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LAND CONTRACTS IN THE CONFLICT OF LAWS— LEX SITUS: RULE OR EXCEPTION

By DAVID COLWYN WILLIAMS*

Introduction

Misleading Generalization

In recent years many scholars writing in the field of conflict of laws have urged that the now overgeneralized choice of law rules be broken down to a much larger number of narrower rules of more specific application.¹ Nevertheless, in a leading treatise² on conflict law the chapter on immovables begins with the following statement:³

In the United States of America, and European countries with few exceptions the general rule is that *lex situs* is the governing law for *all* questions that arise with regard to immovable property.

In an accompanying footnote this proposition is said to be so clear as scarcely to require authorities.⁴

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¹ EHRENZWEIG, *CONFLICT OF LAWS* 15–16 (1959); Cheatham and Reese, *Choice of Applicable Law*, 52 *COLUM. L. REV.* 959 (1952); articles by Currie as follows: *On the Displacement of the Law of the Forum*, 58 *COLUM. L. REV.* 964 (1958); *A Study in Conflict of Laws Method*, 25 *U. CHI. L. REV.* 227 (1958); *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 *STAN. L. REV.* 205 (1958); *Change of Venue and the Conflict of Laws*, 22 *U. CHI. L. REV.* 405 (1955); *Full Faith and Credit to Foreign Land Decrees*, 21 *U. CHI. L. REV.* 620 (1954); Hancock, *Choice-of-Law Policies in Multiple Contract Cases*, 5 *U. TORONTO L. J.* 133 (1943); Freund, *Chief Justice Stone and the Conflict of Laws*, 59 *HARV. L. REV.* 1210 (1946); Heilman, *Judicial Method and Economic Objectives in Conflict of Laws*, 43 *YALE L.J.* 1082 (1934).

² CHESHIRE, *PRIVATE INTERNATIONAL LAW* (5th ed. 1957).

³ *Id.*, at 554. (Emphasis added.) The exceptions referred to are Italy, Spain, Sweden, Finland, Czechoslovakia, and Germany, where succession to immovables is governed by the *lex patriae* of the deceased owner. See also in a similar vein 2 BEALE, *THE CONFLICT OF LAWS* § 214.1 (1935): "Every question arising with regard to land is to be governed by the law of the situs." See also § 340.1; MINOR, *CONFLICT OF LAWS* §§ 11, 176 (1901); WHARTON, *CONFLICT OF LAWS* §§ 273, 277–286 (2d ed. 1881). *Contra*, COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* ch. 10 (1942); STUMBERG, *CONFLICT OF LAWS* ch. 12 (2d ed. 1951); GOODRICH, *CONFLICT OF LAWS* § 149 (3d ed. 1940); LEFLAR, *CONFLICT OF LAWS* § 115 (1938); RESTATEMENT *CONFLICT OF LAWS* § 340 (1934); BATIFFOL, *LES CONFLICTS DE LOIS EN MATIÈRE DE CONTRACTS* § 123 (1938). For cases containing similar sweeping generalizations, see *Losson v. Blodgett*, 1 Cal. App. 2d 13, 18, 36 P.2d 147, 149 (1934); *Lowe v. Plainfield Trust Co.*, 215 N.Y. Supp. 50, 53 (1926); *Bentley v. Whittemore*, 18 N.J. Eq. 366, 373 (1867) *rev'd on other grounds*, 19 N.J. Eq. 462 (1868); *Meylink v. Rhea*, 123 Iowa 310, 98 N.W. 779 (1904); *Commonwealth v. Mirandi*, 243 Ky. 823, 50 S.W.2d 13 (1932); *Alcorn v. Epler*, 206 Ill. App. 140, 143 (1917). For a fuller case list see, 1916A L.R.A. 1012, n.6.

⁴ CHESHIRE, *op. cit. supra* note 2, at 554, n.2, does, however, cite three cases.

To be sure there is a limited area of conflicts law relating to immovable property where application of the *lex situs* presents a satisfactory answer. Examples include accretions to riparian lands,⁵ title to lands forming the bed of a river or lake,⁶ and questions concerning the solemnization of transactions by which interest in real property are created or transferred, including attestation,⁷ seal,⁸ acknowledgment,⁹ delivery, and registration.¹⁰ Moreover, even when the *lex situs* as such is not the law applied, the location of the property to which the contract relates may be an important and in some instances even a controlling circumstance in determining the appropriate law especially when the presumed intention of the parties is the criterion.¹¹

Weakening of the Situs Rule

But in general the *situs* rule is weakening all through the law of conflict of laws. Writers have been almost unanimous in their opposition to the rule when invoked to prevent the recognition of foreign land decrees.¹² It may well be that it is in this area that land taboo will first disappear.

It appears that land contracts too are now widely recognized to be subject to a law other than that of the situs, and are, instead, about to share the conflicts law governing other contracts together with all the difficulties inherent in that law.¹³

⁵ *St. Louis v. Rutz*, 138 U.S. 226, 250 (1890).

⁶ *Lamprey v. Metcalf*, 52 Minn. 181, 53 N.W. 1139 (1893).

⁷ *Clark v. Graham*, 6 Wheat (19 U.S.) 577 (1821), dealing with number of witnesses; *Sherman v. Estey Organ Co.*, 69 Vt. 355, 38 Atl. 70 (1897), dealing with the form of oath.

⁸ *United States v. Crosby*, 7 Cranch (11 U.S.) 115 (1812); *Adams v. Clutterbuck*, 10 Q.B.D. 403 (1883).

⁹ *Root v. Brotherson*, 4 McLean 230, 30 Fed. Cas. No. 12,036 (1847); *Morton v. Smith*, 2 Dill. 316, 17 Fed. Cas. No. 9867 (1873); *Richards v. Randolph*, 5 Mas. [U.S.] 115, 20 Fed. Cas. No. 11,772 (1828); *Knudsen v. Lythman*, 33 Idaho 794, 200 Pac. 130 (1920); *Roode v. State*, 5 Neb. 174, 25 Am. Rep. 475 (1876); *Shattuck v. Bates*, 92 Wis. 633, 66 N.W. 706 (1896).

¹⁰ *Hicks v. Powell*, L.R. 4 Ch. 741 (1869).

¹¹ *Brown v. First Nat. Bank*, 44 Ohio St. 269, 6 N.E. 648 (1886); *True v. Northern Pac. Ry. Co.*, 126 Minn. 72, 147 N.W. 948 (1914); *In re Immanuel Presbyterian Church*, 112 La. 348, 36 So. 408 (1904); *Ricks v. Goodrich*, 3 La. Ann. 212 (1848); *Bernard v. Scott*, 12 La Ann. 489 (1857); *Baxter v. Willey*, 9 Vt. 276 (1837).

¹² EHRENZWEIG, *op. cit. supra* note 1, at 206; GOODRICH, *op. cit. supra* note 3, at 636; STUMBERG, *op. cit. supra* note 3, at 123; CURRIE, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954); Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1, 22 (1944); Schwartz, *Fall v. Eastin Revisited*, 54 DICK. L. REV. 293 (1950); Note, 26 MINN. L. REV. 264 (1942).

¹³ "No topic of the Conflict of Laws is more confused than that which deals with the law applying to the validity of contracts." 2 BEALE, *op. cit. supra* note 3, at 1077. "The question of what law determines the validity of a contract . . . is the most confused subject in the field of Conflict of Laws." GOODRICH, *op. cit. supra* note 3, at 321. "No area in the entire law of Conflict

Polson v. Stewart

The leading case in this field is *Polson v. Stewart*.¹⁴ In that case husband and wife were domiciled in North Carolina. The wife took steps under North Carolina statutes to obtain the right to contract as feme sole with her husband as well as with others. She released her dower rights in his lands, and he in return entered into a covenant to "surrender, convey, and transfer" all his rights in certain of her land which was in Massachusetts.¹⁵ The Massachusetts Supreme Judicial Court speaking through Mr. Justice Holmes¹⁶ took the view that the covenant, though it would have been invalid as to property located in Massachusetts if made in the commonwealth, was valid under the law of North Carolina, which was both the *lex contractus* and *lex domicilii*.

That this result should have been formulated at this late date can, I believe, best be explained by a survey of the history of the concept of the *lex situs* in the conflict of laws. Such a survey will be followed by the attempt to formulate the conflicts rule actually applied to land contracts.

History

I

Early Origins

When migrating tribes occupied central and southern Europe carrying with them their belongings, the *lex situs* had no place in the law.¹⁷ Movables

of Laws is more confused than that concerning the general validity of contracts." LEFLAR, ARKANSAS LAW OF CONFLICT OF LAWS 209 (1938). "The cases dealing with contracts in the Conflict of Laws are by no means harmonious." Note, 15 VA. L. REV. 704 (1929). "There is no topic in the conflict of laws in regard to which there is greater uncertainty than that of contracts." Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws*, 30 YALE L.J. 565 (1921). "The sphere of international contracts appears, as it were, a sort of mare liberum. . . ." Yntema, "Autonomy" in the Choice of Law, 1 AM. J. COMP. L. 356 (1952). "Traditionally, the question what law governs the validity of a contract is the most confused subject in the conflict of laws." Morris, *The Eclipse of the Lex Loci Solutionis—A Fallacy Exploded*, 6 VAND. L. REV. 505 (1953). See also Herzog, *The Conflict of Laws in Land Transactions: The Borderland Between Contract and Property Matters—A Comparative View*, 8 SYRACUSE L. REV. 191 (1957).

¹⁴ 167 Mass. 211, 45 N.E. 737 (1897).

¹⁵ The main issues in the case were the validity of the covenant executed by the husband, the competency of the wife, and the sufficiency of the consideration. For the purposes of this paper the consideration problem will be ignored.

¹⁶ Holmes spoke for the majority of the Court. Chief Justice Field gave a dissenting opinion in which he said, "It seems to me illogical to say that we will not permit a conveyance of Massachusetts land directly between husband and wife wherever they have their domicile and yet say that they may make a contract to convey such from one to the other which our courts will specifically enforce." 167 Mass. at 217, 45 N.E. at 739.

It must be noted that the husband's property was subject to seizure on execution and his person to imprisonment for any failure to perform his covenant. He could be made to grant a release which would be good by Massachusetts law. He could have secured in the life time of the wife all the purposes of the covenant by a joint conveyance of the property to a trustee upon trusts properly limited.

¹⁷ See in general Meijers, *L'Histoire des Principes Fundamentaux du Droit International Privé a Partir du Moyen Age*, 3 RECUEIL DES COURS 549ff. (1934).

were the subject of the first legal regulations with respect to use, acquisition, and defense. It was only after the establishment of permanent homes, the distribution of conquered lands, the pursuit of agriculture on an increasing scale, interest in the preservation of the family, the linking up of public office with rights and duties of tenure that feudalism in the ninth and succeeding centuries imparted a political character to the land. Only then did the *lex situs* begin its long career as what was to become the allegedly best settled principle for transactions concerning immovables. At first it was not choice of law that the rule came to govern. Following Roman rules of jurisdiction, the situs became one of the bases of the competencies¹⁸ of the medieval Italian judge. Obviously that judge needed no choice of law and the *lex fori*¹⁹ was the law naturally applied by him as having the most significant contact with the case. But the *lex fori*, after a regime of about one century, was rendered inadequate at the beginning of the thirteenth century²⁰ when, presumably in part due to the revived influence of Roman law, foreigners were deprived of both the burdens and the privileges of forum law. Aldricus (about 1200) seemed to make the first breach in the *lex fori* when he referred the judge to the "stronger and more useful law."²¹ With the growing self-limitation of the *lex fori* and the failure of the common law which bound everybody everywhere the canonists,²² and independently secular scholars under the influence of Jacobus Balduini and Ubertus de Bobio, first found the law of the forum applicable to foreigners as to contracts made in the forum state and later, conversely, would apply foreign laws to foreign contracts.²³ With other jurisdictional bases joining that of the situs including competencies of the transaction and defendant's general forum, judges came to be called upon to pass on transactions dealing with foreign land. And when in such cases the law of the forum denied its applicability as a *statutum reale*,²⁴ the foreign *lex situs* came to the rescue—far from purporting to "govern" the transaction²⁵ *a priori* as the latter-day statutists of the Restatement would make us believe.²⁶

¹⁸ WENGER, *INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE* 47 (Fisk transl. 1940). Meijers, *supra* note 17, at 573.

¹⁹ Yntema, *The Historic Bases of Private International Law*, 2 *AM. J. COMP. L.* 300 (1953).

²⁰ NEUMEYER, *DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT UND STRAFRECHTS BIS BARTOLUS* 78 (1901).

²¹ *Id.* at 66f, 101.

²² *Id.* at 84, 102.

²³ In general these first conflict rules are ascribed to Bartolus. COOK, *LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS* 63 (1942). See authorities cited by Yntema, *The Historic Bases of Private International Law*, 2 *AM. J. COMP. L.* 303, n.15 (1953).

²⁴ 2 NEUMEYER, *op. cit. supra* note 20, at 94.

²⁵ *Id.* at 84-86.

²⁶ As to Beale's mistranslation of Bartolus ("govern" for "inspicitur"), see Ehrenzweig, *Zum Handwerkszeug des amerikanischen internationalen Privatrechts*, 7 *OESTERR. ZEITSCHRIFT FÜR OEFF. RECHT* 521, 525 (1956).

Feudal Period

A choice of law rule in our present day sense is a rule "governing" the transaction. The *lex situs* became such a rule only in the feudalist era when respect for the lord required the judges, both of the forum and the foreign allodium, to apply the law prevailing at the place where land was situated. D'Argentré (1519-1590) may be taken as the most scholarly exponent of this approach which became particularly conspicuous in its conflict with Dumoulin's (1500-1566) opposite thinking.

The clash of views of these two jurists was clearly seen in the case of the spouses De Ganey.²⁷ They were domiciled in Paris and had made each other heirs of all their after-acquired property. In a dispute between the heirs of the husband and those of the wife, the former claimed a piece of land in Lyon as not having been included in the mutual gift. That gift had been made under the community property law of the Paris Coutume, it was claimed, which lacked extraterritorial validity in Lyon, a city subject to the *droit écrit*. Dumoulin, having been asked for an opinion, favored application by the Paris judge of his local law. This law, because of the contract and the intention of the parties, should be permitted to apply beyond the confines of Paris. D'Argentré also gave an opinion and was anxious at all times to support Breton feudalism against the King. He had a predominant concern for those feudal interests which at this time were beginning to show signs of decline. He laid stress upon the local *lex situs* and was therefore compelled to advise the judge to apply the foreign *lex situs*.

From this opinion can be traced a definite limitation upon the *lex fori* principle—a limitation demanded by the ideology of a feudal law according to which even the *lex fori* was inferior to the power over land. It was this case which brought the teachings of D'Argentré and Dumoulin into the public eye in what has now become a classic incident.

The conflict has never ceased. Ever since the *lex situs* became a governing rule of choice of law did incidental questions such as those concerning capacity, form, matrimonial rights and succession cut through its regime.

Dutch Contribution

The doctrines of D'Argentré at this time received little approbation in France; territorial independence was approaching its end and the reign of Louis XIV was in sight. Yet although in France in this period feudalism was disappearing and there was little inclination to emphasize the differences in the laws of the various provinces, conditions were very different in Holland. In the Dutch provinces which had recently gained

²⁷ As to French antecedents, see Maijers, *supra* note 17, at 549ff.

their independence and formed a federation²⁸ the new union seemed to affect but little the independence of the individual provinces in which there existed an intense jealousy of local rights.

The fact that commerce was growing with foreign nations caused the Dutch to look upon the conflict of laws as arising between separate political sovereignties and they were anxious to accept D'Argentré doctrine of the territoriality of all customs. The doctrines of Ulric Huber (1636-1694),²⁹ Paul Voet (1619-1671),³⁰ and John Voet (1647-1714)³¹ were particularly characteristic of the Dutch school. While these writers adopted D'Argentré's doctrine of territoriality they replaced his feudalistic rigidity with the new flexible doctrine of comity under the label of the new sovereignty theory.³² They did so by leaving open avenues of escape from a purportedly dominant *lex situs*; and when the French Civil Code seemingly followed D'Argentré's preoccupation with the land, it did so while at the same time introducing the new principle of nationality³³ which a few decades later was to take on pre-eminence through Mancini's (1817-1888) teaching.³⁴

German Contribution

The early German codes such as the *Sachsenspiegel* (1215-1235) and the *Schwabenspiegel* (1273-1276) are concerned with forum law. Even the law of succession was apparently that of the forum situs. But in the sixteenth century there arose in Germany, as in France, a feudal preference for the *lex situs*. Mynsinger (1514-1588), Gaill (1526-1587), and later Hertius (1651-1710) are considered the most important representatives of this trend, and Hertius in particular adopted the extreme position of D'Argentré.³⁵

However in the nineteenth century due to the powerful influence of Carl Georg von Wächter (1841)³⁶ and Friedrich Carl von Savigny (1849)³⁷

²⁸ January 29th, 1579, Union of Utrecht.

²⁹ HUBER, *DE CONFLICTU LEGUM DIVERSARUM IN DIVERSIS IMPERIIS* (1678).

³⁰ P. VOET, *DE STATUTIS EORUMQUE CONCURSU LIBER SINGULARIS* (1661).

³¹ J. VOET, *COMMENTARIUS AD PANDECTAS* (1698-1704).

³² Huber, *supra* note 29, at § 2(3); Lorenzen, *Huber's de Conflictu Legum*, in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 164 and comment at 136-139 (1947). See also Meijers, *supra* note 17, at 668.

³³ Dalloz, *Code Civil*, art. 3 (1956). "Laws relating to the status and capacity of persons affect French persons, even though in a foreign country."

³⁴ MANCINI, *DIRITTO INTERNAZIONALE* (1873). This work contains the address of Mancini at the opening of the Academy of Turin in 1851. The Italian Civil Code of 1865, arts. 6-12, contain the rules of Private International Law obtaining in Italy and these rules are based on the work of Mancini and his disciples.

³⁵ 2 LAINÉ, *DROIT INTERNATIONAL PRIVÉ* 408-412 (1888-1892).

³⁶ Wächter, *Ueber die Collision der Privatrechts-Gesetz Verschiedener Staaten*, 24 *ARCH. CIV. PR.* 230 (1841).

³⁷ SAVIGNY, *THE CONFLICT OF LAWS* (Guthrie transl. 1869).

German law adopted a new approach and categorically rejected the circular principle of vested rights and denied to any foreign law a right to application.³⁸ Savigny advocated a more scientific approach. The problem in his view was not to classify laws according to their objects but to discover for every legal relation that local law to which in its proper nature it belongs. Each legal relation has its natural seat in a particular local law, and it is that law which must be applied when it differs from the law of the forum.³⁹

Savigny when discussing immovables clearly distinguished between the contract and the transfer of property and formulated the rule that the validity of a contract concerning immovables depended upon the law of the place where the contract was made "without respect to the *lex rei sitae*."⁴⁰

The work of Savigny acquired considerable reputation in America for several reasons and not least because he paid his repeated respects to the work of his contemporary Joseph Story.⁴¹

American Law

In the United States, Story (1834)⁴² tried first to reconcile the many conflicting theories and ideologies. In this attempt he tended to quote indiscriminately from both Continental and British sources.⁴³ But concerning "real contracts" he was satisfied with the postulate that they ". . . must be governed by the *lex rei sitae*"⁴⁴ though he conceded "that foreign jurists are by no means agreed in admitting the general doctrine."⁴⁵ As authorities for his emphasis on the *lex situs* Story cited in addition to a collection of Scottish cases⁴⁶ a Scottish decision⁴⁷ which held that a "heritable bond," comparable to a mortgage on Scottish land, did not pass by an English will but descended to the heir at law under Scottish law.

³⁸ *Id.* § 361.

³⁹ *Id.* § 360.

⁴⁰ *Id.* § 381.

⁴¹ *Id.* See, e.g., § 348.

⁴² STORY, CONFLICT OF LAWS (1st ed. 1834).

⁴³ *Id.* at §§ 363-373, 424-463.

⁴⁴ *Id.* at § 364.

⁴⁵ *Id.* at § 368. In the second and later editions of Story the author included a quotation from BURGE (see *Id.* at § 372) who stated that a distinction should be made between the contract to transfer and the actual transfer of the dominium. In some cases the *lex domicilii* or the *lex contractus* would prevail in spite of the provisions of the *lex situs*. Holmes appears to have relied upon the first edition of Story and consequently was probably unaware of this valuable supporting reference. See BURGE, 2 COMMENTARIES ON COLONIAL AND FOREIGN LAWS 844 (1838).

⁴⁶ REPORTS OF SOME RECENT DECISIONS BY THE CONSISTORIAL COURTS OF SCOTLAND IN ACTIONS OF DIVORCE 395 (Fergusson ed. 1817).

⁴⁷ *Jerningham v. Herbert*, 1 Tamlyn 103, 48 Eng. Rep. 42 (1829).

The next American jurist writing forty-five years after the publication of Story's first edition was Rorer.⁴⁸ His work and the authorities relied upon by him reveal that in the intervening period American courts had taken a different approach to the problems of land contracts. He stated that sometimes such contracts were partly affected by both the law of the place of contracting and the law of the situs, and concluded that an executory land contract was, in the absence of special circumstances, to be construed and controlled by the law of the place of contracting.⁴⁹ He relied on two cases to support this proposition, *Glenn v. Thistle* (1851)⁵⁰ and *Bethel v. Bethel* (1876).⁵¹ The former case involved the defense of failure of consideration in a contract made in Mississippi for the purchase of land in Louisiana. The Mississippi court applied its own law, but indicated that the result would have been the same if Louisiana law had been applied.⁵² The other case was concerned with the question as to whether a deed executed in Indiana between two Indiana citizens concerning land situated in Missouri could be construed by the law of the situs to contain by implication a covenant of seisin which the law of the place of contracting would not so imply. The Indiana court, after commenting that this was a novel question, stated that the *lex situs* did not necessarily govern conveyances made elsewhere so as to change their character as mere conveyances and invest them with the character of personal covenants. The court applied its own law as the law intended by the parties.⁵³

Holmes cited two Massachusetts decisions, *Ross v. Ross* (1880),⁵⁴ and *Hallgarten v. Oldham* (1883).⁵⁵ In the former we find that rejection of the *lex situs* did not concern a land contract but resulted in the sanction of the *lex domicilii* as governing legitimacy with regard to the right to inherit. The latter case had little to do with the problem, being concerned with the effect of indorsement and delivery in another state of a private warehouse receipt for goods stored in the forum state.

It can truly be said that the dichotomy between conveyances and land contracts was first clearly established in Justice Holmes' now famous opinion in the above mentioned case of *Polson v. Stewart*⁵⁶ where the Supreme Judicial Court of Massachusetts upheld a contract between two

⁴⁸ RORER, *INTER-STATE LAW* (1st ed. 1879).

⁴⁹ *Id.* at 211.

⁵⁰ 23 Miss. 42 (1851).

⁵¹ 54 Ind. 428 (1876).

⁵² 23 Miss. at 48-49.

⁵³ 54 Ind. at 430. See discussion of this and similar cases by Heilman, *Conflict of Laws Treatment of Interpretation and Construction of Deeds in Reference to Covenants*, 29 MICH. L. REV. 277 (1931).

⁵⁴ 129 Mass. 243 (1880).

⁵⁵ 135 Mass. 1 (1883).

⁵⁶ 167 Mass. 211, 45 N.E. 737 (1897).

North Carolina spouses, concerning Massachusetts land under the North Carolina law of the contract, notwithstanding an invalidating law of the forum. That Holmes may indeed claim credit for having established this dichotomy is borne out by the fact that not only the American,⁵⁷ but also the Scottish and English authorities⁵⁸ cited by him afforded but little support for his forthright rejection of the *lex situs* as the rule to govern "all questions that arise with regard to immovable property."⁵⁹

Scottish and English Precedents

Holmes was able to derive some comfort from Scots law. The cases of *Findlater v. Seafeld* (1814)⁶⁰ and *Cunninghame v. Semple* (1706)⁶¹ revealed that in Scots law a contract involving real property was not in all matters subject to the law of the situs. Erskine in his famous treatise (1871)⁶² made a clear distinction between actual transfer of real estate and contracts to convey.

Analyzing the English authorities cited by Holmes we find that *Ex parte Pollard* (1838),⁶³ a bankruptcy case, did not concern choice of law but held that contracts respecting lands in countries not within the jurisdiction of the English courts could only be enforced in proceedings in personam. *Cood v. Cood* (1863)⁶⁴ applied the English law of the contract to a sale of Chilean land, but the decision was based at least in part on the consideration that the contract was between three English gentlemen, two of whom were domiciled and resident in England, and the third, although resident in Chile, did not have his domicile there.

Westlake,⁶⁵ cited by Holmes, was of the opinion that no general rule could be laid down for the construction of land contracts. A stringent rule of construction referring to the law of the situs, he thought useful and urged that in its absence reasonable regard must be had to all the circumstances, including the place of contracting, and the nationality or domicile of the parties. But Holmes had to concede⁶⁶ that Dicey had views which were in conflict with his own. Dicey⁶⁷ was opposed to any sharp distinction between

⁵⁷ See p. 166 *supra*.

⁵⁸ See pp. 167-68 *infra*.

⁵⁹ CHESHIRE, *op. cit. supra* note 2, at 554.

⁶⁰ Faculty Decisions 553 (Feb. 8, 1814).

⁶¹ 11 Morison 4462 (1706).

⁶² 2 INSTITUTE OF THE LAW OF SCOTLAND bk. 3, tit. 2, § 40 (2d ed. 1871).

⁶³ 4 Deac. 27 (1838). See Beale, *Equitable Interests in Foreign Property*, 20 HARV. L. REV. 382, 384 (1907).

⁶⁴ 33 Beav. 314, 322, 55 Eng. Rep. 388 (1863).

⁶⁵ WESTLAKE, PRIVATE INTERNATIONAL LAW 228-230 (5th ed. 1912).

⁶⁶ 167 Mass. at 214. "... [A]nd the doubts expressed in Mr. Dicey's very able and valuable book."

⁶⁷ DICEY, CONFLICT OF LAWS 769 (1896). "The capacity to enter into a valid contract with

contract and conveyance, and asserted that normally the *lex situs* governed land contracts.

In view of this inconclusive state of authority at Holmes' time, his holding in the *Polson* case must truly be seen as the beginning of a new conflicts law of land contracts.⁶⁸

II

Analysis

Whatever its historical basis, the proposition has been virtually undisputed since the *Polson* case that land contracts are subject to the law governing contracts, rather than to the *lex situs*; but little is gained by this proposition if we take into account the fact that the most confused area of the conflicts of law is the conflicts law of contracts.⁶⁹

In a series of recent articles Professor Ehrenzweig⁷⁰ has tried to demonstrate that this confusion is merely apparent and that courts in the United States have in fact long followed a consistent practice based on the following consideration: Equal parties to a contract intend to be bound;⁷¹ courts will, therefore, as a general rule seek to validate the bargain made by the parties as against claims of invalidity based on either the forum or a foreign law, if another "proper" law supports validation.⁷² This validating law may be the *lex situs*, the *lex contractus*, the *lex loci solutionis*, the *lex domicilii* or the *lex fori*. In those few cases where the courts have not applied this Rule of Validation, special circumstances account for the exceptions.

In the present study I shall attempt to show that these propositions are applicable to land contracts. In this analysis certain groups of cases will be excluded: those not concerned with the initial validity of contracts;⁷³

regard to land is certainly, and the formalities necessary for the validity of such a contract are almost certainly, governed wholly by the *lex situs*. . . . [T]he validity and effect of a contract in respect to land is governed wholly by the *lex situs*."

⁶⁸ But see Goodrich, *Two States and Real Estate*, 89 U. PA. L. REV. 417, 422 (1941). "Is there any value in the distinction thus drawn between contracts about land and transfers of interests in land? It is not at all clear that any social utility for such a distinction can be proved."

⁶⁹ See note 13 *supra*.

⁷⁰ *The Contractual Capacity of Married Women and Infants in the Conflict of Laws*, 59 COLUM. L. REV. n.p. (1959); *The Real Estate Broker and the Conflict of Laws*, 43 MINN. L. REV. n.p. (1959); *The Basic Conflicts Rule of the Statute of Frauds: Validation of the Contract*, 59 COLUM. L. REV. n.p. (1959).

⁷¹ Cf. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1088-1090 (1953).

⁷² SAVIGNY, *op. cit. supra* note 37 at § 370-372. WHARTON, *op. cit. supra* note 3, at § 429. Wharton cites in support specific provisions of the Prussian Code, A.L.R.I. 5, § 113. For detailed discussion see BALLEFOL, *op. cit. supra* note 3, at §§ 155-162. AUSTRIAN CIVIL CODE § 35. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 655, 673 (1920). Note, *Choice of Law for Land Transactions*, 38 COLUM. L. REV. 1049, 1059 (1938). But see Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933).

⁷³ *Irving Trust Co. v. Maryland Casualty Co.*, 83 F.2d 168 (2d Cir. 1936); *In re Schafer's*

those in which the result would have been the same under any one of the potentially applicable laws;⁷⁴ those primarily concerned with the sufficiency of title;⁷⁵ and, finally, cases involving intentional evasion of forum law.⁷⁶

To test this thesis it will be shown that the vast majority of the decided cases have resulted in the validity of the contract under either (a) the *lex fori*, (b) the *lex contractus*, (c) the *lex domicilii*, or (d) the *lex situs*; and that every one of the few decisions resulting in invalidation is explainable on special grounds.

Validation

a. *The lex fori.* A contract was entered into in Cuba whereby defendant was given an option to buy a concession for the construction of a railroad in that country. The defendant sought to resist an action for specific performance of the contract by claiming that it was not a valid agreement because under Cuban law the contract was not converted into a public instrument, *i.e.*, one "authenticated by a notary, or by a competent public official with the formalities required by law." Unenforceability of the contract under the Cuban law of the situs did not prevent the New York court from enforcing the contract under its own law.⁷⁷ Similarly, courts have ignored the incapacity of foreign domiciliaries under their own law.⁷⁸ Finally, courts have usually permitted licensed local real estate brokers to

Bakeries, 155 F. Supp. 902 (E.D. Mich. 1957); *In re Estate of Wiley*, 150 Neb. 898, 36 N.W.2d 483 (1949); *In re Newark Shoe Stores*, 2 F. Supp. 384 (Md. 1933). See *Fall v. Eastin*, 215 U.S. 1 (1900); *Jorgensen v. Crandell*, 134 Neb. 33, 277 N.W. 785 (1938); *Scheper v. Scheper*, 125 S.C. 89, 118 S.E. 178 (1923).

⁷⁴ *Atwater v. Seely*, 2 Fed. 133 (Minn. 1880); *Richards v. Richards*, 270 Mass. 113, 169 N.E. 891 (1930); *Dalton v. Talliaferro*, 101 Ill. App. 592 (1901); *Pratt v. Realty Associates, Inc.*, 45 A.2d 478 (Mun. Ct. D.C. 1946); *Hubbard, Price & Co. v. Sayre*, 105 Ala. 440, 17 So. 17 (1895); *Dolman v. Cook*, 14 N.J. Eq. 56 (1861); *Campion v. Kille*, 14 N.J. Eq. 229 (1862); *Lee Wilson & Co. v. Fleming*, 203 Ark. 417, 156 S.W.2d 893 (1942); *Crews v. Mutual Benefit Life Ins. Co.*, 104 Ind. App. 183, 8 N.E.2d 390 (1937); *Gross Income Tax Div. v. Bartlett*, 288 Ind. 505, 93 N.E.2d 174 (1950); *Robinson v. Stratman*, 252 N.Y. Supp. 557 (1931); *Coral Gables v. Patterson*, 236 Ala. 201, 181 So. 236 (1938); *Boyd v. Pancake Realty*, 131 W. Va. 150, 46 S.E.2d 633 (1948); *In re Barnett*, 12 F.2d 73 (2d Cir. 1926); *Lyndon Lumber Co. v. Sawyer*, 135 Wis. 525, 116 N.W. 255 (1908); *Deaton v. Vise*, 186 Tenn. 364, 210 S.W.2d 665 (1948).

⁷⁵ *Atwood v. Walker*, 179 Mass. 514, 61 N.E. 58 (1901); *Coral Gables v. Hanley*, 87 F.2d 780 (6th Cir. 1937); *Cole v. Steinlauf*, 144 Conn. 629, 136 A.2d 744 (1957).

⁷⁶ *Lamkin v. Lovell*, 176 Ala. 334, 339, 58 So. 258, 259 (1912). ALABAMA CODE § 4497 provided "the wife shall not directly or indirectly become surety for the husband." The Court looked through form to substance of the transaction. *Mallory Associates v. Barving Realty Co.*, 300 N.Y. 297, 90 N.E.2d 468 (1949). N.Y. Real Prop. Law § 233.

⁷⁷ *Reilly v. Steinhart*, 217 N.Y. 549, 112 N.E. 468 (1916). See *Kryger v. Wilson*, 242 U.S. 171 (1916); *Daniels v. Rogers*, 108 App. Div. 338, 96 N.Y. Supp. 642 (1905) (deals with statute of frauds).

⁷⁸ *Connor v. Elliott*, 79 Fla. 513, 85 So. 164 (1920) (also situs); *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12 (1897) (same); *Johnston v. Gawtry*, 83 Mo. 339 (1884).

claim commissions for sale of forum⁷⁹ or foreign land⁸⁰ under local law even if the contract of employment⁸¹ or the sale was executed, or concerned land situated, in a state whose law would deny such claims.⁸²

b. *The lex contractus*. In an Iowa case the validity of a contract to pay off certain encumbrances was upheld under the *lex contractus*, in spite of the fact that the underlying conveyance was invalid by the law of the situs.⁸³ Similarly real estate brokers have been permitted to recover their commissions without regard to the situs law to the contrary;⁸⁴ the Pennsylvania Supreme Court has allowed an action on a mortgage bond under the law of the contract notwithstanding a situs law requiring previous exhaustion of the remedies on the mortgage;⁸⁵ and other courts have used the validating law of the contract to overcome the invalidating law of the situs in order to affirm the capacity of married women to execute notes for the debts of their husbands.⁸⁶

c. *The lex domicili*. Occasionally, particularly in Louisiana, the domiciliary law has been resorted to in order to validate transactions between husband and wife, as against the incapacity⁸⁷ or lack of consideration⁸⁸ under the *lex situs*.

d. *The lex situs*. In the early part of 1916 the Ford Motor Company decided to buy land in New York City and to erect thereon a salesroom and

⁷⁹Richmond-Carcia Oil Co. v. Coates, 17 F.2d 262 (5th Cir. 1927); Peters v. Andrews, 74 Ind. App. 578, 129 N.E. 328 (1921). See also, Egeland v. Scheffler, 189 Ill. App. 246 (1914); Woolley v. Bishop, 180 F.2d 188 (10th Cir. 1950).

⁸⁰Tillman v. Gibson, 44 Ga. App. 440, 161 S.E. 630 (1931); Land Co. of Florida v. Fetty, 15 F.2d 942 (5th Cir. 1926), *cert. den.*, 273 U.S. 764 (1927); St. Angel v. Schmid, 4 Ill. App. 2d 113, 123 N.E.2d 642 (1955); O'Dea v. Throm, 250 Ill. App. 577 (1928), *rev'd on other grounds*, 332 Ill. 89, 163 N.E. 390 (1928); Vossler v. Earle, 194 Ill. App. 522 (1915), *aff'd*, 273 Ill. 367, 112 N.E. 687 (1916); Bitterman v. Schulman, 265 App. Div. 486, 39 N.Y.S.2d 495 (1943), 267 App. Div. 858, 46 N.Y.S.2d 250 (1944), *aff'd*, 293 N.Y. 678, 56 N.E.2d 294 (1944); Aronson v. Carobine, 129 Misc. 800, 222 N.Y. Supp. 721 (1927); Folley v. Hassey, 55 Wyo. 24, 95 P.2d 85 (1939).

⁸¹Cochran v. Ellsworth, 126 Cal. App. 2d 429, 272 P.2d 904 (1954). See also, C. B. Snyder Realty Co. v. Sherrill Noonan, Inc., 261 F.2d 269 (3d Cir. 1958); Folsom v. Young and Young, Inc., 216 F.2d 352 (5th Cir. 1954).

⁸²See Ehrenzweig, *The Real Estate Broker and the Conflict of Laws*, 59 COLUM. L. REV. n.p. (1959).

⁸³Liljedahl v. Glassgow, 190 Iowa 827, 180 N.W. 870 (1921).

⁸⁴Johnson v. Allen, 108 Utah 148, 158 P.2d 134 (1945); Callaway v. Prettyman, 218 Pa. 293, 67 Atl. 418 (1957) (statute of frauds). See Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311 (1923); Comment, 43 CALIF. L. REV. 295 (1955).

⁸⁵Hall v. Hoff, 295 Pa. 276, 145 Atl. 301 (1929). Cf. Howell v. Kline, 156 Pa. Super. 628, 41 A.2d 580 (1945); *In re Chessari's Will*, 175 N.Y.S.2d 340 (1958).

⁸⁶Proctor v. Frost, 89 N.H. 304, 197 Atl. 813 (1938); Ohio v. Purse, 273 Mich. 502, 263 N.W. 872 (1935); Moody v. Barker, 188 Ky. 401, 222 S.W. 89 (1920); Law v. Smith, 68 N.J. Eq. 81, 59 Atl. 327 (1904); Polson v. Stewart, 167 Mass. 211, 45 N.E. 737 (1897).

⁸⁷Freret v. Taylor, 119 La. 307, 44 So. 26 (1907).

⁸⁸Rush v. Landers, 107 La. 549, 32 So. 95 (1902).

a warehouse. A hotel company became interested in constructing, on top of these, extensive hotel accommodations. Eventually it was thought that an agreement had been reached for the joint enterprise but the cost was underestimated to the extent of one-half million dollars. The Ford Motor Company refused to proceed with the matter and the hotel company brought action for damages for the breach of a contract to make a lease. Among the defenses of the Ford Motor Company was the plea of the statute of frauds of Michigan, the place of the contracting, which required the agent's written authorization. The court, however, decided for plaintiff, holding applicable the New York statute which did not contain such a requirement.⁸⁹

Conflicts problems are often caused in the realm of mortgages by the adoption in the several states of either the common law (title, estate) theory, followed, *e.g.*, in New Jersey, under which the legal right to possession is in the mortgagee, or the lien theory, followed, *e.g.*, in New York, under which interest in the land is limited to realization by sale. The New York Supreme Court had to pass on a mortgagee's suit to take possession of mortgaged land in New Jersey. The mortgage had been signed and acknowledged in New Jersey but delivered in New York and contained a provision that it was to be construed according to the laws of New York. Although under that law plaintiff would have been precluded from taking possession without first foreclosing the mortgage, the court found for plaintiff under New Jersey law as "the law of the place where the mortgaged premises are."⁹⁰ The *lex situs* was applied by the Illinois Supreme Court to validate a mortgage on Illinois land executed in Texas by a married woman who would have been incapable under the *lex contractus*.⁹¹ The Kansas Supreme Court also validated a marriage contract concerning forum land, which would have been invalid by the law of the matrimonial domicile.⁹²

Invalidation

The Rule of Validation is supported, rather than disproved, by those few cases in which courts have invalidated land contracts in pursuance of specific policies of the forum such as the protection of debtors, minors, married women, or the prevention of fraud.

In the only Supreme Court case apparently contrary to the Rule of Validation as applied to land contracts, the Court invalidated a forfeiture clause in a contract for the sale of land situated in Colorado.⁹³ The Court

⁸⁹ *Hotel Woodward v. Ford Motor Co.*, 258 Fed. 322 (2d Cir. 1919).

⁹⁰ *Guardian Life Ins. Co. v. Rita Realty Co.*, 17 N.J. Misc. 87, 92, 5 A.2d 45, 48 (1939).

⁹¹ *Post v. First Nat. Bank*, 138 Ill. 559, 28 N.E. 978 (1891).

⁹² *Eberhart v. Rath*, 89 Kan. 329, 131 Pac. 604 (1913).

⁹³ *Selover, Bates & Co. v. Walsh*, 226 U.S. 112 (1912).

applied Minnesota law which was the forum law of the contract. Under that law a land contract could only be declared forfeit by the vendor after thirty days written notice to the defaulting vendee and after such notice, thirty more days must be allowed to the vendee to make good the default.⁹⁴ The forum in this case was apparently giving priority to its policy of protecting the debtor.

Where contracts of minors emancipated under the law of the Territory of Oklahoma were held voidable by courts in Arkansas and California as to land situated in those states, insistence on the forum's protective policy as to minors was very clearly determinative.⁹⁵

A similarly overriding policy must account for the decision of an Ohio court when it invalidated a contract concerning Ohio land made by an Indiana married woman, who would have been capable under Ohio law but incapable under the law of Indiana.⁹⁶ And such a policy must also explain decisions of those courts which have reached the same result concerning married women capable under the law of the contract, but incapable under the law of the situs and forum.⁹⁷ Among the cases concerned with defenses under statutes of frauds there are a few which have invalidated land contracts under a foreign *lex situs* notwithstanding compliance with the requirements of the forum.⁹⁸ But these cases were decided in a bygone era when the statute of frauds was still considered effective to prevent fraud and perjury.⁹⁹

If these isolated cases determined by overriding forum policies now obsolescent or obsolete are juxtaposed with what has been shown to be a consistent practice under the Rule of Validation, the exceptions dealt with under this heading appear insignificant and land contracts are proved to be subject to the Rule of Validation as all other contracts. The *lex situs* has been displaced as a governing rule by a principle based on reality rather than on dogma.¹⁰⁰

⁹⁴ MINN. LAWS, ch. 223. Only two of the cases relying on the Selover decision concern our problem. In the first case, Mallory Associates, Inc. v. Barving Realty Co., 300 N.Y. 297, 90 N.E.2d 468 (1949), the New York Court of Appeals applied the strict provisions of the forum real property law to protect the security deposit of a lessee. But in the other case, Johnson v. Allen, 108 Utah 148, 158 P.2d 134 (1945), the court gave priority to its policy of allowing a forum real estate broker to recover his commission for the sale of foreign land, the employment contract being valid under the forum law of the contract but not under the law of the situs.

⁹⁵ Beauchamp v. Bertig, 90 Ark. 351, 119 S.W. 75 (1909); Deason v. Jones, 7 Cal. App. 2d 482, 45 P.2d 1025 (1935).

⁹⁶ Evans v. Beaver, 50 Ohio St. 190, 33 N.E. 643 (1893).

⁹⁷ Swank v. Hufnagle, 111 Ind. 453, 13 N.E. 105 (1887); Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902); Myers v. Steenberg, 206 Ala. 457, 90 So. 302 (1921); Hayden v. Stone, 13 R.I. 106 (1880); Taylor v. Leonard, 275 S.W. 134 (Tex. Civ. App., 1925); Walling v. Christian and Craft Grocery, 41 Fla. 479, 27 So. 46 (1899).

⁹⁸ Heaton v. Eldridge and Higgins, 56 Ohio St. 87, 46 N.E. 638 (1897); Barbour v. Camp-

bell, 101 Kan. 616, 168 Pac. 879 (1917); Franklin Sugar Refining Co. v. Martin-Nelly Grocery Co., 94 W. Va. 504, 119 S.E. 473 (1923).

⁹⁹ For a full analysis of the Statute of Frauds in the conflict of laws, see Ehrenzweig, *The Basic Conflicts Rule of the Statute of Frauds: Validation of the Contract*, 59 COLUM. L. REV. n.p. (1959). The policy to prevent fraud may account for cases such as Burr v. Beckler, 264 Ill. 230, 231, 106 N.E. 206, 207 (1914) where the wife was "induced to execute a note and trust deed by the false and fraudulent representation;" Topp v. White, 59 Tenn. 165, 172 (1873) fraud by the vendor "in concealing [from the vendee] the true state of his title;" Andrews v. Torrey, 14 N.J. Eq. 355, 358 (1862) where a "bond and mortgage were given for a specific purpose, and . . . [were] fraudulently misappropriated by the mortgagee."

¹⁰⁰ The author's thesis finds support in research recently completed in other fields of conflicts law bearing on contracts. See the series of articles by Ehrenzweig: *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); *The Real Estate Broker and the Conflict of Laws*, 59 COLUM. L. REV. 303 (1959); *Contractual Capacity of Married Women and Infants in the Conflict of Laws*, 43 MINN. L. REV. 899 (1959); Book Review (CARNAHAN, *CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS*, 1958), 12 J. LEGAL ED. 137 (1959); *The Statute of Frauds in the Conflict of Laws*, 59 COLUM. L. REV. (1959); *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. (1959).