testator is, generally speaking, merely a phase of the intrinsic validity of the transfer or will, and is therefore governed by the law of the situs of the land.⁸⁸ With special reference to transactions *inter vivos*, it may, however, be doubtful in a particular case whether the question requiring adjudication should be characterized as one of capacity to convey land so as to fall within the scope of the rule that the *lex rei sitae* applies or should be characterized in some other way so as to make applicable some other law, notwithstanding that the question is one relating to land.

One matter for discussion is whether capacity to make a contract relating to land may be governed by the proper law of the contract as distinguished from the *lex rei sitae*. Westlake⁸⁹ states the rule that "the capacity of a person to contract with regard to immovables is governed by the *lex situs*," and in the only case cited by him in support of the rule, namely,

that a party to a contract cannot confer capacity on himself by an arbitrary selection of the law of a country with which the contract has no substantial connection. On the general question of the alleged right of parties to select the proper law of a contract, see my *Bills of Lading: Proper Law and Renvoi* (1940), 18 Can. Bar Rev. 77, commenting on *Vila Food Products v. Unus Shipping Co.*, [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433.

⁸⁴ See, e.g., *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669, C.A. affirming (1926), 95 L.J.K.B. 955, 42 Times L.R. 625.

⁸⁵ CHESHIRE, *PRIVATE INTERNATIONAL LAW* (2nd ed. 1938) 449.

⁸⁶ DICEY, *CONFLICT OF LAWS*, rule 153. See my discussion of all three views in *Situs and Transfer of Intangibles in the Conflict of Laws* (1935), 13 Can. Bar Rev. 265, at pp. 270 ff., and *BANKING AND BILLS OF EXCHANGE* (5th ed. 1935) 46-52.

⁸⁷ As to the general rule with regard to the transfer of interests in things, see § 5, *supra*.

⁸⁸ As to the intrinsic validity of a will, see § 3 (2), *supra*, p. 17, and as to a transfer *inter vivos*, see § 5, *supra*.

⁸⁹ *PRIVATE INTERNATIONAL LAW*, § 165a.

Bank of Africa v. Cohen,⁹⁰ the language of some of the judgments is clear in the same sense. The contract in question was, however, one by which a married woman, domiciled in England, by a deed executed in England, undertook to mortgage to a bank certain land in the Transvaal, the title deeds of which were already in the bank's possession for safe custody, as security for past and future advances to her husband, but without incurring personal liability, and, further, appointed the bank manager at Johannesburg her attorney to mortgage and transfer the land and to execute all necessary instruments for that purpose and to appear before the registrar of deeds at Johannesburg and take all necessary steps for registering the same, and authorized her attorney to declare in her name that she renounced in favour of the bank the benefit of all rights which the law of the Transvaal granted her in relation to the land in question. By virtue of two provisions of the Roman-Dutch law prevailing in the Transvaal a married woman (subject to certain immaterial exceptions) was incapable of becoming surety for her husband unless she expressly renounced the benefit of each of these provisions after having been informed of her rights thereunder, and the general renunciation contained in the power of attorney was insufficient for this purpose. The bank was therefore unable to secure registration of the documents evidencing its security upon the land, and subsequently the married woman refused to renounce the benefit of the two provisions in question, as she was entitled to do under the law of the Transvaal. It was held that the contract to give the mortgage was not valid and that the married woman was entitled to the return of the deeds.

The decision in *Bank of Africa v. Cohen* was based expressly upon the ground of incapacity to contract.⁹¹ It might perhaps have been based also on the ground or is perhaps an illustration of the rule, already mentioned,⁹² that in order to be valid or to secure priority under a system of registration of deeds or registration of titles an instrument must be in conformity with the *lex rei sitae*. The plaintiff in fact claimed specific performance of the agreement and an injunction restraining the married woman from charging or disposing of the land otherwise than to the bank. Either remedy was a remedy *in personam* and therefore one which an English court might

⁹⁰ [1909] 2 Ch. 129, Eve J. and C.A.

⁹¹ And the case was distinguished on this ground from *Ex parte Pollard, In re Courtney* (1840), Mont. & Ch. 239, discussed in § 6, *supra*.

⁹² See § 5, *supra*.

have jurisdiction to grant with regard to foreign land,⁹³ but the contract was one which was intended to have direct operation on the land in question, and in that case even Dicey would say that the parties to it must have capacity under the *lex rei sitae*, although in the case of a contract intended to operate as an equitable mortgage of foreign land⁹⁴ he says that capacity is governed by the proper law of the contract.⁹⁵

The case of *Landreau v. Lachapelle*⁹⁶ involves interesting questions of capacity in transactions relating to land. Georgiana Archambault and Cyrille Lachapelle, both domiciled at all times in the province of Quebec, were married in that province, having made an ante-nuptial contract negating community of property between them, and providing that they should be separate as to property, present or future. After the marriage the wife purchased land in Ontario, and was duly registered as owner under the Land Titles Act, her husband taking from her a charge on the land to secure repayment of money advanced by him in connection with the purchase. Subsequently he released the charge and she transferred the land to herself and him as joint tenants, and they were registered accordingly in the land titles office. The husband and wife having entered into a contract for the sale of the land, and the wife having died before the contract was completely performed, the husband was registered as sole owner, by virtue of his right as surviving joint tenant according to Ontario law, a right unknown to Quebec law. The executor of the wife then brought an action in Ontario against the husband, attacking the defendant's title. The Court of Appeal affirmed the judgment of the trial judge, dismissing the action.

The chief ground of attack on the defendant's title was that by Quebec law the provisions of a marriage contract cannot be altered after the marriage, and that neither consort can confer benefits *inter vivos* upon the other (article 1265 of the Civil Code of Lower Canada), and that husband and wife cannot enter into a contract of sale with each other (article 1483, *ibid.*). On the other hand, it is provided in Ontario, by the Land Titles Act (now R.S.O. 1937, c. 174, s. 105) that a married woman shall "for the purposes of this Act" be deemed a *feme sole*, and by

⁹³ See § 8, *infra*.

⁹⁴ As in *Ex parte Pollard, In re Courtney, supra*.

⁹⁵ DICEY, *CONFLICT OF LAWS*, at the end of note 20, as to the Law governing Contracts with regard to Immovables. See also Dicey's rule 158, exception 2, and rule 150, exception 1.

⁹⁶ [1937] O.R. 444, [1937] 2 D.L.R. 504, C.A., affirming [1936] O.R. 569, [1937] 1 D.L.R. 87.

the Married Women's Property Act (now R.S.O. 1937, c. 209, s. 2) that a married woman shall be capable of acquiring, holding and disposing of any property in the same manner as if she were a *feme sole*. It may be admitted at once that if a third party were claiming under a transfer for value from the husband as registered owner, the title of the transferee would be protected under the Land Titles Act, but in *Landreau v. Lachapelle* the issue with regard to the validity of the husband's title arose between him and the executor of the wife, unembarrassed by any claim of a purchaser for value. The decision was perhaps right in the result, but the court did not clearly distinguish the different phases of the question which presented itself for decision. It is clear that as regards the transfer of interests in land a court of the situs, in accordance with the conflict rules of the *lex rei sitae*, will usually apply the domestic rules of the *lex rei sitae*, and a court other than that of the situs will apply whatever domestic rules a court of the situs would apply.⁹⁷ Whether the case fell within the general rule is not quite so clear. The court seems to have assumed that the case was simply a matter of capacity to transfer land governed by the domestic rule of the *lex rei sitae* within the general rule,⁹⁸ and did not avail itself of the opportunity to discuss the primary purpose and possible territorial limitation of each of the two sets of legislative provisions in question. The purpose of the Quebec provisions is to enforce a policy of family law and they are presumably intended to apply to all married people domiciled in Quebec without regard to the law of the country in which they may purport to transfer property or contract.⁹⁹ These provisions would clearly invalidate the transfer in *Landreau v. Lachapelle* unless the Ontario provisions have an overriding effect as regards the transfer of Ontario land, and that depends on the true construction of the Ontario provisions. The provision of the Married Women's Property Act might be construed as intended to enlarge the capacity of married women domiciled in Ontario and no others. A similar construction of the Land Titles Act would be excluded as against a transferee for value from the husband after he had been registered as sole owner, but would not be excluded as between the husband and the wife or her executor. These matters would seem to consti-

⁹⁷ See §§ 4 and 5, *supra*.

⁹⁸ Cf. STORY, CONFLICT OF LAWS, § § 184, 431; CONFLICT OF LAWS RESTATEMENT, § 216; BEALE, CONFLICT OF LAWS, vol. 1 (1935) 941; DICEY, CONFLICT OF LAWS (5th ed. 1932) 583, 584; all quoted in the judgment.

⁹⁹ Cf. JOHNSON, CONFLICT OF LAWS, vol. 1 (1933) 405 *ff.* and appendix, p. 449, vol. 3 (1937) 408.

tute the real problem presented by *Landreau v. Lachapelle*, but they were not discussed by the court.¹⁰⁰

The case of *Hutchison v. Ross*¹⁰¹ is not one relating to land, but it should be mentioned here because it involves another phase of the conflict between the Quebec statutory provisions above mentioned and the *lex rei sitae*. A marriage was celebrated in Ontario in 1902 between a man domiciled in Quebec and a woman domiciled in Ontario, and the parties were from that time continuously domiciled in Quebec. By their ante-nuptial contract they provided that "there shall be no community of property between the consorts notwithstanding the common law of the province of Quebec, in which they intend to reside, and by the laws of which they wish to be governed." In 1916 the husband, having inherited an estate of about ten million dollars from his father, and desiring to make a settlement of one million dollars for the benefit of his wife and children in place of the covenant for a settlement of \$125,000 included in the ante-nuptial contract, transferred money and movable securities (most of them being already in New York, having been there before the father's death, and the rest being forwarded from Montreal) to a trustee in New York. A trust settlement was prepared in New York form and was signed by the trustee in New York and by the husband and wife before the American Consul General in Montreal. In 1926 the husband, having become insolvent, and having procured by misrepresentation his wife's signature to a revocation of the settlement, brought two actions in New York, one for the revocation of the settlement pursuant to his wife's consent, and the other for the annulment of the settlement *ab initio* on the ground that by the law of Quebec the parties were incapable of altering the terms of their ante-nuptial contract or conferring benefits *inter vivos* upon each other. The Court of Appeals of New York, affirming by a majority of five to two the decision of the Appellate Division, dismissed the actions, and held that the validity of the settle-

¹⁰⁰ Cf. *Smith v. Ingram* (1902), 130 N.C. 100, 40 S.E. 984, and *Proctor v. Frost* (1938), 197 Atl. 813 (N.H.), discussed by Cook, 'Immovables' and the 'Law' of the 'Situs' (1939), 52 Harvard L.R. 1246, at pp. 1265, 1268. The latter case is in accord with the approach advocated in the text, while the former case is in accord with the adopted by the court in *Landreau v. Lachapelle*.

¹⁰¹ (1933), 262 N.Y. 381, 187 N.E. 65, 87 A.L.R. 1007, Court of Appeals of N.Y., affirming *Hutchison v. Ross* (1931), 233 App. Div. 516 (253 N.Y. Supp. 889), and *Ross v. Ross* (1931), 233 App. Div. 626 (253 N.Y. Supp. 871). *Hutchison v. Ross* is cited with approval by BEALE, CONFLICT OF LAWS, vol. 2 (1935) 985, 1019, but the judgment of the Appellate Division in *Ross v. Ross* is severely criticized by JOHNSON, CONFLICT OF LAWS, vol. 1 (1933) 449 (appendix); cf. *ibid*, 419 ff.

ment was governed by New York law, that being the law of the situs of the trust *res* and being the law by which the parties intended the settlement to be governed. It was held that a New York court had no jurisdiction to adjudicate upon the validity of the renunciation (contained in the settlement) by the wife of the benefits of the covenants of the ante-nuptial contract and that this question, which would be governed by Quebec law, must be left for a Quebec court to decide.¹⁰²

§ 8. JURISDICTION OF COURTS.

It is only a court of the country in which land is situated that can effectively grant any remedy enforceable *in rem* or give a judgment or make an order directly affecting the title to land or the possession of land; and while it is not clear that there is any rule of international law by which a court having jurisdiction over the defendant would be prevented from entertaining proceedings relating to foreign land merely on the ground that the proceedings would be ineffective as regards the land, English courts do not assume jurisdiction to deal directly with the title to or the possession of foreign land,¹⁰³ and do not, or ought not to, adjudicate on any matter with regard to which they cannot give an effective judgment.¹⁰⁴

On the other hand, it is common for the courts of a country to entertain actions in circumstances in which they would not admit that the jurisdiction is sufficiently founded to entitle the judgment of a foreign court, pronounced in similar circumstances, to be recognized as internationally binding; whereas the true question for private international law in the matter of jurisdiction is not what actions are entertained by the courts of a given country, but in what cases these courts will recognize foreign judgments.¹⁰⁵ It is not, however, intended to discuss

¹⁰² It being conceded that the renunciation would be invalid by Quebec law, the result, as pointed out in the dissenting judgment, would be that the wife would enjoy in Quebec the benefits of the covenant for the settlement of \$125,000 contained in the ante-nuptial contract and in New York the benefits of the settlement of one million dollars, whereas it was intended by the parties that the \$125,000 should be part of the total of one million dollars.

¹⁰³ Cf. FOOTE, *PRIVATE INTERNATIONAL LAW* (5th ed. 1925) 224; *Deschamps v. Miller*, [1908] 1 Ch. 856, and cases cited in the argument; *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602, at p. 624; *Ross v. Ross* (1892), 23 O.R. 43.

¹⁰⁴ DICEY, *CONFLICT OF LAWS* (5th ed. 1932) 30 ff. ("principle of effectiveness," or "test or criterion of effectiveness").

¹⁰⁵ WESTLAKE, *PRIVATE INTERNATIONAL LAW*, chapter 10. Generally, as to foreign judgments, see READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW UNITS OF THE BRITISH COMMONWEALTH* (Harvard University Press, 1938).

here this "true question for private international law," but it is proposed to indicate some leading principles governing the actual practice of the courts in entertaining actions relating to foreign land, especially cases relating to mortgages on foreign land.

At common law, it was necessary that the writ by which the action was commenced should be served on the defendant personally within the realm, and if the writ was so served a judgment might be obtained although the defendant's domicile and permanent allegiance were foreign.¹⁰⁶ There was also a limitation as to jurisdiction based upon personal service of the writ within the realm, namely, that in the case of a local, as distinguished from a transitory, action, the cause of action must have occurred within the realm. A local action was one the cause of which could not have occurred elsewhere than where it did occur, as, for example, an action for trespass to land, and the rules of venue, requiring the summoning of a jury from the county in which the cause occurred, prevented an English court from entertaining a local action if the land in question was outside the realm.¹⁰⁷ Since the passing of the Judicature Act and notwithstanding the abolition of the requirement of local venue for the trial of an action, it was held by the House of Lords in *British South Africa Co. v. Companhia de Moçambique*¹⁰⁸ that a court in England has no jurisdiction to entertain an action to recover damages for trespass to land situated abroad, there being solid reasons why the court should refuse to give damages founded on an adjudication of the proprietary rights attached to such land.

The scope of the decision in the *British South Africa* case was discussed in *St. Pierre v. South American Stores*¹⁰⁹ by Scott L.J., who, commenting on some observations of Lord Herschell in the earlier case said, "By these words I understand him to have meant that it is the action founded on a disputed claim of title to foreign lands over which an English court has no jurisdiction, and that where no question of title arises, or only arises as a collateral incident of the trial of other issues, there is nothing to exclude the jurisdiction." In this case the Court of Appeal held that an action for the payment of rent under a lease of land situated in Chile is a personal action, transitory in its nature, which may be entertained by an English

¹⁰⁶ Cf. *Western National Bank of City of New York v. Perez*, [1891] 1 Q.B. 304, at pp. 310-311.

¹⁰⁷ WESTLAKE, *op. cit.* (7th ed. 1925) 243-244.

¹⁰⁸ [1893] A.C. 602.

¹⁰⁹ [1936] 1 K.B. 382.

court, notwithstanding that it relates incidentally to foreign land. On the other hand, the rule stated in the *British South Africa* case has been applied and perhaps extended in other cases in which the courts have refused to exercise jurisdiction.¹¹⁰

After the writ of subpoena was invented, the Court of Chancery based its jurisdiction upon service of the writ within the realm either upon the defendant personally or upon some person at the defendant's dwelling-house whose duty it would be to communicate the fact to him. As there was no jury in Chancery, there was no venue, and therefore no formal or procedural obstacle to the court's making its personal jurisdiction over the defendant a ground for determining the title to, or the right of possession of, foreign land. It appears now to be settled, however, that it ought not to do so.¹¹¹

In *Deschamps v. Miller*,¹¹² Parker J. said :

In my opinion the general rule is that the court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a court of equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the *locus* the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think the court ought to entertain jurisdiction to decide the matter.

The classic example of the exercise by a court of jurisdiction to give relief relating to land situated abroad under the guise

¹¹⁰ *Brereton v. Canadian Pacific Ry. Co.* (1894), 29 O.R. 57 (an action, not of trespass, but of trespass on the case, for damages for the destruction by fire of a house on land situated in Manitoba); *Albert v. Fraser Companies* (1936), 11 M.P.R. 209, [1937] 1 D.L.R. 39 (an action in New Brunswick for damages to land situated in Quebec alleged to be caused by the negligent obstruction of the flow of a river running through both provinces). Both cases are discussed and criticized by READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS* (1938) 187 ff.; cf. comment on the latter case by Willis (1937), 15 Can. Bar Rev. 112.

¹¹¹ WESTLAKE, *PRIVATE INTERNATIONAL LAW* (7th ed. 1925) 243-245; cf. *ibid.*, § 173.

¹¹² [1908] 1 Ch. 583, at pp. 863-864.

of an order directed to a person who is within the jurisdiction in the venerable case of *Penn v. Lord Baltimore*,¹¹³ in which the Court of Chancery in England decreed specific performance of a contract providing for the delimitation of the boundaries between two provinces in North America.¹¹⁴ Even if relief given with regard to land situated abroad is supposed to be limited to cases in which the relief is not repugnant to the *lex rei sitae*,¹¹⁵ embarrassing questions suggest themselves, namely, whether a court of the country in which the land is situated will accord any recognition to an adjudication by a foreign court on the merits of a dispute relating to land, or what it may have to say about a conveyance of land made under the coercion of a foreign court, or, conversely, what will be the attitude of an English court as regards a personal judgment of a foreign court relating to land situated in England.¹¹⁶

It has been held that foreclosure may be decreed against a mortgagor who is within the jurisdiction, in respect of land outside the jurisdiction, because the foreclosure operates merely *in personam* by extinguishing the defendant's personal and equitable right to redeem,¹¹⁷ and that an order may be made directing the defendant to execute such conveyance as will vest the legal title in the plaintiff.¹¹⁸ The court will not, however, order a sale of land outside the jurisdiction, because it is not able to supervise or deal effectually with the many matters which are the usual and ordinary incidents of a sale,¹¹⁹ nor will it entertain an action directly involving a decision as to title to land without the jurisdiction.¹²⁰

¹¹³ (1750), 1 Ves. Sen. 444, 1 White & Tudor L.C. (9th ed. 1928) 638.

¹¹⁴ Namely, Pennsylvania and Maryland.

¹¹⁵ Cf. *Ex parte Pollard, In re Courtney* (1840), Mont & Ch. 239, at p. 250 (see § 6, *supra*); *Bank of Africa v. Cohen*, [1909] 2 Ch. 129 (see § 7, *supra*.)

¹¹⁶ Cf. Corry, comment (1933), 11 Can. Bar Rev. 211, on *Andler v. Duke* (1931), 45 B.C.R. 96, [1932] 2 D.L.R. 19, [1932] 1 W.W.R. 257. In the Supreme Court of Canada, *sub nom. Duke v. Andler*, [1932] S.C.R. 734, [1932] 4 D.L.R. 529, the judgment of the Court of Appeal for British Columbia was reversed, and it was held that no effect should be given in British Columbia to a judgment of the Superior Court of California by which it was ordered that the defendants should convey to the plaintiffs certain parcels of land situated in British Columbia, or to a conveyance made by the clerk of the court pursuant to the order of the court on the failure of the defendants to convey. See Gordon, *The Converse of Penn v. Lord Baltimore* (1933), 49 L.Q.R. 547.

¹¹⁷ *Toller v. Carteret* (1705), 2 Vern. 494; *Paget v. Ede* (1874), L.R. 18 Eq. 118; *In re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743.

¹¹⁸ *Bryson v. Huntington* (1877), 25 Gr. 265.

¹¹⁹ *Strange v. Bedford* (1887), 15 O.R. 145; *Grey v. Manitoba and North Western Ry. Co.*, [1897] A.C. 254, affirming (1896), 12 Man. R. 42.

¹²⁰ *In re Hawthorne, supra*; *Ross v. Ross* (1892), 23 O.R. 43.

The jurisdiction to decree foreclosure as to land situated in another country is not in all respects easy to justify. As Westlake points out,¹²¹ to decree foreclosure on the debtor's failure to pay would appear to be contrary to the principle that the court "will decline to make its mere personal jurisdiction over the defendant a ground for determining the right either to the property or the possession of foreign immovables," and "it can hardly be supposed that the *forum situs* of the security would allow any authority to such a decree, if by the *lex situs* the mortgage was still redeemable, and proceedings were taken to redeem it."

Obviously the jurisdiction, so far as it exists, ought to be exercised with great caution. As Lord Macnaghten said in a different but analogous kind of case, "there is, perhaps, some danger of doing injustice if the strict rules which the English Court of Chancery has applied to dealings with trust property are applied to a case between foreigners under foreign law whose relations are not exactly those of trustee and *cestui que trust*";¹²² so, even as between persons who are, or as against a defendant who is, within the jurisdiction, there is certainly danger of injustice being done when a court decrees foreclosure as to foreign land without first ascertaining that the relation of the parties according to the *lex rei sitae* is exactly that of mortgagee and mortgagor in the sense of the *lex fori*. If the *lex rei sitae* as to securities on land is essentially different from the *lex fori*, as, for example, if foreclosure were sought in an English or Ontario court as to land in France or Quebec, it would be obvious that the court should decline jurisdiction, the remedy asked for being wholly inappropriate to, and therefore repugnant to, the hypothecary system of the *lex rei sitae*, in which there is no conditional conveyance, no forfeiture, no equity of redemption and therefore no foreclosure. Even if the discrepancy between the *lex fori* and the *lex rei sitae* were less glaring, as, for example, if foreclosure were sought in an Ontario court as to land registered under the Real Property Act of Manitoba, there might be insuperable objections to the court's entertaining the action. Apart from the fact that a mortgage under that statute, as under the Land Titles Acts of Alberta and Saskatchewan, operates merely by way of charge, there is the further objection that in Manitoba foreclosure cannot be obtained by application to a court, but must be sought by proceedings in the registrar's office, and that, normally at

¹²¹ PRIVATE INTERNATIONAL LAW, § § 173, 174.

¹²² *Concha v. Concha*, [1892] A.C. 670, at p. 675.

least, foreclosure cannot be had until after the mortgaged property has been offered for sale under the direction of the registrar. In other words, strict foreclosure as it exists in Ontario practice does not exist under the Real Property Act of Manitoba. It is doubtful, indeed, whether there are many countries in the world in which strict foreclosure still exists, and therefore doubtful whether a case is likely to arise in which an Ontario court should entertain an action for foreclosure as to land outside of Ontario. In more general terms, it is submitted that when a court today is asked to decree foreclosure as to land in another country, it is necessary for the court, as a condition of entertaining the application, to find that the relation of mortgagee and mortgagor according to the *lex rei sitae* is essentially the same as their relation according to the *lex fori*, and that, apart from the simple case of an action upon the covenant for payment,¹²³ a court is not justified in assuming that a remedy available to a mortgagee by the *lex fori* is appropriate in the case of land in another country.¹²⁴

When the court allows a mortgagor to redeem after default, the relief given is personal in its nature, and therefore it has been held that the court, acting *in personam*,¹²⁵ may entertain an action for redemption against a mortgagee who is within the jurisdiction, notwithstanding that the land in question is outside the jurisdiction.¹²⁶ Nevertheless, it would appear that relief ought not to be granted as to land outside the jurisdiction without due regard to the *lex rei sitae*, otherwise the court might use its mere personal jurisdiction over the defendant to take from him land indefeasibly vested in him by the *lex rei sitae*, but it has been said that if the defendant is bound by some special contract, not merely an incident to the security, the court would be justified in applying the proper law of the contract.¹²⁷

The court will not, however, grant relief by a decree *in personam* as to lands outside the jurisdiction unless there is

¹²³ See *Northern Trusts Co. v. McLean* (1926), 58 O.L.R. 683, [1926] 3 D.L.R. 93.

¹²⁴ When an English court formerly exercised jurisdiction to decree foreclosure as to land in one of the colonies it was perhaps justified in some cases in assuming that the *lex rei sitae* was essentially the same as the law of England as regards the relation of mortgagee and mortgagor, so that in effect the court's assumption of jurisdiction was not complicated by any question of conflict of laws.

¹²⁵ *Penn v. Lord Baltimore* (1750), 1 Ves. Sen. 444, 1 White & Tudor L.C. (9th ed. 1928) 638.

¹²⁶ *Beckford v. Kemble* (1822), 1 Sim. & St. 7; *Bent v. Young* (1838), 9 Sim. 180.

¹²⁷ WESTLAKE, PRIVATE INTERNATIONAL LAW, § 174.

some contractual obligation, express or implied, or some trust, or other ground for imposing a personal obligation on the defendant. Thus, in an action in Ontario the court refused a decree for redemption of a mortgage on lands in Manitoba at the suit of a judgment creditor of the mortgagor, whose judgment was by Manitoba statute a charge upon the lands, the judgment creditor and the mortgagee both being domiciled in Ontario.¹²⁸ The statutory charge did not create any personal obligation, and in the *forum rei sitae* and according to the *lex rei sitae* was enforceable only by sale of the land. In the Supreme Court of Canada, Strong C.J., delivering the judgment of the court, said :¹²⁹

The tendency of modern decisions has been to decline jurisdiction with reference to foreign land, and when we consider that if the arguments invoked for the present appellants were to prevail we might be asked to uphold a judgment of a Quebec court in an hypothecary action respecting lands in Ontario, or *vice versa* a judgment in the Ontario courts directing a sale of hypothecated immovables in the province of Quebec, the convenience, good sense and sound jurisprudence of the rules laid down in the later English authorities, which have now culminated in the decision of the House of Lords in the case of *British South Africa Co. v. The Companhia de Moçambique*,¹³⁰ became at once apparent. It is unnecessary to write more fully, as Mr. Justice Osler in his very able judgment in the Court of Appeal, and which proceeds on the same *ratio decidendi* as the judgment of this court, has fully expounded the principle upon which it must be held that the Ontario courts have no jurisdiction to entertain this action.

The court will not entertain an action to set aside a mortgage of land outside the jurisdiction and to declare the defendant a trustee (on the ground that the mortgage was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed) or, in effect, give the plaintiff relief by way of equitable execution out of the mortgagee's interest,¹³¹ or an action for a declaration that a deed in the form of an absolute conveyance of land outside the jurisdiction is really a mortgage.¹³² Especially if the transaction in question occurred outside the jurisdiction, a court ought not to entertain proceedings to enforce an equity

¹²⁸ *Henderson v. Bank of Hamilton* (1893), 23 Can. S.C.R. 716, affirming 20 O.A.R. 646.

¹²⁹ 23 Can. S.C.R. 716, at p. 722.

¹³⁰ [1893] A.C. 602, already cited earlier in the present § 8.

¹³¹ *Purdum v. Pavey* (1896), 26 Can. S.C.R. 412, reversing *Pavey v. Davidson* (1896), 23 O.A.R. 9; *Burns v. Davidson* (1892), 21 O.R. 547.

¹³² *Gunn v. Harper* (1901), 2 O.L.R. 611.

which may not exist by the law of the place in which the transaction occurred and in which the land was situated, so as to deprive a person of a title which he may have by the *lex rei sitae*.¹³³

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¹³³ *Gunn v. Harper* (1901), 2 O.L.R. 611, at pp. 615, 616, Osler J.A. At pp. 619 ff., Moss J.A. suggests that in order to give the court jurisdiction to entertain an action relating to foreign land, not only must the defendant be within the jurisdiction but the contract or equity must have been made or have arisen within the jurisdiction.