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CONSTITUTIONAL JURISDICTION OVER TANGIBLE CHATTELS

ROBERT A. LEFLAR*

By the weight of American authority, if a chattel be brought into a state without the assent of the non-resident owner of a valid title interest therein, the state into which the chattel is removed will refuse to divest his title save by reason of his own voluntary act. If A in Arkansas takes from B a chattel mortgage, or executes to B a conditional sale, of an automobile or any other tangible chattel, and B then removes the chattel into Missouri and later sells it there to a bona fide purchaser P, A's non-possessory interest being unrecorded in Missouri, the effect of the later transaction upon A's prior title will probably depend upon whether he assented, expressly or impliedly, to the removal of the chattel. If he did assent, he will be bound by the Missouri law which destroys unrecorded interests in favor of bona fide purchasers; if he did not assent, the Missouri law will be held not to have affected his interest. Most of the American states would reach the same result as does Missouri on this set of facts, at least in the case in which A did not assent to the removal of the chattel into the second state. Several states would, however, reach the opposite result. If the chattel were instead removed from Arkansas to Texas, and there sold to the bona fide purchaser P, the law of Texas would declare that P acquired a title superior to A's regardless of whether A had assented to the removal or not. Some

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2. Nat. Bank. of Commerce v. Morris, 114 Mo. 255, 21 S. W. 511, 19 L. R. A. 463 (1893); Schmidt v. Rankin, 193 Mo. 254, 91 S. W. 78 (1906); Note (1921) 22 U. OF Mo. BULL. LAW SER. 31.

3. Beale,Jurisdiction over Title of Absent Owner in a Chattel (1927) 40 HARV. L. REV. 805; Carnahan, Tangible Property and the Conflict of Laws (1935) 2 UNIV. OF Chi. L. REV. 345; Note (1930) 43 HARV. L. REV. 1293. Some states do not apply their recording acts to any interests arising outside the state. See infra note 40.

other states in the position of Texas would reach the same result. This condition of the law at once suggests a further problem. Suppose that after purchasing the chattel in Texas, P in turn removes it to Missouri, where A brings suit against him to recover it. Are the Missouri courts free to hold, as they would in the case first put, that one (A) who owns an interest in a chattel will not be deprived of it by the law of a state to which he has not voluntarily submitted his interest in it by assenting to its presence there, or must the courts of Missouri, or of any other state in which the issue thereafter arises, recognize as valid the title which the law of Texas has created in P? That is the question to which this article is ultimately directed.

GENERAL RULE—LAW OF SITUS GOVERNS

It has now become well settled at the common law that the existence or non-existence of any title in a chattel, whether it be absolute ownership or the slightest non-possessory interest, is determined by the law of the place where the chattel was physically located at the time the title, if any, was created. The old notion that the law of the owner's domicile determined what interests arose in his tangible chattels is now so thoroughly repudiated that it does not merit further discussion. The law of the place where the chattel is situated determines whether title passes on a purported sale, whether an alleged chattel mortgage is valid, what interests if any arise by reason of a

5. *Infra* notes 44-49, inclusive.

6. Story, *Conflict of Laws* (2d ed. 1841) 308. Due largely to Story's influence, a few American cases have said that *mobilia sequuntur personam.* See Minor v. Cardwell, 37 Mo. 350 (1866); Edgerly v. Bush 81 N. Y. 199 (1880). These statements are today explained as *dicta* merely.


9. Roach v. St. Louis Type Foundry, 21 Mo. App. 118 (1886); Brown v. Koenig, 99 Mo. App. 653, 74 S. W. 407 (1903); Youssoupooff v. Widener, 246 N. Y. 174, 158 N. E. 64 (1927); *Restatement, Conflict of Laws* (1934) § 265; Ireland, *Conflict of Laws As to Chattel Mortgages in Louisiana* (1936) 10 *Tulane L. Rev.* 275. Of course, the validity of the mortgage may in turn depend upon the validity of the alleged debt secured by it, which may be controlled by the law of the place of contracting rather than the situs of the security. Trower Bros. Co. v. Hamilton, 179 Mo. 205, 77 S. W. 1081 (1904). See Note (1923) 57 A. L. R. 702.

10. Corbett v. Riddle, 209 Fed. 811 (C. C. A. 4th, 1913); Morris v. Cohn, 55 Ark. 401, 17 S. W. 342 (1891); *Restatement, Conflict of Laws* (1934) § 272; Notes (1923) 25 A. L. R. 1153; (1928) 57 A. L. R. 535; (1933) 87 A. L. R. 1308. *Cf.* Enterprise Optical Mfg. Co. v. Timmer, 71 Fed. (2) 295 (C. C. A. 6th, 1934), pointing out that though the conditional seller's interest arising at the situs will be recognized elsewhere as valid, it may nevertheless be given some other name at the forum.

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conditional sale, the efficacy of an assignment for the benefit of creditors, the validity of trusts or of other equitable interests created either by operation of law or the acts of the parties, and of gifts, the existence and abandonment of all kinds of liens and pledges, the creation of powers, rights acquired by attaching creditors and purchasers at execution sale, and the existence or non-existence of all other rights in rem in chattels. Also, tangible chattels are taxable only at their situs.

It is true, of course, that there are a number of situations remaining in the law in which, for the sake of convenience, reference is still made to the law of the owner's domicile to determine what interests arise in chattels upon certain events. For example, it is the general rule that, on a person's death, the succession to his movable property is governed by the law of his domicile, as is also the validity of a will of his movables. This is deemed a

11. Smith v. Jones, 63 Ark. 232, 37 S. W. 1052 (1896); Brown v. Knox, 6 Mo. 302 (1840). Most American states will recognize the validity, as to chattels within their borders, or an assignment validly made in another state, but they reserve the right not to do so. See Barnett v. Kinney, 147 U. S. 476 (1893); Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624 (1899); Einer v. Deynoodt, 39 Mo. 69 (1866), reaffirming Einer v. Beste, 32 Mo. 240 (1862); RESTATEMENT, CONFLICT OF LAWS (1934) §§ 263, 264.

12. In Hutchison v. Ross, 262 N. Y. 381, 187 N. E. 65 (1933), 89 A. L. R. 1007 (1934), the court emphasized the law of the situs and that "intended" by the parties, which coincided, as governing. See People's Loan & Inv. Co. v. Universal Cr. Co., 75 F. (2d) 545 (C. C. A. 8th, 1935) (trust receipts); RESTATEMENT, CONFLICT OF LAWS (1934) § 294. The rule as to voluntary trusts inter vivos is not yet clearly established by the decisions. The creation of constructive or resulting trusts has always been deemed to be governed by the law of the situs of the res. Depas v. Mayo, 11 Mo. 314 (1848); Cooper v. Standley, 40 Mo. App. 138 (1890).


17. There is some question as to whether rights of foreclosure and redemption, the privilege of a conditional seller to repossess the article sold, and the like, are rights in the res itself, or contractual rights, or possibly remedial only. See Franklin Motor Car Co. v. Hamilton, 113 Me. 63, 92 Atl. 1001 (1915); T. G. Jewett, Inc. v. Keystone Driller Co., 282 Mass. 469, 185 N. E. 369 (1933); American Hoist & Derrick Co. v. Trustee & Registrar Corp., 27 S. W. (2d) 437 (Mo. App. 1930). See Comment (1933) 43 YALE L. J. 323; Note (1930) 69 A. L. R. 622.


good rule because it establishes uniformity in distribution of what is essentially one estate to a group of heirs (distributees) who will thereby avoid unfair preferences among themselves. That it is not the domicile, however, but rather the law of the *situs* of each particular item in the movable estate, which has ultimate control over the distribution, is illustrated by the fact that the *situs* of any particular tangible movable *res* can insist upon applying to it the law of distribution of the *situs* as against the law of the domicile. It is the law of the *situs* which basically governs, though by the law of Conflict of Laws of most American states, the *situs* voluntarily refers questions of distribution of decedents’ estates to the law of each decedent’s domicile.

The situation is the same as to matrimonial property interests. The general rule is well settled that when a man or woman, either or both of whom owns movable property in various places, become married to each other, their marital interests in each other’s goods are fixed as to all the movables wherever located by the law of the husband’s domicile at the time of marriage. This seems desirable, since all the goods really constitute a single body of property, as far as the spouses’ interests are concerned, and the law selected is the only one under which the scattered mass of goods can be conveniently treated as a unit. But the Missouri court in *Locke v. McPherson* clearly demonstrated that the general rule is to be applied only as the law of the *situs* says that it shall be. In that case a Missouri woman owning Missouri movables married a New York domiciliary, then died. Her domicile was admittedly changed to New York. The court in effect held that the husband’s interest in the wife’s goods was only such as was given him by Missouri law. Doubtless it was moved by a local public policy favoring the liberal Missouri Mar-

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20. Two states do this by statute. ILL. REV. STATS., ANN. (Smith-Hurd, 1929) c. 6, § 7; id c. 39, § 1; MISS. CODE, ANN. (1930) § 1401. And see Locke v. McPherson, 163 Mo. 493, 63 S. W. 726, 52 L. R. A. 420 (1901); Matter of Chappell, 124 Wash. 128, 213 Pac. 684 (1923), in which the result was reached without statute.

21. 2 BEALE, CONFLICT OF LAWS (1935) § 303.2; GOODRICH, CONFLICT OF LAWS (1927) 368. And see City Bank Farmers' Tr. Co. v. Schnader, 293 U. S. 112 (1934): “The power to regulate the transmission, administration and distribution of tangible personal property rests exclusively in the State in which the property has an actual situs, regardless of the domicile of the owner... New York (domiciliary) laws had no bearing other than that attributable to their implied adoption by Pennsylvania (situs).”

22. A few cases say the “matrimonial domicile,” but this has always been discovered to be the same as the husband’s domicile. Fisher v. Fisher, 2 La. Ann. 774 (1847); Percy v. Percy, 9 La. Ann. 185 (1854); STORY, CONFLICT OF LAWS (2d ed. 1841) § 146.

23. RESTATEMENT, CONFLICT OF LAWS (1934) § 289; LEFLAR, COMMUNITY PROPERTY AND CONFLICT OF LAWS (1933) 21 CALIF. L. REV. 221, 224.

24. 263 Mo. 493, 63 S. W. 726, 52 L. R. A. 420 (1901).
ried Women's Property Act as against the old common law rule, still operative in New York, which practically gave a married woman's entire movable estate to her husband. Clearly, the Missouri court had power to decide as it did, since Missouri was the *situs* of the movables.

Likewise for the sake of uniformity of marital interests as between the spouses themselves (they being the only ones directly concerned) it is usually held that the nature of their common ownership in chattels acquired during the marriage is fixed by the law of their domicile\(^\text{25}\) rather than by the law of the *situs* of each individual item of goods, but again the law of the *situs* is ultimately controlling and, though it ordinarily refers the question to the law of domicile, it may and sometimes does insist upon determining marital property interests in accordance with its own substantive rules.\(^\text{26}\)

The underlying power of the *situs* is emphasized by the two recent United States Supreme Court decisions in the cases of *Clark v. Williard*. In the first decision,\(^\text{27}\) it was declared that an Iowa judicial proceeding vesting title to all the assets owned by an Iowa corporation, including some in Montana, in a “statutory successor,” was entitled to full faith and credit in Montana. Then the Montana Supreme Court announced that by the law of that state (the *situs*), buttressed by a “strong local public policy” there, the Montana assets were still subject to execution by Montana judgment creditors of the defunct corporation.\(^\text{28}\) The second decision\(^\text{29}\) of the federal Supreme Court, on the same facts, virtually stated that since Montana was the *situs* it had the power to do what it did, regardless of the wisdom of its policy. The principal analogy cited in support of the decision was to the cases involving assignments for the benefit of creditors,\(^\text{30}\) which solve a similar problem in the same fashion.

**Removal of Chattels Across State Lines**

The mere removal of goods across a state line does not change property interests in the goods. If A is the owner of an automobile located in Arkansas, or has a chattel mortgage on it, or a conditional seller's interest in it, or an

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\(^{25}\) Nelson v. Goree's Adm'r., 34 Ala. 565 (1859); Snyder v. Stringer, 116 Wash. 131, 198 Pac. 733 (1921); Restatement, Conflict of Laws (1934) § 290; Leflar, Community Property and Conflict of Laws (1933) 21 Calif. L. Rev. 221, 230.

\(^{26}\) Shumway v. Leakey, 67 Cal. 458, 8 Pac. 12 (1885); Gooding Mill. & Elev. Co. v. Lincoln County State Bk., 22 Idaho 468, 126 Pac. 772 (1912); Smith v. McAtee, 27 Md. 420 (1867).

\(^{27}\) Clark v. Williard, 292 U. S. 112 (1934).


\(^{29}\) Clark v. Williard, 294 U. S. 211 (1935).

\(^{30}\) See supra note 11.
equitable title to it, or any lesser interest, possessory or non-possessory, having the character of an ownership, the physical transfer of the res into Missouri or any other state will not destroy A's interest, whether the transfer is with A's assent or without it. There is very little disagreement among the authorities on this. Occasionally a court has said that it would refuse to recognize some interest created under the law of another state, but almost invariably an analysis of the actual facts before the court in each particular case will reveal that the new interest which was recognized in place of the old arose out of some new transaction concerning the chattel after its removal. Typical of such new transactions are bona fide purchases and levies by attaching creditors. It is obvious in such cases that the old interest persisted

31. Restatement, Conflict of Laws (1934) §§ 260 (general), 266-67 (chattel mortgages), 273-74 (conditional sales), 280 (liens and pledges), 291-93 (marital property); Fuller v. Webster, 5 Boyce 538, 95 Atl. 335 (1915) (Pennsylvania bona fide purchaser's interest recognized in Del. though it could not have arisen there); Newman v. Wilson, 1 La. Ann. 48 (1846) (Mississippi sheriff's lien in Louisiana); Fears v. Sykes, 35 Miss. 633 (1858) (title gained by adverse possession, chattel removed); Robertson v. Staed, 135 Mo. 135, 36 S. W. 610 (1896) (Mexican receiver's title in Mo.); Cooper v. Phila. Worsted Co., 68 N. J. Eq. 622, 60 Atl. 352 (1905) (Pennsylvania bailor's interest not decreased by removal of goods to New Jersey, though New Jersey law would have been only a conditional seller); C. T. Dougherty Co. v. Krimke, 105 N. J. L. 470, 144 Atl. 617 (1929) (power created by New York law exercisable in New Jersey); Born v. Shaw, 29 Pa. 288, 72 Am. Dec. 633 (1857) (Virginia title good in Pennsylvania, though same title would not have arisen in Pennsylvania); Casill v. Wooldridge, 8 Baxt. (Tenn.) 580 (1876) (receiver's Arkansas title good in Tennessee); Phillips v. Eggert, 145 Wis. 43, 129 N. W. 654, 32 L. R. A. N. S. 132, Ann. Cas. 1912A, 1112 (1911) (sheriff's lien valid though goods removed to another state). There are a great many cases to this general effect, but those cited are fair examples. Contra: Forgan v. Bainbridge, 34 Ariz.408,274 Pac. 155 (1928).


In a few cases it is said that a statutory lien arising under the law of one state will not be recognized in another state. Marsh's Adm't v. Elsworth, 37 Ala. 85 (1860); Merrick & Fenno v. Avery, Wayne & Co., 14 Ark. 370 (1854); Woodward v. Roane, 23 Ark. 523 (1861). In these cases also it appears that there was regularly some new transaction in the second state efficient to defeat a recognized lien. Apart from that, it would sometimes be true that the statute creating the lien would create it as an interest valid and enforceable only in the state of its creation, as is generally said to be true of powers created by operation of law. Restatement, Conflict of Laws (1934) § 282. Cf. C. T. Dougherty Co. v. Krimke, 105 N. J. L. 470, 144 Atl. 617 (1929). And the cases might be explained on the theory that even though the lien was recognized as valid, the law of the second state afforded no appropriate remedy for enforcement of the foreign statutory right.
after the chattel was brought into the second state, and was defeated only by the new transaction the effect of which upon the title was determined by the law of the then situs of the chattel, the second state.

The principle is well exemplified by the removal of goods subject to matrimonial property interests from a community property state to a common law state, or vice versa. If H and W, husband and wife, own goods by the community in Louisiana, then bring them into Missouri, their common ownership persists. It will persist, perhaps in the form of a joint tenancy which is as near as Missouri can come to an equivalent of the community, even after the goods are reinvested in other valuable things in Missouri, though Missouri could hold that new types of interests developed out of the Missouri transaction. By the same token, if one of the spouses takes separate property with him from Missouri to California, it remains separate property after it is taken into the community state even though it would have been community property had it first been acquired there. Possibly it might become community property by means of new dealings subsequent to its arrival in California, but that is a different matter.

Thus it is seen that as a matter of common law the removal of chattels across state lines does not affect property interests in them. Suppose, however, that some state undertook to change this rule, and to declare that cer-


34. Stephen v. Stephen, 36 Ariz. 235, 284 Pac. 158 (1930); Re Thornton, 1 Cal. (2d) 1, 33 P. (2d) 1, 92 A. L. R. 1343 (1934); Douglas v. Douglas, 22 Idaho 336, 125 Pac. 796 (1912); Young v. Templeton, 4 La. Ann. 254 (1849); Bosma v. Harder, 94 Ore. 219, 185 Pac. 741 (1919); Oliver v. Robertson, 41 Tex. 422 (1874); Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914, 13 Ann. Cas. 839, 12 L. R. A. (N. S.) 921 (1907).

35. Leflar, Community Property and Conflict of Laws (1933) 21 CALIF. L. REV. 221, 228.

36. A sharp distinction must be drawn between actual ownership and mere incidents of ownership. The latter are always subject to the law of the place where the res is for the time being located. They include such matters as the use to which an admitted owner may put his property, the completeness of his control over it, inheritance of it, and the share which a spouse takes in it on the death of the owner. Minor v. Cardwell, 37 Mo. 350 (1866). For example, in common law states a wife takes dower in her husband's separately owned personality on his death; in community property states she does not. So if a husband's separate property is moved from Missouri to California, it remains his separate property, but California is free to hold that his wife takes no dower in it. In re Estate of Drishaus, 199 Cal. 369, 249 Pac. 515 (1926). Of course the situs usually refers this particular matter to the law of the domicile. Supra note 19.
ertain preexistent interests should automatically cease, or should not be recognized as validly existent, when the chattel came within the state, without any new transaction concerning the chattel. Would this be permissible under the federal Constitution?

Undoubtedly this would amount to depriving the former owner of his property. When the chattel was in State X, he had a property interest in it; when he took it, or allowed it to be taken, into State Y, he would lose his property. Is this deprivation of property accomplished by due process of law? It is impossible to discover anything even remotely resembling the normal processes of the law in connection with it. There is certainly no judicial proceeding. There is no consensual or other transaction between parties to which the law could attach the effect of creation and relinquishment of interests. All that has happened is that the owner of an interest in a res has brought the res into the state. It is, of course, thereby subjected to the police power of the state, and it can even be physically destroyed thereafter if it is dangerous to the public peace, health or welfare, and certainly the law of its new situs may control the legal effect of new transactions concerning it, but to transfer title to it out of one person and into another merely because the res comes within the borders of the state transcends any known exercise of the police power. It is impossible to reach any conclusion other than that such a transfer would violate the due process of law clause of the Fourteenth Amendment. The United States Supreme Court has not as yet, however, had occasion to pass upon the exact problem.37

Transactions Subsequent to Removal of Chattel

It may be assumed, then, that a chattel has been brought from State X into State Y, and that A’s prior interest created in State X still persists in State Y. At this point a new transaction occurs which by the law of State Y

37. In Green v. Van Buskirk, 7 Wall. 139 (1868), New York was required to give full faith and credit to an Illinois adjudication of the title of an Illinois chattel. In such cases as Hervey v. R. I. Locomotive Works, 93 U. S. 664 (1876), no constitutional issue is presented. The exact problem is most nearly approached by a line of California cases culminating in Re Thornton, 1 Cal. (2d) 1, 33 P. (2d) 1, 92 A. L. R. 1343 (1934). In order to avoid the unfairness as to dower and curtesy suggested supra note 36, a California statute was enacted providing that all property acquired anywhere after marriage, by either spouse, regardless of domicile, which would have been community property had it been acquired while they were domiciled in California, should be community property. The statute was finally held to be invalid as violative of both the due process and the privileges and immunities clauses. The violation of the latter clause arose from the fact that the statute was deemed to require non-citizens to relinquish their separate property rights as a condition to acquiring a domicile in California.

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would operate to put title to the chattel into P, but which by the law of State X would have no such legal effect, merely leaving the title in A.

The law is very clear that if the prior owner A assented either expressly or impliedly, to the removal of the chattel into State Y, the law of that state will determine the effect of the new transaction upon the title to it. This is so under the general rule that the law of the *situs* is the governing law. If the possessor of the chattel (someone other than A) sells it to a *bona fide* purchaser P, or P as a creditor of the possessor attaches it in good faith, and by the law of the *situs* this operates to put title in P as against A, that is what happens. The title has passed.38 By the law of several jurisdictions, this follows from A's failure to record his non-possessory interest in the state to which he has caused the chattel to be removed.39 Some states, however, attach no such significance to a failure to record. They follow the substantive common law rule that a legal title is unaffected by an unauthorized sale even to a *bona fide* purchaser. If that is the law of the state of *situs*, the subsequent transaction has no effect on the title,40 regardless of what the law of the state from which the chattel was removed might have said. In any event, it is the law of the state to which the chattel was removed, and in which it was situated at the time of the transaction, which controls.


39. This appears to be the rule in Missouri generally. Geiser Mfg. Co. v. Todd, 204 S. W. 287 (Mo. App., 1918), 224 S. W. 1006 (1920) (prior Arkansas mortgage unrecorded in Mo. defeated by later Missouri mortgage); Hollipeter-Shonyo & Co. v. Maxwell, 205 Mo. App. 357, 224 S. W. 113 (1920) (garage repairman's lien on car prevails over Arkansas conditional seller's title unrecorded in Missouri); Adamson v. Fogelstrom, 221 Mo. App. 1243, 300 S. W. 841 (1927) (Missouri attachment prevails over Kansas mortgage unrecorded in Missouri). Also see Belestin v. First Nat. Bk., 177 Mo. App. 300, 164 S. W. 160 (1914), applying the same principle to a negotiable instrument.

40. Shapard v. Hynes, 104 Fed. 449 (C. C. A. 8th, 1900); Public Parks Amusement Co. v. Embree-McLean Carriage Co., 64 Ark. 29, 40 S. W. 582 (1897); Com'l. Cr. Co. v. Gaiser, 134 Kan. 552, 7 P. (2d) 527 (1932); Langworthy v. Little, 12 Cush. 109 (1853); Cleveland Mach. Works v. Lang, 67 N. H. 348, 31 Atl. 20, 68 A. S. R. 675 (1893). Some extrastate non-possessory interests may not be covered by the Missouri recording acts, for instance. In such case, the extrastate interest persists despite the subsequent transaction. Allison v. Bowles, 8 Mo. 346 (1844); Murray v. Fox, 11 Mo. 555 (1848); Stewart, Sheriff v. Ball's Adm'r., 33 Mo. 154 (1862).
When the chattel is taken from State X into State Y without the assent of the prior owner A, there is a greater divergence in the authorities. The American states may be divided into three groups in reference to their manner of handling this problem. First are the states which hold that foreign-created titles will not be affected by subsequent transactions even though the owner did assent to the removal of the chattel; a fortiori, the same result will be reached if the removal was without his assent. The presence or absence of such assent has no bearing in these states.

The second group of states does attach significance to the absence of assent. These jurisdictions hold that their recording acts and other rules favoring bona fide purchasers, attaching creditors and the like will have no operation against a prior owner who did not consent to the goods being brought within the state. Missouri falls into this group of states. It is notable, however, that the courts of these states regularly reach this result by interpreting their recording acts or related rules of law as simply not applying to chattels thus brought in without the owner's assent. They do not have occasion to say what would be their attitude as to the validity of statutes expressly subjecting such interests to the local title-destroying laws, since they find that such statutes have not been enacted, or are not applicable to the facts of the particular case before the court.

In the third group of states the local laws protecting bona fide purchasers are deemed applicable to chattels brought into the state even without a prior owner's assent. Some of the states in this group (Texas particularly) pro-

41. Supra note 40. See Creelman Lbr. Co. v. Lesh, 73 Ark. 16, 83 S. W. 320 (1904); Wray Bros. v. H. A. White Auto Co., 155 Ark. 153, 244 S. W. 18 (1922); Mercantile Acc. Co. v. Frank, 203 Cal. 483, 265 Pac. 190, 57 A. L. R. 696 (1928).

42. Struble-Werneke Mot. Co. v. Metropolitan Sec. Corp., 93 Ind. App. 416, 178 N. E. 460 (1931); Franklin Motor Car Co. v. Hamilton, 113 Me. 63, 92 Atl. 1001 (1915); Walker Motor Exch. v. Lindberg, 86 Mont. 513, 284 Pac. 270 (1930); Cooper v. Phila. Worsted Co., 68 N. J. Eq. 622, 60 Atl. 352 (1905); Hart v. Oliver Farm Equipment Sales Co., 37 N. M. 267, 21 P. (2d) 96, 87 A. L. R. 963 (1933); Goetschius v. Brightman, 245 N. Y. 186, 156 N. E. 660 (1927). The most complete collection of the cases appears in Carnahan, Tangible Property and the Conflict of Laws (1935) 2 UNIV. oF CH. L. REv. 345. It is frequently difficult to tell from a single case whether a state falls within the first or second classification here suggested, since the courts often emphasize the absence of consent even though they would reach the same result had there been consent to removal.

tect all *bona fide* purchasers from the moment the chattel is brought into the state,\(^4\) some protect such purchasers only if the non-possessory extrastate interest remains unrecorded in the second state for a certain length of time\(^5\) or for a certain length of time after the prior owner learns of the chattel's presence at the new place,\(^6\) some protect purchasers only as against interests which are also unrecorded in the state from which the chattel was removed,\(^7\) one state on a theory of supposed "comity" protects *bona fide* purchasers only when the prior interest thereby defeated arose in some state which protects all *bona fide* purchasers under the same circumstances,\(^8\) and

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Other states usually cited as reaching the same result are Louisiana, Michigan, Pennsylvania and Illinois. 11 C. J. 426, notes 14-17. See Walworth v. Harris, 129 U. S. 355 (1889) (a Louisiana case); Devant v. Pecou, 13 La. App. 594, 128 So. 700 (1930); Fuller v. Webster, 5 Boyce 538, 95 Atl. 335 (1915); (Pennsylvania law applied, as *lex sitae*); Judy v. Evans, 109 Ill. App. 154 (1903). See cases cited in Carnahan, *Tangible Property and the Conflict of Laws*, supra note 42, at 378. Possibly Virginia belongs in this group also. See Applewhite Co. v. Etheridge, 210 N. C. 433, 187 S. E. 588 (1936) (Virginia law applied, as *lex sitae*); Note (1937) 23 Va. L. Rev. 480. For the same result in a case involving a negotiable instrument, see Embiricos v. Anglo-Austrian Bank, [1905] 1 K.B. 677, Cf. Beale, *Jurisdiction over Title of Absent Owner in a Chattel* (1927) 40 Harv. L. Rev. 805, 807.

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\(^45\) Professor Carnahan lists Alabama, Georgia, Mississippi, Oklahoma, Oregon and Washington as having recording acts of this type. *Supra* note 42, at 380.

\(^46\) By the Uniform Conditional Sales Act, § 14, and the Uniform Chattel Mortgage Act, § 37, the owner of the non-possessory interest is given ten days in which to record after he receives notice of the filing district to which the goods have been removed. Ten jurisdictions are listed as having adopted the Conditional Sales Act. They are Arizona, Delaware, Indiana, New Jersey, New York, Pennsylvania, South Dakota, West Virginia, Wisconsin and Alaska. 2 UNIF. LAW ANN. (Supp. 1935) 5. Apparently no states have adopted the Chattel Mortgage Act. See Thayer Merc. Co. v. Milltown Bank, 98 N. J. L. 29, 119 Atl. 94 (1922); Universal Cr. Co. v. Finn, 212 Wis. 601, 250 N. W. 391 (1933), for holdings that a *bona fide* purchaser prevails over a conditional seller who did not assent to removal of the chattel and who fails to record within ten days as required by the Act.

\(^47\) This appears to be the Colorado rule. For cases in which the Colorado *bona fide* purchaser prevailed over the extrastate "secret lien," see Turnbull v. Cole, 70 Colo. 364, 201 Pac. 887 (1921), 25 A. L. R. 1149 (1923); Com'I. Cr. Co. v. Higbee, 92 Colo. 346, 20 P. (2d) 543 (1933); Amer. Eq. Assur. Co. v. Hall Cadillac Co., 93 Colo. 186, 24 P. (2d) 980 (1933); whereas in Flora v. Julesburg Mort. Co., 69 Colo. 238, 193 Pac. 545 (1920), and Mosko v. Matthews, 87 Colo. 55, 284 Pac. 1021 (1930), the non-possessory interest was recorded in the state from which the chattel was removed, therefore deemed not a "secret lien," and the prior owner prevailed over the Colorado *bona fide* purchaser. See Note (1934) 6 Rocky Mt. L. Rev. 221.
several states protect *bona fide* holders of liens given to tradesmen or mechanics to secure payment for value added to the chattel at the request of the possessor.\footnote{49}

The reasons which induce a state to protect *bona fide* purchasers as against prior owners are quite clear, whether one agrees with them or not. They are the same reasons which produced the market overt in other days, reasons fostered by traders in the marketplace whose interest lies in the security of transactions as opposed, frequently, to the interest of less active property-owning groups in the security of ownership. The prevalence of one interest over the other is a matter of the dominant public policy of the time and place, as it makes itself felt in legislatures and courts,\footnote{50} and whichever interest dominates will have to be respected by the lawyer.

Professor Beale has urged that the state to which a chattel is removed without the assent of the owner of an interest therein is without “jurisdiction” to affect the non-assenting owner’s interest.\footnote{51} Since the word “jurisdiction” when used in this connection is commonly thought of as a synonym for “power” to act or attach legal consequences to the facts, and since on these facts the only limitation on the “power” of the state to which the chattels were removed would be imposed by the federal constitution,\footnote{52} it was probably thought by some that Professor Beale meant that such a state (like Texas) was depriving the non-assenting owner of his property without power to do so, so that the purported deprivation was a nullity. But Professor Beale was careful to explain that he did not mean this, that he used the word “jurisdiction” in the sense of “the power of a state to create rights which under the principles of the common law will be recognized as valid in other


49. For example, garagemen’s liens for car repairs: Willys-Overland Co. v. Evans, 104 Kan. 632, 180 Pac. 235 (1919); Universal Cr. Co. v. Marks, 164 Md. 130, 163 Atl. 810 (1933). And see Com't Banking Corp. v. Berkowitz, 104 Pa. Sup. 523, 159 Atl. 214 (1932) (New Jersey lien); Walworth v. Harris, 129 U. S. 355 (1889) (in which a Louisiana factor’s lien cut off a prior Arkansas landlord’s lien.)


51. Beale, *Jurisdiction over Title of Absent Owner in a Chattel* (1927) 40 HARV. L. REV. 805. See also 1 Beale, *Conflict of Laws* (1935) §§ 50.2ff. This view was taken in section 52 of the Tentative and Proposed Final Drafts of the Restatement of Conflict of Laws, but that section was omitted from the final draft.

52. Presumably by the due process clause of the Fourteenth Amendment.
states, which suggests that his "lack of jurisdiction" is equivalent to a kind of "non-conclusive jurisdiction" by which a state has constitutional power to act though its exercise of the power need not be recognized elsewhere.

That jurisdiction in the sense of constitutional power does exist enabling an American state to change or destroy the title interests of an absent owner of a chattel brought into the state without his assent can scarcely be denied today. Professor Carnahan analyzed the cases two years ago, reaching that definite conclusion, and subsequent authorities bear him out. A full half of the states in the Union actually exercise the jurisdiction in one way or another. The concept of market overt, upon which the jurisdiction is based, has been accepted by the common law for centuries. The Commissioners of Uniform State Laws were sufficiently certain of the jurisdiction to include provision for its exercise in two of their Acts. New titles by adverse possession have always been acquired regardless of the assent of the dispossessed owner to the presence of the chattel at the place where the adverse possession occurred. Forfeiture to the state of chattels being used in violation of law is enforceable to destroy titles of non-resident owners who assent neither to the illegal use of the chattel nor its removal. All authorities agree that jurisdictional facts should be as few and simple as possible. The fre-

53. Beale, op. cit. supra, note 51, at 811. And see Harding, Joseph Henry Beale: Pioneer (1937) 2 Mo. L. Rev. 145. The American Law Institute adopts the same definition of "jurisdiction," Restatement, Conflict of Laws (1934) § 42; but follows it by the statement that, "Under the Constitution of the United States, the States cannot create interests if they have no jurisdiction." Id., § 43. This identity of "jurisdiction" with "constitutional power" produces a terminology designed to avoid confusion, but it at least was not presented in Professor Beale's original article, and is not applied by the American Law Institute to the case of chattels removed without the owner's assent.


55. Carnahan, Tangible Property and the Conflict of Laws (1935) 2 U. of Chi. L. Rev. 345, 355. See also Note (1930) 43 Harv. L. Rev. 1293.

56. Supra notes 44 to 49, inclusive.

57. The protection of purchasers in market overt was substantially established in English law by 1473, and was firmly settled by 1596. See 5 Holdsworth, History of English Law (1924) 110.

58. Supra note 46.

59. Howell v. Hair, 15 Ala. 194 (1849); Newcombe v. Leavitt, 22 Ala. 631 (1853); Smith, Adm't. of Taylor v. Newby, 13 Mo. 159 (1850); Alexander v. Torrence, 6 Jones L. 260 (1858). And see Shelby v. Guy, 11 Wheat. 361 (1826); Brown v. Brown, 5 Ala. 508 (1843); Restatement, Conflict of Laws (1934) § 259.

quent difficulty of proving assent or non-assent as a fact, especially in cases where the owner of an interest in a chattel such as an automobile gives possession of it to another without express instructions or agreement as to where it is to be taken or used,\(^{60a}\) indicates that assent to removal is not the type of thing which should be deliberately adopted as a jurisdictional fact unless the authorities absolutely require it. Obviously they do not. The conclusion is almost inevitable that jurisdiction in the federal constitutional sense depends only upon the physical presence of the res, though the exercise of the jurisdiction will frequently depend upon other factors.

**Non-Recognition of Valid Titles**

The problem suggested at the beginning of this article may now be re-stated. A owns a title interest in a chattel in Arkansas (or in Missouri). The chattel is wrongly taken without A's assent into Texas, where it is sold to a bona fide purchaser P, who by Texas law thereby acquires a title good against A and all other prior owners. P then takes the chattel to Missouri (or to Arkansas or any other state) by whose law P would not on these facts have acquired good title as against A.\(^{61}\) A there brings action to recover the chattel. May the Missouri court apply its own Conflict of Laws rule and hold in favor of A, or is it bound to respect the Texas rule favoring P?

A major premise possibly useful in answering this question may be taken as established. It is that the mere removal of a chattel across state lines, without any subsequent transactions concerning the chattel, cannot operate to take pre-existent valid title interests out of one person and put them into another. This would amount to taking property without due process of law.\(^{62}\) The usefulness of this possible major premise depends upon the availability of a suitable minor premise, towit, that P in Texas did acquire such a valid title interest.

Courts faced with this problem have a few times refused to recognize P's Texas title. The Arizona court did this in *Forgan v. Bainbridge*.\(^{63}\) In that case, A's title was acquired in Illinois, from which state the chattel was without A's assent taken to Texas and sold to P, then removed to Arizona where A sought to recover it from P. In allowing recovery the court said:

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60a. For illustration of this difficulty, see the varying interpretations of Fuller v. Webster, *infra* note 68.
61. *Supra* notes 42, 43.
63. 34 Ariz. 408, 274 Pac. 155 (1928).
“... we do not question the interpretation placed by the Texas courts on the bill of sale from Tallmadge to Bibb [P], nor that, in Texas, it gave the latter a good title against the mortgagee [A], any more than we question that the Illinois mortgage gave, in that state, a right superior to that of defendants. We are called on merely to determine which title is entitled to priority under our laws, and, on the grounds that the Illinois title was acquired in a manner in harmony with our law, and the Texas title is one repudiated by us, and that Illinois grants to us the reciprocity which Texas denies, we think a true interpretation of the rule of comity requires that we recognize the priority of the Illinois title.

There was a strong dissenting opinion to the effect that since P’s Texas title was recognizedly a valid one necessarily superseding A’s prior title, the Arizona court could not properly displace it.

One other well known case might be cited as reaching the same result. It is Edgerly v. Bush. In it, A’s chattel was taken without his assent from New York to Canada and there sold to the bona fide purchaser P, in market overt. The chattel was brought back into New York, then again taken to Canada. Both A and P were domiciled in New York. The New York court held for A in his action against P’s assignee for conversion. The reasoning in the case was vague, consisting principally of references to “comity” and the now obsolete notion that the legal effect of transactions concerning chattels is controlled by the law of the domicile of the owner. The case does not clearly recognize that it was destroying an existent title interest in the chattel, rather applying the law of New York to reach the conclusion that no title ever arose in P at all. Yet this case and the Arizona decision are representative of the only discovered judicial authority for non-recognition of a title such as P’s.

On the other hand there are several decisions in which other states have recognized the validity of titles such as P’s acquired in jurisdictions such as Texas. Some of the earliest cases involved titles acquired by adverse possession. A chattel would be stolen from A in State X, removed surreptitiously

64. 34 Ariz. 408, 419, 274 Pac. 155, 159 (1928). Accord, Meyer v. Equitable Cr. Co., 174 Ark. 575, 297 S. W. 846 (1927) (chattel taken from Arkansas to Texas to Arkansas.) And see Metzger v. Columbia Terminals Co., 227 Mo. App. 135, 50 S. W. (2d) 680 (1932). In the latter case, the chattel was taken from Missouri to Pennsylvania, then returned to Missouri by public carrier. A lien which the court assumes would by Pennsylvania law have arisen in favor of the carrier was not enforced in Missouri.
65. 81 N. Y. 199 (1880).
66. Professor Beale says of the reasoning: “The opinion of Chief Judge Folger is not a satisfactory one. It is full of curious and obsolete notions, and avoids any specification of reasons.” Beale, Jurisdiction over Title of Absent Owner in a Chattel (1927) 40 HARV. L. REV. 805.
to State Y and there held adversely by P for the period set by the relevant statute of limitations of State Y. Thereafter the chattel would be removed by P to a third state, or back to State X, and there discovered and claimed by A. It was regularly held that P's title acquired in State Y would be respected, even though he might not have acquired such a title had the adverse possession occurred in State X. In some cases the interests of bona fide purchasers and lienholders acquired in states like Texas have been in other states protected against prior owners in the position of A.

In none of the cases, however, has the problem been dealt with as one involving federal constitutional limitations. The courts in each case have purported to decide the problem purely on the basis of the local law of Conflict of Laws. This attitude can be logically supported only on a theory that the title created by the law of the state to which the chattel was removed without the prior owner's consent was not an absolutely valid title, but only a kind of conditional title, one which could be recognized or refused recognition at will. Such a title would not receive the protection of the due process clause, and the title owner could permissibly be deprived of his property free-


68. Fuller v. Webster, 5 Boyce 538, 95 Atl. 335 (1915), is the best known case of this type. See discussion of this case in Forgan v. Bainbridge, 34 Ariz. 408, 424, 274 Pac. 155, 161 (1928), by Ross, C. J., dissenting. In Fuller v. Webster, the chattel was wrongly taken from Massachusetts to Pennsylvania and there sold to a bona fide purchaser P, whose title, by Pennsylvania law, was superior to that of the prior owner A. The chattel was then removed by P to Delaware where A brought replevin for it. The Delaware court held for P, even though by Delaware law P's title would not have been good, thus respecting the title acquired in Pennsylvania. The case was affirmed without opinion by a divided court in 6 Boyce 297, 99 Atl. 1069 (1916). Professor Beale approves the case as one in which A, by not objecting, consented to the removal of the chattel from Massachusetts to Pennsylvania. Beale, Jurisdiction over Title of Absent Owner in a Chattel (1927) 40 HARV. L. REV. 805, 808. There is, however, no more in the facts of the case to indicate such an implied consent than there is in the Texas cases, supra note 44.

Applewhite Co. v. Etheridge, 210 N. C. 433, 187 S. E. 588 (1936), is a case in which a chattel was removed from North Carolina to Virginia, there sold to a bona fide purchaser, then returned to North Carolina, where it was held that the purchaser's Virginia title prevailed even though he would have acquired no title had North Carolina law prevailed. As is pointed out in (1937) 50 HARV. L. REV. 522, the court did not state whether there was assent by the prior owner to the removal to Virginia or not, but it did decide the case as though the presence or absence of such assent made no difference, which seems to be the only proper approach to the problem in view of the Virginia law which, like the law of Texas, apparently makes nothing turn on such assent. Supra notes 44, 60. And see Bank of Commerce of Earle v. Tubb, 156 Ark. 487, 247 S. W. 1079 (1923); Com'l. Banking Corp. v. Berkowski, 104 Pa. Sup. 523, 159 Atl. 214 (1932).
ly. It would be property, yet somehow classified apart from all other property so as not to fall within the scope of the constitutional guaranties which are accorded to property interests generally. That would be a strange sort of interest in the American constitutional and common law system of property. It might even seem that it had been conjured up in a metaphysician's mind for no other purpose than to explain the phenomenon of this particular group of cases. Yet it is inevitably the type of title produced by the "non-conclusive jurisdiction" previously ascribed to a state to which a chattel has been removed without the assent of the owner of an interest therein.

The alternative to this "now you own it, now you don't" type of title is an ordinary ownership constituting property protected by the due process clause. No careful theory need be devised to explain this alternative. It is the sort of thing which normally results when the law of the situs or a res, determining the effect of a transaction concerning it, creates a title interest in the res.

Furthermore, this alternative is in keeping with the current policy of American law to work toward "uniform interstate enforcement of vested rights," at least in matters having some national significance. The United States Supreme Court has several times recently made use of the full faith and credit clause and the due process clause in the federal Constitution to prevent state courts from nullifying contract rights validly created by the properly governing law of another state or country. The philosophy underlying these decisions is indubitably one favoring the protection of rights once accrued, the elimination of such uncertainties in the ownership of choses in

69. Supra p. 183.
70. The previously mentioned contest of policies between the merchant's interest in the security of transactions and the propertied man's interest in the security of vested ownerships (supra note 50) must now be taken to be already determined by the decision of the state like Texas to put a title in the bona fide purchaser. That contest might well have been decided the other way, and under the Conflict of Laws rule in many states would have been otherwise decided. But in the case under consideration P now has a title acquired in a state like Texas.
71. The possibility that this clause, by its requirement that full faith and credit be given to the "public acts" (statutes) of the states, might compel extrastate recognition of titles arising under recording acts and the like has been suggested. Note (1937) 50 HARV. L. REV. 522. And see Field, Judicial Notice of Public Acts under the Full Faith and Credit Clause (1928) 12 MINN. L. REV. 439; Langmaid, The Full Faith and Credit Required for Public Acts (1929) 24 ILL. L. REV. 383; Ross, "Full Faith and Credit" in a Federal System (1936) 20 MINN. L. REV. 140
action and defenses thereto as would permit one state to say that a right exists and another to say that it does not, both regardless of the single law under which the right arose if it arose at all. The Court has by no means necessarily indicated that the whole law of Conflict of Laws is being made a branch of Constitutional law, but it has indicated that a state will not be permitted to disregard accepted common law theories of the law of Conflict of Laws by applying its own law to destroy rights or defenses which exist altogether under the law of some other state.

It is not difficult to see that the economic and social basis for this philosophy may be as applicable to tangible movable things as to choses in action. An attitude to the effect that non-recognition of existent titles is undesirable, that it is not good economic policy for a title to be valid in one state but invalid across the boundary line, would be readily understandable. That attitude would involve a rejection of the concept of “non-conclusive jurisdiction” as applied to these cases. It would compel the acceptance by every state of all title interests created by the law of the state of situs of a chattel, with change in the title possible only by reason of new transactions concerning the chattel after its removal.


74. This is of course a different matter from merely refusing, for reasons of local public policy, to enforce an admittedly valid foreign executory claim. Such refusal is freely allowed, and involves no deprivation of property since the right remains as valid as ever and may still be taken to some other forum for enforcement. See RESTATEMENT, CONFLICT OF LAWS (1934) § 612; Lorenzen, Territoriality, Public Policy and the Conflict of Laws (1924) 33 YALE L. JOUR. 736; Goodrich, Public Policy in the Law of Conflicts (1930) 36 W. VA. L. Q. 156.