A TREATISE

ON THE

LAW OF DOMICIL,

NATIONAL, QUASI-NATIONAL, AND MUNICIPAL,

BASED MAINLY UPON THE DECISIONS OF THE BRITISH AND AMERICAN COURTS.

WITH ILLUSTRATIONS FROM THE ROMAN LAW AND THE MODERN CONTINENTAL AUTHORITIES.

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PREFACE.

It is the purpose of the following treatise to present to the profession a general discussion of the subject of Domicil in its several phases, — national, *quasi*-national, and municipal. With the exception of a little book by Round, only two general treatises upon the subject have appeared in the English language, — namely, those of Phillimore and Dicey, both works of great excellence, but not meeting the requirements of the American lawyer of the present day; the former having appeared forty years ago, and the latter being written exclusively from the standpoint of the English law, and citing very few of the multitude of American cases. Too much praise cannot be given to the chapter on "National Domicil" contained in Story's "Conflict of Laws." It has had great influence in moulding the jurisprudence of this country on this subject, and in its successive editions has gone far towards keeping the profession informed with regard to the current of judicial decision. Dr. Wharton's chapter on "Domicil," in his treatise on "The Conflict of Laws," has rendered similar service. But the general scope of both of these works necessarily rendered the discussion brief, and forbade extended

references to authorities. In view of this state of legal literature and the wide and constantly increasing application of the principle of Domicil to the determination of legal questions, as well as the great multiplication of decided cases on the subject in this country, it has appeared to the writer that a general treatise on the subject, such as is now presented, might be of some service to the profession, and hence not entirely unacceptable.

It cannot be too carefully kept in mind that the subject of Domicil, whatever may be its application to purely municipal purposes, is a part of the *jus gentium*, and is constantly applied in the field of International Law, public and private, for the determination of relations which extend beyond the limits of a single State or country. It is therefore greatly to be regretted that any distinctive local jurisprudence on the subject should arise in any State or country, and thus add to the already too great want of uniformity in the adjudication of identical questions in different jurisdictions. That such result will to a certain extent naturally and almost necessarily happen is true; but to minimize its extent is manifestly in the interest of both scientific jurisprudence and practical justice. From this consideration, as well as because in many instances much light is thrown by foreign authorities upon points as yet unsettled in our jurisprudence, I have sought to discuss the law of Domicil in the light of all the authorities, domestic and foreign, ancient and modern, available to me; and in view of the fact that many of the foreign authorities are practically inaccessible to a large majority of American lawyers, I have taken

the liberty of quoting from them frequently and in some instances at considerable length.

Some writers on Domicil have included in their discussions the consideration of the "Domicil of Corporations." This, however, is only a figurative application of the term "Domicil," and is in some respects misleading. Its consideration has been omitted from this treatise, which is confined exclusively to the Domicil of natural persons.

The various applications of the principle of Domicil are so numerous, particularly in American law, that it has been found impossible to discuss them in detail and at length without either on the one hand unduly expanding this work or on the other too far sacrificing the discussion of the main subject; to wit, the nature and ascertainment of the Domicil of natural persons. Some of the most important applications have, however, been briefly referred to in a single chapter under the head of "The Uses of Domicil."

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TABLE OF CONTENTS.

CHAPTER I.

INTRODUCTION.

	Section
Municipal Organization of the Roman World	1
Origo and *Domicilium* in the Roman law	2–10
Origo	3, 4
Domicilium	5
Origo not Domicil of Origin	6
Consequences of *Origo* and *Domicilium*	7–10
Subjection to Municipal Burdens	8
Subjection to Local Magistrates; Forum	9
Personal Law	10
Transition to Modern Law	11–16
Personal Law	12
Id. Race Descent	13
Local Laws and Customs	14
Real and Personal Statutes; Return to Domicil	15
Codification and Political Nationality	16
Domicil in British Jurisprudence	17–19
Early English Cases	18
Early Scotch Cases	18*a*
Bruce *v.* Bruce and its Sequents	19
Domicil in American Jurisprudence	20
Present Importance of Domicil in British and American Jurisprudence	21
Bibliography	22–24

CHAPTER II.

USES OF DOMICIL.

	Section
General Remarks	25
Domicil in Public International Law; National Character	26
Naturalization	27
Domicil in Private International and Municipal Law	28 *et seq.*
Status	29
Legitimacy and Legitimation	30
Legal Effects of Legitimation	31
Adoption	32
Paternal Power	33
Guardianship	34
Minority and Majority	35
Marriage	36
Mutual Property Rights of Husband and Wife	37
Construction of Marriage Contracts	37*a*
Capacity of Married Women to make Valid Contracts	38
Jurisdiction in Divorce Cases	39
Relation of Domicil to Assignments of Movables	40
General Assignments; Bankruptcy	41
Intestate Succession	42
Testamentary Succession; Validity of Wills	43
Construction of Wills	44
Probate and Administration	45
Legacy and Inheritance Taxes	46
Jurisdiction	47
Judicial Citizenship	48
Attachments against Non-Residents	49
Limitation of Actions	50
Taxation	51
Liability to other Public Burdens	52
Militia Service	52
Jury Service	52
Right to Vote	53
Eligibility to Office	54
Settlement under the Poor-Laws	55
Homestead and other Exemptions	56

CHAPTER III.

DEFINITIONS.

	Section
Difficulty of Defining Domicil	57
Definitions of the Roman Law	58–61
Definition of the Code	58
Id. Criticism of Lord Cranworth in Whicker *v.* Hume	59
Id. Kindersley, V. C., in Lord *v.* Colvin	60
Definitions of the Digest: Ulpian; Alfenus Varus	61
Other Definitions: Donellus; John Voet; Hertius; Pothier; Vattel	62
Definitions of French Jurists: Denizart; Pothier; Encyclopédie Moderne; French Code; Demolombe; Proudhon; Demante; Ortolan; Marcadé	63
Definitions of Savigny and Calvo	64
American Definitions: Story; President Rush; Parker, J., in Putnam *v.* Johnson	65
Definitions of English Judges: Kindersley, V. C., in Lord *v.* Colvin; Lord Wensleydale, in Whicker *v.* Hume	66
English Text-writers: Phillimore; Foote; Westlake; Dicey	67
Miscellaneous Definitions: Wolff; Forcellini; Glück; Boullenois; Desquiron; Vallette; Emmery; Italian Code; Sardinian Code; Melizet's Case; El Diccionario de Legislacion; Paige, J., in Crawford *v.* Wilson; Wilson *v.* Terry; Woodward, J., in Chase *v.* Miller; Wing, J., in Rue High, Appellant; Bishop	68 *note*
Definitions usually not Broad enough to include all Phases of Domicil	68
Is Domicil Place or Legal Relation?	69
Domicil and Home	70–72
Similarity	70
Differences	71
Home the Fundamental Idea of Domicil	72
Domicil and Residence	73–75
Attempts to define Residence	74
"Residence" in American Legislation generally means "Domicil"	75
Domicil and Inhabitancy	76
Division of Domicil into National, *quasi*-National, and Municipal	77

CHAPTER IV.

GENERAL RULES.

Section
General Remarks 78

(1) *Every Person must have a Domicil somewhere.*

Roman Law and Modern Civilians 79, 80
British and American Authorities 81–83
Vagabonds, Gypsies, etc. 84
French Jurists 85
Municipal Domicil 86, 87

(2) *No Person can at the same Time have more than one Domicil.*

Roman Law 88
French Jurists 89
Necessity for Unity of Domicil 90
British and American Authorities 91–93
Lord Alvanley in Somerville *v.* Somerville, and Lord Loughborough in Ommanney *v.* Bingham 93
"Domicil" and "Principal Domicil" 94
Different Domicils for Different Purposes 95, 96
Municipal Domicil 97

(3) *Every Person who is* sui juris *and capable of controlling his Personal Movements may change his Domicil at Pleasure.*

Roman Law 98
Modern Continental Jurists 99
British and American Authorities 100
Municipal Domicil 101

CHAPTER V.

CLASSIFICATION OF DOMICIL.

Classifications suggested by various Writers 102
Division of this Treatise 103

CHAPTER VI.

DOMICIL OF ORIGIN.

General Remarks 104
Domicil of Origin, how constituted 105
Roman Law 106

Section
Opinions of Continental Jurists 107, 108
Immutability 107
Constitution and Change 108
Domicil of Origin in British and American Jurisprudence 109
(1) "Domicil of Origin clings closely" 110
Udny *v.* Udny 111
Udny *v.* Udny criticised 112
Doctrine of, not likely to be held in America 113
Domicil of Origin adheres until another Domicil is acquired 114
Presumption against a Change of Domicil of Origin . . 115
But this Presumption modified by Circumstances . 116, 117
This Presumption applies also in favor of resumed Domicil of Origin 118
(2) "Domicil of Origin reverts easily" 119
Usually slighter Evidence required to show Reverter of Domicil of Origin than Acquisition of a new Domicil . 119
This Principle, however, a Relative One 120

CHAPTER VII.

CHANGE OF NATIONAL AND QUASI-NATIONAL DOMICIL.

General Remarks 121
Domicil of Origin more difficult to change than Acquired Domicil . 122
National Domicil more difficult to change than *quasi*-National Domicil 123
Change of Domicil a Serious Matter, and presumed against . . . 124
Change of Domicil a Question of Act and Intention 125, 126
The requisite Factum complete Transfer of Bodily Presence . 127 *et seq.*
Dictum of Sir John Leach in Munroe *v.* Douglas 128
Wood, V. C., in Forbes *v.* Forbes; Wharton; Westlake . . . 129
Domicil cannot be changed *in itinere* . . . . . 130 *et seq.*
A fortiori, no Change takes Place when the Territorial Limits of the Old Domicil have not been passed . . . 132
Residence in a Definite Locality not necessary 133
No Length of Residence necessary to constitute Domicil . . . 134
Intention necessary. Length of Residence not sufficient in the Absence of Intention 135, 136
Character of *Animus* or Intention . . . . . 137 *et seq.*
(*i*) Capacity to choose 137
(*ii*) Freedom of Choice 138–142
Compulsory Change of Bodily Presence 138
Inability to return 139
Compulsion and Motive 140, 141
Motive immaterial if the proper Intention exist 142

Section

(*iii*) Actual Choice 143
Requisite *Animus* not Intention to change Political Nationality 144
Moorhouse *v.* Lord; Expressions of Lords Cranworth and Kingsdown, and Comments thereon 145–147
Nor Intention to change Civil *Status* 148, 149
The Requisite *Animus* defined 150
(1) *Animus non revertendi* . . . . . 151 *et seq.*
Mere Absence does not destroy Domicil 152
Abandonment not a mere Matter of Sentiment 153
"Floating Intention to return." Story's Proposition 154, 155
Examination of Authorities upon which Story's Proposition was based 155
Near and Remote Contingency 156–158
Lord Campbell in Aikman *v.* Aikman 156
Craigie *v.* Lewin 157
How far the Distinction between Near and Remote Contingency is applicable in view of the late British Cases doubtful 158
Story's Proposition in the American Cases 159
Occasional Visits to, and Retention of Place of Abode at, Place of former Domicil 160
Animus non revertendi need not be Express or Conscious . 161
(2) *Animus manendi* . . . . . 162 *et seq.*
Roman Law 163
Continental Jurists 164, 165
British Authorities . . . . . 166 *et seq.*
Intention to remain "for an Indefinite Time" . . . 168
Intention to remain during the Life of Another . . 169
American Authorities . . . . . 170 *et seq.*
Intention to remain "for an Indefinite Time" . 171, 172
Intention to make the New Place the Home of the Party . 173
Negative View of *Animus Manendi*, — "without any Present Intention of Removing" 174
Animus Manendi does not exclude the Possibility of Change 175
Contingent *Animus Manendi* not sufficient 176
Intention to reside presently necessary 177
Animus need not be Present at the Time of Removal; it may grow up afterwards 178
At what Point of Time Domicil vests and is divested 179

CHAPTER VIII.

CHANGE OF MUNICIPAL DOMICIL.

Section

Municipal Domicil more easily changed than National or *quasi*-National Domicil 180
Presumption against Change 181
Factum et Animus necessary for a Change 182
The requisite *Factum* 182
The requisite *Animus* . . . . . 183 *et seq.*
(1) Capacity to Choose 183
(2) Freedom of Choice 183
(3) Actual Choice 183
Animus non Revertendi 184
Animus Manendi 185
The Negative View of the *Animus Manendi* 186
Intention to make the new Place of Abode "Home" 187
Contingent *Animus Manendi* 188
Double Residence 189

CHAPTER IX.

REVERTER OF DOMICIL.

General Remarks 190
The Rule of Reverter as laid down by Story 191
The British Doctrine. Udny *v.* Udny . . . . . 192 *et seq.*
Lord Hatherley's Remarks 193
Lord Chelmsford's Remarks 194
Lord Westbury's Remarks 195
Doctrine of Udny *v.* Udny not drawn from the Civilians . . . 196
Domicil of Origin in the Early British Cases 197
Udny *v.* Udny and the British Prize Cases 198
Objections on Principle to Udny *v.* Udny 199
Westlake on Reverter 200
American Doctrine of Reverter 201
Doctrine of Udny *v.* Udny not held on the Continent 202
Reverter not to be presumed 203
Burden of Proof on him alleging Reverter 203
The Requisite *Factum* for Reverter 204
The Requisite *Animus non Revertendi* 205
Transit to Domicil of Origin need not be Direct 206
Quasi-National Domicil the Subject of Reverter 207
Otherwise as to Municipal Domicil 207
Acquired Domicil not the Subject of Reverter 208

CHAPTER X.

DOMICIL OF PARTICULAR PERSONS, — MARRIED WOMEN.

Section

General Doctrine 209
Roman Law 210
Betrothal. Arnott *v.* Groom 211
Invalid Marriage 212
Wife receives Domicil of Husband instantly upon Marriage . . . 213
Domicil of Wife follows that of Husband whether or not she accompanies him to his New Place of Abode 214
Wife cannot select a Domicil for herself 215
Even with the Consent of her Husband 215
Even though a Formal Deed of Separation has been executed . 216
Wife divorced, either *a Vinculo* or *a Mensa et Thoro*, may establish a Domicil for herself 217
Domicil of a *Femme Séparée de Corps* under the French Code Civil . 218
Power of a Wife divorced *a Mensa et Thoro* to establish a Domicil for herself . . . . . 219 *et seq.*
British Authorities 219, 220
American Authorities 221
Domicil of Husband continues to be that of Divorced Wife or Widow until she has established another for herself 222
Can a Wife who is entitled to a Divorce establish for herself a Domicil different from that of her Husband? . . . . . 223 *et seq.*
American Cases . . . . . 224, 224 *a*
English Cases 225
Doctrine, if at all admissible, does not extend beyond Cases of Divorce 226, 227

CHAPTER XI.

DOMICIL OF PARTICULAR PERSONS (*continued*), — INFANTS.

Domicil of Origin of Children, legitimate and illegitimate . . . 228
Domicil of Infant cannot be changed by his own Act 229
Roman Law 230
Rule of Disability sometimes stated in a Qualified Form; Unemancipated Minor 231
Is there any Exception in favor of a Married Minor? 232
Other Exceptions suggested 233
An Emancipated Minor an Exception under the French Law . . . 234

Section

The Domicil of a Minor follows that of his Father during the Life of the Latter . . . . . 235 *et seq.*
Even though the Minor does not dwell with his Father . . . 236
Possible Exception 237
Upon the Death of the Father the Domicil of the Infant follows that of his Mother . . . . . 238 *et seq.*
British Authorities : Potinger *v.* Wightman ; Arnott *v.* Groom 239
American Authorities 240
Does the Domicil of the Infant necessarily follow that of his Widowed Mother, or may the Latter change hers without affecting that of her Infant Child ? 241
Is the Qualification that the Mother must "act without Fraud," a Valid One ? 242, 243
Power of the Mother does not extend beyond Widowhood . . 244
Domicil of Illegitimate Children 244*a*
Upon the Death of both Parents, an Infant may acquire the Domicil of a Grandparent 245
Domicil of an Apprentice 246
Adopted Child 247, 248
Has a Guardian Power to change the Domicil of his Minor Ward ? . . . . . 249 *et seq.*
Continental Authorities in the Affirmative 250
Continental Authorities in the Negative 251
English Text-writers 252
American Text-writers 253
No Direct Decision in England 254
American Decisions 255–260
(1) Natural Guardian may change the Domicil of his Infant Ward 255
(2) Domicil of the Guardian is not necessarily that of his Ward 256
(3) Guardian may change the Municipal Domicil of his Ward 257
(4) Power of Guardian to change the National or *quasi*-National Domicil of his Ward 258, 259
Cases in the Affirmative 258
Cases in the Negative 259
General Results of the American Cases 260
General Reasons against the Power of the Guardian to change the National or *quasi*-National Domicil of his Infant Ward 261–263

CHAPTER XII.

DOMICIL OF PARTICULAR PERSONS (*continued*),—NON COMPOTES AND PAUPERS.

(a) *Non Compotes.*

Section

General Principles 264
Relation of Guardian to the Domicil of his Insane Ward 265
French Law 266
Relation of Father to the Domicil of his Insane Major Child . 267, 268
Domicil of Insane Persons not changed by Removal to Asylum . . 269

(b) *Paupers.*

Domicil of Pauper not changed by Removal to Poor-house 270
Inmates of Hôtel des Invalides in France, and of Soldiers' Homes in this Country 271

CHAPTER XIII.

DOMICIL OF PARTICULAR PERSONS (*continued*),—PRISONERS, EXILES, REFUGEES, ETC.

Domicil not changed by Imprisonment 272
Prisoner may acquire Domicil where he is imprisoned 273
Prisoner for Life 274
Transported Convict 275
"*Relegatus*" in the Roman Law 276
Exiles 277, 278
Refugees 279
Political Refugees 280
De Bonneval *v.* De Bonneval 281
White *v.* Brown 282
Ennis *v.* Smith 283
Fugitives from the Horrors and Dangers of War 284
Exile or Fugitive may acquire Domicil at the Place where he takes Refuge 285
Absconding Debtors 286

CHAPTER XIV.

DOMICIL OF PARTICULAR PERSONS (*continued*), — INVALIDS.

Section
General Remarks 287
Lord Campbell, in Johnstone *v.* Beattie 288
Lord Kingsdown, in Moorhouse *v.* Lord 289
Sir John Dodson, in Laneuville *v.* Anderson 290
Hoskins *v.* Matthews 291
Hegeman *v.* Fox 292
Isham *v.* Gibbons 293
Dupuy *v.* Wurtz 294
Still *v.* Woodville 295
Lord Westbury, in Udny *v.* Udny 296

CHAPTER XV.

DOMICIL OF PARTICULAR PERSONS (*continued*), — SOLDIERS AND SAILORS.

(a) *Soldiers and Sailors in the War Marine.*

Roman Law 297
French Jurists 298
Does a Soldier necessarily become domiciled within the Territory of the Sovereign whom he serves ? 299, 300
Can a Soldier acquire a Foreign Domicil ? 301, 302
Hodgson *v.* De Beauchesne 301
East India Cases 302
Quasi-National and Municipal Domicil not affected by Military Service 303

(b) *Sailors in the Merchant Marine.*

Fewer Facts in the Life of a Sailor from which to determine his *Animus* than in the Lives of most other Persons 304
Sailor does not lose his Domicil by following the Sea 305
Nothing in his Vocation which prevents him from changing his Domicil 305
Residence of Wife of Great Importance in determining the Domicil of a Sailor 306

CHAPTER XVI.

DOMICIL OF PARTICULAR PERSONS (*continued*), — PUBLIC CIVIL OFFICERS.

Section
General Remarks 307
Life Functionaries 308, 309
Holders of Temporary or Revocable Offices or Employments . 310 *et seq.*
Continental Authorities 311
English Cases 312
American Cases 313
Public Officer may acquire Domicil where the Duties of his Office are to be performed 314
Public Officer remaining after the Expiration of Office 315
American State Constitutions 316

CHAPTER XVII.

DOMICIL OF PARTICULAR PERSONS (*continued*), — AMBASSADORS AND CONSULS.

(a) *Ambassadors.*

The Domicil of a Person is not affected by entering the Diplomatic Service of his Country abroad 317–320, 322
Attorney-General *v.* Kent 318, 319
The True Ground of this Principle not Extra-territoriality, but Temporary Residence 320
Can an Ambassador acquire a Domicil in the Country to which he is accredited? 321

(b) *Consuls.*

A Person does not change his Domicil by Residence abroad in the Consular Service of his Country 323
Nor by a Consular Appointment in his own Country in the Service of a Foreign Country . . . . . 323 *a*
A Consul may acquire a Domicil in the Foreign Country in which he serves 324

CHAPTER XVIII.

DOMICIL OF PARTICULAR PERSONS (*continued*), — STUDENTS.

Section

General Statement 325
Roman Law 326, 327
Domicil of Student as viewed in this Country . . . . . 328 *et seq.*
Massachusetts Cases 329–333
Opinion of the Judges 329–331
Granby *v.* Amherst 332
Putnam *v.* Johnson 333
Fry's Election Case 334, 335
Sanders *v.* Getchell 336, 337
Principles of above Cases applicable to both *quasi*-National and Municipal Domicil 338
State Constitutions 339
Presumption in favor of Acquisition of Domicil by a Student who remains after the Completion of his Studies 340

CHAPTER XIX.

DOMICIL IN PARTICULAR PLACES.

(a) *Domicil of Foreigners in France.*

Art. 13 of the French Code Civil 341
The Difficulty attending the Discussion of the Subject largely one of Method 342
Various Opinions held in France 343–347
(1) That a Foreigner cannot establish a Domicil in that Country even with Authorization 343
(2) That a Foreigner may establish a Domicil in France only with Authorization 344, 345
(3) That a Foreigner may establish a Domicil in France without Authorization 346, 347
Decisions of the French Courts 348
English Cases 349–354
Collier *v.* Rivaz 349
Anderson *v.* Laneuville 350
Bremer *v.* Freeman 351
Hodgson *v.* De Beauchesne 352
Hamilton *v.* Dallas 353
Results of the English Cases 354

Section
American Cases 355, 356
Dupuy *v.* Wurtz 355
Harral *v.* Harral 356
Are the Consequences of Authorization Personal, or do they extend to Wife and Family? 357

(b) *Domicil in Eastern Countries.*

Different Rules for the Determination of Domicil applicable to Eastern and to Western Countries 358, 359
Lord Stowell, in The Indian Chief 358
Dr. Lushington, in Maltass *v.* Maltass 359
Can an American or European acquire a Domicil in an Eastern Country? Re Tootal's Trusts 360, 361

CHAPTER XX.

CRITERIA OF DOMICIL, OR THE EVIDENCE BY WHICH DOMICIL IS SHOWN.

Recapitulation of General Principles of Evidence already referred to 362
The Discussion relates directly to the Domicil of Independent Persons 363
The Necessary *Factum* Simple and Easy to prove 364
The Necessary *Animus* Complex and often Difficult to prove . . . 365
Each Case must be determined upon its own Circumstances . . 366–368
All the Facts of a Man's Life Evidence of his Domicil . . . 369, 370
Probabiles Conjecturæ 371
Facts to be construed untechnically and according to their Natural Import 372
Certain Facts usually entitled to more Weight than others . . . 373
The Definitions of Domicil in the Roman Law mainly *Formulæ* of Evidence 374

CHAPTER XXI.

CRITERIA OF DOMICIL (*continued*), — RESIDENCE AND LAPSE OF TIME.

Presence at a Place *prima facie* Evidence of Domicil there 375
Such *Prima Facies* subject to Rebuttal 376
Residence as Evidence of Domicil 377–381
Wayne, J., in Ennis *v.* Smith 378
Residence by itself Equivocal 379
Sir Herbert Jenner, in De Bonneval *v.* De Bonneval 380
Lord Westbury, in Bell *v.* Kennedy 381
Sir John Nicholl, in Moore *v.* Darrell 381

Section

Length of Residence or Time . . . . . 382 *et seq.*
Roman Law and Continental Jurists 383–385
Lord Stowell, in The Harmony 386
Criticism of Lord Stowell's Position 387
If Time is Conclusive Evidence of Domicil, what Length of Time? 388
Dr. Lushington, in Hodgson *v.* De Beauchesne 389
Kindersley, V. C., in Cockrell *v.* Cockrell 390
Poland, J., in Hulett *v.* Hulett 391
Story, J., in The Ann Green 392
Illustrative Cases in which Long Residence was held insufficient to change Domicil 393–396
Illustrative Cases in which Length of Time was held sufficient to change Domicil 397–399
Result of the Decisions 400

CHAPTER XXII.

CRITERIA OF DOMICIL (*continued*), — RESIDENCE OF WIFE AND FAMILY.

A Man is presumed to be domiciled where his Wife and Family reside . . . . . 401 *et seq.*
Their Residence at least *prima facie* Evidence of his Domicil . 402
Bangs *v.* Brewster and Anderson *v.* Anderson 403
But a Wife cannot control the Domicil of her Husband . . . 404
The Presumption is not conclusive 405
Residence of Children, Grandchildren, and other Relatives . . . 406
National Character and Religion of Wife, Form of Marriage Ceremony, etc. 407
Relation of Place of Marriage and Residence of Wife to *quasi*-National Domicil 408
Betrothal as Evidence of Domicil 409

CHAPTER XXIII.

CRITERIA OF DOMICIL (*continued*), — RESIDENCE AND ENGAGING IN BUSINESS, MODE OF LIVING, OWNERSHIP OF REAL ESTATE, ETC.

Residence and Engaging in Business 410–413
Opinions of the Civilians 411
Municipal Domicil 412
Place of Residence preferred to Place of Business 413

Section
Mode of Living . . . . . 414 *et seq.*
Residence in Hotels or Temporary Lodgings 415
Leased Houses or Lodgings 416
Ownership of Dwelling-house or other Real Estate 417
Sale of Dwelling-house or other Real Estate 418
Purchase of Dwelling-house or other Real Estate 419
Location of Personal Property 420

CHAPTER XXIV.

CRITERIA OF DOMICIL (*continued*), — DOUBLE RESIDENCE.

Difficult to determine the Domicil of a Person who resides in different Places 421
Double Residence and National Domicil 422
Double Residence and Municipal Domicil 423
May a Person having several Residences select his Place of Domicil? 424
Domicil of a Person whose Dwelling-house is on the Dividing Line of two Districts 425

CHAPTER XXV.

CRITERIA OF DOMICIL (*continued*), — PLACE OF DEATH AND BURIAL.

Place of Death 426
Place of Burial 427
Purchase of Burial-place 428–430
Haldane *v.* Eckford 428
Succession of Franklin 429
Hodgson *v.* De Beauchesne 430
Sale of Burial-place 431

CHAPTER XXVI.

CRITERIA OF DOMICIL (*continued*), — PUBLIC ACTS: NATURALIZATION, VOTING, PAYMENT OF TAXES, HOLDING OFFICE, ETC.

Naturalization 432–434
Continental Jurists 433
British and American Authorities 434
Voting 435–441
Offering to Vote 436

Section
Refusal to Vote 437
Failure to Vote 438
Absence of Right to Vote 439
Voting: English Cases 440
French Authorities 441
Payment of Personal Taxes 442
Omission or Refusal to pay Taxes 443
Holding Office 444
Treatment by Public Officers 445
Jury Service 446
Militia Service 447
Taking Part in Town Meetings 448

CHAPTER XXVII.

CRITERIA OF DOMICIL (*continued*), — DECLARATIONS, ORAL AND WRITTEN; TESTIMONY OF PERSON WHOSE DOMICIL IS IN QUESTION AS TO HIS INTENTION.

General Remarks 449
Formal Declarations of Domicil 450
Declarations accompanying and explanatory of Acts admissible as Part of the *Res Gestæ* 451
Declarations immediately explanatory of the Act of Removal . . 452
Declarations mediately explanatory of the Act of Removal . . . 453
Declarations not Evidence of Facts, but only explanatory of them . 454
Declarations not conclusive ; their Weight depends upon Circumstances 455
Value of Declarations ; Remarks of various Judges 456–459
Written Declarations : Letters 460
Id. Descriptions in Deeds 461
Id. Descriptions in Wills 462
Id. Descriptions in Wills and Deeds not conclusive 463
Id. Descriptions in Judicial Proceedings 464
Omission to Speak 465
Form of Will ; Spelling of Name 466
Person whose Domicil is in question may testify as to his Intent . 467

TABLE OF CASES.

A.

Page

Abington *v.* Boston, 4 Mass. 312 257

v. North Bridgewater, 23 Pick. 170 . . . . . 91, 114, 123, 124, 125, 140, 146, 155, 156, 164, 175, 256, 468, 511, 525

Adams *v.* Evans, 19 Kans. 174 . . . . . 188, 201

v. Oaks, 20 Johns. 282 826

Afflick's Estate, Matter of, 3 MacAr. 95 . . . . . 123, 340, 363

Aikman *v.* Aikman, 3 Macq. H. L. 854; 7 Jur. (N. S.) 1017; 4 L. T. (N. S.) 374; (In Court of Session) 21 D. (Sc. Sess. Cas. 2d ser. 1859) 757 . . . . . 42, 50, 148, 174, 175, 176, 187, 216, 218, 223, 225, 227, 234, 239, 254, 402, 405, 508, 512, 513, 519, 555, 556, 557, 560

Aitchison *v.* Dixon, L. R. 10 Eq. Cas. 589; 39 L. J. Ch. 705; 23 L. T. (N. S.) 97; 18 W. R. 987 . . . . . 205, 501

Allardice *v.* Onslow, 10 Jur. (N. S.) 352; 33 L. J. Ch. 434; 9 L. T. (N. S.) 674; 2 W. R. 397 . . . . . 96, 221, 227, 287, 496, 510, 562

Allen *v.* Thomason, 11 Humph. 536 . . . . . 166, 247, 321, 326, 327, 332, 333, 338, 340

Allison *v.* Catley, 1 D. (Sc. Sess. Cas. 2d ser. 1839) 1025 305

Alston *v.* Newcomer, 42 Miss. 186 125

Alter *v.* Waddel, 20 La. An. 246 477

Ames *v.* Duryea, 6 Lans. 155 . . . . . 285, 321, 325, 401, 477, 501

Amherst *v.* Hollis, 9 N. H. 107 877

Amis *v.* Bank, 9 Rob. (La.) 348 200

Anderson *v.* Anderson, 42 Vt. 350 . . . . . 111, 226, 256, 262, 355, 369, 371, 374, 481, 494, 501, 502.

v. Laneuville, 9 Moore P. C. 325; 2 Spinks, 41; 29 Eng. L. & Eq. 59. (See also Laneuville *v.* Anderson) 176, 177, 205, 223, 226, 227, 239, 240, 442, 452, 515, 516, 555, 556

Ann Green, The, 1 Gall. 474 . . . . . 180, 187, 199, 200, 217, 241, 245, 253, 287, 481, 482, 489

Antonia Johanna, The, 1 Wheat. 159 . . . . . 29, 31

Arnold & Ramsay *v.* United Ins. Co., 1 Johns. Cas. 363 22

Arnott *v.* Groom, 9 D. (Sc. Sess. Cas. 2d ser. 1846) 142 . . . 198, 221, 251, 296, 332, 508

Ashford *v.* Tustin, Lovell's Monthly Dig. 1852, p. 389 53

Atherton *v.* Thornton, 8 N. H. 178 . . . . . 408, 411

Attorney-General *v.* De Wahlstatt, 3 Hurl. & Colt. 374; 34 L. J. Exch. 29; 10 Jur. (N. S.) 1159; 11 L. T. (N. S.) 454; 13 W. R. 163 . . . . . 174, 176, 206, 214, 216, 240, 532, 533, 552, 554, 555, 564

v. Dunn, 6 Mees. & W. 511 . . . . . 174, 193, 209, 251, 516

v. Fitzgerald, 3 Drew. 610; 25 L. J. Ch. 743 . . . . . 287, 498, 562

v. Kent, 1 Hurl. & Colt. 12; 31 L. J. Exch. 391; 6 L. T. (N. S.) 864; 10 W. R. 722 . . . . . 111, 236, 414, 415, 481, 494, 563

Page

Attorney-General v. Napier, 6 Exch. 217; 15 Jur. 253; 20 L. J. Exch. 173 401
v. Pottinger, 6 Hurl. & Nor. 733; 7 Jur. (N. S.) 470; 30 L. J. Exch. 284; 4 L. T. (N. S.) 368; 9 W. R. 578 185, 221, 223, 225, 229, 235, 237, 238, 288, 400, 401, 408, 410, 415, 470, 514, 516, 562
v. Rowe, 1 Hurl. & Colt. 31; 31 L. J. Exch. 314; 6 L. T. (N. S.) 438; 10 W. R. 718 93, 111, 114, 176, 187, 216, 236, 238, 408, 410, 557
Auburn v. Hebron, 48 Me. 332 370

B.

Babbitt v. Babbitt, 69 Ill. 277 . . . . . 291, 293
Babcock v. Cass Township, 65 Iowa, 110 257
Baldwin v. Flagg, 43 N. J. Law (14 Vroom), 495 . . . . . 125, 291
Balfour v. Scott, Morrison, Dict. of Dec. 2379, 4617; Bro. P. C. 550; Robertson, Pers. Suc. 203 . . . . . 83, 291, 292, 305
Baltica, The, Spinks' Prize Cas. 264 32
Baltimore v Chester, 53 Vt. 315; 38 Am. Rep. 677 377
Bangs v. Brewster, 111 Mass. 382 . . . . . 175, 186, 190, 256, 257, 262, 402, 405, 501, 502
Bank v. Balcom, 35 Conn. 351 . . . . . 135, 146, 284, 285, 288, 291, 482
Exchange v. Cooper (see Exchange).
Hackettstown v. Mitchell (see Hackettstown).
Baptiste v. De Volunbrun, 5 Harr. & J. 86 385
Barber v. Barber, 21 How. 582 . . . . . 83, 291, 292, 305
v. Root, 10 Mass. 260 . . . . . 48, 314
Barnum v. Barnum, 42 Md. 251 . . . . . 45, 56
Barrett & Williford v. Black, 25 Ga. 151 217
Bartlett v. City of New York, 5 Sandf. 44 . . . . . 125, 146, 151
Ex parte, 4 Bradf. 221 . . . . . 355, 363
Barton v. Irasburgh, 33 Vt. 159 . . . . . 200, 229, 257, 259, 470, 514
Bate v. Incisa, 59 Miss. 513 132
Bateman v. Bailey, 5 T. R. 512 . . . . . 552, 553
Beardstown v. Virginia, 81 Ill. 541 . . . . . 217, 250
Beason v. State, 34 Miss. 602 . . . . . 89, 552, 553, 555
Bell v. Kennedy, L. R. 1 Sch. App. 95, 111, 113, 134, 174, 176, 187, 196, 199, 200, 230, 231, 235, 237, 250, 422, 424, 463, 476, 477, 480, 513, 552, 560, 565
v. Packard, 69 Me. 105 . . . . . 47, 67
v. Reid, 1 Maule & S. 726 . . . . . 19, 29, 30
Bempde v. Johnstone, 3 Ves. Jr. 198 . . . . . 21, 167, 230, 231, 234, 277, 404, 475, 476, 478
Benedict, The, Spinks' Prize Cas. 314 . . . . . 422, 424
Bennett v. Bennett, Deady, 299 . . . . . 291, 299, 302
Berembrock's Case, Sirey, 1822, I. 413 439
Besant v. Wood, L. R. Ch. D. 605 302
Bianchi, Goods of, 3 Swab. & Tr. 16 288
Birtwhistle v. Vardill, 2 Cl. & Fin. 571; 7 id. 895; 9 Bligh N. R. 32; 5 B. & C. 438; 6 Bing. N. C. 385; 8 D. & R. 185; 1 Scott N. R. 828; West. H. L. 500 44, 46, 47, 49, 50, 52, 53, 54, 56
Bishoff v. Wethered, 9 Wall. 812 . . . . . 82, 83
Bishop v. Bishop, 30 Pa. St. 412 . . . . . 70, 291, 294
Blaaw v. Chartres, 6 Taunt. 458 405
Black v. Black, 4 Bradf. 174 . . . . . 188, 190, 230
Blair v. Western Female Seminary, 1 Bond, 578 . . . . . 504, 505, 541
Blanchard v. Stearns, 5 Met. 298 . . . . . 90, 123, 125, 129, 130, 470

Page

Blucher *v.* Milsted, 31 Tex. 621 . . . . . 401, 501
Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194 . . . . . 321, 322, 325
Blumer, *Ex parte*, 27 Tex. 735 . . . . . 89, 93, 167, 175, 188, 477, 552, 558
Boardman *v.* House, 18 Wend. 520 201
Bond *v.* Cummings, 70 Me. 125 47
Boon *v.* Savage, 14 La. R. 169 200
Boothbay *v.* Wiscasset, 3 Greenl. 354 . . . . . 90, 405
Borden *v.* Fitch, 15 Johns. 121 315
Borland *v.* Boston, 132 Mass. 89 . . 89, 114, 126, 130, 135, 146, 188, 196, 285
Boucicault *v.* Wood, 2 Biss. 34 123
Boyce *v.* Boyce, 23 N. J. Eq. 337 294
Boyd *v.* Beck, 29 Ala. 703 217
Boyes *v.* Bedale, 1 H. & M. 798; 10 Jur. (N. S.) 196; 33 L. J. Ch. 283; 10 L. T. (N. S.) 131; 12 W. R. 232 . . . . . 45, 53
Bradford *v.* Lunenburgh, 5 Vt. 481 . . . . . 332, 338
v. Young, L. R. 29 Ch. D. 617 173
Bradley *v.* Fraser, 54 Iowa, 289 . . . . . 124, 218, 257
v. Lowery, Speers Eq. 1 . . . . . 477, 481, 482, 504
Bradshaw *v.* Heath, 18 Wend. 407 315
Braintree *v.* Hingham, 1 Pick. 245 554
Bremer *v.* Freeman, 10 Moore P. C. 306 . . . 77, 443, 481, 497, 510, 513, 533, 552, 554, 564
and Bremer, 1 Deane, 192; 5 W. R. 618 . . 201, 202, 443, 481
Brent *v.* Armfeld, 4 Cranch C. Ct. 579 146
Breul's Case, Sirey, 1854, II. 105 439
Brewer *v.* Linnæus, 36 Me. 428 . . . . . 187, 217, 257, 401, 477, 501
Briggs *v.* Briggs, L. R. 5 P. D. 163 . . . . . 176, 385
v. French, 2 Sumn. 251 . . . . . 33, 207
v. Rochester, 16 Gray, 337 . . . . . 89, 126–128, 130, 135, 141, 142, 143
Brook *v.* Brook, 9 H. L. Cas. 193; 7 Jur. (N. S.) 422; 4 L. T. (N. S.) 93; 9 W. R. 461 64
Brookfield *v.* Warren, 128 Mass. 287 . . . . . 552, 553, 556, 557
Brooks *v.* Clay, 3 A. K. Marsh. 545 554
Brown *v.* Ashbough, 40 How. Pr. 260 . . . . . 135, 146, 175, 188, 254, 285
v. Boulden, 18 Tex. 431 . . . . . 155, 253, 501, 505
v. Brown, Kilkerran, *voce* Foreign, No. 1, 199, Falconer, 11; Morrison, Dict. Dec. 4604; Elchies, *voce* Succession, Decisions, and Notes; Robertson, Pers. Suc. 92 20
v. Lynch, 2 Bradf. 214 . . . . . 291, 332, 333, 337, 338
v. Smith, 15 Beav. 444; 21 L. J. Ch. 356; 11 Eng. L. & Eq. 6 187, 189, 201, 235, 401, 555
v. United States, 5 Ct. Cl. 571 209
Bruce *v.* Bruce, 2 Bos. & P. 229 note 19, 20, 96, 167, 220, 221, 231, 277, 414, 475, 478
Bruce's Case, 2 Crompt. & Jer. 435 146
Brundred *v.* Del Hoyo, Spencer, 328 . . . . . 123, 126, 501, 502, 552, 553
Brunel *v.* Brunel, L. R. 12 Eq. Cas. 298 . . . 212, 226, 235, 253, 481, 494, 553
Buckland *v.* Charlemont, 3 Pick. 173 . . . . . 370, 372
Buffaloe *v.* Whitedeer, 15 Pa. St. 182 310
Bulkley *v.* Williamstown, 3 Gray, 493 . . . . . 126, 129, 140, 149, 187
Bullock *v.* Bullock, 122 Mass. 8 48
Bump *v.* Smith, 11 N. H. 48 257
Burch *v.* Taylor, 1 Phila. 224; 8 Leg. Int. 130 . . . . . 501, 512
Burgess *v.* Clark, 3 Ind. 250 . . . . . 552, 553
Burlen *v.* Shannon, 115 Mass. 438 . . . . . 48, 299
Burne *v.* Cole, Ambler, 415 19
Burnham *v.* Rangeley, 1 Woodb. & M. 7 . . . 184, 187, 199, 217, 227, 241, 252, 287, 291, 470, 477, 501, 504, 505, 522, 549, 552, 553, 556

Page

Burrell Township *v.* Pittsburgh, 62 Pa. St. 472 328
Burton *v.* Fisher, Milward (Ir. Eccl.), 183 . . . . . 93, 174, 187, 377
Butler *v.* Farnsworth, 4 Wash. C. Ct. 101 . . 83, 200, 208, 216, 241, 555, 556
v. Hopper, 1 Wash. C. Ct. 499 . . . . . 216, 241, 514, 548
Bye, Matter of, 2 Daly, 525 . . . . . 87, 123, 135, 138, 164, 166, 402, 405, 501, 503, 504, 587

C.

Cabot *v.* Boston, 12 Cush. 52 . . . . . 520, 541, 560
Cadwallader *v.* Howell & Moore, 3 Harr. (N. J.) 138 . . . 123, 124, 199, 217, 477, 501
Cambridge *v.* Charlestown, 13 Mass. 501 . . . . . 504, 505, 586
Campbell *v.* White, 22 Mich. 178 . . . . . 123, 241
Capdevielle, *In re*, 3 Hurl. & Colt. 985; 10 Jur. (N. S.) 1155; 33 L. J. Exch. 306; 12 W. R. 1110 } 18, 111, 131, 147, 187, 201, 202, 210, 216, 219, 225, 226, 482, 491, 510
v. Capdevielle, 21 L. T. (N. S.) 660 . . . . . 174, 176, 235, 492, 493, 535
Carey's Appeal, 75 Pa. St. 201 . . . . . 112, 188, 199, 200, 246, 247, 251, 253, 477, 541, 546, 562
Carlisle *v.* Tuttle, 30 Ala. 613 337
Carnoe *v.* Freetown, 9 Gray, 357 199
Carpenter *v.* Commonwealth of Pennsylvania, 17 How. 456 80
Case *v.* Clarke, 5 Mason, 70 . . . . . 207, 230
Casey's Case, 1 Ashm. 126 . . . . . 123, 188, 190, 503, 504
Caskie *v.* Webster, 2 Wall. Jr. C. Ct. 131 74
Castor *v.* Mitchell, 4 Wash. C. Ct. 191 . . . . . 241, 512, 552
Catlin *v.* Gladding, 4 Mason, 308 . . . . . 83, 180, 187, 241, 245, 501
Cavendish *v.* Troy, 41 Vt. 99 564
Cazanova's Case, Sirey, 1861, I. 800 439
Chaine *v.* Wilson, 1 Bosw. 673 . . . . . 113, 189, 201, 216, 230, 246, 501, 502, 515
Chariton Co. *v.* Moberly, 59 Mo. 238 124
Charleston *v.* Boston, 13 Mass. 468 322
Chase *v.* Miller, 41 Pa. St. 403 . . . . . 113, 123
Cheever *v.* Wilson, 9 Wall. 108 . . . . . 315, 316
Chenery *v.* Waltham, 8 Cush. 327 . . . . . 524, 525, 588
Cherry *v.* Slade, 2 Hawks. 400 . . . . . 552, 554
Cheshire, The, 3 Wall. 231 31
Chicago & Northwestern Ry. Co. *v.* Ohle, 117 U. S. 123 . . . . 208, 251, 541
Chichester *v.* Donegal, 1 Add. Eccl. 5 . . . . . 291, 307
Chicopee *v.* Whately, 6 Allen, 508 . . . . . 184, 217, 256
Christie's Succession, 20 La. An. 383 . . . . . 291, 299
Church *v.* Crossman, 49 Iowa, 447 . . . . . 124, 230, 257, 285
v. Rowell, 49 Me. 367 . . . . . 135, 146, 245
Clark *v.* Clark, 8 Cush. 385 48
v. Graham, 6 Wheat. 577 46
v. Mitchener & Likens, 2 Dutch. 207 . . . . . 217, 241, 285, 552, 553
v. Newmarsh, 14 S. (Sc. Sess. Cas. 1st ser. 1838) 488 401
v. Robinson, 88 Ill. 498 374
v. Whitaker, 18 Conn. 543 374
Clarke *v.* The Territory, 1 Wash. Terr. 82 . . . . . 89, 543, 565
Clinton *v.* Westbrook, 38 Conn. 9 . . . . . 257, 260
Cockerell *v.* Cockerell, 2 Jur. (N. S.) 727; 25 L. J. Ch. 730 } 93, 95, 187, 221, 401, 468, 470, 472, 481, 482, 487, 488, 498, 507, 510
Cohen *v.* Daniels, 25 Iowa, 88 121
Colburn *v.* Holland, 14 Rich. Eq. 176 . . . 167, 175, 200, 253, 291, 292, 363, 468, 501, 502
Cole *v.* Cheshire, 1 Gray, 441 . . . . 256, 257, 548, 552, 554, 557, 560, 564
v. Lucas, 2 La. An. 946 . . 176, 188, 199, 200, 218, 230, 285, 468, 552, 556

Page
Colechurch *v.* Radcliffe, 1 Str. 60 526
Collester *v.* Hailey, 6 Gray, 517 . . . . . 86, 123, 126, 217
Collier *v.* Rivaz, 2 Curteis, 855 . . . . . 187, 188, 189, 201, 440, 452, 482
Colton *v.* Longmeadow, 12 Allen, 598 . . . . . 127, 128, 130, 142, 143
Colville *v.* Lauder, Morrison, Dict. Dec. *voce* Succession, Appendix, No. 1; Robertson, Pers. Suc. 106 . . . . . 180, 192, 194, 268
Colvin *v.* Reed, 55 Pa. St. 375 . . . . . 71, 294, 311, 315
Comm. de Trevilliers' Case. Sirey, 1860, II. 591 439
Commercial Bank *v.* King, 3 Rob. (La.) 243 551
Commissioners of Inland Revenue *v.* Gordon, 12 D. (Sc. Sess. Cas. 2d ser. 1850) 657 . . . . . 166, 187, 249, 412
Commonwealth *v.* Emerson, 1 Pears. 204 . . . . . 541, 542
v. Jones, 12 Pa. St. 365; 7 Leg. Int. 19 . . . . . 90, 406, 408, 414
v. Kelleher, 115 Mass. 103 . . . . . 90, 511, 512
v. Lane, 113 Mass. 458 . . . . . 48, 64
v. Nancrede, 32 Pa. St. 389 58
v. Smith, 5 Pa. St. 142 80
v. Walker, 4 Mass. 556 . . . . . 85, 257
Concord *v.* Rumney, 45 N. H. 423 . . . . . 243, 297, 369
Connolly's Case (Browning *v.* De Veine), Dalloz, 1858, I. 217 439
(De Veine *v.* Routledge), Sirey, 1852, I. 289 . . . . . 439, 450
Cooper *v.* Galbraith, 3 Wash. C. Ct. 546 . . . . . 199, 501, 502, 511
v. Reynolds, 10 Wall. 308 82
Corinth *v.* Bradley, 51 Me. 540 . . . . . 257, 370, 373
Covode *v.* Foster, 4 Brewst. 414 . . . . . 374, 377, 401
Cox *v.* Cox, 19 Ohio St. 502 299
Craigie *v.* Lewin, 3 Curteis, 435; 7 Jur. 519 . . 187, 199, 200, 221, 223, 250, 284, 287, 288, 400, 530
Craven's Case, Sirey, 1872, I. 288 439
v. Craven, 27 Wis. 418 315
Crawford *v.* Wilson, 4 Barb. 504 . . . . . 90, 111, 121, 123, 125, 126, 131, 135, 146, 164, 175, 188, 217, 241, 256, 257, 325, 393, 401, 414, 418, 470, 477
Creuz *v.* Hunter, 2 Cox Cas. 242 357
Croker *v.* Marquis of Hertford, 4 Moore P. C. 339 . . . . . 160, 210
Crookenden *v.* Fuller, 1 Swab. & Tr. 441; 5 Jur. (N. S.) 1222; 29 L. J. Prob. Cas. 1; 1 L. T. (N. S.) 70 . . 148, 174, 176, 186, 217, 516, 552, 555, 562
Cross *v.* Black, 9 Gill & J. 198 196
v. Everts, 28 Tex. 523 . . . . . 92, 135, 141, 146, 155, 175, 256
Cuirana's Case, Journ. du Droit Int. Priv. 1882, p. 194 439
Culver's Appeal, 48 Conn. 304 . . . . . 370, 371
Cumner *v.* Milton, 3 Salk. 259 330
Cunningham *v.* Maund, 2 Kelly, 171 . . . . . 501, 502
Curling *v.* Thornton, 2 Add. Eccl. 6 . . . . . 159, 166, 174, 210, 217, 514
Cutler *v.* Cutler, 2 Brewst. 511 295
Cutter *v.* Davenport, 1 Pick. 81 46
Cutts *v.* Haskins, 9 Mass. 543 . . . . . 353, 355, 356, 357, 359, 371

D.

D'Abaunza's Case, Sirey, 1842, II. 372 . . . . . 439, 449
Da Costa's Case, Sirey, 1825-27, 579 439
Da Gama Machado's Case (Reported with Ott's Case, *q. v.*) 439
Dale *v.* Irwin, 70 Ill. 160 . . . . . 90, 123, 126, 131, 159, 241, 250, 374, 422, 423, 546
Dalhousie, Countess of, *v.* McDoual, 7 Cl. & Fin. 817; 1 Robin. Sch. App. 475 . . . . . 41, 50, 401
Dalrymple *v.* Dalrymple, 2 Hagg. Consist. 54 . . . . . 47, 51

Page

Daly, *In re*, 25 Beav. 456; 27 L. J. Ch. 751 . . . . . 291, 299
Danbury *v.* New Haven, 5 Conn. 584 . . . . . 167, 291, 309
Daniel *v.* Hill, 52 Ala. 430 364
v. Sullivan, 46 Ga. 277 . . . . . 501, 502
Danville *v.* Putney, 6 Vt. 512 . . . . . 377, 378
Darden *v.* Wyatt; 15 Ga. 414 341
Dauphin County *v.* Banks, 1 Pears. 40 . . . 123, 148, 155, 408, 411, 412, 470, 501, 502, 541, 542, 545
Davis *v.* Binion, 5 La. An. 248 . . . . . 560, 561
v. Davis, 30 Ill. 180 . . . . . 291, 299, 311
Dawson, *Ex parte*, 3 Bradf. 180 . . . . . 166, 321, 325, 332, 367
v. Jay, 3 De G. M. & G. 764 . . . . . 60, 366, 367
Dean *v.* Richmond, 5 Pick. 461 314
De Bonneval *v.* De Bonneval, 1 Curteis, 856 . . . 174, 176, 187, 201, 216, 217, 218, 285, 382, 476, 478, 479, 514, 545, 547, 555, 557, 564
Deck *v.* Deck, 2 Swab. & Tr. 90 316
Dedham *v.* Natick, 16 Mass. 135 . . . . . 328, 332
De Fontaine *v.* De Fontaine, 5 Harr. & J. 99 note 385
Dennis *v.* State, 17 Fla. 389 . . . . . 123, 126, 408, 411
Dennysville *v.* Trescott, 30 Me. 470 321
Derby *v.* Salem, 30 Vt. 772 . . . . . 552, 553, 554, 555
Desesbats *v.* Berquier, 1 Binn. 335 22
Desmare *v.* United States, 93 U. S. 605 . . . . . 30, 86, 184, 216, 284
De Veine *v.* Routledge, Sirey, 1852, I. 289 . . . . . 439, 450
Dexter *v.* Sangerville, 70 Me. 441 374
D'Herwas' Case, Sirey, 1833, I. 663 449
Diana, The, 5 C. Rob. Ad. 59 35
Dinning *v.* Bell, 6 Low. Can. 178 511
Di Savini *v.* Lousada, 18 W. R. 425 . . . . . 60, 366, 367
Ditson *v.* Ditson, 4 R. I. 87 . . . . . 291, 315
Doe dem. Birtwhistle *v.* Vardill (see Birtwhistle *v.* Vardill).
Dolphin *v.* Robins, 7 H. L. Cas. 390; 3 Macq. H. L. 563; 5 Jur. (N. S.) 1271; 29 L. J. Prob. Cas. 11. (See also Robins *v.* Dolphin) . . . 235, 291, 299, 300, 304, 317, 318
Donaldson *v.* McClure, 20 D. (Sc. Sess. Cas. 2d ser. 1857) 307 . . . 180, 181, 187, 214, 216, 226, 530, 531
Donegal *v.* Donegal (see Chichester *v.* Donegal).
Don's Estate, *In re*, 4 Drew. 194; 3 Jur. (N. S.) 1192; 27 L J. Ch. 98; 30 L. T. 190 . . . . . 45, 52
D'Orléans, Duchess, Goods of, 1 Swab. & Tr. 258; 5 Jur. (N. S.) 104; 28 L. J. Prob. Cas. 129 382
Dorsey *v.* Dorsey, 5 Watts, 349 . . . . . 70, 291, 292, 311, 315
v. Kyle, 30 Md. 512 125
Dos Hermanos, The, 2 Wheat. 75 85
Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441 . . . 93, 119, 212, 222, 226, 227, 235, 238, 245, 246, 481, 482, 492, 495, 507, 513, 552, 555, 556, 562, 564
Dougherty *v.* Snyder, 15 S. & R. 84 . . . . . 291, 292
Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617 . . . 97, 119, 146, 166, 167, 176, 177, 178, 200, 202, 213, 217, 229, 235, 237, 245, 246, 321, 351, 408, 411, 504, 508, 513
v. Mayor of New York, 2 Duer, 110 . . . . . 125, 146, 151
Dow *v.* Gould, 31 Cal. 629 . . . . . 242, 291, 411
Doyle *v.* Clark, 1 Flip. 536 . . . . . 123, 187, 199, 226, 552, 553, 555, 556
Draper *v.* Hatfield, 124 Mass. 53 207
Dremmler's Case, Sirey, 1844, II. 617 . . . . . 439, 449
Drevon *v.* Drevon, 34 L. J. Ch. 129; 10 Jur. (N. S.) 717; 10 L. T. (N. S.) 780; 12 W. R. 946 . . . 93, 96, 177, 189, 221, 222, 470, 481, 506, 510, 514, 516, 539, 545, 548, 552, 555, 562, 564

Page
Drivier-Cooper's Case, Sirey, 1828, I. 212 439
Dugat v. Markham, 29 La. R. 35 291
Dumas, Interdiction of, 31 La. An. 679 137
Dupuy v. Seymour, 64 Barb. 156 . . . . . 200, 468, 470
v. Wurtz, 53 N. Y. 556 . . . . . 77, 119, 135, 148, 175, 176, 188, 189, 200, 201, 202, 230, 241, 246, 392, 394, 457, 470, 478, 481, 482, 512, 514, 552, 554, 555
Dutcher v. Dutcher, 39 Wis. 651 . . . . . 311, 315

E.

Eagan v. Lumsden, 2 Disn. 168; 4 W'kly L. Gaz. 161 . . . . . 217, 482
Easterly v. Goodwin, 35 Conn. 279 . . . . . 481, 482, 499, 541, 542
East Livermore v. Farmington, 74 Me. 154 . . . . . 541, 542, 543
Edwards v. Green, 9 La. An. 317 70
Elbers & Krafts v. United Ins. Co. 16 Johns. 128 . . . . . 30, 477, 481
Ellsworth v. Gouldsboro, 55 Me. 94 . . . . . 529, 542, 544, 546
Emden, The, 1 C. Rob. Ad. 17 29
Ennis v. Smith, 14 How. 400 . . . . . 176, 187, 241, 242, 243, 384, 468, 476, 477, 478, 496, 497, 540, 552, 554, 556, 562
Enohin v. Wylie, 10 H. L. Cas. 1; 8 Jur. (N. S.) 897; 31 L. J. Ch. 402; 6 L. T. (N. S.) 263; 10 W. R. 467 . . . . . 76, 77
Ensor v. Graff, 43 Md. 391 . . . . . 200, 230, 309
Evans v. Payne, 30 La. An. 498 . . . . . 137, 551
Exchange Bank v. Cooper, 40 Mo. 169 504
Exeter v. Brighton, 15 Me. 58 . . . . . 91, 113, 114

F.

Farlee v. Runk, 2 Cong. El. Cas. 87, 91 422
Fayette County v. Bremer County, 56 Iowa, 516 374
v. Livermore, 62 Me. 229 189
Fenton v. Livingstone, 3 Macq. H. L. 497; 33 L. T. 335 52
Fight, *In re*, 89 Ala. 452 . . . . . 89, 204
Firebrace v. Firebrace, L. R. 4 P. D. 63 . . . . . 166, 178, 180, 401
Fishli v. Fishli, 2 Littell, 337 315
Fisk v. Chester, 8 Gray, 506 . . . . . 549, 565
Fiske v. Chicago, R. I. & Pac. R. R. Co. 53 Barb. 473 . . . 285, 501, 502, 541
Fitzgerald v. Arel, 63 Iowa, 104 121
Matter of, 2 Caines, 318 217
Fleming v. Straley, 1 Ired. 305 552
Foley's Estate, 11 Phila. 47; 33 Leg. Int. 117 . . . . . 325, 344
Folger v. Slaughter, 19 La. An. 323 . . . . . 257, 258, 385, 542, 552
Follweiler v. Lutz, 112 Pa. St. 107; 2 Atl. R. 721; 2 Cent. R. 535; 6 East R. 528 . . . . . 528, 541
Forbes v. Forbes, Kay, 341; 18 Jur. 642; 23 L. J. Ch. 724; 2 Eq. R. 178 . . . . . 174, 187, 190, 194, 195, 221, 229, 321, 325, 401, 462, 500, 501, 504, 505, 514, 515
Forgo's Case, Sirey, 1875, I. 409; Bull. des Arrêts, May, 1875, p. 138 439, 455
Foster v. Eaton & Hall, 4 Humph. 346 . . . . . 125, 188, 246
v. Waterman, 124 Mass. 592 . . . . . 46, 58
Frances, The (Gillespie's Claim), 8 Cranch, 363 29
(before Story, J.) 1 Gall. 614 29
Franklin, Succession of, 7 La. An. 395 . . . . 112, 175, 176, 515, 516, 520, 533, 534, 551, 564
Frary v. Frary, 10 N. H. 61 315

Page
Freeport *v.* Supervisors, 41 Ill. 495 . . . . 291, 321, 325, 374, 375, 377, 378
Freetown *v.* Taunton, 16 Mass. 52 . . . . . 334, 338
Frentzal's Case, Sirey, 1861, II. 65 439
Friendschaft (Moreira, claimant), 4 Wheat. 105 31
(Winn *et al.* claimants) 3 Wheat. 14 . . . . . 30, 217, 287
Frost *v.* Brisbin, 19 Wend. 11 . . . . . 122, 125, 131
Fry's Election Case, 71 Pa. St. 302 . 90, 112, 113, 119, 123, 126, 246, 422, 428
Fuller *v.* Bryan, 8 Harris, 144 217

G.

Galpin *v.* Page, 18 Wall. 350 82
Gambier *v.* Gambier, 7 Sim. 263; 4 L. J. Ch. 81 59
Gardner *v.* O'Connel, 5 La. An. 353 . . . . . 552, 553, 556
Garengeau's Case, Denizart *verb.* Dom. no. 38 490
Geils *v.* Geils, 1 Macq. 284; s. c. *sub nom.* Geils *v.* Dickenson, 17 Jur. 423; 20 Eng. L. & Eq. 1 . . . . . 291, 305
Gillis *v.* Gillis, 8 Ir. R. Eq. 597 . . . . 176, 227, 235, 237, 291, 481, 482, 493, 516, 562, 565
Gilman *v.* Gilman, 52 Me. 165 . . . . 111, 135, 148, 151, 174, 245, 247, 284, 285, 519, 563
Gilmer *v.* Gilmer, 32 Ga. 685 . . . . . 501, 504
Glover *v.* Glover, 18 Ala. 367 . . . . . 217, 285, 477
Goddard *v.* Sawyer, 9 Allen, 78 46
Goodman's Trusts, *Re*, L. R. 14 Ch. D. 619 (M. R.) 45, 53
17 id. 266 (Ct. of Appeal) 43, 45
v. Goodman, 3 Giff. 643 . . . . . 43, 45, 53
Goodwin *v.* Jones, 3 Mass. 514 78
v. McCoy, 13 Ala. 271 285
Gorham *v.* Canton, 5 Greenl. 266 . . . . . 552, 553
v. Springfield, 21 Me. 58 . . . . . 141, 189, 257
Gouhenant *v.* Cockrell, 20 Tex. 97 . . . . . 92, 175, 218, 256, 285
Gout *v.* Zimmerman, 5 Notes of Cases, 440 . . . . . 309, 326, 419
Graham *v.* Commonwealth, 51 Pa. St. 255 401
v. Public Administrator, 4 Bradf. 127 . . . . . 89, 175, 188, 195, 196
v. Trimmer, 6 Kans. 230 . . . . . 226, 244, 245
Granby *v.* Amherst, 7 Mass. 1 . . . . . 257, 402, 422, 427
Grant *v.* Dalliber, 11 Conn. 234 . . . . . 377, 378, 501
Gravillon *v.* Richards' Ex'rs, 13 La. R. 293 . . . 148, 188, 198, 201, 230, 241
Gray Jacket, The, 5 Wall. 342 31
Green *v.* Van Buskirk, 5 Wall. 307 74
Greene *v.* Greene, 11 Pick. 410 . . . . 147, 148, 291, 299, 311, 501, 502, 511
v. Windham, 13 Me. 225 . . . . . 90, 189, 256, 260, 291, 299, 501, 504
Greenwood *v.* Curtis, 6 Mass. 358 48
Griffin *v.* Wall, 32 Ala. 149 . . . . . 552, 553, 554, 556
Grimmett *v.* Witherington, 16 Ark. 377 . . . . . 321, 326, 329, 340
Guier *v.* O'Daniel, 1 Binney, 349, note . . . 22, 106, 108, 188, 199, 241, 261, 321, 325, 356, 357, 359, 468, 470, 478, 512, 530, 541, 544, 545, 547, 552, 564
Guildford *v.* Oxford, 9 Conn. 321 . . . . . 291, 310

H.

Hackettstown Bank *v.* Mitchell, 2 Dutch. 516 291
Haggart *v.* Morgan, 4 Sandf. 198 (affirmed 1 Seld. 427) 125
Hair *v.* Hair, 10 Rich. Eq. 163 293
Hairston *v.* Hairston, 27 Miss. 704 . . . . 112, 119, 188, 199, 201, 246, 468, 470, 477, 481, 504, 515, 541, 552

Page

Haldane *v.* Eckford, L. R. 8 Eq. Cas. 631; 21 L. J. (N. S.) 87; 17 W. R. 1059 . . . . . 206, 209, 214, 215, 216, 223, 253, 481, 496, 506, 533
Hall *v.* Hall, 25 Wis. 600 . . . . . 123, 135, 146, 188, 190, 251, 565
v. Lanning, 91 U. S. 160 82
Hallet *v.* Bassett, 100 Mass. 167 . . . . 86, 93, 123, 146, 175, 180, 226, 244, 470, 545, 547, 565
Halley *v.* Ball, 66 Ill. 250 67
Hallowell *v.* Saco, 5 Greenl. 143 . . . . . 90, 189, 257
Hamilton *v.* Dallas, L. R. 1 Ch. D. 257 . 159, 216, 453, 515, 552, 554, 557, 560
Hampden *v.* Levant, 59 Me. 557 . . . . . 141, 253, 257, 401
Hanberry *v.* Hanberry, 29 Ala. 719 . . . . . 291, 311
Hardy *v.* De Leon, 5 Tex. 211 . . . . 112, 166, 167, 175, 189, 218, 246, 247, 285, 321, 329, 340, 377, 384
Hare *v.* Hare, 10 Tex. 355 70
Harkins *v.* Arnold, 46 Ga. 656 . . . 92, 166, 175, 200, 291, 309, 321, 329, 332, 335, 337, 338, 340
Harmony, The, 2 C. Rob. Ad. 322 . . . . . 29, 31, 33, 253, 484, 488
Harral *v.* Harral, 39 N. J. Eq. 279, affirming 66, 112, 159, 457
v. Wallis, 37 N. J. Eq. 458 457
Harris *v.* Firth, 4 Cranch C. Ct. 710 242
Harrison *v.* Harrison, 20 Ala. 629 311
Hart *v.* Horn, 4 Kans. 232 . . . . . 188, 190, 199, 325, 512
v. Lindsey, 17 N. H. 235 . . . . . 89, 111, 166, 167, 175, 226, 246, 321, 422, 476
Harteau *v.* Harteau, 14 Pick. 181 . . . . . 291, 307, 311, 312, 315
Hartford *v.* Hartland, 19 Vt. 392 259
Harvard College *v.* Gore, 5 Pick. 370 . . . 124, 125, 126, 129, 130, 155, 167, 176, 187, 195, 217, 256, 257, 286, 287, 408, 519, 530, 541, 546, 548
Harvey *v.* Ball, 32 Ind. 98 56
v. Farnie, L. R. 5 P. D. 153 (V. C.) 48, 69, 292
6 id. 35 (Ct. of Appeal) 69, 292, 298
8 App. Cas. 43 (H. L.) 69
Hawley, Matter of, 1 Daly, 531 . . . . . 93, 112, 123, 408, 499, 510
Hayes *v.* Hayes, 74 Ill. 312 . . . . . 112, 119, 188, 189, 241, 246, 516, 542
Haynes *v.* Rutter, 24 Pick. 242 . . . . . 552, 554
Heath *v.* Samson, 14 Beav. 441 . . . . . 418, 533
Hegeman *v.* Fox, 31 Barb. 475 (affirming Same *v.* Same, 1 Redf. 297) 112, 185, 188, 241, 242, 285, 390, 395, 468, 475, 516, 552, 555, 559, 564
Heidenbach *v.* Schland, 10 How. Pr. 477 247
Hellman's Will, *Re*, L. R. 2 Eq. Cas. 368 63
Hennen *v.* Hennen, 12 La. R. 190 . . . . . 159, 160
Henrietta *v.* Oxford, 2 Ohio St. 32 . . . . . 200, 257
Hepburn *v.* Skirving, 9 W. R. 764 . . . . . 221, 369
Hicks *v.* Skinner, 72 N. C. 1 . . . . . 137, 175, 285
Hiestand *v.* Kuns, 8 Blackf. 345 . . . . . 246, 321, 340
High, Rue, Appellant, 2 Doug. (Mich.) 515 . . 111, 135, 146, 175, 189, 217, 226, 241, 246, 247, 253, 254, 321, 393
Hill *v.* Fuller, 14 Me. 121 . . . . . 89, 260
v. Spangenberg, 4 La. An. 553 . . . . . 501, 502, 511, 541, 561
Hindman's Appeal, 85 Pa. St. 466 . . . . . 112, 135, 148, 188, 200, 247, 249, 285, 477, 515, 544, 548, 555
Hinds *v.* Hinds, 1 Iowa, 36 124
Hodgson *v.* De Beauchesne, 12 Moore P. C. 285; 33 L. T. 36; 7 W. R. 397 . . . . . 32, 176, 177, 185, 187, 200, 201, 202, 206, 216, 218, 221, 279, 397, 399, 401, 453, 468, 469, 477, 481, 482, 487, 492, 506, 508, 532, 535, 552, 555, 556, 558, 564

Page

Hog *v.* Lashley, Morrison, Dict. Dec. 4619, 4628; Robertson, Pers. Suc. 126, 391 . . . . . 19, 21
Holbeck *v.* Leeds, 20 L. J. (N. S.) (M. C.) 107; 2 Eng. L. & Eq. 377
Holliman, Heirs of, *v.* Peebles, 1 Tex. 673 . . 92, 111, 175, 188, 241, 514, 544
Hollister *v.* Hollister, 6 Pa. St. 449 . . . . . 291, 292
Holmes *v.* Greene, 7 Gray, 299. . . . . 90, 226, 244, 524, 555, 556
v. Remsen, 4 Johns. Ch. 460 73
Holyoke *v.* Haskins, 5 Pick. 20 . . . . . 355, 356, 357, 359, 370, 371
Hood's Estate, 21 Pa. St. 106 . . . . 80, 175, 176, 177, 227, 299, 481, 495, 510, 516, 532, 538
v. Hood, 11 Allen, 196 . . . . . 48, 291
Same *v.* Same, 110 Mass. 463 48
Hopkins *v.* Hopkins, 35 N. H. 474 311
3 Mass. 158 312
Horne *v.* Horne, 9 Ired. 99 . . . . . 112, 113, 119, 175, 188, 196, 199, 241, 246
Same *v.* Same 477, 478, 482, 562
Hoskins *v.* Matthews, 8 De G. M. & G. 13; 2 Jur. (N. S.) 196; 25 L. J. Ch. 689; 35 Eng. L. & Eq. 532 . . . . . 97, 180, 187, 227, 253, 388, 395, 470, 501, 516, 554, 555, 556, 557, 559, 560, 562
Hoyt *v.* Sprague, 103 U. S. 613 . . . . . 60, 366
Hubbard, *Re*, 82 N. Y. 90 325
Hubgh *v.* R. R. Co., 6 La. An. 495; 54 Am. Dec. 565 15
Hulett *v.* Hulett, 37 Vt. 581 . . . . . 199, 481, 482, 489, 541, 546, 552, 565
Hull *v.* Hull, 2 Strob. Eq. 174 311
Hunt *v.* Hunt, 4 De G. F. & J. 221 302
Same *v.* Same, 72 N. Y. 217 . . . . . 292, 306
Hyde *v* Hyde, L. R. 1 P. & D. 130 47
Hylton *v.* Brown, 1 Wash. C. Ct. 298 . . . . . 201, 217, 501

I.

Ilderton *v.* Ilderton, 2 H. Bl. 145 47
Indian Chief, The (Ship, Johnson's Claim) 3 C. Rob. Ad. 12 . . 180, 197, 269, 272, 278
Id. (Cargo, Millar's Claim) 22. . . . . 14, 29, 421, 459, 460, 462
Isham *v.* Gibbons, 1 Bradf. 69 . . . . . 123, 125, 128, 131, 188, 217, 230, 285, 392, 479, 513, 515, 546, 555, 556, 561, 563

J.

Jackson *v.* Jackson, 1 Johns. 424 . . . . . 299, 315
Jamaica *v.* Townshend, 19 Vt. 267 . . . . . 243, 260
Jefferson *v.* Washington, 19 Me. 293 . . . . . 91, 114, 141
Jeffreys *v.* Vanswartswarth, Barnardiston, 144 367
Jenness *v.* Jenness, 24 Ind. 355 . . . . . 291, 311
Jennison *v.* Hapgood, 10 Pick. 77 . . 217, 230, 240, 284, 386, 500, 501, 561, 562
Johnson *v.* Copeland, 35 Ala. 521 338
v. Johnson, 12 Bush, 485 291
v. Smith, 43 Mo. 499 125
v. Turner, 29 Ark. 280 . . . . . 92, 199, 241, 242, 252, 291, 299, 321, 326, 329, 340, 477, 478, 505
v. Twenty-one Bales, &c., 2 Paine, 601; Van Ness, 5 . . . . . 80, 111, 166, 174, 180, 189, 199, 217, 241, 250, 284, 287, 476, 481, 552
Johnstone *v.* Beattie, 10 Cl. & Fin. 42 . . . 56, 60, 331, 351, 359, 366, 367, 387, 395, 530, 532
Jones *v.* Gerock, 6 Jones Eq. 190 47

Page

Jopp v. Wood, 4 De G. J. & S. 616; 11 Jur. (N. S.) 212; 12 L. T. (N. S.) 41; 13 W. R. 222, affirming Same v. Same, 34 Beav. 88; 34 L. J. Ch. 211 . . . 96, 113, 119, 187, 200, 201, 202, 217, 218, 222, 230, 235, 246, 397, 398, 462, 479, 482, 486, 491, 510, 563

Joseph, The, 1 Gall. 545 . . . . . 30, 217, 287

Judges, Opinion of the, 5 Met. 587 . . . . . 90, 114, 123, 126, 130, 135, 140, 146, 155, 175, 188, 254, 256, 284, 422, 423, 424, 431

Judkins v. Reed, 48 Me. 386 528

Judson v. Lathrop, 1 La. An. 78 551

K.

Kashaw v. Kashaw, 3 Cal. 312 . . . . . 291, 311

Keegan v. Geraghty, 101 Ill. 26 51

Keith v. Stetter, 25 Kans. 100 . . . . . 185, 188, 217, 501, 565

Kellar v. Baird, 5 Heisk. 39 . . . . 226, 246, 284, 285, 289, 477, 478, 482, 530

Kelley's Ex'r v. Garrett's Ex'rs, 67 Ala. 304 . . . . . 92, 176, 217, 325, 422

Kellogg v. Oshkosh, 14 Wis. 623 . . . . . 135, 398, 541, 542

v. Supervisors of Winebago Co., 42 Wis. 97 . . . 123, 126, 135, 146, 175

Kemna v. Brockhaus, 10 Biss. 128 . . . . . 83, 199, 208, 227, 230, 241, 287, 291, 476, 565

Kennedy v. Kelley, 7 Ir. Jur. 326 174

Kennedy v. Ryal, 67 N. Y. 379 (see also Ryal v. Kennedy) . 123, 135, 248, 510

Kenyon, *Ex parte*, 5 Dillon, 385 217

Kerr v. Moon, 9 Wheat. 565 46

Kilburne v. Bennett, 3 Met. 99 . . . . . 256, 552, 553, 554, 557

Kilpatrick v. Kilpatrick, Robertson, Pers. Suc. 116 19

King v. Foxwell, L. R. 3 Ch. D. 518 . . . . . 173, 180, 235, 236, 476, 481, 496, 510, 515

Kinnier v. Kinnier, 45 N. Y. 435 315

Kirby and others' Case, Sirey, 1853, 714 449

Kirkland v. Whately, 4 Allen, 462 . . . . . 141, 175, 188, 256, 355

Kirtland v. Hotchkiss, 100 U. S. 491 88

Knowles v. The Gaslight and Coke Co., 19 Wall. 58 82

Knox v. Waldoborough, 3 Greenl. 455 . . . . . 256, 291, 481, 482, 501

Kruse v. Kruse, 25 Mo. 68 311

L.

Lacey v. Clements, 36 Tex. 661 . . . . . 92, 291, 299, 505

Lacy v. Williams, 27 Mo. 280 332

Lake v. South Canaan, 37 Pa. St. 19 310

Lamar v. Micou, 112 U. S. 452 . . . . 321, 325, 327, 332, 338, 339, 340, 364

(Motion for rehearing) 114 U. S. 218 341

v. Scott, 3 Strob. 562 47

Lambe v. Smith, 15 Mees. & W. 433 . . . . . 113, 125

Landis v. Walker, 15 La. An. 213 260

Lane v. Lane, 2 Mass. 167 313

Laneuville v. Anderson, 2 Spinks, 41; 22 Eng. L. & Eq. 641 (see also Anderson v. Laneuville) 111, 113, 187, 235, 321, 388, 530, 531

Langdon v. Doud, 6 Allen, 423 . . . . . 86, 87, 114, 123, 124, 126

Lauderdale Peerage, The, L. R. 10 App. Cas. 692 . . . . . 176, 401

La Virginie. See Virginie.

Layne v. Pardee, 2 Swan (Tenn.), 282 . . . . . 175, 188

Leach v. Pillsbury, 15 N. H. 137 . . . . . 187, 552, 553

Le Breton v. Nouchet, 3 Mart. (La.) 60 66

Lee v. Stanley, 9 How. Pr. 272 . . . . . 146, 501

Page
Leith v. Hay, Fac. Coll. 17th Jan. 1811; Robertson, Pers. Suc. 115 . . . 371
v. Leith, 39 N. H. 20 70
Lestapies v. Ingraham, 5 Pa. St. 71 159
Le Sueur v. Le Sueur, L. R. 1 P. D. 139 . . . . . 304, 305, 317
Letcher v. Moore, 1 Cong. El. 715 422
Lethbridge's Case, Dalloz, 1874, I. 465 439
Les Trois Frères, Stew. Ad. 1 290
Lett's Trusts, *Re*, 7 L. R. Ir. 132 67
Levy's Case, 2 Cong. El. Cas. 41 326
Lewis, Succession of, 10 La. An. 789 . . . . . 332, 339, 347, 352, 362
Lincoln v. Hapgood, 11 Mass. 350 . . . . . 257, 542, 543
Lindsay v. Murphy, 76 Va. 428 . . . . . 92, 185, 188, 200, 217, 241, 285, 386
Lingen v. Lingen, 45 Ala. 410 . . . . . 45, 56
Liscomb v. N. J. R. R. & Trans. Co., 6 Lans. 75 . . . . . 291, 552
Littlefield v. Brooks, 50 Me. 475 . . . . . 91, 111, 114, 125, 141, 164, 174, 196, 241, 256, 257, 284
Livingston v. The Maryland Ins. Co., 7 Cranch, 506 . . . . . 29, 30
Lockhart's Trusts, 11 Ir. Jur. (N. S.) 245 . . . . . 197, 307
Lolley's Case, 2 Russ. & Ry. 237; 2 Cl. & Fin. 567 . . . . . 69, 70
Londonderry v. Andover, 28 Vt. 416 554
Long v. Ryan, 30 Gratt. 718 . . . . . 112, 121, 122, 128, 125, 146, 151, 188, 242
Lord Advocate v. Lamont, 19 D. (Sc. Sess. Cas. 2d ser. 1857) 779 180, 216, 286
Lord v. Colvin, 4 Drew. 366; 5 Jur. (N. S.) 351; 28 L. J. Ch. 361; 7 W. R. 250; 32 L. T. 377 } 99, 102, 108, 119, 177, 185, 187, 235, 236, 246, 250, 470, 554, 560, 561
Loring v. Thorndike, 5 Allen, 257 . . . . . 54, 58
Love v. Cherry, 24 Iowa, 204 . . . . . 93, 146, 151, 204, 218
Lowndes v. Douglas, 24 D. (Sc. Sess. Cas. 2d ser. 1862) 1391 178, 180, 552, 553, 554, 555, 556, 560
Lower Oxford Election, *Re*, 11 Phila. 641; 32 Leg. Int. 450 217, 250, 321, 322, 340, 422, 423, 431
Lowry v. Irwin, 6 Rob. (La.) 192 200
Lubec v. Freeport, 3 Greenl. 220 322
Ludlow v. Landgrove, 42 Vt. 137 370
Lumb v. Jenkins, 100 Mass. 527 55
Lund v. Tyngsborough, 9 Cush. 36 . . . . . 552, 553
Luscher, *Ex parte*, 27 Tex. 746 89
Lyall v. Paton, 25 L. J. Ch. 746 . . . . . 95, 187, 191, 192, 196, 221, 481, 496, 562
Lyle v. Foreman, 1 Dall. 480 . . . . . 190, 196, 197
Lyman v. Fiske, 17 Pick. 231 . . . . . 125, 126, 129, 187, 256, 468, 522, 523, 547
Lynch's Case, Sirey, 1851, II. 791 . . . . . 439, 450

M.

McAfee v. Kentucky University, 7 Bush (Ky.), 135 291
McCarthy v. De Caix, 2 Russ. & M. 614; 2 Cl. & Fin. 568 69
McClerry v. Matson, 2 Ind. 250 246
McCollum v. White, 28 Ind. 48 . . . . . 246, 291, 325
McConnell v. Kelley, 138 Mass. 372; 19 Rep. 594 . . . . . 207, 242
McCormick v. Sullivant, 10 Wheat. 192 46
McDaniel's Case, 3 Pa. L. J. 310 . . . . . 90, 123, 188, 254
v. King, 5 Cush. 469 . . . . . 123, 124, 135, 146, 254, 284, 468, 503, 504
McDermott's Appeal, 8 Watts & S. 251 70
McGehee v. Brown, 4 La. An. 186 257
McIntyre v. Chappel, 4 Tex. 187 . . . . . 188, 196, 246, 285
McKenna, Succession of, 23 La. An. 369 . . . . . 291, 299
McKowen v. McGuire, 15 La. An. 637 . . . . . 188, 201, 256, 511, 546, 562
McPherson v. Housel, 2 Beasl. 35 . . . . . 291, 504

Page

Macreight, *In re*, L. R. 30 Ch. D. 165 401
Maddox *v.* State, 32 Ind. 111 . . . . . 217, 321, 343
Madison *v.* Munroe, 42 N. J. L. 403 326
Maghee *v.* McAllister, 3 Ir. Ch. 604 291
Maguire *v.* Maguire, 2 Dana, 181 . . . . . 201, 299, 315
Makepeace *v.* Lee, cited 5 Pick. 378 525
Male *v.* Roberts, 3 Esp. 163 61
Malone *v.* Lindley, 1 Phila. 192 128
Maltass *v.* Maltass, 1 Robertson Eccl. 67 . . 95, 209, 419, 459, 460, 464, 465
Manchester *v.* Rupert, 6 Vt. 291 377
Mandeville *v.* Huston, 15 La. An. 281 . . . . . 542, 548
Manning *v.* Manning, L. R. 2 P. & D. 223 69
Marheineke *v.* Grothaus, 72 Mo. 204 . . . . . 341, 355
Marryat *v.* Wilson, 1 Bos. & P. 430 (see also Wilson *v.* Marryat) . . . 29, 30
Marsh *v.* Hutchinson, 2 Bos. & P. 226 . . . . . 220, 470
Marshall *v.* Marshall, L. R. 5 P. D. 19 302
Mary and Susan, The, 1 Wheat. 46 29
Mason *v.* Fuller, 36 Conn. 160 457
v. Homer, 105 Mass. 116 . . . . . 291, 457
Masten *v.* Masten, 15 N. H. 159 311
Matchless, The, 1 Hagg. Ad. 97 180
Maxwell *v.* McClure, 6 Jur. (N. S.) 407; 8 W. R. 370; 2 L. T. (N. S.) 65; imperfectly reported, 3 Macq. H. L. 852 . . 147, 148, 181, 216, 226, 227, 244, 286, 287, 473, 477, 515, 519, 548, 565
Mayor of New York *v.* Genet, 4 Hun, 487 125
Mead *v.* Boxborough, 11 Cush. 362 . . . . . 243, 260, 549
Mears *v.* Sinclair, 1 W. Va. 185 . . . . . 321, 325, 332, 333, 338, 340, 363, 364, 365
Mecklembourg, Baron de, Case of, Le Droit, 29th July, 1856 450
Medway *v.* Needham, 16 Mass. 157 48
Melizet's Case, Dalloz, 1869, I. 294; Sirey, 1869, I. 1838 . . . . . 439, 457
Metcalf *v.* Lowther's Ex'rs, 56 Ala. 312 . . . . . 321, 325
Mette *v.* Mette, 1 Swab. & Tr. 416; 28 L. J. Prob. 117 64
Middleborough *v.* Rochester, 12 Mass. 363 297
Middleton *v.* Janverin, 2 Hagg. Cons. 437 64
Miller's Estate, 3 Rawle, 312 . . . . . 180, 217, 242, 247, 284
v. Miller, 91 N. Y. 315 . . . . . 44, 45
v. Thompson, 2 Cong. El. Cas. 120 477
Milliken *v.* Pratt, 125 Mass. 374 . . . . . 47, 48, 66, 366
Mills *v.* Alexander, 21 Tex. 154 . . . . . 180, 188, 284, 287, 290, 477, 478
Mitchell *v.* United States, 21 Wall. 350 . . . 30, 36, 111, 113, 184, 187, 189, 200, 216, 241, 284, 476, 477, 510, 541, 546, 552
Moffatt *v.* Moffatt, 5 Cal. 280 315
Monson *v.* Fairfield, 55 Me. 117 256
v. Palmer, 8 Allen, 551 . . . . . 55, 200, 320, 552, 553, 554
Moosar *v.* Harvey, 128 Mass. 219 . . . . . 86, 184, 217, 401, 402, 545, 548, 565
Moore *v.* Darrell and Budd, 4 Hagg. Eccl. 346 . . . . . 480, 510
v. Wilkins, 10 N. H. 452 260
Moorhouse *v.* Lord, 10 H. L. Cas. 272; 9 Jur. (N. S.) 677; 32 L. J. Ch. 295; 8 L. T. (N. S.) 212; 11 W. R. 637 . . 96, 108, 113, 119, 174, 176, 179, 185, 189, 200, 201, 210, 211, 212, 216, 218, 221, 225, 226, 230, 235, 236, 238, 240, 246, 276, 387, 395, 477, 478, 481, 512, 513, 514, 515, 516, 533, 552, 554, 555, 556, 557, 560
Morand's Case, Sirey, 1873, II. 148 439
Morgan *v.* Nunes, 54 Miss. 308 . . . . . 122, 125, 135, 175, 188
Morris *v.* Wright, Morrison, Dict. Dec. 4616, Robertson, Pers. Suc. 100 20
Morrison's Case 371

Page
Mostyn *v.* Fabrigas, Cowp. 177 416
Moultrie *v.* Hunt, 23 N. Y. 394 77
Munro *v.* Munro, 7 Cl. & Fin. 842; 1 Robin. Sch. App. 492 . . . . . 43, 49, 50, 53, 174, 176, 187, 193, 200, 217, 234, 235, 269, 277, 286, 477, 493, 508, 513, 514, 515, 554, 557, 560
v. Saunders, 6 Bligh N. R. 468 49
Munroe *v.* Douglas, 5 Madd. 379 . . . . . 187, 191, 192, 193, 194, 195, 266, 268, 271
v. Jackson, 2 Cong. El. Cas. 101 375
Musson *v.* Trigg, 51 Miss. 172 67
Myers' Case, Sirey, 1872, II. 313 439

N.

Nelson *v.* Botts, 16 La. R. 596 . . . . . 190, 551
Neptunus, The, 6 C. Rob. Ad. 403 29
New Albany, City of, *v.* Meekin, 56 Am. Dec. 522 88
New Orleans, City of, *v.* Shepherd, 10 La. An. 268 . . 515, 516, 520, 561, 564
Niboyet *v.* Niboyet, L. R. 4 P. D. 1 . . . . . 39, 68, 69, 291, 419
Nixon *v.* Palmer, 10 Barb. 175 . . . . . 185, 217, 477
Northfield *v.* Vershire, 33 Vt. 110 377
North Yarmouth *v.* West Gardiner, 58 Me. 207 . . . . . 114, 125, 141
Nugent *v.* Bates, 51 Iowa, 77 . . . . . 185, 217, 501, 504
v. Vetzera, L. R. 2 Eq. Cas. 704 . . . . . 60, 366, 367

O.

Ocean, The, 5 C. Rob. 90 . . . . . 35, 197, 205, 279
Olivarez's Case, Le Droit, Oct. 11, 1854 . . . . . 439, 449, 450
Ommanney *v.* Bingham, Robertson, Pers. Suc. 152, 468 . 21, 148, 149, 150, 230, 277, 397, 470, 501, 530, 531
Onslow's Case, Dalloz, 1836, II. 57; Sirey, 1836, II. 374 . . . . . 439, 449
Otis *v.* Boston, 12 Cush. 44 . . . . . 114, 125, 126, 129, 131, 135, 146, 153, 155, 180, 196, 199, 256, 257
Ott's Case, Sirey, 1868, II. 198; 1869, I. 135; Bull. des Arrêts, Cass. Jan. 1869, p. 17 . . . . . 111, 439
Oxford *v.* Bethany, 19 Conn. 229 . . . . . 332, 338
v. Rumney, 8 N. H. 331 378

P.

Parker City *v.* DuBois, 8 Cent. R. 207 . . . . . 261, 262
Parsonfield *v.* Kennebunkport, 4 Greenl. 47 90
v. Perkins, 2 Greenl. 411 . . . . . 90, 256
Parsons *v.* Bangor, 61 Me. 457 . . . . . 187, 199, 200, 504, 505, 565
Pate *v.* Pate, 6 Mo. App. 49 311
Patience, *In re*, L. R. 29 Ch. D. 976 . . . . . 176, 401
Patten, Goods of, 6 Jur. (N. S.) 151 . . . . . 325, 401
Patterson *v.* Gaines, 6 How. 550 . . . . . 40, 64
Paulding's Will, 1 Tuck. 47 . . . . . 299, 306
Pawlet *v.* Rutland, Bray. 175 377
Payne *v.* Dunham, 29 Ill. 125 369
Pearce *v.* State, 1 Sneed (Tenn.), 63 . . . . . 246, 501, 503, 504, 505
Pearl *v.* Hansborough, 9 Humph. 426 67
Pedan *v.* Robb's Adm'r, 8 Ohio, 227 . . . . . 356, 357

Page
Penfield *v.* Chesapeake, &c. R. R. Co. 29 Fed. Rep. 494 . . 189, 190, 503, 504
Penley *v.* Waterhouse, 1 Iowa, 498 . . . . . 218, 501
Pennoyer *v.* Neff, 95 U. S. 714 82
Pennsylvania *v.* Ravenel, 21 How. 103 . . . . . 80, 291, 552
People *v.* Holden, 28 Cal. 123 . . . . . 412, 413
v. Peralta, 4 Cal. 175 . . . . . 89, 188, 201
Perkins *v.* Davis, 109 Mass. 239 . . . . . 246, 554
Pfoutz *v.* Comford, 36 Pa. St. 420 . . . . . 85, 188, 250, 285
Phillips *v.* Gregg, 10 Watts, 158 . . . . . 63, 64
v. Kingsfield, 19 Me. 375 . . . . . 141, 257
Phipps, *Re*, 2 Curteis, 368 401
Phœnix, The, 5 C. Rob. Ad. 21 80
Pilson *v.* Bushong, 29 Gratt. 229 . . . . . 185, 188, 200, 217, 247, 285
Pipon *v.* Pipon, Ambler, 26; Ridg. 230 . . . . . 19, 20
Pitt *v.* Pitt, 4 Macq. H. L. 627; 10 Jur. (N S.) 735; 12 W. R. 1089; 10 L. J. (N. S.) 626 . . . . . 93, 217, 230, 235, 385, 468, 513
Pittsfield *v.* Detroit, 53 Me. 442 . . . . . 374, 377
Platt's Appeal, 80 Pa. St. 501 811
v. Attorney-General, L. R. 3 App. Cas. 336 . . . . . 227, 235, 253, 514, 515, 516, 532
Plummer *v.* Brandon, 5 Ired. Eq. 190 . . . . . 175, 176, 188, 199, 217, 230, 241, 250, 501
Polydore *v.* Prince, 1 Ware, 402 47
Pond *v.* Vermont Valley R. R. Co., 12 Blatchf. 280 208
Poniatowska's (Princess) Case, Sirey, 1811, II. 446; Dalloz, Rec. Alph. III. 348; Jour. du Pal. t. 32, p. 371 . . . . . 439, 449
Poppenhausen *v.* The India Rubber Comb Co., 11 L. Rec. 696 291
Porterfield *v.* Augusta, 67 Me. 556 . . . . . 401, 504
Portland, The, 3 C. Rob. Ad. 41 31
Potinger *v.* Wightman, 3 Meriv. 67 . . . . . 330, 332, 333, 337, 351, 353, 356, 357, 359
Potter *v.* Titcomb, 22 Me. 300 47
Powell *v.* Powell, 29 Vt. 148 293
Powers *v.* Mortee, 4 Am. L. Reg. 427 . . . . . 166, 167, 175, 321, 329, 332, 333
Prentiss *v.* Barton, 1 Brock, 389 . . . . . 83, 166, 174, 180, 241, 284, 470, 477, 552
President, The, 5 C. Rob. Ad. 277 . . . . . 35, 189, 279
President of the United States *v.* Drummond, 3 Beav. 449; 10 Jur. (N. S.) 533; 32 L. J. Ch. 501 397
Prieto *v.* Duncan, 22 Ill. 26 . . . . . 500, 501, 504
Prize Cases, The, 2 Black. (U. S.) 635 30
Prosser *v.* Warner, 47 Vt. 667 315
Putnam *v.* Johnson, 10 Mass. 488 . . 90, 103, 106, 107, 114, 247, 261, 422, 427
v. Putnam, 8 Pick. 433 . . . . . 90, 221

Q.

Quinby *v.* Duncan, 4 Harr. (Del.) 383 . . . . . 175, 477

R.

Raffenel, In Goods of, 3 Swab. & Tr. 49; 9 Jur. (N. S.) 386; 32 L. J. Prob. Cas. 203; 11 W. R. 549; 8 L. T. (N. S.) 211 . . . . . 84, 197, 205, 287
Rawson *v.* Haigh, 2 Bing. 99 . . . . . 552, 553, 554
Read *v.* Bertrand, 4 Wash. C. Ct. 514 . . . . . 217, 230, 241, 470
Reading *v.* Westport, 19 Conn. 561 377
Reed's Appeal, 71 Pa. St. 378 . . . . . 85, 123, 180, 188, 250, 284, 285, 289
Reed *v.* Ketch, 1 Phila. 105 . . . . . 202, 504, 505

Page
Reeder *v.* Holcomb, 105 Mass. 93 . . . . . 552, 553, 565
Reel *v.* Elder, 62 Pa. St. 308 . . . . . 71, 311
Regina *v.* Stapleton, 1 Ell. & B. 766 122
Registry Lists, *In re*, 10 Phila. 213; 31 Leg. Int. 332 375
Republic *v.* Skidmore, 2 Tex. 261 230
v. Young, Dallam, 464 . . . . . 92, 199, 252, 253, 291, 299, 505
Rex *v.* Barton Turfe, Burr. Sett. Cas. 49 330
v. Brighton, 5 T. R. 180 526
v. Oulton, Burr. Sett. Cas. 64 330
v. Ringwood, 1 Maule & S. 381 526
v. St. Olaves, 1 Str. 51 526
Ricard *v.* Kimball, 5 Rob. (La.) 142 561
Rice, Matter of, 7 Daly, 22 . . . . . 422, 431
Richardson *v.* Richardson, 3 Mass. 158 312
Richmond *v.* Vassalborough, 5 Greenl. 396 . . . . . 90, 470, 504
Rieffel's Case, Sirey, 1873, II. 265 439
Riggs *v.* Andrews, 8 Ala. 628 501
Ringgold *v.* Barley, 5 Md. 186 . . . . . 190, 196, 200, 201, 226, 285
Risewick *v.* Davis, 19 Md. 82 125
Roberti & Wife *v.* Methodist Book Concern, 1 Daly, 3 . . . . . 175, 501
Roberts' Will, *Re* Catharine, 8 Paige, 519 . . 93, 217, 241, 287, 552, 554, 557
v. Cannon, 4 Dev. & B. 256 . . . . . 90, 113, 123
v. Walker, 18 Ga. 5 322
Robins *v.* Dolphin, 1 Swab. & Tr. 37; 4 Jur. (N. S.) 187 (see also Dolphin *v.* Robins) 187
v. Weeks, 5 Mart. (N. S.) 379 347
Robinson *v.* Blakely, 4 Rich. 586 554
Rogers *v.* The Arnado, 1 Newb. 400 30
Roosevelt *v.* Kellogg, 20 Johns. 208 180
Rose *v.* Ross, 4 Wils. & S. 37; 5 S. (Sc. Sess. Cas. 1st ser.) 618 . . 41, 49, 50
Ross *v.* Ross, 108 Mass. 575 . . . . . 188, 250
Same *v.* Same, 129 Mass. 243 . . . . . 38, 39, 40, 44, 45, 46, 344
Rowland & Son's Case, Sirey, 1844, 746; 1848, 417 450
Royalton *v.* West Fairlee, 11 Vt. 438 310
Ruding *v.* Smith, 2 Hagg. Cons. 371 63
Rue High, Appellant (see High).
Rumney *v.* Camptown, 10 N. H. 567 . . . . . 201, 256, 257, 386, 501
Russell *v.* Randolph, 11 Tex. 460 . . . . . 92, 159, 175, 180, 199, 201, 227, 252, 253, 287, 291, 299, 321, 505
Ryal *v.* Kennedy, 40 N. Y. Superior Ct. 34 (see also Kennedy *v.* Ryal) . . 126, 146, 247, 248, 325, 332, 333, 338, 477
Ryan *v.* Malo, 12 Low. Can. 8 408

S.

Sackett's Case, 1 Mass. 58 217
St. Albans *v.* Huntington, unreported; cited in Manchester *v.* Rupert, *q. v.* 377
St. George *v.* Catharine, 1 Sett. Cas. 72 330
Salem *v.* Lynn, 13 Met. 544 . . . . . 552, 553, 554
Sanders *v.* Getchell, 76 Me. 158 . . . . . 422, 423, 429, 430
Sanderson *v.* Ralston, 20 La. An. 312 . . 188, 299, 468, 470, 504, 541, 549, 561
San Jose Indiano, The, 2 Gall. 268 31
Santissima Trinidad, The, 7 Wheat. 283 37
Saul *v.* His Creditors, 5 Mart. (N. S.) 569 . . . . . 62, 66
Sawtell *v.* Sawtell, 17 Conn. 284 315
Schafer *v.* Eneu, 54 Pa. St. 304 58
Schibsby *v.* Westenholz, L. R. 6 Q. B. 154 82
Scholes *v.* The Murray Iron Works Co., 44 Iowa, 190 504
Schonwald *v.* Schonwald, 2 Jones Eq 367 311

Page

School Directors *v.* James, 2 Watts & S. 568 . 132, 291, 292, 321, 325, 332, 333, 335, 337, 338, 339, 340, 352, 359, 361, 363
Scott, Matter of, 1 Daly, 534 . . . 87, 123, 164, 166, 284, 288, 402, 403, 405, 501, 537
v. Key, 11 La. An. 282 . . . . . 45, 55
v. Schwartz, Comyn R. 677 19
Scrimshire *v.* Scrimshire, 2 Hagg. Cons. 395 64
Sears *v.* Boston, 1 Met. 250 . . . . . 129, 217, 230, 241, 401, 402, 468, 478
Sedgwick *v.* Laflin, 10 Allen, 430 46
Seiter *v.* Straub, 1 Demarest, 264 . . . . . 321, 354, 368
Sewall *v.* Roberts, 115 Mass. 262 58
v. Sewall, 122 Mass. 156 . . . . . 48, 547, 549
Shackell *v.* Shackell (cited in Whitcomb *v.* Whitcomb, *q. v.*) . . . 291, 307
Sharpe *v.* Crispin, L. R. 1 P. & D. 611; 38 L. J. Prob. 17; 20 L. T. (N. S.) 41 178, 325, 333, 369, 372, 414, 418, 419, 420, 468, 470
v. Orde, 8 S. (Sc. Sess. Cas. 1st Ser. 1829) 49 . . . . . 377, 386
Shattuck *v.* Maynard, 3 N. H. 123 . . . . . 89, 121, 501
Shaw *v.* Attorney-General, L. R. 2 P. & D. 156 . . . . . 69, 70
v. Gould, L. R. 3 H. L. 55 . . . . . 52, 53, 69
v. Shaw, 98 Mass. 158 . . 113, 123, 124, 130, 142, 188, 196, 230, 285, 311
Shearer *v.* Clay, 1 Littell, 260 554
Shedden *v.* Patrick, 5 Paton, 194; 1 Macq. H. L. 535 . . . . . 48, 49, 53, 56
Shelton *v.* Tiffin, 6 How. 163 . . . . . 83, 498, 510, 516, 541, 544, 555
Shepherd *v.* Cassiday, 20 Tex. 24 . . . . . 93, 135, 141, 146, 155, 256, 285
Sherwood *v.* Judd, 3 Bradf. 267 . . . . . 402, 405, 555, 556
Short's Estate, 16 Pa. St. 68 80
Shreck *v.* Shreck, 32 Tex. 578 315
Sill *v.* Worswick, 1 H. Bl. 665 72
Simonin *v.* Mallac, 2 Swab. & Tr. 67; 6 Jur. (N. S.) 561; 29 L. J. Mat. Cas. 97 47
Skottowe *v.* Young, L. R. 11 Eq. Cas. 474 . . . . . 52, 58
Sleeper *v.* Paige, 15 Gray, 349 . . . . . 226, 242, 243
Smith *v.* Croom, 7 Fla. 81 . . . . . 94, 113, 119, 151, 175, 190, 196, 201, 246, 251, 501, 504, 510, 541, 555, 561
v. Dalton, 1 Cin. Superior Ct. R. 150 . . . . . 188, 190, 201, 217, 250
v. Derr's Adm'rs, 34 Pa. St. 126 . . . . . 45, 46, 56
v. Goods of, 2 Robertson Eccl. 332 412
v. Kelley, 23 Miss. 167 55
v. Moorehead, 6 Jones Eq. 360 . . . . . 291, 311
v. People, 44 Ill. 16 . . . . . 217, 250
v. Smith, 4 Greene (Iowa), 266 . . . . . 112, 217, 230
Snelle Zeylder, The, The Lords, 1783, cited 3 C. Rob. Ad. 12 . . . 197, 278
Somerville *v.* Somerville, 5 Ves. Jr. 750 . . 20, 93, 98, 147, 148, 149, 165, 166, 174, 175, 205, 225, 230, 254, 278, 321, 325, 355, 397, 480, 513, 514, 515, 518, 519, 530, 581, 557
Sottomayer *v.* De Barros, L. R. 3 P. D. 1 . . . . . 62, 64
Same *v.* Same, L. R. 5 P. D. 94 . . . . . 47, 64
Specht's Case, Dalloz, 1872, II. 255; Sirey, 1875, I. 19 . . . . 439, 455, 456
Stanley *v.* Bernes, 3 Hagg. Eccl. 373 . . . . 160, 210, 219, 220, 249, 287, 475, 476, 481, 482, 486, 487, 494, 507, 538, 555, 556
Stansbury *v.* Arkwright, 5 C. & P. 575 552
State *v.* Adams, 45 Iowa, 99 399
v. Aldrich, 14 R. I. 171 . . . . . 113, 123, 541
v. Daniels, 44 N. H. 383 422
v. Dodge County, 56 Wis. 79 . . . . . 112, 123, 230, 246, 257, 262
Ex rel. Fuselier *v.* Judge of Probates, 2 Rob. (La.) 160 347
Same *v.* Same, id. 418 347

Page
State, *Ex rel.* Tilghman *v.* Judge of Probates, 2 Rob. (La.) 449 200
v. Frest, 4 Harr. (Del.) 558 . . . . 90, 146, 188, 190, 200, 226, 227, 254, 470, 474, 510
v. Graham, 39 Ala. 454 (see *Re* Toner) 287, 398
v. Griffey, 5 Neb. 161 541
v. Grizzard, 89 N. C. 115; 18 Rep. 375 . 90, 112, 123, 135, 137, 217, 408
v. Groome, 10 Iowa, 308 . . . . . 89, 226, 501, 541, 549
v. Hallett, 8 Ala. 159 . . . . . 90, 188, 216, 230, 251, 252, 505, 516
v. Judge, 13 Ala. 805 . . . . . 90, 217, 257
v. Minnick, 15 Iowa, 123 . . . . . 230, 246
v. Poydras, 9 La. An. 167 137
v. Ross, 23 N. J. L. (3 Zab.) 517 . . 125, 126, 131, 149, 151, 155, 241, 541
v. Schlachter, Phil. N. C. 520 315
v. Steele, 33 La. 910 . . . . . 151, 155, 176, 256, 541, 546
State Tax on Foreign-held Bonds, 15 Wall. 300 88
Steer, *In re*, 3 Hurl. & Nor. 594 . . . . 148, 215, 216, 219, 227, 238, 555, 563
Stephens *v.* McFarland, 8 Ir. Eq. 444 325
Succession of, 19 La. 449 . . . . . 342, 347
Stevenson *v.* Masson, L. R. 17 Eq. Cas. 78 . . . . . 505, 514, 515, 536
v. Sullivant, 5 Wheat. 207 53
Still *v.* Woodville, 38 Miss. 646 . . . . . 393, 394
Stockton *v.* Staples, 66 Me. 197 . . . . . 187, 199, 241, 256, 565
Stoddert *v.* Ward, 31 Md. 563 257
Stoughton & Peck *v.* Hill, 3 Woods, 404 185
Stover, Matter of, 4 Redf. 82 . . . . . 175, 188
Strathmore Peerage, 4 Wils. & S. 89; 6 Paton, 645 49
Stratton *v.* Brigham, 2 Sneed (Tenn.), 420 . . . . 112, 128, 125, 132, 226, 248, 260, 261
Strong *v.* Farmington, 74 Me. 46 . . . . . 369, 374
Stuart *v.* Marquis of Bute, 9 H L. Cas. 460 . . . . . 60, 366
Sussman's Case, Dalloz, 1872, II. 65 439
Swaney *v.* Hutchins, 15 Neb. 266 . . . . . 199, 227, 255, 291, 505

T.

Tabbs *v.* Bendelack, 4 Esp. 108 501
Talbot *v.* Jansen, 3 Dall. 128 37
Talmadge Adm'r *v.* Talmadge, 66 Ala. 199 . . . . . 91, 92, 123, 197, 251, 285, 505
Tanner *v.* King, 11 La. R. 175 . . . . . 107, 160, 188, 217, 256
Taunton *v.* Plymouth, 15 Mass. 208 324
Taylor *v.* Reading, 4 Brewst. 439 . . . . . 123, 200, 241
Tazewell *v.* Davenport, 4 Ill. 197 . . . . . 123, 125, 131
Thayer *v.* Boston, 124 Mass. 132 . . . . . 114, 207, 520, 525, 565
Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191 31
Thomaston *v.* St. George, 17 Me. (5 Shep.) 117 . . . . . 552, 555
Thompson *v.* Advocate General, 12 Cl. & Fin. 1 19
v. Ketcham, 8 Johns. 190 62
Matter of, 18 Wend. 43 . . . . . 111, 125
v. Whitman, 18 Wall. 457 82
Thorndike *v.* Boston, 1 Met. 242 . . . . . 93, 123, 125, 129, 130, 135, 146, 175, 249, 285, 467, 552, 554, 556, 560
Thorne *v.* Watkins, 2 Ves. Sr. 35 19
Thornton's Case, Sirey, 1825-27, 442; Dalloz, 1827, II. 49; Jour. du Pal., Nov. 7, 1826 439
Tillman *v.* Moseley, 14 La. An. 710 561
Tobin *v.* Walkenshaw, 1 McAll. 186 . . . . . 552, 556
Tolen *v.* Tolen, 2 Blackf. 407 315
Toner, *In re*, 39 Ala. 454 (see also State *v.* Graham) 89, 477, 478
Tootal's Trusts, *Re*, L. R. 23 Ch. D. 532 . . . . . 221, 460

Page
Topsham *v.* Lewiston, 74 Me. 236 . . . . . 377, 378, 501
Tovey *v.* Lindsay, 1 Dow, 117 401
Townshend *v.* Kendall, 4 Minn. 412 356
Trammell *v.* Trammell, 20 Tex. 406 . . . . . 175, 323, 329, 340
Tremont *v.* Mt. Desert, 36 Me. 390 373
Tucker *v.* Field, 5 Redf. 139 . . . . . 176, 457
Tulloh *v.* Tulloh, 23 D. (Sc. Sess. Cas. 2d ser. 1861) 639 291
Turner *v.* Buckfield, 3 Greenl. 229 261
Tyler *v.* Murray, 57 Md. 418 . . . . . 123, 200, 408, 411

U.

Udny *v.* Udny, L. R. Sch. App. 441; 7 Macph. (Sc. Sess. Cas. 3d ser. 1869) 89; (In Court of Session, 5 Macph. 164) . . . . . 38, 43, 50, 53, 62, 93, 95, 97, 111, 135, 136, 146, 149, 155, 164, 166, 167, 171, 172, 173, 174, 180, 187, 194, 195, 196, 197, 204, 209, 211, 212, 213, 226, 229, 230, 235, 236, 237, 240, 253, 265 *et seq.*, 289, 380, 385, 386, 394, 408, 419, 455, 515, 552, 557
Union *v.* Plainfield, 39 Conn. 563 554
United States *v.* Crosby, 7 Cranch, 115 46
v. Farragut, 22 Wall. 406 30
v. Guillem, 11 How. 47 30
v. The Penelope, 2 Pet. Ad. 438 . . . . . 30, 187, 199, 217, 230, 241
v. Thorpe, 2 Bond, 340 . . . . . 89, 217, 230, 501, 502, 541
President of, *v.* Drummond (see President).
Upton *v.* Northbridge, 15 Mass. 237 . . . . . 359, 373

V.

Vanderpoel *v.* O'Hanlon, 53 Iowa, 246; 36 Am. Rep. 216 . . . 90, 188, 196, 218, 422
Van Storch *v.* Griffin, 71 Pa. St. 240 311
Van Voorhis *v.* Brintnal, 86 N. Y. 18 . . . . . 40, 64
Veile *v.* Koch, 27 Ill. 129 230
Venable *v.* Paulding, 19 Minn. 488 . . . . . 114, 123, 226, 242, 244, 408, 411, 541, 565
Venus, The, 8 Cranch, 253 . . . . . 29, 31, 35, 111, 180, 197, 199, 201, 241, 242, 250, 283, 284, 289, 470, 476
Verret *v.* Bonvillain, 33 La. An. 1304 . . . . . 199, 470, 552, 555, 556
Vigilantia, The, 1 C. Rob. Ad. 1 . . . . . 29, 31
Villere *v.* Butman, 28 La. An. 515 . . . . . 522, 542, 549
Virginie, La, 5 C. Rob. Ad. 99 . . . . . 180, 269
Vischer *v.* Vischer, 12 Barb. 640 . . . . . 188, 199, 241, 306, 342
Von Glahn *v.* Varenne, 1 Dill. 515 209
Von Hoffman *v.* Ward, 4 Redf. 244 . . . . . 135, 148, 188, 327, 328
Vrow Anna Catharina, The, 5 C. Rob. Ad. 161 31

W.

Walcot *v.* Botfield, Kay, 534; 18 Jur. 570 . . . . . 135, 166, 280
Walker, *In re*, 1 Lowell, 237 . . . . . 84, 180, 283, 284, 288, 289
v. Barrelli, 32 La. An. 467 137
v. Walker, 1 Mo. App. 404 218
Wallace's Case, Robertson, Pers. Suc. 201 . . . . . 422, 424, 432, 508

Page
Wallace *v.* Attorney-General, L. R. 1 Ch. 1 53
Waller *v.* Lea, 8 La. R. 213 551
Walpole *v.* Marblehead, 8 Cush. 528 338
Ward *v.* Oxford, 8 Pick. 476 . . . . . 561, 562, 563
Warren *v.* Hofer, 13 Ind. 167 . . . . . 321, 340
v. Thomason, 43 Me. 406 . . . . . 91, 114, 125, 187
Warrender *v.* Warrender, 2 Cl. & Fin. 488; 9 Bligh, 89 . 47, 69, 291, 292, 299, 300, 307, 309, 334, 504
Washington *v.* Beaver, 3 Watts & S. 548 . . . . . 167, 322, 369, 378
v. Kent, 38 Conn. 249 377
Washington County *v.* Mahaska County, 47 Iowa, 57 374
Waterborough *v.* Newfield, 8 Greenl. 203 . . . . . 90, 256
Watson *v.* Simpson, 13 La. An. 337 556
Wauchope *v.* Wauchope, 4 Rettie (Sc. Sess. Cas. 4th ser.), 945 221
Wayne *v.* Greene, 21 Me. 357 . . . . . 201, 257, 467, 552, 556, 558
Wayne Township *v.* Jersey Shore, 81 Pa. St. (32 Smith), 264 167
Weaver *v.* Norwood, 59 Miss. 665 125
Weld *v.* Boston, 126 Mass. 166 . . . . 524, 541, 546, 550, 560, 561, 562, 565
Wellesley *v.* Wellesley, 2 Bligh (N. S.), 124; 1 Dow & Cl. 152 357
Wells *v.* Kennebunkport, 8 Greenl. 200 322
v. People, 44 Ill. 40 . . . . . 504, 505
Wesson *v.* Marshall, 13 La. An. 436 200
West, Goods of, 6 Jur. (N. S.) 831 . . . . . 201, 401, 493, 562
West Boylston *v.* Sterling, 17 Pick. 126 549
West Cambridge *v.* Lexington, 1 Pick. 506 48
Weston *v.* Weston, 14 Johns. 428 . . . . . 498, 504, 515
Wheeler *v.* Burrow, 18 Ind. 14 . . . . . 322, 325
v. Hollis, 19 Tex. 522 . . . . . 337, 359, 363
Whicker *v.* Hume, 7 H. L. 274; 4 Jur. (N. S.) 933; 28 L. J. Ch. 396 . . . . . 77, 96, 98, 99, 108, 113, 119, 185, 187, 221, 225, 226, 234, 237, 246, 250, 513, 514, 533, 554, 568
Whitcomb *v.* Whitcomb, 2 Curteis, 851 . . . . . 291, 307
White *v.* Brown, 1 Wall. Jr. C. Ct. 217 . . . 98, 111, 113, 135, 147, 148, 166, 174, 180, 187, 189, 199, 201, 202, 209, 217, 219, 241, 242, 246, 288, 383, 468, 481, 482, 490
v. Burnley, 20 How. 235 384
v. Howard, 52 Barb. 294 . . . . . 358, 368, 422, 510
v. Repton, 3 Curteis, 818 401
v. White, 3 Head, 404 . . . . . 93, 99, 246, 515
Whitney *v.* Sherborn, 12 Allen, 111 . . . . . 141, 188, 261
Wiggin, *Ex parte*, 1 Bank. Reg. 90 (s. c. as *In re* Walker, *q. v.*)
Wilbraham *v.* Ludlow, 99 Mass. 587 131
Wilkins *v.* Marshall, 80 Ill. 14 . . . . . 201, 250
William Bagaley, The, 5 Wall. 377 30
Williams *v.* Dormer, 2 Robertson Eccl. 505; 16 Jur. 366; 9 Eng. L. & Eq. 598 304
v. Henderson, 18 La. R. 557 . . . . . 250, 262, 502
v. Roxbury, 12 Gray, 21 . . . . . 197, 251
v. Saunders, 5 Cold. 60 . . . . . 188, 217, 291, 401
v. Whiting, 11 Mass. 424 . . . . . 257, 501, 502
Williamson *v.* Parisien, 1 Johns. Ch. 389 . . . . . 227, 287, 495, 504, 516
Williamsport *v.* Eldred, 84 Pa. St. 429 307
Wilmington *v.* Burlington, 4 Pick. 174 454
Wilson's Trusts, *Re*, L. R. 1 Eq. Cas. 247 53
v. Marryat, 8 T. R. 31 (see also Marryat *v.* Wilson) 29
v. Terry, 11 Allen, 206 . . . . . 141, 188, 246, 256, 262
Same *v.* Same, 9 id. 214 . . . . . 552, 553, 562
Wilson *v.* Wilson, L. R. 2 P. & D. 435 . . . . . 69, 235, 236, 565
Same *v.* Same, 1 H. L. Cas. 538; 5 id. 40 302

Page
Winn, Succession of, 3 Rob. (La.) 303 339
Winter Iron Works *v.* Toy, 12 La. An. 200 200
Winton *v.* Falmouth, 15 Me. 479 199
Wiscasset *v.* Waldoborough, 3 Greenl. 388 373
Wood *v.* Fitzgerald, 3 Oregon, 568 . . . . . 412, 413
v. Wood, 5 Paige, 596 . . . . . 357, 358
Woodend, Inhabitants of, *v.* Inhabitants of Paulspury, 2 Ld. Ray. 1473, Stra. 776 330
Woodworth *v.* St. Paul, M. & M. R'y Co. 18 Fed. Rep. 282 . . . 408, 411, 541, 552, 553, 565
v. Spring, 4 Allen, 321 . . . . . 60, 321, 366, 367
Wooldridge *v.* Wilkins, 3 How. (Miss.) 360 . . . . . 419, 555
Wright's Trusts, *In re*, 2 K. & J. 595; 2 Jur. (N. S.) 465; 25 L. J. Ch. 621 43, 58
v. Boston, 126 Mass. 161 . . . . . 552, 560, 561, 562, 563, 565
v. Remington, 12 Vroom, 48 47
v. Wright, 24 Mich. 180 315
Wrigley, Matter of, 8 Wend. 134 . . . . . 111, 125, 130, 230, 284
Wylie *v.* Laye, 12 S. (Sc. Sess. Cas. 1st ser. 1834) 927 166

Y.

Yarmouth *v.* North Yarmouth, 44 Me. 352 374
Yelverton *v.* Yelverton, 1 Swab. & Tr. 574; 29 L. J. (Mat. Cas.) 34; 1 L. T. (N. S.) 194 . . . . . 151, 318, 401
Yerkes *v.* Brown, 10 La. An. 94 . . . . . 190, 551
Yonkey *v.* State, 27 Ind. 236 . . . . . 90, 201, 217, 408, 411, 541, 546
Yule *v.* Yule, 10 N. J. Eq. (2 Stock.) 138 299

THE LAW OF DOMICIL.

THE LAW OF DOMICIL.

CHAPTER I.

INTRODUCTION.

§ 1. **Municipal Organization of the Roman World.** — We are indebted to the Civil Law for both the term "domicil" and the legal idea which it represents. The organization and polity of the Roman world were pre-eminently municipal.[1] In its early history we find Rome, itself a walled city, having an organization and institutions suitable to the requirements of municipal life, surrounded by numerous independent states, composed in their turn either of single cities or confederations of cities. As these fell one by one under the sway of their ambitious and insatiate neighbor, either by treaty or conquest, they experienced treatment differing according to circumstances. Some, becoming allies, merely or mainly recognized the military hegemony of Rome, and retained, at least for a time, their independence in other or most other respects. Some, upon being beaten in war, were allowed to a large degree their autonomy, retaining in some cases their ancient constitutions and the power to choose their own magistrates, etc., and enact their own laws; while in other cases new bodies of laws were imposed, or the power of selecting magistrates was denied, etc. Again, some of the conquered cities were depopulated in whole or in part, and had introduced into them colonies, bringing with them new constitutions modelled usually after that of Rome itself.

[1] See Guizot, Hist. of Civilization in Europe, lect. ii.; and for much that is contained in this chapter see Savigny, System des heutigen Römischen Rechts, vol. viii. (Guthrie's Savigny's Priv. Int. Law), §§ 346–359.

Various subsequent changes took place from time to time in the constitutions of many of these cities, voluntarily in some cases, and in others in consequence of internal disorders or open revolt against Rome; and changes also occurred in the relations with that city of themselves and their citizens, new privileges being conferred in some cases, and in others existing privileges being withdrawn or restricted. And doubtless, too, there was constantly going on a gradual assimilation in the main between the constitutions of the various cities. Without entering into these matters in detail, and without stopping to discuss the consequences of the *Lex Julia Municipalis*, which conferred the *jus civitatis* upon all Italians, it is sufficient to say that these cities — or urban communities, as they are sometimes aptly called — bore the common name of *civitates* or *respublicæ*,[2] and included two general classes, *municipia* and *coloniæ*, under which were several subordinate classes, such as *civitates fundanæ*, *prefecturæ*, etc.; each urban community possessing a more or less independent constitution, with its own magistrates, having jurisdiction, and even with power, more or less limited, of making its own laws. To each town was attached a district called *territorium* or sometimes *regio*. "At the time of the complete development of the Roman constitution, towards the close of the republic and during the first centuries of the empire," as Savigny points out, the whole soil of Italy outside of the city of Rome was included in these urban communities, "and every inhabitant of Italy belonged either to the city of Rome or to one or other of these urban communities. The provinces, on the contrary, had originally very various constitutions. They had, however, gradually approximated to the municipal system of Italy, although in them this system was not carried out so completely and thoroughly. In the time of the great jurists, in the second and third centuries of our era, the proposition just now laid down in regard to Italy could almost be applied

[2] The subject of the various constitutions of the Roman urban communities has been ably discussed with special reference to the Roman doctrine of domicil in the Thèses du Doctorat of Ancelle, Chavanes, Roussel, and De Fongaufier. See also Demangeat, Cours Élémentaire de Droit Romain, t. 1, l. 1, pp. 152–172, 2d ed. (1867).

to the whole empire. The soil of the empire was almost entirely included in distinct urban territories, and the inhabitants of the empire appertained either to the city of Rome or to one or other urban community."[3]

§ 2. **Origo and Domicilium.** — The Roman law recognized two kinds of connection between a person and an urban community; namely, citizenship (generally called *origo*) and domicil (*domicilium*). While a discussion of the former does not fall directly within the scope of this work, it is necessary to state briefly its general features, inasmuch as without such statement it is impossible to arrive at any clear conception of domicil under the Roman law.

Those who possessed citizenship in an urban community were usually designated as *municipes*, or sometimes as *cives*, while *incolæ* were those who were domiciled within the urban territory.[1]

§ 3. **Id. Origo.** — Citizenship arose in four ways: *first*, by birth; *second*, by adoption; *third*, by manumission; and *fourth*, by allection, or formal admission by the magistracy. "Municipem aut nativitas facit, aut manumissio, aut adoptio."[1] "Cives quidem origo, manumissio, allectio, vel adoptio: incolas vero, domicilium facit."[2]

First, by Birth. — This was *nativitas* or *origo* in its restricted sense. But inasmuch as it described the most usual mode of acquisition of citizenship, the term *origo* was commonly employed as a generic term to designate the civic relation however arising. A legitimate child usually followed the citizenship of his father,[3] and whether such child at birth acquired citizenship in a particular place depended upon *whether his father had citizenship there.* The exception to this general rule arose in a few cases where, by special privi-

[3] Savigny, *op. cit.* § 351.

[1] Savigny, *op. cit.* § 353, gives the following contrasted terminology by which the two grounds of connection were distinguished: —

Municipes and *incolæ.*
Origo and *domicilium.*
Jus originis and *jus incolatus.*
Patria and *domus.*

[1] Dig. 50, t. 1, l. 1.

[2] Code 10, t. 39, l. 7.

[3] Dig. 50, t. 1, l. 6, § 1. "Filius civitatem, ex qua pater ejus naturalem originem ducit, non domicilium sequitur." Code 10, t. 38, l. 3. "Filios apud originem patris, non in materna civitate, etsi ibi nati sint (si modo non domiciliis retineantur) ad honores, seu munera posse compelli, explorati juris est." Also Dig. 50, t. 1, l. 1, § 2;

lege conferred upon certain cities, women belonging to them transmitted their citizenship to their legitimate children;[4] and it is not clear from the texts which have come down to us whether in such case the child took citizenship only in the native town of his mother or in both places.[5] This exception is of little importance to us beyond this, that it conclusively demonstrates that the *citizenship* of the parent and not the *domicil* (which in the case of a married woman was always that of her husband[6]) was the basis upon which the *jus originis* of the child rested.

Illegitimate children acquired by *origo* citizenship in the town to which the mother belonged.[7]

Second, by Adoption. — Adoption conferred a cumulative citizenship upon the adopted person. For while he retained his former citizenship with all its incidents, he gained also that of his adoptive father, and this double citizenship was transmitted also to the children of the adopted son.[8] But as this anomalous condition of cumulative citizenship began with and depended upon the artificial relation created by adoption, so it ceased upon the destruction of that relation by emancipation.[9]

Code 10, t. 31, l. 36, and see *infra*, next note.

[4] Dig. 50, t. 1, l. 1, § 2. "Qui ex duobus igitur Campanis parentibus natus est, Campanus est. Sed si ex patre Campano, matre Puteolana, æque municeps Campanus est; nisi forte privilegio aliquo materna origo censeatur; tunc enim maternæ originis erit municeps. Utputa Iliensibus concessum est, ut qui matre Iliensi est, sit eorum municeps. Etiam Delphis hoc idem tributum et conservatum est. Celsus etiam refert, Ponticis ex beneficii Pompeii Magni competere, ut qui Pontica matre natus esset, Ponticus esset. Quod beneficium ad vulgo quæsitos solos pertinere quidam putant; quorum sententiam Celsus non probat; neque enim debuisse caveri, ut vulgo quæsitus matris conditionem sequeretur; quam enim aliam originem hic habet? sed ad eos, qui ex diversarum civitatium parentibus orirentur."

[5] Savigny considers the latter opinion in itself the more probable. *Op. cit.* § 351, note *i*.

[6] See *infra*, § 210.

[7] Dig. 50, t. 1, l. 9. "Ejus, qui justum patrem non habet, prima origo a matre eoque die, quo ex ea editus est, numerari debet." See also Dig. 50, t. 1, l. 1, § 2. *Supra*, § 3, n. 4.

[8] Dig. 50, t. 1, l. 15, § 3. "Jus originis in honoribus obeundis ac muneribus suscipiendis, adoptione non mutatur; sed novis quoque muneribus filius per adoptivum patrem adstringitur." And Dig. 50, t. 1, l. 17, § 9. "In adoptiva familia susceptum, exemplo dati, muneribus civilibus apud originem avi quoque naturalis respondere, D. Pio placuit; quamvis in isto fraudis nec suspicio quidem interveniret."

[9] Dig. 50, t. 1, l. 16. "Sed si emancipatur ab adoptivo patre, non tantum filius, sed etiam civis ejus civitatis, cujus per adoptionem fuerat factus, esse desinit."

Third, by Manumission. — The freedman by manumission acquired citizenship in the native town of his patron;[10] and this also descended to his children. If the patron had citizenship in several places,[11] or if the common slave of several masters[12] were manumitted by them, then a plural citizenship might arise by manumission. But only by complete manumission was thus acquired citizenship which imperfect manumission did not confer.[13]

Fourth, by Allection. The last mode of acquiring citizenship was by allection. This subject is involved in much obscurity. It has been thought by some that this was not a distinct mode, but that *allectio* is only another name for *adoptio*. Cujas[14] cites from manuscripts (without however approving) a reading of the text contained in the Code different from that given above, — namely, "allectio, *id est*, adoptio;" and some color has been given to this reading by the entire omission of *allectio* in the text contained in the Digest. But it is not usually accepted; and although authority in the Roman law sources is wanting, Savigny[15] holds that by *allectio* "is to be understood the free gift of citizenship by the municipal magistrates, of the legality of which there could be no doubt even if it were not expressly attested." Without authority it certainly seems reasonable that the power to admit citizens must have

[10] Dig. 50, t. 1, l. 6, § 3. "Libertini originem patronum vel domicilium sequuntur; item qui ex his nascuntur."

Id. l. 22, *pr.* "Filii libertorum, libertarumque, liberti et patroni manumissoris domicilium aut originem sequuntur."

Id. l. 37, § 1. "Libertos eo loco munus facere debere, unde patrona erit, et ubi ipsi domicilium habebunt, placet."

Id. t. 4, l. 3, § 8. "Liberti muneribus fungi debent apud originem patronorum; sed si sua patrimonia habent sussectura oneribus: res enim patronorum muneribus libertinorum subjecta non est."

Code 10, t. 38, l. 2. "Si, ut proponis, ea, quæ ex causa fideicommissi te manumisit, ab ea libertatem justam fuerit consecuta, quæ originem ex provincia Aquitania ducebat; tu quoque ejus conditionis ejusque civitatis jus obtinea, unde, quæ te manumisit, fuit. Eorum enim conditionem sequi ex causa fidei commissi manumissos pridem placuit, qui libertatem præstiterint, non qui dari rogaverint." See also the next two notes.

[11] Dig. 50, t. 1, l. 27, *pr.* "Ejus, qui manumisit, municeps est manumissus, non domicilium ejus, sed patriam secutus. Et si patronum habeat duarum civitatium municipem, per manumissionem earundem civitatium erit municeps."

[12] Dig. 50, t. 1, l. 7. "Si quis a pluribus manumissus sit, omnium patronum originem sequitur."

[13] See Savigny, *op. cit.* § 351, note *n*, and § 356.

[14] Tom. ii. p. 737 B.

[15] *Op. cit.* § 351.

rested somewhere in the civic body; but by whom it was to be exercised, in what manner, or on what conditions, we have not the grounds even for conjecture.

§ 4. Id. id. By whichever of these means citizenship arose, it could not be extinguished by the mere will of the person; but, as Savigny points out [1] (except in the case of citizenship arising from adoption, which as we have seen ceased with emancipation) "dismission by the municipal authorities must have been as necessary as allection by them." A legal marriage, while it did not destroy the *origo* of the wife even if it were different from that of her husband, suspended during her marriage her liability to personal burdens connected with her native citizenship.[2] And a similar immunity from personal burdens without the complete dissolution of his original citizenship applied in the cases of a citizen raised to the dignity of a senator, and his children,[3] and a soldier during the period of his service.[4]

It is apparent, from what has already been said, that a person might at the same time possess citizenship in several urban communities, and so too it was possible that in several cases he might be without citizenship in any.[5]

[1] *Op. cit.* § 351, note *p*.

[2] Code 10, t. 62, l. 1. "Eam, quæ aliunde oriunda, alibi nupta est; si non in urbe Roma maritus ejus consistat, non apud originem suam, sed apud incolatum mariti ad honores seu munera, quæ personis cohærent, quorumque is sexus capax esse potest, compelli posse, sæpe, rescriptum est. Patrimonii vero munera necesse est mulieres in his locis, in quibus possident, sustinere." See also Dig. 50, t. 1, l. 37, § 2, and l. 38, § 3.

[3] Dig. 50, t. 1, l. 23, *pr.* "Municeps esse desinit senatoriam adeptus dignitatem, quantum ad munera; quantum vero ad honorem, retinere creditur originem. Denique manumissi ab eo, ejus municipii efficiuntur municipes, unde originem trahit."

Id. l. 22, §§ 4 and 5. "Senator ordine motus, ad originalem patriam, nisi hoc specialiter impetraverit, non restituitur. Senatores et eorum filii, filiæque, quoque tempore nati, natæve, itemque nepotes, pronepotes et proneptes ex filio, origini eximuntur, licet municipalem retineant dignitatem."

[4] Dig. 50, t. 4, l. 3, § 1. "His, qui castris operam per militiam dant, nullum municipale munus injungi potest; cæteri autem privati, quamvis militum cognati sunt, legibus patriæ suæ, et provinciæ obedire debent."

Id. l. 4, § 3. "Qui obnoxius muneribus suæ civitatis fuit, nomen militiæ, defugiendi oneris municipalis gratia, dedit; deteriorem causam Reip. facere non potuit."

[5] According to Savigny, *op. cit.* § 351, this might occur in several ways: (1) "When a foreigner was received as a resident into the Roman Empire without becoming by allection a citizen of any municipality;" (2) "When a citizen of any town was released from its municipal connection without being received into another community;" and (3) it took place among "the freedmen of

§ 5. **Id. Domicilium.** — The second bond or connection which the Roman law recognized between person and place was *domicilium*. It differed from *origo* in that it was of a less artificial character and generally depended solely upon the will of the person; so that, generally speaking, without the consent of the municipal authorities one might acquire and abandon domicil at pleasure, provided that his intention to do so was accompanied by the fact of transfer of bodily presence. It is not proposed here to enter into an inquiry concerning the Roman theory of domicil, inasmuch as it will be noticed incidentally in various parts of the body of this work. For the present the learned reader is referred to the principal texts contained in the Code and Digest, which are collected below in a note.[1] It is sufficient to say that although it differs in some points from the modern theory, there is a general correspondence, and more particularly with the modern theory as held by the continental jurists, than whom the British and American authorities have taken a somewhat wider departure from the Roman theory in several particulars.

the lowest class, who were *dedititiorum numero*, and belonged to no community." Bar, however, disputes the correctness of these three categories, and argues that every free inhabitant of the Roman world must have either actively or passively belonged to some definite municipal territory. He considers it probable that the *dedititii* "did belong to some particular community as passive citizens, if not active." Bar, Int. Privat und Strafrecht, § 29, pp. 75–77 (Gillespie's trans. pp. 82, 83).

[1] DEFINITIONS.

C. 10, t. 39, l. 7. Cives quidem origo, manumissio, allectio, vel adoptio: incolas vero (sicut et Divus Hadrianus Edicto suo manifestissime declaravit) domicilium facit. Et in eodem loco singulos habere domicilium, non ambigitur, ubi quis larem, rerumque, ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet: unde cum profectus est, peregrinari videtur: quod si rediit, peregrinari jam destitit.

Dig. 50, t. 1, l. 27, § 1. Si quis negotia sua non in colonia, sed in municipio semper agit, in illo vendit, emit, contrahit, eo in foro, balineo, spectaculis utitur; ibi festos dies celebrat: omnibus denique municipii commodis, nullis coloniarum, fruitur, ibi magis habere domicilium, quam ubi colendi causa diversatur.

Dig. 50, t. 16, l. 203. Sed de ea re constitutum esse, eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet, suarumque rerum constitutionem fecisset.

Dig. 50, t. 16, l. 239, § 2. Incola est, qui aliqua regione domicilium suum contulit: quem Græci πάροικον (id est, *juxta habitantem*) appellant. Nec tantum hi, qui in oppido morantur, incolæ sunt: sed etiam, qui alicujus oppidi finibus ita agrum habent, ut in eum se, quasi in aliquam sedem, recipiant.

GENERAL PRINCIPLES.

Dig. 50, t. 1, l. 27, § 2. Celsus, lib. 1 Digestorum, tractat: si quis instruc-

§ 6. **Origo not Domicil of Origin.** — In these two ways, therefore, a person might belong to an urban community. Enough

tus sit duobus locis æqualiter, neque hic, quam illic, minus frequenter commoretur: ubi domicilium habeat, existimatione animi esse accipiendum: ego dubito, si utrobique destinato sit animo, an possit quis duobus locis domicilium habere: et verum est, habere, licet difficile est: quemadmodum difficile est, sine domicilio esse quemquam. Puto autem et hoc procedere posse, si quis domicilio relicto naviget, vel iter faciat, quærens, quo se conferat, atque ubi constituat: nam hunc puto sine domicilio esse.

Dig. 50, t. 1, l. 5. Labeo judicat, eum, qui pluribus locus ex æquo negotietur, nusquam domicilium habere: quosdam autem dicere refert, pluribus locis eum incolam esse aut domicilium habere: quod verius est.

Dig. 50, t. 1, l. 6, § 2. Viris prudentibus placuit, duobus locis posse aliquem habere domicilium, si utrobique ita se instruxit, et non ideo minus apud alteros se collocasse videatur.

Dig. 50, t. 1, l. 20. Domicilium re et facto transfertur, non nuda contestatione: sicut in his exigitur, qui negant se posse ad munera, ut incolas, vocari.

Dig. 50, t. 1, l. 17, § 13. Sola domus possessio, quæ in aliena civitate comparatur, domicilium non facit.

Dig. 50, t. 1, l. 31. Nihil est impedimento, quominus quis, ubi velit, habeat domicilium, quod ei interdictum non sit.

Dig. 35, t. 1, l. 71, § 2. Titio centum relicta sunt ita, ut a monumento meo non recedat, vel uti in illa civitate domicilium habeat: potest dici, non esse locum cautioni, per quam jus libertatis infringitur. Sed in defuncti libertis alio jure utimur.

Dig. 50, t. 1, l. 34. Incola jam muneribus publicis destinatus, nisi perfecto munere, incolatui renunciare non potest.

C. 10, t. 39, l. 1. Non tibi obest, si cum incola esses, aliquod munus suscepisti: modo si antequam ad alios honores vocareris, domicilium transtulisti.

DOMICIL OF PARTICULAR PERSONS.

a. *Wife.*

C. 12, t. 1, l. 13. Mulieres honore maritorum erigimus, genere nobilitamus, et forum ex eorum persona statuimus: et domicilia mutamus. Sin autem minoris ordinis virum postea sortitæ fuerint: priore dignitate privatæ, posterioris mariti sequentur conditionem.

Dig. 50, t. 1, l. 38, § 3. Item rescripserunt, mulierem, quamdiu nupta est, incolam ejusdem civitatis videri, cujus maritus ejus est: et ibi, unde originem trahit, non cogi muneribus fungi.

Dig. 23, t. 2, l. 5. Mulierem absenti per literas ejus, vel per nuncium posse nubere placet, si in domum ejus deduceretur: eam vero, quæ abesset, ex literis vel nuncio suo duci a marito non posse: deductione enim opus esse in mariti, non in uxoris domum, quasi in domicilium matrimonii.

Dig. 5, t. 1, l. 65. Exigere dotem mulier debet illic, ubi maritus domicilium habuit, non ubi instrumentum dotale conscriptum est: nec enim id genus contractus est, ut et eum locum spectari oporteat, in quo instrumentum dotis factum est, quam eum, in cujus domicilium et ipsa mulier per conditionem matrimonii erat reditura.

Dig. 50, t. 1, l. 37, § 2. Mulieres, quæ in matrimonium se dederint non legitimum, non ibi muneribus surgendas, unde mariti earum sunt, sciendum est: sed unde ipsæ ortæ sunt: idque Divi Fratres rescripserunt.

Dig. 50, t. 1, l. 32. Ea, quæ desponsa est, ante contractus nuptias suum non mutat domicilium.

Dig. 50, t. 1, l. 22, § 1. Vidua mulier amissi mariti domicilium retinet, exemplo clarissimæ personæ per maritum factæ; sed utrumque aliis intervenientibus nuptiis permutatur.

b. *Child.*

Dig. 50, t. 1, ll. 3, 4. Placet etiam, filios-familias domicilium habere posse:

has been said to show that *origo* (whether that word be used in its generic or specific sense) and *domicilium* differ widely in their constitution, and particularly that the former in the Roman law did not correspond with what is now termed "domicil of origin,"[1] as is erroneously supposed by some good

non utique ibi, ubi pater habuit, sed ubicunque ipse domicilium constituit.

Dig. 50, t. 1, l. 6, § 1. Filius civitatem, ex qua pater ejus naturalem originem ducit, non domicilium sequitur.

Dig. 50, t. 1, l. 17, § 11. Patris domicilium filium aliorum incolam civilibus muneribus aliense civitatis non adstringit: cum in patris quoque persona domicilii ratio temporaria sit.

c. *Freedmen.*

Dig. 50, t. 1, l. 6, § 3. Libertini originem patronorum vel domicilium sequuntur: item qui ex his nascuntur.

Dig. 50, t. 1, l. 22, *pr.* Filii libertorum, libertarumque, liberti paterni et patroni manumissoris domicilium aut originem sequuntur.

Dig. 50, t. 1, l. 22, § 2. Municipes sunt liberti et in eo loco, ubi ipsi domicilium sua voluntate tulerunt: nec aliquod ex hoc origini patroni faciunt præjudicium; et utrobique muneribus adstringuntur.

Dig. 50, t. 1, l. 27, *pr.* Ejus, qui manumisit, municeps est manumissus, non domicilium ejus, sed patriam secutus.

Dig. 50, t. 1, l. 37, § 1. Libertos eo loco munus facere debere, unde patrona erit, et ubi ipsi domicilium habebunt, placet.

d. *Students.*

C. 10, t. 39, l. 2. Nec ipsi, qui studiorum causa aliquo loco morantur, domicilium ibi habere creduntur, nisi decem annis transactis eo loco sedes sibi constituerint, secundum epistolam Divi Hadriani: nec pater qui propter filium studentem frequentius ad eum commeat. Sed si aliis rationibus domicilium in splendidissima civitate Laodiceorum habere probatus fueris, mendacium, quominus muneribus fungaris, non proderit.

Dig. 47, t. 10, l. 5, § 5. Si tamen in fundum alienum qui domino colebatur, introitum sit, Labeo negat esse actionem domino fundi ex Lege Cornelia: quia non possit ubique domicilium habere, hoc est, per omnes villas suas. Ego puto ad omnem habitationem, in qua paterfamilias habitat, pertinere hanc Legem: licet ibi quis domicilium non habeat: ponamus enim studiorum causa Romæ agere: Romæ utique domicilium non habet; et tamen dicendum est, si vi domus ejus introita fuerit, Corneliam locum habere. Tantum igitur ad meritoria vel stabula non pertinebit. Cæterum ad hos pertinebit, qui inhabitant non momenti causa, licet ibi domicilium non habeant.

e. *Relegati.*

Dig. 50, t. 1, l. 22, § 3. Relegatus in eo loco, in quem relegatus est, interim necessarium domicilium habet.

Dig. 50, t. 1, l. 27, § 3. Domicilium autem habere potest et relegatus eo loci, unde arcetur, ut Marcellus scribit.

f. *Soldiers.*

Dig. 50, t. 1, l. 23, § 1. Miles ibi domicilium habere videtur, ubi meret, si nihil in patria possideat.

g. *Senators.*

C. 10, t. 39, l. 8. Senatores in sacratissima urbe domicilium dignitatis habere videntur.

Dig. 50, t. 1, l. 22, § 6. Senatores, qui liberum commeatum, id est, ubi velint, morandi arbitrium impetraverunt, domicilium in urbe retinent.

C. 12, t. 1, l. 15. Clarissimis, vel Spectabilibus universis ad genitale solum, vel quolibet alio, et sine commeatu proficiscendi, et ubi voluerint, commorandi, habitandive permittimus facultatem.

[1] See *infra*, §§ 104, 106.

writers in modern times,[2] and as was apparently assumed by some of the older continental writers, who in other respects seem to have correctly apprehended the Roman doctrine of *origo*.

§ 7. **Consequences of Origo and Domicilium.** — The consequences of such connection were threefold:[1] *first*, liability to share municipal burdens; *second*, the duty of obedience to municipal magistrates, and particularly the personal jurisdiction arising therefrom; and *third*, subjection to the special municipal law applicable to an individual as a personal quality.

§ 8. **Id. (*a*) Subjection to Municipal Burdens.** — *First.* Whatever rights may have been derived from the connection of a person with a particular place, they were the result of citizenship (*origo*) alone, and not of domicil; for domicil was dependent upon the will of the individual, and it is not to be supposed that municipal rights could be obtained without the consent of the municipal authorities. But even such rights as citizenship conferred, however valuable they may have been at first, in course of time grew to be very insignificant; while on the other hand the municipal burdens to which both *municipes* and *incolæ* were subject grew to be very grievous; and especially so were the duties and responsibilities incident to the *decurionatus*, or municipal office.[1]

[2] Thus, for example, even so accurate a writer as Story (Confl. of Laws, § 46), says: "*First*, the place of birth of a person is considered as his domicil, if it is at the time of his birth the domicil of his parents. 'Patris originem unusquisque sequatur.' This is usually denominated the domicil of birth or nativity, 'domicilium originis.' . . . If he is an illegitimate child, he follows the domicil of his mother. 'Ejus, qui justum patrem non habet, prima origo a matre.'" See also *infra*, § 104. See *infra*, §§ 107, 202, note 1.

[1] See Savigny, *op. cit.* §§ 355–357, and the authorities there cited.

[1] "Under the Emperors the *decuriones*, who collected the imperial taxes, became responsible for the payment of the fixed amount, and were compelled to supply the deficiencies from their own property. Each *decurio* was, moreover, considered as a guarantee for the solvency and good faith of his colleague, and for the successor whom he had presented to fill the office which he vacated. This grievous oppression made every citizen as anxious to escape as he had been formerly desirous to obtain the honor; but the law imposed upon every one who had his *domicilium* in a particular place the necessity of filling the public offices and discharging the duties incident to them in that place. So also with respect to the assessment and payment of taxes domicil was of much importance; hence the *criteria* of it are more fully examined in the passages of the Digest and the Code which relate to these subjects. But not alone in

But the obligation to undertake these and other municipal burdens rested upon all the members of the municipality, whether they entered into the relation by *origo* or domicil. It was particularly in consequence of the oppressive nature of these burdens, which were constantly sought to be evaded, that the subjects of *origo* and domicil were much discussed, and many texts have come down to us.

§ 9. **Id. (*b*) Subjection to Local Magistrates; Forum.** — *Second.* It was a general principle of the Roman law that every lawsuit must be brought in the *forum* of the defendant and not in that of the plaintiff; and a *forum* was imputed to each individual in every town, whose magistrates he was bound to obey by reason of his belonging to such town. But as he belonged thus to every town in which he had *origo* or *domicilium*, it follows that *origo* and *domicilium* determined the *forum* of the defendant, and hence the place where every lawsuit must be brought. Where, however, one had *origo* and *domicilium* in different places, the place to which he belonged by *origo* was doubtless usually resorted to as the *forum* only in case he happened to be found there; and as he could be more easily and conveniently reached in the place of his domicil, it is probable that that place was usually resorted to. This is probably the explanation of the fact that in the texts relating to jurisdiction domicil is more frequently referred to than *origo*.

§ 10. **Id. (*c*) Personal Law.** — *Third.* With reference to the third consequence of the connection of a person with an urban community mentioned above, much is left to conjecture, as few texts which have any bearing on the subject have come down to us. There is enough, however, as Savigny acutely demonstrates, to show that in certain cases, at least, the territorial law applicable to an individual as a personal quality

these passages, for in discussing the question as to the difference between the *civis* and the *incola* of a province, as to the tribunal before which a person should be convened, when and under what modifications the doctrine of prescription should take place, what causes excused the tutor from accepting the office imposed upon him, — in discussing these and various other subjects, the question of domicil was frequently brought under the consideration of the jurists of ancient Rome." Phillimore on Dom., ch. 1, no. 5. These remarks are with special reference to domicil; but what is said of *domicilium* may be said with equal force of *origo*.

was determined by his citizenship if he had any. If he had citizenship in several communities, that learned jurist contends, his citizenship by birth determined in preference to that subsequently acquired by adoption or allection; and if he had *origo* in no place, his domicil necessarily must have been resorted to. The last hypothesis, however, Bar[1] combats upon the ground that "the particular law of an individual was considered to be *privilegium* — either *odiosum* or *favorabile*, as the case might be — of his *status*," and therefore that it is obviously absurd to hold that a person by changing his domicil according to his own pleasure could have acquired such a "*privilegium* of *status*."

§ 11. **Transition to Modern Law.** — All of the consequences above enumerated of connection between person and place have survived to our times; to what extent will be briefly outlined in the succeeding chapter. For this historical account the first two may be dropped, and the third — namely, subjection to territorial law as a personal quality — briefly followed.

§ 12. **Id. Personal Law.** — Several principles more or less distinct have in different times and countries been resorted to for the purpose of determining the personal law applicable to an individual; namely, *citizenship* (or, as it has appeared in recent times, *political nationality*), *race descent*, and *domicil*.

Besides citizenship as we have already contemplated it, in its restricted sense (namely, municipal citizenship, or *origo*), there was in the Roman law a citizenship higher and having a wider scope, which did not always accompany the lower and more restricted form. For until the time of Caracalla a *municeps*, or citizen of an urban community, was not necessarily a *civis Romanus*. Roman citizenship carried with it the adherence to the individual who possessed it of a particular law (that is, the *jus civilis*) as the personal quality, which clothed him with rights and capacities which those who did not possess it were denied. How far the *status* conferred by Roman citizenship might have been modified by the possession of *jus*

[1] *Op. cit.* § 29, p. 79 (Gillespie's trans. p. 86), and § 2, note 6 (Gillespie's trans. p. 12). Besides, he holds, as we have seen (§ 4, note 5, *supra*), that the case supposed could not happen.

originis in an urban community having particular local laws, is by no means clear. Bar[1] holds that with the universal extension of citizenship by Caracalla, the particular system ceased; but this is denied by Savigny.

§ 13. Id. id. **Race Descent.** — But citizenship, of whichever aspect, as a test and determinant of the personal law of an individual, after a while gave way before a new principle, and was almost entirely lost sight of until it was revived in quite recent times. The principle referred to was *nationality* or *race descent*, and was carried to its utmost extent during the wandering and early settlement of the Teutonic tribes, immediately before and after the fall of the Roman Empire. Having no settled abode, but wandering about from place to place, a member of such tribe could not be looked upon as connected with any particular place by any tie. He was looked upon as a Lombard, a Burgundian, or a Frank, and judged as such and not as a citizen or an inhabitant of this or that particular place. And even when these wanderers, after having overrun and conquered different parts of the Roman Empire, had become settled in permanent seats, they did not for a long time become fused with the inhabitants of the conquered provinces, but conqueror and conquered remained distinct, each race retaining its own laws; so that there were often found in the same district several distinct systems of jurisprudence administered to different portions of the inhabitants in accordance with their respective nationalities. Thus the Frank was judged by the Salique or Ripuary Code, and the Gaul by that of Theodosius; and "even in the same city Roman, Lombard, Frank, Burgundian, and Goth might all be found, each living under his own personal law."[1]

[1] *Op. cit.* § 29, p. 79 (Gillespie's trans. p. 86).

[1] Westlake, Priv. Int. L. 2d ed. Introd. p. 11; Savigny, *op. cit.* § 346, and Geschichte des Römischen Rechts im Mittelalter, vol. i. c. 3, §§ 30–33; Bar, *op. cit.* 3; Hallam, Middle Ages, ch. 2; Gibbon, ch. 38; Montesquieu, Espr. des Lois, l. 28, c. 2; Story, *op. cit.* § 2 *a*; Laurent, Droit Civil Int. t. 1, pt. 1, c. 2, § 2, no. 3, par. 168 *et seq.* The Bishop Agobardus, writing to Louis le Débonnaire in the ninth century, said: "Tanta diversitas legum, quanta non solum in regionibus, aut civitatibus, sed etiam in multis domibus habetur. Nam plerumque contingit ut simul eant aut sedeant quinque homines, et nullus eorum communem legem cum altero habeat." Quoted by Gibbon, ch. 38, note 69.

But with the rise of the feudal system we note the decline of this principle. The corner-stone of that system was territorial sovereignty, and hence its policy was to fuse all the inhabitants of the particular territorial division into one mass, to strike out all distinctions depending on national descent, and to substitute strict territoriality. This was the general rule, although there were particular instances in which a contrary policy was to a certain extent followed,—as for example in the case of England after the Norman conquest. There the distinction between Norman and Saxon was for many years kept up, although it was mainly political and penal in its character. A trace of this principle of national descent has come down to more modern times in the disabilities imposed upon the Jews in various countries, as well as in the allowance to that people of certain peculiar laws relating to marriage and kindred subjects usually cognizable in the ecclesiastical courts.[2]

The rise of free cities and the growth of municipal institutions also contributed largely to the desuetude of the principle of national descent. But, as is pointed out by Savigny, the influence of Christianity, the advance of civilization, and the more varied and active intercourse between different nations have removed the rougher contrasts of nationalities, and thrown their characteristic differences more and more into the background.[3]

So that the principle of nationality as a test and determinant of civil *status* has been for the most part eliminated from modern law. But not entirely; for it is still applied in the cases of European merchants resident in Eastern countries, where, in the language of Lord Stowell, "an immiscible character is kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners, as all their fathers were."[4] It is also applied

[2] See authorities cited, Guth. Savig. § 346, note B, and Sir William Scott in The Indian Chief, 3 C. Rob. 22.

[3] On the causes of the disappearance of race descent as the basis of personal laws, cf. Savigny, Geschichte, etc. vol. i. § 49; System, etc. vol. viii. § 346 (Guthrie's trans. p. 59); Eichhorn, Deutsche Staats- und Rechtsgeschichte, vol. i. § 46.

[4] The Indian Chief, 3 C. Rob. 22, 29. See on this subject Lawrence's Wheaton, pt. 2, ch. 2, § 11, and notes.

in Eastern countries, not only to Europeans residing there, but also among natives belonging to different races,—for example in Turkey and India; and to some degree it is applied in this country in the case of the North American Indians.

§ 14. **Id. Local Laws and Customs.**—But the feudal system, besides fusing the different races dwelling within a given territory, and therefore rendering impossible the application of race descent for the determination of personal law, had done another thing. It had broken up continental Europe into a vast number of petty sovereignties exercising authority more or less independent over territories each possessing its own customary law, and had thus rendered possible, in course of time, the rehabilitation of the old Roman principle of domicil.

The vast number of legal territories into which the soil of continental Europe was split up seems at this day almost incredible. France, where the feudal system flourished most vigorously, was divided in the first instance into the "pays de droit écrit" and the "pays de droit coutumier," and the latter in its turn into many legal territories; so that prior to the adoption of the Code Napoléon the number of local customs exceeded three hundred,[1] and according to Beaumanoir,[2] "the customs were so diverse that one was not able to find in the kingdom of France two *châtellenies* which in every case used one and the same custom." The rise of free cities contributed to the same result. Girardus Corselius writes to Burgundus[3] that there were as many different sets of laws in the Netherlands as there were cities. In Germany this state of things was carried to the extent of dividing sometimes the same township or city into several local customs.[4] "Thus there coexisted in Breslau until Jan. 1, 1840, five different particular laws and observances in regard to succession, the property of spouses, etc., and the application of which was limited to certain territorial jurisdictions. Not unfrequently the law varied from house to house; and it even happened

[1] Demolombe, Cours de Code Napoléon, t. 1, no. 339. Desquiron (Domicile, p. 48) says two hundred. See also Livermore, Contrariety of Laws, pp. 5, 6, and Eustis, C. J., in Hubgh v. R. R. Co., 6 La. An. 495; s. c. 54 Am. Dec. 565.

[2] Coutume de Beauvoisis, preface.

[3] Epistola ad Nich. Burgundum, cited by Livermore, *loc. cit.*

[4] Savigny, System, etc. vol. viii. § 347 and note (*c*).

that one house was situated on the borders of different laws, to each of which, therefore, it belonged in part."

§ 15. **Id. Real and Personal Statutes; Return to Domicil.** — The necessity for some uniform principle for the application of these local laws to constantly recurring legal relations early became apparent, and the doctrine of real and personal statutes was invented with domicil as the basis of the application of the latter. Hence domicil came to be discussed to a large extent by the continental jurists, and to be frequently used for the settlement of conflicts of local laws.

§ 16. **Id. Codification and Political Nationality.** — In recent times codification has in most European countries stricken out local customs, and replaced them with uniform national laws; and the field of the conflict of laws has therefore become largely international instead of domestic, as it originally was. Moreover, several European nations[1] have by positive

[1] Italy; *e. g.*, Code, Preliminary Article 6. So too Belgium. The principle of nationality prevails in the codes of many of the Swiss cantons. See Soldan, De l'influence de la loi d'Origine et de la loi du Domicile sur l'état et la capacité des personnes en droit international privé, c. 9.

Whether, and, if at all, to what extent, the French code establishes the principle of nationality, are questions of no little difficulty and dispute. Most of the writers think it does, but there is high authority to the contrary. Art. 3 of the Code Civil provides, "Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger;" and this is generally construed to apply to all Frenchmen in foreign lands, whether permanently or temporarily resident there. Some, however, refer the word *résidant* to temporary residence alone in contradistinction to domicil, and argue that no new rule is introduced by the provision quoted. With reference to foreigners in France the Code Civil is still less explicit, and furnishes two texts, — namely, Art. 11: "L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités de la nation à laquelle cet étranger appartiendra;" and Art. 13, "L'étranger qui aura été admis par la gouvernement à établir son domicile eh France, y jouira de tous droits civils, tant qu'il continuera d'y résider." But in the interpretation and application of these provisions no end of difference of opinion appears. As it is impossible here to state the various theories, the learned reader is referred for further information to the following among other authorities: Laurent, Droit Civil Int. t. 2, no. 97 *et seq.*; Fiore, Droit Int. Priv. l. 1, c. 1 (Pradier-Fodéré's translation) and note 1, p. 76; Brocher, Cours du Droit Int. Priv. nos. 53–55; Asser et Rivier, Éléments de Droit Int. Priv. nos. 20–23, and authorities cited in notes; Demolombe, Cours de Code Napoléon, t. 1, no. 97 *et seq.*; Sirey et Gilbert, Code Civil Annoté, notes to Arts. 3, 11, and 13; Fœlix, Traité du Droit Int. Priv. no. 28, and Demangeat's note; Savigny, System, etc. vol. viii. § 359 (Guthrie's trans. pp. 127, 128); Westlake, Priv. Int. L. 2d ed. pp. 27, 28; Bar, *op. cit.* §§ 30, 31, and Gillespie's note A; Wharton, Confl. of Laws, §§ 7, 8. What has been said of France applies also to Belgium. The

legislation discarded the principle of domicil in the determination of private international questions, and substituted for it the principle of citizenship or political nationality. Domicil has in those countries thus ceased to have the importance which it once had, although it is still resorted to for the settlement of many questions of municipal law. While, therefore, its discussion is omitted from many of the recent European treatises on private international law, it is contained in many of the works on municipal law, notably in the numerous explications of the French Code.

§ 17. **Domicil in British Jurisprudence.** — Turning now to Great Britain, we find that the notion of domicil is of quite recent introduction into the jurisprudence of the countries composing that realm. Indeed, it is asserted that the word itself — so little was it known — did not find its way into English dictionaries until about a half century ago,[1] although

law of Holland is substantially the same. Asser et Rivier, *op. cit.* no. 23. It may be added that among continental writers the doctrine of political nationality, as the basis of personal law, has been rapidly gaining ground during the past few years. In this country and Great Britain it never has been recognized, and whether it ever will be is, to say the least, very doubtful; the principle of domicil being so firmly rooted in our jurisprudence that positive legislation would be required to remove it, and to induce the large number of legislative bodies, which would have to pass upon the subject, to act would be an undertaking of no small magnitude.

[1] Round on Domicil, pp. 9–11. He says: "The word 'domicil' is of modern introduction into our language, not being found in dictionaries published as far back as Johnson's; but in Todd's edition he inserts it, and writes it 'domicile' with an *e*, and quotes it from an old book called 'Brevint's Saul and Samuel at Endor,' p. 303, where there is this passage: 'This famous *domicile* was brought with their appurtenances in one night from Nazareth, over seas and lands, by mighty angels, and can, if honoured with a visit, with an offering, and with a vow, cure in a moment all diseases.' Todd's edition was published in 1827; but in an earlier work by Mason (1801), entitled 'An *Addendum* to Johnson's Large English Dictionary,' the word 'domiciliary' occurs, which he renders as adj., from *domicile*, French, 'intruding into private houses;' and says in a bracket, 'This word is a new offspring of the French Tyranny,' which Todd refers to, but seems to plume himself upon having discovered so erudite an authority as Brevint for the use of the word 'domicile,' which was, in fact, the first use of the French word in an English composition, and Brevint was not an Englishman, but a native of Jersey, although he graduated at Oxford, and was afterwards Dean of Lincoln; and therefore, allowing all honor due to Mr. Todd's industry, this I look upon as an accidental use of it, more particularly as the natives of Jersey speak French, and that it did not obtain till the year 1830, at the earliest, in common use, except in America, and not then common, for in 1827 he was put to the necessity of searching for it in such a recondite authority. He admits, moreover, that it was not to be found in our 'lexicography,' and says, 'Burke uses the

it was used by the courts much earlier. Chief Baron Pollock, speaking in 1864, says:[2] "It is somewhat remarkable that 'domicil' is now very frequently the subject of discussion in our courts, and as we have more than once observed, the word is comparatively entirely new to the English law, for neither it nor the notion it conveys belongs to anything English. The word 'domicil' is not to be found in Viner's Abridgment, Bacon's Abridgment, Comyn's Digest, or in English law books from Bracton down to Blackstone." To

Latin word as if he had not known the English.'

"Vattel, in his 'Law of Nations,' treats of the subject of 'settlement' in precisely the same manner as 'domicil' is now treated of at page 103 of his work, and as the French word 'domicile' was translated 'settlement;' hence we may infer that although the word itself was not used at the time in England (the middle of the eighteenth century when he wrote), yet the subject was then discussed among jurists, although it had not monopolized so much attention as since. We, however, find the word used as an English, or at all events as a Scotch, word in the Dictionary of Decisions for 1813, Lord Eldon's [Elchies'?] notes, p. 199.

"In Littleton's Latin Dictionary, he translates it thus, 'domicilium,' domicolium, *οἰκητηριον ἔναυλημα*, 'a mansion, a dwelling-house, an abode;' *sedes*, Cicero. The word 'mansion' certainly signifies a *fixed* residence, for although it may be let, yet it is usually something belonging to 'the family,' and likely to be retained as a residence. The next word, 'dwelling-house,' might be any house, so might the word 'abode;' but the word 'sedes,' as used by Cicero, probably referred to the villa residences in the vicinity of Rome, that is, a place of retirement, or what we, probably from the same word, call a 'seat,' and there is no doubt that a 'country seat' usually answers the description of a domicil. In the Rev. J. G. Wood's very pretty little work, entitled 'The Common Objects of the Sea Shore,' the following passage occurs at p. 115, showing plainly in what sense the word 'domicil' is taken by a scholar who is *not* a lawyer: 'These creatures (soft-tailed crabs) are generally called hermit crabs, because each one lives a solitary life in his own habitation, like Diogenes in his tub. . . . The species here given is the common hermit crab (Pagurus Bernhardus), and the particular individual is inhabiting a whelk shell, a *domicile*, that is in great request when the creature grows to any size.' It should be observed, in reference to this passage, that the creatures in question make the shells of deceased univalves their *home* as long as they answer their purpose, and therefore the word 'domicil' is used by Mr. Wood in the sense of 'home,' which these shells undoubtedly are to the crabs. The word *domicilium* is used by Grotius, lib. ii. cap. 5, s. 24, where there is this passage: 'Romanis legibus saltem posterioribus *domicilium* quidem transferre licebat.' The Roman law here referred to is as follows: 'Municipes sunt liberti et in eo loco ubi "ipse" *domicilium* suâ voluntate tulerunt, nec aliquod ex hoc origini patroni faciunt præjudicium et utrobique numeribus adstringuntur.' Digest, lib. l. tit. 1. 'Ad municipalem et de incolis.' Leg. xxii. § 2. In the translation of Grotius by Mr. J. Barbeyrac, in 1788, the word *domicilium* is translated 'habitation.'" The above quotation is given for what it is worth, as containing some matters which are of interest, although not stated with entire accuracy.

[2] *Re* Capdevielle, 2 Hurl. & Colt. 985, 1018.

the same effect is the remark of Lord Campbell in Thomson *v.* The Advocate General[3] (1845): "The truth is, my lords, that the doctrine of domicil has sprung up in this country very recently, and that neither the legislature nor the judges, until within a few years, thought very much of it."

§ 18. **Id. Early English Cases.** — The principle of domicil seems to have first made its appearance in both England and Scotland in cases of personal succession. Perhaps Sir Leoline Jenkins was the first English lawyer to use the term.[1] In the reign of Charles II. he speaks of it as "a term not vulgarly known," but holds that the *lex domicilii* furnishes the correct rule for the distribution of the personal property of deceased persons. Almost a century elapsed after this before the subject was brought to the notice of the courts, at least in any reported cases. But in Pipon *v.* Pipon[2] (1744), and Thorne *v.* Watkins[3] (1750), Lord Hardwicke laid down the law with great positiveness and clearness, holding, in accordance with the now universally received doctrine, that personal property must be distributed according to the law of the decedent's domicil. It is to be observed, however, that while this doctrine was clearly set forth, the term *domicil* was not used by his lordship in either of these cases. The question does not appear to have again arisen[4] until in the case of Kilpatrick *v.* Kilpatrick[5] (1787), at the Rolls before Sir Lloyd (afterward Lord) Kenyon, who decided it

[3] 12 Cl. & F. 1, 28.

[1] Phillimore on Domicil, no. 9, p. 8, and nos. 42–44, pp. 28, 29, citing Wynne's Life of Sir Leoline Jenkins, vol. ii. pp. 665–670 and 785. The first reported case before the English courts, so far as the writer is aware, in which the subject of domicil is referred to, was Scott *v.* Schwartz, Comyn R. 677 (1738), in the Court of Exchequer. It was a case of seizure under the Navigation Laws, and the question of national character was involved. The subject of domicil was not particularly discussed, but the application by the Roman law of domicil to the determination of liability to municipal burdens was referred to. In Bell *v.* Reid, 1 Maule & S. 726, Lord Ellenborough speaks of this as the first English case where a question of domicil arose. In it however, national character was not distinctly put upon the ground of domicil, and the Roman doctrine above mentioned was used rather by way of illustration than authority.

[2] Ambler, 25; s. c. Ridg. t. Hard. 230.

[3] 2 Ves. Sen. 35.

[4] But see Burn *v.* Cole (1756), Ambler, 415, as to right to administration.

[5] Unreported, but cited in argument in Bruce *v.* Bruce (*infra*), and Hog *v.* Lashley. The substance of the case is stated from these sources by Robertson, Pers. Succn. p. 116.

upon the same principles as those relied on by Lord Hardwicke. It is surprising that the different customs prevailing in the provinces of York and Canterbury did not early give rise to the application of the principle of domicil in cases of personal succession. But in 1801, while the case of Somerville *v.* Somerville[6] was before him, Sir Richard Pepper Arden directed search for cases in which it had been applied to be made in the Spiritual Court and the Court of Chancery, with the result that no such case could be discovered.

§ 18 *a.* **Id. Early Scotch Cases.** — Contemporary with the case of Pipon *v.* Pipon in England was the case of Brown *v.* Brown[1] (1744) in Scotland, in which the Court of Session confirmed the decision of the Commissaries of Edinburgh, who had decided "that the deceased, Captain Brown, was *origine* a Scotsman, and never had any proper or fixed domicil elsewhere," and that therefore "the succession to said Captain Brown's movable estate is to be regulated by the laws of Scotland," — a recognition of domicil both in principle and in name. In a number of cases before and after this one,[2] however, a contrary view was held, and in Morris *v.* Wright[3] (1785) the Court of Session declared it to be "firmly fixed that the *Lex Loci* ought to be the rule," and further observed that the doctrine of the case of Brown *v.* Brown "was exploded by the most eminent lawyers of the time." So widely did the Scotch courts differ from those of England and from the jurists of the Continent. It required, therefore, several decisions of the House of Lords to put the question at rest and settle the law of Scotland upon this point in accordance with that of other civilized countries.

§ 19. **Id. Bruce v. Bruce and its Sequents.** — The first of these cases, Bruce *v.* Bruce,[1] came up on appeal from Scotland in 1790, and was argued at the bar of the House of Lords by

[6] 5 Ves. Jun. 750.

[1] Kilkerran, *voce* Foreign, No. 1, p. 199, Falconer, p. 11. Elchies, *voce* Succession, Decisions, and Notes. Morrison, Dict. of Dec. p. 4604. Robertson, Pers. Succn. p. 92.

[2] See Robertson, *op. cit.* c. 6. A similar conflict of opinion existed among the institutional writers of Scotland. *Ib.*

[3] Fac. Coll. Morrison, 4616. Robertson, *op. cit.* p. 100.

[1] Reported in a note to Marsh *v.* Hutchinson, 2 Bos. & Pul. 229; s. c. Fac. Coll. 25th June, 1788; Morrison, 4617, omitting Lord Thurlow's speech. It is given at length by Robertson, *op. cit.* p. 118, and by Phillimore, *op. cit.* Appendix, p. 197.

advocates of great celebrity, — Sir John Scott (afterwards Lord Eldon) and William Alexander (afterwards Lord Chief Baron) being on one side, and Sir Ilay Campbell and Charles Hope (both afterwards Presidents of the Court of Session) on the other. The Court of Session had decided, *first*, that the decedent Major Bruce (whose domicil of origin was Scotch), being in the service of the East India Company, had his domicil in India (that is, by fiction of law, or at least in legal effect, in the province of Canterbury), and *second*, that as his effects were all either in England or in India, distribution must be in accordance with the law of England, the *locus rei sitæ*. Lord Thurlow, in his opinion delivered at the time of giving judgment in the Appeal, went into a discussion of the grounds of the judgment of affirmance which was pronounced, saying that "the true ground upon which the cause turned was the deceased being domiciled in India," and that therefore the law of England furnished the correct rule of distribution, not because it was the *lex loci rei sitæ*, but because it was the *lex domicilii*. This case has "ever since been held to have fixed the law of Scotland upon this subject, on the basis of the law of nations."[2] The judgment, however, having been simply an affirmance of the decision of the Court of Session, and nothing else appearing upon the record, as the case appears in the Scotch report, its grounds might be misapprehended but for the fortunate preservation of a stenographic report of Lord Thurlow's speech. This celebrated case having been followed in the House of Lords and Court of Chancery during the next five or six years by the equally celebrated cases of Hog *v.* Lashley,[3] Balfour *v.* Scott,[4] Ommanney *v.* Bingham,[5] Bempde *v.* Johnstone,[6] and others, in which not only was the principle of domicil applied,

[2] Robertson, *op. cit.* p. 121.

[3] This case was before the Scotch Court of Session and the House of Lords several times. It is reported, Fac. Coll. 7th June, 1791, Morrison 4619, and again, *ib.* 16th June, 1795, Morrison 4628. The facts are given at length, and the case discussed by Robertson, *op. cit.* pp. 126 *et seq.* He also gives (Appendix, pp. 391–467) the proceedings before the House of Lords in 1792, and the speeches of Lord Eldon in moving judgment in 1802, and again in 1804.

[4] Fac. Coll. 15 Nov. 1787, Morrison 2379, 4617. House of Lords, 11th April, 1793. Robertson, *op. cit.* 203.

[5] Robertson, *op. cit.* p. 152, and Appendix, p. 468.

[6] 3 Ves. Jun. 198.

but its nature and grounds discussed, the attention of the profession in both countries was attracted to the subject, and thenceforward cases involving the principle became numerous.

§ 20. **Domicil in American Jurisprudence.** — In America the subject of Domicil was first discussed in the case of Guier *v.* O'Daniel, decided in 1806 in the Court of Common Pleas of Philadelphia County and reported in a note to the case of Desesbats *v.* Berquier.[1] The opinion delivered by Rush, President Judge, recognized and followed the law laid down in Bruce *v.* Bruce, and the case has ever since been looked upon as a leading one. Like the earlier cases in England and Scotland, it involved the question of the distribution of the personal estate of a decedent. And as in those countries, so in this, — the principle, once having been recognized, was quickly appreciated by the profession and applied to the determination of cases involving a great variety of questions.

§ 21. The division of the United States into a great number of *quasi* independent States, the vast colonial possessions of Great Britain, the increased and increasing value of personal property, and the greater freedom of migration brought about by improved means of locomotion, have rendered cases involving the principle of domicil of frequent occurrence in those countries. The most powerful minds in the profession on both sides of the Atlantic have been applied to the consideration of the subject; and notwithstanding the occasional conflicts of opinion upon particular points, the general prin-

[1] 1 Binney, 335, 349 note. It is true that prior to this (*e. g.*, in Arnold & Ramsay *v.* The United Ins. Co. 1 Johns. Cas. 363 (1800, opinion by Kent, J.), the principle of domicil in a qualified form (see *infra*, c. 2, § 26), and even under the name of domicil, had been applied to the determination of national character in time of war; but it was not through this class of cases that domicil gained admission to the general jurisprudence of this country. Guier *v.* O'Daniel, however, although decided by a court of inferior jurisdiction, containing as it does a clear statement of many of the principles of law relating to the constitution and proof of domicil, has been frequently quoted and referred to in succeeding cases and in text books, and has, it is believed by the writer, had not a little influence in moulding the American, and to a smaller extent even the British jurisprudence on the subject. For example, President Rush's definition of domicil is substantially that adopted by Phillimore, and can be traced in many of the cases, American and English. It is also adopted, with Phillimore's amendment, by Calvo (Manuel de Droit Int. Pub. et Priv. § 197), as "the most exact definition" given.

ciples of the Law of Domicil have been explicated with considerable clearness, and a system has been built up differing in some respects from the doctrine of the Roman Jurisconsults and the modern Civilians. Between the British and American authorities, however, there is, except in a few particulars, a close correspondence, brought about in great part, we are glad to believe, by the influence of the writings of that eminent judge and accomplished jurist, Judge Story.

§ 22. **Bibliography.** — There are in the English language but three substantive treatises upon the Law of Domicil.

First. "The Law of Domicil, by Robert Phillimore, Advocate in Doctors Commons, and Barrister of the Middle Temple: London, 1847." Reprinted in "The Law Library," Philadelphia, 1847. This a work of great learning and industry, in which are collected, perhaps, all the English cases decided up to that time, together with some of the American cases and with copious references to foreign authorities. An Appendix contains extracts relating to the subject of Domicil from the writings of Menochius, Mascardus, Pothier, Bynkershoek, and Cochin, and from the French and Sardinian Codes, together with the judgments in the leading cases of Bruce *v.* Bruce, Bempde *v.* Johnstone, Somerville *v.* Somerville, and Guier *v.* O'Daniel. Altogether it is a very valuable book, and has always been cited with the greatest respect. This work was subsequently incorporated bodily, and with scarcely any additions, in the fourth volume of the work by the same author on International Law, which has run through several editions; the second edition of the fourth volume appearing in 1874. It is to be regretted that this learned author and distinguished judge did not see proper to rewrite his exposition of this subject, in view of the large number of cases which had appeared in the interim, or at least to incorporate the most important of them into the body of his text.

Second. "A Treatise on the English Law of Domicil, by Oliver Stephen Round, Esq., of Lincolns Inn, Barrister at Law: London, 1861, 16mo, pp. 124." This does not pretend to be either an exhaustive or an accurate treatise, but was written, as the preface tells us, "chiefly in vacation, without the aid of

books, but of notes only collected at spare moments." The aim of the author seems to have been rather to "touch upon" every "branch of the subject" than either to collect all the cases or to weave them into a systematic exposition. The work is but little known, and is to be found in but few libraries in America. It has been cited in only several English cases, and does not seem to be relied upon as an authority.

Third. "The Law of Domicil as a Branch of the Law of England, stated in the Form of Rules, by A. V. Dicey, B. C. L., Barrister at Law, and formerly Fellow of Trinity College, Oxford:[1] London, 1879." This is a clear and systematic discussion of the subject exclusively from the standpoint of an English lawyer; and notwithstanding the almost entire absence from it of any notice of American cases, the work is a valuable one to American lawyers because, among other reasons, of its excellent analysis of fundamental notions. The author does not, however, limit himself to the consideration of domicil *per se*, but devotes more than one half of his space to an examination into its legal effects. His work is thus substantially a treatise on the Conflict of Laws from the standpoint of domicil.

Another work may be here mentioned, although it considers but a narrow branch of our subject; namely, "A Treatise on the Domicil of Englishmen in France, by Henry W. Cole: London, 1857." It collects and discusses with clearness and ability the authorities, both French and English, which had appeared up to the date of its publication upon the subject of the acquisition of domicil by foreigners in France. The author appears to have had some special qualification by reason of his experience in litigation involving the subject-matter of his treatise; and although this might be supposed to bias somewhat his opinions and to detract from his judgment while adding to his information, yet his statements are fair, and his conclusions are given without apparent partisanship.

§ 23. Each of the several treatises in the English language

[1] Since Professor of Law at Oxford.

on the Conflict of Laws or Private International Law contains a chapter on Domicil.

The earliest (with the exception of Henry on Foreign Law [1] and Livermore on the Contrariety of Laws,[2] which is indeed in size only a tract, and, although containing much that is suggestive, is neither a full nor a systematic exposition of the subject of the Conflict of Laws) is Mr. Justice Story's "Commentaries on the Conflict of Laws," which originally appeared in 1834, and has run through eight editions. Chapter III. is devoted to a discussion of National Domicil, and is by far the most lucid exposition of the subject in the English language. It has done more than any other work to bring into harmony the decisions of the courts on the subject, and in a large proportion of the cases on both sides of the Atlantic has been cited and relied upon by both counsel and court. Owing, however, to the plan of the work, it was possible only to state conclusions and refer to authorities, without entering into any minute discussions.

Four years later appeared, in England, William Burge's learned "Commentaries on Foreign and Colonial Law," in four large volumes. This work is a great storehouse of profound and accurate information upon the subject expressed in the title. It is unfortunately inaccessible to most American lawyers. Chapter II. discusses the subject of Domicil with great learning and ability, in the light of the foreign authorities principally.

Following this in England were the treatises of Westlake,[3] Phillimore, and Foote [4] on Private International Law, in each of which the subject of Domicil has been separately considered. And in this country has appeared the well-known work of Dr. Wharton on the Conflict of Laws,[5] which has passed

[1] See *infra*, note 7.

[2] "The Contrariety of the Positive Laws of Different States and Nations, by Samuel Livermore: New Orleans, 1828." It contains no discussion of domicil.

[3] There are two editions of Westlake, the first appearing in 1858, republished in "The Law Library," Philadelphia, 1859. The second, appearing in 1880, is substantially a new work, being entirely rewritten, and as the author says in his preface, differs in many points from that published in 1858, to which it stands in lieu of a new edition.

[4] "A Concise Treatise on Private International Jurisprudence, based on the Decisions in the English Courts: London, 1878."

[5] "A Treatise on the Conflict of

through several editions, and which also devotes considerable space to the discussion of our subject. To these may be added the English translation by Guthrié of Savigny's volume on the Conflict of Laws,[6] where the subject of Domicil is considered at some length, with the historical and exegetical accuracy and learning which characterizes the writings of that "prince of modern jurists."

This list may be still further increased by adding a large number of works on special subjects to which the principle of domicil is more or less applicable.[7] Particular mention, however, should not be omitted of the excellent collection

Laws, or Private International Law: Philadelphia," 1st ed. 1872, 2d ed. 1881.

[6] This is the eighth volume of Savigny's "System des heutigen Römischen Rechts," translated by William Guthrie, Advocate, under the name of "A Treatise on the Conflict of Laws and the Limits of their Operation in respect of Place and Time: Edinburgh," 1st ed. 1869, 2d ed. 1880.

[7] In the following works in the English language will be found discussions, more or less full, of the subject of Domicil:—

Arnould on Marine Insurance, 2d Am. ed. ch. 5, § 2, art. 2; 6th Eng. ed. (by Maglachlan), vol. i. ch. 3, pp. 135–145.

Bishop on Marriage and Divorce, vol. ii. bk. 2, chs. 7, 9, §§ 116–131.

Bouvier's Institutes of American Law, vol. i. bk. 1, pt. 2, t. 4.

Bouvier's Law Dictionary, *verb.* Domicil.

Duer on Marine Insurance, vol. i. lect. 5.

Encyclopedia Americana, *verb.* Domicil. This article, by Dr. Francis Lieber, is a valuable one, and was greatly relied upon by Story, in the preparation of the chapter on National Domicil contained in his work on the Conflict of Laws.

Flood on Wills, pp. 233 *et seq.*

Fraser on Husband and Wife, vol. ii. pt. 7, ch. 1.

Henry on Foreign Law, Appendix A. This was the first treatise (1823) on the Conflict of Laws in the English language, and had its origin in the case of Odwin *v.* Forbes, decided by the court of Demerara, over which the learned author presided. The book is particularly valuable with respect to the subject of Domicil, because of the opinions which it collects of various eminent Dutch jurists, such as Corvinus, Grotius, De Witt, Groenewgen, and others. These opinions are taken from the "Hollandsche Consultatien" and the "Nieuw Nederlands Advys Boek," and, so far as they were originally written in Dutch, translated into English.

Jarman on Wills, vol. i. ch. 1. (See particularly the notes contained in the several American editions.)

Kent's Commentaries on American Law, vol. ii. pp. 227 note, and 430 note. The discussion of the subject of Domicil by this learned writer is brief, being confined to a few pages.

Kneeland on Attachments, ch. 10.

McLaren on Wills, vol. i. ch. 1.

Parsons on Contracts, vol. ii. pt. 2, ch. 2, § 4.

Parsons on Maritime Law, bk. 2, ch. 1.

Parsons on Marine Insurance, vol. i. ch. 2, § 2.

Redfield on Wills, vol. iii. ch. 1, § 2.

Theobald on Wills, ch. 1.

Wait's Actions and Defences, vol. ii. ch. 58 (*verb.* Domicil).

Williams on Executors, pt. 3, bk. 4, ch. 1, § 5. (See particularly the American notes.)

of English and American authorities and discussion of the subject contained in the first volume of Hare and Wallace's American Leading Cases.

§ 24. Among the works of continental writers treating solely or largely of Domicil may be mentioned Lauterbach's Dissertatio de Domicilio, and Thomasius' Tractatio de Vagabundo; and in French, Desquiron's Traité du Domicile et Absence, and the several Thèses pour le Doctorat, of Ancelle, Chavanes, Roussel, and De Fongaufier. The subject is discussed at greater or less length by many of the older as well as later continental writers. A list of the most important is given below.[1]

[1] Among the older writers may be mentioned the following: —

Barbosa, De Offic. Episcopi, pt. 2, all. 4.

Bartolus, In Cod. l. 10, t. 39.

Bouhier, Obser. sur la Cout. du Duché de Bourgogne, c. 21, 22.

Burgundus, Ad Consuet. Fland. Tract. 2, no. 32 *et seq.*

Bynkershoek, Quæstiones Juris Privati, l. 1, c. 16.

Carpzovius, Processus Juris. t. 3, a. 1. Forum competens, etc.

Christenæus, Decis. Curiæ Belgic. vol. v. decis. 31 *et seq.* In Cod. l. 10, t. 38, 39.

Corvinus, Jurisprud. Rom. Summarium, pt. 2. In Cod. l. 10, t. 39.

Cujas, In Cod. l. 10, t. 38, 39, and elsewhere.

D'Argentré, Consuet. Brit. art. 449.

Denizart, Collection de Décisions, etc., *verb.* Domicile. The edition referred to throughout this work is the seventh (1771). The references by Story and Phillimore appear to be to earlier editions.

Domat, Droit Pub. l. 1, t. 16, § 3.

Donellus, De Jure Civili, l. 17, c. 12.

Gail, Practicar. Observat. l. 2, obs. 35, 36.

Mascardus, De Probationibus, conclus. 535.

Menochius, De Arbitratu Judic. l. 2, cent. 1, casus 86.

Pothier, Ad Pand. l. 50, t. 1.

Pothier, Introd. Gén. aux Cout. d'Orléans.

Struvius, Ad Pand. l. 5, t. 1, De judiciis.

Van Leeuwen, Censura Forensis, l. 3, c. 11, no. 5.

Voet, John, Ad Pand. l. 5, t. 1.

Zangerus, De Exceptionibus, pt. 2, c. 1, nos. 9 *et seq.*

Besides the passages indicated, there occur in many of the above-named works other passages in which the subject of Domicil is both discussed and applied.

Among the works of writers of the present century, the following may be mentioned as containing important discussions of Domicil: —

Glück, Ausfürliche Erläuterung der Pandecten, th. 6, bk. 5, t. 1, § 512 *et seq.*

Merlin, Répertoire, etc. de Jurisprud. *verb.* Domicil, Déclinatoire, and other titles.

Calvo, Manuel de Droit Int. Pub. et Privé, ch. 8, sec. 4, § 197 *et seq.*

Calvo, Dictionnaire de Droit Int. Pub. et Privé, *verb.* Domicil.

Brocher, Cours de Droit Int. Privé, l. 1, t. 1, c. 5.

Discussions, more or less extended, of Domicil are to be found in vol. i. of each of the following commentaries on the French Code: —

Aubry et Rau, Cours de Droit Civil Français.

Demante, Cours Analytique du Code Civil.

Demolombe, Cours de Code Napoléon.

Duranton, Cours de Droit Français.

Marcadé, Explication, etc. du Code Civil.

Massé et Vergé, sur Zachariae, Le Droit Civil Français.

Mourlon, Répétitions Écrites sur le Code Napoléon.

Proudhon, Traité sur l'État des Personnes.

Toullier, Le Droit Civil Français.

Vallette, Cours de Code Civil; also sur Proudhon, *supra*.

Zachariae, Handbuch des Französischen Civilrechts.

Also Laurent, Principes de Droit Civil Français, t. 2; and Ortolan, Explications Historiques des Institutes, t. 1.

The various French works on Civil Procedure, etc., discuss the subject of Domicil.

CHAPTER II.

USES OF DOMICIL.

§ 25. **General Remarks.** — Before entering upon a consideration of the general subject of domicil, — its definition, nature, constitution, and change, and the ordinary evidence by which its change is shown, etc., — it will be well to take a brief survey of the general field — or perhaps it would be more accurate to say the several fields — of jurisprudence in which it is usually applied for the determination of legal relations. To do this with any degree of detail would itself require a volume, and moreover such a discussion would more naturally and logically follow than precede the consideration of domicil *per se*. It is the object of the writer, however, here only to outline briefly the various uses to which in American and British jurisprudence the principle of domicil is practically applied, for the purpose, if possible, of approximately estimating the values as authorities of the several classes of cases hereafter to be cited in the body of this work. From this chapter therefore the continental authorities will be, in the main, omitted, and the several topics will be discussed as succinctly as possible, with references only to the leading cases and text-books, to which the learned reader may refer for more elaborate discussion and fuller lists of authorities.

§ 26. **Domicil in Public International Law; National Character.** — In general, the determination of the national character of a person, as subject, enemy or neutral, in time of war, depends upon his domicil;[1] "the general principle being that

[1] The Vigilantia, 1 C. Rob. 1; The Emden, id. 17; The Harmony, 2 id. 322; The Indian Chief, 3 id. 22; The Neptunus, 6 id. 403; Marryat *v.* Wilson, 1 Bos. & P. 430, affirming Wilson *v.* Marryat, 8 T. R. 31; Bell *v.* Reid, 1 Maule & S. 726; Livingston *v.* Maryland Ins. Co., 7 Cranch, 506, 542, per Story, J.; The Venus, 8 id. 253; The Frances (Gillespie's Claim), id. 363; s. c. before Story, J., 1 Gall. 614; The Mary and Susan, 1 Wheat. 46; The Antonia

every person is to be considered as belonging to that country where he has his domicil, whatever may be his native or adopted country."[2] This principle is usually applied in prize cases,[3] in the determination of which, however, peculiar considerations prevail. The object of prize capture in war is to cripple the resources of the enemy, and thus indirectly abridge fighting by depriving him of the sources of his wealth and the means of supplying himself with the sinews of war. To attain this object, not only is the property of every person domiciled within the territory of the enemy held liable to capture,[4] but also the products of the hostile soil[5] and all

Johanna, id. 159; The Friendschaft (Winn *et al.*, claimants), 3 id. 14; United States *v.* Guillem, 11 How. 47; The Prize Cases, 2 Black, 635; The William Bagaley, 5 Wall. 377; Mitchell *v.* United States, 21 id. 350; United States *v.* Farragut, 22 id. 406; Desmare *v.* United States, 93 U. S. 605; The Ann Green, 1 Gall. 274; The Joseph, id. 545; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; United States *v.* Penelope, 2 Pet. Ad. 438; Rogers *v.* The Amado, 1 Newb. 400; Elbers *v.* United Ins. Co., 16 Johns. 128; Lawrence's Wheaton Int. L. 2d ed. p. 557 *et seq.*; Kent's Comm. vol. i. lect. 4; Phillimore, Int. L. vol. iii. pp. 128, 603; Twiss, Law of Nations in Time of War, § 152 *et seq.*; Arnould, Mar. Ins. ch. 5, § 2, art. 2; Duer, Mar. Ins. vol. i. lect. 5; Parsons, Mar. Ins. vol. i. ch. 2, § 2; Id. Maritime L. bk. 2, ch. 1. In Livingston *v.* Maryland Ins. Co., *supra*, Story, J., thus clearly states the doctrine: "It is clear, by the law of nations, that the national character of a person, for commercial purposes, depends upon his domicil. But this must be carefully distinguished from the national character of his trade. For the party may be a belligerent subject, and yet engaged in neutral trade; or he may be a neutral subject and yet engaged in hostile trade. Some of the cases respecting the colonial and coasting trade of enemies have turned upon this distinction. But whenever a person is *bona fide* domiciled in a particular country, the character of the country irresistibly attaches to him. The rule has been applied with equal impartiality in favor and against neutrals and belligerents. It is perfectly immaterial what is the trade in which the party is engaged, or whether he be engaged in any. If he be settled *bona fide* in a country with the intention of indefinite residence, he is, as to all foreign countries, to be deemed a subject of that country. Without doubt, in order to ascertain this domicil, it is proper to take into consideration the situation, the employment, and the character of the individual. The trade in which he is engaged, the family that he possesses, and the transitory or fixed character of his business, are ingredients which may properly be weighed in deciding on the nature of an equivocal residence or domicil. But when once that domicil is fixed and ascertained, all other circumstances become immaterial."

[2] Phillimore, Int. L. 1st ed. vol. iii. p. 603.

[3] Collaterally it is applied in other cases also, particularly in cases of marine insurance. Marryat *v.* Wilson, *supra*; Bell *v.* Reid, *supra*; Livingston *v.* Maryland Ins. Co., *supra*; Elbers *v.* United Ins. Co., *supra*; Duer, Mar. Ins., *supra*; Arnould, id., *supra*; Parsons, id., *supra*; Id. Maritime L., *supra*.

[4] Authorities cited in note 1, *supra*.

[5] The Phœnix, 5 C. Rob. 21; The

interests and property in or connected with houses of trade established within the hostile territory,[6] no matter to whom they may belong, whether friend, enemy, or neutral. Cases of this description are usually decided in the courts of the belligerents themselves, and at times and under circumstances which preclude the fullest investigation of all the facts bearing upon the ownership of the thing captured, and particularly of the facts bearing upon the *animus* of the claimant. For all these reasons, and because, moreover, there are great temptations, and great possibilities also, for the commission of frauds by claimants, prize courts have leaned strongly in favor of captors, and principles have been applied by them which do not prevail in other classes of cases.

The development of the law of prize as it has been applied by the British and American courts is due mainly to the learned and luminous judgments of Lord Stowell at the close of the last and the beginning of the present century, and the leaning of the mind of that great jurist was, as has been pointed out by high authority, strongly in favor of captors.[7] As a single instance may be given his remarks, in The Harmony,[8] upon the subject of length of residence as indicative of domicil, in which he propounds doctrine wholly at variance

Vrow Anna Catharina, id. 161; Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191; The Gray Jacket, 5 Wall. 342; 1 Kent's Comm. p. 74; Lawrence's Wheaton, 2d ed. p. 576 *et seq.*; Phillimore, Int. L. 1st ed. vol. iii. p. 607.

[6] The Vigilantia, 1 C. Rob. 1; The Portland, 3 id. 41; The Antonia Johanna, 1 Wheat. 159; The Friendschaft (Moreira, claimant), 4 id. 105; The Cheshire, 3 Wall. 231; The San Jose Indiano, 2 Gall. 268; 1 Kent's Comm. p. 80; Phillimore, Int. L. vol. iii. p. 605.

[7] Marshall, C. J., in The Venus, 8 Cranch, 253, 299, said: "I respect Sir William Scott as I do every truly great man, and I respect his decisions; nor should I depart from them on light grounds; but it is impossible to consider them attentively without perceiving that his mind leans strongly in favor of the captors. Residence, for example, in a belligerent country will condemn the share of a neutral in a house trading in a neutral country; but residence in a neutral country will not protect the share of a belligerent or neutral in a commercial house established in a belligerent country. In a great maritime country, depending on its navy for its glory and its safety, the national bias is perhaps so entirely in this direction, that the judge, without being conscious of the fact, must feel its influence. However this may be, it is a fact of which I am fully convinced; and on this account it appears to me to be the more proper to investigate rigidly the principles on which his decisions have been made, and not to extend them where such extension may produce injustice."

[8] 2 C. Rob. 322. See further on this subject, *infra*, § 386 *et seq.*

with the views of almost all of the courts and writers who have spoken on the subject of time in its relation to domicil considered with reference to general purposes. From these and other considerations it is apparent that cases of national character in time of war should be used with the greatest caution upon the general subject of domicil.[9]

[9] In Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285, 313, Dr. Lushington says: "Various meanings have been affixed to the word 'domicil,' — domicil *jure gentium;* domicil by the municipal law of any country, and we may add domicil during war, as it may govern the rights of belligerent States. This species of domicil is, it is true, in one sense domicil *jure gentium;* but in many particulars it is governed by very different considerations, and decisions belonging to it must be applied with great caution to the questions of domicil independent of war." In The Baltica, Spinks' Prize Cas. 264, 266, the same distinguished judge said: "Much has been said as to the domicil of origin of Mr. Sorensen, Jr. I briefly advert to it, though I do not think it has any strong bearing on the case, for the question before me is that of mercantile national character, which is governed by rules and by authorities particularly applicable to it alone. I think I should only confuse the case by following it up in reference to other cases of domicil." The same caution is repeated by various writers on the subject of domicil. See, *e. g.*, Westlake, 2d ed. p. 285; Wharton, § 70; Dicey, p. 341 *et seq.*

The last-named writer thus notices the differences between (to use the terminology adopted by him) "commercial domicil" and "civil domicil": "The nature of the trading residence or commercial domicil, which determines a person's friendly or hostile character in time of war, may be made clear by comparing such commercial domicil with the domicil properly so called, which forms the subject of this treatise, and is, in this note, termed, for the sake of distinction, a civil domicil. Each domicil is a kind of residence, each bears a close resemblance to the other, but they are distinguished by marked differences.

"I. *Resemblance of Commercial Domicil to Civil Domicil.* — A trading or commercial domicil bears so close a resemblance to a civil domicil that it is often described in language which appears to identify the two kinds of domicil. Thus Arnould writes of the domicil which determines a person's character in time of war, 'That is properly the domicil of a person where he has his true, fixed, permanent home and principal establishment, in which when present he has the intention of remaining (*animus manendi*), and from which he is never absent without the intention of returning (*animus revertendi*) directly he shall have accomplished the purpose for which he left it' (1 Arnould, Marine Insurance, 3d ed. p. 121), whilst Duer states with regard to the national character of a merchant: 'It is determined solely by the place of his permanent residence. In the language of the law, it is fixed by his domicil. He is the political member of the country into which, by his residence and business, he is incorporated; a subject of the government that protects him in his pursuits that his industry contributes to support, and of whose national resources his own means are a constituent part' (1 Duer, p. 495). Nor are the points in which the two kinds of domicil resemble each other hard to discern. They are each kinds or modes of residence. The constituent elements of each are, first, 'residence;' secondly, a 'purpose or intention' (on the part of the person whose domicil is in question) 'with regard to residence.' In spite, however, of the terms used by

In this country the decisions of Lord Stowell have usually

high authorities, and of the undoubted likeness between the two kinds of domicil, they are different in essential particulars.

"II. *Differences between Civil and Commercial Domicil.* — The fundamental distinction between a civil domicil and a commercial domicil is this: A civil domicil is such a permanent residence in a country as makes that country a person's home and renders it, therefore, reasonable that his civil rights should in many instances be determined by the laws thereof. A commercial domicil, on the other hand, is such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it therefore reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there. From this fundamental distinction arise the following differences: (i.) *As to residence.* — Residence in a country is, in general, *prima facie* evidence of a person having there his civil domicil, but it is only *prima facie* evidence, the effect of which may be quite got rid of by proof that a person has never lived in the country with the intention of making it his permanent home; but residence is far more than *prima facie* evidence of a person's commercial domicil. In time of war a man is taken to be domiciled for commercial purposes in the country where he in fact resides; and if he is to escape the effect of such presumption, he must prove affirmatively that he has the intention of not continuing to reside in such country. A long period further of residence, which, as regards civil rights, is merely evidence of domicil, might, it would seem, be absolutely conclusive in determining national character in time of war (1 Duer, pp. 500, 501; The Harmony, 2 C. Rob. 322). (ii.) *As to intention.* — The intention or *animus* which, in combination with residence, constitutes a civil domicil, is different from the intention or *animus* which, together with residence, makes up a commercial domicil.

"The intention which goes to make up the existence of a civil domicil is the present intention of residing permanently, or for an indefinite period, in a given country. The intention which goes to make up the existence of a commercial domicil is the intention to continue residing and trading in a given country for the present. The former is an intention to be settled in a country and make it one's home; the latter is an intention to continue residing and trading there. Hence, on the one hand, a person does not acquire a civil domicil by residence in a country for a definite purpose or period (pp. 80, 81, *ante*), and cannot by residence in one country, *e. g.* France, get rid of a domicil in another, *e. g.* England, if he retains the purpose of ultimately returning to England as his home; while, on the other hand, the intention 'which the law attributes to a person residing in a hostile country, is not disproved by evidence that he contemplated a return to his own country at some future period. If the period of his return is wholly uncertain, if it remains in doubt at what time, if at all, he will be able to accomplish the design, the design, however seriously entertained, will not avail to refute the legal presumption. A residence for an indefinite period is, in the judgment of law, not transitory, but permanent. Even when the party has a fixed intention to return to his own country at a certain period, yet, if a long interval of time — an interval not of months, but of years — is to elapse before his removal

been followed, although not entirely without protest in some

is to be effected, no regard will be had to an intention of which the execution is so long deferred' (1 Duer, pp. 500, 501).

"D., domiciled in England, goes to British India with the full intention of residing there till he has made his fortune in trade, and of then returning to England, where he has his domicil of origin. He resides in India for twenty years. He retains his English civil domicil. Suppose, however, that D., under exactly similar circumstances in every other respect, takes up his residence not in British India, but in the Portuguese settlement in India, and after war has broken out between England and Portugal, continues to reside and trade in the Portuguese settlement, though still retaining his intention of ultimately returning to England. D., thereupon, acquires a Portuguese commercial domicil.

"(iii.) *As to Abandonment.* The rules as to abandonment are different. A civil domicil once acquired can be changed only by complete abandonment in fact of the country where a person is domiciled (In Goods of Raffenel, 32 L. J. P. & M. 203). The intention to change, even if accompanied by steps for carrying out a change, will not, it would seem, produce a change as long as the person whose domicil is in question continues in fact to reside in the country where he has been domiciled.

"A commercial domicil in time of war can, it would seem, be changed, under some circumstances, by the intention to change it, accompanied by steps taken for the purpose of effecting a change. 'The native national character, that has been lost or partially suspended by a foreign domicil, easily reverts. The circumstances by which it may be restored are much fewer and slighter than those that were originally necessary to effect its change. It adheres to the party no longer than he consents to bear it. It is true, his mere intention to remove, not manifested by overt acts, but existing secretly in his own breast, . . . is not sufficient to efface the character that his domicil has impressed; something more than mere verbal declarations, some solid facts, showing that the party is in the act of withdrawing, is always necessary to be proved; still, neither his actual return to his own country, nor even his actual departure from the territories of that in which he has resided, is indispensable' (1 Duer, pp. 514, 515).

"(iv.) *As to Domicil by Operation of Law.*— It may fairly be doubted whether the rules as to domicil by operation of law, *e. g.*, in the case of persons who have in fact no home, or of dependent persons, which play so large a part in the law of civil domicil, can be without considerable limitations applied to the ascertainment of commercial domicil. D., for example, is a French subject, whose domicil of origin is English. He has an acquired domicil in France. Both France and America declare war against England. D. thereupon leaves France, intending to settle in New York. He resumes during the transit from one country to another his domicil of origin; but it can hardly be supposed that he is not during such transit an alien enemy. D., again, is an infant, or a married woman, carrying on a commercial business on his, or her, own account in France during a war with England. It can hardly be maintained that the fact of the father in the one case, or the husband in the other, having an English domicil and being resident in England, will free D. from the character of an alien enemy.

"(v.) *As to Special Rules.* — There are one or two rules as to commercial domicil which can have no application to an ordinary civil domicil. Thus, according to American decisions, at least, an American citizen (and the same principle would perhaps be applied by English courts to British subjects) cannot, by emigration from his own country during the existence of hostilities, acquire such a foreign domicil as to protect his trade

particulars by such jurists as Marshall [10] and Story.[11] But the

during the war against the belligerent claims either of his own country or of a hostile power (1 Duer, p. 521; The Dos Hermanos, 2 Wheaton, 76). So, again, a neutral merchant may at any time withdraw his property and funds from a hostile country, and such a withdrawal may restore him to his neutral domicil. But whether the subject of a belligerent state can, after the outbreak of hostilities, withdraw from a hostile state, so as to escape the imputation of trade with the enemy is doubtful. If the withdrawal can be effected at all, either it must be done within a short period after the outbreak of war, or any delay in effecting it must be shown to have arisen from necessity or from compulsion (The Diana, 5 C. Rob. 59; The Ocean, id. 90; The President, id. 277; 1 Duer, p. 519).

"C. *Person's Civil need not coincide with his Commercial Domicil.* — From the distinctions between a civil and a commercial domicil, the conclusion follows that a person may have a civil domicil in one country, and, at the same time, a commercial domicil or residence in another. Thus, suppose that D.'s domicil of origin is English, but that he goes to France and sets up in trade there without any purpose of making France his permanent home, but with the distinct intention of returning to England within ten years. He clearly retains his English domicil of origin; and the outbreak of a war between France and England does not of itself affect D.'s civil domicil.

"If D. continues to reside and trade in France after the outbreak of hostilities, though without any change of intention as to the time of his stay in France, he will acquire a French commercial domicil. In other words, he will have a civil domicil in England and a commercial domicil in France. Nor is this fact really inconsistent with Rule 3, that no person can, at the same time, have more than one domicil. It only illustrates the fact constantly dwelt upon in this work, that residence is different from domicil, and that a person while domiciled in one country may, in fact, reside in another."

But he is not correct in assuming that the intention requisite for the establishment of "commercial domicil" is "intention to continue residing and trading in a given country." Intention to trade is merely accessory, and not at all essential, — at least such is the American view, as may be seen in the cases cited in the notes to this section; and it is so explicitly declared by Story, J., in the passage quoted above, in note 1. See also particularly The Venus, *supra*, where Marshall, C. J., says: "For commercial purposes, the merchant is considered as a member of that society in which he has his domicil; and less conclusive evidence than would seem to be required in general cases, by the law of nations, has been allowed to fix the domicil for commercial purposes. But I cannot admit that the original meaning of the term is to be entirely disregarded, or the true nature of this domicil to be overlooked." It is true that this language was used in a dissenting opinion; but the nature of the *animus manendi* was not the point upon which the court divided. Washington, J., in the majority opinion, considers the necessary *animus* to be intention to settle permanently or "for an indefinite time."

Twiss, in his treatise on "The Law of Nations in Time of War" (§ 153), after laying down domicil as the test of national character, says: "A nation may have made no provision whatever under its municipal law for distinguishing the *status* of one foreigner from that of another foreigner within its territory; and such a system of law may not be attended with any inconvenience in time of peace; but in time of war it becomes indispensable for every nation to have some criterion to enable

[10] In The Venus, *supra*.

[11] In The Ann Green, 1 Gall. 274.

Supreme Court of the United States in its latest decisions[12] seems inclined to put the question of national character upon the broad ground of domicil; and for the ascertainment of domicil, to apply as far as possible the same principles and tests in cases of this description as in other cases.

§ 27. **Id. Naturalization.** — The Act of Congress regulating naturalization requires as a condition precedent to admission

it readily to distinguish the character of an alien friend from that of an alien enemy. Nations have accordingly sought for a common rule in such matters, which would be free from ambiguity, whilst it should commend itself to universal acceptance by its natural justice; and permanent residence has been found to answer all the requirements of such a rule. An individual cannot be permanently resident in two countries; and wherever he is permanently resident, there he is contributing by his industry and general wealth to the strength of the country and to its capacity to wage war. There can be, therefore, no injustice in regarding the property of such a person as forming part of the common stock of the enemy nation, upon which a belligerent may make reprisals. Thus Grotius observes: 'By the law of nations all the subjects of the sovereign, from whom an injury has been received, who are such from a permanent cause, are liable to reprisals, whether they be natives or immigrants; but not such persons as are only passing through his territory and sojourning in it for a short time.' Accordingly, we find, in the ordinary declarations of reprisals issued by sovereign powers, an express provision that the ships and goods of all persons inhabiting the territory of the adverse power shall be subject to reprisals. The most recent order in council issued by Great Britain, on 29 March, 1854, was to the like effect: 'Her Majesty is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that general reprisals be granted against the ships, vessels, and goods of the Emperor of all the Russias, and of his subjects and *others inhabiting* within any of his countries, territories, or dominions.'" It is true that Twiss notes a difference between "domicil for civil purposes" and "domicil for international purposes;" but what he particularly points out is, that for the latter purposes a person can have but one domicil, while for the former (as he assumes) he can have several. But this assumption is, as we shall hereafter see, (*infra*, ch. 4), inadmissible. The same learned author, however, says (§ 156) that "courts of prize do not weigh the question of domicil in the same accurate scales which are used by courts which administer the law of nations in time of peace" (Conf. with Marshall, C. J., *supra*). And herein, as the writer believes, lies the true solution of the whole matter. For upon a review of the various authorities the better opinion appears to be that domicil used as a test of national character is the same as domicil when applied to other purposes, but that in its ascertainment different results may be reached in different courts, because of differences in the methods of inquiry; in other words, that the difference consists not in the thing inquired about, but in the method of ascertaining it. And mainly because of these different results and methods of proof arises the danger of indiscriminate reliance upon cases of national character in cases involving other subjects.

[12] Mitchell *v.* United States, 21 Wall. 351; Desmare *v.* United States, 93 U. S. 605. There has, however, from the first been a stronger disposition in the American cases to put national character upon the general principles of domicil than is apparent in the English cases.

to citizenship five years' residence in the United States and one year's residence in the State or Territory in which application is made;[1] and the residence required by the act is domicil.[2] Conversely, it has been declared by high authority[3] that an American citizen cannot throw off his allegiance without a *bona fide* change of domicil. In questions of international citizenship, therefore, domicil plays an important part.

§ 28. **Domicil in Private International and Municipal Law.** — In British jurisprudence domicil finds its main application within the field of what is commonly known as Private International Law or the Conflict of Laws; that is to say, it is principally used for the purpose of ascertaining which of several conflicting territorial laws is applicable to the determination of certain legal questions arising between individuals. In American jurisprudence domicil is similarly applied, but it is also very extensively used for the determination of the rights and duties of individuals under the municipal law, and particularly for the ascertainment of the place where such rights may be enjoyed and such duties must be performed. It is apparent that in the first class of cases, namely, those involving Private International Law, questions of national or *quasi*-national domicil can alone arise; while in the second class the question may be one of either national, *quasi*-national, or municipal domicil; although in point of fact, in cases of this character, municipal domicil most frequently comes under discussion.

In continental practice, as we have seen,[1] after the failure of the principle of national descent, domicil became, as it had been to a limited degree under the Roman law, the basis of the application of personal laws, — or, as they were for a long time and to some extent are even now technically known, personal statutes. And this continued to be the almost universally received doctrine, at least until the adoption of the Code Napoleon, although there were many and grave disputes in its application.

[1] April 14, 1802, § 1, 2 Sts. p. 153; Rev. St. § 2165. As to the requirement by other countries of domicil as a condition precedent to naturalization, see Cockburn on Nationality, *passim*.

[2] Matter of Scott, 1 Daly, 534; Matter of Bye, 2 id. 525.

[3] Talbot *v.* Jansen, 3 Dall. 133; The Santissima Trinidad, 7 Wheat. 283, 347, per Story, J.

[1] *Supra*, § 15.

How far that system of legislation wrought a change in this respect is a matter which has caused some dispute, and cannot be considered as definitely settled. But during the past few decades there has been a growing disposition among continental jurists, which has also found expression to some extent in positive legislation, to replace domicil as the basis of personal laws by political nationality.[2] But here again exist differences of opinion as to the extent and manner of the application of the new doctrine; and at the present day continental views upon the subject of Private International Law may be said to be in a very unsettled and unsatisfactory state, from which probably the only definite relief will be by some concerted action among the principal civilized nations, by treaty or otherwise. To state even briefly the views propounded by the leading jurists, or applied by courts upon the Continent, would require more space than can be here devoted, and would indeed be beside the immediate purpose of this chapter. It seems best, therefore, to confine the discussion in the domain of Private International Law exclusively, or nearly so, to the doctrine laid down by the British and American authorities.

§ 29. **Status.**[1] It may be laid down that the *status* — or, as it is sometimes called, *civil status*, in contradistinction to *political status* — of a person depends largely, although not universally, upon domicil. The older jurists, whose opinions are fully collected by Story[2] and Burge,[3] maintained, with few exceptions, the principle of the ubiquity of *status* conferred by the *lex domicilii* with little qualification. Lord Westbury, in Udny *v.* Udny,[4] thus states the doctrine broadly: "The civil *status* is governed by one single principle, namely, that

[2] *Supra*, § 16, and id. note 1.

[1] On this general subject, see Story, Confl. of L. ch. 4; Burge, For. & Col. L. vol. i. ch. 3 *et seq.*; Phillimore, Int. L. vol. iv. ch. 17; Westlake, Priv. Int. L. 1st ed. ch. 13; id. 2d ed. ch. 2, 3; Foote, Priv. Int. L. ch. 3; Wharton, Confl. of L. ch. 3; Dicey, Dom. pt. 3, ch. 2; Piggott, For. Judgments, ch. 10; Savigny, System, etc. vol. viii. §§ 362-365 (Guthrie's trans. p. 148 *et seq.*); Bar, Int. Priv. und Strafrecht, §§ 42-46 (Gillespie's trans. p. 160 *et seq.*); and see particularly the learned and elaborate opinion of Gray, C. J., in Ross *v.* Ross, 129 Mass. 243 (given *infra*, § 32, note 2). In these places the reader will find collected almost all of the important authorities upon the subject of *status*.

[2] *Ubi supra.*

[3] *Ubi supra.*

[4] L. R. 1 Sch. App. 441, 457.

of domicil, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party — that is to say, the law which determines his majority and minority, his marriage, succession, testacy, or intestacy — must depend." Gray, C. J., in the late Massachusetts case of Ross *v.* Ross,[5] speaking with special reference to capacity to inherit, says: "It is a general principle that the *status*, or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicil; and that this *status* and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy."

But great difficulty in the discussion of this subject has arisen by reason of the loose and varying use of the term *status*, and the want of any clear definition of what is meant by it. Savigny[6] understood it to mean "capacity to have rights and to act;" and this undoubtedly was the sense in which it was understood by the older jurists. In Niboyet *v.* Niboyet,[7] Brett, L. J., gives this definition: "The *status* of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community." But whatever may be the definition of the term, or whatever rules applicable to *status* in general may be looked upon as having received general acceptance, there are certain prominent states or conditions of persons, which have been treated of by writers and considered by the courts, and these it will be well to examine separately, with a view to ascertain how far they are affected by domicil.

§ 30. **Legitimacy and Legitimation.** — Beginning with the

[5] 129 Mass. 243, 246.

[6] System, etc. § 361 (Guthrie's trans. p. 139). Bar understands *status* in the same sense, § 44 (Gillespie's trans. p. 172). Gray, C. J., in the case above cited, thus distinguishes the two phases of capacity which go to make up *status*: "The capacity or qualification to inherit or succeed to property, which is an incident of the *status* or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others. A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding from a capacity to act." Ross *v.* Ross, *ubi supra*.

[7] L. R. 4 P. D. 1, 11.

advent of the person into the world, legitimacy (from birth) does not, at least immediately, depend upon domicil. A child born anywhere in lawful wedlock will be everywhere else considered legitimate. The lawfulness of the marriage must however be understood, with the qualification that it is such as is generally recognized among Christian nations as lawful, — *e. g.*, not polygamous or incestuous. Whether the child is born in or out of wedlock is a matter of proof with which domicil is not concerned.[1]

[1] The view stated in the above paragraph is substantially that maintained by Dicey (Dom. rule 34, p. 181), and is believed to be in entire accord with the general doctrines of English and American jurisprudence. Lawful wedlock assumes a valid marriage, and this in its turn depends upon (*a*) the capacity of the parties to enter into the marriage, and (*b*) the lawful performance of the marriage ceremony. With neither of these requirements according to the American view, as we shall hereafter see, has domicil anything to do. In the present state of English jurisprudence domicil may become important with respect to the capacity of the parties, and thus may *indirectly* have a bearing upon the question of legitimacy. But assuming the marriage to be valid, and still subsisting (at least at the time of conception), a child of such marriage will, in our own jurisprudence, be considered to be born legitimate, no matter where the birth may occur, or where the parents may at the time be domiciled. Here we have to do with legitimacy *ab initio*, and this case must be carefully distinguished from subsequent legitimation, and filiation by acknowledgment. Story (Confl. of L. § 105) says upon this subject: "In questions of legitimacy, or illegitimacy, the law of the place of the marriage will generally govern as to the issue subsequently born. If the marriage is valid by the law of that place, it will generally be held valid in every other country, for the purpose of ascertaining legitimacy and heirship. If invalid there, it will generally (if not universally) be held invalid in every other country." This view was carried out in Van Voorhis *v.* Brintnal, 86 N. Y. 18. (See also Patterson *v.* Gaines, 6 How. 550, and Ross *v.* Ross, 129 Mass. 263, 247, 248.) He reasons from the standpoint of what may now be considered the thoroughly settled American doctrine, and was then considered the English doctrine as to the validity of marriages. But the latter has, as we shall see, undergone some change. Piggott, in his work on Foreign Judgments (p. 275), thus states the present English doctrine of legitimacy *ab initio*: "The decision as to the legitimacy or illegitimacy of the children follows immediately on the declaration of the validity or invalidity of the marriage. From what has been already said, it seems that it is scarcely accurate to say that legitimacy is universally determined by the law of the domicil; for we have seen that where the ceremony has not been performed in accordance with the law of the place of the contract, the marriage will be held invalid; and in this one instance the legitimacy of the children depends upon the *lex loci contractus* of the parents' marriage, and not upon the law of the domicil." See also Westlake, Priv. Int. L. 2d ed. p. 83. On the other hand, Bar (§ 102, Gillespie's trans. p. 414) takes the following view: "The law of the place in which the father of a child had his domicil at the time of the child's birth must decide all questions as to whether the child was born in wedlock, and therefore became subject to his father's authority. The place of the marriage particularly may be

But with respect to the legitimation of one who is born illegitimate, whether by subsequent marriage or by an act of sovereign power, domicil is of vast importance. In a case of legitimation *per subsequens matrimonium*, it is possible to imagine nine different sets of laws competing; namely, those of the places of conception, birth, and marriage, and those of the several domicils of both father and mother at the periods of the occurrences named. In answering the question, By what law is the case to be determined? the period of conception has by common consent of jurists been entirely thrown out of consideration, and so has substantially the place of marriage. In favor of *lex domicilii* of the mother plausible reasons may be urged, inasmuch as her domicil at the time of the birth of her illegitimate child becomes his domicil of origin,[2] and subsequently any change in her domicil is followed by a corresponding change in his;[3] and this view has been maintained by some.[4] Nevertheless, modern jurists generally have eliminated the *lex domicilii* of the mother from the competition. There yet remain the *lex loci* of the birth, and the *lex domicilii* of the father at the time of the birth and of the marriage. Few contend for the place of birth,[5] and practically the discussion among

set out of account. The same law will determine the effect of the special presumptions with regard to paternity; these are not rules for convincing the judge, which would be subject to the *lex fori*, but substantial rights of the child. We shall give our reasons for this view in discussing the law of process; at present we need only point out how dangerous it would be if the child were prevented from founding on the presumptions that established his legitimacy at the time of his birth, or if different judgments as to his legitimacy could be given in different countries." Savigny (System, etc. § 380; Guthrie's trans. p. 301) is cited, among others, by Bar, in support of the latter writer's first proposition; but that great jurist does not distinctly assert such view, but rather holds that paternal power resulting from birth in wedlock is to be judged by the *lex domicilii* of the father at the time of the birth of the child. Burge (For. & Col. L. vol. i. p. 89) appears to hold that the *status* of legitimacy or illegitimacy is to be judged by the law of the domicil of origin of the child; but he also holds in opposition to Bar, and in accordance with the view stated above in the text, — which is also Dicey's (Dom. p. 181) — that the proofs of legitimacy are to be according to the *lex fori*.

[2] *Infra*, § 228.

[3] *Infra*, § 244 *a*.

[4] *E. g.*, Lord Cringletie in Rose *v.* Ross (5 Shaw & Dunlop, 618), 4 Wils. & Sh. Appendix, 37; Lord President Hope, in Dalhousie *v.* McDouall. See s. c. in House of Lords, 7 Cl. & F. 817, 820.

[5] Among others, Schaefner, Int. Privatrecht, § 37; Lords Lyndhurst & Wynford, in Rose *v.* Ross, 4 Wils. &

the modern jurists and in the British courts has been narrowed down to the *lex domicilii* of the father at the time of birth and at the time of marriage. Upon the Continent the current of opinion is strongly in favor of the latter,[6] while in Great Britain the current has been generally the other way, although there have not been wanting judicial expressions in favor of his domicil[7] at the date of the marriage. Thus in Aikman *v.* Aikman,[8] the whole point of inquiry, both

Shaw, 289; Lord President Hope, in Munro *v.* Munro (his view is so stated in the case on appeal, 7 Cl. & F. 842, 845, 885); and a few others might be cited. The view of Story on this subject is difficult to extract. He says (Confl. of L. § 105 *a*): "As to issue born before the marriage, if, by the law of the country where they are born, they would be legitimated by the subsequent marriage of their parents, they will by such subsequent marriage (perhaps in any country, but at all events in the same country) become legitimate, so that this character of legitimacy will be recognized in every other country. If illegitimate there, the same character will belong to them in every other country." But in all the cases of conflict upon this subject which he supposes, he assumes the place of birth to be the same as the place of the domicil of the parents at the time of the birth, and the question which he proposes is, "Ought the law of the place of the birth, or that of the place of the marriage, or that of the actual domicil of the parents, or that of the actual domicil of the child, to govern?" (§ 93 *g*.) In another place (§ 87 *a*) he declares in favor of the domicil of birth of the child; which is, strictly speaking, the domicil of the mother at the time of the birth of the child (*supra*, note 2). Upon the whole, therefore, all that can be affirmed with respect to his opinion is that he considered that the time of birth, and not of marriage, should be looked to. And this also may be the true explanation of most of the apparent expressions in favor of the place of birth.

[6] Savigny, System, etc. § 380 (Guthrie's trans. p. 302); Bar, § 102 (Gillespie's trans. p. 415).

[7] See authorities cited *infra*.

[8] 3 Macq. H. L. Cas. 854; s. c. (in the Court of Session) 21 D. (Sch. Sess. Cas. 2d ser. 1859) 757. In the court below, Lord Cowan, delivering the opinion of the court, said: "This question of *status* depends upon the domicil of Captain George Robertson Aikman at the date of his marriage with Sarah Cumby, on the 13th of November, 1820. . . . Assuming the domicil of the father to have been in Scotland at the date of his marriage, the defenders are thereby legitimated and the action must fail; but on the supposition of England having been the place of the father's domicil, the pursuer is entitled to have the decree he asks. Was England or Scotland, then, the place of Captain Robertson Aikman's domicil in November, 1820?" And in the House of Lords, Lord Wensleydale said: "This case . . . depends upon one question only, Whether the appellant has proved to your lordships' satisfaction that his late father, Captain Robertson Aikman, was on the 13th November, 1820, when he was married at Glasgow, domiciled in England? If he has established that fact, then the marriage could not render his brothers who were born before it legitimate; if he has failed to do so, it did, and the eldest was consequently entitled to the Scotch estate;" and again, "But the question to be decided is, Had that domicil commenced before the 13th November, 1820?" And Lords Campbell and Cranworth used similar language.

in the Scotch Court of Session and in the House of Lords, was the domicil of the father at the time of the marriage. This was also the case in Munro *v.* Munro,[9] where Lord Brougham said: "With the exception of the learned Lord President all the judges of the court below held that the subsequent marriage of the parents would legitimate the issue before marriage, provided the parties were domiciled at the time of the marriage in a country the law of which recognizes legitimation *per subsequens matrimonium*." And his lordship apparently adopted this view. It is to be noted, however, that in these cases the domicil of the father was held to be Scotch both at the time of the birth and of the marriage, so that the question between the two domicils did not actually arise.

But, on the other hand, in *Re* Wright's Trusts,[10] where the question was distinctly before the court, the father, who was at the time of the birth of the child domiciled in England, having before marriage changed his domicil to France, Wood, V. C., held that the capacity of the child for legitimation was to be determined by the law of the former domicil, and consequently held the child not to have been legitimated; and subsequently, in Udny *v.* Udny,[11] the same judge (then Lord Chancellor Hatherley) declared that he saw no reason to retract that opinion. The same position was taken by Stuart, V. C., in Goodman *v.* Goodman,[12] and by the majority of the Court of Appeal in the very late case of *Re* Goodman's Trusts.[13] Dicey,[14] while laying this down as the general rule, and holding that the child of an English father would not acquire capacity for legitimation by the subsequent change of his father's domicil, does not consider the converse settled; namely, that the child of a Scotch father would not be rendered incapable of legitimation by the father becoming domiciled in England. Phillimore[15] and Foote[16] appear to consider the rule settled in favor of the domicil of the father at the time of the birth of the child.

[9] 7 Cl. & F. 842.
[10] 2 K. & J. 595.
[11] L. R. 1 Sch. App. 441, 447.
[12] 3 Giff. 643.
[13] L. R. 17 Ch. D. 266.
[14] Dom. rule 35, pp. 181, 192.
[15] Int. L. vol. iv. no. 541.
[16] Priv. Int. L. pp. 41, 47.

Westlake,[17] however, holds the result of the cases to be that legitimation *per subsequens matrimonium* will be recognized in England only when it is permitted by the *lex domicilii* of the father, both at the time of the birth and at the time of the marriage. Certainly this is the only theory upon which the conflicting judicial expressions can be reconciled, but that such result will finally be reached by judicial decision appears doubtful; that it should be reached, more than doubtful.

With respect to legitimation by act of sovereign power (in the Roman law, *per rescriptum principis;* in ours, usually by act of legislation) somewhat different principles may possibly be applicable. A child legitimated by authority of the State in which he and his father are domiciled, should undoubtedly be held legitimate everywhere.

Domicil is doubtless the basis of authority to confer such legitimation, unless we adopt the recent continental theory of political nationality. It is, however, possible that the domicil of the parent would not be so closely adhered to as in cases of legitimation *per subsequens matrimonium*, but that some effect, at least, may be given to the domicil of the child, if it be different from that of the parent.[18]

§ 31. **Legal Effects of Legitimation.** — With respect to the legal effects of legitimation *per subsequens matrimonium*, it has been settled by Birtwhistle *v.* Vardill [1] in the House of Lords that a person so legitimated cannot inherit land in

[17] Priv. Int. L. 2d ed. §§ 50, 51. In his first edition he favors the "matrimonial domicil," no. 406, p. 388. In this country, in Miller *v.* Miller, 91 N. Y. 315, 320, the New York Court of Appeals expressed an opinion in favor of the law of the domicil (Pennsylvania) of the father at the time of the marriage; but it also considered the child legitimated according to the law of the father's domicil (Würtemberg) at the time of the birth. In this case, however, there was the additional peculiarity that the law of the domicil at the time of the marriage did not then admit of legitimation *per subsequens matrimonium;* but after the marriage the legislature of Pennsylvania, where the parties were still domiciled, passed an act legitimating children in cases where marriage had already taken place. In Ross *v.* Ross, 129 Mass. 243, Gray, C. J., considers it still a grave question, which domicil of the father shall govern. See *infra*, § 32, note 2.

[18] See Schaefner, Int. Privatrecht, § 40; Bar, § 102, n. 6 (Gillespie's trans. p. 415); Wharton, Confl. of L. § 249. And this is consistent with what is hereafter said concerning adoption, *infra*, § 32, note 1.

[1] 7 Cl. & F. 895.

England. This was held, however, not because the *status* of legitimation so conferred by foreign law would not be recognized in England, but because by virtue of the positive law of that country, and particularly of the Statute of Merton, land can descend only to those *born* in lawful matrimony. This decision has been followed in this country,[2] and the converse has also been held in England;[3] namely, that no person can inherit land there situate from a person so legitimated, except his own lawful issue. The question has been raised in England whether persons legitimated in this manner satisfy the definition of the word "children" used in the Statute of Distributions relating to personal property. The negative was held by Jessel, M. R., in *Re* Goodman's Trusts,[4] but his decision was reversed on appeal.[5] It is, indeed, noticeable that there has been a disposition on the part of some lawyers in that country to restrain as far as possible the legal effects of legitimation under foreign law, rather, however, on technical grounds of construction than otherwise; nevertheless, the decided cases fully recognize the existence of such *status* when it properly arises under the *lex domicilii*. In this country, where legitimation *per subsequens matrimonium* is so largely allowed, an opposite tendency is to be expected.

The legal effects of legitimation by act of sovereign power are similar to those of legitimation *per subsequens matrimonium*. Thus, in a Louisiana case,[6] where the Statute of Merton was never in force, it was held that a child legitimated by an act of the Territorial legislature of Arkansas, where he and his putative father were domiciled, might inherit land situate in Louisiana.

§ 32. **Adoption.** — The validity of an act of adoption, and the legal *status* of parent and child resulting therefrom, depend upon the *lex domicilii* of the parties to it at the time it occurs.[1] This was fully demonstrated in the late Massachu-

[2] Smith *v.* Derr's Admrs., 34 Pa. St. 126; Lingen *v.* Lingen, also approved Barnum *v.* Barnum, 42 Md. 251, 307. *Contra*, Miller *v.* Miller, 91 N. Y. 315; Scott *v.* Key, 11 La. Ann. 232, and see Ross *v.* Ross, 129 Mass. 243.

[3] *In re* Don's Estate, 4 Drew. 194.

[4] L. R. 14 Ch. D. 619.

[5] 17 id. 266. See also Goodman *v.* Goodman, 3 Giff. 643; Boyes *v.* Bedale, 1 H. & M. 798.

[6] Scott *v.* Key, *supra*.

[1] Here the *lex domicilii* of the child is to be looked to, as well as that of the

setts case of Ross *v.* Ross,[2] in which Gray, C. J., reviewed at

adopting person. Wharton, Confl. of L. § 251; Brocher, Cours de Droit Int. Priv. t. 1, § 101. As bearing somewhat upon the converse of this, see Foster *v.* Waterman, 124 Mass. 592.

[2] 129 Mass. 243. The opinion so clearly and ably discusses the relation of domicil to *status* in many of its phases, that it is deemed wise to introduce it here *in extenso*. The learned Chief Justice said: —

"This case presents for adjudication the question whether a child adopted, with the sanction of a judicial decree and with the consent of his father, by another person, in a State where the parties at the time have their domicil, under statutes substantially similar to our own, and which, like ours, give a child so adopted the same rights of succession and inheritance as legitimate offspring in the estate of the person adopting him, is entitled, after the adopting parent and the adopted child have removed their domicil into this Commonwealth, to inherit the real estate of such parent in this Commonwealth upon his dying here intestate.

"The question how far a child adopted according to law in the State of the domicil can inherit lands in another State, was mentioned by Lord Brougham in Doe *v.* Vardill, 7 Cl. & Fin. 895, 898, and by Chief Justice Lowrie, in Smith *v.* Derr, 34 Penn. St. 126, 128; but, so far as we are informed, has never been adjudged. It must therefore be determined upon a consideration of general principles of jurisprudence, and of the judicial application of those principles in analogous cases.

"As a general rule, when no rights of creditors intervene, the succession and disposition of personal property are regulated by the law of the owner's domicil. It is often said, as in Cutter *v.* Davenport, 1 Pick. 81, 86, cited by the tenant, to be a settled principle that 'the title to and the disposition of real estate must be exclusively regulated by the law of the place in which it is situated.' But so general a statement, without explanation, is liable to mislead. The question in that case was of the validity of an assignment of a mortgage of real estate; and there is no doubt that by our law the validity, as well as the form, of any instrument of transfer of real estate, whether a deed or a will, is to be determined by the *lex rei sitæ*. Goddard *v.* Sawyer, 9 Allen, 78; Sedgwick *v.* Laflin, 10 Allen, 430, 433; United States *v.* Crosby, 7 Cranch, 115; Clark *v.* Graham, 6 Wheat. 577; Kerr *v.* Moon, 9 Wheat. 565; McCormick *v.* Sullivant, 10 Wheat. 192.

"It is a general principle that the *status* or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicil; and that this *status* and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the *status* of those who claim succession or inheritance in his estate is to be ascertained by the law under which that *status* was acquired; his personal property is indeed to be distributed according to the law of his domicil at the time of his death, and his real estate descends according to the law of the place in which it is situated; but, in either case, it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status.

"The capacity or qualification to inherit or succeed to property, which is an incident of the *status* or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others. A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding from a capacity to act. Generally speaking, the validity of a personal contract, even as regards

length the leading cases of personal *status*. It was there

the capacity of the party to make it, as in the case of a married woman or an infant, is to be determined by the law of the State in which it is made. Milliken *v.* Pratt, 125 Mass. 374, and authorities cited; Polydore *v.* Prince, 1 Ware, 402, 408–413; Bell *v.* Packard, 69 Me. 105; Bond *v.* Cummings, 70 Me. 125; Wright *v.* Remington, 12 Vroom, 48. Sir William Scott, in Dalrymple *v.* Dalrymple, 2 Hagg. Consist. 54, 61. Lord Brougham, in Warrender *v.* Warrender, 2 Cl. & Fin. 488, 544; s. c. 9 Bligh N. R. 89, 120; 2 Sh. & Macl. 154, 214; Simonin *v.* Mallac, 2 Sw. & Tr. 67, 77; Sottomayer *v.* De Barros, 5 P. D. 94, 100. And the validity of any transfer of real estate by act of the owner, whether *inter vivos* or by will, is to be determined, even as regards the capacity of the grantor or testator, by the law of the State in which the land is situated. Story, Confl. §§ 431, 474. But the *status* or condition of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicil which creates the *status*, at least when the *status* is one which may exist under the laws of the State in which it is called in question, and when there is nothing in those laws to prohibit giving full effect to the status and capacity acquired in the State of the domicil.

"A person, for instance, who has the *status* of child of another person in the country of his domicil, has the same *status* here, and as such takes such share of the father's personal property as the law of the domicil gives him, and such share of his real estate here as a child takes by the laws of this Commonwealth, unless excluded by some positive rule of our law. Inheritance is governed by the *lex rei sitæ;* but legitimacy is to be ascertained by the *lex domicilii*. If a man domiciled in England has two legitimate sons there, and dies intestate, owning land in this Commonwealth, both sons have the *status* of legitimate children here; but by virtue of our statute of descents, the land descends to them equally, and not to the oldest son alone, as by the law of England.

"If a marriage (in the proper sense of the term, not including Mormon or other polygamous marriages; Hyde *v.* Hyde, L. R. 1 P. & D. 130) is celebrated in one State, according to the form prescribed by its laws, between persons domiciled there, and competent to intermarry, it is universally admitted that the woman must be recognized everywhere as the lawful wife of the man, and entitled as such, upon his death, to such dower in his lands as the law of the State in which they are situated allows to a widow; although it is this law, and not the law of the domicil, which fixes the proportion that she shall take. Ilderton *v.* Ilderton, 2 H. Bl. 145; Doe *v.* Vardill, 2 Cl. & Fin. 571, 575, 576; s. c. 9 Bligh N. R. 32, 47, 48; Potter *v.* Titcomb, 22 Me. 300; Lamar *v.* Scott, 3 Strob. 562; Jones *v.* Gerock, 6 Jones Eq. 190; Story, Confl. §§ 159, 454.

"Our law goes beyond this in recognizing the validity of foreign marriages, and holds that the relation of husband and wife being a *status* based upon the contract of the parties, and recognized by all Christian nations, the validity of that contract, if not polygamous, nor incestuous, according to the general opinion of Christendom, is governed, even as regards the competency of the contracting parties, by the law of the place of the contract; that this *status*, once legally established, should be recognized everywhere as fully as if created by the law of the domicil; and therefore that any such marriage, valid by the law of the place where it is contracted, is, even if contracted between persons domiciled in this Commonwealth and incompetent to marry here under our laws (except so far as the legislature has clearly enacted that such marriages out of the Commonwealth shall be deemed void here), valid here to all intents and effects, civil or crimi-

decided also that a child adopted in accordance with the law

nal, including the settlement of the wife and children, her right of dower, and their legitimacy and capacity to inherit the father's real estate. Parsons, C. J., in Greenwood *v.* Curtis, 6 Mass. 358, 377–379; Medway *v.* Needham, 16 Mass. 157; West Cambridge *v.* Lexington, 1 Pick. 506; Putnam *v.* Putnam, 8 Pick. 433; Commonwealth *v.* Lane, 113 Mass. 458; Bullock *v.* Bullock, 122 Mass. 3; Milliken *v.* Pratt, 125 Mass. 380, 381.

"As to foreign divorces, it is well settled in this Commonwealth that a decree of divorce rendered in another State, in which the legal domicil of the parties is at the time, and according to its laws, even for a cause which is not a ground of divorce by our laws, and although their marriage took place while they were domiciled in this Commonwealth, is valid here, and conclusive in a suit concerning the husband's interest or the wife's dower in lands in this Commonwealth. Barber *v.* Root, 10 Mass. 260; Clark *v.* Clark, 8 Cush. 385; Hood *v.* Hood, 11 Allen, 196; Hood *v.* Hood, 110 Mass. 463; Burlen *v.* Shannon, 115 Mass. 438; Sewall *v.* Sewall, 122 Mass. 156. The provision of the existing statutes, affirming the validity of foreign divorces, made no change in the law; but, in the words of the commissioners, upon whose advice it was first enacted, 'is founded on the rule established by the comity of all civilized nations, and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be.' Rev. Sts. c. 76, § 40, and note of commissioners; Gen. Sts. c. 107, § 55. The leading case of Barber *v.* Root, above cited, arose and was determined before the enactment of this provision. And in England, since the establishment of a court vested with power to grant divorces from the bond of matrimony, the tendency of the judges is to recognize the validity of a foreign divorce between English persons married in England, but domiciled in good faith at the time of the divorce in the foreign State, at least for a cause which would be a cause of divorce in England. See Dicey on Domicil, 234–237, 353–355; Harvey *v.* Farnie, 5 P. D. 153.

"Another class of cases requires more particular examination. By the rule of the common law, which is the law of England to this day, and formerly prevailed throughout the United States, a child not born in lawful matrimony is not deemed the child of his father, although the parents subsequently intermarry, but is indelibly a bastard. By the rule of the civil law, on the other hand, which has been adopted in Scotland, as well as in France, Germany, and other parts of Europe, and more recently in many States of the Union, such a child may become legitimate upon the subsequent marriage of his parents.

"The leading case in Great Britain on this subject is Shedden *v.* Patrick, briefly reported in Morison's Dict. Dec. Foreign Appx. I. no. 6, and more fully in 5 Paton, 194, which was decided by the House of Lords, on appeal from the Scotch Court of Session, in 1808, and in which a Scotchman, owning land in Scotland, became domiciled in New York, and there cohabited with an American woman, had a son by her, and afterwards married her, and died there; and the son was held not entitled to inherit his land in Scotland. Two questions were argued: 1st. Whether the plaintiff, being by the law of the country where he was born, and where his parents were domiciled at the time of his birth and of their subsequent marriage, a bastard and not made legitimate by such marriage, could inherit as a legitimate son in Scotland, the law of which allows legitimation by subsequent matrimony. 2d. Whether, being a bastard, and therefore *nullius filius* at the time of his birth in America, he was an alien and therefore incapable of inheriting land in Great Britain; the act of Parliament of 4 Geo. II. c. 21, making

of their common domicil could take by inheritance from his

only those children, born out of the ligeance of the British crown, natural-born subjects, whose fathers were such subjects 'at the time of the birth of such children respectively.' The Court of Session decided the case upon the first ground. In the House of Lords, after full argument of both questions by Fletcher and Brougham for the appellant and by Romilly and Nolan for the respondent, Lord Chancellor Eldon, speaking for himself and Lord Redesdale, said that, 'as it was not usual to state any reasons for affirming the judgment of the court below, he should merely observe that the decision in this case would not be a precedent for any other which was not precisely the same in all its circumstances,' and thereupon moved that the judgment of the Court of Session should be affirmed, which was accordingly ordered. On a suit brought forty years afterwards by the same plaintiff against the same defendant to set aside that judgment for fraud in procuring it, the House of Lords in 1854, without discussing the first point, except so far as it bore upon the question whether there had been any fraudulent suppression of facts relating to the father's domicil, held that the plaintiff was an alien at the time of his birth, and could not be afterward naturalized except by act of Parliament. Shedden *v.* Patrick, 1 Macq. 535.

"But the remark of Lord Eldon, above quoted, in moving judgment in the original case, and the statements made in subsequent cases by him, by Lord Redesdale, who concurred in that judgment, and by Lord Brougham, who was of counsel in that case, clearly show that the judgment in the House of Lords, as well as in the Court of Session, went upon the ground that the child was illegitimate because the law of the foreign country, in which the father was domiciled at the time of the birth of the child and of the subsequent marriage of the parents, did not allow legitimation by subsequent matrimony. Lord Eldon's judgment in the Strathmore Peerage Case, 4 Wils. & Sh. Appx. 89–91, 95; s. c. 6 Paton, 645, 656, 657, 662; Lord Redesdale's judgment in s. c. 4 Wils. & Sh. Appx. 93, 94, and 6 Paton, 660, 661; expounded by Lord Lyndhurst in the presence and with the concurrence of Lord Eldon, in Rose *v.* Ross, 4 Wils. & Sh. 289, 295–297, 299; s. c. *nom.* Munro *v.* Saunders, 6 Bligh N. R. 468, 472–475, 478. Lord Brougham, in Doe *v.* Vardill, 2 Cl. & Fin. 571, 587, 592, 595, 600; s. c. 9 Bligh N. R. 32, 75, 80, 83; in Munro *v.* Munro, 7 Cl. & Fin. 842, 885; s. c. 1 Robinson H. L. 492, 615; and in Shedden *v.* Patrick, 1 Macq. 622.

"That decision is wholly inconsistent with the theory that upon general principles, independently of any positive rule of law, the question whether a person claiming an inheritance in real estate is the lawful child of the last owner is to be determined by the *lex rei sitæ;* for if that law had been applicable to that question, the plaintiff must have been held to be the legitimate heir; and it was only by trying that question by the law of the domicil of his father that he was held to be illegitimate. The decision receives additional interest and weight from the fact that the case for the appellant (which is printed in 1 Macq. 539–552) was drawn up by Mr. Brougham, then a member of the Scotch bar, and contained a very able statement of reasons why the *lex rei sitæ* should govern.

"In later cases in the House of Lords, like questions have been determined by the application of the same test of the law of the domicil. In the case of the Strathmore Peerage, above cited, which was what is commonly called a Scotch peerage, having been such a peerage before the union of the two kingdoms, the last peer was domiciled in England, had an illegitimate son there by an Englishwoman, and married her in England; and it was held that by force of the law of England the son did not inherit the

adopted father land situate in Massachusetts. The contrary

peerage. So in Rose *v.* Ross, above cited, where a Scotchman by birth became domiciled in England, and had a son there by an Englishwoman, and afterwards went to Scotland with the mother and son, and married her there, retaining his domicil in England, and then returned with them to England and died there, it was held that the son could not inherit the lands of the father in Scotland, because the domicil of the father, at the time of the birth of the child and of the subsequent marriage, was in England. On the other hand, where a Scotchman, domiciled in Scotland, has an illegitimate son born in England, and afterwards marries the mother, either in England, whether in the Scotch or in the English form, or in Scotland, the son inherits the father's land in Scotland because the father's domicil being throughout in Scotland, the place of the birth or marriage is immaterial. Dalhousie *v.* McDouall, 7 Cl. & Fin. 817; s. c. 1 Robinson H. L. 475; Munro *v.* Munro, 7 Cl. & Fin. 842; s. c. 1 Robinson H. L. 492; Aikman *v.* Aikman, 3 Macq. 854; Udny *v.* Udny, L. R. 1 H. L. Sc. 441.

"In the well-known case of Doe *dem.* Birtwhistle *v.* Vardill, it was indeed held by the Court of King's Bench in the first instance, and by the House of Lords on writ of error, after two arguments, at each of which the judges attended and delivered an opinion, that a person born in Scotland, and there legitimate by reason of the subsequent marriage of his parents in Scotland, they having had their domicil there at the time of the birth and of the marriage, could not inherit land in England. 5 B. & C. 438; 8 D. & R. 185; 2 Cl. & Fin. 571; 9 Bligh N. R. 32; 7 Cl. & Fin. 895; 6 Bing. N. C. 385; 1 Scott N. R. 828; West H. L. 500.

"One curious circumstance connected with that case is, that under the English usage, which allows counsel in a cause, if raised to the bench during its progress, to sit as judges in it, Chief Justice Tindal, who had argued the case for the plaintiff in the King's Bench, gave the opinion of the judges in the House of Lords, in accordance with which judgment was finally rendered for the defendant; and Lord Brougham, who had taken part as counsel for the defendant in the first argument in the House of Lords, was most reluctant, for reasons which he stated with characteristic fulness and power, to concur in that judgment. 5 B. & C. 440; 2 Cl. & Fin. 582–598; 7 Cl. & Fin. 924, 940–957.

"But that case, as clearly appears by the opinions of Chief Justice Abbott and his associates in the King's Bench, as well as by that of the judges, delivered by Chief Justice Tindal, and those of Lord Brougham and Lord Cottenham, after the rehearing in the House of Lords, was decided upon the ground that, admitting that the plaintiff must be deemed the legitimate son of his father, yet, by what is commonly called the Statute of Merton, 20 Hen. III. c. 9, the Parliament of England, at a time when the English Crown had possessions on the Continent, in which legitimation by subsequent matrimony prevailed, had, although urged by the bishops to adopt the rule of the civil and canon law, by which children born before the marriage of their parents are equally legitimate as to the succession of inheritance with those born after marriage, positively refused to change the law of England as theretofore used and approved. The *ratio decidendi* is most clearly brought out by Mr. Justice Littledale and by Chief Justice Tindal.

"Mr. Justice Littledale said: 'One general rule applicable to every course of descent is, that the heir must be born in lawful matrimony. That was settled by the Statute of Merton, and we cannot allow the comity of nations to prevail against it. The very rule that a personal status accompanies a man everywhere is admitted to have this qualification, that it does not militate against the law of the country where the conse-

was held in an Illinois case;[8] but in this, as in other in-

quences of that status are sought to be enforced. Here it would militate against our statute law to give effect to that status of legitimacy acquired by the lessor of the plaintiff in Scotland. He cannot, therefore, be received as legitimate heir to land in England.' 5 B. & C. 455.

"Upon the first argument in the House of Lords, Chief Baron Alexander, adopting the sentiment and the language of Sir William Scott in Dalrymple *v.* Dalrymple, 2 Hagg. Consist. 58, 59, 'varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage,' said, in the name of all the judges who attended at the argument: 'The cause being entertained in an English court must be adjudicated according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of England is, that the *status* or condition of the claimant must be tried by reference to the law of the country where the status originated; having furnished this principle, the law of England withdraws altogether, and leaves the question of status in the case put to the law of Scotland.' The learned Chief Baron added: 'The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character.' 2 Cl. & Fin. 573–575. The grounds upon which, notwithstanding this, he undertook, without alluding to the Statute of Merton and the practice under it, to maintain that, by the rules of inheritance and descent which the law of England had impressed upon all land in England, the plaintiff could not recover, were so unsatisfactory to the lords that Lord Brougham, at that stage of the case, declared that he entertained a very strong opinion that the case was wrongly decided in the court below, and Lord Lyndhurst and Lord Denman concurred in his motion that the case should be reargued. 2 Cl. & Fin. 598–600.

"In delivering the opinion of the judges after the second argument, Chief Justice Tindal said: 'The grounds and foundation upon which our opinion rests are briefly these, — That we hold it to be a rule or maxim of the law of England with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent, being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of the comity of nations.' 7 Cl. & Fin. 925.

"The Chief Justice then proceeded to make an elaborate statement of the provisions of the Statute of Merton, and of the circumstances under which it was passed, particularly dwelling upon the facts that at the time of its passage, Normandy, Aquitaine, and Anjou were under the allegiance of the King of England, and those born in those dominions were natural-born subjects and could inherit land in England; and that many of the peers who attended appeared to have been of foreign lineage if not of foreign birth, and were, at all events, well acquainted with the rule of law which was then so strongly contested,

[8] Keegan *v.* Geraghty, 101 Ill. 26.

stances, questions relating to the title to land are to be governed by the *lex loci rei sitæ*.

'yet, notwithstanding the rule of the civil and canon law prevailed in Normandy, Aquitaine, and Anjou, by which the subsequent marriage makes the *antenatus* legitimate for all purposes and to all intents; and notwithstanding the precise question then under discussion was whether this rule should govern the descent of land locally situate in England, or whether the old law and custom of England should still continue as to such land, under which the *antenatus* was incapable to take land by descent, — there is not the slightest allusion to any exception in the rule itself as to those born in the foreign dominions of the Crown, but the language of the rule is, in its terms, general and universal as to the succession to land in England.' And he fortified his position that no such exception was intended, by referring to the forms of writs before and after the passage of the statute, and to Glanville, Bracton, and other early authorities. 7 Cl. & Fin. 926–933.

"It was upon the 'very great new light' thus thrown upon the question, and the 'very important additions' thus made to the former arguments, that Lord Brougham, though not wholly convinced, waived his objections to judgment for the defendant. 7 Cl. & Fin. 939, 943–946, 956. And Lord Cottenham, the only other law lord present, in moving that judgment, said: 'I am extremely satisfied with the ground upon which the judges put it, because they put the question on a ground which avoids the difficulty that seems to surround the task of interfering with those general principles peculiar to the law of England, principles that at first sight seem to be somewhat at variance with the decisions to which the courts have come.' 7 Cl. & Fin. 957. And see Lord Brougham, Lord Cranworth, and Lord Wensleydale, in Fenton *v.* Livingstone, 3 Macq. 497, 532, 544, 550.

"In the case of Don's Estate, 4 Drewry, 194, Vice Chancellor Kindersley declared that the general principle was that 'the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin; if he is legitimate in his own country, then all other countries, at least all Christian countries, recognize him as legitimate everywhere;' and the ground of the decision in Doe *v.* Vardill was that, admitting the personal *status* of legitimacy, the law of England attached to land certain rules of inheritance which could not be departed from. And he therefore held that, assuming that a son born in Scotland before the marriage of his parents domiciled there, and there legitimate in consequence of their subsequent marriage, was legitimate all over the world, at any rate in England, yet, as he could not inherit land in England from his father or from any other person, so no other person could succeed to him by inheritance except his own issue.

"So, in Shaw *v.* Gould, L. R. 3 H. L. 55, 70, Lord Cranworth said of Doe *v.* Vardill: 'The opinions of the judges in that case, and of the noble lords who spoke in the House, left untouched the question of legitimacy, except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the Statute of Merton, the law of the domicil would decide the question of *status*. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinions given in the case seem to me to show a strong bias towards the doctrine that the question of *status* must, for all purposes unaffected by the feudal law, as adopted and acted on in this country, be decided by the law of the domicil.'

"In Skottowe *v.* Young, L. R. 11 Eq. 474, the proceeds of lands in England were devised by a British subject

§ 33. **Paternal Power.** — Continental jurists contend strongly for the regulation of paternal power according to the *lex domi-*

domiciled in France, in trust to sell and to pay the proceeds to his daughters born of a Frenchwoman before marriage, but afterwards legitimated according to the law of France; and it was held by Vice-Chancellor Stuart, in accordance with a previous dictum of Lord Chancellor Cranworth, in Wallace *v.* Attorney-General, L. R. 1 Ch. 1, 8, that the daughters were not 'strangers in blood,' within the meaning of the legacy duty act. The Vice-Chancellor observed that in Doe *v.* Vardill the claimant was admitted to have in England the *status* of the eldest legitimate son of his father, and failed in his suit only because he could not prove that he was heir according to the law of England, in which the land was; that this will was that of a domiciled Frenchman, and his *status* and that of his children must be their *status* according to the law of France, which, according to Doe *v.* Vardill, constituted their English *status*; and that 'the *status* of these ladies being that of daughters legitimated according to the law of France by a declaration of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that if they had been English, and their father domiciled in England, they would have been illegitimate.'

"It may require grave consideration, when the question shall arise, whether the legitimacy of a child depending upon marriage of its parents or other act of acknowledgment after its birth, should not be determined by the law of the domicil at the time of the act which effects the legitimation, rather than by the law of the domicil at the time of the birth, or even of the marriage, when some other acknowledgment is necessary. See Sir Samuel Romilly's argument, in Shedden *v.* Patrick, 5 Paton, 205; printed more at length in 1 Macq. 556–558; Lord Brougham, in Munro *v.* Munro, 7 Cl. & Fin. 882; s. c. 1 Robinson H. L. 612; Lord St. Leonards, in Shedden *v.* Patrick, 1 Macq. 641; Stevenson *v.* Sullivant, 5 Wheat. 207, 259; 2 Toullier, Droit Civil (5th ed.), 217; Savigny's Private International Law, § 380; (Guthrie's ed.), 250 and note 260.

"These authorities do not appear to have been considered in those English cases, in which, under a bequest in an English will to 'the children' of an Englishman who afterwards became domiciled in a foreign country, and there married the mother of his illegitimate children born there, whereby they became legitimate by the law of that country, Vice-Chancellor Wood (afterwards Lord Hatherley) and Vice-Chancellor Stuart were of opinion that those children born before the change of domicil could not take, and differed upon the question whether those born after the change could take, Vice-Chancellor Stuart holding that they could, and Vice-Chancellor Wood holding that they could not. Wright's Trust, 2 K. & J. 595; s. c. 25 L. J. (N. S.) Ch. 621; 2 Jur. (N. S.) 465; Goodman *v.* Goodman, 3 Giff. 643; Boyes *v.* Bedale, 1 Hem. & Mil. 798; Lord Hatherley in Udny *v.* Udny, L. R. 1 H. L. Sc. 441, 447. See also Kindersley, V. C., in Wilson's Trusts, L. R. 1 Eq. 247, 264–266; Lord Chelmsford, in s. c. *nom.* Shaw *v.* Gould, L. R. 3 H. L. 55, 80. But those opinions proceeded upon the construction of wills of persons domiciled in England; and Vice-Chancellor Wood appears to have admitted that if the father had never been domiciled in England the rule would have been different. Wright's Trust, 25 L. J. (N. S.) Ch. 632; s. c. 2 Jur. (N. S.) 472; citing Ashford *v.* Tustin, before Parker, V. C., reported only in Lovell's Monthly Digest, 1852, p. 389; Udny *v.* Udny, L. R. 1 H. L. Sc. 448.

"The dictum of Vice-Chancellor Wood in Boyes *v.* Bedale, 1 Hem. & Mil. 805, and the decision of Sir George Jessel, M. R., in the case of Goodman's

cilii.[1] But so far as this extends to the power of the parent over the person of the child, it is not admitted in our juris-

Trusts, 14 Ch. D. 619, that the word 'children' in the English statute of distributions means only children according to the law of England, and that therefore children born in a foreign country, and legitimated by the law of that country upon the subsequent marriage of their parents there, could not take by representation under that statute as children of their father, although he was domiciled in that country at the time of their birth and of the subsequent marriage, can hardly, as it seems to us, be reconciled with the general current of judicial opinion in England, as shown by the cases already referred to.

"The most accomplished commentators on the subject, English and American, are agreed that the decision in Doe *v.* Vardill, which has had so great an influence with English judges, does not rest upon general principles of jurisprudence, but upon historical, political, and constitutional reasons peculiar to England. Westlake's Private International Law (ed. 1858), §§ 90–93; (ed. 1880) intro. 9, §§ 53, 168; 4 Phillimore's International Law (2d ed.), § 538 note; Dicey on Domicil, 182, 188, 191, pref. iv.; 2 Kent Com. 117, note *a*, 209, note *a*; 4 Kent Com. 413, note *d*; Story, Confl. §§ 87, 87 *a* and note, 93 *i*, 93 *m*; Redfield, in Story, Confl. § 93 *w* and note; Whart. Confl. § 242. Upon questions of comity of States, considerations derived from the feudal law, from an act of Parliament of the time of Henry III., and from the constitution and policy of the English government, have no weight in Massachusetts at the present day.

"Almost fifty years ago, the legislature of this Commonwealth enacted that children born before the marriage of their parents and acknowledged by their father afterwards, and legitimate children of the same parents, should inherit from each other as if all had been born in lawful wedlock; but did not make such illegitimate children capable of inheriting from their father. St. 1832, c. 147. Whether this was accidental or designed, the commissioners on the revision of the statutes in 1835 reported to the legislature that they had no means to conjecture, not knowing the reasons on which the statute itself was founded, 'the whole of it being an innovation upon the law as immemorially practised and transmitted to us by our ancestors;' and therefore proposed a section making no change in this respect, but only expressing what they supposed to have been the intention of the framers of that statute; 'leaving it to the wisdom of the legislature, if they should think fit to continue this law in force, to modify it in such manner as shall be thought proper.' Report of Commissioners on Rev. Sts. c. 61, § 4 and note.

"The legislature solved the doubt of the learned commissioners by making the statute more comprehensive, and enacting it in this form: 'When, after the birth of an illegitimate child, his parents shall intermarry, and his father shall, after the marriage, acknowledge him as his child, such child shall be considered as legitimate to all intents and purposes, except that he shall not be allowed to claim, as representing either of his parents, any part of the estate of any of their kindred, either lineal or collateral.' Rev. Sts. c. 61, § 4.

"In Loring *v.* Thorndike, 5 Allen, 257, a testator domiciled in this Commonwealth, by a will admitted to probate before the Revised Statutes were passed, bequeathed a sum in trust to pay the income to his son for life, and the principal at his death 'to his lawful

[1] Savigny, System, etc. § 380 (Guthrie's trans. p. 301); Bar, § 102 (Gillespie's trans. p. 414 *et seq.*). See also Phillimore, Int. L. vol. iv. nos. 523, 524, and Wharton, Confl. of L. § 353, and the authorities cited by both.

prudence.[2] Our courts constantly interfere to regulate the custody of children, and will allow a foreign parent no greater

heirs.' After the Revised Statutes took effect, the son, whose domicil also was and continued to be in this Commonwealth, had two illegitimate children in Germany by a German woman, and afterwards married her there in a form authorized by the law of the place, and there acknowledged them as his children. This court held that by the Rev. Sts. c. 61, § 4, such children must be deemed legitimate for all purposes, except of taking by inheritance as representing one of the parents any part of the estate of the kindred, lineal or collateral, of such parent; and that the children took directly under the will of their grandfather, and not as the representatives of their father, and were therefore not within the exception of the statute, but were entitled to the benefit of the bequest.

"Still greater changes in the rules of the law of England as to the descent of real estate have been made by subsequent legislation in this Commonwealth. Aliens, whether residing here or abroad, may take, hold, convey, and transmit real estate. St. 1852, c. 29; Gen. Sts. c. 90, § 38; Lumb *v.* Jenkins, 100 Mass. 527. And if the parents of an illegitimate child marry, and the father acknowledges him as his child, the child is to be deemed legitimate for all purposes whatsoever, whether of inheritance or settlement or otherwise. St. 1853, c. 253; Gen. Sts. c. 91, § 4; Monson *v.* Palmer, 8 Allen, 551. The statutes of adoption will be referred to hereafter.

"In Smith *v.* Kelly, 23 Miss. 167, it was held that the *status* or condition of a person as to legitimacy must be determined by reference to the law of the country where such *status* or condition had its origin, and that the *status* so ascertained adhered to him everywhere; and therefore that where, at the time of the birth of an illegitimate child and of the subsequent marriage of its parents, they were domiciled in South Carolina, in which such marriage did not make the child legitimate, and afterwards removed with the child to Mississippi, by the law of which State subsequent marriage of the parents and acknowledgment of the child by the father would legitimate it, and the child was always recognized by the father as his child, yet the child, having had the *status* of illegitimacy in South Carolina, retained that status in Mississippi, and could not inherit or succeed to either real or personal property in Mississippi. That decision is a strong application of the law of the domicil of origin, and perhaps did not give sufficient effect to the father's recognition of the child in Mississippi after they had established their domicil in that State.

"In Scott *v.* Key, 11 La. Ann. 232, while a father and his illegitimate son, whose mother he never married, were domiciled in the Territory of Arkansas, the legislature of that Territory passed a special statute enacting that the son should be made his father's legal heir and representative in as complete a manner as though he had been such from his birth, and should be as capable of inheriting his father's estate in a full and complete manner, as if his father had been married to his mother at the time of his birth, and should be known and called by his father's name; and the father and son afterwards removed to Louisiana. The majority of the court held that the heritable quality of legitimacy, which the son had received from the legislature of the State of his residence, accompanied him when he changed his domicil, and that he was entitled to inherit his father's im-

[2] See particularly the remarks of Lord Cottenham, in Johnstone *v.* Beattie, 10 Cl. & F. 42, 114. Also Wharton, Confl. of L. § 253; Phillimore, Int. L. vol. iv. nos. 524, 525.

privilege in this respect than one domiciled within the territory of the court exercising jurisdiction.

movable property in Louisiana, to the exclusion of the father's brothers and sisters. Chief Justice Merrick dissented, but only upon the ground that to allow such an act to have an extra-territorial effect would be to allow another State to provide a new class of heirs for immovables and successions in Louisiana; and that in order that personal statutes should be enforced in another country, there must be something in common between the jurisprudence of the two countries; and, speaking of the conflicting rules of the civil law and the common law in regard to legitimation by subsequent matrimony, said: 'The doctrine of the civil law ought to be enforced, doubtless, in those cases where our own statute recognizes a mode of legitimation by acknowledgment by notarial act and subsequent marriage, although the form in which it has been done in another State differs from our own.' 11 La. Ann. 239. And see 4 Phillimore, § 542; Savigny (Guthrie's ed.) 258, 260, 264 and note.

"In Barnum *v.* Barnum, 42 Md. 251, on the other hand, it was said, in the opinion of the majority of the court, that a special statute of the legislature of Arkansas, enacting that one person be constituted the heir of another, both of whom had a domicil there, making no reference to any marriage, and not even depending on the one being the child of the other, could have no extra-territorial operation whatever. See pp. 305, 307, 325. But the point decided was, that the former was not an 'heir' of the latter, within the meaning of the will of the latter's father, who, nine years before the passage of the Arkansas statute, died domiciled in Maryland, the law of which does not appear to have permitted the creation of an heir in that manner.

"The cases on this topic in other States, so far as they have come to our notice, afford little assistance. The decision in Smith *v.* Derr, 34 Penn. St. 126, that a child born out of wedlock, and legitimated by the law of another State where the father and child were domiciled, could not inherit land in Pennsylvania in 1855, was, as the court said, covered by the principle decided in Doe *v.* Vardill; for the Statute of Merton was then in force in Pennsylvania, although since repealed there. See Report of the Judges, 3 Binn. 595, 600; Purd. Dig. (10th ed.) 1004. The decision in Harvey *v.* Ball, 32 Ind. 98, allowing a bastard child of parents who at the time of its birth and of their subsequent intermarriage, and until their death, had their domicil in Pennsylvania, to inherit land in Indiana under a statute of Indiana enacting that 'if any man shall marry a woman who has, previous to the marriage, borne an illegitimate child, and after marriage shall acknowledge such child as his own, such child shall be deemed legitimate to all intents and purposes,' was put exclusively upon the meaning attributed by the court to that statute, without regard to general principles or cases decided elsewhere; and upon any other ground would be inconsistent with the decision in the leading case of Shedden *v.* Patrick, before cited. In Lingen *v.* Lingen, 45 Ala. 410, in which it was held that a child, born in France of parents who never intermarried, and there acknowledged by his father according to the forms of the French law, and so made legitimate by that law, could not take a share in the father's estate in Alabama, the father's domicil was always in Alabama, and the child had not been legitimated in any manner allowed by the laws of that State.

"The legal adoption by one person of the offspring of another, giving him the *status* of a child and heir of the parent by adoption, was unknown to the law of England or of Scotland, but was recognized by the Roman law, and exists in many countries on the continent of Europe which derive their jurisprudence from that law. Co. Lit. 7 *b*, 237 *b*;

The *lex domicilii* is allowed in this country and in England no influence upon the relation of the parent to the immovable

4 Phillimore, § 531; Mackenzie's Roman Law, 120–124. Whart. Confl. § 251. It was long ago introduced, from the law of France or of Spain, into Louisiana and Texas, and more recently, at various times, and by different statutes, throughout New England, and in New York, New Jersey, Pennsylvania, and a large proportion of the other States of the Union. Fuselier *v.* Masse, 4 La. 423; Vidal *v.* Commagère, 13 La. Ann. 516; Teal *v.* Sevier, 26 Tex. 516; Miss. St. 1846; Hutch. Miss. Code, 501; Alabama Code of 1852, § 2011; N. Y. St. 1873, c. 830; N. J. Rev. Sts. of 1877, § 1345; Penn. St. 1855, c. 456; Purd. Dig. 61; 1 Southern Law Rev. (N. S.) 70, 79 and note, citing statutes of other States. One of the first, if not the very first, of the States whose jurisprudence is based exclusively on the common law, to introduce it, was Massachusetts.

"By the St. of 1851, c. 324, upon the petition of any inhabitant of this Commonwealth, and of his wife, if he was a married man, for leave to adopt a child not his own by birth, with the consent in writing of its parents, or the survivor of them, or, if neither should be living, of the child's legal guardian, next of kin, or next friend, and the consent of the child also if of the age of fourteen years or upwards, the judge of probate of the county in which the petitioner resided, upon being satisfied that the petitioner, or, in case of husband and wife, the petitioners, were of sufficient ability to bring up the child and furnish it with suitable nurture and education, and that it was fit and proper that such adoption should take effect, was authorized to decree that the child should be deemed and taken to be, to all legal intents and purposes, the child of the petitioner or petitioners; and the child so adopted was thereafter to be deemed, for the purposes of inheritance and succession by such child, custody of his person, duty of obedience to such parents or parent by adoption, and all other legal consequences and incidents of the natural relation of parents and children, the same as if he had been born of such parents or parent by adoption in lawful wedlock, saving only that he should not be capable of taking property expressly limited to the heirs of the body of the petitioner or petitioners. St. 1851, c. 324, §§ 1–6. And by the St. of 1854, c. 24, the petitioner was authorized to have the name of the child changed at the same time. These provisions were substantially re-enacted in 1860, and again in 1871, with a further exception that the adopted child should not be capable of taking property from the lineal or collateral kindred of such parents by the right of representation. Gen. Sts. c. 110, §§ 1–8; 13 St. 1871, c. 310.

"The statute of Pennsylvania of 1855, which is made part of the case stated, and under which the demandant was adopted by the intestate in 1871, while both were domiciled in that State, corresponds to these statutes of this Commonwealth in most respects. Like them, it permits any inhabitant of the State to petition for leave to adopt a child; it requires the petition to be presented to a court in the county where the petitioner resides; it requires the consent of the parents or surviving parent of the child; it authorizes the court, upon being satisfied that it is fit and proper that such adoption should take effect, to decree that the child shall assume the name, and have all the rights and duties of a child and heir, of the adopting parent; and it makes the record of that decree evidence of that fact.

"The statute of Pennsylvania differs from our own only in not requiring the consent of the petitioner's wife, and of the child if more than fourteen years of age; in omitting the words 'as if born in lawful wedlock' in defining the effect of the adoption; in also omitting any

property of his child. This is governed exclusively by the *lex loci rei sitæ*.[3] But the rights of the parent with respect to the

exception to the adopted child's capacity of inheriting from the adopting parent; and in expressly providing that, if the adopting parent has other children, the adopted child shall share the inheritance with them in case of intestacy, and he and they shall inherit through each other as if all had been lawful children of the same parent.

"In Commonwealth *v.* Nancrede, 32 Penn. St. 389, it was held that a child adopted under the act of 1855, and to whom the adopting father had devised and bequeathed all his estate, was not exempt from the collateral inheritance tax under an earlier statute of that State; and Chief Justice Lowrie said: 'It is property devised or descending to children or lineal descendants that is exempt from the tax. If the heirs or devisees are so in fact, they are exempt; all others are subject to the tax. Giving an adopted son a right to inherit does not make him a son in fact. And he is so regarded in law, only to give the right to inherit, and not to change the collateral inheritance tax law. As against that law, he has no higher merit than collateral blood relations of the deceased, and is not at all to be regarded as a son in fact.' The scope and meaning of that decision appear more clearly by referring to the terms of the earlier statute, which imposed such a tax on all estates passing from any person dying seised thereof, either testate or intestate, to any person other than the 'father, mother, husband, wife, children, and lineal descendants born in lawful wedlock.' Purd. Dig. 214, 215. The whole effect of the decision therefore was, that a child adopted under the act of 1855 was not exempt from the tax, because he was not a 'child born in lawful wedlock,' or, in the words of the Chief Justice, not 'a son in fact.'

"In Schafer *v.* Eneu, 54 Penn. St. 304, a testator who died before the passage of the adoption act of 1855, devised property in trust for the sole and separate use of his daughter for life, and on her death to be conveyed to her children and the heirs of her children forever, and made a residuary devise to his own children, by name, in fee; the daughter afterwards adopted three children under the act of 1855, and died leaving no other children; and it was held that the estate devised went to the children of the testator, and not to the adopted children of the daughter. Mr. Justice Strong, in delivering judgment, referred to Commonwealth *v.* Nancrede, above cited, and said: 'Adopted children are not children of the person by whom they have been adopted, and the act of Assembly does not attempt the impossibility of making them such. . . . The right to inherit from the adopting parent is made complete, but the identity of the child is not changed. One adopted has the rights of a child without being a child.' And he added that the testator's own children had a vested interest under his will, when the act of 1855 was passed, which it was not in the power of the legislature to take away.

"We are not required, and are hardly authorized, for the purposes of the present case, to consider whether the first of these decisions can be reconciled in principle with that of Vice-Chancellor Stuart in Skottowe *v.* Young, L. R. 11 Eq. 474, above referred to, or the second with those of this court in Sewall *v.* Roberts, 115 Mass. 262, and Loring *v.* Thorndike, 5 Allen, 257. We assume them to establish conclusively that by the law of Pennsylvania a child adopted by a man under the act of 1855, not being a child born to him in wedlock, is not his child, within the terms of the collateral inheritance tax act of that

[3] Story, Confl. of L. § 463.

movable property of his child are probably to be considered in our law as subject to the *lex domicilii*. This is the view indicated by a decision[4] of Shadwell, V. C., and it has been, at least tentatively, adopted by the text-writers who have considered the matter.[5] The question, however, still remains open.

State, nor within the meaning of the will of a third person, domiciled in that State, who died before adoption had any legal existence there.

"But the opinion in each of those cases clearly recognizes, what is indeed expressly enacted in the statute, that, as between the adopted child and the adopting father, the child has all the rights and duties of a child, and the capacity to inherit as such. According to one of the most learned and thoughtful writers on jurisprudence of our time, it is the rights, duties, and capacities arising from the event which creates a particular status, that constitute the status itself and afford the best definition of it. 2 Austin on Jurisprudence (3d ed.), 706, 709–712, 974. By the law of Pennsylvania, therefore, as enacted by its legislature and expounded by its highest judicial tribunal, the demandant, as between him and his adopting father, has in all respects the legal status of a child.

"The law of the domicil of the parties is generally the rule which governs the creation of the status of a child by adoption. Foster *v.* Waterman, 124 Mass. 592; 4 Phillimore, § 531; Whart. Confl. § 251. The status of the demandant, as adopted child of the intestate, in the State in which both were domiciled at the time of the adoption, was acquired in substantially the same manner, and was precisely the same so far as concerned his relation to, and his capacity to inherit the estate of, the adopting father, as that which he might have acquired in this Commonwealth, had the parties been then domiciled here. In this respect there is no conflict between the laws of the two Commonwealths. The difference between them in regard to the consent of the wife of the adopting father, and to the inheritance of estates limited to heirs of the body, or inheritance from the kindred, or through the children, of such father, are not material to this case, in which the only question is whether the adopted child or a brother of the adopting father has the better title to land in the absolute ownership of such father at the time of his death. Whatever effect the want of formal consent, on the part of the wife of the intestate, to the adoption of the demandant, might have, if she were claiming any interest in her husband's estate, it can have no bearing upon this controversy between the adopted child and a collateral heir.

. . . . . .

"We are not aware of any case, in England or America, in which a change of status in the country of the domicil, with the formalities prescribed by its laws, has not been allowed full effect, as to the capacity thereby created of succeeding to and inheriting property, real as well as personal, in any other country the laws of which allow a like change of status in a like manner with a like effect under like circumstances.

"We are therefore of opinion that the legal status of child of the intestate, once acquired by the demandant under a statute and by a judicial decree of the State of Pennsylvania, while the parties were domiciled there, continued after their removal into this Commonwealth, and that by virtue thereof the demandant is entitled to maintain this action."

[4] Gambier *v.* Gambier, 7 Sim. 263.

[5] Phillimore, Int. L. vol. iv. no. 529; Dicey, Dom. rule 27, pp. 170–172; Westlake, Priv. Int. L. 1st ed. no. 405, p. 387; Story, Confl. of L. § 463; and Wharton, Confl. of L. § 255; and with some qualifications, Id. § 256.

§ 34. **Guardianship.** — There is no doubt that primarily the appointment of the guardian of a minor belongs to the court, or other proper authority, at the domicil of the minor. This is especially true with respect to the jurisdiction of the various courts or other appointing authorities within the same State. Continental writers with great unanimity contend for the recognition everywhere of the rights and powers of the domiciliary guardian with respect to both the person and the movable property of the ward,[1] differing, however, in their views with respect to his immovable property.[2] But this doctrine has not obtained in England or in this country. In Johnstone *v.* Beattie[3] the House of Lords settled it that a foreign guardian has *virtute officii* no authority over an infant in England. The Court of Chancery, therefore, may, in its discretion, appoint a different guardian, and may interfere to prevent the removal of the ward by the domiciliary guardian.[4] Of the American doctrine Story[5] says: "In the States acting under the jurisprudence of the common law, the rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other States." Nevertheless, the domiciliary appointment is of considerable importance, and will be recognized by the courts of other jurisdictions in this country and in England, in their discretion, to the extent of handing over the ward to the domiciliary guardian for removal, or of requiring the local guardian to carry out with respect to the ward the directions of the domiciliary court or guardian.[6] But this is a matter purely of discretion, which

[1] Savigny, System, etc. § 380 (Guthrie's trans. p. 302 *et seq.*); Bar, § 106 (Gillespie's trans. p. 437 *et seq.*); Story, Confl. of L. §§ 495–498, 500–502 *a*; Wharton, Confl. of L. § 267. The older authorities are more in conflict than those of the present day.

[2] See authorities cited in the last note.

[3] 10 Cl. & F. 42. See, however, Stuart *v.* Bute, 9 H. L. Cas. 440, and on this subject generally see Phillimore, Int. L. vol. iv. no. 548 *et seq.*; Westlake, Priv. Int. L. 2d ed. §§ 5–9; Foote, Priv. Int. Jur. p. 35 *et seq.*; Dicey, Dom. pp. 172–176; Story, Confl. of L. § 499 and note *a*, and § 504 *a*; Wharton, Confl. of L. § 261 *et seq.*

[4] Besides authorities cited in the last note, see particularly Dawson *v.* Jay, 3 De G. M. & G. 764.

[5] Confl. of L. § 499. See also Hoyt *v.* Sprague, 103 U. S. 613, 631; Woodworth *v.* Spring, 4 Allen, 321, 324; and *infra*, ch. 11.

[6] Nugent *v.* Vetzera, L. R. 2 Eq. Cas. 704; Di Savini *v.* Lousada, 18 W. R. 425; and see *infra*, ch. 11.

will be exercised in accordance with what the court conceives to be the best interests of the ward.

With respect to the movables, Story [7] lays down the following as the fully recognized doctrine both in England and in America, namely: "No foreign guardian can *virtute officii* exercise any rights or power or functions over the movable property of his ward which is situated in a different State or country from that in which he has obtained his letters of guardianship. But he must obtain new letters of guardianship from the local tribunals authorized to grant the same, before he can exercise any rights, powers, or functions over the same." But here again the domiciliary appointment becomes important both with respect to the grant of local guardianship and because it is the constant practice of our courts (regulated in many States by statute) to direct the payment, upon proper conditions, to the domiciliary guardian of the proceeds of property, real and personal, in the hands of ancillary local guardians. Perhaps the whole matter may be thus summed up; namely, that the domiciliary guardian has *virtute officii* no authority beyond the territorial limits of the State or country appointing him,[8] but that he will usually be everywhere recognized as possessing superior rights upon properly satisfying the local tribunal that such right will be exercised for the best interests, personal and pecuniary, of the ward.

§ 35. **Minority and Majority.** — It has been frequently laid down that the question of the majority or minority of a person is to be determined by the law of his domicil. This is particularly true of the writings of the older continental jurists. But such a rule cannot be said now to prevail anywhere — even upon the Continent — without much qualification.

As to the capacity, with respect to age, of a person to enter into a valid contract (other than the contract of marriage), the law does not appear to be entirely settled in England. In the early case of Male *v.* Roberts,[1] Lord Eldon declared that

[7] Confl. of L. § 504 *a*. This statement must be now somewhat modified in view of the existence of statutes in some of the States permitting foreign guardians to act upon certain conditions and under certain limitations. See Wharton, Confl. of L. § 263, note 1.

[8] Except as stated in the last note.

[1] 3 Esp. 163.

questions of this character are to be decided according to the law of the country where the contract arises. But in several late cases there are *dicta* broadly in favor of the *lex domicilii*.[2] In this country there is a decision of the New York Supreme Court [3] in favor of the *lex loci contractus*, and the opinions of the majority of the best text-writers in both countries are the same way;[4] as also is the analogy to be drawn from the American cases upon the capacity of married women.[5] In the celebrated case of Saul *v.* His Creditors,[6] which has been much criticised and much misunderstood, Porter, J., used language which when rightly interpreted amounts to this; namely, that, when the defence of infancy is set up to a contract, the Louisiana courts will apply either the *lex domicilii* or the *lex loci contractus*, as the one or the other will the more

[2] In Sottomayor *v.* De Barros, L. R. 3 P. D. 1, 5, Cotton, L. J., said: "It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil." And again, "As in other contracts, so in that of marriage, personal capacity must depend on the law of domicil." See also the dictum of Lord Westbury, in Udny *v.* Udny, L. R. 1 Sch. App. 441, 457, quoted *supra*, § 29.

[3] Thompson *v.* Ketcham, 8 Johns. 190, Kent, C. J., delivering the opinion.

[4] Story, Confl. of L. §§ 82, 102, 103, 242, 332; Kent's Comm. vol. ii. p. 233, note *c*; Parsons on Contracts, vol. iii. pt. 2, ch. 2, § 3, p. 575, 5th ed.; Wharton, Confl. of L. §§ 114, 115; Dicey, Dom. rule 31, pp. 177–179; Foote, Priv. Int. Jur. pp. 31, 260, 261; Schouler, Domestic Relations, p. 521. Westlake seems to prefer the *lex domicilii*, Priv. Int. L. 1st ed. no. 401, p. 237; 2d ed. p. 40.

[5] See *infra*, § 38.

[6] 5 Mart. (N. s.) 569, 596. In this case, Porter, J., delivering the opinion of the court, used the following oft quoted and much criticised language: "The writers on this subject, with scarcely any exception, agree that the laws or statutes which regulate minority and majority, and those which fix the state and condition of man, are personal statutes, and follow and govern him in every country. Now, supposing the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and lived previous to his coming here placing it at twenty-one, no objection could be perhaps made to the rule just stated, and it may be, and we believe, would be true, that a contract made here at any time between the two periods already mentioned would bind him. But reverse the facts of this case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided; and that at the age of twenty-four he came into this State, and entered into contracts, — would it be permitted that he should in our courts, and to the demand of one of our citizens, plead as a protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge; and would we tell them that ignorance of foreign laws, in relation to a contract made here, was to prevent them enforcing it, though the agreement was binding by those of our own State? Most assuredly we would not."

tend to support the validity of the contract. And this is substantially the same rule as was subsequently enacted in both the Prussian and the Austrian Codes.[7] The same principle was applied by Lord Romilly in *Re* Hellman's Will [8] in fixing the time for the payment of a legacy.

Dicey [9] lays it down that the capacity of any person for the alienation of movables depends (so far as the question of infancy or majority is concerned) on the law of that person's domicil.

Testamentary capacity [10] and capacity for marriage [11] will be hereafter considered.

§ 36. **Marriage.** — With regard to the formal requisites of a valid marriage, it is now generally agreed that the *lex loci celebrationis* furnishes the true test.[1] At least it may be laid down as the general rule, that a marriage celebrated in accordance with the formalities required by that law will be considered in this respect valid everywhere,[2] although it may be added that in some cases also the marriage will be held valid if celebrated in accordance with the formal requirements of the *lex domicilii*.[3]

[7] See Westlake, Priv. Int. L. 2d ed. pp. 29, 30.

[8] L. R. 2 Eq. Cas. 363.

[9] Dom. rule 32, pp. 179, 180.

[10] *Infra*, § 43.

[11] *Infra*, § 36.

[1] Story, Confl. of L. §§ 79 *et seq.*, 260, and ch. 5, *passim*; Burge, For. & Col. L. p. 184 *et seq.*; Savigny, System, etc. § 381 (Guthrie's trans. p. 323); Phillimore, Int. L. vol. iv. no. 394; Westlake, Priv. Int. L. 1st ed. nó. 344; Id. 2d ed. §§ 13–16; Foote, Priv. Int. Jur. pp. 48–52; Dicey, Dom. rule 44, p. 200 *et seq.*; Fraser, Husband and Wife, p. 1309; Wharton, Confl. of L. § 169; Bishop, Marr. & Div. vol. i. § 371 *et seq.*; Schouler, Domestic Relations, p. 47; Kent's Comm. vol. ii. p. 91. Phillimore (*ubi supra*) says: "That the law of the place of celebration is binding as to outward form is a *recepta sententia* of Private International Law." Bar (§ 91, Gillespie's trans. p. 368), while admitting that the rule *locus regit actum* is generally prevalent with respect to the form of celebration of marriage, himself prefers the *lex domicilii* of the husband at the time of the celebration. He, however, cites numerous authorities to the contrary. For qualifications of the general rule, see Wharton, Confl. of L. § 170 *et seq.*

[2] See authorities cited in the last note.

[3] Bishop, Marr. & Div. vol. i. § 392 *et seq.*; Story, Confl. of L. § 79; Burge, For. & Col. L. vol. i. p. 168; Dicey, Dom. pp. 201, 209–211; Bar, § 91 (Gillespie's trans. p. 368, and note 2); Ruding *v.* Smith, 2 Hagg. Cons. 371; Phillips *v.* Gregg, 10 Watts, 158. This principle is particularly applicable to marriages in barbarous and uninhabited lands. The British legislation on this matter, however, applies to all British subjects (Westlake, Priv. Int. L. 2d ed. p. 57; Dicey, Dom. *ubi supra*); and in

But with respect to the capacity of the parties to a marriage there has been much discussion and diversity of opinion. Two principal theories have been held: (1) that matrimonial capacity is determined by the law of the place of solemnization; (2) that it is determined by the law of the domicil of the parties. To these Wharton[4] has added a third, which concerns mainly our own country; namely, that "our national policy in this respect is to sustain matrimonial capacity in all cases of persons arrived at puberty and free from the impediments of prior ties." Upon this question the doctrine of the English cases is in a far from satisfactory condition. The earlier cases[5] were supposed to have settled the rule upon the basis of the *lex loci celebrationis*,[6] but the later cases have shaken this doctrine; and in view of the recent decision of the Court of Appeal in Sottomayor *v.* De Barros,[7] the rule may at present be considered to be, that the *lex domicilii* of the parties is the test; and further, that where the domicils of the parties are different, that of the man is to govern, notwithstanding that the *lex domicilii* of the woman pronounces her incapable of entering into the particular marriage.[8] In this country it is different; for, although there are some conflicting decisions, it is pretty thoroughly settled that the law of the place of solemnization furnishes the rule.[9] This is in accordance with the very decided opinion of Story.[10]

this instance it may be said that the *national law* and not the *lex domicilii* is applicable.

[4] Confl. of L. § 165.

Scrimshire *v.* Scrimshire, 2 Hagg. Cons. 395; Middleton *v.* Janverin, id. 437; and others.

[5] Story, Confl. of L. §§ 79 *et seq.*, 102 *et seq.*, 113, and ch. 5, *passim*; Burge, For. & Col. L. p. 184 *et seq.*; Kent's Comm. vol. ii. p. 91 *et seq.*

[6] L. R. 3 P. D. 1; Brook *v.* Brook, 9 H. L. Cas. 193, tended in the same direction, as also Mette *v.* Mette, 1 Swab. & Tr. 416.

[7] Sottomayor *v.* De Barros, *ubi supra*, and L. R. 5 P. D. 94. Mette *v.* Mette, *supra*, is the converse of this.

[8] Story, Confl. of L. §§ 79 *et seq.*, 102 *et seq.*, 113, and ch. 5, *passim*; Kent's Comm. vol. ii. p. 91 *et seq.*; Bishop, Marr. & Div. vol. i. § 371 *et seq.*; Schouler, Domestic Relations, pp. 47, 48; Patterson *v.* Gaines, 6 How. 550; Phillips *v.* Gregg, 10 Watts, 158; Commonwealth *v.* Lane, 113 Mass. 458; Van Voorhis *v.* Brintnall, 86 N. Y. 18. See particularly the last two cases and the cases therein cited. In Commonwealth *v.* Lane, Gray, C. J., collects the authorities very fully, and lays down the following as the correct doctrine: "What marriages between our citizens shall be recognized as valid in the Commonwealth, is a subject within the power of the Legislature to regulate. But

[10] Confl. of L. *ubi supra*.

Of course, when we speak of a marriage being valid by a particular law, it must be understood that such law is applicable only in so far as it permits marriages which are not polygamous, or incestuous according to the generally received opinion in Christendom. Therefore, a polygamous marriage of Americans in Turkey would not, upon the theory of the applicability of the *lex loci celebrationis*, be recognized by the courts of this country as valid; nor would such a marriage in England of domiciled Turks be, upon the theory of the *lex domicilii*, recognized by the English courts as valid. In either case the marriage would be considered as contrary to good morals and the policy of the *lex fori*, and therefore would be deemed void.

§ 37. **Mutual Property Rights of Husband and Wife.** — The marriage being assumed to be valid, in the absence of any settlement or express contract, the mutual rights of the husband and the wife in immovable property belonging to either of them are of course determined by the *lex loci rei sitæ* under our jurisprudence,[1] although many high authorities on the Continent contend for a different rule.[2]

As to movable property domicil plays an important part. The mutual rights of the parties in the movable property belonging to either of them at the time of the marriage are

when the statutes are silent, questions of the validity of marriages are to be determined by the *jus gentium*, the common law of nations, the law of nature as generally recognized by all civilized peoples. By that law the validity of a marriage depends upon the question whether it was valid where it was contracted; if valid there, it is valid everywhere. The only exceptions admitted by our law to that general rule are of two classes: 1st. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries. 2d. Marriages which the legislature of the Commonwealth has declared shall not be allowed any validity, because contrary to the policy of our own laws. The first class includes only those void for polygamy or for incest. To bring it within the exception on account of polygamy, one of the parties must have another husband or wife living. To bring it within the exception on the ground of incest, there must be such a relation between the parties contracting as to make the marriage incestuous according to the general opinion of Christendom; and by that test the prohibited degrees include, beside persons in the direct line of consanguinity, brothers and sisters only, and no other collateral kindred."

[1] Story, Confl. of L. §§ 159, 186, 454, 483; Westlake, Priv. Int. L. 2d ed. § 31; Burge, For. & Col. L. vol. i. p. 618; Wharton, Confl. of L. § 191.

[2] Savigny, System, etc. § 379 (Guthrie's trans. p. 292 and authorities cited); and see Bar, § 94.

regulated by the law of the matrimonial domicil;[3] which may be described as the domicil which is contemplated or intended by the parties at the time of the marriage.[4] Usually, but not necessarily, this is the domicil of the husband at that time; but it may be the domicil of the wife, if the parties intend to dwell at the place of that domicil; or it may be at a third place, if the parties intend to dwell there. In the absence, however, of proof to the contrary, the domicil of the husband at the time of the marriage will be presumed to be the matrimonial domicil.

As to property acquired by either of the parties after the marriage, there has been much difference of opinion. The continental jurists generally contend that the law of the matrimonial domicil governs throughout the existence of the marital relation, and applies not only to property owned by the spouses at the time of the marriage, but also to subsequent acquisitions.[5] But with respect to the latter the doctrine is now settled in this country that they are governed by law of the actual domicil.[6] This was early declared to be the true rule by Story, and is now abundantly supported by the decided cases. In England the question is not settled by judicial decision, and the opinions of the text-writers, when expressed at all, appear to be divided.[7]

[3] Story, Confl. of L. §§ 143 *et seq.*, 186; Burge, For. & Col. L. vol. i. p. 619 *et seq.*; Phillimore, Priv. Int. L. nos. 445, 456 *et seq.*; Westlake, Priv. Int. L. 1st ed. no. 366 *et seq.*; Id. 2d ed. § 32; Foote, Priv. Int. Jur. p. 240 *et seq.*; Dicey, Dom. rule 60, p. 268 *et seq.*; Wharton, Confl. of L. § 187 *et seq.*; Parsons, Contracts, vol. ii. p. 290; Savigny, System, etc. § 379 (Guthrie's trans. p. 292); Harral *v.* Harral, 39 N. J. Eq. 279.

[4] Story, Confl. of L. §§ 191–199; Burge, For. & Col. L. vol. i. p. 244 *et seq.*; Wharton, Confl. of L. § 190; Dicey, Dom. p. 269; Bar, § 96 (Gillespie's trans. pp. 401, 402, and note *o*, p. 403); Bishop, Marr. & Div. vol. i. § 404; Harral *v.* Harral, *supra*; Le Breton *v.* Nouchet, 3 Mart. 60.

[5] Savigny, System, etc. § 379 (Guthrie's trans. p. 293 and authorities cited); Bar, § 96 and authorities cited. See Burge, For. & Col. L. vol. i. ch. 7, sec. 8, *passim*; Story, Confl. of L. § 161 *et seq.*

[6] Story, Confl. of L. § 187; Wharton, Confl. of L. § 196; Bishop, Marr. & Div. vol. i. § 405; Id. Law of Married Women, vol. ii. § 569; Schouler, Domestic Relations, p. 67. This point was decided in the celebrated case of Saul *v.* His Creditors, 5 Mart. (N. s.) 569.

[7] Burge, For. & Col. L. vol. i. p. 619 *et seq.*, states the view that the law of matrimonial domicil governs future acquisitions, notwithstanding a change of domicil, to be the prevailing one; but himself appears to incline to the opposite view. The same may be said of Dicey, Dom. p. 270 *et seq.*; while

§ 37 *a*. **Construction of Marriage Contracts.** — Domicil is also of some importance in the construction of marriage contracts.[1] It is by no means controlling, however; and no definite rule upon the subject can be laid down, inasmuch as in the construction of such instruments, just as in the construction of other contracts, a variety of matters must be taken into consideration, and each case must to a large extent stand upon its own circumstances.

§ 38. **Capacity of Married Women to make Valid Contracts.** — As to capacity to make valid contracts, much that has been heretofore said with respect to nonage applies also to coverture. Continental authorities assume the personal law (that is, that of the domicil, or nationality according to the new theory) as decisive.[1] In England the question is an open one, with recent *dicta* in favor of the same view.[2] But on the other hand it may now be considered as settled in this country, that the capacity of a married woman to enter into a binding contract is to be determined by the *lex loci contractus*.[3] This question was examined at length by Gray, C. J., in the recent Massachusetts case of Milliken *v.* Pratt,[4] and the result indicated was reached after an elaborate review of the authorities. There are decisions to the same effect in other States. This view has also received the unqualified support of Story and Wharton.

§ 39. **Jurisdiction in Divorce Cases.** — It is undoubtedly

Westlake takes distinct ground in favor of the continental view. Priv. Int. L. 1st ed. no. 368; 2d ed. p. 641. An Irish Case, *Re* Lett's Trusts, 7 L. R. Ir. 132, appears to support the American view.

[1] Phillimore, Int. L. vol. iv. p. 329 *et seq.*; Westlake, Priv. Int. L. 1st ed. no. 371; Id. 2d ed. p. 68; Foote, Priv. Int. Jur. pp. 241–243; Dicey, Dom. p. 273 *et seq.*; Wharton, Confl. of L. § 199; Bishop, Marr. & Div. vol. i. § 404.

[1] Savigny, System, etc. § 362; Bar, § 95 (Gillespie's trans. p. 396 and authorities cited). See also the authorities collected by Burge, For. Col. L. vol. i. ch. 6, § 2, and Story, Confl. of L. ch. 4, *passim*, § 136 *et seq.*; Asser et Rivier, Droit Int. Privé, no. 47; Fœlix, Droit Int. Privé, t. 1, l. 2, t. 1, c. 2; Fiore, Droit Int. Privé (by Pradier-Fodéré), § 105 *et seq.*

[2] See *supra*, § 35, note 2.

[3] Story, Confl. of L. § 103, and 102 note (*a*), 8th ed.; Wharton, Confl. of L. § 118; Milliken *v.* Pratt, 125 Mass. 374; Bell *v.* Packard, 69 Me. 105; Halley *v.* Ball, 66 Ill. 250; Pearl *v.* Hansborough, 9 Humph. 426; Musson *v.* Trigg, 51 Miss. 172. This appears also to be the view of the Scotch courts. Fraser, Husband & Wife, vol. ii. p. 318. See also Dicey, Dom. pp. 193, 194, and Westlake, Priv. Int. L. 1st ed. no. 404.

[4] *Supra*.

competent for the sovereign power of any State or country to confer upon its tribunals such jurisdiction in matters of divorce as it deems proper, and a decree pronounced by a competent tribunal under authority so conferred would necessarily be held valid and binding within the territorial limits of the State or country whose tribunal it was. But what effect, if any, would elsewhere be given to such a decree, depends mainly upon whether the jurisdiction of the court pronouncing it has been conferred and exercised in accordance with the generally received principles of international law. The test, therefore, of the validity, as to jurisdiction, of a *domestic* divorce is anything which the law-making power chooses to enact, while the test, as to jurisdiction, of the validity of a *foreign* divorce is, according to the generally received view, the domicil of the parties.[1] The place of the celebration of the marriage is immaterial; and so, according to almost all the authorities, is the place of the commission of the offence.

In England there has been considerable confusion in the decisions and judicial expressions of opinion upon the question of jurisdiction. Until the Statute of 20 and 21 Vict. c. 85, which went into operation in 1858, divorces *a vinculo* could be granted only by act of Parliament. Since that time they have been grantable for certain causes by a special court created by that act, and since become one of the divisions of the High Court of Justice. The jurisdiction of the court is, therefore, purely statutory, and was, until recently, generally understood, although the matter was not considered as settled, to depend upon the domicil of the parties. But in Niboyet *v.* Niboyet,[2] which was decided by a divided Court of Appeal, it was held to depend upon residence somewhat short of domicil. This, however, is merely the result of the

[1] Story, Confl. of L. § 229 *a*, note (*a*), and § 230 *a*; Burge, For. & Col. L. vol. i. ch. 8, § 2, *passim*, and particularly from p. 680 to end of section; Savigny, System, etc. 379 (Guthrie's trans. p. 299); Bar, § 92 (Gillespie's trans. p. 373 *et seq.*); Phillimore, Int. L. vol. iv. ch. 21, 22; Westlake, Priv. Int. L. 1st ed. no. 361 *et seq.*; Id. 2d ed. § 46; Dicey, Dom. rule 46, pp. 225–228, 233–242; Piggott, Foreign Judgments, p. 280 *et seq.*; Foote, Priv. Int. Jur. p. 61 *et seq.*; Wharton, Confl. of L. ch. 4, § 10, *passim*; Bishop, Marr. & Div. vol. ii. §§ 141 *et seq.*, 144 *et seq.*

[2] L. R. 4 P. D. 1.

construction of the act of Parliament conferring jurisdiction upon this particular court,[3] and does not in the slightest degree affect the doctrine held by the English courts with respect to the international validity of foreign divorces. Indeed, the English courts have constantly refused to recognize as valid Scotch divorces pronounced upon jurisdictional facts similar to those upon which the English Divorce Court finds itself compelled by act of Parliament to assume jurisdiction. With respect to foreign divorces, it was formerly supposed that a marriage celebrated in England could not be dissolved, except by act of Parliament, and it was therefore held that the decree of a foreign court dissolving such marriage was void, even though the parties were, both at the time of the marriage and of the divorce proceedings, domiciled in the country of *forum*.[4] But this doctrine has now been thoroughly overturned, and the test which will be applied by the British courts to the jurisdiction of a foreign tribunal pronouncing a decree in divorce is the domicil of the parties. This has recently been held in the House of Lords in a case[5] in which the matrimonial domicil continued up to the time the proceedings were had. And in view of the strong *dicta*[6] on the

[3] In Harvey *v.* Farnie, L. R. 6 P. D. 35, Cotton, L. J., who was one of the majority of the Court of Appeal in Niboyet *v.* Niboyet, said of that case: "What was said by Brett, L. J. [who favored domicil as the test of the jurisdiction of the court], was in favor of the respondent to this appeal, and he was in the minority; but the decision of the other members of the court turned entirely upon the construction of the English Act of Parliament, and they said, whatever might have been the consequences independently of those words, this Act of Parliament gives to us, an English court, jurisdiction in the matter, and says what is to be the consequence, if certain facts are proved in a suit and brought before us under the Act. That was the *ratio decidendi* in that case."

[4] See particularly McCarthy *v.* De Caix, 2 Russ. & M. 614, where Lord Brougham applied the doctrine of Lolley's Case, Russ. & Ry. 237, which he understood in this sense. But see remarks of Lord Selborne in Harvey *v.* Farnie, L. R. 8 App. Cas. 43.

[5] Harvey *v.* Farnie, *supra*, affirming s. c. L. R. 6 P. D. 35, and 5 id. 153. The same had long before been settled for Scotland in Warrender *v.* Warrender, 2 Cl. & F. 488.

[6] Among others may be particularly mentioned those of Lord Westbury in Shaw *v.* Gould, L. R. 3 H. L. 55, and of Lord Penzance in Shaw *v.* Attorney-General, L. R. 2 P. & D. 156; Manning *v.* Manning, id. 223, and Wilson *v.* Wilson, id. 435. In Shaw *v.* Gould, Lord Westbury said: "If, as is certain, the domicil of origin may be effectually put off, and a new domicil acquired by persons who are *sui juris*, it must follow that such persons thereby become, to all intents and purposes, subject to, and entitled to the benefit of, the laws and institutions of the adopted country, in

subject, there is little doubt that the same doctrine will be held in cases where the matrimonial domicil has been changed; or, in other words, the test which will be applied is the domicil of the parties at the time of the commencement of the proceedings.

In this country the decisions on the subject of divorce jurisdiction are very numerous and very conflicting; but the one principle which may above all others be extracted from them is that jurisdiction depends upon domicil.[7] But what domicil? In the first place, the suit need not be brought at the place of the matrimonial domicil. If there has been a *bona fide* change of domicil to another State, the courts of that State will have jurisdiction. Again, it has been held in some of the States that the proceedings must be had at the place of the domicil of the parties existing at the time the cause of divorce arose.[8] But the weight of authority is now against this position.[9] It may therefore be laid down that jurisdiction depends upon domicil existing at the time the proceedings are begun.[10]

like manner as they were entitled and subject to the laws of the domicil of origin, and that without becoming aliens in their own native country. . . . The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bona fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in Lolley's case." In Shaw *v.* Attorney-General, Lord Penzance said: "To my mind it is manifestly just and expedient that those who may have permanently taken up their abode in a foreign country, resigning their English domicil, should, in contemplation of English law, be permitted to resort with effect to the tribunals exercising jurisdiction over the community of which, by their change of domicil, they have become a part, rather than they should be forced back for relief upon the tribunals of the country they have abandoned."

[7] See the American works cited, *supra*, note 5, and the cases cited by them and in the following notes.

[8] Dorsey *v.* Dorsey, 7 Watts, 349; McDermott's Appeal, 8 Watts & S. 251; Bishop *v.* Bishop, 30 Pa. St. 412; Leith *v.* Leith, 39 N. H. 20, and numerous earlier cases in New Hampshire; Edwards *v.* Green, 9 La. Ann. 317; and see Hare *v.* Hare, 10 Tex. 355.

[9] Wharton, Confl. of L. § 231; Bishop, Marr. & Div. vol. ii. § 172 *et seq.*

[10] Wharton, Confl. of L. §§ 223, 231; Bishop, Marr. & Div. vol. ii. § 172 *et seq.*, and cases cited. It is superfluous to cite cases upon this point. It may be considered as now thoroughly established in this country, except perhaps in Pennsylvania, where a doctrine, which, although it has much to recommend it, is peculiar to that State, has

But whose domicil is to govern? We shall see hereafter that for all purposes other than divorce the domicil of the wife follows that of the husband.[11] But if the husband deserts his wife and establishes his domicil in another State, it would be contrary to the dictates of natural justice and would only assist him in the perpetration of a wrong, either to deprive her of her remedy entirely or to compel her to follow him from State to State to seek redress. It is therefore well and properly settled that the courts of the State in which the parties were domiciled at the time of the desertion will entertain her suit and give her redress.[12] But then arises the question: Is this an exception to the rule that jurisdiction depends upon domicil, or to the rule that the wife's domicil follows that of her husband? The authorities generally take the latter position, and hold that a wife entitled to a divorce may for the purposes of divorce have a domicil of her own.[13] And further it is held that under similar circumstances a wife may, quitting the place of the common domicil, go into another State and establish there an entirely new domicil for the purposes of divorce.[14] Questionable as this doctrine may be upon general principles, and out of consonance as it certainly is with the principles of international law, as understood in other countries, it has the support of a number of decided cases in this country.

There are many other positions and distinctions declared in the decided cases both of this country and England; but enough has been said to show the important part which is played by domicil in the law of marriage and divorce.

§ 40. **Relation of Domicil to Assignments of Movables.** — "Mobilia sequuntur personam," or, as it was sometimes

been adopted. It is there held that the proceeding for divorce must be had at the place of the last common domicil of the parties. Thus A., who had previously been domiciled in Pennsylvania, deserted his wife there and went to Tennessee, where he acquired a domicil, his wife continuing to dwell in Pennsylvania. The latter having subsequently committed adultery, A. obtained a divorce therefor in Tennessee, which the Supreme Court of Pennsylvania declared, in a proceeding for dower, to be null and void, holding that the proper *forum* was in Pennsylvania. Reel *v.* Elder, 62 Pa. St. 308; Colvin *v.* Reed, 55 id. 375.

[11] *Infra*, ch. 10.

[12] This subject is considered *infra*, ch. 10.

[13] See *infra*, ch. 10.

[14] See *infra*, ch. 10.

strongly expressed, "Mobilia ossibus inhærent," was admitted by the older authorities as a maxim of very wide application, and hence, upon the assumption that movables could have no *situs*, they were considered as subject in almost all respects to the *lex domicilii* of their owner. But in modern practice so many exceptions have been admitted to this principle as to almost entirely destroy its force as a rule. It will be impossible in this sketch to enter into any detailed account of these exceptions. We must content ourselves with a brief statement of a few of the most important principles upon the general subject of the assignment of movables.

With respect to the assignment of particular corporeal chattels as distinguished from the general mass of the movable property of the owner, the tendency of modern theory and practice has been to recognize the *lex loci rei sitæ* as the applicatory law.[1] And this may be said to be the now generally received view in England and in this country, both among the text-writers and in the decided cases.[2] It is true that Story,[3] largely upon the authority of the older continental writers and the *dictum* of Lord Loughborough in Sill *v.* Worswick,[4] in general leans strongly towards the application of the *lex domicilii*, although he admits that in many cases the law of the *situs* would be equally applicable, and in some cases entitled to superior respect.

Assignments of debts are in general, but subject to many qualifications, governed by the *lex domicilii* of the creditor. This seems to be now settled in this country,[5] but in England there are no decisions exactly in point.

§ 41. **General Assignments; Bankruptcy.** — But there are several kinds of assignments *en masse* of movables, which

[1] Savigny, System, etc. §§ 366, 367; Bar, § 57 *et seq.*; Waechter, Die Collision der Privatrechtgesetze Verschiedener Staaten, Archiv für Civilistische Praxis, vol. xxiv. pp. 292–298; Westlake, Priv. Int. L. 1st ed. no. 360 *et seq.*; Id. 2d ed. p. 154 *et seq.*; Foote, Priv. Int. Jur. p. 174 *et seq.*; Dicey, Dom. rule 51, pp. 246–249; Wharton, Confl. of L. §§ 297 *et seq.*, 334 *et seq.*

[2] See the English and American works mentioned in the last note and the cases by them cited. See also the cases cited by the editor of the eighth edition of Story, Confl. of L. in note (*a*) to § 383 of that work.

[3] See Confl. of L. § 376 *et seq.*

[4] 1 H. Bl. 665, 690.

[5] Wharton, Confl. of L. § 363 *et seq.*; Story, Confl. of L. 8th ed. §§ 362 *et seq.*, 383 note (*a*), 395 *et seq.*

have been treated of by text-writers and discussed in the decided cases, and with respect to which the principle of domicil has generally been acknowledged to be of considerable importance. They are, (1) Assignments by Marriage, (2) by Bankruptcy, and (3) by Death, — that is, (*a*) Intestate Succession and (*b*) Testamentary Succession. The first has already been referred to.

In England it is held that an assignment in bankruptcy under proceedings had at the place of the domicil of the bankrupt operates upon all of the movables of the bankrupt wherever found.[1] This doctrine has been held as well in favor of foreign bankruptcies as in favor of those of English origin, and has been applied to the extent both of defeating the attempt of the creditors of foreign bankrupts to obtain preference out of movable assets in England, and of compelling English creditors of an English bankrupt to make restitution of funds received by them in payment of their debts out of the movable assets of such bankrupt in foreign countries; an exception to the latter application being made in favor of creditors who have obtained the payment of their debts by the decision of foreign courts.

In this country the English rule was at first followed, even the high authority of Chancellor Kent[2] supporting it; but now the doctrine is thoroughly settled the other way, that eminent jurist candidly admitting in his Commentaries that "it may now be considered as a part of the settled jurisprudence of this country, that personal property as against creditors has locality, and the *lex loci rei sitæ* prevails over the law of the domicil with regard to the rule of preference in the case of insolvents' estates."[3] This doctrine is applied not only to foreign bankruptcy proceedings, but also as a principle of interstate law to insolvency proceedings which are *in invitum*.[4]

[1] Phillimore, Int. L. vol. iv. no. 770 *et seq.*; Westlake, Priv. Int. L. 1st ed. no. 277 *et seq.*; Id. 2d ed. § 125; Dicey, Dom. rule 63, p. 277 *et seq.*; Wharton, Confl. of L. § 389; Story, Confl. of L. §§ 403–409.

[2] See Holmes *v.* Remsen, 4 Johns. Ch. 460; also remarks of Parker, C. J., in Goodwin *v.* Jones, 3 Mass. 514, 517, and cases cited by Story, Confl. of L. § 409, note 2.

[3] Kent's Comm. vol. ii. p. 406; Story, Confl. of L. § 410 *et seq.*; Wharton, Confl. of L. § 390.

[4] Wharton, Confl. of L. § 390 *a*.

But in the case of voluntary assignments for the benefit of creditors, there has been some conflict of opinion. Story[5] holds that they will, if valid by the law of the domicil of the assignor, be allowed to prevail in other States, provided they do not violate some positive law or rule of public policy in the latter.[6] But there has been an apparent tendency to test their validity rather by the *lex loci contractus* than by the *lex domicilii*, although the cases are not harmonious.[7]

§ 42. **Intestate Succession.** — With the third kind of general assignment of movables, — namely, personal succession, whether testamentary or intestate, — domicil has much to do. It is here that the maxim *Mobilia sequuntur personam* has its most general and effective application.

It is a principle of international law, acknowledged in all civilized countries (except in those in which the doctrine of political nationality prevails), that in cases of intestacy the distribution of movables is to be governed by the law of the domicil of the deceased person existing at the time of his death.[1] We have already seen when and how this rule was introduced into the jurisprudence of Great Britain and this country.[2] Probably the only exception to the rule is in cases of exemptions and inheritance taxes under the laws of other States or countries, operating upon movables found within their territorial limits.

[5] Confl. of L. §§ 411, 423 *a*, *et seq.* See also Grier, J., in Caskie *v.* Webster, 2 Wall. Jr. C. Ct. 131, and opinion of the court, per Miller, J., in Green *v.* Van Buskirk, 5 Wall. 307.

[6] Id. § 416.

[7] Burrill on Assignments, 4th ed. §§ 302 *et seq.*, 310, and cases cited. The great difficulty in arriving at the true *ratio* of the cases arises from the fact that usually assignments are made at the place of the domicil of the assignor, and therefore the *lex domicilii* and the *lex loci contractus* are coincident. In such cases the courts have frequently used language so loose as to render it impossible to discern which they really considered the applicatory law. But the weight of both *dicta* and decisions now seems to be in favor of the *lex loci contractus*.

[1] Story, Confl. of L. § 480 *et seq.*; Phillimore, Int. L. vol. iv. no. 885; Savigny, System, etc. § 375 (Guthrie's trans. p. 272 *et seq.*); Bar, § 107 (Gillespie's trans. p. 445 *et seq.*); Westlake, Priv. Int. L. 1st ed. no. 314 *et seq.*; Id. 2d ed. §§ 54–56; Foote, Priv. Int. Jur. pp. 194–197; Dicey, Dom. rules 66, 67, pp. 291–294; Robertson, Pers. Suc., p. 118 and *passim*; Williams on Executors, vol. ii. pt. 3, bk. 4, ch. 1, § 5; Jarman on Wills, vol. i. ch. 1, p. 2 *et seq.*; Kent's Comm. vol. ii. p. 428 *et seq.*; Wharton, Confl. of L. § 561.

[2] *Supra*, §§ 17–20.

§ 43. **Testamentary Succession; Validity of Wills.**—In determining the validity of a testamentary disposition of movables, three principal points are to be observed; namely, (1) the personal capacity of the testator; (2) the formal execution of the testamentary instrument; and (3) the special validity of the particular disposition or provision in dispute. As regards the first point, it has been uniformly held that capacity to make a will is to be determined by the *lex domicilii* of the alleged testator.[1] But as between domicil at the time of making the supposed will and domicil at the time of the death, in a case in which there has been a change of domicil, which is to govern? Story[2] has apparently, although not certainly,

[1] Story, Confl. of L. ch. 11, § 465 *et seq.*; Phillimore, Int. L. vol. iv. no. 863; Dicey, Dom. rules 68, 69, p. 294 *et seq.*; Foote, Priv. Int. Jur. p. 183 *et seq.*; Jarman on Wills, vol. i. pp. 2, 3; Williams on Executors, vol. i. p. 366 *et seq.*; Wharton, Confl. of L. § 568 *et seq.*

[2] Confl. of L. § 465. It is somewhat difficult to arrive at Story's true opinion upon this subject. In the section cited he says: "So far as respects the capacity or incapacity of a testator, to make a will of personal or movable property, we have already had occasion to consider the subject in another place. The result of that examination was, that the law of the actual domicil of the party, at the time of the making of his will or testament, was to govern as to that capacity or incapacity." Now, the discussion to which he alludes had reference more particularly to the question whether capacity to do certain acts (and among others, testamentary acts) is to be determined by the law of the domicil of origin or by that of the domicil existing at the time the act is done; and the case which he had in view, when writing the passage quoted, may have been the one which so frequently arises; viz., where domicil of origin has been superseded by a new domicil which subsists both at the time of the making of the will and at the time when it goes into effect, *i. e.*, at the death of the testator. This conjecture is strengthened by what follows. He next proceeds to consider "the forms and solemnities by which wills of personal estates are to be governed," and after reviewing the authorities, English, American, Scotch, and continental, upon this subject, he proceeds to consider (under a separate title, § 473) the "effect of change of domicil." His own remarks under this head are as follows: "But it may be asked, What will be the effect of a change of domicil after a will or testament is made of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicil at the time of his death? The terms in which the general rule is laid down would seem sufficiently to establish the principle that in such a case the will or testament is void; for it is the law of his actual domicil at the time of his death, and not the law of his domicil at the time of making his will or testament of personal property, which is to govern. This doctrine is very fully recognized and laid down by John Voet." He then quotes from that great civilian several passages, which, singularly enough, relate to testamentary *capacity* and not to "forms and solemnities." These considerations lead the writer to think that the distinguished commentator on the Conflict of Laws did not intend to assert that the *lex domicilii* at the time

declared in favor of the former; and Phillimore[3] has followed him. But this view does not appear to be maintained by the weight of the authorities either in England or in this country, which hold the doctrine that capacity to make wills, as well as all other matters of testamentary validity, is to be determined by the law of the domicil existing at the time of the death of the supposed testator.[4]

As regards the formal execution and revocation of testa-

of the execution of the will is to determine questions of his testamentary capacity in preference to the *lex domicilii* at the time of death; although he has been usually understood in a contrary sense. It may be added that in Moultrie *v.* Hunt (23 N. Y. 394), Story was understood both in the majority and minority opinions of the court to have special reference in § 473 to testamentary capacity. But out of deference to the generally received interpretation of Story's language in § 465, the statement has been made as above in the text.

[3] Int. L. vol. iv. no. 863; Dicey, Dom. p. 311, takes the same view, also relying upon Story, Confl. of L. § 465.

[4] This is to be gathered mainly, however, from the general terms in which the rule as to testamentary validity is laid down. Take for example the language of Lord Westbury in Enohin *v.* Wylie (10 H. L. Cas. 1, 13). He says: "I hold it to be now put beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the court of the country where the deceased was domiciled at his death. *All questions of testacy and intestacy belong to the judge of the domicil.* It is the right and duty of that judge to constitute the personal representative of the deceased. To the court of the domicil belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator, is the prerogative of the judge of the domicil. In short, the court of the domicil is the *forum concursûs* to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort." Moreover, the English court will follow a judgment obtained in the country in which the testator or alleged testator had his last domicil as to the testamentary character of a document, and its validity as a will or codicil, with respect not only to the forms of execution, but also to every circumstance on which the validity of a will may depend. Westlake, Priv. Int. L. 2d ed. § 74, and see also the succeeding sections of the same book. But as directly in point upon the statement above in the text, see Wharton, Confl. of L. § 570; Jarman on Wills, vol. i. pp. 2, 4; Williams on Executors, vol. i. p. 366; Foote, Priv. Int. Jur. pp. 183, 184. Savigny holds that the personal capacity of a testator in respect to his *legal relations* is to be determined by the concurrence of the *leges domicilii*, both at the time of the execution and the time of the death, and therefore, if a will be invalid for want of testamentary capacity according to either law, it can have no effect. But he holds that capacity with respect to *physical qualities* (*e. g.*, age) is ruled by the law of the domicil at the time of execution. System, etc. § 377 (Guthrie's trans. p. 282). Bar holds that the law of the last domicil rules generally, but that a testament which is bad from the beginning cannot be made good merely by a subsequent change of domicil, § 108 (Gillespie's trans. pp. 464, 465). See Asser et Rivier, Droit Int. Priv. no. 64, to the same effect, applying, however, the principle of nationality instead of domicil.

mentary papers, continental jurists generally, applying the maxim *Locus regit actum*, hold that a will is valid if executed according to the formal requirements of the place of execution.[5] But this rule is said to be merely *facultative* and not *imperative*. Hence many hold that a will is valid if executed according to the formal requirements either of the place of execution or of the domicil of the testator. And this result has now been reached in Great Britain as to the wills of British subjects, by an act of Parliament (Lord Kingsdown's act).[6] But in England, prior to the passage of that act it was settled, and in this country, in the States in which there has been no positive enactment on the subject, it is now settled, that a will of movables in order to be valid must be executed in accordance with the formal requirements of the law of the last domicil of the testator.[7] The same rule applies also to revocation.

But even though a will be made by a person under no testamentary incapacity and be properly executed, its particular provisions will be held valid or invalid as they are in accordance or not with the law of the testator's last domicil.[8]

§ 44. **Id. Construction of Wills.** — The construction of a will of movables is, generally speaking, to be made in accordance with the *lex domicilii* of the testator;[1] but whether it is the law of the domicil existing at the time of the execution of the will or of that existing at the time of the death of

[5] Savigny, System, etc. § 381 (Guthrie's trans. pp. 322, 323); Bar, § 109 (Gillespie's trans. p. 466 *et seq.*); Asser et Rivier, Droit Int. Priv. no. 63; Phillimore, Int. L. no. 864; Wharton, Confl. of L. § 588. See also the testimony of the French lawyers in Bremer *v.* Freeman, 10 Moore P. C. C. 306, *infra*, § 351, note 2.

[6] 24 and 25 Vict. c. 114.

[7] Story, Confl. of L. §§ 465 *et seq.*, 473; Westlake, Priv. Int. L. 1st ed. no. 324; Id. 2d ed. § 74 *et seq.*; Foote, Priv. Int. L. p. 183 *et seq.*; Jarman on Wills, vol. i. pp. 6, 7; Dicey, Dom. rule 68 *et seq.*, pp. 294 *et seq.*, 311; Wharton, Confl. of L. § 585; Moultrie *v.* Hunt, 23 N. Y. 394; Dupuy *v.* Wurtz, 53 N. Y. 556; Bremer *v.* Freeman, 10 Moore P. C. C. 306.

[8] Savigny, System, etc. § 377 (Guthrie's trans. p. 283); Story, Confl. of L. § 479 *d*; Phillimore, Int. L. vol. iv. no. 892; Westlake, Priv. Int. L. 1st ed. no. 329; Jarman on Wills, pp. 2–5; Enohin *v.* Wylie, 10 H. L. Cas. 1; Whicker *v.* Hume, 7 id. 124.

[1] Story, Confl. of L. §§ 479 *a*, *et seq.*, 479 *f*, *et seq.*, 491; Phillimore, Int. L. vol. iv. no. 890, 891; Savigny, System, etc. § 377 (Guthrie's trans. p. 283); Westlake, Priv. Int. L. 1st ed. nos. 329–331; Foote, Priv. Int. Jur. pp. 191–221; Dicey, Dom. rule 70, pp. 306–308;

the testator, which is to be looked to, is neither clear on principle nor settled by the decided cases.[2]

§ 45. **Probate and Administration.**[1] — The probate of wills of movables and the grant of letters testamentary and of administration belong primarily to the proper tribunal of the last domicil of the deceased person. Under our jurisprudence, such letters *proprio vigore* confer no authority upon the executor or administrator beyond the territorial limits of the State or country in which they are granted; but in order to bring suits in, or to administer and take possession of, the movable property of the decedent in another State or country, it is necessary to obtain express authority from the proper tribunal of the latter State or country, either by a fresh probate or grant of letters or by entering such security as the local law may require. In granting ancillary probate or letters, however, the local tribunal will give great respect and weight to the acts of the domiciliary tribunal, and will as far as possible select as administrator the same person as has been intrusted with the administration by the latter. The administration of the local personal assets will always be carried on under the supervision and control of the court of the *situs;* but when all the expenses of administration and debts due creditors there are paid, the surplus will either be remitted to the place of the decedent's domicil or distributed by the court of the *situs* in accordance with the law of that domicil.

There are numerous special points under this head which have been decided and discussed. As it is impossible in this sketch of the uses of domicil even to notice them all, the reader will have to refer for them to the special treatises and the decided cases.

§ 46. **Legacy and Inheritance Taxes.** — Closely connected

Bar, § 110 (Gillespie's trans. p. 476); Jarman on Wills, vol. i. p. 6; Wharton, Confl. of L. § 592 *et seq.*

[2] See Story, Confl. of L. § 479 *g.*

[1] Without stopping to cite authorities for each particular proposition contained in this section, it is sufficient to refer generally to the following: Story, Confl. of L. ch. 13; Westlake, Priv. Int. L. 1st ed. ch. 10; Id. 2d ed. ch. 5; Foote, Priv. Int. Jur. pt. 2, ch. 7, p. 193 *et seq.*; Dicey, Dom. p. 313 *et seq.*; Wharton, Confl. of L. ch. 9, §§ 604 *et seq.*, 644; and the various text-books upon Wills and Executors.

with the foregoing, although it might properly also be noticed under a succeeding head, is the use of domicil for the purpose of determining the liability of the movable estate of a decedent to legacy duties and taxes upon its transmission. Probate and administration duties are of course determined by the laws of the State in which probate or administration is granted. They are the consideration paid for the grant and for the protection afforded by the State and the use of its legal machinery in the collection and administration of the estate, and with them domicil has nothing to do.[1] But with respect to taxes upon the transmission of movable property, two principles may be adopted; namely, (*a*) the State in which such property is found may tax it without regard to the domicil of its deceased owner; or (*b*), applying the maxim *Mobilia sequuntur personam*, the State or country within whose territorial limits the deceased person was last domiciled may lay a tax upon the whole of his movable property, without regard to its location at the time of his death. The first principle has been applied to some extent in this country, and the second has been applied both in Great Britain and in this country. It is thus held in England that legacy and succession duties are payable when, and only when, the deceased person was last domiciled within the United Kingdom; and this principle is applied without regard either to the location of the property or to the domicil of the legatees or distributees.[2] By the law of Pennsylvania,[3] collateral inheritance tax is payable to the State (*a*) upon all property within the State passing by will or intestate succession to strangers or collateral relations; and (*b*) upon all of the personal property (wherever situated and thus passing) of persons domiciled within the State. Other States have enacted similar laws, but this only need be referred to by way of illustration.

[1] Westlake, Priv. Int. L. 1st ed. no. 320; id. 2d ed. p. 114 *et seq.*; Wharton, Confl. of L. § 643; Foote, Priv. Int. Jur. pp. 208–211; Jarman on Wills (Randolph & Talcott's Am. ed.), vol. i. p. 5, note.

[2] Westlake, Priv. Int. L. 1st ed. no. 320; Id. 2d ed. § 106 *et seq.*; Foote, Priv. Int. Jur. p. 212 *et seq.*; Dicey, Dom. rule 73, p. 317 *et seq.*; Hanson Prob. Leg. and Suc. Duties, *passim*.

[3] Acts, 7 Apr. 1826, § 1; 10 Apr. 1849, §§ 13 and 11; Mar. 1850, § 3, and see 1 Purd. Dig. 11th ed. p. 259 *et*

§ 47. **Jurisdiction.** — We have already seen that in the Roman law domicil furnished a very important, and indeed practically the most important, ground of jurisdiction.[1] A person was subject to the laws of his domicil, and therefore bound to obey, and subject to the jurisdiction of, its magistrates. This is a very important principle, valid now as then, and cannot be kept too steadily in view in discussing questions of this kind. It received wide application on the Continent upon, and to some extent before, the decadence of the feudal system, and is now extensively applied there for the determination of questions of jurisdiction. Indeed, this is at present one of the chief uses of domicil under the French law.

But under the English common law the sole basis of jurisdiction in personal actions was personal service upon the defendant within the kingdom; and this was applied alike to subjects and to foreigners, whether domiciled or transiently present; the place where the action was tried resting partly upon the will of the plaintiff and partly upon the distinction between local and transitory actions peculiar to the common law, and with which domicil had nothing whatever to do. In this country the common law rules have generally been applied, and jurisdiction, so far as regards the different local courts of the same State, has been made to depend mainly upon the fact of service of process upon the defendant. This is not universally true, however; for in Louisiana[2] (following the civil law rule) and in some other States, by statutory enactments, jurisdiction is made to depend, to a certain extent at least, upon domicil.[3]

But in the interstate questions of jurisdiction which are constantly arising in this country by reason of the large num-

seq. See also Pennsylvania *v.* Ravenel, 21 How. 103; Carpenter *v.* Pennsylvania, 17 id. 456; Commonwealth *v.* Smith, 5 Pa. St. 142; Short's Estate, 16 id. 63; Hood's Estate, 21 id. 106.

[1] *Supra*, § 9.

[2] La. Code of Practice, art. 162; re-enacted in the Revised Laws of 1871.

[3] This is particularly true with respect to the jurisdiction of justices of the peace and other inferior magistrates in some of the States. The statement in the text has reference, of course, to the ordinary common law actions and to the statutory forms of action modelled after them. In a large number of other judicial proceedings, however, such as probate, and all matters relating to the estates of decedents and orphans, divorce, insolvency, etc., jurisdiction has been conferred upon local tribunals upon the basis of domicil.

ber of *quasi* independent States of which our Union is composed, domicil becomes of great importance. This is brought into especial prominence in cases in which it is sought in one State to enforce, or otherwise give validity to, the judgments of the courts of other States. The Constitution of the United States[4] declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." In pursuance of this authority, Congress (after providing for the mode of authentication) has declared[5] that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which the said records are or shall be taken." In applying these provisions, the question first of all naturally arises, What is a "judicial proceeding"? And this is answered by the self-evident, as well as now thoroughly settled, doctrine that there can be no judicial proceeding without a court competent to act; that is to say (so far as concerns personal actions), possessing jurisdiction both over the parties and the subject-matter of the controversy. Otherwise the proceeding is simply *coram non judice*, and does not fall within the meaning of the phrase. Hence it is settled by a long train of decisions, that when a judgment of a State court is sought to be enforced, or otherwise relied upon, in a court of another State or of the United States, it is entirely competent, notwithstanding the constitutional and statutory provisions above referred to, to inquire, even in contradiction of the record, into the jurisdiction of the court pronouncing the judgment, and if the requisite jurisdiction be found wanting, to treat the judgment as a nullity. Now, with respect to jurisdiction as to parties, it is no doubt generally true that a State may give to its courts jurisdiction over persons domiciled within its territorial limits, by any sort of service, actual or constructive, that it sees fit to adopt; and a judgment

[4] Art. 4, § 1.

[5] Act, 26 May, 1790, § 1; Rev. Sts. § 905.

thereupon obtained would be considered valid and binding, not only in that State, but in all of the other States of the Union and in the Federal courts.[6] But such is not the rule with respect to persons domiciled elsewhere. For it is now settled that in order to confer upon the courts of one State jurisdiction in personal actions over persons domiciled in other States, there must be (*a*) personal service within the State of the court assuming to act, or (*b*) voluntary appearance either in person or by attorney; and a judgment of a State court without jurisdiction would be treated by the courts of the other States and of the United States as a nullity.[7] And substantially the same doctrine has been applied to judgment obtained in courts of foreign countries.[8]

In England, the law with reference to the recognition and enforcement of the judgments of foreign tribunals is neither clear nor well settled; there is much apparent conflict in the decisions, and no rules as definite as those which are recognized in this country have been formulated. It is noteworthy, however, that the English courts themselves, under authority of an act of Parliament, pronounce judgments upon extra-territorial service against persons domiciled out of the United Kingdom, which will not be recognized as binding in this country.[9]

[6] See Freeman on Judgments, § 570 and the cases there collected.

[7] Story on the Constitution of the United States, vol. ii. § 1313; Id. Confl. of L. 8th ed. § 586, note (*a*); Wharton, Confl. of L. § 660, and authorities cited in notes; Bigelow on Estoppel, 1st ed. p. 223 *et seq.*; Freeman on Judgments, § 559 *et seq.*; Am. Lead. Cas. vol. ii., notes to Mills *v.* Duryea and McElmoyle *v.* Cohen (where the subject is fully discussed), and the cases cited. The decided cases, both in the State and the United States courts, holding this doctrine, are so numerous that no attempt will be made here to give a list of them. It is sufficient to refer to a few of the later cases decided by the Supreme Court of the United States; viz., Cooper *v.* Reynolds, 10 Wall. 308; Galpin *v.* Page, 18 id. 350; Thompson *v.* Whitman, id. 457; Knowles *v.* The Gaslight & Coke Co., 19 id. 58; Hall *v.* Lanning, 91 U. S. 160; Pennoyer *v.* Neff, 95 id. 714.

[8] See particularly Bishoff *v.* Wethered, 9 Wall. 812.

[9] In Schibsby *v.* Westenholz, L. R. 6 Q. B. 154, 159, Blackburn, J., in delivering the opinion of the Court of Queen's Bench, speaking of judgments obtained by such extra-territorial service, said: "Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgment being given against him in our courts, an action were brought upon it in the courts of the United States

§ 48. **Judicial Citizenship.** — A few special phases of jurisdiction have already been referred to; several others will now be noticed.

The Constitution of the United States[1] gives to the United States Courts jurisdiction of "controversies . . . between citizens of different States;" and Congress, in distributing jurisdiction among the several Federal Courts, has assigned to the Circuit Courts original jurisdiction of cases "where . . . the suit is between a citizen of the State where it is brought and a citizen of another State."[2] In applying these provisions it has been determined that a citizen of a particular State is one who is (1) a citizen of the United States, native or naturalized, and (2) domiciled in such State.[3] It is true that in Shelton *v.* Tiffin,[4] McLean, J., in delivering the opinion of the court, used language which seems to demand a further condition; namely, intention to become a citizen of the particular State. But the current of authority and opinion is entirely in favor of the rule as above stated. Moreover, the language of the learned judge was in this respect wholly *obiter*, inasmuch as no such intention was shown; yet a change of citizenship was held upon mere proof of a change of domicil from one State to another.

Another instance of the dependence of jurisdiction upon

(where the law as to the enforcing of foreign judgments is the same as our own), a further question would be open; viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created." The question thus suggested has been passed upon in this country by the Supreme Court of the United States in Bishoff *v.* Wethered, 9 Wall. 812, where a judgment thus obtained in the English Court of Common Pleas was pronounced to be a nullity.

[1] Art. 3, § 2.

[2] Act 24 Sept. 1789, c. 20, § 11; Rev. St. § 629; Act 3 Mar. 1887, § 1.

[3] Story on the Constitution, § 1693; Curtis, Jurisdiction of the United States Courts, p. 118; Dillon, Removal of Causes, p. 67 note; Barber *v.* Barber, 21 How. 582; Prentiss *v.* Barton, 1 Brock. 389; Catlin *v.* Gladding, 4 Mas. 308; Briggs *v.* French, 2 Sumn. 251; Butler *v.* Farnsworth, 4 Wash. C. Ct. 101; Kemna *v.* Brockhaus, 10 Biss. 128. Curtis says (*loc. cit.*): "It is well settled that a citizen, judicially, is one who is a citizen of the United States, either native or naturalized, and domiciled in a particular State. Any person who is a native or naturalized citizen of the United States, and who has a domicil in Massachusetts, is a citizen of Massachusetts, and so of the other States."

[4] 6 How. 163, 185. He said: "On a change of domicil from one State to another, citizenship may depend upon the intention of the individual."

domicil under the United States laws may be mentioned. Under the late bankruptcy law jurisdiction in bankruptcy was given to the United States District Court in the district in which the debtor had carried on business or resided for the last six months, or the longest period thereof prior to the time of the filing of his petition;[5] and this *residence* has been construed to be domicil in a case[6] in which Lowell, Cir. J., applied the most technical of all the principles of domicil; namely, reverter of domicil of origin.

§ 49. **Attachments against Non-Residents.** — Closely akin to the subject of jurisdiction is that of attachments against non-residents.

Generally speaking, it may be said that the object of foreign or non-resident attachments is to grasp the property of those who cannot be reached in the ordinary way by personal actions. If, therefore, the position is correct (and how can it be gainsaid?) that a State has the power to legislate with binding force with respect to all persons who are domiciled within its territorial limits, and thus to give its courts jurisdiction over such persons whether absent or present, it would seem to follow that logically foreign attachment proceedings should be applicable only to persons domiciled elsewhere. On the other hand, it is true that a State has, at least within certain bounds, the power to legislate with binding force with respect to all things found within its territorial limits, and therefore can, if it deems proper, authorize the laying of attachments upon any property there found, whether belonging to its own citizens or to strangers. Where, therefore, the legislature has clearly expressed its intention to grant such authority, theoretical views of jurisdiction have no application. But it happens that in the statutes of almost all the States of the Union respecting foreign attachments, the favorite legislative, but very indefinite, term "residence" is in some form used. This term, as we shall hereafter see, has been under many statutes construed to mean domicil;[1] and if the question were an open one, there would seem to be, upon theory, plausible grounds for so construing it when used in the attachment

[5] Act 2 Mar. 1867, c. 176, § 11; Rev. Sts. § 5014.

[6] *In re* Walker, 1 Lowell, Dec. 237.

[1] *Infra*, § 75.

laws, and practically a standard of at least reasonable definiteness would thus be furnished. But a contrary practice has prevailed in many, if indeed not in most, of the States, and residence, when used in this connection, is generally held to be something less than domicil, but approaching to and resembling it in some important particulars.[2] What such residence is no one has yet succeeded in saying with any approach to definiteness,[3] and the cases upon this branch of the law are in a most distressing state of confusion and conflict. It is true that the authorities upon the general subject of domicil are frequently used in cases of attachment, and the converse is also true; but it is apparent that great caution must be observed in using the cases of attachment as authorities upon the general subject of domicil. Still they are frequently useful as illustrating principles which are applicable to both classes of cases. For such purpose they will be hereafter cited in the body of this treatise.

In some of the States, however, jurisdiction in foreign attachment proceedings is apparently placed upon the basis of domicil. This is notably so in Pennsylvania.[4]

§ 50. **Limitation of Actions.** — There is another use sometimes made of domicil which may be considered as having some bearing upon the relation of domicil to jurisdiction; namely, in the construction of the provision contained in the statutes of some of the States to the effect that the running of the statute in favor of the defendant shall be suspended for the time during which "he is absent from and resides out of the State." And in some of the States, principally Massa-

[2] Drake on Attachments, § 57 *et seq.*; Kneeland on Attachments, § 169 *et seq.*; Waples on Attachments, p. 39. It is a singular fact, however, that the writers on this subject, while they maintain substantially the doctrine stated above in the text, constantly apply the principles of domicil to the determination of residence under the attachment laws, and constantly cite cases of domicil (properly so called) in support of their various positions. The truth is, that the distinction between domicil and residence under the attachment laws is often so shadowy as to be incapable of definition or description.

[3] The futile attempts at a definition of residence will be noticed hereafter (*infra*, § 74). The most conspicuous is that which describes the requisite *animus* as "intention to remain permanently at least for a time," — a conception, which it would require acumen of no ordinary degree to grasp.

[4] Reed's Appeal, 71 Pa. St. 378. See also Pfoutz *v.* Comford, 36 id. 420.

chusetts,[1] such absence from and residence out of the State has been dealt with as a question of domicil, the theory

[1] Collester *v.* Hailey, 6 Gray, 517; Langdon *v.* Doud, 6 Allen, 423; Hallet *v.* Bassett, 100 Mass. 167; Mooar *v.* Harvey, 128 Mass. 219. In Langdon *v.* Doud, Bigelow, C. J., thus states the grounds of this interpretation: "In the case of Collester *v.* Hailey, 6 Gray, 517, it was decided that under Rev. Sts. c. 120, § 9, which was re-enacted in Gen. Sts. c. 155, § 9, the time of a debtor's absence from the State without losing his domicil is not to be excluded in computing the period of limitation of an action against him; in other words, that temporary absences, although extending over consecutive periods of several months, but effecting no change in the legal domicil of the debtor, do not operate to extend the period of limitation, but are to be included in reckoning the time within which an action may be commenced against him. It is now urged by the learned counsel for the plaintiff that this construction of the exception to the Statute of Limitations is too narrow, and that, by restricting its operation to the single class of cases in which the debtor has no domicil or habitancy in the Commonwealth, creditors may be deprived of all effectual remedy to enforce their claims against debtors who are actually absent from the State for long-continued periods without abandoning or forfeiting their domicil here. But if this be the effect of the interpretation of the statute, we do not see how it can be avoided. Absence from the State of itself is clearly not sufficient to suspend the operation of the statute. The provision is explicit that the time of a debtor's absence shall be deducted from the time limited for the commencement of the action, only in case 'he is absent from and resides out of the State.' The contention, therefore, concerning the interpretation of the statute resolves itself into a question as to the true meaning of the word 'residence.' Of this there is no room for any serious doubt. It certainly does not signify a temporary sojourn or occasional abode. In legal phraseology it is synonymous with 'habitancy' or 'domicil.' This is the sense in which it is used in statutes. By Gen. Sts. c. 3, § 7, cl. 7, it is enacted that the word 'inhabitant' may be construed to mean 'resident.' And by the Constitution of Massachusetts, c. 1, § 2, art. 2, it is provided that the word 'inhabitant' shall be held to signify that a person 'dwelleth or hath his home' in a particular place. Nor are we able to see any good or sufficient reason for attributing to the language of the statute, creating an exception to the Statute of Limitations, any new or unusual signification. A residence out of the State, as applied to the subject-matter, may well mean the acquisition of a domicil without its limits. So long as a debtor has a last and usual place of abode in the Commonwealth, that is, while he retains his domicil or residence here, the courts of the State have jurisdiction over him, and due service of legal process can be made upon him. A creditor can at any time commence a suit to enforce a claim against a debtor domiciled within the State. A writ can be served by leaving a summons at his last and usual place of abode, and in case of his absence from the State actual notice of the pendency of the action can be given to him, so that a valid and binding judgment can be obtained. In such case, the creditor has ample opportunity to prevent the operation of the statute bar. But it would be otherwise where the debtor had no domicil within the State. No valid service of process could be made upon him, and the courts could have no jurisdiction over his person. The true construction, therefore, of this clause of the statute would seem to be this: that where a defendant against whom a cause of action accrues is a resident within the State, and continues to reside therein, his occasional and temporary absences,

apparently being that so long as the defendant remains domiciled in the State he remains subject to the jurisdiction of its courts, and that therefore an action can be commenced against him even in his absence. But the Massachusetts view cannot be said to be by any means the prevailing one;[2] in the most of the States possessing similar statutory provisions, residence out of the State not amounting to a change of domicil being considered sufficient. But here, as in the case of foreign attachments, by reason of the extreme indefiniteness of the term "residence," when not measured and defined by the rules applicable to domicil, great difficulty arises in obtaining any standard of decision which will not be found to be greatly varying and inconstant.[3]

§ 51. **Taxation.** — We have seen that under the Roman law, at least during the imperial period, the chief application of domicil was to the determination of liability to municipal burdens;[1] and this application has survived to our day. It has become in American jurisprudence a most useful principle for the ascertainment of the liability of individuals to per-

however long continued, if not of such a character as to change his domicil, are not to be deducted in computing the statutory term fixed for the limitation of an action. . . . It may be added, that this construction of the statute seems to be the only one which will afford a fixed, permanent, and certain rule by which to ascertain whether a particular case is included within or excluded from the operation of the exception to the statute. If residence is not held to signify domicil, it can have, as applied to the subject-matter, no definite and ascertained meaning; but it would be necessary to vary its interpretation in each particular case, according to the circumstances proved concerning the length of the absence of the debtor from the State, and the objects for which he went away. There would be no standard by which to determine whether he could claim the benefit of the statute bar, or was excluded from the operation of the exception." The learned editor of the eighth edition of Story on the Conflict of Laws (p. 60), doubts whether the word "domicil" has been, in this connection, used in its technical sense. But there seems to be little ground for this doubt when we look at the language of the decisions, and when we consider further that this construction is a part of the consistent policy of the Massachusetts courts to interpret "residence," "inhabitancy," "dwelling-place," and like words, when used in statutes, in the technical sense of domicil. Moreover, in no State of the Union has the subject of domicil been so frequently, so ably, or so consistently treated as in the courts of that State; and it seems extremely improbable that the word would be used there, without qualification, in any but its technical sense.

[2] See Story, Confl. of L. 8th ed. § 49, note (*c*), pp. 58–60.

[3] See Bigelow, C. J., in Langdon *v.* Doud, *supra*,

[1] *Supra*, § 8.

sonal taxes and taxes upon their personal property. Taxes upon immovable property can be assessed only at the place of its location. But movables, upon the principle of the maxim *Mobilia sequuntur personam*, are taxable at the place of the domicil of their owner,[2] although there is a distinction in this respect between tangible and intangible personal property. The former may be taxed either by the State in which the owner has his domicil,[3] or by that in which they have their actual *situs*,[4] while the latter, including debts of all kinds whether or not secured by mortgage upon real estate situate in another State, is taxable only at the domicil of the owner.[5] As to purely personal taxes, such as poll-taxes, it is settled that they can be assessed only where the person is domiciled.

The above principles have been stated with special reference to the interstate law of taxation; but they are equally applicable to inter-municipal conflicts unless modified by statute. A State having the power to tax a person may fix the particular place within its limits at which he shall be taxed by whatever standard it chooses to adopt. This has been done in most of the States by providing that persons shall be taxed in the municipal divisions of which they are "residents" or "inhabitants," and these words have with great uniformity been construed to have reference to domicil in its technical sense. An attempt was made by the Supreme Court of

[2] Cooley on Taxation, pp. 14, 15, 43, 269, 270; Desty on Taxation, vol. i. § 67; Burroughs on Taxation, § 7; Wharton, Confl. of L. § 80.

[3] Cooley, *op. cit.* pp. 43, 269, 270; Desty, *ubi supra*. This, however, is denied by some. See Wharton, Confl. of L. § 80, p. 124, note 2; Burroughs on Taxation, §§ 40, 50. It is to be noted, however, that most of the cases cited for this position, that tangible personal property is not taxable at the domicil of the owner, turn upon the construction of statutory provisions, and simply hold that under this or that statute such property is not taxable at the owner's domicil, because the legislature does not appear to have intended that it should be there taxed. It is a question, therefore, of legislative intent, and not of legislative power.

[4] Cooley on Taxation, pp. 15, 43, 270; Desty on Taxation, vol. i. p. 323 *et seq.*; Burroughs on Taxation, §§ 40, 50; Wharton, Confl. of L. § 80, p. 124, note 2.

[5] Cooley on Taxation, pp. 15, 270, note; Desty on Taxation, vol. i. § 67, p. 326; Burroughs on Taxation, §§ 41, 42; Wharton, Confl. of L. § 80; State Tax on Foreign-held Bonds, 15 Wall. 300; Kirtland *v.* Hotchkiss, 100 U. S. 491. See generally, upon the subject of the place where property should be taxed, the valuable note to City of New Albany *v.* Meekin, 56 Am. Dec. 522.

Massachusetts in Briggs *v.* Rochester[6] to ignore this generally received construction; but that case was subsequently overruled by the same court in Borland *v.* Boston,[7] where an elaborate opinion was rendered, in which the subject was reviewed at great length, and the result reached that beyond doubt "the word 'inhabitant' as used in [the Massachusetts] statutes, when referring to liability to taxation, by an overwhelming preponderance of authority means 'one domiciled.'"

This branch of the law has furnished a large number of cases in which the subject of domicil has been discussed and applied.

§ 52. **Liability to other Public Burdens.** — Domicil has been used in this country as the test of liability to other public burdens, among which two may be mentioned; namely, (1) liability to militia service,[1] and (2) liability to jury service.[2] The latter has, however, been usually discussed from the opposite standpoint, namely, that of eligibility.

§ 53. **Right to Vote.** — In this country the qualifications for the exercise of the electoral franchise are fixed by the constitutions and laws of the several States. These qualifications vary somewhat in different States, although they are in most respects substantially the same everywhere.

In most of the States citizenship of the United States is required, although in a number it is deemed sufficient if the person whose right is in question, being a foreigner by birth, has declared his intention of becoming a citizen of the United States. But the laws of all the States unite in requiring residence for a fixed period (which varies in different States), both in the State and in the particular election district; and "residence," as so used, has, wherever the question has

[6] 16 Gray, 337.

[7] 132 Mass. 89.

[1] Hill *v.* Fuller, 14 Me. 121; Shattuck *v.* Maynard, 3 N. H. 123; Hart *v.* Lindsey, 17 id. 235; Commonwealth *v.* Walker, 4 Mass. 556. Domicil was used as the test of military service in the armies of the late Confederate States. *In re* Fight, 39 Ala. 452; *In re* Toner, id. 454; *Ex parte* Blumer, 27 Tex. 735; *Ex parte* Luscher, cited id. 746.

[2] United States *v.* Thorp, 2 Bond, 340; State *v.* Groome, 10 Iowa, 308; Graham *v.* Trimmer, 6 Kans. 230; Beason *v.* State, 34 Miss. 602; People *v.* Peralta, 4 Cal. 175; Clarke *v.* The Territory, 1 Wash. Ter. 82.

arisen, been uniformly construed to mean "legal residence," or domicil.[1]

§ 54. **Eligibility to Office.** — Domicil is also frequently used in this country for the determination of other public rights of the citizen, one of which may be particularly mentioned; namely, eligibility to office, where such eligibility depends upon "residence." [1]

§ 55. **Settlement under the Poor-Laws.** — Settlement or right to support under the poor-laws depends, in England and in the various States of this country, upon various statutory provisions, the principal grounds (which are recognized in most of the poor-law systems) of the right to such support in or by a particular poor-district being, ownership of real estate, payment of taxes, and residence for a fixed period in such district. In England residence under the poor-laws has never been considered as in any way connected with the subject of domicil. This is no doubt due to the fact that the principles of pauper settlements were substantially fixed before the introduction into English jurisprudence of either the term "domicil" or the definite notion signified by that term. In this country various statutory words, such as "dwelling-place," "home," "inhabitancy," and "residence," have been used to fix the place of settlement; and these words in different States have been differently construed. In some States they have been held to mean, or treated as meaning, domicil; while in others a contrary view has prevailed. It is not proposed here to examine the decisions in the various States upon this subject; it is sufficient to notice only those of Maine and Massachusetts as representing the opposite tendencies. In the earlier cases [1]

[1] Putnam *v.* Johnson, 10 Mass. 488; Blanchard *v.* Stearns, 5 Met. 298; Opinion of the Judges, id. 587; Holmes *v.* Greene, 7 Gray, 299; Crawford *v.* Wilson, 4 Barb. 504; Fry's Election Case, 71 Pa. St. 302; McDaniel's Case, 3 Pa. L. J. 310; State *v.* Frest, 4 Harr. (Del.) 558; Roberts *v.* Cannon, 4 Dev. & B. 256; State *v.* Hallett, 8 Ala. 159; State *v.* Judge, 13 id. 805; Dale *v.* Irwin, 78 Ill. 160; Vanderpoel *v.* O'Hanlon, 53 Iowa, 246; Cooley, Const. Lim. p. 600.

[1] Commonwealth *v.* Kelleher, 115 Mass. 103; Commonwealth *v.* Jones, 12 Pa. St. 365; State *v.* Grizzard, 89 N. C. 115; Yonkey *v.* State, 27 Ind. 236.

[1] Parsonfield *v.* Perkins, 2 Greenl. 411; Boothbay *v.* Wiscassett, 3 id. 354; Parsonfield *v.* Kennebunkport, 4 id. 47; Hallowell *v.* Saco, 5 id. 143; Richmond *v.* Vassalborough, id. 396; Waterborough *v.* Newfield, 8 id. 203; Greene *v.* Windham, 13 Me. 225, and others.

decided by the Supreme Court of the former State, settlement was apparently put squarely upon the basis of domicil; but these cases have long since been overruled, and the position established by numerous decisions[2] that "residence," "dwelling-place," and "home," as used in the pauper laws of that State, are not equivalent to, but mean something less than "domicil," the principal difference noted, however, being that while a person cannot be without a domicil somewhere he can be absolutely without a residence, dwelling-place, or home. On the other hand, the Massachusetts courts have with great consistency construed "inhabitancy," "residence," etc., in the statutes relating to pauper settlements in the same sense as that in which they have construed the same and similar words in statutes relating to other subjects, and have with great uniformity held them to mean "domicil" in its technical sense.[3]

No apparent difficulty has arisen from the application of the Massachusetts doctrine, and it has the merit of furnishing a more certain and more generally understood standard of decision than any which can result from its rejection. In the present state of the decisions, however, it is unsafe to rely too far upon settlement cases as decisive of principles relating to even municipal domicil without at least inquiring into the general tenor of the decisions upon this branch of the law in the particular State in which they have been decided. But even when settlement cases cannot be relied upon strictly as authorities, they often furnish illustrations of principles which are equally applicable to domicil, and particularly to municipal domicil. For this purpose they will mainly be used in this treatise.

§ 56. **Homestead and other Exemptions.** — One other use of domicil may be mentioned; namely, for the determination of the right of persons to homestead and other exemptions, out of their own property or that of deceased persons. All the

[2] Exeter *v.* Brighton, 15 Me. 58; Jefferson *v.* Washington, 19 id. 293; Warren *v.* Thomaston, 43 id. 406; Littlefield *v.* Brooks, 50 id. 475, and others.

[3] Although not the earliest, the leading case is Abington *v.* North Bridgewater, 23 Pick. 170. See remarks of Shaw, C. J., *infra*, § 75, note 2.

States of the Union have passed laws allowing such exemptions, — usually to their own citizens only; and in determining who are entitled to the statutory exemptions the principle of domicil has been extensively applied.[1]

[1] Wharton, Confl. of L. § 189; Lindsay *v.* Murphy, 76 Va. 428; Harkins *v.* Arnold, 46 Ga. 656; Talmadge's Adm'r *v.* Talmadge, 66 Ala. 199; Kelley's Ex'r *v.* Garrett's Ex'rs, 67 id. 304; Johnson *v.* Turner, 29 Ark. 280; Republic *v.* Young, Dallam, 464; Heirs of Holliman *v.* Peebles, 1 Tex. 673; Russell *v.* Randolph, 11 id. 460; Shepherd *v.* Cassiday, 20 id. 24; Gouhenant *v.* Cockerell, id. 96; Cross *v.* Everts, 28 id. 523; Lacey *v.* Clements, 36 id. 661.

CHAPTER III.

DEFINITIONS.

§ 57. **Difficulty of Defining Domicil.** — The difficulty, if not impossibility, of arriving at an entirely satisfactory definition of domicil has been frequently commented upon.[1] Lord Al-

[1] In addition to the cases mentioned in the text, Attorney-General *v.* Rowe, 1 Hurl. & Colt. 31, per Bramwell, B.; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441, per Jessel, M. R.; White *v.* Brown, 1 Wall. Jr. C. Ct. 217, per Grier, J.; Hallet *v.* Bassett, 100 Mass. 167, per Colt, J.; Matter of Hawley, 1 Daly (N. Y. Common Pleas), 531; *In re* Catharine Roberts' Will, 8 Paige, Ch. 519, per Walworth, Ch.; White *v.* White, 3 Head, 404, per Cooper, J.; *Ex parte* Blumer, 27 Tex. 735.

Lord Chelmsford says, in Pitt *v.* Pitt, 4 Macq. 627: "A disputed question of domicil is always one of difficulty, on account of the impossibility of arriving at a satisfactory definition which will meet every case that can arise." "No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case." Per Shaw, C. J., in Thorndike *v.* Boston, 1 Metc. 242, 245. Dr. Radcliffe, in Burton *v.* Fisher, Milward (Ir. Eccl.), 183, declares that no accurate definition of domicil can be found or hoped for. There are also many expressions in the books to the effect that at least no satisfactory definition has been framed. "It has been observed over and over again that no one has succeeded in giving a definition of domicil that will, in the first place, comport with all the decisions that have been come to, or will, in the next place, assist in relieving the court from the difficulty of defining it." Drevon *v.* Drevon, 34 L. J. Ch. 129, per Kindersley, V. C. The same judge says in another case: "With respect to these questions of domicil there is no precise definition or formula which can be laid down by the application of which to the facts of the case it is possible at once to say where the domicil was." Cockrell *v.* Cockrell, 2 Jur. (N. S.). 727. Says Hatherley, Lord Ch., in Udny *v.* Udny, L. R. 1 Sc. & Div. App. 441, 449: "I shall not add to the many ineffectual attempts to define domicil." And an American judge declares that "the books are full of unsatisfactory definitions as well as confused and conflicting decisions in relation to those terms" (*i. e.*, domicil and residence). Love *v.* Cherry, 24 Iowa, 204, 208, per Cole, J. But the great source of difficulty lies, not, as was intimated by Bramwell, B., in Attorney-General *v.* Rowe, *supra*, in the vagueness of the meaning of the term "domicil," but in the fact that the attempted or desiderated definition has generally been some such formula as that referred to by Kindersley, V. C., *supra*. Upon this point the language of Du Pont, J., contains a great deal of truth as well as rhetoric. He says, speaking particularly of what he and some others call "domicil of succession:" "In the elementary works, as well as in the reports of adjudicated cases, much

vanley, in Somerville *v.* Somerville,[2] praised the wisdom of Bynkershoek in not hazarding a definition; and Dr. Lushing-

difficulty has been encountered in circumscribing within the limits of a definition this term, and it has even been said that it is a term which is not susceptible of a definition. In the correctness of this latter assertion we cannot concur, for it would be a reproach to our language to suppose that its poverty is so extreme that no apt and appropriate words could be found in its extensive vocabulary sufficiently comprehensive to compass the meaning of a legal term of every-day use. And it would be a greater libel on the noble science of law to charge it with the use of a term incapable of definition, and consequently unintelligible to the legal apprehension. The real difficulty encountered by writers upon this subject lies not at all in being unable to assign a definite meaning to the term itself, but the failure to do so has arisen from the vain attempt to circumscribe within certain prescribed limits, and to enumerate the particular acts which shall be taken to prove the establishment of a domicil of succession. It must readily occur that no compass of language can ever fully comprehend the variety of acts which shall in any given case tend to prove the establishment of domicil; for these acts will ever be as various as are the occupations of men or the emotions of the mind." Smith *v.* Croom, 7 Fla. 81, 150.

Westlake, in the first edition of his work on Private International Law, says (ch. 3, no. 30, p. 31): "The modern attempts at defining domicil have not aimed at elucidating the meaning of the word, but at comprising in a formula all the conditions which the law demands for its recognition of the fact. . . . No such attempt, however, can be perfectly successful, because domicil is not inferred solely from the circumstances which surround the person at the moment, but, as we shall see, the law presumes a domicil of origin, and is occupied with the changes to which that, or any other subsequently acquired, is subject. The nature of the case would admit of our summing up in a formula the conditions under which *a change of domicil* will be inferred, but the resulting proposition would be either too cumbrous or too defective for utility." The same writer, however, considers that "no true definition of domicil is possible," inasmuch as residence (of which he says domicil "is the legal conception") is itself "a simple conception, which may serve to fix others, but which cannot be made plainer itself by any amount of verbiage." Id. p. 30.

Although at the risk of appearing to extend this note unduly, the writer cannot refrain from quoting the admirable remarks of Dicey upon this point. After quoting expressions by several English judges concerning the difficulty of arriving at a satisfactory definition, he says (p. 335 *et seq.*): "The opinion which these dicta embody is, however, in spite of the eminence of its supporters, one in which it is on logical grounds hard to acquiesce. To define a word is simply to explain its meaning, or, where the term is a complex one, to resolve it into the notions of which it consists. The two possible obstacles to definition would seem on logical grounds to be, either that a term is of so complex a nature that language does not avail to unfold its meaning, or, in other words, that the term is in the strict sense incomprehensible, or that it connotes an idea so simple as not to admit of further analysis. Neither of these obstacles can, it is conceived, hinder the definition of the term 'domicil.' It is certainly not the name of any notion so complex that it cannot be rendered into language. It is certainly, again, not the name for an idea so simple as

[2] 5 Ves. Jr. 750.

ton, in Maltass *v.* Maltass,[3] speaking of the various attempts of jurists in this direction, considered himself justified in

not to admit of further analysis. The expression for example, 'permanent home,' which is often used as its popular equivalent, is clearly a complex one, which needs and may receive further explanation.

"Nor are the reasons suggested for holding that domicil is indefinable by any means conclusive. The objection often made in various forms, that any definition must terminate in the ambiguity of the word 'settled' or its equivalent, may be a proof that the process of definition has to be pushed farther than it has hitherto been carried, but does not show either that definitions already made are, as far as they go, inaccurate, or still less that the attainment of a complete definition is impossible. The perfectly sound remark, again, that no formula can be laid down by the application of which to the facts of the case it is possible at once to say where the domicil may be, points not to any necessary defect in the definition of the term, but to the narrow limits within which definition, however perfect, can be of practical utility. Any term the meaning of which involves a reference to 'habit' or to 'intention' will always be difficult of application. No definition can ever remove the difficulty of determining in a particular case what number of acts make a course of action habitual, or what is the evidence from which we may legitimately infer the existence of intention. Difficulties similar in kind, if not in degree, to those which attend the application to the facts of the case of any definition of domicil, arise whenever questions as to 'possession' or as to 'intention' require to be answered by the courts. The peculiar difficulty of dealing with the term 'domicil' arises, it is apprehended, from its being a term the meaning of which involves a reference both to habit and to intention, while the intention, viz., the *animus manendi*, is one of a very indefinite character, and as to the existence of which the courts often have to decide without possessing the data for a reasonable decision.

"The admission, in fact, that domicil depends on a relation between 'residence' and 'the intention of residence' or, to use the words of Lord Westbury, that 'domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time' (Udny *v.* Udny, L. R. 1 Sc. App. 441, 458, and compare Bell *v.* Kennedy, ibid. 307, 319; Cockrell *v.* Cockrell, 25 L. J. Ch. 730–732; Lyall *v.* Paton, ibid. 739, 746) is, it is conceived, a virtual concession that a definition of domicil is, at any rate, possible. When his lordship adds that 'this is a description of the circumstances which create or constitute domicil, it is not a definition of the term,' there is a difficulty in following his reasoning; for such a description, if accurate, is an explanation or, in other words, a definition of what is meant by domicil. It is, at any rate, the only kind of definition which a lawyer need care to frame.

"The prevalent opinion that no attempt to define domicil has been crowned with success deserves careful consideration. For if the opinion be well founded, the conclusion naturally suggests itself that where writers of great eminence have failed, success is practically unattainable, while the mere existence of the opinion in question appears, at first sight, to be something like a guarantee

[3] 1 Rob. Eccl. 67, 74. The language of Hertius was originally applied to the difficulty experienced by the civilians in distinguishing between statutes, real, personal, and mixed. 1 Hertii Opera, De Collis. Legum, s. 4, n. 3, p. 120, ed. 1716.

applying the remarkable language of Hertius: "Verum in iis definiendis mirum est quam sudant doctores." Lord Chelms-

that it rests on sound foundations. It is worth while, therefore, to consider what are the grounds on which the belief that the existing definitions of domicil are unsatisfactory is based, and whether it be possible to find an explanation for the existence of this belief, which, without impugning the sagacity of those by whom it has been entertained, leaves its truth at least open to doubt.

"English tribunals have tested every definition of domicil by what undoubtedly is, subject to one condition, the true criterion, at any rate in an English court, of the soundness of such a definition, viz., whether it includes all the cases in which it has been judicially decided that a person has, and excludes all the cases in which it has been judicially decided that a person has not, a domicil in a particular country; and it is because judges have found that no received definition has stood this test, that they have pronounced every existing definition defective, and have all but despaired of the possibility of framing a sound definition. The condition, however, of the validity of this criterion is that the cases by which a definition is tested should be really inconsistent with the definition, and that the cases themselves should be decided consistently with generally admitted principles. For if a definition is really applicable to cases which at first sight seem inconsistent with it, or if the decisions by which it is tested are themselves in principle open to doubt, the difficulty which arises in applying the definition is in reality a strong testimony to its essential soundness. The matter, therefore, for consideration is whether the test applied to the definitions of domicil has fulfilled the condition on which its validity depends.

"Definitions of domicil have made shipwreck on three distinct sets of cases which may, for the sake of brevity, be described as 'Anglo-Indian Cases,' 'Allegiance Cases,' and 'Health Cases.'

"(I.) *Anglo-Indian Cases.* — A series of decisions beginning, in 1790, with Bruce *v.* Bruce (2 B. & P. 229), and ending, in 1864, with Jopp *v.* Wood (4 De G. J. & S. 616), decided that an officer in the service of the company was domiciled in India. It was as clear, in ninety-nine instances out of a hundred, as such a thing could be, that a servant of the Company did not intend to make India his permanent home (Allardice *v.* Onslow, 33 L. J. Ch. 434, 436, judgment of Kindersley, V. C.). It was, therefore, in the strictest sense impossible that any definition which made the existence of domicil depend on the *animus manendi* should justify the decisions as to Anglo-Indian domicil. No accuracy of terms or analysis of the meaning of the word could by any possibility achieve this result. As long, therefore, as the Anglo-Indian cases were held to be correctly decided, English judges were inevitably driven to the conclusion that every received definition of domicil, such, for example, as Story's, was incorrect. The courts, however, have now pronounced the Anglo-Indian cases anomalous, or, in other words, have held that these cases were in principle wrongly decided, though their effect could now be got rid of only by legislative action (Jopp *v.* Wood, 34 L. J. Ch. 212, 4 De G. J. & S. 616; Drevon *v.* Drevon, 34 L. J. Ch. 129, 134). These cases, therefore, do not fulfil the condition necessary to make them a test of a definition of domicil.

"(II.) *Allegiance Cases.* — The doctrine was at one time laid down (Moorhouse *v.* Lord, 10 H. L. C. 272, 32 L. J. Ch. 295; Whicker *v.* Hume, 7 H. L. C. 124, 23 L. J. Ch. 396), that a change of domicil involves something like a change of allegiance, and that, for instance, an Englishman, in order to acquire a French domicil, must, at any rate as far as in him lies, endeavor to become a French citizen. This doctrine

ford, speaking, as late as 1863, in the case of Moorhouse *v.* Lord,[4] says: "The difficulty of getting a satisfactory defini-

was strictly inconsistent with the theory, on which the received definitions of domicil are based, that a domicil is merely a permanent home. As long, therefore, as this doctrine was maintained, it was impossible for English judges to treat as satisfactory any of the current definitions of domicil. The attempt, however, to identify change of domicil with change of allegiance has now been pronounced on the highest authority a failure (Udny *v.* Udny, L. R. 1 Sc. App. 441; Douglas *v.* Douglas, L. R. 12 Eq. 617). The allegiance cases, therefore, are not entitled to weight, and are no criterion of the correctness of a definition.

"(III.) *Health Cases.* — Dicta, though not decisions, may be cited as showing that a change of residence made by an invalid for the sake of his health cannot effect a change of domicil. This doctrine, if adopted without considerable limitations, makes domicil depend upon the motive, and not upon the intention, with which a person changes his residence. It is, therefore, inconsistent with, and throws doubts upon, the correctness of any definition of domicil depending upon the combination of residence and *animus manendi*. The doctrine, however, is now shown by the one decided case on this subject (Hoskins *v.* Matthews, 25 L. J. Ch. 689, 8 De G. M. & G. 13) to be either unfounded or else to be explainable in a manner perfectly consistent with the ordinary definitions of domicil.

"A result, therefore, of the examination of the three sets of cases, by which definitions of domicil have been tested and found wanting, is, that no one of these sets fulfils the conditions necessary to make it the criterion of a definition, and that the difficulty which has been found in reconciling several definitions with the Anglo-Indian cases, the allegiance cases, and the health cases tells rather in favor of than against the correctness of the definitions, which, because they could not cover these cases, were naturally thought incorrect and unsatisfactory.

"A survey, in short, of the attempts which have been made to define domicil, and of the criticisms upon such attempts, leads to results which may be summed up as follows: —

"*First.* Domicil, being a complex term, must from the nature of things be capable of definition. In other words, it is a term which has a meaning, and that meaning can be explained by analyzing it into its elements.

"*Secondly.* All the best definitions agree in making the elements of domicil 'residence' and '*animus manendi*.'

"*Thirdly.* Several of these definitions — such, for example, as Story's, Phillimore's, or Vice-Chancellor Kindersley's — have succeeded in giving an explanation of the meaning of domicil, which, even if not expressed in the most precise language, is substantially accurate.

"*Fourthly.* The reason why English courts have been inclined to hold that no definition of domicil is satisfactory is that they have found it impossible to reconcile any definition with the three sets of judicial decisions or dicta. When, however, these sets are examined, it is found that two of them consist of cases embodying views of domicil now admitted to be erroneous, while the third set can be reconciled with all the best definitions of domicil. The great difficulty, in short, which English judges have experienced in discovering a satisfactory definition, arises from the fact that when of recent years the courts have been called upon to determine questions of domicil, they have been hampered by the almost insuperable difficulty of reconciling a generally sound theory with decisions or dicta delivered at a period when the whole subject of the conflict of laws was much less perfectly understood than at present."

[4] 10 H. L. Cas. 272, 284.

tion of domicil, which will meet every case, has often been admitted, and every attempt to frame one has hitherto failed."

Still it is desirable, if not absolutely necessary, at the beginning of a treatise to arrive at, with at least approximate accuracy, a general conception of the subject which it is intended to unfold. It is proposed, therefore, to give some of the most celebrated definitions, together with such criticisms as have been passed upon them by others, and such also as may appear to the writer necessary and proper.

§ 58. **Definitions of the Roman Law; Code.** — The oldest and by far the most celebrated definitions of domicil are those which are to be found in the Roman law; the one most frequently quoted being that of the Code:[1] "In eodem loco singulos habere domicilium, non ambigitur, ubi quis larem, rerumque, ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet: unde cum profectus est, peregrinari videtur: quod si rediit, peregrinari jam destitit." Donellus[2] criticises this definition as possessing more elegance than certainty; and Lord Alvanley[3] declares that its words are very vague and difficult to apply. It is to be observed that it is hardly a definition, but, to use the expression of Lord Cranworth in Whicker *v.* Hume,[4] more properly "an illustration." "There is no doubt" that the circumstances set forth would suffice to constitute domicil; but would not circumstances far less cogent suffice? Westlake[5] remarks that it would not "be just to the Roman Emperors to represent them as having attempted [a definition], in that pathetic description of home so often and deservedly quoted."

§ 59. **Id. id. Criticism of Lord Cranworth in Whicker v. Hume.** — In Whicker *v.* Hume, above referred to, Lord Cranworth thus speaks of this passage: "Upon the subject of domicil my noble learned friend has alluded to one definition which he said came from the Digest. It is also to be found in the Codes, and was a principle of the Roman law. There have been many others, but I never saw any of them that

[1] Code 10, t. 39, l. 7.
[2] Comm. de Jure Civili, l. 17, c. 12, p. 978, 20 *b*, ed. Frankfort, 1626.
[3] Somerville *v.* Somerville, *supra*.
[4] 7 H. L. Cas. 124, 160.
[5] Priv. Int. L. 1st ed. p. 31.

appeared to me to assist us at all in arriving at a conclusion. In fact, none of them is, properly speaking, a definition. They are all illustrations, in which those who have made them have sought to rival one another by endeavoring, as far as they can, by some epigrammatic neatness or elegance of expression, to gloss over the fact that, after all, they are endeavoring to explain something *clarum per obscurum*. By domicil we mean home, the permanent home; and if you do not understand your permanent home I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it. I think the best I have ever heard is the one which describes the home as the place (I believe there is one definition in which the *lares* are alluded to), the place 'unde non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur.' I think that this is the best illustration, and I use that word rather than definition to describe what I mean."

§ 60. **Id. id. Criticism of Kindersley, V. C., in Lord v. Colvin.** — The remarks upon the same definition by Kindersley, V. C., in Lord *v.* Colvin,[1] are so appropriate and elegant that they are here given in full: "It is not my intention to enter upon an elaborate discussion of the various definitions which have been given or attempted to be given of the term 'domicil;' at the same time it is impossible to avoid some reference to them. I concur with the observations of Lord Cranworth in Whicker *v.* Hume, that many of them are rather illustrations than definitions. Some of them also appear to me objectionable, because they are expressed in language more or less figurative, which ought never to be the case in what professes to be a definition. Some of the Roman definitions are utterly inapplicable to the present condition and habits of mankind. The Roman definition most frequently cited is this: 'In eodem loco, etc.' . . . I confess that it has appeared to me that this sentence is more to be admired for the neatness of its latinity than for its merits as a legal definition. It seems to me to be open to the objection of being (at least in the first branch of the sentence) expressed in figurative language.

[1] 4 Drew. 366, 373.

Moreover, it depends upon the manner in which it is translated whether it accords with the decisions of our courts; and I know of no sentence more difficult to translate. Almost every important word presents some difficulty. 'Larem,' which even to a Roman was a figurative expression, may be properly translated 'household,' meaning by that term the united body, consisting of a man and his wife and children and domestics dwelling together in one abode. 'Larem' does not signify the *place* of abode. The words are 'in eodem loco ubi quis larem constituit;' *i. e.*, a man has his domicil in that *place* where he has established his 'larem.' The word must mean not the *place* of residence, but the body which resides there; or perhaps more correctly, the act of co-residence as members of the same family. It is not easy to suggest a translation of the words 'rerum ac fortunarum summam' which shall be faithful to the original, and at the same time convey to the mind a precise and definite idea. 'Res' probably here signifies 'business;' 'fortunæ' no doubt means 'possessions' or 'property;' but what does 'summa' mean? The proper meaning is the 'sum' or 'aggregate;' but it is, perhaps, here used to signify 'the chief or principal part or bulk.' Mr. Justice Story evidently felt the difficulty of rendering this branch of the sentence into English; and in order to give something intelligible he has sacrificed accuracy of translation. He renders it thus: 'There is no doubt that every person has his domicil in that place which he makes his family residence and principal place of his business.'[2] This

[2] Story's translation is as follows: "There is no doubt that every person has his domicil in that place which he makes his family residence and principal place of business; from which he is not about to depart, unless some business requires; when he leaves it, he deems himself a wanderer; and when he returns to it, he deems himself no longer abroad." Story, Confl. of L. § 42. Phillimore translates, or rather paraphrases, the same passage thus: "In whatsoever place an individual has set up his household gods, and made the chief seat of his affairs and interests, from which, without some special avocation, he has no intention of departing; from which, when he has departed, he is considered to be from home; and to which, when he has returned, he is considered to have returned home; — in this place, there is no doubt whatever, he has his domicil." Law of Dom. no. xi. p. 11. In White *v.* White, *supra*, Cooper, J., says: "The beautiful definition of the civil law is as unexceptionable as any which has been attempted, if we give to the terms used a liberal translation to adapt them to the circumstances of modern times; for it combines precision

is obviously rather a paraphrase than a translation. Again, the term 'peregrinari' in the last branch of the sentence requires a particular translation to make the definition agree with the decisions of our courts; the word properly means 'to be in a foreign country,' but if it is so translated, it militates with the proposition now well established, that a man may establish a domicil in a foreign country, and in which he still continues to be a foreigner. The word 'peregrinari' must therefore be translated 'to be a wanderer,' viz., from home, and so Mr. Justice Story translates it. Therefore, if this celebrated passage from the Roman law is to be used as a definition by which our courts of justice are to be guided, I think it must be translated in some such form as this: 'There is no doubt that every person has his domicil in that place where he has established his household and the chief part or bulk of his business and property, from which he is not intending to depart if nothing calls him away; from which when he goes away he seems to be wandering from home, and when he has returned he has ceased wandering.' Thus translated, the sentence may not be objected to on the score of inaccuracy, though it is still open to the observation that a man may have his family residence (his 'larem') in one country and the chief part or bulk of his business ('rerum ac fortunarum summam') in another."

§ 61. **Id. Definitions of the Digest.** — Another passage from the Roman law is frequently quoted and treated as a definition. It is by Ulpian, is found in the Digest,[1] and is as follows: "Si quis negotia sua non in colonia, sed in municipio semper agit, in illo vendit, emit, contrahit, eo in foro, balineo,

of language with poetic imagery. A person's domicil is 'ubi quis, etc. . . . where he has his principal home and place for the enjoyment of his fortunes; which he does not expect to leave except for a purpose; from which when absent he seems to himself a wayfarer; to which, when he returns, he ceases to travel.' And yet this definition, beautiful as it is, seems insufficient to meet all the varying phases of the actual, and the courts have not undertaken to adopt it or any other."

[1] Dig. 50, t. 1, l. 27, § 1. Story (§ 42) thus translates it: "If any one always carries on his business, not in a colony but in a municipality or city where he buys, sells, and contracts, where he makes use of and attends the *forum*, the public baths and public shows, where he celebrates the holidays and enjoys all municipal privileges, and none in the colony, he is deemed there to have his domicil, rather than in the place (colony) in which he sojourns for the purpose of agriculture."

spectaculis utitur: ibi festos dies celebrat: omnibus denique municipii commodis, nullis coloniarum, fruitur, ibi magis habere domicilium, quam ubi colendi causa diversatur."

Most of the criticisms made upon the passage above quoted from the Code apply also to this passage. It is apparently a statement of the most usual criteria of domicil to be found in the life of a Roman, and is therefore more properly a formula of evidence than a definition.

Alfenus Varus, in a passage also to be found in the Digest,[2] in answer to the question "Quid est domum ducere?" says: "Sed de ea re constitutum esse, eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet, suarumque rerum constitutionem fecisset." But this definition, far from solving the difficulty, only increases it. For what are we to understand by "sedes et tabulæ," and what by "rerum constitutio"?

§ 62. **Other Definitions: Donellus; John Voet; Hertius; Pothier; Vattel.** — Donellus,[1] after criticising and pointing out the uncertainty of the expressions used in the passage above quoted from the Code, suggests as more concise and certain a definition of his own, as follows: "Locus, in quo quis habitat eo animo, ut ibi perpetuo consistat, nisi quid avocet."

John Voet says:[2] "Aliud insuper proprie dictum domicilium est, quod quis sibi constituit animo inde non discedendi, si non aliud avocet." This definition Kindersley, V. C., in Lord *v.* Colvin, considers "as little open to objection as any." Hertius[3] defines domicil: "Ubi quis frequentius ac diutius commorari solet, rerumque ac fortunarum suarum majorem partem constituit." Pothier,[4] in his introduction to Book 50, Title 1, of the Pandects, generalizes the Roman definitions thus: "Domicilium facit potissimum sedes fortunarum suarum, quas quis in aliquo loco habet." Vattel[5] describes domicil as "an habitation fixed in any place, with an intention of always staying there." This definition has been frequently quoted

[2] 50, t. 16, l. 203.

[1] *Op. cit.* l. 17, c. 12, p. 978, no. 30 *b*.

[2] Comm. ad Pand. l. 5, t. 1, no. 94.

[3] Opera, De Collisione Legum, p. 177, ed. 1716.

[4] Ad Pand. 50, 1, introd. art. 2, no. 18.

[5] Droit des Gens, l. 1, c. 19, § 218. "Le domicile est l'habitation fixée en quelque lieu, dans l'intention d'y demeurer toujours."

and criticised. Story,[6] following Parker, Justice, in Putnam *v.* Johnson,[7] says: "But this is not an accurate statement. It would be more correct to say that that place is properly the domicil of a person in which his habitation is without any present intention of removing therefrom." Cujas[8] combines in one the several Roman definitions thus: "Domicilium cujusque ibi est ubi larem fovet, ubi sedes et tabulas rationum suarum habet, ubi rerum et fortunarum suarum summam constituit, ubi assidue versatur, negotiatur, ubi majorem suorum bonorum partem habet, ubi festos dies agitat, utitur foro eodem, balneo eodem, spectaculis."

§ 63. **Definitions of French Jurists.** — The French writers have made frequent attempts at the definition of domicil. In addition to the several already given, the following may be noted. Denizart[1] says: "Domicil is the place where a person enjoys his rights, and establishes his abode and the seat of his fortune." Pothier[2] says: "It is the place where a person has established the principal seat of his abode and of his business." The "Encyclopédie Moderne"[3] defines it thus: "It is, properly speaking, the place where one has fixed the centre of his business." The French Code[4] declares: "The domicil of every Frenchman, as to the exercise of his civil rights, is at the place where he has his principal establishment." Demolombe,[5] in commenting upon this definition, after quoting also

[6] Confl. of L. § 43.

[7] 10 Mass. 488, 501. See *infra*, § 65.

[8] Opera 5, 1148, c.

[1] The definition above given is quoted by Story (§ 43), who also gives the original as follows: "Le domicile est le lieu où une personne, jouissant de ses droits, établit sa demeure et le siége de sa fortune." The 7th edition of the "Collection de Décisions" (which is the one possessed by the writer and usually cited herein), published in 1771, six years after the death of Denizart, contains the following (*verb.* Dom. nos. 1 and 2): "On appelle domicile, le lieu de la demeure ordinaire de quelqu'un. Le principal domicile de chacun est celui qu'il a dans le lieu où il tient le siége et le centre de ses affaires, où il a ses papiers, qu'il ne quitte que pour quelque cause momentanée; d'où, quand il est absent, on dit qu'il est en voyage; où, quand il revient, on dit qu'il est de retour; où il passe les principales fêtes de l'année, où il supporte les charges publiques, où il jouit des priviléges de ceux qui en sont habitans."

[2] Introd. Gén. aux Cout. d'Orléans, c. 1, § 1, no. 8. "C'est le lieu où une personne a établi le siége principal de sa demeure et de ses affaires."

[3] *Verb.* Dom. "C'est, à proprement parler, l'endroit où l'on a placé le centre de ses affaires."

[4] Art. 102. "Le domicile de tout Français, quant à l'exercice de ses droits civils, est au lieu où il a son principal établissement."

[5] Cours de Code Napoléon, t. 1, no. 344. See also no. 338.

the definition contained in the Roman Code, says: "Such is also the thought of Article 102, when it declares that the domicil of every Frenchman is at the place of his principal establishment, — that is to say, at the place which he has made the centre of his affections, of his affairs and habits, — the seat, in fine, of his social existence, *rerum ac fortunarum suarum summam*, at the place where he is established in a manner permanent and durable, with the intention of being there held, of being there attached, of there returning sooner or later whenever he is absent. It must be understood, besides, that this word 'establishment' ought here to receive a very broad interpretation relatively to all the situations so diverse and so varied of which society is composed. The aged servant has his principal establishment in his little solitary chamber, just as the most opulent *père de famille* in his *hôtel* or the merchant in his house of commerce. In what place, above all, has he established his fixed abode? Where is found, if I may so express myself, his chief place, having regard to his personal situation? Such is the question of domicil, a question necessarily altogether relative. It is necessary, moreover, not to confound domicil with residence; the one is *de droit*, the other is *de fait*. Residence may be assuredly one of the *indices* of the principal establishment which constitutes domicil, and we say even that the actual habitation is one of the conditions demanded when the question is concerning the changing of it. But it is not the less certain that domicil does not depend upon residence; for it is an effect of the law, a juridical creation, a thing intellectual and abstract; it consists, as we have said, in the moral relation of the person with a certain place where the law has placed the juridical seat of such person, independently of the fact of residence. It is indeed that, above all, which constitutes the utility of this institution; for it has precisely for its object, to determine in a manner regular, fixed, and constant, the domicil of the person apart from his removals, his travels, his residence more or less accidental and transient in other places."

"Domicil consists," says Proudhon,[6] "in the moral relation of a man with the place of his residence, where he has

[6] Cours de Droit Français, t. 1, p. 119.

fixed the administrative seat of his fortune, the establishment of his affairs. We say 'in the moral relation,' because domicil does not consist in physical existence or in actual residence in a place, but in the attachment contracted by the person for the place chosen for the centre of his negotiations." Demante[7] says: "It is an effect of law which consists in the relation established by law between a person and the place where he exercises his rights." Ortolan[8] says: "Domicil is nothing else than the legal seat, the juridical seat of every person, — the seat where he is considered to be in the eyes of the law, for certain applications of the law, whether he be corporeally found there, or whether he be not found there." Marcadé[9] remarks: "Domicil is then the legal seat, the juridical seat, of the person. We say the juridical seat; for domicil is not, properly speaking, the house, the material construction; it is a thing altogether ideal, a thing moral and abstract, resulting solely from the creation of the law." And again:[10] "Domicil is the seat, purely moral and juridical, which the law attributes to each person for the exercise of the rights existing for or against such person."

§ 64. **Definitions of Savigny and Calvo.** — Savigny[1] thus defines domicil: "That place is to be regarded as a man's domicil which he has freely chosen for his permanent abode, and thus for the centre at once of his legal relations and his business. The term *permanent* abode, however, excludes neither a temporary absence nor a future change, the res-

[7] Cours Analytique, t. 1, p. 197.

[8] Explication des Institutes, t. 1, no. 80, p. 402.

[9] Explic. du Code Nap. t. 1, no. 309.

[10] Id. no. 334.

[1] System, etc. vol. viii. § 353 (Guthrie's trans. p. 97). According to Dicey (p. 333): "This definition brings into prominence exactly the point neglected by most writers, viz., the element of choice or intention." But in the opinion of the writer it is just here that the definition fails as a general definition of domicil, inasmuch as it omits to provide for domicil attributed by law. (See *infra*, § 68.) Dicey objects, however, that the words "and thus for the centre at once of his legal relations and his business," "appear to be superfluous, since they point to a consequence of the place being a permanent abode." He objects also that its terms might be taken to imply that a new domicil may be gained before the actual transfer of bodily presence to the place of contemplated permanent abode, and further that the words "freely chosen" might be understood as excluding a change of domicil where the change of residence is in consequence of some degree of moral compulsion, such as motives of economy, health, and the like.

ervation of which faculty is plainly implied; it is only meant that the intention of mere transitory residence must not at present exist." One of the latest definitions is that of Calvo,[2] who, though a South American diplomat, may be classed among the continental jurists. He says: "In its juridical acceptation, domicil is the legal seat where a person is presumed to be in contemplation of the law and for the application of the law. According to this definition, domicil would be an abstraction purely intellectual, created solely by the law, an effect of the law consisting in the relation established between the person and the place where he exercises his rights. In a usual and more practical acceptation, is meant by domicil the place itself, where a person has established the seat of his affairs and the centre of his interests."

§ 65. **American Definitions: Story; President Rush; Parker, J., in Putnam v. Johnson.** — Story's[1] definition, which has been so often and so deservedly quoted, is as follows: "By the term *domicil*, in its ordinary acceptation, is meant the place where a person lives or has his home. In this sense the place where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicil. In a strict and legal sense that is properly the domicil of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*)." President Rush, in the leading American case of Guier *v.* O'Daniel,[2] defines domicil "to be a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time." This definition has been much quoted, and with general approbation. It is highly commended by Calvo,[3] is repeated by Phillimore[4] with a slight modification, and through the influence of his authority has produced some effect in the English cases.

The definition of Parker, Justice, in Putnam *v.* Johnson,[5]

[2] Dict. de Droit Int. Pub. et Priv., *verb.* Dom.

[1] Confl. of L. § 41.

[2] 1 Binney, 349 *n.*

[3] Manuel de Droit Int. Pub. et Priv. § 197.

[4] Law of Domicil, no. 15, p. 13; Int. L. vol. iv. no. 49.

[5] 10 Mass. 488, 501.

in the slightly inverted form in which it has been given by Story, has also been received by many jurists in this country as accurate. In that case the learned judge, commenting upon the definition of Vattel, says: "The definition of domicil, as cited from Vattel by the counsel for the defendants, is too strict, if taken literally, to govern in a question of this sort; and if adopted here, might deprive a large portion of the citizens of their right of suffrage. He describes a person's domicil as the habitation fixed in any place, *with an intention of always staying there.* In this new and enterprising country it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of *always staying there.* They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life, and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain. Probably the meaning of Vattel is that the habitation fixed in any place, without any present intention of removing therefrom, is the domicil. At least this definition is better suited to the circumstances of this country." It is to be remarked, however, that Putnam *v.* Johnson was a case of municipal domicil, and it will be seen further on in this work that the definition there given by Parker, Justice, is not applicable to cases of national or *quasi*-national domicil. It is believed that this distinction has been overlooked by many of the judges who have sought to apply this definition with sometimes unfortunate results.

The Louisiana Code,[6] following the French Code, declares: "The domicil of each citizen is in the parish wherein his principal establishment is selected." An opinion of the Louisiana Supreme Court,[7] in applying this definition, defines further thus: "A man's domicil is his home, where he establishes his household and surrounds himself with the apparatus and comforts of life." Wharton[8] defines domicil as "a residence acquired as a final abode."

[6] Art. 42 (38). It further defines the principal establishment as "that in which he makes his habitual residence."

[7] Tanner *v.* King, 11 La. R. 175, per Carleton, J.

[8] Confl. of L. § 21.

§ 66. **Definitions of English Judges: Kindersley, V. C., in Lord v. Colvin; Lord Wensleydale in Whicker v. Hume.** — The English judges have, with several exceptions, studiously avoided defining domicil. Kindersley, V. C., who has decided more cases on the subject of domicil than any other single English judge, after carefully considering the definitions in the light of the decided cases, suggests this:[1] "That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home." This definition, however, is unfavorably criticised by Lord Chelmsford in the same case on appeal.[2] Lord Wensleydale, in Whicker *v.* Hume,[3] adopts this as a "very good definition:" "Habitation in a place with the intention of remaining there forever, unless some circumstance should occur to alter his intention."

§ 67. **English Text-writers: Phillimore, Foote, Westlake, Dicey.** — Phillimore,[1] in his work on our subject, referring to some of the dicta of American judges, who he says have been most successful in their attempts at definition, frames the following as a tolerably accurate definition: "A residence at a particular place, accompanied with positive or presumptive proof of an intention of remaining there for an unlimited time." It will be seen that this is based mainly upon the language of President Rush, in Guier *v.* O'Daniel. It has been much quoted, and probably has had considerable effect in fixing the description of the *animus manendi* requisite for a change of domicil. The introduction into it, however, of the words "positive or presumptive proof of," which also are in President Rush's definition, is criticised by Dicey[2] as being at best superfluous, upon the ground that the maxim *De non apparentibus et non existentibus eadem est ratio* is in law of universal

[1] Lord *v.* Colvin, 4 Drew. 366.

[2] *Sub nom.* Moorhouse *v.* Lord, 10 H. L. Cas. pp. 272, 285. See *infra*, § 166, where his criticism is given in full.

[3] 7 H. L. Cas. 124, 164.

[1] Law of Dom. no. 15; also Int. L. vol. iv. no. 49.

[2] Appendix, note 1, p. 334.

application, and a fact which cannot be proved to exist has for legal purposes no existence; and further, "that they tend to confuse together the inquiry, What is the nature of the fact constituting domicil?—or, in other words, its definition,—with a different question, What is the evidence by which the existence of this act, when its nature is known, can be proved?" Foote[3] defines domicil "as the relation of an individual to a particular State, which arises from his residence within its limits as a member of its community." Westlake[4] says: "*Domicil then is the legal conception of residence*, and the two words differ no otherwise than, as in all sciences, common words, on becoming technical, are limited in meaning for the sake of precision." The objection to this statement as a definition (if indeed it was intended as such, and probably it was not) is that "residence" (particularly in American law) is used in various senses, sometimes technical, sometimes untechnical; and even when used technically its meaning is not, as we shall see further on in this chapter, definitely fixed, but depends much upon the subject to which it is applied. Dicey,[5] in his valuable work on this subject, defines domicil to be "the place or country which is considered by law to be a person's permanent home." And this, with perhaps one change, is as nearly accurate a definition as has been given. Attention will be called further on to the fact that domicil is not strictly, in a legal sense, *the place* where a person has his home, but expresses the *connection between such person and place*.

§ 68. **Definitions usually not Broad enough to include all Phases of Domicil.** — Most of the so-called definitions of domi-

[3] Priv. Int. Jurisprudence, ch. 2, p. 8.

[4] Priv. Int. L. 1st ed. ch. 3, no. 30, p. 30.

[5] Pages 1, 29, 30. He adds (p. 31): "The words 'considered by law' are important, and point to the fact that a person's domicil need not necessarily be his actual home; or, to put the same thing in another form, that the existence of a domicil is not a mere question of fact, but an inference of law drawn from the facts whatever they may be, from which the courts infer that a person has a domicil in a particular country." Further on (p. 42, rule 1), speaking of natural persons, he says: "The domicil of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law."

cil are not definitions of the term in its general scope and meaning, but of domicil of choice, or that which is acquired by the act and intention of an independent person, and, therefore, do not cover either domicil of origin or that imputed by law to dependent persons. Moreover, even as definitions of domicil of choice or acquired domicil they are usually defective, in that they relate only to the time of the acquisition of such domicil, and do not provide for its retention by actual residence, where there has been a change of intention, or by intention, where there has been a change of actual residence. Again, many of them are not properly definitions at all, but mere formulæ of evidence framed apparently for the purpose of succinctly stating the most usual criteria by which domicil of choice is determined.[1]

[1] Following are a number of additional definitions, some of which may be useful to the student of the subject of domicil: "Domicilium dicitur habitatio aliquo in loco constituta perpetuo ibidem movendi animus — idiomate patrio dicitur *die Behausung*." Wolff, Jus Gentium, c. 1, no. 137. "Domicilium, domus, sedes domestica, habitatio certa et diuturna." Forcellini, Lexicon, curâ Facciolati. "Der Wohnort ist da, wo einer sich in der Absicht aufhält, um so lange daselbst zu bleiben, bis ihn besondere Ursachen bestimmen, seinen Aufenthalt zu verändern." Glück, Commentary on the Pandects, vol. vi. p. 264; bk. 5, t. 1, § 512. "En effet quoique l'homme soit né pour se mouvoir et parcourir cette terre que Dieu lui a donnée il n'est pas fait pour demeurer dans tous les lieux que la nécessité l'oblige de parcourir; il fait nécessairement qu'il y ait un lieu de repos, un lieu de choix et de prédilection, un lieu de société, un lieu où il puisse jouir avec sa famille des avantages de ses travaux et de ses peines, ce lieu est celui que nous appellons domicile." Boullenois, Traité de la Personalité, etc. obs. 32, p. 40. "Dans l'acception la plus commune, on entend par domicile le lieu où un individu fait sa demeure habituelle, où il a fixé son établissement, où il a placé le siége de sa fortune." Desquiron, Dom. et Abs. l. 1, t. 1, no. 1, p. 41. "Le mot domicile indique la relation de l'homme avec un certain lieu, telle ville ou tel village, et même, dans un sens plus restreint, telle maison où il a le centre de ses affaires et où il revient naturellement, dès qu'il n'en est point écarté par quelque intérêt ou quelque soin temporaire." Vallette, Cours de Code Civil, t. 1, p. 124, quoted by Ancelle, Thèse pour le Doctorat, p. 86. In the course of the preparation of the Code Napoleon, in his report to the Corps Legislatif, Councillor of State Emmery defined domicil as "le lieu où une personne, jouissant de ses droits, a établi sa demeure, le centre de ses affaires, le siége de sa fortune" (Séance du 13 Ventose, An 11). "Il domicilio civile di una persona è nel luogo in cui essa ha la sede principale dei propri affari ed interressi." Codice Civile del Regno d'Italia, t. 2, 16. And to distinguish domicil from residence, the same code provides: "La residenza è nel luogo in cui la persona ha la dimora abituale." *Loc. cit.* The definition contained in the Sardinian Code is almost identical with that contained in the French Code Civil. Codice Civil del Regno di Sardegna, t. 3, art. 66. Several late French cases describe domicil as "the place

§ 69. **Is Domicil Place or Legal Relation?** — There has been considerable metaphysical discussion, of perhaps no very prof-

allotted to everybody for the use of his civil rights." Melizet's Case, Bulletin des Arrêts de la Cour de Cassation, January, 1869, p. 16; s. c. Dalloz, Recueil Périodique, 1869, pt. 1, p. 294, Sirey, 1869, pt. 1, p. 138, and Ott's Case, Bulletin, etc. January, 1869, p. 17. "El Diccionario de Legislacion" (p. 180) defines domicil as "the place where one is established and resides with his wife, children, and family, and the greater part of his movable property." Quoted in Holliman *v.* Peebles, 1 Tex. 673, 688. "The place where a man carries on his established business and has his permanent residence is his domicil." Crawford *v.* Wilson, 4 Barb. 504, per Paige, J. "One may be said to have a domicil in that place which constitutes the principal seat of his residence, of his business pursuits, connections, attachments, and of his political and municipal relations." Wilson *v.* Terry, 11 Allen, 206. "Domicil . . . means the place where a man establishes his abode, makes the principal seat of his property, and exercises his political rights." Chase *v.* Miller, 41 Pa. St. 403, 420, per Woodward, J. "It is always that place which has more the qualities of a principal or permanent residence, and more pretensions to be considered as such than any other place." Rue High, Appellant, 2 Dougl. (Mich.) 515, per Wing, J.

Bishop, in his work on Marriage and Divorce (vol. ii. bk. 2, § 118), has gone farther than any other writer in attempting to compress "in a single sentence, which shall serve as a clear outline," a general view of the whole law of domicil. He says: "Domicil, then, is the place in which, both in fact and intent, the home of a person is established without any existing purpose of mind to return to a former home; it is the place where the person lives, in distinction from the place where he transacts his business; the place where he chooses to abide, in distinction from the place in which he may be for a temporary purpose; the place which he has chosen, in distinction from one to which he may be exiled; if he is entitled in law to command where his place of residence shall be, it is the place which he has himself selected, in distinction from any place which another may have selected for him; if the person is an infant or a married woman, it is the place which the husband or father has ordained, in distinction from the place of the person's own choice; it is ordinarily, in the case of the wife, the place where the husband has his domicil; every person has a domicil; no person has but one; it is the place which the fact and the intent, combining with one another and with the law, gravitate to and centre in, as a home." The learned writer does not in terms declare this statement to be a definition, although his language used in introducing it seems to imply that he so intended it. Moreover, if he did not so intend it, it is difficult to see why so much pains have been used to bring, by a trick of punctuation, the statement within the compass of a single sentence. As a definition, however, it is obviously defective in many respects.

Upon the definition of domicil the following cases may also be referred to: Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Udny *v.* Udny, id. 441; Attorney-General *v.* Kent, 1 Hurl. & Colt. 12; Attorney-General *v.* Rowe, id. 31; *In re* Capdevielle, 2 id. 985; Laneuville *v.* Anderson, 2 Spinks, 41; The Venus, 8 Cranch, 253; Mitchell *v.* United States, 21 Wall. 350; Johnson *v.* Twenty-one Bales, etc., 2 Paine, 601; s. c. Van Ness, 5; White *v.* Brown, 2 Wall. Jr. C. Ct. 217; Littlefield *v.* Brooks, 50 Me. 475; Gilman *v.* Gilman, 52 Me. 165; Hart *v.* Lindsey, 17 N. H. 235; Anderson *v.* Anderson, 42 Vt. 350; Matter of Thompson, 1 Wend. 43; Matter of Wrigley, 8 id. 134;

itable nature, in France with regard to one point in the definition of domicil. Some jurists define it as "the place where, etc.," others as "at the place where, etc.," and others again as a "relation between a person and the place where, etc." The first form of expression, as appears from the definitions above quoted, was in common use in France prior to the adoption of the Code Civil; and not in France only, but elsewhere; and it has continued to be used in many of the American and English definitions down to this day. This evidently was not the idea of the Roman law, as is shown by the expressions "In eodem loco singulos habere domicilium non ambigitur ubi, etc.," [1] "ibi magis habere domicilium." [2] "Relegatus in eo loco . . . domicilium habet." [3] "Domicilium autem habere potest et relegatus eo loco," [4] "pluribus locis domicilium habere," [5] etc. The jurists whose writings compose the body of that law were careful to preserve substantially the expression "to have domicil in the place," nowhere declaring that domicil is "the place." In the first draft of the Code Napoléon, it was said: "Le domicile . . . est le lieu où;" but this phrase was amended so as to read "Le domicile . . . est au lieu où," and since the adoption of that code French jurists in general have sought to conform their definitions to its language. But in endeavoring so to do, some — among whom are Proudhon,[6] Demolombe,[7] and Demante [8] — have described domicil as a relation between a person and a place, and this has been vigorously combated by others, among whom are Ortolan [9] and Marcadé.[10] To serve a writ, to make a demand at the domicil, or to summon before the tribunal of the domicil, say the last-

Hegeman *v.* Fox, 31 Barb. 475; Mayor *v.* Genet, 4 Hun, 487; Matter of Hawley, 1 Daly, 531; Harral *v.* Harral, 39 N. J. Eq. 279; Fry's Election Case, 71 Pa. St. 302; Carey's Appeal, 75 id. 201; Hindman's Appeal, 85 id. 466; Long *v.* Ryan, 30 Gratt. 718; Horne *v.* Horne, 9 Ired. 99; State *v.* Grizzard, 89 N. C. 115; Hayes *v.* Hayes, 72 Ill. 312; Smith *v.* Smith, 4 Greene (Iowa), 266; State *v.* Dodge Co., 56 Wis. 79; Stratton *v.* Brigham, 2 Sneed (Ky.), 420; Hairston *v.* Hairston, 27 Miss. 704; Succession of Franklin, 7 La. An. 395; Hardy *v.* De Leon, 5 Tex. 211.

[1] Code 10, t. 39, l. 7. See *supra*, § 5, note 1.

[2] Dig. 50, t. 1, l. 27, § 1; *supra*, id.

[3] Id. l. 22, § 3; *supra*, id.

[4] Id. l. 27, § 3; *supra*, id.

[5] Id. l. 6, § 2; *supra*, id.

[6] *Supra*, § 63 and note 6.

[7] *Supra*, id. and note 5.

[8] *Supra*, id. and note 7.

[9] *Op. cit.* t. 1, p. 402, no. 80, note.

[10] *Op. cit.* t. 1, 309.

named jurists, would be to serve a writ, to make a demand at the legal relation, or to summon before the tribunal of the legal relation, — "a strange cacophony," says Ortolan. But such criticisms, as has been justly remarked,[11] might be expected rather from a grammarian than from a jurist. Both of these writers describe domicil as the legal or juridical seat of a person. But what is the legal or juridical seat of a person, if it does not express a relation of the person with a place? Marcadé, however, while admitting the idea of legal relation, holds that domicil "is the seat which the law creates in consequence of that relation." The truth is that the question may be looked at from several sides, and it probably might be quite as plausibly argued that domicil is the relation, and the juridical seat is the consequence of domicil. It therefore seems to the writer entirely accurate to describe domicil as a relation between person and place. This view has been taken in Bell *v.* Kennedy [12] by Lord Westbury, who says: "Domicil is an idea of the law. It is the relation which the law creates between an individual and a particular locality or country."

§ 70. **Domicil and Home. Similarity.** — "It may be correctly said," remarks Grier, J., in White *v.* Brown,[1] "that no one word is more nearly synonymous with the word 'domicil' than our word 'home.'" "'Domicil' answers very much to the common meaning of our word 'home;' and where a person possessed two residences, the phrase, 'he made the latter his home,' would point out that to be his domicil." [2] And the two words have been pronounced to be substantially equivalent in many cases both in this country and in England.[3]

[11] De Fonganfier, Thèse pour le Doctorat, p. 70. The simple answer to criticisms such as those above referred to is that (*e.g.*, to serve a writ) "at the domicil" of a person is merely an elliptical expression for "at the place of his domicil."

[12] L. R. 1 Sch. App. 307, 320.

[1] 1 Wall. Jr. C. Ct. 217.

[2] Phillimore, Dom. ch. 2, no. 15, p. 13; Id. Int. L. vol. iv. no. 49.

[3] Whicker *v.* Hume, 7 H. L. Cas. 124; Moorhouse *v.* Lord, 10 id. 272; Jopp *v.* Wood, 4 De G. J. and S. 616; Laneuville *v.* Anderson, 2 Spinks, 41; Lambe *v.* Smith, 15 Mees. & W. 433; Mitchell *v.* United States, 21 Wall. 350; Exeter *v.* Brighton, 15 Me. 58; Shaw *v.* Shaw, 98 Mass. 158; State *v.* Aldrich, 14 R. I. 171; Chaine *v.* Wilson, 1 Bosworth, 673; Fry's Election Case, 71 Pa. St. 302; Roberts *v.* Cannon, 4 Dev. & B. 256; Horne *v.* Horne, 9 Ired. 99; Smith *v.* Croom,

Thus, for example, "dwelleth" and "hath his home," as used in the Constitution of Massachusetts, are construed by the Supreme Court of that State to have reference to domicil for the purpose of voting, and are used as synonymous with that term with reference to various other purposes.[4] Such undoubtedly was the idea also of the Roman law at a time when the notion of domicil was much less technical than it now is.

7 Fla. 81; Venable *v.* Paulding, 19 Minn. 488. And see the Massachusetts cases cited in next note. In Attorney-General *v.* Rowe, Bramwell, B., says it has occurred to him "whether one might not interpret this word 'domicil' by substituting the word 'home' for it, — not home in the sense in which a man who has taken a lodging for a week in a watering-place might say he was going home; nor home in the sense in which a colonist, born in a colony, intending to live and die there, might say he was coming home when he meant coming to England, but using the word 'home' in the sense in which a man might say, 'I have no home; I live sometimes in London, sometimes in Paris, sometimes in Rome, and I have no home.'" 31 L. J. Ex. 314, 320; s. c. 1 Hurl. & Colt. 31, 44. But the report of this passage in the latter book is obviously erroneous.

The Maine Settlement cases, on the other hand, distinguish between domicil and home, and in applying the latter term in the technical sense in which it is used in the pauper laws of that State hold it to mean something less than the former. Thus in Exeter *v.* Brighton, 15 Me. 58, 60, Weston, C. J., says: "Home and domicil may, and generally do, mean the same thing; but a home may be relinquished and abandoned while the domicil of the party, upon which his civil rights and duties depend, may in legal contemplation remain." In North Yarmouth *v.* West Gardiner, 58 Me. 207, 211, Danforth, J., says: "Another principle which may be considered as well settled in this State is that a residence once established may be abandoned or lost without having acquired another. In regard to 'domicil,' a word not used in the pauper laws, it is different. This cannot be lost without gaining another. Every person owes some duties to society, has some obligations to perform to the government under which he lives, and from which he receives protection. These duties and obligations are not to be laid aside at will, but rest upon and attach to the person from the earliest to the latest moment of his life. His domicil is the place where those duties are defined and are to be performed. It is imposed upon him by the law, at his birth; and though when arriving at legal age he may choose the place where it shall be, it is not at his option whether he shall be without any. With regard to a residence or home it is entirely different. This is a matter of privilege exclusively. It imposes no public burdens, but is private in its nature, relates to personal matters alone, and is the place about which to a greater or less extent cluster those things which supply personal needs or gratify his affections. Hence it is purely and solely a matter of choice, not only where it shall be, but also whether there shall be any." To the same effect see Phillips *v.* Kingsfield, 19 Me. 375; Jefferson *v.* Washington, id. 293; Warren *v.* Thomaston, 43 id. 406; Littlefield *v.* Brooks, 50 id. 475, and generally the Maine Settlement cases.

[4] Putnam *v.* Johnson, 10 Mass. 488; Opinion of the Judges, 5 Metc. 587; Abington *v.* North Bridgewater, 23 Pick. 170 (see *infra*, § 76, note 2); Langdon *v.* Doud, 6 Allen, 423; Otis *v.* Boston, 12 Cush. 44; Thayer *v.* Boston, 124 Mass. 132; Borland *v.* Boston, 132 Mass. 89.

§ 71. **Id. Differences.** — There are several objections, however, to affirming the entire and universal equivalency of "domicil" and "home:"[1] —

[1] Dicey, with his usual clear and thorough analysis, considers the subject of home and its relation to domicil at considerable length. His remarks are so valuable that the liberty is taken of reproducing some of them at length. He says (p. 42 *et seq.*): —

"*Home.* — The word 'home' is not a term of art, but a word of ordinary discourse, and is usually employed without technical precision. Yet, whenever a place or country is termed, with any approach to accuracy, a person's home, reference is intended to be made to a connection or relation between two facts. Of these facts the one is a physical fact, the other is a mental fact.

"The physical fact is the person's 'habitual physical presence,' or, to use a shorter and more ordinary term, 'residence,' within the limits of a particular place or country. The mental fact is the person's 'present intention to reside permanently, or for an indefinite period,' within the limits of such place or country; or, more accurately, the absence of any present intention on his part to remove his dwelling permanently, or for an indefinite period, from such place or country. This mental fact is technically termed, though not always with strict accuracy, the *animus manendi*, or 'intention of residence.'

"When it is perceived that the existence of a person's home in a given place or country depends on a relation between the fact of residence and the *animus manendi*, further investigation shows that the word 'home,' as applied to a particular place, or country, may be defined or described in the following terms, or in words to the same effect: —

"'A person's home is that place or country, either (i.) in which he, in fact, resides with the intention of residence (*animus manendi*), or (ii.) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*), or (iii.) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he in fact no longer resides there.'

"More briefly, a person's 'home' is 'that place or country in which either he resides with the intention of residence (*animus manendi*), or in which he has so resided, and with regard to which he retains either residence or the intention of residence.'

"This definition or formula accurately describes all the circumstances or cases under which a given person D. may, with strict accuracy, be said to have a home in a particular country, *e. g.*, England; or, in other words, in which England can be termed his home, and excludes the cases in which England cannot with accuracy be termed his home. The first clause of the formula or definition describes the conditions under which a home is acquired. The second and third clauses describe the conditions under which a home is retained. The meaning and effect of the whole definition is most easily seen from examples of the cases in which, under it, a country can, and a country cannot, be considered D.'s home. . . .

"From our formula . . . the conclusion follows that as a home is acquired by the combination of actual residence (*factum*) and of intention of residence (*animus*), so it is (when once acquired) lost or abandoned only when *both* the residence *and* the intention to reside cease to exist. If, that is to say, D., who has resided in England as his home, continues either to reside there in fact, or to retain the intention of residing there permanently, England continues to be his home. On the other hand, if D. ceases both to reside in England and to entertain the intention of residing there permanently, England ceases to be his home, and the process of abandonment is complete. If, to

First. Because, while the former is a word of at least approximately precise meaning, the latter is used in various

such giving up of a home by the cessation both of residence and of the *animus manendi*, we apply the terms 'abandon' and 'abandonment,' the meaning of the word 'home' may be defined with comparative brevity.

"A 'home' (as applied to a place or country) means 'the place or country in which a person resides with the *animus manendi*, or intention of residence, or which, having so resided in it, he has not abandoned.'

"This definition or description of a home, in whatever terms it is expressed, gives rise to a remark which will be found of considerable importance. This is, that the conception of a place or country as a home is in no sense a legal or a technical idea, since it arises from the relation between two facts, 'actual residence' and 'intention to reside,' neither of which has anything to do with the technicalities of law. A person might have a home in a place where law and law courts were totally unknown, and the question whether a given place is or is not to be considered a particular person's home is in itself a mere question of fact, and not of law.

"It is worth while to insist on the non-legal or natural character of the notion signified by the word 'home,' because from the definition of a home, combined with knowledge of the ordinary facts of human life, flow several conclusions which have a very close connection with the legal rules, determining the nature, acquisition, and change of domicil.

"Of these results flowing from the definition of a home, considered merely as a natural fact, without any reference to legal niceties or assumptions, the following are the principal:—

"*First.* The vast majority of mankind (in the civilized parts of the world at least) have a home, since they generally reside in some country, *e. g.*, England or France, without any intention of ceasing to reside there. It is nevertheless clear (if the thing be looked at merely as a matter of fact without any reference to the rules of law) that a person may be homeless. There may be no country of which you can at a given moment with truth assert that it is in fact D.'s home."

After giving instances he continues: "In these instances a person is as a matter of fact homeless, and if, as we shall find to be the case, he is considered by law to have a home in one country rather than in another, or, in other words, if he has a domicil, this is the result of a legal convention or assumption. He acquires a home not by his own act, but by the operation of law.

"*Secondly.* The definition of home suggests the inquiry, which has, in fact, been sometimes raised in the courts, whether a person can have more than one home at the same time, or, in other words, whether each of two or more countries can at the same moment be the home of one and the same person?

"The consideration of what is meant by 'home' shows that (if the matter be considered independently of all legal rules) the question is little more than one of words."

After supposing a case, he continues: "If the question be asked whether D. has two homes, the answer is that the question is mainly one of language. If the intention entertained by D. to reside in each country be not a sufficient *animus manendi* as to each, then D. is to be numbered among the persons who in fact have no home. If it be a sufficient *animus manendi*, then D. is correctly described as having two homes.

"*Thirdly.* The abandonment of one home may either coincide with or precede the acquisition of a new home. In other words, abandonment of one home may be combined with settlement in another home, or else may be the simple abandonment of one home without the acquisition of another.

significations; for example, (*a*) with reference to a temporary abiding-place, as when one speaks of "going home" to

"D., for example, goes from England where he is settled, to France on business. At the moment of leaving England, and on his arrival in France, he has the fullest intention of returning thence to England, as his permanent residence. This purpose continues for the first year of his residing in France. D., therefore, though living in France, still retains his English home. At the end of the year he makes up his mind to reside permanently in France. From that moment he acquires a French, and loses his English home. The act of acquisition and the act of abandonment exactly coincide. They must, from the nature of the case, be complete at one and the same moment.

"The act of abandonment, however, often precedes the act of acquisition. D. leaves England with the intention of ultimately settling in France, but journeys slowly to France, travelling through Belgium and Germany. From the moment he leaves England, his English home is lost, since from that moment he gives up both residence and intention to reside in England; but during his journey no French home is acquired, for though he intends to settle in France, residence there cannot begin till France is reached. The relation between the abandonment of one home and the acquisition of another deserves careful consideration, for two reasons.

"The first reason is, that the practical difficulty of deciding in which of two countries a person is at a given moment to be considered as domiciled, arises (in general) not from any legal subtleties, but from the difficulty of determining at what moment of time, if at all, a person resolves to make a country, in which he happens to be living, his permanent home. . . .

"The second reason is, that there exists a noticeable difference between the natural result of abandonment and the legal rule as to its effect. As a matter of fact, a person may abandon one home without acquiring another. As a matter of law, no man can abandon his legal home or domicil without, according to circumstances, either acquiring a new, or resuming a former domicil.

"*Fourthly.* From the fact that the acquisition of a home depends upon freedom of action or choice, it follows that a large number of persons either cannot or usually do not determine for themselves where their home shall be. Thus, young children cannot acquire a home for themselves; boys of thirteen or fourteen, though they occasionally do determine their own place of residence, more generally find their home chosen for them by their father or guardian; the home of a wife is usually the same as that of the husband, and, speaking generally, persons dependent upon the will of others have, in many cases, the home of those on whom they depend. This is obvious; but the fact is worth notice, because it lies at the bottom of what might otherwise appear to be arbitrary rules of law, *e. g.*, the rule that a wife can in no case have any other domicil than that of her husband.

"*Domicil.* — As a person's domicil is the place or country which is considered by law to be his home, and as the law in general holds that place to be a man's home which is so in fact, the notion naturally suggests itself that the word 'domicil' and the word 'home' (as already defined) mean in reality the same thing, and that the one is merely the technical equivalent for the other."

After quoting Bramwell, B., in Attorney-General *v.* Rowe, *supra*, § 70, note 3, he continues: "The notion, however, expressed in the passage cited is, though countenanced by high authorities, fallacious. This idea, that the word 'home' means, when strictly defined, the same thing as the term 'domicil,' is based on the erroneous assumption that the law

his lodgings, — and this certainly is not domicil; (*b*) with reference to a permanent or usual abiding-place, as when one

always considers that place to be a person's home which actually is his home, and on the omission to notice the fact that the law in several instances attributes to a person a domicil in a country where in reality he has not, and perhaps never had, a home. Thus the rule that a domiciled Englishman, who has in fact abandoned England without acquiring any other home, retains his English domicil, or the principle that a married woman is always domiciled in the country where her husband has his domicil, involves the result that a person may have a domicil who has no home, or that a woman may occasionally have her domicil in one country, though she has her real home in another. An attempt therefore to obtain a complete definition of the legal term 'domicil,' by a precise definition of the non-legal term 'home,' can never meet with complete success, for a definition so obtained will not include in its terms the conventional or technical element which makes up part of the meaning of the word 'domicil.'

"The question may naturally occur to the reader, Why is it that the term 'domicil' should not be made to coincide in meaning with the word 'home,' or, in other words, why is it that the courts consider in some instances that a place is a person's home, which is not so in fact?

"The answer is as follows: It is for legal purposes of vital importance, that every man should be fixed with some home or domicil, since otherwise it may be impossible to decide by what law his rights, or those of other persons, are to be determined. The cases, therefore, of actual homelessness must be met by some conventional rule; or, in other words, a person must have a domicil, or legal home, assigned to him, even though he does not possess a real one. It is, again, a matter of great convenience that a person should be treated as having his home, or being domiciled, in the place where persons of his class or in his position would in general have their home. The law, therefore, tends to consider that place as always constituting a person's domicil which would generally be the home of persons occupying his position. Thus the home of an infant is generally that of his father, and the home of a wife is generally that of her husband. Hence the rule of law assigning to an infant, in general, the domicil of his father, and to a married woman, invariably, the domicil of her husband.

"The considerations of necessity or of convenience introduce that conventional element into the rules as to domicil which make the idea itself a technical one and different from the natural conception of home. As these conventional rules cannot be conveniently brought under any one head, there is a difficulty in giving a neat definition of domicil as contrasted with home. Since, however, the courts generally hold a place to be a person's domicil because it is in fact his permanent home, though occasionally they hold a place to be a person's domicil because it is fixed as such by a rule of law, a domicil may accurately be described in the terms of our rule, and we may lay down that a person's domicil is in general the place or country which is in fact his permanent home, though in some cases it is the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

"*Comparison of Home and Domicil.* — The word 'home' denotes a merely natural and untechnical conception, based upon the relation between a person's residence and his intention as to residence. The term 'domicil' is a name for a legal conception, based upon, and connected with, the idea of home, but containing in it elements of a purely legal or conventional character. Whether a place or country is a man's home, is a

in emigrating to a new country says, "Here I fix my home;" or when an Englishman during a temporary absence on the Continent says, "My home is in England;" or (*c*) in a figurative sense with reference to a former place of abode for which great attachment is felt, although the person may not retain the slightest expectation or intention of returning to it, as where a colonist speaks of the mother country as "home." In addition to these, various other shades of meaning have been attached to the word; and this unsettled and varying signification has led many jurists, when they wish to employ the word "home" in their descriptions of domicil, to qualify it with some adjective word or phrase expressive of permanency.[2] Primarily and properly, perhaps, "home" includes the idea of permanency;[3] but contrary usage seems to render the express qualification useful if not necessary.

Second. When used in the sense last described, *i. e.*, in connection with the qualifying idea of permanency, the "home" of the person usually corresponds with his "domicil," but not always. The conception of domicil, being a creation of the law, contains within it certain legal fictions established for the purpose of giving greater precision and certainty in the application of various rules of law. But these fictions are not recognized as belonging to the ordinary conception of home, and consequently a person's domicil and home may be in different places. Take, for example, the case of a married woman living apart from her husband by mutual agreement without sentence of a court. Clearly her home in the ordinary sense of the word is not that of her husband, and yet the law by a fiction imputes to her a home with him; or perhaps, to

question of fact. Whether a place or country is a man's domicil, is a question of mixed fact and law, or rather of the inference drawn by law from certain facts, though in general the facts which constitute a place a man's home are the same facts as those from which the law infers that it is his domicil."

[2] Whicker *v.* Hume, 7 H. L. Cas. 124, per Cranworth; Moorhouse *v.* Lord, 10 id. 272, per Chelmsford; Jopp *v.* Wood, 34 Beav. 88, per Romilly, M. R.; s. c. on appeal, 4 De G. J. & S. 616, per Turner, L. J.; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617, per Wickens, V. C.; Lord *v.* Colvin, 4 Drew. 366, per Kindersley, V. C.; Dupuy *v.* Wurtz, 53 N. Y. 556; Fry's Election Case, 71 Pa. St. 302; Horne *v.* Horne, 9 Ind. 99; Hayes *v.* Hayes, 74 Ill. 312; Hairston *v* Hairston, 27 Miss. 704; Story, § 41; Dicey, 1, 3, 29, 30, and *passim*.

[3] Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441, per Jessel, M. R.; Smith *v.* Croom, 7 Fla. 81.

speak more accurately, the law closes its eyes to the real facts, and will not suffer it to be alleged that man and wife live apart.[4] Again, when a person *sui juris*, and capable of acting for himself, quits the place where his settled abode has been fixed, intending never to return, until he fixes himself in a sufficient manner elsewhere, he is clearly homeless in fact, yet he is not without domicil. For the law, to attain certain wise results, imputes to every person a domicil somewhere, and for this purpose holds that a domicil when once established cannot be lost by mere abandonment, but continues until another is acquired.[5] It thus results that a person may be in the position of having a domicil but no home in the ordinary sense.

§ 72. **Id. Home the Fundamental Idea of Domicil.** — But in spite of this lack of entire correspondence between the two conceptions, home is the fundamental idea of domicil; and this cannot be kept too faithfully in view. The law takes the conception of home, and moulding it by means of certain fictions and technical rules to suit its own requirements, calls it domicil; or perhaps this may be best expressed by slightly altering Westlake's statement[1] and saying, "Domicil is the legal conception of" home.

To combine, then, what has been said in this and the last preceding sections, *Domicil expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent home.*

§ 73. **Domicil and Residence.** — "Residence" is another word which is frequently used in connection with the subject of domicil. But great caution must be observed in its employment, as it is a word of very indefinite meaning, and to which different significations and many shades of meaning have been attached. It is frequently used in the sense of mere bodily presence in a place, without reference to time or continuance. It is employed sometimes to denote mere temporary presence in a place, and sometimes to denote the most settled and permanent abode there, with every conceivable shade of meaning between these two extremes. It is sometimes used

[4] See *infra*, ch. 10. [5] See *infra*, ch. 4. [1] *Supra*, § 67.

to signify the *act* of "residing" at a place, sometimes the *place* where a person "resides," and at other times the *relation* between person and place. It commonly imports something less fixed and stable than, and to that extent different from, domicil; and a distinction is taken between the actual and legal residence,[1] the latter being generally deemed equivalent to domicil.

[1] See, for example, Shattuck *v.* Maynard, 3 N. H. 123; Long *v.* Ryan, 30 Gratt. 718; Crawford *v.* Wilson, 4 Barb. 504; Cohen *v.* Daniels, 25 Iowa, 88; Fitzgerald *v.* Arel, 63 id. 104. In Long *v.* Ryan, Staples, J., says: "There is a wide distinction between domicil and residence recognized by the most approved authorities. Domicil is defined to be a residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. To constitute domicil two things must concur: first, residence; secondly, the intention to remain there. Domicil, therefore, means more than residence. A man may be a resident of a particular locality without having his domicil there. He can have but one domicil at one and the same time, at least for the same purpose, although he may have several residences. According to the most approved writers and lexicographers, residence is defined to be the place of abode, a dwelling, a habitation, the act of abiding or dwelling in a place for some continuance of time. To reside in a place is to abide, to sojourn, to dwell there permanently or for a length of time. It is to have a permanent abode for the time being as contradistinguished from a mere temporary locality of existence.

"Notwithstanding these definitions, it is extremely difficult to say what is meant by the word 'residence' as used in particular statutes, or to lay down any particular rules on the subject. All the authorities agree that each case must be decided on its own particular circumstances, and that general definitions are calculated to perplex and mislead. It is apparent that the word 'residence,' like that of domicil, is often used to express different meanings according to the subject-matter. In statutes relating to taxation, settlements, right of suffrage, and qualification for office, it may have a very different construction from that which belongs to it in statutes relating to attachments. In the latter actual residence is contemplated as distinguished from legal residence. The word is to be construed in its popular sense, according to the definition already given, as the act of abiding or dwelling in a place for some continuance of time.

"While, on the one hand, the casual or temporary sojourn of a person in this State, whether on business or pleasure, does not make him a resident of this State within the meaning of the attachment laws, especially if his personal domicil be elsewhere; so, on the other hand, it is not essential he should come into this State with the intention to remain here permanently to constitute him a resident."

The following language of Richardson, C. J., in Shattuck *v.* Maynard, may also be quoted: "The word 'reside' is used in two senses, — the one constructive, technical, legal; the other denoting the personal actual habitation of individuals. When a person has a fixed abode where he dwells with his family, there can be no doubt as to the place where he resides. The place of his personal and legal residence are the same. So when a person has no permanent habitation or family, but dwells in different places, as he happens to find employment, there can be no doubt as to the place where he resides. He must be considered as residing where he

A person may have his residence in one place and his domicil in another. Again, while he can have but one domicil he may have two or more residences; and, on the other hand, he may be without an actual residence, although he cannot be without a domicil.

§ 74. **Id. Attempts to define Residence.** — Various attempts have been made to define residence. Dicey[1] defines it "as habitual physical presence in a place or country," qualifying the word "habitual" by saying that by it is "meant, not presence in a place or country for a length of time, but presence there for the greater part of the time, be it long or short, which the person using the term 'residence' contemplates." In Frost *et al. v.* Brisbin,[2] Nelson, C. J., says: "There must be a settled, fixed abode, an intent to remain permanently at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term;" and this he intimates is *actual* residence as contradistinguished from domicil. In Morgan *v.* Nunes,[3] it is said: "Residence implies an established abode, fixed permanently for a time for business or other purposes, although there may be an intent in the future, at some time or other, to return to the original domicil." In Long *v.* Ryan,[4] Staples, J., says: "According to the most approved writers and lexicographers residence is defined to be the place of abode, a dwelling or habitation, the act of abiding or dwelling in a place for some continuance of time. To reside in a place is to abide, to sojourn, to dwell there permanently or for a length of time. It is to have a permanent abode for the time being, as contradistinguished from a mere temporary locality of existence, . . . the act of abiding or dwelling in a place for

actually and personally resides. But some persons have permanent habitations where their families constantly dwell, yet pass a great portion of their time in other places. Such persons have a legal residence with their families and a personal residence in other places; the word 'reside' may, with respect to them, denote either the personal or the legal residence. The books furnish ample illustrations of this distinction."

[1] Dom. p. 76. See also p. 43 and note. In Regina *v.* Stapleton, 1 Ell. & Bl. 766, Erle, J. (p. 770) doubts whether a general definition of residence can be found anywhere, and adds: "It has been a desideratum to me for many years, and I never could find or frame a definition satisfactory to my mind."

[2] 19 Wend. 11.

[3] 54 Miss. 308.

[4] 30 Gratt. 718; *supra*, § 73, note 1.

some continuance of time." In Tazewell *v.* Davenport,[5] it is said: "A resident of a place is one who dwells in that place for some continuance of time for business or other purpose."

§ 75. **Id. "Residence" in American Legislation generally, although not always, means "Domicil."**—The word "domicil," although so often used and commented upon by our courts, is rarely to be met with in our constitutions or legislative enactments. "Residence" is the favorite term employed by the American legislator to express the connection between person and place, its exact signification being left to construction, to be determined from the context and the apparent object sought to be attained by the enactment.[1] It is to be regretted that these lights are often very feeble, and that not a little confusion has been introduced into our jurisprudence by the different views held by different courts with regard to the exact force of this and similar words when applied to substantially the same subject-matter. "Residence" when used in statutes is generally construed to mean "domicil."[2] In fact,

[5] 40 Ill. 197.

[1] See Long *v.* Ryan, *supra*, § 73, note 1.

[2] Following are a few of the many cases in which residence (usually statutory) has been held substantially or nearly equivalent to domicil. For convenience the general nature of each case is briefly stated in parentheses: Boucicault *v.* Wood (Residence under the Copyright Laws), 2 Biss. 34; Doyle *v.* Clark (Judicial Citizenship), 1 Flip. 536; Abington *v.* North Bridgewater (Settlement), 23 Pick. 170; Thorndike *v.* Boston (Tax), 1 Metc. 242; Blanchard *v.* Stearns (Voting), 5 id. 298; Opinion of the Judges (Voting), id. 587; McDaniel *v.* King (Insolvency) 5 Cush. 469; Collester *v.* Hailey (Limitation), 6 Gray, 517; Langdon *v.* Doud (Limitation), 6 Allen, 423; Shaw *v.* Shaw (Divorce), 98 Mass. 158; Hallet *v.* Bassett (Limitation), 100 id. 167; State *v.* Aldrich, 14 R. I. 171; Kennedy *v.* Ryal (Jurisdiction to grant Administration), 67 N. Y. 379; Crawford *v.* Wilson (Voting), 4 Barb. 504; Isham *v.* Gibbons (Probate) 1 Bradf. (N. Y. Surrogate) 69; Matter of Hawley (Naturalization), 1 Daly (N. Y. C. P.), 531; Matter of Scott (Id.), id. 534; Matter of Bye (Id.), 2 id. 525; Cadwallader *v.* Howell & Moore (Voting), 3 Harr. (N. J.) 138; Brundred *v.* Del Hoyo (Attachment), Spencer (N. J.), 328; Chase *v.* Miller (Voting), 41 Pa. St. 403; Fry's Election Case, 71 id. 302; Reed's Appeal (Attachment), id. 378; McDaniel's Case (Voting), 3 Pa. L. J. 315 (2 Clark, 82); Casey's Case (Insolvency), 1 Ashm. 126; Malone *v.* Lindley (Attachment), 1 Phila. 192; Taylor *v.* Reading (Voting), 4 Brews. 439; Dauplin Co. *v.* Banks (Taxation), 1 Pears. 40; Tyler *v.* Murray (Jurisdiction), 57 Md. 418; Matter of Afflick's Estate (Jurisdiction to appoint Guardian), 3 MacArth. 95; Roberts *v.* Cannon (Voting), 4 Dev. & B. 256; State *v.* Grizzard (Id.), 89 N. C. 115; Dennis *v.* State (Id.), 17 Fla. 389; Talmadge's Adm'r *v.* Talmadge (Homestead), 66 Ala. 199; Dale *v.* Irwin (Voting), 78 Ill. 160; Campbell *v.* White (Limitation), 22 Mich. 178; Hall *v.* Hall (Divorce), 25 Wis. 600; Kellogg *v.* Supervisors (Taxation),

the great bulk of the cases of domicil reported in the American books are cases of statutory residence. This is especially true with regard to the subjects of voting, eligibility to office,

42 id. 97; State *v.* Dodge (Settlement), 56 id. 79; Hinds *v.* Hinds (Divorce), 1 Iowa, 36; Church *v.* Crossman (Jurisdiction), 49 id. 447; Bradley *v.* Fraser (Id.), 54 id. 289; Chariton County *v.* Moberly (Attachment), 59 Mo. 238; Stratton *v.* Brigham (Id.), 2 Sneed, 420; Venable *v.* Paulding (Limitation), 19 Min. 488.

In Abington *v.* North Bridgewater (Pauper Settlement), Shaw, C. J., says (p. 176): "In the several provincial statutes of 1692, 1701, and 1767 upon this subject [settlement] the terms 'coming to sojourn or dwell,' 'being an inhabitant,' 'residing and continuing one's residence,' 'coming to reside and dwell,' are frequently and variously used, and we think they are used indiscriminately and all mean the same thing, namely, to designate the place of a person's domicil. This is defined in the Constitution, c. 1, § 1, for another purpose, to be the place 'where one dwelleth or hath his home.'" The same learned judge says, in McDaniel *v.* King (Jurisdiction in Insolvency Proceedings), p. 473: "It has been argued, in behalf of the respondents, that residence is something different from, and something less than, domicil. If this be so under some circumstances, and in connection with a particular subject, or particular words, which may tend to fix its meaning (Harvard College *v.* Gore, 5 Pick. 370), yet, in general, residence and domicil are regarded as nearly equivalent, and there seems to be no reason for making the distinction precisely in the present case." In the opinion of the judges of the Supreme Court of Massachusetts rendered to the Legislature of that State upon the right of college students to vote, they say (5 Metc. 588): "By the Constitution it is declared that to remove all doubts concerning the meaning of the word 'inhabitant,' every person shall be considered an inhabitant, for the purpose of electing and being elected into any office or place within this State, in that town, district, or plantation where he dwelleth or hath his home. In the third article of the amendments of the Constitution, made by the Convention of 1820, the qualification of inhabitancy is somewhat differently expressed. The right of voting is conferred on the citizen *who has resided* within this Commonwealth, and *who has resided* within the town or district, &c. We consider these descriptions, though differing in terms, as identical in meaning, and that 'inhabitant' mentioned in the original Constitution, and 'one who has resided,' as expressed in the amendments, designate the same person. And both of these expressions, as used in the Constitution and amendment, are equivalent to the familiar term 'domicil,' and therefore the right of voting is confined to the place where one has his domicil, his home, or place of abode." In Shaw *v.* Shaw (Jurisdiction in Divorce), Foster, J., says (p. 159): "The words 'to live' and 'to reside' in these provisions [relating to jurisdiction to decree divorces] are obviously synonymous, and both relate to the domicil of the party, or the place where he is deemed in law to reside, which is not always the place of one's present actual abode. To live, to reside, to dwell, to have one's home or domicil, are usually, in our statutes, equivalent and convertible terms." "The word 'residence' (fixed residence, I mean) is generally used as tantamount to domicil, though I am not prepared to say whether they are or are not in all respects convertible terms." Cadwallader *v.* Howell & Moore (*supra*), per Dayton, J., p. 144. See also Bigelow, C. J., in Langdon *v.* Doud, 6 Allen, 423, *supra*, § 50, note 1. In Hinds *v.* Hinds, *supra*, Wright, C. J., after an elaborate review of the cases concludes that residence within the divorce laws of Iowa means legal residence or domicil; and in

taxation, jurisdiction in divorce, probate and administration, etc. With respect to these subjects there is substantial unanimity in this country in holding statutory residence to mean domicil. In cases of pauper settlement, limitations, etc., there is much conflict of opinion, and in those of attachment the weight of authority is the other way.[5]

§ 76. **Domicil and Inhabitancy.** — Habitancy or inhabitancy is another word which is also often construed to mean domicil. But this depends much upon the connection in which, and the purpose for which, the word is used. In some cases it has been held to mean less than domicil, and in others more; implying, in addition to what is included in that term, citizenship and municipal relations.[1] But in general, statutory inhabitancy is construed to be substantially equivalent to domicil;[2] at least, in the language of Shaw, C. J., in Otis *v.* Boston: "Most of the rules of the law of domicil apply to the question, where one is an inhabitant."

Isham *v.* Gibbons, *supra*, Bradford, Surrogate, after a similar review, concludes that the terms "resident" and "inhabitant," as used in the New York statutes relating to testamentary matters, have reference to domicil.

In Lambe *v.* Smythe, 15 Mees. & W. 433, speaking with reference to "residence" within the St. 3 & 4 Will. IV. c. 42, § 8, which requires the residences of persons named in pleas of abatement to be stated on affidavit, Parke, B., said: "It means *domicil* or *home*," probably using the term "domicil," however, in a broader sense than that in which it is generally used in English jurisprudence.

But that residence and domicil are not always equivalent terms, see the following among other cases: Warren *v.* Thomaston (Settlement), 43 Me. 406; North Yarmouth *v.* West Gardiner (Id.), 58 id. 207; Matter of Thompson (Attachment), 1 Wend. 43; Matter of Wrigley (Insolvency), 8 Wend. 134; Frost *v.* Brisbin (Imprisonment for Debt), 19 id. 11; Haggart *v.* Morgan (Attachment), 4 Sandf. 198; affirmed, 5 N. Y. 422; Bartlett *v.* City of New York (Tax), 5 Sandf. 44; Crawford *v.* Wilson (Voting), 4 Barb. 504; Douglas *v.* Mayor of New York (Tax), 2 Duer, 110; Mayor of New York *v.* Genet (Attachment), 4 Hun, 487; Baldwin *v.* Flagg (Id.), 43 N. J. L. 495; Risewick *v.* Davis (Id.), 19 Md. 82; Dorsey *v.* Kyle (Id.), 30 id. 512; Long *v.* Ryan, (Id.), 30 Gratt. 718; Tazewell *v.* Davenport (Tax), 41 Ill. 197; Johnson *v.* Smith (Limitation), 43 Mo. 499; Foster *v.* Eaton & Hall (Attachment), 4 Humph. 346; Stratton *v.* Brigham (Id.), 2 Sneed, 420; Alston *v.* Newcomer (Id.), 42 Miss. 186; Morgan *v.* Nunes (Id.), 54 id. 308; Weaver *v.* Norwood (Administration), 59 id. 665.

[5] On these subjects see *supra*, ch. 2.

[1] Harvard College *v.* Gore (Probate Jurisdiction), 5 Pick. 370; Lyman *v.* Fiske (Tax), 17 id. 231; State *v.* Ross (Tax), 3 Zab. 517, 520, per Greene, C. J.

[2] Littlefield *v.* Brooks (Tax), 50 Me. 475; Abington *v.* North Bridgewater (Settlement), 23 Pick. 170; see remarks of Shaw, C. J., *supra*, § 75, note 2; Thorndike *v.* Boston (Tax), 1 Met. 242; Blanchard *v.* Stearns (Voting),

§ 77. **Domicil, National, quasi-National, and Municipal.**—Whatever may be the true definition of domicil, it expresses, at all

5 id. 298; Opinion of Judges (Id.), id. 587, *supra*, § 75, note 2; Otis *v.* Boston (Tax), 12 Cush. 44; Bulkley *v.* Williamstown (Tax), 3 Gray, 493; Collester *v.* Hailey (Limitation), 6 Gray, 517; Langdon *v.* Doud (Id.), 6 Allen, 423; Borland *v.* Boston (Tax), 132 Mass. 89; Ryal *v.* Kennedy (Jurisdiction to grant Administration), 40 N. Y. Super. Ct. 347; affirmed, 67 N. Y. 379; Crawford *v.* Wilson (Voting), 4 Barb. 504; Isham *v.* Gibbons (Probate), 1 Bradf. 69; State *v.* Ross, *supra*; Fry's Election Case, 71 Pa. St. 302; Dennis *v.* State (Voting), 17 Fla. 389; Kellogg *v.* Supervisors (Tax), 42 Wis. 97.

In several cases inhabitancy has been said to mean something less than domicil. Brundred *v.* Del Hoyo (Attachment), Spencer (N. J.), 328; Dale *v.* Irwin (Voting), 78 Ill. 160; Briggs *v.* Rochester (Tax), 16 Gray, 337; but the latter case was overruled in Borland *v.* Boston, *supra*, and its doctrine was expressly repudiated in the Wisconsin case of Kellogg *v.* Supervisors, *supra*. In Harvard College *v.* Gore, Parker, C. J., says (p. 377): "The term 'inhabitant' as used in our laws and in this statute means something more than a person having a domicil. It imports citizenship and municipal relations, whereas a man may have a domicil in a country to which he is alien, and where he has no political relations. As if an American citizen should go to London or Paris with an intention to remain there in business for the rest of his life, or if an English or French subject should come here with the same intention, they would respectively acquire a domicil in the country in which they should so live, but would have no political relation except that of local allegiance to such country. An inhabitant, by our constitution and laws, is one who being a citizen dwells or has his home in some particular town, where he has municipal rights and duties, and is subject to particular burdens." And further on in the same opinion he says (p. 379): "The constitutional definition of habitancy is the place where a man dwells or has his home; in other words, his domicil."

In Lyman *v.* Fiske (17 Pick. 231, 234), Shaw, C. J., says: "In some respects, perhaps, there is a distinction between habitancy and domicil, as pointed out and explained in the case of Harvard College *v.* Gore, 5 Pick. 377, the former being held to include citizenship and municipal relations. But this distinction is believed to be of no importance in the present case; because all the facts and circumstances, which would tend to fix the domicil, would alike tend to establish the habitancy. It is difficult to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place, which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home."

The whole subject was carefully and fully reviewed in Borland *v.* Boston, 132 Mass. 89, as follows (per Lord, J., p. 93): "There are certain words which have fixed and definite significations. 'Domicil' is one such word; and for the ordinary purposes of citizenship, there are rules of general, if not universal acceptation, applicable to it. 'Citizenship,' 'habitancy,' and 'residence' are severally words which may in the particular case mean precisely the same as 'domicil,' but very frequently they may have other and inconsistent meanings; and while in one use of language the expressions 'a change of domicil, of citizenship, of habitancy, of residence,' are necessarily identical or synonymous, in a different use of language they import different ideas. The statutes of this Commonwealth

events, a connection between person and place. But the term "place" is an indefinite one, and may be used to denote a larger

render liable to taxation in a particular municipality those who are inhabitants of that municipality on the first day of May of the year. Gen. Sts. c. 11, §§ 6, 12. It becomes important, therefore, to determine who are inhabitants, and what constitutes habitancy.

"The only case adjudged within this Commonwealth, in which the word of the statute, 'inhabitant,' is construed to mean something else than 'being domiciled in,' is Briggs *v.* Rochester, 16 Gray, 337, although that decision is subsequently recognized in Colton *v.* Longmeadow, 12 Allen, 598. In Briggs *v.* Rochester, Mr. Justice Metcalf, in speaking of the word 'inhabitant,' says that it has not the meaning of the word 'domicil' 'in its strictly technical sense, and with its legal incidents.' He says also that the word 'domicil' is not in the Constitution nor in the statutes of the Commonwealth. So far as the Constitution is concerned, this is correct; but he had evidently overlooked a statute of ten years before, in which the word 'domicil' was used, and upon the very subject of taxation, in a proviso in these words: 'Provided that nothing herein contained shall exempt said person from his liability to the payment of any tax legally assessed upon him in the town of his legal domicil.' St. 1850, c. 276; Gen. Sts. c. 11, § 7. This language is a strong legislative assertion that domicil is the test of liability to taxation; and in an opinion given by the justices of this court to the House of Representatives in 1843, in reference to a student's right to vote in the municipality in which he is residing for the purposes of education, it was said, 'And as liability to taxation for personal property depends on domicil.' 5 Met. 587, 590.

"Nor do we think that the opinion in Briggs *v.* Rochester gives the true force as used in the Constitution of the word 'inhabitant;' for we cannot doubt that for the purposes of taxation the word 'inhabitant' must be used in the same sense as when used in reference to electing and being elected to office; especially as at that time the payment of a tax duly assessed was one of the qualifications of an elector; and more especially as the Constitution itself professes to give its definition of 'inhabitant' for the purpose of removing all doubt as to its meaning. Its language is, 'And to remove all doubts concerning the meaning of the word "inhabitant" in this Constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office or place within this State, in that town, district, or plantation where he dwelleth, or hath his home.' Const. Mass. c. 1, § 2, art. 2.

"Nor do we see how the construction given to the statute is consistent with the result at which the court arrived. The learned judge says: 'In the statute on which this case depends, we are of the opinion that the words "where he shall be an inhabitant on the first day of May" mean where he shall have his home on that day.' It is therefore clear that the learned judge does not give to the word 'inhabitant' the meaning which the construction of the statute before referred to authorizes him to give, but he does give the exact definition of the Constitution, to wit, 'where he dwelleth, or hath his home;' for these words have not in the Constitution two meanings, but the single signification given to them by the learned judge, 'his home,' — the exact, strict, technical definition of domicil.

"We cannot construe the statute to mean anything else than 'being domiciled in.' A man need not be a resident anywhere. He must have a domicil. He cannot abandon, surrender, or lose his domicil until another is acquired. A cosmopolite, or a wanderer up and down the earth, has no residence, though he must have a domicil. It surely was not the purpose of the legislature to al-

or a smaller division of territory. There was no difficulty whatever upon this point under the Roman law, since, generally

low a man to abandon his home, go into another State, and then return to this Commonwealth, reside in different towns, board in different houses, public or private, with no intention of making any place a place of residence or home, and thus avoid taxation. Such a construction of the law would create at once a large migratory population.

"Although we have said that the case of Briggs *v.* Rochester has been recognized in Colton *v.* Longmeadow, 12 Allen, 598, yet we ought to state that the decision in Colton *v.* Longmeadow was placed upon entirely different grounds. It was there held that the plaintiff had lost his domicil in Massachusetts because he had actually left the Commonwealth, and was actually *in itinere* to his new domicil, which he had left this Commonwealth for the purpose of obtaining, and which in fact he did obtain. If it should be deemed sound to hold that a person who before the first of May, with an intention in good faith to leave this State as a residence and to adopt as his home or domicil another place, is in good faith and with reasonable diligence pursuing his way to that place, is not taxable here upon the first of May, the doctrine should be limited strictly to cases falling within these facts. And both of the cases cited, Briggs *v.* Rochester and Colton *v.* Longmeadow, would fall within the rule. In each of those cases the plaintiff had determined, before starting upon his removal, not only upon his removal, but upon his exact destination, and in fact established himself, according to his purpose, without delay, and within a reasonable time.

"We think, however, that the sounder and wiser rule is to make taxation dependent upon domicil. Perhaps the most important reason for this rule is that it makes the standard certain. Another reason is that it is according to the general views and traditions of our people. One cannot but be impressed by certain peculiarities in Briggs *v.* Rochester. The bill of exceptions in that case begins thus: 'It was admitted by both parties and so presented to the jury, that the only question at issue was the domicil of the plaintiff on the first of May, 1858; and that if he was then an inhabitant of the defendant town, the tax was rightly imposed; but that if he was not on that day an inhabitant of said town, he was not then rightly taxable and taxed therein.' Nothing can be more clear than that all parties understood, and the case was tried upon the understanding, that domicil and inhabitancy meant the same thing; otherwise, domicil, instead of being 'the only question at issue,' would not have been in issue at all. And the judge in giving his opinion says that, if domicil in its strictly technical sense and with its legal incidents was the controlling fact, the plaintiff was rightly taxed in Rochester.

"Another noticeable fact in Briggs *v.* Rochester is this, that if the tax-payer in the pursuit of his purpose is beyond the line of the State before the first of May, he is not liable to taxation in the State; but if by detention he does not cross the line of the State till the first of May, he is taxable here. We cannot adopt a rule which shall make liability to taxation depend upon proximity to a State line.

"We have said that we prefer the test of domicil, because of its certainty and because of its conformity to the views and traditions of our people, and, we may add, more in accordance with the various adjudications upon the subject in this State, and more in accord with the general legal and judicial current of thought. It is true that, as said by Mr. Justice Metcalf, 'it has repeatedly been said by this and other courts, that the terms "domicil," "inhabitancy," and "residence" have not precisely the same meaning.' But it will be found upon examination that these three words

speaking, but one unit of place was recognized,— the urban community,— and to this single unit the relation *domicilium*

are often used as substantially signifying the same thing.

"In one of the earliest cases, Harvard College *v.* Gore, 5 Pick. 370, 377, Chief Justice Parker, in defining the word 'inhabitant' as used in the laws, defined it as one which imported not only domicil, but something more than domicil [quoting as above from Harvard College *v.* Gore]. There are other passages in the same opinion which, although used *alio intuitu*, yet clearly indicate the current of judicial thought; for example, 'The term "inhabitant" imports many privileges and duties which aliens cannot enjoy or be subject to' (p. 373); 'does not fix his domicil or habitancy' (p. 372); 'a pretended change of domicil to avoid his taxes' (p. 378). There are other similar expressions running through the whole opinion.

"In Lyman *v.* Fiske, 17 Pick. 231, the views of Chief Justice Parker in Harvard College *v.* Gore were considered by Chief Justice Shaw; and although expressing no dissent from the views of Chief Justice Parker, it is evident that in his apprehension the word 'inhabitant' as used in the Constitution imported one domiciled, and he did not deem it important to consider whether it imported anything else in relation to political rights, duties, and liabilities than the word 'domiciled' would import. But as the views of that magistrate are never to be slightly regarded, and as he gave the opinion in both the cases decided by this court, cited by Mr. Justice Metcalf, as settling that the words 'domicil,' 'habitancy,' and 'residence' have not precisely the same meaning, we cite from his opinion to show what his views were of 'domicil' and 'habitancy' [quoting as above from Lyman *v.* Fiske].

"It is entirely clear that in his opinion, so far as relates to municipal rights, privileges, and duties, there is substantially no distinction between 'domicil' and 'habitancy.' And, as further illustrating the views of that magistrate and the general sentiment of our people as to the use of such language in legislative enactments, we cite his language in Abington *v.* North Bridgewater, 23 Pick. 170, 176: 'In the several provincial statutes of 1692, 1701, and 1767, upon this subject, the terms, "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," "coming to reside and dwell," are frequently and variously used, and, we think, they are used indiscriminately, and all mean the same thing, namely, to designate the place of a person's domicil. This is defined in the Constitution, c. 1, § 2, for another purpose, to be the place "where one dwelleth or has his home."'

"Authorities could be multiplied almost indefinitely in which it has been held by this court that so far as it relates to municipal rights, privileges, powers, or duties, the word 'inhabitant' is, with the exceptions before referred to, universally used as signifying precisely the same as one domiciled. See Thorndike *v.* Boston, 1 Met. 242, 245; Sears *v.* Boston, 1 Met. 250, 252; Blanchard *v.* Stearns, 5 Met. 298, 304; Otis *v.* Boston, 12 Cush. 44, 49; Bulkley *v.* Williamstown, 3 Gray, 493, 494.

"As illustrative, however, of the fact that domicil and habitancy are, for the ordinary purposes of citizenship, such as voting, liability to taxation, and the like, identical, and that when they are susceptible of different meanings they are used *alio intuitu*, we cite the language of Chief Justice Shaw in Otis *v.* Boston, 12 Cush. 44, 49: 'Perhaps this question has heretofore been somewhat complicated, by going into the niceties and peculiarities of the law of domicil, taken in all its aspects; and there probably may be cases where the law of domicil, connected with the subject of allegiance, and affecting one's national character, in regard to amity,

always referred. But among modern civilized nations units of place have been greatly multiplied, and differ in number and kind in different countries. Although not absolutely the largest, yet the largest known to the law is the sovereign State in its territorial aspect, while the smallest are the various municipal divisions, such as town, township, ward, parish, etc. Between these two extremes, and approaching more or less nearly to one or the other, are numerous territorial divisions; some rising into *quasi*-autonomy, and others, instituted for purely municipal purposes, nearly approaching the smallest. It is evident that any of these various territorial divisions

hostility, and neutrality, is not applicable to this subject. But as a man is properly said to be an inhabitant where he dwelleth and hath his home, and is declared to be so by the Constitution, for the purpose of voting and being voted for; and as one dwelleth and has his home, as the name imports, where he has his domicil, most of the rules of the law of domicil apply to the question, where one is an inhabitant.'

"A very strong case of retention of domicil, while *in itinere* to a new one which is subsequently reached, is Shaw *v.* Shaw, 98 Mass. 158, in which the court say that the rule of Colton *v.* Longmeadow, which merely followed Briggs *v.* Rochester, 'is such an exception to the ordinary rule of construction as ought not to be extended.'

"Upon the whole, therefore, we can have no doubt that the word 'inhabitant,' as used in our statutes when referring to liability to taxation, by an overwhelming preponderance of authority, means 'one domiciled.' While there must be inherent difficulties in the decisiveness of proofs of domicil, the test itself is a certain one; and inasmuch as every person by universal accord must have a domicil, either of birth or acquired, and can have but one, in the present state of society it would seem that not only would less wrong be done, but less inconvenience would be experienced, by making domicil the test of liability to taxation, than by the attempt to fix some other necessarily more doubtful criterion.

"Whether the cases of Briggs *v.* Rochester and Colton *v.* Longmeadow should be followed in cases presenting precisely similar circumstances, the case at bar does not require us to decide; and we reserve further expression of opinion on that question until it shall become necessary for actual adjudication. If they are to be deemed authority, they should certainly be limited to the exact facts, where a person before leaving this Commonwealth has fixed upon a place certain as his future home, and has determined to abandon this Commonwealth for the purpose of settling in his new home, and is, upon the first of May, without the Commonwealth, in good faith and with reasonable despatch actually upon his way to his new home."

As the decided result of the cases it may be stated that, at least where the question of international citizenship does not arise, "inhabitancy" and "domicil" are substantially convertible terms.

Whether "residence" and "inhabitancy" are at all synonymous, and if so, how far, has been mooted in some of the cases. See Harvard College *v.* Gore, *supra;* Thorndike *v.* Boston, *supra;* Blanchard *v.* Stearns, *supra;* Opinion of Judges, *supra;* Borland *v.* Boston, *supra;* Roosevelt *v.* Kellogg, 20 Johns. 208; Matter of Wrigley, 4 Wend. 602 and note; s. c. on appeal,

may be the seat of a man's domicil or home;[1] so that while his abode remains at one spot, the scope of the relation signified by the term "domicil," viewed with reference to different purposes, may vary from the smallest to the largest unit of place. The relation has been appropriately termed national domicil when its seat is a country, and municipal or domestic domicil when its seat is one of the smaller municipal divisions.[2] We will use the term *quasi*-national when we

8 id. 134; Frost *v.* Brisbin, 19 id. 11; Crawford *v.* Wilson, 4 Barb. 504; Isham *v.* Gibbons, *supra;* State *v.* Ross, *supra;* Tazewell *v.* Davenport, 40 Ill. 197; Dale *v.* Irwin, *supra.*

[1] In the valuable note on the "Interpretation of 'Residence,' 'Inhabitant,' etc., in Statutes" appended to chapter 3, the learned editor of the eighth edition of Story on the Conflict of Laws falls into a manifest error in saying (p. 58) that "in its technical sense *domicil* is applicable only to a country." The truth is, as we have already seen, that "domicil" was, in its origin in the Roman law, strictly a municipal, and not an international institution; and so it long continued, no person being looked upon as domiciled in the Roman Empire, but in this or that particular urban territory. After the dismemberment of that empire and the disappearance of the principle of race descent as the basis of personal law, when occasion arose the mediæval jurists borrowed the principle of domicil, first, probably for the solution of conflicts of local laws within the same country, and afterwards extended the same mode of solution to conflicts between different countries. Moreover, about the same time, domicil was much resorted to by the canonists to determine interparochial and interdiocesan questions, and in modern times one has only to examine the writings of continental jurists, particularly those of France, to find that domicil is as much a matter of purely municipal as of international law. It is true that it was first introduced into our jurisprudence in the form of national or *quasi*-national domicil, but its constant application, in all the States of the Union, to various municipal subdivisions renders it impossible, entirely apart from historical considerations, to maintain that such application is not technical in its character. The learned editor, however, relies for authority (p. 58 and p. 40, § 41 note) upon Dicey, whose work, it must be remembered, is written exclusively in point of view of the English law, which alone of all systems of European jurisprudence does not recognize municipal domicil. Says Pollock, C. B. (*In re* Capdevielle, 2 Hurl. & Colt. 985, 1018), after remarking upon the entire absence of all mention of domicil in the older English law-books: "An English subject is domiciled in every part of England; but that is not so in foreign countries where the law of domicil prevails. There a man is domiciled at the particular part of the dominions where he was born (*sic*), and there are certain acts which he cannot perform unless at his place of domicil." Besides, Dicey uses the term "country" in the sense of "a territory subject to one system of law," which, as we have already seen, *supra*, § 14, may be only a part of a municipal subdivision.

[2] This distinction is brought out in the learned note to Guier *v.* O'Daniel, in Hare and Wallace's American Leading Cases, vol. i. p. 742. See also Bouvier, L. Dict. *verb.* Dom.; Wait's Actions and Defences, vol. ii. ch. 59, art. 1, §§ 3 and 4; Argument of Counsel, *In re* Capdevielle, *supra*, p. 991; Otis *v.* Boston, 12 Cush. 44; Wilbra-

desire specially to speak of that domicil which has for its seat a *quasi*-autonomous State, — such as the States of this Union, or the various countries and colonies composing the realm of Great Britain. This distinction is not known in England,[3] but is palpably recognized in many of the American cases, even where it is not expressed in terms. It would, however, be a mistake to suppose that these several phases of domicil are distinct things; for they do not differ otherwise than as a part differs from its whole. Thus a man is said to have municipal domicil when the town in which he has his home is considered, and national domicil when the country in which the town is situated is looked at. But the one includes the other. A person who has a municipal domicil in a Massachusetts town is also connected with the territorial division known as the State of Massachusetts by the tie of *quasi*-national domicil. And the converse is generally, although not universally, true;[4] namely, that a person who is connected with a great division of territory by national or *quasi*-national domicil also has a municipal domicil at some place within that State or country.

ham *v.* Ludlow, 99 Mass. 587; School Directors *v.* James, 2 Watts & Serg. 568; Stratton *v.* Brigham, 2 Sneed, 420; Bate *v.* Incisa, 59 Miss. 513. In the last-named case, however, the court appears to draw a distinction between national domicil and domicil for the purpose of succession, evidently confusing allegiance and domicil.

[3] An approach to municipal domicil is found in residence under the poor-laws, but the English cases have never recognized this as domicil.

[4] See *infra*, § 133.

CHAPTER IV.

GENERAL RULES.

§ 78. It has been said that it is difficult, if not indeed impossible, to lay down any general rules on the subject of domicil. In a certain sense this is true; for the determination of a person's domicil is so much a question of fact, and so largely dependent upon the peculiar circumstances of each particular case, that no one has yet succeeded in framing any general body of rules which will without modification determine every question which may arise. Still, there are several elementary principles which have been received by the British and American, and indeed by almost all modern, jurists with wellnigh axiomatic authority, and which, if properly appreciated and constantly kept in view, will go very far toward solving most questions. Indeed they are the groundwork of the whole subject, and most of what has been said in the text-books and decided cases is but in elaboration of them and application of them to particular sets of circumstances. The most important of them are: (1) *Every person must have a domicil somewhere;* (2) *No person can at the same time have more than one domicil;* (3) *Every person who is* sui juris *and capable of controlling his personal movements may change his domicil at pleasure;* (4) *A change of domicil is a question of act and intention* (factum et animus). The first three will be discussed here in the order in which they have been stated, the last being reserved for succeeding chapters.

1. *Every Person must have a Domicil somewhere.*

§ 79. **The Roman Law and Modern Civilians.** — The Roman law, while adhering generally to this rule, admitted one exception. It declared that although it is a difficult thing, a

person may be without a domicil when, a previous domicil having been abandoned, he has gone in quest of a new one. Ulpian says: "Difficile est sine domicilio esse quemquam. Puto autem et hoc procedere posse, si quis domicilio relicto naviget, vel iter faciat, quærens quo se conferat atque ubi constituat; nam hunc puto sine domicilio esse." [1] Savigny remarks [2] of this exception that it is of little importance on account of the generally short duration of the interval, but there are some cases reported in the books in which it has lasted for years.[3] Many of the Modern Civilians [4] have followed the doctrine of Ulpian. Donellus [5] even includes in this category one who has been driven from his native country by war or other misfortunes, and is thus caused to wander in search of a habitation. But in this he is not borne out by the authorities.

§ 80. Id. — Savigny mentions [1] two other exceptions: the first is where "a person has for a long time made travelling his occupation, without having any home as the permanent centre of his affairs and to which he is wont regularly to return. This case, too," he says, "is of little importance,

[1] Dig. 50, t. 1, l. 27, § 2.

[2] Savigny, System, etc. § 354 (Guthrie's trans. p. 107); and he adds (note c): "To this category belongs very often the case of a hired servant, day-laborer, or journeyman tradesman changing his service or his work, when such a change is accompanied by a change of residence."

[3] *E. g.*, Bell *v.* Kennedy, L. R. 1 Sch. App. 307.

[4] Voet, Ad Pand. l. 5, t. 1, no. 92; Donellus, Comm. de Jure Civili, l. 10, c. 12, p. 979; Corvinus, Jur. Rom. l. 10, t. 39, pt. 2, p. 46. Grotius insists upon the difficulty of being without a domicil, and argues therefore: "Firmissima hæc est conjectura, quod prius domicilium quod habuit, plane extinctum sit; unde præsumendum est electum ab ipso aliud domicilium." Opinion from Hollandsche Consultatien, vol. iii. p. 528, quoted by Henry, Foreign Law, p. 198. The Prussian Allgemeine Landrecht in terms treats of a person without any *determinate* domicil (Introd. § 25; see Westlake, Priv. Int. L. 2d ed. p. 29); while the Austrian Code apparently assumes that a person may be without a domicil (Gesetzbuch, § 34; see Westlake, Priv. Int. L. 2d ed. p. 30).

[5] *Ubi supra.* The objection to this extension of the doctrine of Ulpian is that under the circumstances named the absence from the old place of abode is not voluntary, but compulsory; and moreover in most instances there exists the intention of ultimate return as soon as the impelling cause of absence is removed. In cases such as those referred to by Donellus, the old domicil is, according to almost all the authorities, presumed to continue, at least until it is shown that the person has surrendered his intention to return. See *infra*, ch. 13.

[1] System, etc. § 354 (Guthrie's trans. p. 107).

because it seldom occurs." The second is "the case of vagabonds or wanderers, who rove about without any settled way of life, seeking their subsistence for the most part by means uncertain and dangerous to the public welfare and security."[2]

§ 81. **British and American Authorities.** — But the British and American cases of national and *quasi*-national domicil assume as an elementary principle, from which many of the other doctrines on the subject are deduced, that every person must have a domicil somewhere.[1] It would be indeed extremely inconvenient, and productive of the greatest confusion, if a person were allowed to withdraw himself from subjection to the laws of one place without at the same time subjecting himself to the laws of any other place. He would, *e. g.*, have no peculiar *forum* in cases where *forum* depends upon domicil, and there would be no general rule to determine his *status* during life or the distribution of his personal estate after death. In short, all the perplexities would arise which

[2] Savigny adds (note *d*): "It is remarkable that in the sources of the Roman law there is no special mention of this class. Even the fugitive slaves (*errones, fugitivi*), who are often mentioned, cannot be reckoned in it, since these have, in the legal sense, a certain domicil; that, namely, of their masters. The explanation of this remarkable fact is, that the persons who with us are vagabonds (together with the greatest part of our *proletaires*) were included by the Romans in the slave class. Thomasius (De Vagabundo, §§ 79, 91, 112) calls *vagabundus* every one who has no *domicilium*, and distinguishes him from the wanderer of doubtful character, quite contrary to the prevailing usage, which regards these two expressions as equivalent. No one will call the merchant who has given up his domicil to seek a new one or the respectable traveller by profession, a vagabond."

[1] Bell *v.* Kennedy, L. R. 1 Sch. App. 307, per Westbury, 320; Udny *v.* Udny, id. 441, per Hatherley, 447; Chelmsford, 453, and Westbury, 457; Wolcott *v.* Botfield, Kay, 534; Desmare *v.* United States, 93 U. S. 605; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Church *v.* Rowell, 49 Me. 367; Gilman *v.* Gilman, 52 id. 165; Thorndike *v.* Boston, 1 Met. 242; Report of the Judges, 5 id. 587; McDaniel *v.* King, 5 Cush. 469; Otis *v.* Boston, 12 id. 44; Briggs *v.* Rochester, 16 Gray, 337; Wilson *v.* Terry, 11 Allen, 206; Shaw *v.* Shaw, 98 Mass. 158; Borland *v.* Boston, 132 id. 89; Bank *v.* Balcom, 35 Conn. 351; Crawford *v.* Wilson, 4 Barb. 504; Brown *v.* Ashbough, 40 How. Pr. 260; Ryal *v.* Kennedy, 40 N. Y. Super. Ct. 347; Matter of Bye, 2 Daly, 525; Reed's Appeal, 71 Pa. St. 378; Hindman's Appeal, 85 id. 466; State *v.* Grizzard, 89 N. C. 115; Rue High, Appellant, 2 Dougl. (Mich.) 515; Kellogg *v.* Oshkosh, 14 Wis. 623; Hall *v.* Hall, 25 id. 600; Kellogg *v.* Supervisors, 42 id. 97; Morgan *v.* Nunes, 54 Miss. 308; Shepherd *v.* Cassiday, 20 Tex. 24; Cross *v.* Everts, 28 id. 523. And see authorities cited, *infra*, § 86, note 1. For purposes of succession, Dupuy *v.* Wurtz, 53 N. Y. 556; State *v.* Grizzard, *supra*; Von Hoffman *v.* Ward, 4 Redf. 244.

scientific jurists have sought to avert by the introduction of the doctrine of domicil into private international law. There are two ways of getting rid of the difficulty: (1) by assuming that the old domicil, and therefore the subjection of the person to its laws, continues until a new domicil is gained; and (2) by assuming that although the old domicil has ceased immediately upon being quitted, yet the subjection of the person to its laws continues until a new domicil is gained. The latter is the doctrine of the Civilians according to Savigny,[2] and the former that of the British and American authorities. Theoretically there is a difference, yet in practice the result is the same; for in either case the person is subject to the laws of his prior domicil.

§ 82. **Id.** — According to the British and American authorities every person receives at birth a domicil of origin, which continues not only until it is abandoned but also until an acquired domicil or domicil of choice is substituted for it.[1] This in its turn, according to the American authorities, continues until a third domicil is acquired, and so on throughout life, each successive domicil adhering until it gives place to another.[2] The late case of Udny *v.* Udny[3] in the House of Lords established a doctrine different from that held by the American authorities concerning the adherence of acquired domicil. It was there held that when a person has quitted an acquired domicil *animo non revertendi*, and is either *in transitu* to a new domicil or *quærens quo se conferat*, his last-acquired domicil does not adhere to him, but instantly his domicil of origin reverts in order to prevent him from being without domicil. But so far as concerns the integrity of the general principle which we are discussing, it matters not which view be accepted as correct; for whether an acquired domicil adhere until a new domicil is acquired, or the domicil of origin spring out of abeyance to fill up the gap between two acquired domicils, the result is the same, — that a person is never, in contemplation of law, without a domicil somewhere.

[2] System, etc. § 359 (Guthrie's trans. p. 130).

[1] *Infra*, § 114.

[2] *Infra*, §§ 113, 201.

[3] L. R. 1 Sch. App. 441; and *infra*, § 192 *et seq.*

§ 83. **Id. Hicks v. Skinner.** — The universal application of this principle to cases of national and *quasi*-national domicil has, it is believed, never been denied by any British or American authority, except in the case of Hicks *v.* Skinner.[1] In that case Reade, J., declared it to be "*well settled* that one may abandon his domicil of origin with the design of acquiring no other; and then until he acquire another he is without domicil except the domicil of actual residence." It must be confessed that the phrase "domicil of actual residence" is a new one in our law and rather obscure;[2] but the meaning seems to be that when a domicil of origin has been quitted, *animo non revertendi*, it is thereby extinguished and the person is subject to no law as his personal law save that of the place where he happens temporarily to be, — a doctrine entirely in conflict with all authority, British, American, and Continental. But the language of the judge throughout is very loose, wholly *obiter*, and, as he himself admits, used without the sanction of his brethren. The case, therefore, cannot be looked upon as shaking the general principle. In the subsequent case, in the same court, of State *v.* Grizzard,[3] Smith, C. J., says: "Domicil is a legal word, and differs [from residence] in one respect, and perhaps in others, in that it is never lost until a new one is acquired, while a person may cease to reside in one place and have no fixed habitation elsewhere. This rule as to domicil is based upon the neces-

[1] 72 N. C. 1. Reade, J., relies upon Savigny and Wharton (Confl. of L. § 78); but the latter does not hold the view that a person may be without domicil.

A further exception to the statement in the text may perhaps be made of several Louisiana cases, viz.: State *v.* Poydras, 9 La. An. 167; Black *v.* Nelson, 29 id. 245; Evans *v.* Payne, 30 id. 498; Walker *v.* Barrelli, 32 id. 467; Interdiction of Dumas, id. 679. They rest, however, upon a positive provision of the Louisiana Code (Rev. Civ. Code, art. 46) which declares that "a voluntary absence of two years from the State . . . shall forfeit a domicil within this State." It would seem to follow that in such case a person, unless he acquired a domicil elsewhere, might be without any. But whether this would be recognized as a valid principle by the courts of other States or foreign countries, may well be doubted.

[2] It is not even equivalent to the phrase of the Civilians, — *domicilium habitationis*, — by which they mean acquired domicil as distinguished from domicil of origin or possibly any other domicil imputed by the law; *e. g.*, Christenæus, Decis. Curiæ Belgicæ, vol. v. dec. 31; Carpzovius, Processus Juris. t. 3, art. 1, no. 65; and opinion of Grotius quoted by Henry, For. Law, p. 196.

[3] 89 N. C. 115.

sity of having some place by whose laws in case of death the personal estate must be administered."

§ 84. **Vagabonds, Gypsies, etc.** — It has been held by some that a person may be such a wanderer or vagabond as to be throughout life entirely without domicil. This doctrine has the support of some of the modern continental jurists, although it is denied by others; and it is worthy of remark that in the sources of the Roman law there is no special mention of this class of persons.[1] In a French case it was attempted to include a *comédien*, a travelling player, in this class; but the doctrine was combated by Cochin,[2] who declared that every person is born with a domicil which adheres, unless another is gained, until death. In Guier *v.* O'Daniel[3] it was argued that Thomas Guier, a seafaring man, had no domicil anywhere; but the court held otherwise. Gypsies have been included in the same class.[4] In the view of the law as held by the British and American authorities a gypsy or other vagabond has probably a theoretical domicil somewhere,[5] but certainly it is in most cases practically impossible

[1] See *supra*, § 80, note 2.

[2] Œuvres, t. 1, p. 184.

[3] 1 Binney, 349 note.

[4] See Phillimore, Dom. no. 31; Id. Priv. Int. L. vol. iv. no 65.

[5] In the Matter of Bye, 2 Daly, 525, Daly, J., says: "Although there are supposed exceptional cases, as gypsies or those wandering vagabonds or outcasts who do not know where or when they were born, it is not so in fact; for the place of birth, when known, is the domicil; or if it is not there, it is the place of which the person has the earliest recollection, where he was first seen by others." But this reasoning cannot well be applied to the case of a gypsy, since it is well known that, generally speaking, members of that race have no settled abodes. And as the place of birth is resorted to in order to ascertain the domicil of origin of a person only upon the presumption that his parents were there domiciled at the time of his birth, the assumed fact that they were habitual and life-long wanderers of itself rebuts such presumption, and renders the place of birth wholly unimportant. The same applies *à fortiori* to the place where the gypsy is first seen, inasmuch as such place is resorted to only as *prima facie* the place of birth, and therefore (again only *prima facie*) the place where the parents were domiciled at the time of the birth of the child. (Upon the relation of place of birth to domicil of origin, see *infra*, § 105.) It is apparent that the ordinary rules for the ascertainment of domicil are not applicable to the case of a member of a wandering gypsy tribe or any like person. Where, however, individuals belonging to that race are permanently settled (see Ency. Brit. 9th ed. art. Gypsy), or confine their wanderings to a single State or country, *e. g.*, England, of course the same difficulty does not arise. On this general subject Savigny, System, etc. § 359 (Guthrie's trans. p. 132): "We might . . . ask what law is applicable to a man for whom neither a self-elected nor a paternal domicil can

to decide where, and the fiction of the persistence of domicil of origin in such cases has been not inaptly characterized as "a sterile subtlety which cannot be of any assistance in practice." [6]

§ 85. **French Jurists.** — Most of the French jurists hold that a person is not able to be without a domicil,[1] although his domicil may not be known; and they follow the same course of reasoning as the British and American authorities, relying besides upon the interpretation of several provisions of the French Codes. Some of them, however, — notably Demolombe, — are unwilling to admit the universal application of the principle.[2] That author, while admitting that the theory of the persistence of the paternal domicil is generally true, cites two cases in which it does not appear to him sufficient to remove all the difficulties which the situation presents; namely, first, "where the trace of domicil of origin is entirely lost and unknown," — for example in the case of "a strolling player, a pedler, or other itinerant individual, who passes his life in travelling from town to town. His domicil of origin is in fact altogether unknown, — perhaps he never had any. He was born in an inn, of parents in simple passage in a town, and who have led the same cosmopolitan life which he has

be discovered. This question may arise when the man dies, and his intestate succession is to be determined. Scarcely any course will be possible but to assume his residence at the time to be the domicil, and therefore (if the question relates to succession) the place at which he has died." And Dicey (Dom. pp. 61, 117) expresses a similar opinion. Westlake says (Priv. Int. L. 1st ed. p. 34, no. 34): "Suppose a vagabond whose parentage and place of birth are totally unknown, so that no domicil of origin can be assigned him; practically such a person could hardly come under the law of domicil for any other purpose than that of jurisdiction, which would probably be exercised over him without scruple by any court within the territory of which he might be found."

[6] Ancelle, Thèse pour le Doctorat (Du Domicile), p. 105.

[1] Duranton, Cours de Droit Français, t. 1, no. 360; Toullier, Droit Civil Français, t. 1, no. 371; Richelot, Principes de Droit Civil Français, t. 1, no. 224; Prondhon, Traité sur l'État des Personnes, t. 1, p. 243; Laurent, Principes de Droit Civil Français, t. 2, no. 66; Marcadé, Explication, etc. de Code Napoléon, sur art. 103, no. 3. See also Demolombe, Cours de Code Napoléon, t. 1, no. 348. Such is also the doctrine of Pothier, Intr. aux Cout. d'Orléans, no. 12; and see the report of Conseiller d'État Emmery, presented at the time of the discussion of tit. iii. Code Napoléon (Séance du 13 Ventôse, An 11).

[2] Demolombe, *loc. cit.*; Ducaurroy, Bonnier et Roustain, Commentaire, etc. de Code Civil, t. 1, no. 470; Vallette, Cours de Code Civil, t. 1, p. 139. See also Marcadé, Explication, etc. de Code Napoléon, sur art. 103, no. 4; Zacharise, t. 1, p. 278; and Sirey et Gilbert, Code Civil Annoté, art. 103, notes 21–25.

continued with them and after them. The paternal domicil is here evidently of no assistance. The truth is that these individuals then have no domicil even in the subtlety of the law. *Idem est non esse aut non apparere.*" Of such nomads Valette[8] also remarks: "Without doubt, by running back far enough, one may succeed in finding a sedentary ancestor, but it would be puerility to pretend to attach his descendants to a place where they never have had any interest whatever or where they never have lived." The second case supposed by Demolombe is as follows: "Even when the domicil of origin is known, it is possible that a person who has not adopted another, and who is thus reputed to have preserved the former, has for a long time and absolutely abandoned it, and has no longer any kind of connection with it. I demand whether the domicil which is in such case, to speak truly, only a pure abstraction, a sort of juridical subtlety, shall nevertheless produce all of the effects of actual domicil." "It may be perfectly well known that Paul was born at Strasburg; but twenty or thirty years have elapsed since he quitted that city, since he broke all his relations with it, where he has no longer any interest, and where perhaps he knows no person. He travels, he rambles over the world, he is not fixed in any place, or else he has devoted his life to a military career and follows his colors everywhere." While admitting that for most purposes the reasoning which invokes the effect of the domicil of origin proceeds logically, he is of opinion that it should not be pushed to the extent of covering the facts of his second case, when a question of the service of process or the like is involved. His remarks upon this point, however, are based mainly upon the provisions of the French Code of Procedure, and relate rather to municipal than to national domicil; indeed, the discussions of the later French jurists have, generally, reference more to the former than to the latter phase of domicil.

§ 86. **Municipal Domicil.** — With respect to municipal domicil the principle has been laid down as a general rule, subject to few, if any, exceptions.[1] It is necessary that a person who

[8] *Loc. cit.*

[1] Abington *v.* North Bridgewater, 23 Pick. 170; Opinion of the Judges, 5 Met. 587; Bulkley *v.* Williamstown,

is subject to the laws of a State should have some certain, fixed place where he may be called upon to perform the duties and obligations which he owes to the State, and where, too, he may enjoy the privileges which the State accords to him. The cases of municipal domicil, therefore, lay down the principle broadly that every person must have a domicil somewhere.

The Maine Settlement cases[2] hold that a person may abandon his "home" within the meaning of that word as used in the poor-laws, without gaining another. But the courts of that State have been careful to say distinctly that such "home" is something different from, and less than, domicil.[3] These cases, therefore, cannot be considered as militating against the general principle laid down.

Several Massachusetts cases have occasioned some comment. In the case of Briggs *v.* Rochester[4] there was evidence that in April, 1858, B., who was then an inhabitant of Rochester, Mass., removed out of the State *cum animo non revertendi*, and with the intention of fixing his future abode and home in Motthaven, New York; that on the 1st of May he had not yet reached his intended new abode, but was sojourning in New York City, and that shortly afterwards he went to Motthaven and henceforth resided there. Upon this state of facts the court held that B. had on the 1st of May ceased to be an inhabitant and taxable in Rochester, putting its decision, however, upon a distinction between domicil and inhabitancy under the tax laws of the State. In Colton *v.* Longmeadow[5] the court went a step farther. In that case the facts were

3 Gray, 493; Briggs *v.* Rochester, 16 id. 337; Kirkland *v.* Whately, 4 Allen, 462; Wilson *v.* Terry, 11 id. 206; Whitney *v.* Sherborn, 12 id. 111; Littlefield *v.* Brooks, 50 Me. 475; North Yarmouth *v.* West Gardner, 58 id. 207; Shepherd *v.* Cassiday, 20 Tex. 24; Cross *v.* Everts, 28 id. 523. The French authorities cited above (§ 85, note 1) are mainly upon municipal domicil.

The case of Kilburn *v.* Bennett, 3 Met. 199, has been cited as establishing a contrary doctrine, but this point does not seem to have been either decided or discussed, the questions raised having been merely questions of evidence.

[2] Exeter *v.* Brighton, 15 Me. 58; Jefferson *v.* Washington, 19 id. 293; Phillips *v.* Kingsfield, id. 375; Gorham *v.* Springfield, 21 id. 58; Littlefield *v.* Brooks, *supra*; North Yarmouth *v.* West Gardner, *supra*; Hampden *v.* Levant, 59 id. 557.

[3] See particularly Littlefield *v.* Brooks, *supra*, and the cases cited *supra*, § 55, note 2.

[4] 16 Gray, 337.

[5] 12 Allen, 598.

that on the 28th of April C. left Longmeadow, Mass. (where he had up to that time always resided) *cum animo non revertendi*, and proceeded on his way to Philadelphia, with the intention of residing there. On the 1st of May he was not in Massachusetts but in Connecticut, *in itinere* to Philadelphia, which place he reached a few days afterwards. Upon this state of facts the court decided that on the 1st of May C. had ceased to be an inhabitant of Longmeadow, so as to be taxable there under the statute. In Shaw *v.* Shaw,[6] a case of divorce, the same court (per Foster, J.), referring to Colton *v.* Longmeadow and making it depend upon the construction of the statute, said that the rule laid down in that case "is such an exception to the ordinary rule of construction as ought not to be extended;" and in the subsequent tax case of Borland *v.* Boston,[7] after holding the word "inhabitant," as used in the tax laws of that State, to mean, according to an overwhelming preponderance of authority, "one domiciled," and after doubting the authority of Briggs *v.* Rochester and Colton *v.* Longmeadow, declared (per Lord, J.) that "if they are to be deemed authority, they should certainly be limited to the exact facts" contained in them.

§ 87. But, notwithstanding the comments upon it and the fact that it was distinctly put upon the construction of the statute, it is probable that Briggs *v.* Rochester was correctly decided upon general principles as to domicil. For as B. had left not only the town in which he had formerly resided, but the State also, *cum animo non revertendi*, and had already reached a point in the State in which he intended setting up his new abode, the requirements of a change of *quasi*-national domicil were fulfilled.[1] In such case it would be difficult to contend that he retained his former municipal domicil, because it would certainly be an anomaly for a person to have the seat of his *quasi*-national domicil in one place and that of his

[6] 98 Mass. 158.

[7] 132 Mass. 89. For the comments at length in this case upon Briggs *v.* Rochester and Colton *v.* Longmeadow, see *supra*, § 76, note 2.

[1] That a person may acquire a national or *quasi*-national domicil without at the same time acquiring a municipal domicil, or having a definite place of abode within the State or country in question, see *infra*, § 133.

municipal domicil in another, — a greater anomaly, indeed, than that he should be without municipal domicil. For, with the cessation of his subjection to the laws of the former State, would also cease the necessity for his having a certain, fixed place where to perform the duties or fulfil the obligations imposed by its laws. On the other hand, as B. was proceeding with reasonable speed to the place in New York selected by him as his place of abode, but had not yet arrived there, he could hardly be said to have gained a municipal domicil in that State. It follows that he must have been without one in either State. Colton *v.* Longmeadow, however, although professedly decided upon the authority of Briggs *v.* Rochester, contained a different state of facts and cannot be sustained upon general principles, inasmuch as no change of *quasi*-national domicil had taken place while C. was *in itinere*, and it would seem to follow that he retained his municipal domicil along with his *quasi*-national domicil.

2. *No Person can at the same Time have more than one Domicil.*

§ 88. **Roman Law.** — While there was some conflict of opinion among the jurists whose writings constitute the sources of the Roman law, yet the generally received opinion seems to have been that a person might have domicil in two places at the same time if he appeared to be equally established in both. Labeo decided that a person who transacted his affairs equally in several places had domicil nowhere; while others were of opinion that under such circumstances he had several domicils, and Paulus approved the latter opinion. The text of Paulus is: "Labeo judicat, eum, qui pluribus locis ex æquo negotietur, nusquam domicilium habere; quosdam autem dicere refert, pluribus locis eum incolam esse aut domicilium habere; quod verius est."[1] We find Ulpian cited upon this point in two passages in the Digest, in the first of which he declares it to be a received opinion that a person may be domiciled in two places if he appears to be equally established in both. "Viribus prudentibus placuit, duobus locis posse

[1] Dig. 50, t. 1, l. 5.

aliquem habere domicilium, si utrobique ita se instruxit, ut non ideo minus apud alteros se collocasse videatur." [2]

In the second passage he reports the opinion of Celsus, that if a person is established equally in two places, frequenting one no more than the other, which place is his domicil depends upon his own selection. Ulpian adds that it appears doubtful whether one can be domiciled in two places by mere manifestation of will. The text is: "Celsus lib. 1 Digestorum tractat: Si quis instructus sit duobus locis æqualiter, neque hic, quam illic minus frequenter commoretur, ubi domicilium habeat existimatione animi esse accipiendum. Ego dubito si utrobique destinato sit animo, an possit quis duobus locis domicilium habere; et verum est, habere, licet difficile est." [3] But the case was doubtless a rare one, and the doctrine for the most part speculative. Modern Civilians have however, with few exceptions, held the doctrine of Paulus and Ulpian.[4]

§ 89. **French Jurists.** — Among the French jurists, since the adoption of the Code which fixes "the domicil of every Frenchman . . . at the place of his principal establishment," [1] it is the unanimous opinion that a person can have but one domicil; [2] for, they hold, while a person may have several es-

[2] Dig. 50, tit. 1, l. 6, § 2.

[3] Id. l. 27, § 2.

[4] Voet, Ad Pand. l. 5, t. 1, no. 92; Donellus, De Jure Civili, l. 17, ch. 12; Zangerus, De Except. pt. 2, c. 1, no. 34; Mascardus, De Probat. concl. 535, nos. 24, 25; Corvinus, Jur. Rom. l. 10, t. 39; also opinion of Corvinus given by Henry, For. Law, p. 192; Glück, vol. vi. bk. 5, t. 1, § 512; Savigny, System, etc. § 354 and elsewhere (Guthrie's trans. p. 107); Bar, § 29 and elsewhere (Gillespie's trans. p. 85); Fœlix, Droit Int. Priv. t. 1, no. 28 (ed. 1856, p. 56). See also opinion of Grotius, Henry, For. Law, p. 197, and Denizart, *verb.* Dom. nos. 39, 40. The last-named, however, says distinctly that under the French customary law a person can have but one domicil. The Prussian Allgemeine Landrecht assumes that a person may have two domicils at the same time. Introd. § 27. See Westlake, Priv. Int. L. 2d ed. p. 29.

[1] Art. 102.

[2] Merlin, Répertoire, *verb.* Déclinatoire, § 1; Demolombe, Cours de Code Napoléon, t. 1, nos. 345, 347; Toullier, Droit Civil Français, t. 1, no. 367; Richelot, Principes de Droit Civil Français, t. 1, no. 224; Duranton, Cours de Droit Français, t. 1, no. 359; Laurent, Principes de Droit Civil Français, t. 2, no. 69; Marcadé, Cours de Code Civil, sur art. 103, no. 3; Aubry et Rau, Cours de Droit Civil, t. 1, § 142, note 1; Malleville, Analyse, etc. de la Discussion du Code Civil, t. 1, p. 126; Boncenne, Théorie de la Procéd. Civ. t. 2, p. 198; Ducaurroy, Bonnier et Roustain, Commentaire, etc., du Code Civil, t. 1, no. 170; Massé et Vergé, Droit Civil Français, t. 1, § 88, note 1; Mersier, Traité, etc. des Acts de l'État

tablishments, he can have but one "principal establishment." The unity of domicil was thus proclaimed by one of the orators of the Tribunat, Malherbe, in his "Discours" to the Corps Legislatif concerning this provision:[3] "Each individual can have but one domicil, although he may have several residences. It was essential to leave no doubt upon the unity of domicil, in order to prevent the errors and frauds which the contrary principle, admitted in the former jurisprudence, might produce; this unity is positively established by the first article of the proposed law." But even among the older French jurists the possibility of double domicil was not universally accepted. Denizart,[4] although citing D'Argentré to the contrary, says, "It must be remarked that in our usages one can have but one domicil." In his argument in the case of the Marquis d'Hautefort, Cochin[5] admits the possibility of different domicils for different purposes, but declares that such case would be very extraordinary and scarcely admissible. Pothier also subscribes to the unity of domicil when, in speaking of a change of domicil, he says, "From the time when we arrive there we acquire a new domicil there and lose the old one."[6]

§ 90. It would be not only highly inconvenient but quite impossible for a person to have two places from which equally to draw the law applicable to him as a personal quality,— in other words, to have adhering to him perhaps conflicting laws, the one affirming and the other denying capacity or the

Civil, no. 141. These authorities have, however, mainly reference to municipal domicil. Fœlix, speaking from an international standpoint, assumes that a person may have several domicils.

[3] Séance du 23 Ventôse, An 11. Locré, Procès Verbeaux du Conseil d'État, t. 1, p. 452.

[4] *Verb.* Dom. no. 39.

[5] Œuvres, t. 1, p. 327. He says: "Mais on peut avoir deux domiciles dit la demoiselle de Kerbahn et n'est-ce pas ce qui a été jugé dans la succession du Prince de Guimené, par l'arrêt du 6 Septembre, 1670? Ainsi le Comte d'Hautefort pouvoit être domicilé à Paris et à Hauterive. Deux réponses fait cesser une pareille objection. La premier est *que si l'on pouvoit avoir deux domiciles, ce seroit par rapport à des objets tout différens;* ainsi l'une pourroit être un domicile de fait qui influeroit sur tout ce qui regarde directement la personne domiciliée; l'autre un domicile de droit et de volonté, qui décideroit du sort de la succession. Le cas est sans doute fort extraordinaire, et peut-être même que dans les règles il ne devroit point être admis."

[6] Introd. gén. aux Cout. d'Orléans, no. 15.

like. In such case there would be no certain uniform rule for the guidance of courts in the determination of legal relations, and the greatest perplexity and confusion would arise.

There are two ways of escaping the consequences of such an anomalous situation: (1) by assuming that a person can have but one domicil; and (2) by assuming that while a person may have more than one domicil, yet he draws his personal law from the earliest established domicil still adhering to him. The latter is the position of the Civilians according to Savigny,[1] while the former is the position of the British and American authorities. The result is, however, practically the same, since in the one case the existence of a later domicil is denied and in the other is simply ignored.

§ 91. **British and American Authorities.** — Although perhaps from a desire to guard against a too broad statement, the principle is sometimes laid down with the qualification, "for the same purpose,"[1] yet most of the British and American authorities seem to consider it a broad general principle,[2] — in fact to assume it as a postulate,[3] — upon which much of the reasoning of the cases is based, that no person can have more than one domicil at the same time. It has been indeed

[1] System, etc. § 359 (Guthrie's trans. p. 129, citing also Meier, De Conflictu Legum, p. 16).

[1] Abington *v.* North Bridgewater, 23 Pick. 170; Opinion of the Judges, 5 Met. 587; McDaniel *v.* King, 5 Cush. 469; Hallet *v.* Bassett, 100 Mass. 167; Thayer *v.* Boston, 124 id. 132; Brown *v.* Ashbough, 40 How. Pr. 260; Hall *v.* Hall, 25 Wis. 600.

[2] Udny *v.* Udny, L. R. 1 Sch. App. 441, 448, per Hatherley, Lord Ch. (assumed by both sides in Douglas *v.* Douglas, L. R. 8 Eq. Cas. 617); Church *v.* Rowell, 49 Me. 367; Thorndike *v.* Boston, 1 Met. 242; Opinion of the Judges, 5 id. 587; Otis *v.* Boston, 12 Cush. 44; Bulkley *v.* Williamstown, 3 Gray, 493; Borland *v.* Boston, 132 Mass. 89; Bank *v.* Balcom, 35 Conn. 351; Crawford *v.* Wilson, 4 Barb. 504; Lee *v.* Stanley, 9 How. Pr. 272; Bartlett *v.* City of New York, 5 Sandf. 44; Douglas *v.* Mayor of New York, 2 Duer, 110; Ryal *v.* Kennedy, 40 N. Y. Super. Ct. 347; State *v.* Frest, 4 Harr. (Del.) 538; Brent *v.* Armfield, 4 Cranch, C. Ct. 579; Long *v.* Ryan, 30 Gratt. 718; Love *v.* Cherry, 24 Iowa, 204; Rue High, Appellant, 2 Doug. (Mich.) 515; Kellogg *v.* Supervisors, 42 Wis. 97; Shepherd *v.* Cassiday, 20 Tex. 24; Cross *v.* Everts, 28 id. 523. See also Walke *v.* Bank of Circleville, 15 Ohio, 288. During the argument in Bruce's Case (2 Cr. & J. 435, 445), Bailey, B., used language to the effect that a person might have two domicils at the same time, viz., a domicil of origin and an acquired domicil. But in the opinion of the Court of Exchequer subsequently delivered by him in the same case, no allusion is made to such doctrine.

[3] See remarks of Shaw, C. J., on Abington *v.* North Bridgewater, quoted *infra*, § 97.

remarked in an *obiter* way that for some purposes a person may have more than one domicil;[4] but no case is reported either in Great Britain or America in which it has been so decided, if we except the cases of jurisdiction in divorce. And it is to be observed that these *dicta* are often mere concessions for the sake of the argument, and usually speak only in a general way of the possibility of two domicils for *some* purposes, without pointing out specifically for *what* purposes. The remarks of Pollock, C. B., in Capdevielle's case[5] are in

[4] Maxwell *v.* McClure, 6 Jur. N. s. 407, per Lord Wensleydale; Somerville *v.* Somerville, 5 Ves. Jr. 750; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Greene *v.* Greene, 11 Pick. 410. In the latter case (divorce), Wilde, J., says (p. 416): "Speaking individually, I should have no hesitation in saying that a man may have two domicils in different States or within separate jurisdictions, so as to be amenable to a process of this description in either. That a man may have two domicils for some purposes, although he can have but one for succession to personal property, is well settled in England and in other countries;" citing Somerville *v.* Somerville. And to the expression of Lord Alvanley in the latter case it will be found that all of these *dicta* remount. It is apparent that that learned judge merely intended to concede for the sake of argument the possibility of several domicils for some purposes, while firmly maintaining and demonstrating the impossibility of such a state of things with respect to personal succession (see his language *infra*, note 6). The authority to which he refers is Denizart, who says (*verb.* Domicil, no. 6): "On ne connoit qu'un seul domicile pour régler les successions; mais relativement aux mariages, on en distingue de deux espèces; savoir, le domicile de droit et le domicile de fait," — thus taking the distinction between legal and actual domicil, or, in other words, domicil and residence. At another place (Bans de Mariage, nos. 9, 10) the same author thus enlarges: "Un mineur qui veut se marier, et qui ne demeure pas chez ses père et mère, ou chez son tuteur, est obligé de faire publier des bans, non seulement dans la paroisse où il est domicilié de fait, mais encore dans celle de ses père et mère, ou de son tuteur chez lesquels il a un domicile de droit, au moyen de ce que la loi le soumet à leur puissance. Le changement d'un domicile, de fait ou de droit, ne suffit pas pour dispenser ceux qui se marient, de faire publier des bans dans la paroisse de ce domicile, à moins que depuis la sortie il ne se soit écoulé un délai de six mois; et d'un an, si en changeant de domicile, ils ont aussi changé de diocèse. Sans cet intervalle, la publication de bans est nécessaire non-seulement à la paroisse de l'ancien domicile, mais encore à celle du nouveau." In this passage four so-called domicils seem to be contemplated; viz., the present and the former, the legal and the actual. But as we have to do only with legal domicil, and not with the so-called domicil *de fait*, the expressions of Denizart do not, when we thus come to examine them, militate with the proposition laid down in the text, that no person can at the same time have more than one domicil. With this explanation the oft-repeated expression of Lord Alvanley entirely loses its force.

[5] 2 Hurl. & Colt. 985, 1018. He is reported as saying: "I think that for certain purposes a person may have more than one place of domicil. I apprehend that a peer of England, who is also a peer of Scotland, and has estates in both countries, who comes to Parliament to discharge a public duty and re-

this respect exceptional, for he plainly intimates his opinion that a person may have two domicils for the purposes of succession and for other purposes. But this opinion is not only not supported, but is flatly contradicted by the decided cases which clearly establish — if they establish anything — the principle that for whatever other purpose a person might have more than one domicil, he can have but one for the purposes of succession;[6] besides, he himself was of a contrary opinion in Steer's case.[7]

turns to Scotland to enjoy the country, is domiciled both in England and Scotland. A lawyer of the greatest eminence, formerly a member of this court and now a member of the House of Lords, to whose opinion I, in common with all the profession, attach the highest importance, once admitted to me that for some purposes a man might have a domicil both in Scotland and England. I cannot understand why he should not. Then why may not the same thing occur with reference to commerce, manufactures, or any other purpose? Suppose, for instance, a person born in England of French parents (and therefore a French subject with an English domicil of origin) had a large commercial establishment in both countries, without any particular attachment to either, but only intending to make the most money he could in both; why should he not, for the purposes of the particular establishment, be domiciled in both countries, so that his property in England would be administered according to the law of England, and his property in France according to the law of France? But somehow or other a notion has crept in that although there may be three sorts of domicil, as in France, there can be only one for the purpose of administering property in England. I cannot conceive what reason or necessity there is for any such distinction, and in the case I have put I cannot understand why a person, for the purpose of commerce and manufacture should not have a domicil both in England and France."

[6] Somerville *v.* Somerville, 7 Ves. Jr. 750; Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854, per Campbell, Lord Ch., and Lord Wensleydale; Maxwell *v.* McClure, 6 Jur. N. S. 407, per Lord Wensleydale; Crookenden *v.* Fuller, 1 Swab. & Tr. 441; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Gilman *v.* Gilman, 52 Me. 165; Greene *v.* Greene, 11 Pick. 410; Dupuy *v.* Wurtz, 53 N. Y. 556; Von Hoffman *v.* Ward, 4 Redf. 244; Hindman's Appeal, 85 Pa. St. 466; Danphin Co. *v.* Banks, 1 Pears. 40; Gravillons *v.* Richards Ex'rs, 13 La. Rep. 293. See remarks of Lord Loughborough in Ommanney *v.* Bingham, *infra*, § 93.

In Somerville *v.* Somerville Lord Alvanley puts the subject thus: "The next rule is that though a man may have two domicils for some purposes, he can have only one for the purpose of succession. That is laid down expressly by Denizart under the title *Domicil;* that only one domicil can be acknowledged for the purpose of regulating the succession to the personal estate. I have taken this as a maxim, and am warranted by the necessity of such a maxim; for the absurdity would be monstrous, if it were possible, that there should be a competition between two domicils as to the distribution of the personal estate. It could never possibly be determined by the casual death of the party at either. That

[7] 3 Hurl. & Nor. 594.

§ 92. **Id.** — Upon the principles laid down in most of the British and American cases, it seems impossible to conceive of a person having more than one domicil. At birth he receives a domicil of origin;[1] he cannot acquire a new domicil without abandoning his domicil of origin and taking up the new one with the intention of making it his sole domicil.[2] In such case, however, there is merely the substitution of the one for the other, and not the cumulative acquisition of a new domicil. And so also, according to the American authorities, in every subsequent change of domicil, the old is abandoned and the new substituted for it.[3] Even if we accept the doctrine of Udny *v.* Udny,[4] that the domicil of origin can never be wholly extinguished by the act of the person, we are led to the same conclusion; for it was there said that during the continuance of the acquired domicil the domicil of origin is in abeyance. It is, therefore, for all purposes, except for the possibility of reverter, extinct; so that, in such case, practically the acquired domicil is the only one.

Perhaps the only exception to the general rule — if indeed it is an exception — arises from the disposition of the courts to assume jurisdiction in favor of a wife in cases of divorce in order to prevent her husband from taking advantage of his own wrong and thus to prevent a failure of justice. This subject is discussed elsewhere.[5]

§ 93. **Id. Lord Alvanley in Somerville v. Somerville and Lord Loughborough in Ommanney v. Bingham.** — At the close of his judgment in the case of Somerville *v.* Somerville,[1] the Master of the Rolls, Lord Alvanley, proposed what he considered the only possible case of two equal domicils. He said: "I shall conclude with a few observations upon a ques-

would be most whimsical and capricious. It might depend upon the accident whether he died in winter or summer, and many circumstances not in his choice; and that never could regulate so important a subject as the succession to his personal estate." See also Bouhier, Obs. sur la Cout de Bourg. ch. 22, p. 448, ed. 1742.

That a person can have but one domicil for the purpose of voting, see State *v.* Ross, 23 N. J. Law (3 Zab.), 517; or taxation, Id. and Dauphin Co. *v.* Banks, *supra*.

[1] See *infra*, § 104.

[2] See *infra*, ch. 7.

[3] *Infra*, ch. 7.

[4] L. R. 1 Sch. App. 441; *infra*, § 192 *et seq.*

[5] *Supra*, § 39; and *infra*, § 222 *et seq.*

[1] 5 Ves. Jr. 750, 791.

tion that might arise, and which I often suggested to the bar. What would be the case upon two contemporary and equal domicils, if ever there can be such a case? I think such a case can hardly happen, but it is possible to suppose it. A man born no one knows where, or having had a domicil that he has completely abandoned, might acquire in the same or different countries two domicils at the same instant and occupy both under exactly the same circumstances; both country houses, for instance, bought at the same time. It can hardly be said that of which he took possession first is to prevail. Then suppose he should die at one, shall the death have any effect? I think not, even in that case; and then *ex necessitate* the *lex loci rei sitæ* must prevail, for the country in which the property is would not let it go out of that until they knew by what rule it is to be distributed. If it was in this country they would not give it until it was proved that he had a domicil somewhere." But the closing words of his Honor are significant, as indicating his opinion that the case supposed was rather one of no known domicil than of two equal domicils. However, in the light of the late British and American decisions, the case supposed appears to be quite impossible. If the individual ever had a domicil of origin it would cling to him until he had acquired another as his sole domicil. And even if no such original domicil could be shown, it would be a physical as well as a legal impossibility to acquire two domicils at once; for domicil can only be acquired by the fact of bodily presence coupled with the requisite *animus*, and, when once acquired, continues until it is abandoned. It seems therefore to be entirely in accordance with the modern decisions to hold that the domicil first acquired would be the sole domicil, and, as such, would furnish the rule of distribution.

Lord Loughborough, in Ommanney *v.* Bingham,[2] remarks: "In no case is it possible for a man to be so situated as to admit the idea of anything like two domicils for the purpose of succession, unless his time were so arranged as to be equally and statedly divided betwixt two countries in each of

[2] Robertson, Pers. Suc. Appendix, 471.

which his residence had exactly the same appearance of permanency as in the other, — a case which could hardly occur, for some shade of difference would in general appear, giving a clearer character of permanency or established settlement to one of the situations than the other." The above criticism of Lord Alvanley's remarks may also be applied to those of Lord Loughborough.

§ 94. **"Domicil" and "Principal Domicil."** — Formerly some jurists were in the habit of speaking of a man's "domicil" and "principal domicil;" but the practice now is wellnigh universal to apply the term "domicil" only to what was thus formerly spoken of as the "principal domicil," and to use the word "residence" to describe that which falls short of it.[1] Thus it is said that a person may have several residences, but only one domicil.[2]

§ 95. **Different Domicils for Different Purposes.** — It is said by some of the authorities that a person may have different domicils for different purposes.[1] It is to be remarked that

[1] See Phillimore, Dom. ch. 3 and notes; Id. Int. L. vol. iv. ch. 5. Also Denizart, *verb.* Domicil, nos. 1 and 2: "On appelle domicile le lieu de la demeure ordinaire de quelqu'un. Le principal domicile de chacun est celui qu'il a dans le lieu où il tient le siége et le centre de ses affaires," etc. See *supra*, § 91, note 4. This is the same distinction as that which Story makes between "domicil in its ordinary acceptation" and in its "strict and legal sense." Confl. of L. § 41.

[2] Gilman *v.* Gilman, 52 Me. 165; Bartlett *v.* City of New York, 5 Sandf. 44; Douglas *v.* Mayor of New York, 2 Duer, 110; State *v.* Ross, *supra*; Long *v.* Ryan, 30 Gratt. 718; Love *v.* Cherry, 24 Iowa, 204; State *v.* Steele, 33 La. An. 910.

[1] Yelverton *v.* Yelverton, 1 Swab. & Tr. 574; Smith *v.* Croom, 7 Fla. 81. See also Phillimore, Law of Dom. no. 20, p. 17; Id. Int. L. vol. iv. no. 54; and Kent's Comm. vol. ii. p. 431 note; see *infra*, § 96.

The learned editor of the eighth edition of Story on the Conflict of Laws speaks thus on this subject (p. 45): "It is sometimes said that a person cannot have more than one domicil at the same time *for the same purpose*. This qualification was probably suggested by the use of the term 'domicil' to designate different kinds of residence, to which the term is not applicable in its technical sense. . . . It has never been held that a person can have a domicil, in its technical sense, in more than one country at one time. The rules for ascertaining domicil admit of only one domicil at a time. In order to give any effect to the suggestion that a man may have different domicils for different purposes, the purpose for which reference is made to domicil, in cases of a conflict of laws, must be regarded as a single purpose. For this purpose he cannot have more than one domicil at the same time."

Dicey thus speaks upon this subject (Dom. pp. 62–66): "*Can a person have different domicils for different purposes?* It is clear that no man can for the same purpose, *i. e.*, when the determination of one and the same class of rights is in

no trace of this doctrine is to be found in the Roman law sources; and upon strict analysis it will be found, the writer

question, be taken to have a domicil in more countries than one at the same time.

"A doubt has, however, been raised, whether a person cannot have at the same moment a domicil in one country for the determination of one class of rights (*e. g.*, rights of succession), and a domicil in another country for the determination of another class of rights (*e. g.*, capacity for marriage)." After quoting Lord Alvanley, in Somerville *v.* Somerville, *supra*, Pollock, C. B., in *Re* Capdevielle, *supra*, and Phillimore, Int. L. vol. iv. no. 54, Law of Dom. no. 20, he continues: "If the notion suggested by these authorities be correct, Rule 3 must be modified and run, 'No person can *for the same purpose* have at the same time more than one domicil.'

"The rule, however, as it stands, is probably correct. The notion that a person may be held in strictness to have been domiciled in Scotland for the purpose of determining the validity of his will, and to have been domiciled at the same moment, in Germany, for the purpose of determining the validity of his marriage (in so far as that depends upon domicil), is opposed to the principles by which the law of domicil is governed, and is not, it is believed, supported by any decided case.

"The prevalence of the notion is due to two causes:—

"*First.* The term 'domicil' is often used in a lax sense, meaning no more than is meant by the term 'residence' as used in this treatise. Thus, a 'forensic domicil' or a 'commercial domicil' often signifies something far short of domicil strictly so called. Now, it is obvious that a person may have a 'residence' in one place, and a 'domicil' in another, and that residence may often be sufficient to confer rights or impose liabilities. It is from cases in which 'residence' alone has been in question that the possibility of contemporaneous domicils in different countries for different purposes has suggested itself. Thus D., though domiciled in France, can, if present in England, be sued in our courts. This fact has been expressed by the assertion that D. has a forensic domicil in England, — an expression which certainly countenances the notion that D. is for one purpose domiciled in England, and for another in France. A forensic domicil, however, means nothing more than such residence in England as renders D. liable to be sued; the co-existence, therefore, of a forensic domicil in one country, and of a full domicil in another, is simply the result of the admitted fact that a person who resides in England may be domiciled in France, and does not countenance the idea that D. can, in strictness, be at one and the same moment domiciled both in France and in England.

"*Secondly.* The inquiry which of two countries is to be considered a person's domicil, has (especially in the earlier cases) been confused with the question whether one person can at the same time have a domicil in two countries.

"D. is a Scotchman. He has a family estate in Scotland. He purchases a house and marries in England, where he generally lives with his wife. He, however, visits Scotland every summer, and goes to his estate there during the shooting-season. On his death in England intestate, a question arises as to the succession to D.'s movable property. The question must be decided with reference to the law of Scotland or of England, according to the view taken of D.'s domicil. The decision depends on a balance of evidence. Probably, if there are no other circumstances than those stated, the courts will hold him domiciled in England.

"*Exception.* A person within the operation of 24 & 25 Vict. c. 121, may possibly have one domicil for the pur-

thinks, that a person can have but one domicil for whatever purpose, although possibly for some special purposes there may be different modes of proof. The same elements of fact and intention are requisite to produce a change of the same grade of domicil, whether that grade be national, *quasi*-national, or municipal. Difficulty, however, sometimes arises from the consideration of cases of national character in time of war as authorities upon the general subject of domicil. National character is generally treated as dependent upon domicil, although certain principles are applied to the determination of the former which have no place in the determination of domicil as applicable to personal succession, jurisdiction, and the like. Indeed, the English Prize Courts have laid down some principles with respect to national character which are wholly in conflict with the generally approved

pose of testate or intestate succession, and another domicil for all other purposes.

"The general effect of 24 & 25 Vict. c. 121, is to enable the Crown to make a convention with any foreign State, the effect of which convention shall be that no British subject dying in the country to which the convention applies, or subject of such country dying in the United Kingdom, shall be deemed to have acquired a domicil in the country where he dies, unless he has fulfilled the conditions provided by the act. This enactment apparently applies only to domicil for purposes of testate or intestate succession, and does not affect a person's domicil for other purposes, *e. g.*, the determination of legitimacy or of the validity of a marriage.

"If a convention were made under it, *e. g.*, with France, a case such as the following might arise: D., a British subject, dies (after the supposed convention) domiciled in fact in France, though resident at the moment in England. He has failed to comply with the provisions of 24 & 25 Vict. c. 121, s. 1. As regards, therefore, succession to his movables, he is held domiciled in England.

"A further question arises as to the legitimacy of D.'s child, born in France, after D.'s acquisition of a French domicil. This question must probably be decided on the view of D.'s being domiciled in France. D., therefore, will be held for one purpose to have had an English, and for another, to have had a French domicil at the same time."

The following language of Shaw, C.J., in Otis *v.* Boston (12 Cush. 44, 49), although used primarily with reference to municipal inhabitancy, may, it seems to the writer, well be extended to domicil of whatever grade. He says: "Nor is it consistent with these provisions" (of the tax laws) "to hold that a man may be an inhabitant in one town for purposes of taxation, and in another for the enjoyment of political privileges or municipal rights. *The being 'an inhabitant' is a fact first to be fixed.* These laws, we think, assume that a man may be an inhabitant of some one town in the Commonwealth, and cannot at the same time be an inhabitant of any other; and that there are facts and circumstances attending every man's personal, social, and relative condition, which do determine in what town he is an inhabitant, and that these facts and circumstances are capable of judicial proof."

principles of the law of domicil. It is best, therefore, to consider the cases of national character as standing wholly by themselves, and resting upon something which is not domicil in its true sense, but only resembles it in its general features.[2]

§ 96. **Id.** — It is said by Chancellor Kent: "There is a political, a civil, and a forensic domicil;"[1] and similar language is used by others. It is not probable that this learned jurist meant by a political domicil the place where one's allegiance is due. This is an error fallen into by some, but allegiance (except that temporary allegiance which every person owes to the laws of the place where he happens to be) and domicil have no necessary connection.[2] By the phrase "political domicil" is probably meant the place where, if a man's domicil and allegiance happen to coincide, he discharges his obligations to the Government and enjoys his rights of citizenship. But so far as is discoverable from the decided cases, this sort of domicil is constituted in exactly the same manner as that sort of domicil which is used to

[2] See *supra*, § 26, and *infra*, § 387. These remarks have reference more particularly to the English cases.

[1] Comm. vol ii. p. 431 note.

The French law recognizes several different kinds of domicil with reference to different purposes; viz., "domicile réel," or general, "domicil élu," "domicile de secours," and political domicil. The first of these is domicil in its general sense, and such as is discussed in this work. "Domicile élu" is a conventional or fictitious domicil, actually or presumably selected by the parties (or one or more of them) to a transaction, for the purpose of designating a particular place where may be performed or executed acts flowing out of or relating to such transaction. It is a pure fiction, and is not in any sense domicil as that term is understood in our jurisprudence. Upon this subject see Sirey et Gilbert, Code Civil Annoté, art. 111 and notes, and the authorities there cited. "Domicile de secours" is thus defined by La loi du 24 Vendémiaire, An 2: "C'est le lieu où l'homme nécessiteux a droit aux secours publiés." It is largely the same as pauper settlement under the laws of England and the various States of this Union, although it seems to depend upon mere sojourn or continued physical presence in a particular place to a larger extent than does settlement either in England or in this country. The subject is discussed at some length in the Thèses pour le Doctorat of Ancelle, Chavanes, and De Fongaufier. "Domicile politique" indicates the place where a Frenchman of the age of twenty-one years, and enjoying civil and political rights, may exercise the right of suffrage. It does not depend upon "domicile réel," as does the right of suffrage in this country. A Frenchman may have a "domicile réel" in one place and the right of suffrage in another, although the two usually correspond. See on this subject the Thèses above named.

[2] See *infra*, § 144 *et seq.*

determine the civil as distinguished from the political *status* of the individual.[3] Speaking generally, the same may be said with regard to "forensic domicil." For, as has been justly pointed out by Savigny, the adherence of the law of a particular State as a quality of the person and the subjection of the person to the jurisdiction of the courts of a State "are to be regarded only as different sides of the totality of the local law"[4] — different appearances of the same territorial law to which the individual is subject. Generally speaking, therefore, jurisdiction, according to the British and American cases, when it depends upon domicil at all, depends upon the same kind of domicil as that which determines civil *status*. This is illustrated by the cases involving the question of the jurisdiction of the United States Courts in suits between citizens of different States.[5] With respect to jurisdiction for purposes of divorce, however, certain considerations have induced at least an apparent departure from this principle in certain cases.[6]

§ 97. **Municipal Domicil.** — The maxim applies as well to cases of municipal domicil as to those of national or *quasi*-national domicil.[1] It is true that in cases of the former class it is more frequently difficult to distinguish between what are apparently equal residences, and therefore slighter circumstances have to be resorted to for that purpose, but there is almost invariably some preponderating circumstance which fixes some particular place as more than all others the *home* of the person. The extreme inconvenience of attributing

[3] See *supra*, § 53.

[4] System, etc. § 356 (Guthrie's trans. p. 114).

[5] *Supra*, § 48.

[6] *Supra*, § 39, and *infra*, § 222 *et seq.*

[1] Harvard College *v.* Gore, 5 Pick. 370; Abington *v.* North Bridgewater, 23 id. 170; Opinion of the Judges, 5 Met. 587; Otis *v.* Boston, 12 Cush. 44; State *v.* Ross, 23 N. J. Law (3 Zab.) 517; Dauphin County *v.* Banks, 1 Pears. 40; State *v.* Steele, 33 La. An. 910; Brown *v.* Boulden, 18 Tex. 431; Shepherd *v.* Cassiday, 20 id. 24; Cross *v.* Everts, 28 id. 523. In Harvard College *v.* Gore, Parker, C. J., says (p. 377): "In England it is said there may be two domicils at the same time, and then the question of birth or death may be important, among other things, in ascertaining the rule of succession; but by our law a man cannot be an inhabitant of two towns at the same time. The right to vote, eligibility to office, and the liability to taxes in one town, are necessarily exclusive of the same rights and liabilities in all other towns. Showing, therefore, that the testator was an inhabitant of Waltham, is showing that he was not an inhabitant of Boston."

to a person more than one place for settlement, voting, taxation, militia and jury services, and the like, becomes apparent without discussion. Says Shaw, C. J., in Abington *v.* North Bridgewater,[2] a case of municipal domicil: "The supposition that a man can have two domicils would lead to the absurdest consequences. If he had two domicils within the limits of distant sovereign States, in case of war, what would be an act of imperative duty to one would make him a traitor to the other. As not only sovereigns, but all their subjects, collectively and individually, are put into a state of hostility by war, he would become an enemy to himself, and bound to commit hostilities and afford protection to the same persons and property at the same time. But without such an extravagant supposition, suppose he were domiciled within two military districts of the same State, he might be bound to do personal service at two places at the same time; or in two counties, he would be compellable, on peril of attachment, to serve on juries at two remote shire towns; or in two towns, to do watch and ward in two different places. Or, to apply an illustration from the present case. By the provincial laws cited, a man was liable to be removed by a warrant to the place of his settlement, habitancy, or residence,—for all these terms are used. If it were possible that he could have a settlement or habitancy in two different towns at the same time, it would follow that two sets of civil officers, each acting under a legal warrant, would be bound to remove him by force, the one to one town, and the other to another. These propositions, therefore, that every person must have some domicil, and can have but one at one time for the same purpose, are rather to be regarded as *postulata* than as propositions to be proved. Yet we think they go far in furnishing a test by which the question may be tried in each particular case."

8. *Every Person who is* sui juris *and capable of controlling his Personal Movements may change his Domicil at Pleasure.*

§ 98. **Roman Law.** — Freedom of choice and change lay at the foundation of domicil in the Roman law, and was one

[2] 23 Pick. 170, 177.

of the distinguishing features between it and *origo*. We have seen that the *municeps* could not, without the consent of the magistrates, divest himself of his *origo*, even though he acquired citizenship elsewhere, and that such acquisition could not take place through his own act and will alone. But it was different with respect to domicil, which, subject to a few exceptions, might be abandoned or acquired at pleasure. "Nihil est impedimento, quominus quis, ubi velit, habeat domicilium, quod ei interdictum non sit."[1] And so strongly was this freedom insisted upon, that we find it decided that if a legacy have annexed to it a condition of residence in a particular place, the condition is void.[2] The exceptions were: (1) where residence in a particular place was forbidden (alluded to in the above-cited text),[3] and (2) where an *incola* had been called to the exercise of public functions, in which case he was not allowed to abandon his domicil until these functions were fulfilled.[4] A third exception to the general rule of freedom of choice, although not an exception to the rule as above stated, was the case of a person whose domicil was fixed by law, *e.g.*, a soldier who was domiciled at the place where he served, or an exile who was domiciled at the place to which he was banished.[5] Such was the case in the time of the earlier Empire; but subsequently, the municipal burdens having become so grievous

[1] Dig. 50, t. 1, l. 31.

[2] Dig. 35, t. 1, l. 71, § 2. See *supra*, § 5, note 1.

[3] See also Dig. 48, t. 22, l. 7, § 10.

[4] Dig. 50, t. 1, l. 34: "Incola jam muneribus publicis destinatus, nisi perfecto munere, incolatui renunciare non potest;" and Code 10, t. 39, l. 1: "Non tibi obest, si cum incola esses, aliquod munus suscepisti; modo si antequam ad alios honores vocareris, domicilium transtulisti." Grotius understood the provisions of the Roman law upon this subject to mean rather that an *incola* could not, by changing his domicil, free himself from his municipal obligations than that he was not allowed to change his domicil. De Jure Belli et Pacis, l. 2, c. 5. no. 24. Here may be corrected an error fallen into by Washington, J., in The Venus, 8 Cranch, 253, 278, in saying that "Grotius nowhere uses the word 'domicil.'" "Domicilium" is used in the passage above cited. The remark quoted is erroneously attributed by Phillimore to Marshall, C. J., Law of Dom. no. 8, note (*i*); Int. L. vol. iv. no. 42, note (*o*).

[5] Dig. 50, t. 1, l. 23, § 1, and id. l. 22, § 3. See *supra*, § 5, note 1. So also a senator had a *domicilium dignitatis* in the Imperial City, although this did not prevent him from having a domicil elsewhere. Code 10, t. 39, l. 8; id. 12, t. 1, l. 15, and Dig. 50, t. 1, l. 22, § 6. See same note and Voet, Ad Pand. l. 5 t. 1, no. 93.

as to cause many to seek to escape them, it was found necessary to prohibit change of domicil, except when specially authorized by the Emperor, and to enforce the prohibition by confiscation of goods.[6] But the exceptions arising out of particular and peculiar circumstances cannot be regarded as shaking the general rule of freedom of choice.

§ 99. **Modern Jurists.** — Among the modern continental jurists the principle of entire freedom to change domicil at pleasure has been generally received.[1] Bouhier says[2] emphatically: "One of the principal attributes of the freedom of man is the power to go where he pleases, and to transfer his domicil to whatever place seems good to him, unless he be subject to some political law or seignorial right which forbids." Mouricault, in his report to the Tribunat, says:[3] "The citizen is not tied down to his domicil of origin; free, at his majority or even at his emancipation, to dispose of his person, he may choose his residence where it seems good to him; he may quit not only his domicil of origin for another, but again that one for a new one; he may, in a word, change it at will according to his interest or even according to his fancy." This language may have been intended to apply only to change of domicil within the territory of France, although its scope seems to be wider. There has been some difference of opinion in France as to whether a Frenchman can establish

[6] Dig. 27, t. 1, l. 12, and Code 10, t. 1, l. 4. These texts do not seem entirely satisfactory, but such was the opinion of Cujas, tom. 5, 1148. See also Ancelle, p. 58, Chavanes, p. 61, Roussel, p. 28, and De Fongaufier, p. 55, Thèses pour le Doctorat.

[1] Voet, Ad Pand. l. 5, t. 1, no. 99; Corvinus, Jur. Rom. l. 10, t. 39; Pothier, Intr. aux Cout. d'Orléans, no. 14; Bouhier, Obs. sur la Cout. de Bourg. ch. 22, p. 417, ed. 1742; Fœlix, Droit Int. Priv. t. 1, no. 28; Savigny, System, etc. § 353 (Guthrie's trans. p. 99); Demolombe, Cours de Code Napoléon, t. 1, no. 351; Calvo, Manuel de Droit Int. § 201, and Dict. Droit Int. Pub. et Priv. *verb.* Domicile.

Phillimore (Law of Dom. nos. 162, 163) held the principle of freedom of choice and change of domicil as a general maxim, but admitted a possible exception in the case of Russian subjects. This opinion he subsequently qualified. Int. L. vol. iv. 2d ed. no. 205. It may however be taken as beyond peradventure that the courts of this country and Great Britain would refuse to give effect to any restriction put by the Government of Russia, or of any other country, upon the free migration of its subjects, and would, in a proper state of facts, hold a change of domicil in the case of a subject of such Government, notwithstanding any prohibition, general or special, forbidding his emigration.

[2] *Loc. cit.*

[3] Séance du 18 Ventôse, An 11.

a domicil in a foreign country in complete derogation of his French domicil. Demolombe[4] holds that he cannot. But the great weight of authority — both of authors and judicial decisions[5] — is that he can, and the law of July 27, 1872, providing for registration for military purposes, assumes the latter view as correct.

Another and more serious question has divided opinion among jurists, particularly those of France, — namely, whether a foreigner may acquire without authorization a true domicil in a country whose laws require authorization. This question will be discussed further on.[6]

§ 100. **British and American Authorities.** — The British and American authorities are unanimous in support of the rule as above stated.[1] It is true that Sir John Nichol, in Curling

[4] Cours de Code Napoléon, tom. 1, no. 349. He says "that an establishment of a Frenchman in a foreign country, so long as he has not there become naturalized, does not present the characters of duration and fixity which constitute domicil. A Frenchman is always presumed to preserve intention to return (*esprit de retour*), and hence to be only more or less temporarily in the foreign country." No doubt such presumption is perfectly valid; but it is only a presumption of fact, and, although strong, is not conclusive; as appears from the Code Civil itself, which provides (Art. 17) that "the quality of Français will be lost, 1st, by naturalization acquired in a foreign country; . . . 3d, by every establishment set up in a foreign country, *sans esprit de retour*." In construing this article the French tribunals and writers have very properly held that "esprit de retour" is to be presumed until the contrary is shown. See Sirey et Gilbert, Code Civil Annoté, art. 17 and note 45 *et seq.*, and authorities there cited; also Demolombe, Cours de Code Napoléon, t. 1, no. 181, and authorities cited.

[5] Dalloz, *verb.* Dom. § 2, no. 20; Massé et Vergé, Droit Civil Français, t. 1, § 80, p. 124, note 4; Demangeat sur Fœlix, t. 1, p. 57, note *a*, 3d ed.; Laurent, Principes de Droit Civil Français, t. 2, no. 67; Sirey et Gilbert, Code Civil Annoté, art. 103 and cases cited in note 21 *et seq.*; also Thèses pour le Doctorat of Ancelle, p. 107 *et seq.*, and Chavanes, p. 120 *et seq.*

[6] *Infra*, ch. 19.

[1] In the presence of the large number of cases in which freedom of change has been recognized, it seems scarcely worth while to cite any specific authorities upon this point. The following may however be referred to: Udny *v.* Udny, L. R. 1 Sch. App. 441, per Hatherley, Ch.; Hamilton *v.* Dallas, L. R. 1 Ch. Div. 257, 269; Harral *v.* Harral, 39 N. J. Eq. 279; Lestapies *v.* Ingraham, 5 Pa. St. 71; Dale *v.* Irwin, 78 Ill. 160; Tanner *v.* King, 11 La. R. 175; Hennen *v.* Hennen, 12 id. 190; Randolph *v.* Russell, 11 Tex. 460.

In Udny *v.* Udny Lord Hatherley said: "It seems to me consonant both to convenience and to the currency of the whole law of domicil to hold that the man born with a domicil may shift and vary it as often as he pleases, indicating each change by intention and act, whether in its acquisition or abandonment." In Hamilton *v.* Douglas, Bacon, V. C., in holding that a peer of the British Parliament may acquire a foreign domicil, said: "In my opinion

v. Thornton,[2] doubted "whether a British subject is entitled so far 'exuere patriam' as to select a foreign domicil in complete derogation of his British," and thereby render his personal property in England liable to distribution according to foreign law. But his doubts were distinctly overruled by the High Court of Delegates in Stanley *v.* Bernes,[3] and all the subsequent cases have followed the doctrine of the latter case. No such question should now arise, as modern improved means of travel and views of government have brought nations into a state of closer community and reciprocity, and have induced those countries which clung most tenaciously to the doctrine of perpetual allegiance, lately to surrender it. And if a person is allowed to change his nationality at pleasure, there seems to be no good reason why he should not be allowed equal facility in changing his domicil.

§ 101. **Municipal Domicil.** With respect to municipal domicil the reason for the application of the rule is particularly strong. In a Louisiana case[1] of that kind it was remarked: "He may change it [domicil] at will, and any restraint upon his choice would be an abridgment of his rights. . . . The law seeks for the intention, and allows every citizen freely to select his domicil accordingly as his interest, inclination, or even caprice may direct."

it was abundantly competent for him or any other free man, peer or peasant, to change his residence from his place of origin and take up a domicil in a foreign country."

With respect to persons incompetent to change their domicils at pleasure by reason of not being *sui juris*, or being under constraint, see the various heads of Wife, Infant, Non Compos, Prisoner, Exile, etc., *infra*.

[2] 2 Add. 6.

[3] 3 Hagg. Eccl. 373. See also Croker *v.* Marquis of Hertford, 4 Moore P. C. 339.

[1] Tanner *v.* King, *supra*, and repeated in Hennen *v.* Hennen, *supra*.

CHAPTER V.

CLASSIFICATION OF DOMICIL.

§ 102. VARIOUS classifications of the different kinds of domicil, with respect to the manner in which they may be obtained, have been suggested; but they are for the most part arbitrary and unsatisfactory. Voet[1] divides domicil into two kinds, voluntary and necessary; but unfortunately appears to confine the latter to the domicil which was attributed by the Roman law to a person whose presence at a place was compulsory (*e. g.*, a *relegatus*, or a soldier), and consequently makes no provision for the domicil of dependent persons (infants and married women). If, however, "necessary domicil" is understood to include all cases in which domicil is imputed by law to a person without his choice, this classification is exhaustive; but whether it is at all serviceable — at least without more minute subdivision — in helping us to any clearer understanding of the subject, may well be doubted.

Story[2] classifies as follows: (1) domicil by birth; (2) domicil by choice; and (3) domicil by operation of law. "The last," he says, "is consequential, as that of the wife arising from marriage." But so is "domicil by birth," or, to use the more common phrase, "domicil of origin." The first is therefore not properly a division by itself, but a subdivision of the third.

Phillimore's[3] classification, which is carried out further, is open to the same criticism, as well as others. He reduces the different kinds of domicil to three: (1) domicil of origin or birth (*domicilium originis vel naturale*); (2) domicil by operation of law (*necessarium*); (3) domicil of choice where

[1] Ad Pand. l. 5, t. 1, no. 93.

[2] Confl. of L. § 49. This is substantially the same division as that given by Bouhier, Obs. sur la Cout. de Bourg. c. 22, p. 417, ed 1742.

[3] Law of Dom. c. 5, pp. 25, 26; Id. Int. L. vol. iv. ch. 7.

one is abandoned and another acquired (*voluntarium*, *adscititium*, *domicile de choix*). Domicil by operation of the law he further subdivides by saying that it comprises two classes of persons: (1) those who are under the control of another and to whom the State gives the domicil of another; (2) those on whom the State affixes a domicil, (i.) by virtue of the employment or office they hold, (ii.) by virtue of some punishment inflicted upon them. Under the first class he includes (1) the wife; (2) the minor; (3) the student; (4) the servant. Under the second class he includes (1) the officer, civil or military; (2) the prisoner; (3) the exile.

In this subdivision he is unfortunate, inasmuch as many of his subordinate classes are composed of persons whose domicils are not necessarily fixed by operation of the law. Thus, for example, that of the student is as much a domicil of choice as that of his teacher. So too, while a person appointed for life to a civil office, which requires residence at a particular place, takes by operation of law a domicil there, one who receives a temporary or revocable appointment is free to retain the domicil which he had at the time of his appointment or to change it for another as he sees fit. And similar criticisms may be made with regard to other subordinate classes.

Another classification is that which Dicey [4] has apparently followed; namely, (1) domicil of origin, (2) domicil of choice, and (3) domicil of dependent persons. But this is not exhaustive, as it does not include some domicils which are fixed by operation of law, — for example, of a person appointed for life to a civil office requiring residence,[5] or a prisoner for life (according to some authorities), etc.

§ 103. A proper classification [1] is doubtless desirable, but

[4] Dom. rules 5 to 11 and *passim*. For a discussion of several of the best-known classifications of domicil, see Dicey, Appendix, no. 2, pp. 339–341.

[5] Unless, perhaps, this may be looked upon as a species of domicil of choice, inasmuch as the acceptance of such an office is usually a matter of choice. And perhaps, further, the rule may be looked upon as having its foundation in the presumption that the official intends to do his duty and reside at the place which the law points out. Such appears to be the view of Bouhier, Obs. sur la Cout. de Bourg. c. 22, p. 417, ed. 1742.

[1] A favorite classification among the older commentators upon the Roman law is the division of domicil into three kinds, viz., *naturale*, *accidentale*, and *commune*, the first being domicil of ori-

it is not essential to a proper understanding of the subject. It is proposed here not to attempt one, but simply to consider the subject of domicil in what appears to be its natural order; namely, (1) domicil of origin; (2) domicil of choice and the requisites for a change of domicil, *i. e.* (*a*) abandonment of domicil of origin and the acquisition of a domicil of choice, or (*b*) the substitution of one domicil of choice for another; (3) reverter of domicil, or the rehabilitation of domicil of origin after the abandonment of domicil of choice; (4) domicil of particular persons; (5) domicil at particular places, including domicil in countries where authorization is required and in barbarous and Mahometan countries; and (6) the *criteria* of domicil, or the evidence by which a domicil is shown.

gin, although it is much confused with *origo*, or local citizenship, as it existed in the Roman law. The second — *domicilium habitationis*, as it was frequently called — included domicil of choice and possibly necessary domicil, or at least some kinds of necessary domicil. The third was not properly domicil at all, but *patria* in the broad sense expressed by Modestinus, "Roma communis nostra patria est." Dig. 50, t. 1, l. 33. See Corvinus, Jur. Rom. l. 10, t. 39, and Christenæus, Decis. Curiæ Belgic. vol. v. l. 10, t. 38 and 39, dec. 31.

CHAPTER VI.

DOMICIL OF ORIGIN.

§ 104. **General Remarks.** — Every person receives at birth a domicil, technically known among modern jurists as "domicil of origin." [1] Says Lord Westbury in Udny *v.* Udny: "It is a settled principle that no man shall be without a domicil; and to secure this result the law attributes to every individual as soon as he is born the domicil of his father if the child be legitimate, and the domicil of his mother if illegitimate. This has been called the domicil of origin, and is involuntary."

We have seen that *origo* and *domicilium* in the Roman law were distinct ideas, and the collocation of them in the phrase *domicilium originis* would have implied a contradiction.[2]

[1] Udny *v.* Udny, L. R. 1 Sch. App. 441, per Lord Westbury, p. 457; Littlefield *v.* Brooks, 50 Me. 475; Abington *v.* North Bridgewater, 23 Pick. 170; Crawford *v.* Wilson, 4 Barb. 504; Matter of Scott, 1 Daly, 534; Matter of Bye, 2 id. 525; Voet, Ad Pand. l. 5, t. 1, no. 92; Mascardus, De Probat. concl. 535, no. 1; Christenæus, Decis. Curiæ Belgic. vol. v. l. 10, t. 39, decis. 32, no. 13; Calvo, Manuel, § 198; Savigny, System, etc., § 359 (Guthrie's trans. pp. 130, 131); Westlake, Priv. Int. L. 1st ed. no. 33, rule 1; Id. 2d ed. § 228; Dicey, Dom. p. 69.

Westlake, while correctly defining (2d ed. § 228) domicil of origin to be that which the law attributes to a person at the time of his birth, thinks that for some purposes (*e. g.*, reverter) the term should be understood as including also the domicil which a person possesses at the time when he first becomes capable of selecting one for himself, or, in other words, his last derivative domicil (2d ed. § 245). He cites no authority, however, and certainly no British or American case is to be found which holds this doctrine, although a loose expression of Judge Rush in Guier *v.* O'Daniel (1 Binney, 349, note), seems to give some countenance to it; but see authorities collected in notes, *infra*, § 105.

Laurent, Principes de Droit Civil Français, t. 2, no. 73, distinguishes between domicil of birth and domicil of origin. By the former he understands that which the child at his birth receives from his father, and by the latter that which the father has at the moment when the child becomes free to dispose of his person. The two are identical provided the father retains the same domicil throughout the entire infancy of the child; otherwise not.

[2] See *supra*, §§ 2–6. Savigny says: "We must here notice particularly a

But the word *origo*, having dropped out of common use in the sense in which it was understood among the Roman jurists, has been adopted by modern jurists in an entirely new and different sense. It is rarely — at least in our law — used alone, but is joined with *domicilium* in the phrase given above, which, although open to criticism, is now in too general use to be discarded. Phillimore prefers the phrase "domicil of birth," and it is used by some; but the phrase "domicil of origin" has now obtained almost universal acceptance among the British and American authorities, and is also generally used by the continental writers.[3]

singular, but among modern writers a very common, technical expression, — *domicilium originis*. According to the Roman usage, this collocation of words is contradictory, as these expressions indicated two different, independent grounds of subjection. As used by the modern jurists, it means the domicil of a man which is constituted, not by his own free will, but by his descent, and which therefore in some sort rests on a fiction. . . . The Romans designate as *origo* the citizenship acquired by his birth. We call by the name of *origo* the fiction that a man has a domicil at the place where his father's domicil was at the time of his birth." System, etc. § 359 (Guthrie's trans. pp. 130 and 131).

This distinction is not unfrequently lost sight of by even the best writers. Thus we find texts of the Roman law relating to *origo* cited as authorities upon domicil of origin; *e. g.*, even Story, Confl. of L. § 46, and Phillimore, Dom. nos. 84, 35, and 97. The latter writer, however, in his work on International Law (vol. iv. no. 69), says: "But this expression 'domicil of origin' is incorrect, and tends to confound the distinct ideas of 'origin' and 'domicil.' There is a time, indeed, when they happen to be identical; for instance, a child born in the State in which his father is domiciled has, generally speaking, his origin and his domicil in that State; because in the case of a person who has never *acquired* a domicil, you must go back to the epoch when a domicil was chosen for him; this epoch is the time of his birth. This is the true meaning of 'origo,' to which jurists have referred when they have spoken of *forum originis*; though they have sometimes confounded *origin* with the accidental *place of birth*, and sometimes have not had a clear idea of the relation which modern *origin* bears to the Roman *origo*." And after calling attention to Savigny's explanation of *origo*, he proceeds: "The expression, therefore, *domicilium originis*, is, with reference to the language of the Roman law, unintelligible, and confounds two distinct and independent ideas; while with reference to modern law, it signifies a *domicil* not founded upon choice, but upon descent from a parent, and therefore in some sort upon fiction." But despite this explanation the same learned writer again falls into the old habit of citing Roman law texts covering *origo* as authorities upon the subject of domicil (Int. L. vol. iv. nos. 69, 132).

[3] Various other terms have been applied to this species of domicil; viz., "natural," "paternal," "original," "native domicil," "domicil by birth," "of nativity," etc. Another, and altogether inexcusable, phrase was formerly used to a considerable extent in some of the decided cases, as synonymous with domicil of origin, viz., "*forum* originis," *e. g.*, by Lord Alvanley in Somerville

§ 105. **Domicil of Origin, how constituted.** — "Domicil of origin," according to Lord Alvanley in Somerville *v.* Somerville,[1] "is that arising from a man's birth and connections." It is imputed to a person by a fiction of law,[2] and hence, according to some of the authorities, arises the peculiar significance attached to it.[3]

A child, if legitimate, receives, as his domicil of origin, the domicil of his father at the time of his birth,[4] and, if illegitimate, the domicil of his mother at the time of his birth.[5] Ordinarily domicil of origin corresponds with the place of birth; but this is merely accidental, and a child born upon a journey will have the same domicil of origin as if born at the home of his parents.[6] So too the child of an ambassador or

v. Somerville, 5 Ves. Jr. 750. "The third rule I shall extract is that the original domicil, or, as it is called, the *forum originis*, or the domicil of origin, is to prevail," etc. So, too, Sir John Nichol in Curling *v.* Thornton, 2 Add. Ecc. 6; Grier, J., in White *v.* Brown, 1 Wall. Jr. C. Ct. 217, and others. The phrase, however, is no longer commonly used.

[1] *Supra*, 5 Ves. Jr. 750.

[2] Savigny, System, etc. § 359 (Guthrie's trans. p. 132); Bouhier, Obs. sur la Cout. de Bourg. c. 21, p. 183, ed. 1742; Dicey, Dom. p. 69. It is not acquired, but attributed by law. Udny *v.* Udny, *supra*.

[3] Udny *v.* Udny, *supra*, and see Lord Fullerton, in Comm'rs of Inland Rev. *v.* Gordon's Ex'rs, 12 D. (Sc. Sess. Cas. 2d ser. 1850) 657, 661.

[4] Udny *v.* Udny, *supra*; Wolcott *v.* Botfield, Kay, 534; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Firebrace *v.* Firebrace, L. R. 4 P. D. 63; Wylie *v.* Laye, 12 S. (Sc. Sess. Cas. 1st ser. 1834) 927; Prentiss *v.* Barton, 1 Brock. 389; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; Hart *v.* Lindsey, 17 N. H. 235; *Ex parte* Dawson, 3 Bradf. 130; Matter of Scott, 1 Daly, 534; Matter of Bye, 2 id. 525; Allen *v.* Thomason, 11 Humph. 536; Harkins *v.* Arnold, 46 Ga. 656; Powers *v.* Mortee, 4 Am. L. Reg. 427; Story, Confl. of L. § 46; Wharton, Confl. of L. § 35; Westlake, Priv. Int. L. 1st ed. no. 35, rule 2; Id. 2d ed. § 233; Dicey, Dom. p. 69, rule 6; Foote, Priv. Int. Jur. p. 9; Savigny, System, etc., § 353; (Guthrie's trans. p. 100); Fœlix, Droit Int. Priv. t. 1, no. 28; Bouhier, Obs. sur la Cout. de Bourg. c. 22, p. 417, ed. 1742; Calvo, Manuel, § 198; Id. Dict. *verb.* Dom.

Some of the above authorities lay it down that the domicil of origin of a legitimate child is that of his *parents* at the time of his birth, but this of course means that of his father, inasmuch as the wife has no other domicil than that of her husband. See *infra*, § 209 *et seq.*

[5] Udny *v.* Udny, *supra*, per Lord Westbury; Story, Confl. of L. § 46; Wharton, Confl. of L. § 37; Westlake, Priv. Int. L. 1st ed. no. 35, rule 2; Id. 2d ed. § 234; Dicey, Dom. p. 69, rule 6; Savigny, System, etc. § 353 (Guthrie's trans. p. 100); Fœlix, Droit Int. Priv. t. 1, no. 28; Calvo, Manuel, § 198; Id. Dict. *verb.* Dom. See also Bluntschli, Das Moderne Völkerrecht, § 366.

[6] Somerville *v.* Somerville, 5 Ves. Jr. 750; Hardy *v.* De Leon, 5 Tex. 211; Bouhier, Obs. sur la Cout. de Bourg. c. 21, p. 383, ed. 1742; Story, Confl. of L. § 46; Dicey, Dom. p. 71. Voet (Ad Pand. l. 5, t. 1, no. 91), speaking concerning *origo*, says: "Est autem

consul (as was the case in Udny *v.* Udny) or a soldier stationed abroad,[7] born in a foreign country would not take his domicil of origin there, but where his father is domiciled at the time of the birth of such child. The place of birth is, however, *prima facie* evidence of domicil.[8] But this is mere *prima facies*, subject to rebuttal by proof that the parent was domiciled at the time elsewhere.[9] In the absence of proof of the actual domicil of the father at the time of the birth of the child, the domicil of origin of the former, if it can be shown, will doubtless be assumed to be the domicil of origin of the latter.[10] A foundling takes his domicil of origin from the place where he is found,[11] subject to correction upon discovery of his parentage,[12] or (his parents still continuing unknown) a place of birth elsewhere than where he is found.[13] A posthumous child, according to Mr. Westlake's [14] opinion, follows

originis locus, in quo quis natus est, aut nasci debuit, licet forte re ipsâ alibi natus est, matre in peregrinatione parturiente." See also Christenæus, Decis. Curiæ Belgic. vol. v. l. 10, t. 39, decis. 33.

[7] See Wylie *v.* Laye, 12 S. (Sc. Sess. Cas. 1st ser. 1834) 927.

[8] Bruce *v.* Bruce, 2 B. & P. 229 note; Bempde *v.* Johnstone, 3 Ves. Jr. 198; Hart *v.* Lindsey, 17 N. H. 235; Harvard College *v.* Gore, 5 Pick. 370; Thorndike *v.* Boston, 1 Met. 242; Danbury *v.* New Haven, 5 Conn. 584; Washington *v.* Beaver, 3 Watts & S. 548; Wayne Township *v.* Jersey Shore, 81* Pa. St. (32 Sm.) 264; Colburn *v.* Holland, 14 Rich. Eq. 176; Hardy *v.* De Leon, 5 Tex. 211; *Ex parte* Blumer, 27 id. 731; Powers *v.* Mortee, 4 Am. L. Reg. 427; Story, Confl. of L. § 46; Dicey, Dom. p. 116.

[9] See authorities cited in last note, and Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; also authorities cited in note 6, *supra*.

[10] It was so held in Shrewsbury *v.* Holmdel (42 N. J. L. 373) with reference to settlement; and undoubtedly the same rule is applicable to domicil in general. Indeed, it flows from the principle (hereafter to be noticed, § 115) that the domicil of origin of the father is presumed to continue until it is shown to be changed.

[11] Savigny, System, etc. § 359 (Guthrie's trans. p. 132), citing Linde, Lehrbuch, § 89; Fœlix, Droit Int. Priv. no. 28; Calvo, Manuel, § 198; Id. Dict. *verb.* Dom.; Westlake, Priv. Int. L. 1st ed. no. 35, rule 2; Id. 2d ed. § 236; Dicey, Dom. p. 69, rule 6; Foote, Priv. Int. Jur. p. 9; Wharton, Confl. of L. § 39, citing Heffter, pp. 108, 109.

[12] Apart from authority this follows as a natural consequence.

[13] Westlake, *ubi supra*; Dicey, *ubi supra*; Calvo, *ubi supra*.

[14] This apparently originates with Westlake, Priv. Int. L. 1st ed, no. 35, rule 2. He is, however, followed by Dicey, Dom. p. 69, rule 6, and Foote, Priv. Int. Jur. p. 9. Calvo also takes the same view (Manuel, § 198; Id. Dict. *verb.* Dom.) apparently also following Westlake.

Dicey also holds (Dom. pp. 69, 72, 73) that a child born illegitimate, but afterwards legitimated *per subsequens matrimonium* takes as his domicil of origin the domicil which his father had at the time of the birth of the child. The authorities which he cites do not bear

the same rule as an illegitimate child, and takes the domicil of his mother at his birth; and apart from authority this seems reasonable.

§ 106. **Roman Law.** — In the Roman law sources no mention is made of anything corresponding with what modern jurists call domicil of origin, although it is probable, as Savigny [1] points out, that the Roman jurists, if a man had been found without citizenship or domicil, and for whom no domicil could be shown to have existed at any previous time, would have resorted to the domicil which his father had at the time of the birth of the son, in order to determine the *forum* or the personal law of the latter. Or, in other words, they would have imputed to the domicil of the father the same legal consequences which moderns recognize as flowing from it. This he considers a fair presumption, resulting as well from the intrinsic reasonableness of the modern doctrine (at least as he develops it) as from the analogy furnished by the case of the freedman.[2] By manumission, which was indeed the civil birth of the freedman, he took as his own the domicil of his patron; and this was communicated to his children, and even to the slaves whom he in turn manumitted. But he could nevertheless exchange this for

him out, and the proposition is by no means clear. He rests it upon the principle that a person thus legitimated "stands in the same position (after legitimation) which he would have occupied if he had been born legitimate." But this is a fiction; so is domicil of origin. So that we have fiction resting upon fiction. Moreover, to maintain the proposition it is necessary to hold that domicil of origin may be shifted from one country to another, and that a person may have one such domicil at one time and another at another time, inasmuch as according to the authorities above cited the domicil of origin of the child before legitimation is the domicil of his mother at the time of his birth. Some singular results might follow. It may be conceded that, upon the marriage of his parents, the child, if still under age, takes the domicil of his father as his own, although that this necessarily happens is denied by some. But it by no means follows that his domicil of origin is affected. Suppose that between the times of birth and marriage the father has changed his domicil; or suppose that at the time of marriage the child is of full age and has actually established for himself a domicil of choice. To attempt, particularly in the latter case, to fix upon him, by a double fiction, the suggested domicil of origin, with all the adhesiveness imputed to domicil of origin in Udny *v.* Udny, would seem to be going too far and sacrificing considerations of general convenience to the logical development of highly technical ideas.

[1] System, etc. § 359 (Guthrie's trans. pp. 130, 131).

[2] See *supra*, § 5, note 1.

a self-elected domicil of his own whenever he saw fit to do so. These decisions of the Roman jurists, Savigny argues, evidently rest upon the same principle as domicil of origin in modern law, and "leave hardly a doubt that the Romans would have given to the son of a free-born man, if he had acquired no domicil of his own, that which his father had at his birth."

§ 107. **Opinions entertained by Continental Jurists. Immutability.** — The doctrine of domicil of origin was one which presented considerable difficulty to the Civilians, and gave rise to no little contrariety of opinion among them.[1] Some undoubtedly held that it was, at least for some purposes, immutable. But this view was by no means held by all; and even where it appears to be held there is a provoking looseness of expression, and the grounds upon which it is put are far from being either satisfactory or indeed apparent, although it undoubtedly resulted from an imperfect notion of *origo*, as it existed in the Roman law, and a consequent confusion of *origo* and *domicilium*. This is especially noticeable among the glossators and the writers who immediately succeeded them. Grotius, however, in an opinion[2] written in 1613,

[1] Without citing in detail the authorities to particular points, it is sufficient to refer to the following: Bartolus, Comm. in Cod. De Municip. 10, 38; Azo, Summa, t. 38, no. 1; Christenæus, Decis. Curiæ Belgic. vol. v. l. 10, t. 39, dec. 32, no. 7 *et seq.*; Gail, Pract. Obs. l. 2, obs. 36; Zangerus, De Except. pt. 2, c. 1, no. 68 *et seq.*; Corvinus, Jur. Rom. l. 10, t. 38, 39; Henry, For. Law, p. 197; Fœlix, Droit Int. Priv. t. 1, p. 55, note 2, ed. 1856; Bouhier, Obs. sur la Cout. de Bourg. ch. 22, p. 417, ed. 1742.

It is unnecessary, as well as improper, here to enter into any minute examination of the positions of the Civilians on this subject. It is sufficient to say that what appears most prominently in their writings is that they held the doctrine of the immutability of domicil of origin or natural domicil with reference to municipal and personal burdens (which shows that they had in view the Roman doctrine of *origo*), and that they held the contrary with respect to jurisdiction (which corresponds with what has already been pointed out with respect to jurisdiction in the Roman law, *supra*, § 9). But they extended the doctrine of the immutability of domicil of origin to other subjects, *e. g.* succession. See Zangerus, *loc. cit.* and authorities there cited. Moreover, they were inaccurate in two particulars, — first, in calling *origo* by the name *domicilium*, and second, in holding the domicil of the father instead of his citizenship as the basis of *origo*. In these respects, at least, they departed from the teachings of the Roman law.

[2] Henry, For. Law, p. 197, quoting at length the opinion of Grotius from Hollandsche Consultatien, vol. iii. p. 528.

declares that not only according to the general custom of the Netherlands, but even of the whole world at that time, a man might freely change his domicil of origin for another. The doctrine of the immutability of domicil of origin appears never to have been known in France,[3] and it seems to have been entirely abandoned by the later continental jurists. It is true that some writers have considered that questions of majority and minority, paternal power, and the like should be determined by the law of the domicil of origin.[4] But this relates to the legal consequences of domicil, and not to its constitution and change.

§ 108. **Id. Constitution and Change.** — With reference to the constitution of domicil of origin, continental jurists are substantially agreed; namely, that it is the first domicil, or that which the child receives at birth, and corresponds with that which his parents have at the time of his birth, irrespective of the place of birth.[1] Laurent, however, among the later writers, holds that it is "that which the father has at the moment when the infant becomes free to dispose of his person."[2] They are generally agreed, also, that domicil of origin is of considerable importance, and is presumed to continue until it is shown to have been displaced by the acquisition of a domicil of choice, the burden of proof resting upon him who denies the domicil of origin to be the true domicil.[3]

[3] Denizart, *verb.* Dom. no. 11.

[4] See Story, Confl. of L. ch. iv. and authorities cited; Fiore, Droit Int. Priv. translated into French by Pradier-Fodéré, l. 1, c. 1, and authorities cited; Savigny, System, etc. §§ 365, 380; and Bar, § 52.

[1] Savigny, System, etc. § 359 (Guthrie's trans. p. 130); Lauterbach, De Domicilio, no. 13; Bouhier, Obs. sur la Cout. de Bourg. c. 21, p. 383, ed. 1742; Boullenois, Personalité et Réalité des Lois, etc. tit. 1, c. 2, obs. 4, t. 1, p. 53; 2 Domat, Pub. L. bk. 1, t. 16, s. 3, art. 10; Denizart, *verb.* Dom. 12 and 13; Meier, De Conflictu Legum, p. 14; Fœlix, Droit Int. Priv. t. 1, no. 28; Zangerus, De Except. pt. 1, no. 9; Toullier, Droit Civil Français, t. 1, no. 371; Calvo, Manuel, etc. § 198; Id. Dict. *verb.* Dom. See also the additional authorities cited in note 3, *infra*.

[2] Principes de Droit Civil Français, t. 2, no. 73.

[3] Mascardus, De Probat. concl. 535, no. 1; Carpzovius, Respons. l. 2, t. 2, respons. 21, no. 14; Zangerus, De Except. pt. 2, c. 1, nos. 10, 11; Voet, Ad Pand. l. 5, t. 1, nos. 92, 97; Bouhier, Obs. sur la Cout. de Bourg. c. 21, p. 383, ed. 1742; Meier, De Conflictu Legum, p. 14, no. 1; Pothier, Intr. aux Cout. d'Orléans, no. 12; Henry, For. Law (Opinion of Corvinus), p. 191; Denizart, *verb.* Dom. no. 13; Merlin, Répertoire, *verb.* Dom. § 2; Fœlix, Droit Int.

§ 109. **Domicil of Origin in British and American Jurisprudence.** — The British and American authorities attach great importance and peculiar qualities to domicil of origin, and lay down with respect to it two principles, which have passed into maxims; namely, (1) *Domicil of origin clings closely;* and (2) *Domicil of origin reverts easily.* Both of these principles are universally received in Great Britain and America.

§ 110. **Id. (1) Domicil of Origin clings closely.**[1] — As a mere principle of evidence for the ascertainment of the element of intention in a question of change of domicil, it may be assumed that a person will be loath to leave, and eager to return to, the land of his birth; and that, therefore, when a question arises between a domicil of origin and an acquired domicil, in an otherwise doubtful case, where the facts are apparently *in equilibrio*, the presumption of intention should be applied in favor of the former and against the latter. This reasoning would apply, however, only where domicil of origin happens — as it generally, although not universally, does — to coincide with the land of birth and early connections. And thus far the propositions laid down above would express presumptions of fact rather than rules of law. But they have a much deeper and more artificial meaning, resting upon the legal fiction which attributes to every person a domicil of origin at the place where his parents happen to be domiciled at the time of his birth, without any necessary reference to the place of his birth and early education. Thus in Udny *v.* Udny[2] the most extraordinary consequences are attributed to Colonel Udny's domicil of origin in Scotland, where he was neither born nor reared; his father, though a native of Scotland, having been at the time of his birth, and for many years afterwards, a British consul in Italy.

§ 111. **Id. Udny v. Udny.** — With respect to the first maxim, namely, "Domicil of origin clings closely," the British and American authorities are in entire accord in holding it,

Priv. no. 28; Demolombe, Cours de Code Napoléon, t. 1, §§ 345, 348; Laurent, Principes de Droit Civil Français, t. 2, no. 74; Calvo, Manuel, etc. § 198; Id. Dict. *verb.* Dom., and many others. See, *e. g.*, French authorities cited, Sirey et Gilbert, Code Civil Annoté, art. 102, notes 3, 8.

[1] See generally the authorities cited under this and the succeeding sections.

[2] L. R. 1 Sch. App. 441.

although the degree of tenacity attributed by the late British cases to domicil of origin is greater than that ever yet attributed to it by any decided case in this country.

In the late case of Udny *v.* Udny, decided in 1869 by the House of Lords, it was held that domicil of origin, having its foundation in a legal fiction, and being wholly independent of the will of the subject of it, clings and adheres to him so closely that he can never wholly free himself from it, and that, upon the acquisition of a domicil of choice, his domicil of origin is merely suspended or put in abeyance, to spring again into full being upon his abandonment of the acquired domicil, without any reference whatever to his ulterior intention. Lord Westbury thus states the doctrine: "It is a settled principle that no man shall be without a domicil, and to secure this result the law attributes to every individual, as soon as he is born, the domicil of his father, if the child be legitimate, and the domicil of his mother, if illegitimate. This is called the domicil of origin, and is involuntary. Other domicils, including domicil by operation of the law as on marriage, are domicils of choice. For as soon as an individual is *sui juris*, it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act. When another domicil is put on, the domicil of origin is for that purpose relinquished and remains in abeyance during the continuance of the domicil of choice; but as domicil of origin is the creature of the law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a domicil of choice. . . . The domicil of origin may be extinguished by the act of the law, as, for example, by sentence of death, or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party."

The doctrine thus laid down was necessary to the decision of the case, and was substantially concurred in by Lords

Hatherley and Chelmsford.[1] The case originated in the Scotch courts, and came up to the House of Lords on appeal. It has, however, been followed in several English decisions,[2] so that the British doctrine, thus clearly enounced, may be considered as firmly established beyond the reach of change, save by legislation.

§ 112. **Id. id.** — In spite of the care with which Lord Westbury distinguishes in this case between allegiance and domicil, it is impossible not to discover the tincture of the doctrine of perpetual allegiance running throughout it. The earliest British cases,[1] in which peculiar adhesiveness was attributed to domicil of origin, were prize cases, in which the question of national character in time of war was involved. Clinging as the British courts then did to the doctrine of the indelibility of native allegiance, and at the same time endeavoring to administer the more modern doctrine that national character in time of war depends upon residence or domicil, they very naturally came to invest domicil of origin by way of analogy with a prominence and controlling influence which, if the question had first arisen in another class of cases, they probably would not have attributed to it. But the doctrine having been once adopted, was with such astonishing severity of logic carried out to its utmost conclusions in Udny *v.* Udny, in which the question involved was a purely civil one, — *legitimation per subsequens matrimonium.*

In 1870 British statesmen by treaty and statute finally surrendered the principle of perpetual allegiance; and it may well be doubted whether, if the case had been decided a year later, a different doctrine would not have been held, or at least the doctrine stated in a more qualified form.

§ 113. **Id. Doctrine of Udny v. Udny not likely to be held in America.** Leaving out of view several *dicta*[1] by — it must be confessed — illustrious jurists, no American authority has ever gone — perhaps it might be added ever will go — to the same length as Udny *v.* Udny. It is true that the precise question

[1] For the opinions of Lords Hatherley and Chelmsford, see *infra*, §§ 193, 194.

[2] King *v.* Foxwell, L. R. 3 Ch. D. 518; Firebrace *v.* Firebrace, L. R. 4 P. D. 63; Bradford *v.* Young, L. R. 29 Ch. D. 617.

[1] See *infra*, §§ 197, 198.

[1] See *infra*, § 201, note 2.

seems never to have been raised; but the American judges have frequently, though in an *obiter* way, laid down broadly, and without restricting its operation to the case of domicil of origin, the principle that domicil once acquired continues not only until it is abandoned but until another is acquired.[2] Moreover, since the doctrine of perpetual allegiance has been abandoned by civilized nations, it is highly improbable that an American court in a case of first impression, when untrammelled by authority, would attribute greater adhesiveness to original domicil than in the present state of international law could be attributed to original allegiance. The doctrine of reverter has been, up to this time at least, confined by the American decisions to cases where there was an *animus revertendi* to the domicil of origin.[3]

§ 114. **Id. Domicil of Origin adheres until another Domicil is acquired.** — But whether the doctrine of Udny *v.* Udny be or be not accepted, the law, as held in Great Britain and America, is beyond all doubt clear that domicil of origin clings and adheres to the subject of it until another domicil is acquired. This is a logical deduction from the postulate that "every person must have a domicil somewhere." For as a new domicil cannot be acquired except by actual residence *cum animo manendi*,[1] it follows that the domicil of origin adheres while the subject of it is *in transitu*, or, if he has not yet determined upon a new place of abode, while he is in search of one, — "quærens quo se conferat atque ubi constituat." Although this is a departure from the Roman law doctrine, yet it is held with entire unanimity by the British and American cases.[2] It was first announced, though

[2] See *infra*, § 201, note 4.

[3] See *infra*, id.

[1] See *infra*, § 127 *et seq.*

[2] Somerville *v.* Somerville, 5 Ves. Jr. 750; Munro *v.* Munro, 7 Cl. & F. 842; Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Moorhouse *v.* Lord, 10 H. L. Cas. 272; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Udny *v.* Udny, id. 441; Attorney-General *v.* Dunn, 6 Mees. & W. 511; Attorney-General *v.* De Wahlstatt, 3 Hurl. & Colt. 374; De Bonneval *v.* De Bonneval, 1 Curteis, 856; Forbes *v.* Forbes, Kay, 341; Crookenden *v.* Fuller, 1 Swab. & Tr. 441; Capdevielle *v.* Capdevielle, 21 L. T. (N. S.) 660; Curling *v.* Thornton, 2 Add. 6; Burton *v.* Fisher, Milward (Ir. Eccl.), 183; Kennedy *v.* Kelley, 7 Ir. Jur. (N. S.) 326; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Prentiss *v.* Barton, 1 Brock. 389; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; Littlefield *v.* Brooks, 50 Me. 475; Gilman *v.* Gilman, 52 id.

somewhat confusedly, by Lord Alvanley in Somerville *v.* Somerville:[3] "The third rule I shall extract is that the original domicil . . . or the domicil of origin is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and taking another as his sole domicil." The same idea has been expressed by Lord Wensleydale in somewhat different phrase in Aikman *v.* Aikman:[4] "Every man's domicil of origin must be presumed to continue until he has acquired another sole domicil by actual residence with the intention of abandoning his domicil of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies upon him who asserts the change." Lord Cranworth observed in the same case: "It is a clear principle of law that the domicil of origin continues until another is acquired; *i. e.*, until the person has made a new home for himself in lieu of the home of his birth."[5] In America similar language has been used.[6]

165; Hart *v.* Lindsey, 17 N. H. 235; Abington *v.* North Bridgewater, 23 Pick. 170; Thorndike *v.* Boston, 1 Met. 242; Opinion of the Judges, 5 id. 587; Kirkland *v.* Whately, 4 Allen, 462; Hallet *v.* Bassett, 100 Mass. 167; Bangs *v.* Brewster, 111 id. 382; Dupuy *v.* Wurtz, 53 N. Y. 556; Crawford *v.* Wilson, 4 Barb. 504; Brown *v.* Ashbough, 40 How. Pr. 260; Roberti *v.* Methodist Book Concern, 1 Daly, 3; Graham *v.* Public Administrator, 4 Bradf. 127; Matter of Stover, 4 Redf. 82; Von Hoffman *v.* Ward, id. 244; Tucker *v.* Field, 5 id. 139; Hood's Estate, 21 Pa. St. 106; Reed's Appeal, 71 id. 378; Quimby *v.* Duncan, 4 Harr. (Del.) 383; Plummer *v.* Brandon, 5 Ired. 190; Horne *v.* Horne, 9 id. 99; Colburn *v.* Holland, 14 Rich. Eq. 176; Harkins *v.* Arnold, 46 Ga. 656; Smith *v.* Croom, 7 Fla. 81; Rue High, Appellant, 2 Doug. (Mich.) 515; Kellogg *v.* Supervisors, 42 Wis. 97; Layne *v.* Pardee, 2 Swan, 232; Morgan *v.* Nunes, 54 Miss. 308; Succession of Franklin, 7 La. An. 395; Heirs of Holliman *v.* Peebles, 1 Tex. 673; Hardy *v.* De Leon, 5 id. 211; Russell *v.* Randolph, 11 id. 460; Gouhenant *v.* Cockrell, 20 id. 96; Trammel *v.* Trammel, id. 406; *Ex parte* Blumer, 27 id. 735; Cross *v.* Everts, 28 id. 523; Powers *v.* Mortee, 4 Am. L. Reg. 427. *Contra*, Hicks *v.* Skinner, 72 N. C. 1.

[3] *Supra.* [4] *Supra.*

[5] The language of Lord Alvanley is open to objection in that it seems to imply that upon the acquisition of a domicil of choice, a person may, if he so elects, have two domicils, namely, a domicil of origin and one of choice, and that this happens necessarily unless he intends his acquired domicil to be his *sole* domicil. But that such was not his meaning is clearly shown by the fact that in the same case he held that, for the purpose which he was specially considering, — succession, — a person can have but one domicil. Lord Wens-

[6] See cases cited *supra*, note 2, a large number of which simply repeat the language of Lord Alvanley.

§ 115. **Id. Presumption against a Change of Domicil of Origin.** — Returning now to the consideration of the maxim as a principle of evidence upon the question of abandonment, the presumption of law is against a change of domicil of origin.[1] And the burden of proof rests upon him who impugns domicil of origin[2] or asserts a change.[3] This presump-

leydale's use of the word "sole" is open to the same criticism. Lord Cranworth's language better expresses the principle, although perhaps the explanatory clause is liable to the objection that it too closely identifies "home of birth" with domicil of origin, the latter being in many cases a pure fiction and entirely distinct from *actual* home. Lord Chancellor Cairns in Bell *v.* Kennedy, says: "The law is beyond all doubt clear with regard to the domicil of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicil is acquired."

[1] Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Moorhouse *v.* Lord, 10 H. L. Cas. 272; The Lauderdale Peerage, L. R. 10 App. Cas. 692; Anderson *v.* Laneuville, 9 Moore P. C. C. 325; Hodgson *v.* De Beauchesne, 12 id. 285; De Bonneval *v.* De Bonneval, 1 Curteis, 856; Attorney-General *v.* Rowe, 1 Hurl. & Colt. 31; Attorney-General *v.* DeWahlstatt, 3 id. 374, per Pigott, B.; Ennis *v.* Smith, 14 How. 400; Dupuy *v.* Wurtz, 53 N. Y. 556; Tucker *v.* Field, 5 Redf. 139; Hood's Estate, 21 Pa. St. 106; Plummer *v.* Brandon, 5 Ired. 190; Kelley's Ex'r *v.* Garrett's Ex'rs, 67 Ala. 304; Succession of Franklin, 7 La. An. 395; State *v.* Steele, 33 id. 910.

[2] Hodgson *v.* De Beauchesne, *supra*.

[3] Id; Aikman *v.* Aikman, *supra;* Moorhouse *v.* Lord, *supra;* Munro *v.* Munro, 7 Cl. & F. 842; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; The Lauderdale Peerage, *supra;* Crookenden *v.* Fuller, 1 Swab. & Tr. 441; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; *In re* Patience, L. R. 29 Ch. D. 976; Capdevielle *v.* Capdevielle, 21 L. T. (N. S.) 660; De Bonneval *v.* De Bonneval, *supra;* Briggs *v.* Briggs, L. R. 5 P. D. 163; Attorney-General *v.* De Wahlstatt, *supra;* Gillis *v.* Gillis, Ir. R. 8 Eq. 597; Ennis *v.* Smith, *supra;* Harvard College *v.* Gore, 5 Pick. 370; Dupuy *v.* Wurtz, *supra;* Plummer *v.* Brandon, 5 Ired. 190; Cole *v.* Lucas, 2 La. An. 946; Succession of Franklin, *supra*.

How this burden is discharged will appear in detail hereafter; but the following remarks are not out of place here. Says Sir Herbert Jenner in De Bonneval *v.* De Bonneval (*supra*): "The presumption of law being that the domicil of origin subsists until a change of domicil is proved, the *onus* of proving the change is on the party alleging it, and this *onus* is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicil; for the change must be demonstrated by fact and intention." Says Rost, J., in Succession of Franklin (*supra*): "His domicil of origin was in Sumner County, State of Tennessee; that domicil of course continued until another was acquired *animo et facto*. And the parties seeking to avail themselves of the change of domicil from Tennessee to Louisiana, must prove it by express and positive evidence; so long as any reasonable doubt remains, the legal presumption is that it was not changed." In the very recent case of The Lauderdale Peerage (*supra*) Lord FitzGerald said: "It is not upon light evidence or upon a light presumption that we can act, but it must clearly appear by unmistakable evidence that the party who has a domicil of origin intends to part with it, and intends to establish a domicil elsewhere."

tion is instanced by Voet [4] as one of the *probabiles conjecturæ* to which a judge must resort in determining doubtful or disputed questions of domicil. It rests upon two underlying principles (upon the first of which alone, however, Voet puts it).[5] For, in the first place, domicil of origin, like acquired domicil, or indeed like any other thing which is once shown to exist, is presumed to continue without change until the contrary is shown.[6]

But in the second place, keeping in view the principle (which will be discussed hereafter) that domicil can be changed only *animo et facto*, as a rule for the ascertainment of the element of intention it is to be assumed, in most cases at least, that one will very reluctantly and only under the influence of the most cogent reasons abandon his domicil of origin for another. "The existence of ordinary family ties, such as are to be presumed under [most] circumstances to be of force independent of evidence, render an attachment to such domicil probable. In all such cases, therefore, the presumption of law is against an intentional change of domicil, and ordinarily so; for a change of domicil supposes a severance, to a great degree at least, of all those mutual ties which bind mankind together, and which we all desire to retain, the dissolution of which is repugnant to all our feelings." [7]

For such reasons, therefore, in most cases stronger evidence of intention must appear in order to establish a change of domicil of origin than will be required to show abandonment of an acquired domicil.[8]

§ 116. **Id. id. But this Presumption modified by Circumstances.** — But the importance of domicil of origin in this respect is somewhat modified by circumstances. For it may sometimes happen that the individual whose domicil is in

[4] Ad Pand. l. 5, t. 1, no. 97.

[5] Id., no. 92.

[6] See *infra*, § 151 and notes.

[7] Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285. Lewis, Jr., Hood's Estate, 21 Pa. St. 106, 115, says: "The attachment which every one feels for his native land is the foundation of the rule that the domicil of origin is presumed to continue until it is actually changed by acquiring a domicil elsewhere."

[8] Lord *v.* Colvin, 4 Drew. 366; Drevon *v.* Drevon, 34 L. J. Ch. 129; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Hallet *v.* Bassett, 100 Mass. 167. See also Anderson *v.* Laneuville, 9 Moore P. C. C. 325.

question has been, at a very tender age, and before strong attachments have had time to spring up, transplanted from the land of his birth to another; or he may during the whole course of his previous life have had little, or indeed no connection with the place where the law by its fiction attributes to him a domicil. In such case the attachments which form as the child grows up, would probably be assumed in favor of his home in fact, and less than the usual *quantum* of evidence be required to show a change of his domicil of origin. "The evidence that a man intends to resign his domicil of origin ought to be cogent in proportion to the improbability of such desire. And the converse is true, — that if the probability is great, far less evidence may suffice." [1]

§ 117. Id. id. id. — The subject is illustrated by the remarks of Wickens, V. C., in Douglas *v.* Douglas: [1] "For many purposes, no doubt, a domicil of origin requires more to change it than a domicil of acquisition. Independently of any authority, nothing is easier to understand than that a Scotchman by birth considers himself to be a Scotchman in a much more definite and solemn sense than that in which a Scotchman who has acquired an English domicil by settling in England considers himself to be an Englishman. But in this case, if the testator's Scotch domicil had been an acquired and not an original domicil, it was so acquired as to resemble an original domicil rather than an acquired one. For it can hardly be doubted that from the age of twelve, or thirteen at any rate, the testator had no idea of home except a Scotch home, and thought of his father as a Scotch laird and nothing else. Hence I conceive that if the testator's domicil of origin had been English, the burthen on those who contend that he changed his then Scotch domicil after his mother's death, would be hardly lighter than if it had been Scotch, as I hold it to have been."

The remarks of Lord Justice Clerk Inglis in Lowndes *v.* Douglas [2] are to a similar effect. He said: "The domicil of origin in this case was not of a strong or deeply rooted

[1] Sharpe *v.* Crispin, L. R. 1 P. & D. 611, 621, per Lord Penzance.
[1] L. R. 12 Eq. Cas. 617, 642.
[2] 24 D. (Sc. Sess. Cas. 2d ser. 1862), 1391, 1406.

kind. The father of the testator was originally an Englishman, though resident in Scotland, and domiciled there at the time of his son's, the testator's, birth. The testator's mother was a Scotch woman, and the testator was not only born in Scotland, but received the early part of his education there. But he left Scotland at the age of ten, while still *in statu pupillari*, and was taken by his parents to England, where he received perhaps the most important part of his education; and his father and he himself became then domiciled in England. It was not from Scotland, therefore, but from England, that the testator went forth to seek his fortune in the world. And therefore his domicil of origin in Scotland was not of that strong kind to which so great effect is sometimes given, that nothing but the acquisition of a clear and permanent domicil elsewhere can destroy it, and the slightest appearance of abandonment of the acquired domicil and return to the place of domicil of origin suffices to revive it. We have not the case of a man born in Scotland of parents wholly connected with Scotland, receiving all of his education in Scotland and going forth into the world from Scotland, leaving behind him in Scotland his nearest friends and relatives. The domicil of origin here is of a different kind altogether, much more easily lost and not so easily regained." [3]

It was apparently the force of such considerations which led Westlake [4] to suggest that, for the purpose of determining questions of the displacement and reverter of domicil of origin, that term must be understood as meaning the domicil which a person has when he first acquires the power of changing his domicil for himself. While this suggestion is not admissible in view of the authorities, it is at least a strong protest against, and an evident attempt to qualify, the rigid application, made by the British courts, of the highly technical doctrine of domicil of origin.

§ 118. **Id. Presumption applies also in favor of resumed Domicil of Origin.** — The maxim applies also to resumed domicil of origin,[1] — at least, as between the state or country

[3] The original is, "not so easily recognized;" which is evidently a misprint for "regained."

[4] Priv. Int. L. 2d ed. § 245.

[1] See Moorhouse *v.* Lord, 10 H. L. Cas. 272.

of such domicil and a state or country in which the person has never before been domiciled; although it probably would require less cogent evidence to show the reacquisition of a former domicil of choice, even after the resumption of domicil of origin, than to show the acquisition of an entirely new one.[2]

§ 119. **Id. Usually slighter Evidence required to show Reverter of Domicil of Origin than Acquisition of a new Domicil.** — (2) *Domicil of origin reverts easily.*[1] This maxim also has both a technical and a natural side. The former will be discussed hereafter in the chapter on Reverter of Domicil, which it is, for various reasons, deemed best to postpone until some inquiry has been made into the requisites of a change of domicil. The principle of evidence, however, which underlies the maxim is so interwoven with what has already been said on the subject of domicil of origin, that it seems proper to consider it, at least to some extent, in this chapter.

As evidence of intention, fewer circumstances are required to show the resumption of domicil of origin than to show the acquisition of a new domicil.[2] This rests upon the general presumption of attachment which usually, though not universally, exists towards one's domicil of origin. Says Shaw, C. J., in Otis v. Boston:[3] "It is said that one's domicil of

[2] See Lowndes *v.* Douglas, *supra.*

[1] Udny *v.* Udny, L. R. Sch. App. 441; Hoskins *v.* Mathews, 8 De G. M. & G. 13, 16; King *v.* Foxwell, L. R. 3 Ch. D. 518; Firebrace *v.* Firebrace, L. R. 4 P. D. 63; The Indian Chief, 3 Rob. 12; La Virginie, 5 Rob. 98; The Matchless, 1 Hagg. Adm. 97; Colville *v.* Lauder, Morrison, Dict. Dec. *Succession*, App. no. 1; Robertson, Pers. Suc. p. 166; Lord Advocate *v.* Lamont, 19 D. (Sc. Sess. Cas. 2d ser. 1857), 779; The Venus, 8 Cranch, 253; Prentiss *v.* Barton, 1 Brock. 389; The Ann Green, 1 Gall. 274; The Francis, id. 614; Catlin *v.* Gladding, 4 Mason, 308; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; *Re* Walker, 1 Lowell, 237; s. c. *sub nom. Ex parte* Wiggin, 1 Bank. Reg. 90; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; Otis *v.* Boston, 12 Cush. 44; Hallet *v.* Bassett, 100 Mass. 167; Matter of Wrigley, 8 Wend. 140; Miller's Estate, 3 Rawle, 312; Reed's Appeal, 71 Pa. St. 378; Russell *v.* Randolph, 11 Tex. 460; Mills *v.* Alexander, 21 id. 154; Story, Confl. of L. § 48.

[2] La Virginie, *supra;* Lord Advocate *v.* Lamont, *supra;* Donaldson *v.* McClure, 20 D. (Sc. Sess. Cas. 2d ser. 1857), 307, see *infra*, § 120, note 2; Lowndes *v.* Douglas, 24 id. (1862) 1391, see *supra*, § 117; The Ann Green, *supra;* The Francis, *supra*; Catlin *v.* Gladding, *supra;* Otis *v.* Boston, *supra.*

[3] 12 Cush. 44, 50.

origin is more easily regained than any other. This is only one of those modes of approximating to the proof of fact and intent, which constitute a change of domicil in a doubtful case; because, from the natural propensities of the human mind, one will more readily be presumed to intend returning to his earliest home than to a place of temporary abode. It is but a slight circumstance, but resorted to in a nicely balanced case where slight circumstances will turn the scale."

§ 120. **Id. id. The Principle a Relative One.** — The principle is, however, a relative one, and not applicable with the same force to all cases. If domicil of origin corresponds with the place of birth and education, with allegiance and the ties of family relationship, etc., it is obviously more probable, under a given state of facts, that a resumption of such domicil is intended than if there exists nothing but the bald fiction of domicil of origin to connect the person with the place to which the change is alleged. Indeed, it is not the mere fact of domicil of origin, which is, of itself, of value in determining intention, but the facts which usually attend domicil of origin. These may vary in kind and degree, and with them, of course, varies the value of the fact of domicil of origin in assisting us to get at the intention. In Maxwell v. McClure [1] the son of a poor laborer left Scotland at an early age and went to England, where he engaged in business and acquired wealth and social position. Subsequently, his house in England having been taken by a railway company, he transferred his household establishment to a mansion which he had erected in Scotland. The circumstances (which need not be given) tending to show his intention to retain his English domicil were indeed strong, and it was held not to have been changed. In the Court of Session [2] the effect of the fact that

[1] 6 Jur. (N. S.) 407.

[2] *Sub nom.* Donaldson *v.* McClure, see *supra*. The remarks of several of the Scotch judges are important, and illustrate several points with respect to domicil of origin. They are therefore here given at length. Lord President McNeil says: "Then there is the domicil of origin. The influence of that circumstance in a case of this kind is that, according to a principle recognized in law, a party who returns to the place where he was born is more readily to be presumed to have come there with a view to permanent domicil than a party who comes as a stranger. More slender circumstances will imply a disposition to remain and become domiciled there. I believe it to be the disposition of the people of this country as of other moun-

his domicil of origin was Scotch was expressly considered and discussed at some length, with the result that little or no

tainous countries, perhaps of all countries, that after going abroad in pursuit of fortune they desire to return to the land of their birth and to spend the remainder of their days there in the enjoyment of the fortunes they have acquired elsewhere. The natives of this country, more perhaps than those of any country in the world, furnish examples of this disposition. In every county over the length and breadth of Scotland great agricultural improvements, ornamented grounds, and elegant mansions attest the success of our fellow-countrymen in other lands, — at once the monuments of and the fruits of their industry and enterprise in every quarter of the globe, — in the east, the west, the north, and the south, — in India and the West Indies, in northern America and southern Africa, in Australasia and in China, under burning suns and in frozen regions. There they have sought and made their fortunes, but they have not dwelt there to spend them. They have returned to Scotland, and have reverted to the domicil of their origin; these who have so exerted themselves — who have gone to great distances from home and realized a competency and returned to their native land — may readily be presumed to have abandoned all intention of going back to the distant countries they had left. But in the state of relationship and constant communication and intercourse which subsist between this country and England, and in the case of parties who are related to England by strong ties, who retain their friends and acquaintance there, who have been only a short time absent, and can return at any time to conduct their business there without any difficulty whatever, the intention permanently to remain in Scotland is perhaps not to be so readily inferred in such a case as in that other class of cases to which I have alluded."

Lord Ivory says: "Domicil of origin is always a circumstance of weight in cases of this sort, but not of great weight. It is generally looked upon as one of the weaker circumstances, easily obliterated and therefore not by itself conclusive. Now, with reference to the *domicilium originis* in the present case it is to be observed that if it had given rise to any continued connection and intercourse with this country or between the defender and his relations in Scotland, its effect on the result of the case might have been greater. But as I read the evidence, there has been no intercourse of any substantial kind since 1813 — when the defender left for Wigan — between him and his relations, who were of the humblest class; and when he left he was not of age. He was the son of a laborer, and was himself a laborer during all that period of his life which he spent in his native country. There were none of those ties connected with his earlier history which make a *domicilium originis* of importance. His native soil had been ungrateful. He left it for another soil, where he prospered, attained distinction, acquired friends and public station. . . . Everything that could tie a man to a place was to be found at Wigan, and therefore I start in this case with the sole conviction that his domicil of origin is to be held entirely obliterated, and that in its place there has been substituted a domicil resting on the most solid basis that one can conceive."

Lord Curriehill says: "Considering that the domicil which the defender is alleged to have abandoned was in a locality where from his boyhood he had spent his life in actual and prosperous business, and where he was enjoying the *status* and society and the municipal and political privileges to which he had risen, I desiderate clear evidence of his intention to abandon that domicil and to change it for another domicil in a locality where, so far as appears, he was an entire stranger. . . . That evidence does not appear to me to be much af-

weight was attached to it; and in the House of Lords, where the interlocutor of Court of Session was affirmed, no stress whatever seems to have been laid upon it.

fected by the circumstance that the defender's original domicil had been in Scotland; for although the abandonment of the acquired domicil is more easily presumed when the change of residence is to the native country, such a presumption can have but little operation in the present case, considering that the defender had left his native parish in early life without having ever been in circumstances to form many ties to it, and that, after more than the third of a century spent by him in the country of his adoption, there does not appear to have been anything in his native parish to attract him from the station and social position he had come to hold in England."

CHAPTER VII.

CHANGE OF NATIONAL AND QUASI-NATIONAL DOMICIL.

1. *Acquisition of Domicil of Choice.*

§ 121. WE now come to consider the subject of a change of domicil,[1] which may occur in either of two ways: (*a*) by the acquisition of a domicil of choice, or (*b*), after a domicil of choice has been abandoned, by the reverter of the domicil of origin. It is proposed to consider the former branch of the subject in this chapter, and to confine the discussion for the present to cases of national and *quasi*-national domicil, leaving the question of a change of municipal domicil for subsequent discussion.

§ 122. **Domicil of Origin more difficult to change than Acquired Domicil.** — Two points must be kept in view throughout the discussion: (1) The acquisition of a domicil of choice may be either (*a*) by the substitution of an acquired domicil for domicil of origin, or (*b*) by the substitution of one acquired domicil for another; and for the reasons given in the last chapter, domicil of origin is more difficult to change than acquired domicil.

A change of domicil is always presumed against;[1] but this

[1] This discussion has, of course, regard only to change of domicil of independent persons. The manner in which the domicil of a dependent person (married woman, infant, or, in some cases, non-compos) is altered, will be considered hereafter; and it will be found that whenever a change of the national or quasi-national domicil of a dependent person occurs, such change results from either (*a*) the acquisition of a domicil of choice by, or (*b*) the reverter of the domicil of origin of, an independent person; so that, in inquiring concerning the domicil of a dependent person, we are always driven back to an inquiry concerning the domicil of an independent person.

[1] Cases cited, *supra*, § 115, and *infra*, § 151, and Mitchell *v.* United States, 21 Wall. 350; Desmare *v.* United States, 93 U. S. 605; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Burnham *v.* Rangeley, 1 Wood. & M. 7; Kilburn *v.* Bennett, 3 Met. 199; Chicopee *v.* Whately, 6 Allen, 508; Mooar *v.*

presumption is particularly strong when the change in question is in derogation of the domicil of origin, especially if the domicil of origin corresponds with the place of birth and early education.[2]

§ 123. **National Domicil more difficult to change than quasi-National.** — (2) The change may be (*a*) from one sovereign State to another, or (*b*) from one province or State to another within the same sovereignty. The analogy of perpetual allegiance, together with some reasons drawn from the well-known feelings of mankind, have led courts to insist upon stronger facts and clearer evidence to establish a change to a foreign country than will be required to establish a change within a sovereign State.[1] Says Kindersley, V. C., in Lord *v.* Colvin: "Another principle is that which is referred to by Lord Cranworth in Whicker *v.* Hume in the House of Lords, namely, that it requires stronger and more conclusive evidence to justify the court in deciding that a man has acquired a new domicil in a foreign country, than would suffice to warrant the conclusion that he has acquired a new domicil in a country where he is not a foreigner. For instance, the court would more readily decide that a Scotchman had acquired a domicil in England than that he had acquired a domicil in France." Lord Cranworth's language is this: "I think that all courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicil into a foreign country. You may much more easily suppose that a person having originally been living in Scotland, a Scotchman, means permanently to quit it and come to England, or *vice versâ*, than that he is quitting the United Kingdom in order to make his permanent home where he must forever be a foreigner, and in a country where there must always be those difficulties which arise from the complication that exists and the

Harvey, 128 Mass. 219; Nixon *v.* Palmer, 10 Barb. 175; Pilson *v.* Bushong, 29 Gratt. 229; Lindsay *v.* Murphy, 76 Va. 428; Tanner *v.* King, 11 La. R. 175; Nugent *v.* Bates, 51 Iowa, 77; Keith *v.* Stetter, 25 Kans. 100. See also Stoughton & Peck *v.* Hill, 3 Woods, 404.

[2] *Supra*, § 115.

[1] Whicker *v.* Hume, 7 H. L. Cas. 124 (per Lord Cranworth); Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733 (per Pollock, C. B.); Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285 (per Lord Cranworth during the argument); Lord *v.* Colvin, 4 Drew. 366, 422. See same case, *sub nom.* Moorhouse *v.* Lord, 10 H. L. Cas. 272; Hegeman *v.* Fox, 31 Barb. 475.

conflict between the duties that you owe to one country and the duties which you owe to the other. Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam;* but that is a presumption at which we ought not easily to arrive, more especially in modern times, when the facilities for travelling and the various inducements for pleasure, for curiosity, or for economy so frequently lead persons to make temporary residences out of their native country."

§ 124. **A Change of Domicil a Serious Matter, and presumed against.** — But in any case a change of domicil, whether domicil of origin or of choice, national or *quasi*-national, is a very serious matter, involving as it may, and as it frequently does, an entire change of personal law. The validity and construction of a man's testamentary acts and the disposition of his personal property in case of intestacy; his legitimacy in some cases and, if illegitimate, his capacity for legitimation; the rights and (in the view of some jurists) the capacities of married women; jurisdiction to grant divorces, and, according to the more recent English view, capacity to contract marriage, — all these and very many other legal questions depend for their solution upon the principle of domicil;[1] so that upon the determination of the question of domicil it may depend oftentimes whether a person is legitimate or illegitimate, married or single, testate or intestate, capable or incapable of doing a variety of acts and possessing a variety of rights. To the passage quoted in the last section Kindersley, V. C., adds: "In truth, to hold that a man has acquired a domicil in a foreign country is a most serious matter, involving as it does the consequence that the validity or invalidity of his testamentary acts and the disposition of his personal property are to be governed by the laws of that foreign country. No doubt the evidence may be so strong and conclusive as to render such a decision unavoidable. But the consequences of such a decision may be, and generally are, so serious and so injurious to the welfare of families that it can only be justified by the clearest and most conclusive evidence."[2] And the remarks of his Honor might

[1] See *supra*, ch. 2.

[2] Also quoted and approved by Sir Cresswell Cresswell, in Crookenden *v.* Fuller, 1 Swab. & Tr. 441.

be extended, although with somewhat diminished force, to smoe cases of *quasi*-national domicil, where the change sought to be established is between States or provinces under the same general government, but having different systems of private law, as for example between Scotland and England or between Pennsylvania and Louisiana. Thus Lord Curriehill, in Donaldson *v.* McClure,[3] referring particularly to a change of domicil between England and Scotland, says: "The *animus* to abandon one domicil for another imports an intention not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicil confers, — in the domestic relations, in purchases and sales, and other business transactions, in political or municipal *status*, and in the daily affairs of common life, — but also the laws by which succession to property is regulated after death. The abandonment or change of a domicil is therefore a proceeding of a very serious nature, and an intention to make such a change requires to be proved by very satisfactory evidence."

§ 125. **Change of Domicil a Question of Act and Intention.** — All jurists agree that a change of domicil, of whatever grade, is a question of "act," or "fact," and intention, and cannot be accomplished without the concurrence of both.[1] Pothier

[3] 20 D. (Sc. Sess. Cas. 2d ser. 1857) 307, 321.

[1] Munro *v.* Munro, 7 Cl. & F. 842; Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Whicker *v.* Hume, 7 H. L. Cas. 124; Moorhouse *v.* Lord, 10 id. 272; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Udny *v.* Udny, id. 441; Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285; Attorney-General *v.* Rowe, 1 Hurl. & Nor. 31; *In re* Capdevielle, 2 Hurl. & Colt. 985; Hoskins *v.* Mathews, 8 De G. M. & G. 13; Munroe *v.* Douglas, 5 Mad. 379; Jopp *v.* Wood, 34 Beav. 88; s. c. on appeal, 4 De G. S. & J. 616; Cockerell *v.* Cockerell, 2 Jur. (N. S.) 727; Robins & Paxton *v.* Dolphin, 4 Jur. (N. S.) 267; Lyall *v.* Paton, 25 L. J. Ch. (N. S.) 746; Forbes *v.* Forbes, Kay, 341; Lord *v.* Colvin, 4 Drew. 366; Brown *v.* Smith, 15 Beav. 444; De Bonneval *v.* De Bonneval, 1 Curteis, 856; Collier *v.* Rivaz, 2 id. 855; Craigie *v.* Lewin, 3 id. 435; Laneuville *v.* Anderson, 2 Spinks, 41; Burton *v.* Fisher, 1 Milw. (Ir. Eccl.) 183; Comm'rs of Inland Rev. *v.* Gordon, 12 D. (Sc. Sess. Cas. 2d ser. 1850) 657; Ennis *v.* Smith, 14 How. 400; Mitchell *v.* United States, 21 Wall. 350; The Ann Green, 1 Gall. 274; Catlin *v.* Gladding, 4 Mason, 308; Burnham *v.* Rangeley, 1 Wood. & M. 7; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; United States *v.* Penelope, 2 Pet. Adm. 438; Doyle *v.* Clark, 1 Flipp. 536; Wayne *v* Greene, 21 Me. 357; Brewer *v.* Linnæus, 36 id. 428; Warren *v.* Thomaston, 43 id. 406; Parsons *v.* Bangor, 61 id. 457; Stockton *v.* Staples, 66 id. 197; Leach *v.* Pillsbury, 15 N. H. 137; Harvard College *v.* Gore, 5 Pick. 370; Lyman *v.* Fiske, 17 id. 231;

says: "Il faut pour cette translation le concours de la volonté et du fait;" and Denizart puts it thus: "Deux choses sont nécessaires pour constituer le domicile: 1° l'habitation réele; et 2° la volonté de le fixer au lieu que l'on habite." "Length of residence will not alone effect the change; intention alone will not do it, but the two taken together do constitute a change of domicil."[2] The French Code provides: "Le changement de domicile s'opérera par le fait d'une habitation réele dans un autre lieu, joint à l'intention d'y fixer son principal établissement."[3] In his report upon this article, the Tribune Mouricault says: "L'intention, qui n'est point accompagnée du fait, peut n'indiquer qu'un projet sans issue; le fait, qui n'est point accompagné de l'intention, peut n'indiquer qu'un essai, qu'un déplacement passager, que l'établissement d'une maison sécondaire."[4]

Opinion of the Judges, 5 Met. 587; Otis *v.* Boston, 12 Cush. 44; Bulkley *v.* Williamstown, 3 Gray, 493; Kirkland *v.* Whately, 4 Allen, 462; Wilson *v.* Terry, 11 id. 206; Whitney *v.* Sherborne, 12 id. 111; Shaw *v.* Shaw, 98 Mass. 158; Ross *v.* Ross, 103 id. 575; Bangs *v.* Brewster, 111 id. 382; Borland *v.* Boston, 132 id. 89; Dupuy *v.* Wurtz, 53 N. Y. 556; Crawford *v.* Wilson, 4 Barb. 504; Vischer *v.* Vischer, 12 id. 640; Hegeman *v.* Fox, 31 id. 475; Brown *v.* Ashbough, 40 How. Pr. 260; Isham *v.* Gibbons, 1 Bradf. 69; Graham *v.* Public Adm'r, 4 id. 127; Black *v.* Black, 4 id. 174; *Re* Stover, 4 Redf. 82; Von Hoffman *v.* Ward, 4 id. 244; Pfoutz *v.* Comford, 36 Pa. St. 420; Reed's Appeal, 71 id. 378; Carey's Appeal, 75 id. 201; Hindman's Appeal, 85 id. 466; Casey's Case, 1 Ashmead, 126; McDaniel's Case, 3 Pa. L. J. 310; State *v.* Frest, 4 Harr. (Del.) 538; Pilson *v.* Bushong, 29 Gratt. 229; Long *v.* Ryan, 30 id. 718; Lindsay *v.* Murphy, 76 Va. 428; Plumer *v.* Brandon, 5 Ired. 190; Horne *v.* Horne, 9 Ired. 99; State *v.* Hallet, 8 Ala. 159; Smith *v.* Dalton, 1 Cin. S. C. Rep. 150; Hayes *v.* Hayes, 74 Ill. 312; Hall *v.* Hall, 25 Wis. 600; Vanderpool *v.* O'Hanlon, 53 Iowa, 246; Hart *v.* Horn, 4 Kans. 232; Keith *v.* Stetter, 25 id. 100; Adams *v.* Evans, 19 id. 174; Foster *v.* Eaton & Hall, 4 Humph. 346; Layne *v.* Pardee, 2 Swan (Tenn.), 232; Williams *v.* Saunders, 5 Cold. 60; Hairston *v.* Hairston, 27 Miss. 704; Morgan *v.* Nunes, 54 id. 308; Tanner *v.* King, 11 La. Rep. 175; Gravillon *v.* Richards' Ex'rs, 13 id. 293; Cole *v.* Lucas, 2 La. An. 946; McKowen *v.* McGuire, 15 id. 637; Sanderson *v.* Ralston, 20 id. 312; Heirs of Holliman *v.* Peebles, 1 Tex. 673; McIntyre *v.* Chappel, 4 id. 187; Mills *v.* Alexander, 21 id. 154; *Ex parte* Blumer, 27 id. 734; People *v.* Peralta, 4 Cal. 175; Dig. 50, t. 1, l. 20; Voet, Ad Pand. l. 5, t. 1, no. 98; Donellus, De Jure Civili, l. 17, c. 12, no. 30; Zangerus, De Except. pt. 2, c. 1, no. 12; Corvinus, Jur. Rom. l. 10, t. 39; Denizart, *verb.* Dom. nos. 7, 17, 18; Pothier, Intr. aux Cout. d'Orléans, nos. 9, 14; Story, Confl. of L. § 44; Dicey, Dom. p. 73 *et seq.*; Westlake, Priv. Int. L. 1st ed. nos. 37–40; Id. 2d ed. §§ 229, 229 *a*, 242, 243.

[2] Collier *v.* Rivaz, 2 Curteis, 855, slightly modified in Dupuy *v.* Wurtz, 53 N. Y. 556.

[3] Art. 103.

[4] Séance du 18 Ventôse, An 11.

Demolombe draws an ingenious and interesting parallel between the acquisition of domicil and the establishment of possession. He says:[5] "The principle . . . is that domicil is formed by taking legal possession of the place in which one wishes to establish himself; and it is thus that the two most important rules of possession are found applicable to domicil. (1) Legal possession, civil possession, is acquired only by fact and intention united, — '*corpore et animo, neque per se corpore, neque per se animo;*'[6] by fact, — that is to say, by occupation; by intention, — that is to say, in general, by will to have the thing for one's own, to keep it not for a time, not precariously, as the hirer or the depositary, but on the contrary to appropriate it in a manner permanent and durable; and here indeed is, as we shall see, the intention which particularly characterizes the establishment of domicil; this intention of the person who definitively adopts a certain place for the purpose of being there held and fixed. (2) Possession, once acquired, is preserved by intention alone; '*solo animo retinetur.*'[7] In the same way domicil also is preserved, as we have seen, distinct from and independent of residence."

§ 126. **Id.** — On the one hand the mere fact of the transfer of bodily presence from one place to another will not work a change;[1] and on the other, while mere intention is sufficient to retain a domicil already established,[2] it is not sufficient to establish a new one,[3] no matter how strong that intention

[5] Cours de Code Napoléon, t. 1, no. 351.

[6] Dig. 41, t. 2, l. 3, § 1.

[7] Code 7, t. 32, l. 4: "Licet possessio nudo animo acquiri non possit, tamen solo animo retineri potest."

[1] See authorities cited, *infra*, § 135.

[2] White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Hayes *v.* Hayes, 74 Ill. 312; Rue High, Appellant, 2 Doug. (Mich.) 515; McIntyre *v.* Chappel, 4 Tex. 187; Hardy *v.* De Leon, 5 id. 211, and authorities cited, *infra*, § 151, note 6; Pothier, Int. aux Cout. d'Orléans, no. 9; Story, Confl. of L. § 44; Denizart, *verb.* Domicile, nos. 8, 19; Westlake, Priv. Int. L. 1st ed. no. 38; Demolombe, Cours de Code Napoléon, t. 1, nos. 348, 351.

[3] Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Collier *v.* Rivaz, 2 Curteis, 855, *supra;* Brown *v.* Smith, 15 Beav. 444; The President, 5 C. Rob. 277; Drevon *v.* Drevon, 34 L. J. Ch. 129; Mitchell *v.* United States, 21 Wall. 350; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; Penfield *v.* Chesapeake, etc. R. R. Co. 29 Fed. Rep. 494; Hallowell *v.* Saco, 5 Greenl. 143; Greene *v.* Windham, 13 Me. 225; Gorham *v.* Springfield, 21 id. 58; Fayette *v.* Livermore, 62 id. 229; Dupuy *v.* Wurtz, 53 N. Y. 556; Chaine *v.* Wilson, 1 Bos. 673;

may be[4] or how solemnly expressed.[5] Fact must concur with intention, otherwise no change takes place. Sir William Scott says, in "The President": "A mere intention to remove has never been held sufficient, without some overt act, being merely an intention, residing secretly and undistinguishably in the breast of the party and liable to be revoked every hour;" and he adds that even strong declarations of intention would not suffice. Paulus decided, "Domicilium re et facto transfertur, non nuda contestatione."[6] Casey's case is a strong illustration of this principle. The petitioner (in insolvency) having determined to remove from New York, where he was domiciled, to Philadelphia and to reside there permanently, sent his wife and family to the latter city, but was himself detained in New York a month longer in the adjustment of his affairs. The court, remarking that no other weight could be attached "to his sending his wife and children here except as a strong circumstance manifesting his intention to remove," dismissed the petition on the ground of want of jurisdiction, for which six months' residence was required. Almost identical with this case is the very recent case of Penfield *v.* The Chesapeake, etc. R. R. Co. in the U. S. Circuit Court for the District of New York, in which the facts were that a resident of St. Louis, Mo., having formed the intention of transferring his residence to Brooklyn, N. Y., in pursuance of that intention sent his wife and family to the latter city in August, 1883. Upon their arrival his wife hired a house there, in which she and her children thereafter continued to live. The plaintiff himself did not come to Brooklyn until January of the next year. Upon these facts the court held that he was not a resident of the State of New York prior to Nov. 30, 1883, the question being one of limitation.[7]

Black *v.* Black, 4 Bradf. 174; Lyle *v.* Foreman, 1 Dall. 480; Casey's Case, 1 Ashmead, 126; Ringgold *v.* Barley, 5 Md. 186; State *v.* Frest, 4 Harr. (Del.) 538; Smith *v.* Croom, 7 Fla. 81; State *v.* Hallet, 8 Ala. 159; Smith *v.* Dalton, 1 Cin. S. C. Rep. 150; Hall *v.* Hall, 25 Wis. 600; Hart *v.* Horn, 4 Kans. 232; and many of the authorities cited, *supra*, § 125, note 1.

[4] Forbes *v.* Forbes, Kay, 341.

[5] Waller *v.* Lea, 8 La. Rep. 213; Nelson *v.* Botts, 16 id. 596; Yerkes *v.* Brown, 10 La. An. 94.

[6] Dig. 50, t. 1, l. 20.

[7] A case of municipal domicil, Bangs

§ 127. **The requisite Factum complete Transfer of Bodily Presence.** — The requisite fact, or *factum*, is the transfer of bodily presence from the old place of abode to the new; and this *factum* must be complete.[1] "The *factum* must be not merely an inchoate act, not merely the first step towards the *factum*, but the completion of the *factum* by actual residence." "The intention must be to leave the place where the party has acquired a domicil and to go to reside in some other place as the new place of domicil, or the place of new domicil," [2] and the *factum* must be commensurate with it. Therefore it is that a new domicil cannot be acquired *in itinere*, except in cases of reverter, hereafter to be discussed.

§ 128. **Dictum of Sir John Leach in Munroe v. Douglas.** — A loose and obscure *dictum* of Sir John Leach in Munroe *v.* Douglas [1] has given much trouble, and has misled several eminent jurists into stating doctrine in entire conflict with elementary principles and the great weight of the decided cases. His language is as follows: "It is said that having afterwards quitted India in the intention never to return thither, he abandoned his acquired domicil, and that the *forum originis* revived. As to this point I can find no difference in principle between the original domicil and an acquired domicil, and such is clearly the understanding of Pothier in one of the passages which has been referred to. A domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicil be acquired unless the party die *in itinere* toward an intended domicil." The qualification of death *in itinere* appears to be a singular one, and under all the circumstances it is hard to understand exactly what his Honor meant by it. It was a mere *dictum*, apparently

v. Brewster, 111 Mass. 382, is in conflict with these cases; but the doctrine of the former is questionable, at least if extended beyond its particular facts, and probably would not be applied to national or *quasi*-national domicil.

[1] Lyall *v.* Paton, 25 L. J. Ch. 746; Pothier, Intr. aux Cout. d'Orléans, no. 15; Westlake, Priv. Int. L. 1st ed. no. 39, rule 6. But see also Id. 2d ed. § 244. Pothier says (*loc. cit.*): "La volonté de transférer notre domicile dans un autre lieu doit être justifiée. Elle n'est pas équivoque lorsque c'est un bénéfice, une charge, ou un autre emploi non amovible, qui nous y appelle. *En ce cas*, dès que nous y sommes arrivés nous y acquérons domicile et nous perdons l'ancien."

[2] Lyall *v.* Paton, *supra*.

[1] 5 Mad. 379, 404.

thrown in out of an abundance of caution, as a possible qualification of the general principle laid down, — probably to cover the Scotch case of Colville *v.* Lauder,[2] — a case of reverter, which had been cited in argument. There were, however, no facts before his Honor to which the qualification could be applied, as it was clear from all the evidence and was assumed by the court that Dr. Munroe, whose domicil was in question, did not die *in itinere* toward an intended domicil, but while on a visit to his native land (Scotland), and it was held that his acquired domicil in India continued. The meaning of the Vice-Chancellor has been discussed at considerable length by Kindersley, V. C., in Lyall *v.* Paton[3] and

[2] Morrison, *Succession*, App. no. 1; Robertson, Pers. Suc. p. 166, and see *infra*, § 129, note 2.

[3] *Supra*, Kindersley, V. C., says: "Reliance is placed upon the *dictum* of Sir John Leach in the case of Munroe *v.* Douglas. In that case, I may observe, the gentleman in question, Dr. Munroe, had acquired an Anglo-Indian domicil by long residence in India. He was in the East India Company's service; his domicil of origin was Scotch; he had returned to England, and when in England, owing to the state of his health, he was in uncertainty whether he should settle himself in England or in Scotland. In that state he went to pay a temporary visit to a friend in Scotland, and while on that visit he died in Scotland. Those were the circumstances upon which the argument and the judgment turned. Sir John Leach made this observation, and it is an observation relied upon: 'A domicil cannot be lost by mere abandonment.' I think there is no doubt that that is quite in accordance with the law of domicil, at least as established by the law of this country. He adds: 'It is not to be defeated *animo* merely, but *animo et facto*.' Nobody, I think, will dispute that proposition. Then he adds this, 'and necessarily remains until a subsequent domicil be acquired.' That, I think, is a proposition in accordance also with the law of domicil held by the courts of this country. Then he adds this, 'unless the party die *in itinere* towards an intended domicil.' Now, that is the *dictum* upon which reliance is very naturally and very properly placed by the learned counsel for the Crown; and it is contended that that is to be taken as an authority, at least as indicating the opinion of Sir John Leach, that if a party, having acquired a certain domicil different from his domicil of origin, leaves the country where he has acquired the domicil with the intention of acquiring a domicil in another country; if he sets out upon the journey towards that other country, though he never arrives there, dying *in itinere*, he does acquire the domicil which he intended to acquire. That is the view which is taken of that *dictum*.

"I confess it appears to me, when the language is examined, that it is, to say the least, somewhat doubtful whether the language really does import that opinion, especially when I take it coupled with the argument of counsel, which was a very elaborate and learned argument, referring to authorities of all kinds and from all quarters, the object of it being to show that if a party has acquired a domicil, and, intending to abandon that domicil and acquire another, starts upon his journey or voyage towards that domicil, but dies *in itinere*, the domicil of origin will revert. That was the contention that was strongly labored for by the learned counsel. The argument is

by other judges in other cases, and various conjectures have been started; but the obscurity still remains, and the case has

extremely long, and I do not think it necessary to occupy time by referring to it in detail to show that that was the labored object of counsel in using that argument. The observation of Sir John Leach, no doubt, had reference to the argument used and the cases cited in support of that argument.

"Now, what is it that Sir John Leach says? What is his general proposition? And then, what is the exception to it, if there be an exception? He says: 'A domicil cannot be lost by mere abandonment; it is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains,' — that is, the old domicil remains, — 'until a subsequent domicil be acquired.' Now, what is the exception to that? — 'unless the party die *in itinere* toward an intended domicil.' So that he says you do not acquire the new domicil by dying *in itinere* towards an intended domicil; but the effect of that is that the old domicil does not remain. The domicil may be abandoned, but Sir John Leach may have considered that the argument was a good argument that the domicil of origin would revert in such a case. That, I believe, is the doctrine of the civil law, and it appears to be held by some at least of the American jurists. But, however, let me assume that the proposition which is supposed to be contained in this *dictum* of Sir John Leach was a proposition which he meant to maintain or to indicate. I think that it is, to say the least, a proposition extremely questionable. It is admitted on all hands and by all the authorities, it is admitted by this very judgment of Sir John Leach, in Munroe *v.* Douglas, that in order to change the domicil there must be a concurrence of two things, — the *animus* and the *factum*, — there must be the intention and there must be the act done.

"Now, what must be the intention? The intention must be to leave the place where the party has acquired a domicil, and to go to reside in some other place as the new place of domicil, or the place of new domicil. That is the intention supposed. Then must not the *factum* be commensurate with that? Must it not be to the same effect as the intention? And taking the first step towards the *factum* is not the *factum*; the setting out for the purpose of going to reside in another country is not residing in another country. And surely the *factum* which is referred to when you say there must be the *animus* and the *factum* combined, is the actual residence in the other country. That is the *factum*, and not the mere *factum* of setting out with the intention of arriving, some day or other, in that country." And after commenting upon Attorney-General *v.* Dunn, 6 M. & W. 511, and Munro *v.* Munro, 7 Cl. & F. 842, he says: "What Lord Cottenham there says [Munro *v.* Munro] with regard to the abandonment of domicil of origin and acquiring a new one, appears to me, according to our law, to apply with equal force to an acquired domicil, that in order to abandon that and acquire a new one, there must be *le concours de la volonté et du fait*; that is, the *factum* and the *animus* must together combine; and the *factum* must be not merely an inchoate act, not merely the first step towards the *factum*, but the completion of the *factum* by actual residence."

In this case Lyall, the testator, had a Scotch domicil of origin, but acquired a domicil in India, and after residing there for upwards of twenty years, he sailed from India in a vessel bound for an English port and died *in itinere*. Vice-Chancellor Kindersley held that even if his intention had been to settle in England his Indian domicil would have adhered to him until his actual arrival in England, but at the same time held that there was not sufficient evidence of such intention.

been so much shaken by criticism as to be now of little, if of any, authority.

§ 129. **Wood, V. C., in Forbes v. Forbes. Wharton. Westlake.** — In Forbes *v.* Forbes[1] (1854) Wood, V. C., was, however, misled by it into laying down as a settled principle, "that a new domicil cannot be acquired except by intention and act, *animo et facto;* and apparently if a man be *in itinere* it is a sufficient fact for this purpose (see Sir John Leach's judgment in Munroe *v.* Douglas)." It will be observed that this *dictum* is much broader than that of Sir John Leach, who limited the doctrine to the case of one *dying in itinere.* Subsequently, however, in Udny *v.* Udny[2] (1869), Vice-Chan-

[1] Kay, 341.

[2] L. R. 1 Sch. App. 441, 449. "It is said by Sir John Leach that the change of the newly acquired domicil can only be evidenced by an actual settlement elsewhere, or (which is, however, a remarkable qualification) by the subject of the change *dying in itinere* when about to settle himself elsewhere. But the dying *in itinere* to a wholly new domicil would not, I apprehend, change a domicil of origin if the intended new domicil were never reached. So that at once a distinction is admitted between what is necessary to reacquire the original domicil and the acquiring of a third domicil. Indeed, the admission of Sir John Leach seems to have been founded on the actual decision of the case of Colville *v.* Lauder, cited in full in Munroe *v.* Douglas from the Dictionary of Decisions. In that case a person of Scottish origin became domiciled in St. Vincent, but left that island, writing to his father and saying that his health was injured, and he was going to America, and that if he did not succeed in America he would return to his native country. He was drowned in Canada, and some memoranda were found indicating an intention to return to Scotland, and it was held that his Scottish domicil had revived." And after discussing at considerable length the subject of reverter (for his remarks see *infra*, § 193), he concluded: "It appears to me, however, that each acquired domicil may be also successively abandoned *simpliciter*, and that thereupon the original domicil *simpliciter* reverts." Lord Chelmsford says in the same case: "Sir John Leach, V. C., in Munroe *v.* Douglas, held that in the case supposed the acquired domicil attaches to the person till the complete acquisition of a subsequent domicil, and (as to this point) he said there was no difference between the original domicil and an acquired domicil. His Honor's words are, etc. . . . There is an apparent inconsistency in this passage, for the Vice-Chancellor having said that a domicil necessarily remains until a subsequent domicil be acquired *animo et facto*, added, 'unless the party die *in itinere* towards an intended domicil;' that is, at a time when the acquisition of the subsequent domicil is incomplete and rests in intention only." And after stating his opinion that an acquired domicil may be lost by mere abandonment, he continues: "Sir John Leach seems to me to be incorrect also in saying that in the case of the abandonment of an acquired domicil there is no difference in principle between the acquisition of an entirely new domicil and the revival of the domicil of origin. It is said by Story, in § 47 of his Conflict of Laws: 'If a man has acquired a new domicil different from that of his birth, and he removes from it with an intention to resume his native

cellor Wood, then Lord Chancellor Hatherley, seems to have recanted this doctrine, and indeed used language apparently wholly in conflict with it. Resting upon these *dicta*, a distinguished American law-writer, Dr. Wharton, in his work on the Conflict of Laws,[3] has fallen into the same error. He says: "Even when the point of destination is not reached, domicil may shift *in itinere* if the abandonment of the old domicil and the setting out for the new are plainly shown." Mr. Westlake also, in the second edition of his work on Private International Law,[4] in speaking of change from one domicil of choice to another, says: "In the event of death *in itinere*, the last domicil is the one toward which the person is journeying."

§ 130. **Domicil cannot be changed in itinere.** — But notwithstanding these expressions of opinion by eminent jurists, the decided cases both in England and in this country appear

domicil, the latter is reacquired even while he is on his way, *in itinere;* for it reverts from the moment the other is given up.' This certainly cannot be predicated of a person journeying towards a new domicil which it is his intention to acquire." Lord Westbury, in the same case, while not criticising Munroe *v.* Douglas, lays down doctrine which cannot be reconciled with the *dictum* of Vice-Chancellor Leach. In Harvard College *v.* Gore, Putman, C. J., speaking of the same *dictum*, says: "This qualification may be doubted, as it seems in a measure inconsistent with the rule that the act and intention must unite in order to effect a change."

[3] § 58, 2d ed. He adds in a footnote: "If an emigrant from Germany, for instance, marries or dies on shipboard, after having severed all connection with his native land, and completed his arrangements for a settlement in New York, I believe that his domicil would, in this country, be held to be in New York." But see Graham *v.* The Public Administrator, *infra*, in which this point was decided the other way.

[4] § 244. For this he cites Munroe *v.* Douglas and Forbes *v.* Forbes, and adds: "This part of Leach's doctrine does not seem to have been censured in Udny *v.* Udny." (But see the passages quoted from that case, *supra*, note 2, and *infra*, § 193 *et seq.*) On the contrary, the proposition as stated seems to be *particularly* in conflict with the language held in Udny *v.* Udny, as well as the general doctrine of that case. Moreover, as Kindersley, V. C., points out (Lyall *v.* Paton, *supra*), Sir John Leach does not say that upon death *in itinere* the intended domicil attaches, but *that the abandoned domicil no longer remains.* He may, for all that appears to the contrary, have meant that the domicil of origin reverts, which would be in accordance with Udny *v.* Udny, although he was not so understood in that case. Furthermore, Forbes *v.* Forbes does not fit Westlake's proposition as stated. It rather goes beyond it, and does not sustain the qualification of death *in itinere.* However, as has been pointed out, Vice-Chancellor Wood changed his opinion when he became Lord Chancellor Hatherley. And after all, it certainly cannot be accurate to say, stretching fiction to its utmost, that whether a person is domiciled in a State or country at a particular time depends upon his death.

to have overwhelmingly settled the doctrine precisely the other way, and the general rule — to which, however, reverter of domicil is an exception — is now thoroughly established, that domicil cannot be acquired *in itinere*.[1]

§ 131. Id. In Lyall *v.* Paton,[1] Lyall, the testator, had a Scotch domicil of origin, but had acquired a domicil in India, and after residing there for upwards of twenty years he sailed from India in a vessel bound for an English port and died *in itinere*. Kindersley, V. C., although deeming the evidence of his intention to settle in England insufficient, held that even if such had been his intention his Indian domicil would have adhered to him until his actual arrival in England. In a New York case, Graham *v.* The Public Administrator,[2] the deceased having died at New York on her way from Scotland, her domicil of origin, to Canada, where she intended to settle, the court held that, "not having reached her proposed home," and the rule that domicil can be acquired only *animo et facto* not having been satisfied, her Scotch domicil remained, and her estate was distributable according to the Scotch law. In Bell *v.* Kennedy,[3] Lord Chelmsford says: "It is necessary to bear in mind that a domicil, although intended to be abandoned, will continue until a new domicil is

[1] Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Udny *v.* Udny, id. 441; Lyall *v.* Paton, 25 L. J. Ch. 746; Littlefield *v.* Brooks, 50 Me. 475; Harvard College *v.* Gore, 5 Pick. 370; Otis *v.* Boston, 12 Cush. 44; Shaw *v.* Shaw, 98 Mass. 158; Borland *v.* Boston, 132 id. 89; Graham *v.* The Public Administrator, 4 Bradf. N. Y. 127; Lyle *v.* Foreman, 1 Dall. 480; Cross *v.* Black, 9 Gill & J. 198; Ringgold *v.* Barley, 5 Md. 186; Horne *v.* Horne, 9 Ired. 99; Smith *v.* Croom, 7 Fla. 81; Vanderpoel *v.* O'Hanlon, 53 Iowa, 246; McIntyre *v.* Chappel, 4 Tex. 187. Dicey says (Dom. p. 84): "It was at one time thought that a new domicil could be acquired *in itinere*. . . . But this notion has now been rejected by the highest authorities, and the principle is completely established that a domicil of choice is established by nothing short of the concurrence of residence and intention."

[1] *Supra*. [2] *Supra*.

[3] *Supra*. In the same case Lord Colonsay says: "There are *dicta* to the effect that if Scotland had been the domicil of origin, and he had bid a final adieu to Jamaica and sailed for Scotland and had died *in itinere*, the domicil of origin would have been held to have revived; but there is no authority for saying that a person dying *in transitu* from a domicil of origin to a foreign land, had lost the domicil of origin. He could not so displace the effect which law gives to the domicil of origin, and which continues to attach until a new domicil is acquired *animo et facto*. He cannot have acquired a domicil in a new country which he has never reached." And see remarks of Sir John Dodson in Laneuville *v.* Anderson, 2 Spinks, 41.

acquired, and that a new domicil is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there." This language, although general, was, it is true, used in a case in which it was sought to set up a domicil of choice in derogation of the domicil of origin; but there is every reason to believe that American courts would apply it as well when the question was between two domicils of choice. The British courts, however, might, in view of the adventitious character ascribed to acquired domicil in Udny *v.* Udny, in a case in which it became necessary to determine the domicil of a person during the *transitus* from an acquired domicil to an intended domicil, now decide that his domicil of origin had reverted.

§ 132. Id. **A fortiori, no Change takes Place when the Territorial Limits of the Old Domicil have not been passed.** — In the cases which have been so far referred to, the *factum*, although not complete, had progressed to the extent of removal of bodily presence from the seat of the former domicil. It follows, *a fortiori*, that no change can take place where a person has not yet passed the limits of the State or country of the domicil which he seeks to abandon, even though he has already commenced his journey, or is prevented from making it by circumstances beyond his control. This is true both as applied to questions of reverter and of the acquisition of domicil of choice. Thus in an early Pennsylvania case,[1] F. left his former abode in Pennsylvania with the intention of settling in the then Spanish province of Louisiana, and while he was at Lancaster in that State, *in itinere*, a foreign attachment was issued against him, which the court promptly quashed. In an English case[2] a widow whose domicil of

[1] Lyle *v.* Foreman, 1 Dall. 480. "Shippen, President, observed that while a man remained in the State, though avowing an intention to withdraw from it, he must be considered an inhabitant, and therefore not an object of the foreign attachment."

[2] Goods of Raffenel, 3 Swab. & Tr. 49; see also Talmadge *v.* Talmadge, 66 Ala. 199. The case of the Snelle Zeylder, referred to by Sir William Scott in his judgment in The Indian Chief, 3 C. Rob. 12, appears to be somewhat in conflict with this decision, and so The Ocean, 5 id. 90. And see the opinion of Marshall, C. J., in The Venus, 8 Cranch, 253. But these were cases of national character in time of war.

origin was English, having acquired by marriage a French domicil, after the death of her husband embarked at Calais upon a steamer bound for England, with the intention of going to that country to reside permanently there, but before the vessel left, becoming ill, she was obliged to reland and soon afterwards died in France. Upon these facts Sir C. Cresswell held that her acquired domicil remained, there being no sufficient abandonment so long as she remained within the territory of France.

§ 133. **Id. Residence in a Definite Locality not necessary.** — It is probably not necessary that, in order to work a change of domicil from one State or country to another, the person whose domicil is in question should reach the particular spot within the territorial limits of the latter at which he intends fixing his permanent abode; and indeed it may perhaps be said that it is not absolutely necessary for such purpose that the person should ever have, either in fact or in contemplation, a permanent home within any particular municipal division of such State or country. Such cases must necessarily be rare, but it is possible to conceive of a Frenchman, for example, coming to England with the intention of permanently remaining there, but without ever fixing a permanent abode in any particular part of that country. In such case, while it would doubtless be much more difficult to prove the requisite intention than if he had, for example, purchased a dwelling-house and fixed himself in it in an apparently permanent manner, yet, assuming the requisite intention to be made out by other proofs, there is little doubt that his domicil would be held to be changed. Lord Jeffrey, in Arnott *v.* Groom,[1] thus remarks upon this subject: "I cannot admit, what Lord Fullerton assumes to be the rule, that in order to make a domicil it is necessary to have some particular spot within the territory of a law, — that it is not enough that the party shall have an apparently continual residence there, but shall actually have a particular spot or remain fixed in some permanent establishment. In considering the *indiciæ* of domicil these things are important;[2] but they are not necessary, as matters

[1] 9 D. (Sc. Sess. Cas. 2d ser. 1846) 142, 150.

[2] See Lockhart's Trusts, 11 Ir. Jur. (N. s.) 245.

of general law, to constitute domicil. Many old bachelors never have a house they can call their own. They go from hotel to hotel, and from watering-place to watering-place, careless of the comfort of more permanent residence, and unwilling to submit to the *gêne* attendant on it. There was the case of a nobleman who always lived at inns, and would have no servants but waiters; but he did not lose his domicil on that account. If the purpose of remaining in the territory be clearly proved *aliter*, a particular home is not necessary." Dicey [3] also maintains the same view.

§ 134. **Id. No Length of Residence necessary to constitute Domicil.** — When the transfer of bodily presence has been accomplished, the *factum* is complete; and generally speaking, no further act is necessary, but domicil vests immediately,[1]

[3] Dom. p. 56 *et seq.* The contrary view appears to have been taken in Cole *v.* Lucas, 2 La. An. 946. Said Shaw, C. J., in Otis *v.* Boston, 12 Cush. 44, 48: "We think the law assumes that if a person is an inhabitant of the State, he must be an inhabitant of some one town." And doubtless this is true as an almost universal rule; but still it is possible to conceive cases in which it would be extremely difficult, if not impossible, to locate the municipal domicil of the person. And there is little doubt also that in cases such as Briggs *v.* Rochester, 16 Gray, 337 (see *supra*, §§ 86, 87), there may be at least a brief space of time during which a person, in the process of changing his national or *quasi*-national domicil, may be without a municipal domicil. In cases, however, like those mentioned above in the text, the courts will lay hold of slighter circumstances to fix municipal domicil than in cases where the question is one of a change from one municipal division in which a domicil has admittedly been established to another municipal division within the same State. See Williams *v.* Roxbury, 12 Gray, 21; see also Carnoe *v.* Freetown, 9 Gray, 357.

[1] Bell *v.* Kennedy, *supra*; Craigie *v.* Lewin, 3 Curteis, 435; The Venus, 8 Cranch, 253; The Ann Green, 1 Gall. 274; Burnham *v.* Rangeley, 1 Woodb. & M. 7; Cooper *v.* Galbraith, 3 Wash. C. Ct. 546; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; United States *v.* The Penelope, 2 Pet. Ad. 438; Kemna *v.* Brockhaus, 10 Biss. 128; Doyle *v.* Clark, 1 Flipp. 536; Wilton *v.* Falmouth, 15 Me. 479; Parsons *v.* Bangor, 61 id. 457; Stockton *v.* Staples, 66 id. 197; Hulett *v.* Hulett, 37 Vt. 581; Vischer *v.* Vischer, 12 Barb. 640; Cadwallader *v.* Howell & Moore, 3 Harr. (N. J.) 138; Guier *v.* O'Daniel, 1 Binn. 349; Carey's Appeal, 75 Pa. St. 201; Plummer *v.* Brandon, 5 Ired. 190; Horne *v.* Horne, 9 id. 99; Kellar *v.* Baird, 5 Heisk. 39; Hairston *v.* Hairston, 27 Miss. 704; Gravillon *v.* Richards Ex'r, 13 La. Rep. 293; Verret *v.* Bonvillain, 33 La. An. 1304; Johnson *v.* Turner, 29 Ark. 280; Hart *v.* Horn, 4 Kans. 232; Swaney *v.* Hutchins, 13 Neb. 266; Republic *v.* Young, Dallam, 464; Russell *v.* Randolph, 11 Tex. 460; Pothier, Intr. aux Cout. d'Orléans, No. 15; Story, Confl. of L. § 46; Wharton, Confl. of L. § 58; Dicey, Dom. pp. 45, 76, 123; Demolombe, Cours de Code Napoléon, t. 1, no. 353; Sirey et Gilbert, Code Civil Annoté, art. 103, notes 1 and 2 and authorities there cited. Story says

provided the requisite *animus* be present. "Uno solo die constituitur domicilium si de voluntate appareat," says D'Argentré; and Grotius puts it still more strongly: "uno momento domicilium constitutum intelligitur."[2] Formerly in Germany domicil could be acquired only by residence for a year,[3] and this was so, too, according to the custom of Paris;[4] but Denizart lays it down that "un seul jour de demeure dans un lieu, avec intention d'y fixer un domicile, suffit pour l'établir."[5] It was sought to incorporate in the French code a provision requiring residence for a certain length of time to establish domicil, but this was deemed unwise and the proposition was rejected.[6]

§ 135. **Intention necessary. Length of Residence not sufficient in the Absence of Intention.** — But if the proper *factum* is absolutely essential to the constitution of a domicil of choice, certainly the proper *animus* is not less so.[1] Hence mere

(*supra*): "If he removes to another place with an intention to make it his permanent residence (*animo manendi*), it becomes instantaneously his place of domicil;" and this is substantially the language used in most of the cases cited above. In Louisiana it was at one time held that residence for one year in the State was necessary for the acquisition of domicil by persons coming from other States. State *ex rel.* Tilghman *v.* Judge of Probates, 2 Rob. (La.) 449; Boone *v.* Savage, 14 La. R. 169; Lowry *v.* Irwin, 6 Rob. (La.) 192. But this doctrine, which had its origin in a confusion of domicil with political rights, was subsequently overruled. Amis *v.* Bank, 9 Rob. (La.) 348; Winter Iron Works *v.* Toy, 12 La. An. 200; Wesson *v.* Marshall, 13 id. 436.

[2] Opinion, from Hollandsche Consultatien, given on Henry, For. Law, 198.

[3] Henry, For. Law, 194 and 199, and Gail, Pract. Obs. l. 2, obs. 35, no. 8.

[4] "A year and a day." Art. 173, cited by Demolombe, Cours de Code Napoléon, t. 50, no. 353; Ancelle, Thèse pour le Doctorat, p. 94; Chavanes, Thèse pour le Doctorat, p. 127.

[5] *Verb.* Domicil, no. 19.

[6] Séance du 18 Ventôse, An 11 (Mouricault); Locré, Législation Civile, t. 3 (Code Civil) pp. 414–417; Ancelle, Thèse pour le Doctorat, p. 94; Phillimore, Dom. no. 277; Id. Int. L. vol. 4, no. 317.

[1] Munro *v.* Munro, 7 Cl. & F. 842; Moorhouse *v.* Lord, 10 H. L. Cas. 272; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285; Craigie *v.* Lewin, 3 Curteis, 435; Jopp *v.* Wood, 34 Beav. 88; on app. 4 De G. J. & S. 616; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Mitchell *v.* United States, 21 Wall. 350; The Ann Green, 1 Gall. 274; Butler *v.* Farnsworth, 4 W. C. Ct. 101; Parsons *v.* Bangor, 61 Me. 457; Rumney *v.* Camptown, 10 N. H. 567; Barton *v.* Irasburgh, 33 Vt. 159; Monson *v.* Palmer, 8 Allen, 551; Dupuy *v.* Wurtz, 53 N. Y. 556; Dupuy *v.* Seymour, 64 Barb. 156; Hindman's Appeal, 85 Pa. St. 466; Casey's Case, 1 Ashmead, 126; Reading *v.* Taylor, 4 Brewst. 439; State *v.* Frest, 4 Harr. (Del.) 558; Ringgold *v.* Barley, 5 Md. 186; Ensor *v.* Graff, 43 id. 391; Tyler *v.* Murray, 57 id. 418; Pilson *v.* Bushong, 29 Gratt. 229; Lindsay *v.* Murphy, 76 Va. 428; Colborn *v.* Holland, 14 Rich. Eq. 176; Harkins *v.* Arnold, 46 Ga.

change of residence,[2] however long continued,[3] is not sufficient unless the proper *animus* be present. This, too, is an almost undisputed rule. Says Donellus:[4] "Habitatio non est satis, animum consistendi accedere oportet. . . . Quisquis temporis causa alicubi commoratur et consistit, ibi domicilium non habet;" and Zangerus:[5] "Ex sola autem domus inhabitatione, vel aliarum rerum, immobilium scilicet, in aliena civitate aut regione seu territorio comparatarum et acquisitarum possessione domicilium non probatur, nec constituitur; sed ex animo et voluntate alicubi domicilium habendi. . . . Non enim ex eo, quod quis focum et ignem teneat, arguitur domicilii constitutio, utpote, quæ ex solo animo perpetuo habitandi in loco dependet." And Corvinus:[6] "Nec etiam sola habitatio per se, etiamsi sit longissimi temporis, domicilium constituit." And Denizart:[7] "Pour se fixer un domicile, il faut qu'il y ait un choix manifesté par une volonté expresse . . . quelque longue que soit l'habitation dans un lieu, elle ne constitue pas de domicile, si on n'a pas en intention de l'y établir."

656; Henrietta *v.* Oxford, 2 Ohio St. 32; Yonkey *v.* State, 27 Ind. 236; Wilkins *v.* Marshall, 80 Ill. 74; Hairston *v.* Hairston, 27 Miss. 704; Cole *v.* Lucas, 2 La. An. 946; Adams *v.* Evans, 19 Kans. 174; Voet, Ad Pand. l. 5, t. 1, no. 98; Donellus, de Jure Civili, l. 17, c. 12, p. 978, nos. 40–50; Zangerus, De Except. pt. 2, c. 1, nos. 12–18; Corvinus, Jur. Rom. l. 10, t. 39, and opinion given in Henry, For. Law, p. 193, from Hollandsche Consultatien; Pothier, Intr. aux Cout. d'Orléans, no. 181 and 182; Denizart, *verb.* Domicil, nos. 18 and 20; Story, Confl. of L. § 44; Wharton, Confl. of L. § 56; Westlake, Priv. Int. L. 1st ed. no. 38; Id. 2d ed. § 243; Dicey, Dom. 77 *et seq*, and see authorities cited, *supra*, § 125, note 1, and *infra*, notes 2 and 3.

[2] De Bonneval *v.* De Bonneval, 1 Curteis, 856; Bremer *v.* Freeman, 1 Deane, 192; Brown *v.* Smith, 15 B. 444; The Venus, 8 Cranch, 116; Hylton *v.* Brown, 1 W. C. Ct. 314; Prentiss *v.* Barton, 1 Brock. 389; Wayne *v.* Green, 21 Me. 357; Rumney *v.* Camptown, 10 N. H. 567; Boardman *v.* House, 18 Wend. 512; Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673; Ringgold *v.* Barley, 5 Md. 186; Smith *v.* Croom, 7 Fla. 81; Smith *v.* Dalton, 1 Cin. S. C. Rep. 150; Veile *v.* Koch, 27 Ill. 129; Gravillon *v.* Richards Ex'r, 13 La. Rep. 293; McKowen *v.* McGuire, 15 La. An. 637; Russell *v.* Randolph, 11 Tex. 460; People *v.* Peralta, 4 Cal. 175, and see notes 1, *supra*, and 3, *infra*.

[3] Moorhouse *v.* Lord, *supra*; Hodgson *v.* De Beauchesne, *supra*; Jopp *v.* Wood, *supra*; Bremer *v.* Freeman, *supra*; Goods of West, 6 Jur. (N. S.) 831; *In re* Capdevielle, 2 Hurl. & Colt. 985; Collier *v.* Rivaz, 2 Curteis, 855; The Venus, *supra*; White *v.* Brown, *supra*; Dupuy *v.* Wurtz, *supra*; and see the discussion of the effect of length of residence on domicil, *infra*, § 382 *et seq*, and authorities there cited.

[4] De Jure Civili, l. 7, c. 12, p. 978.

[5] De Except. pt. 2, c. 1, nos. 12 and 18.

[6] Jur. Rom. l. 10, t. 39.

[7] *Verb.* Dom. nos. 18 and 20.

"Nulla tempora constituunt domicilium aliud cogitanti," says D'Argentré;[8] and Mascardus[9] tells us, on the authority of Bartolus, Baldus, Salicetus and others, that a thousand years would not suffice; and his statement is repeated with approbation by Corvinus.[10] John Voet, in his commentaries on the Pandects, says:[11] "Illud certum est, neque solo animo atque destinatione patrisfamilias, aut contestatione solâ, sine re et facto, domicilium constitui; neque solâ domus comparatione in aliquâ regione; neque solâ habitatione, sine proposito illic perpetuo morandi; cum Ulpianus a domicilio habitationem distinguat dum asserit, legem Corneliam injuriarum de domo vi introitâ, ad omnem habitationem in quâ paterfamilias habitat, licet ibi domicilium non habeat, pertinere." This distinction between *habitatio* and *domicilium* is the familiar one between residence and domicil, the latter being residence coupled with the intention to settle permanently.

§ 136. Id. — In the American case of White *v.* Brown the jury found that absence for forty-eight years did not destroy domicil, and the court affirmed their finding. In England it was held, in Capdevielle's case, that residence for twenty-nine years worked no change; so in Jopp *v.* Wood twenty-five years', and in Hodgson *v.* De Beauchesne twenty-three years', residence was considered insufficient. In Bremer *v.* Freeman Sir John Dodson said that "a person may live fifty years in a place and not acquire a domicil, for he may have had all the time an intention to return to his own country." Residence of itself, although decisive of the *factum*[1] necessary for a change of domicil, is decisive of nothing further, and even when long continued, although *per se* evidence of intention,[2] will not supply its place. Residence is of little value if not united to intention, and is nothing if contradicted by it.[3] Intention must concur with fact, and must clearly appear.[4] On

[8] Comm. ad leg. Briton. art. 449.

[9] De Probat. concl. 535, no. 13.

[10] See opinion from Hollandsche Consultation, given in Henry, For. Law, p. 193.

[11] L. 5, c. 1, no. 95.

[1] Jopp *v.* Wood, 4 De G. J. & S. 616, per Turner, L. J.

[2] See *infra*, ch. 20.

[3] Dupuy *v.* Wurtz, *supra*.

[4] Dupuy *v.* Wurtz, *supra*; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Reed *v.* Ketch, 1 Phila. 105; see *infra*, § 151, note 3.

the one hand the shortest residence is sufficient if the requisite *animus* be present, and on the other the longest will not suffice if it be absent.

§ 137. **Character of the Animus or Intention. Capacity to choose.** — But intention implies three things: (1) capacity to choose, (2) freedom of choice, and (3) actual choice. In order to set up a domicil of choice there must be, —

First, capacity to choose. Therefore it is that one who is not *sui juris* is deemed in law incapable of acquiring a domicil for himself. Thus, at birth an infant, if legitimate, takes as his domicil of origin the domicil of his father at the time of his birth,[1] and acquires no other during infancy except through the act of his father;[2] or if he be dead, through the act of his mother, so long, at least, as she remains a widow.[3] In like manner an illegitimate or posthumous child takes as his domicil of origin the domicil of his mother,[4] and acquires no other during infancy except through the act of his mother, so long, at least, as she remains single.[5] So, too, a married woman upon marriage takes as her domicil the domicil of her husband, and, speaking generally, is incapacitated during coverture from acquiring any other by her own act.[6] Idiots and lunatics[7] furnish further illustration of the principle. All of these persons are conclusively presumed in law to be wanting in capacity to form the intention requisite for a change of domicil, and therefore depend for such change upon others who are in law capable of forming such intention.

§ 138. **Id. Freedom of Choice. Compulsory Change of Bodily Presence.** — *Second.* There must be freedom of choice. A compulsory change of bodily presence is not a change of domicil. Thus a soldier, according to the English and American cases, does not necessarily become domiciled at the place where he is stationed,[1] although, by a confusion of the ideas of allegiance and domicil, he is in most cases conclusively presumed to be domiciled within the country in

[1] *Supra*, § 105.
[2] *Infra*, § 229 *et seq.*
[3] *Infra*, § 238 *et seq.*
[4] *Supra*, § 105.
[5] *Infra*, § 245 *a*.
[6] *Infra*, § 209 *et seq.*
[7] *Infra*, § 264 *et seq.*
[1] *Infra*, ch. 15.

whose service he is employed.[2] This, however, does not conflict with the principle above stated, as, generally speaking, a man enters the service of a foreign country only through choice; nor does it conflict with the right of the soldier to change his *quasi*-national[3] domicil. A prisoner does not necessarily become domiciled at the place where he is imprisoned,[4] nor a pauper where he is kept at an almshouse.[5]

The exile escaping from political persecution,[6] the fugitive from justice,[7] and (according to the opinion of a great English judge) the one who, harassed by debts, flees to avoid his creditors,[8] — all fall within the same category. Their absence from the old place of abode, at least, if not their presence in the new, is a matter of necessity and not of choice, of compulsion and not of intention, and therefore no change of domicil ensues.

§ 139. **Id. id. Inability to return.** — Moreover, it is immaterial whether a person has been driven from his former place of domicil and prevented from returning by causes existing there, or whether he has voluntarily left it intending to return, and is prevented from carrying out his intention by irresistible causes existing elsewhere. In neither case is his domicil changed, because in both his continued absence is involuntary. Thus in an Alabama case,[1] in which the facts were that a minor left his parents in Germany, and, coming to that State, always declared his intention of returning home upon the attainment of his majority, but was prevented from so doing by the outbreak of the Rebellion and the blockade, — it was held that he had acquired no domicil and was not subject to military service in the Confederate Army. So, too, in an Iowa case,[2] in which the facts were that a person domiciled in that State went in 1860 to Texas on a visit to her daughter, and to collect a debt from the estate of a deceased relative, but the Rebellion breaking out she was detained there, and during her absence suits were brought against her in Iowa,

[2] *Infra*, ch. 15.
[3] *Infra*, id.
[4] *Infra*, ch. 13.
[5] *Infra*, ch. 12.
[6] *Infra*, ch. 13.
[7] *Infra*, id.
[8] Such at least was the opinion of Lord Westbury in Udny *v.* Udny, L. R. 1 Sch. App. 441, but see *infra*, ch. 13.
[1] *Re* Fight, 39 Ala. 452.
[2] Love *v.* Cherry, 24 Iowa, 204.

and process was served by leaving copies at her former usual dwelling-place, — it was held that the service was good, and the subsequent proceedings and sale of real estate based thereon were valid, the defendant never having relinquished her *animus revertendi.* Sir William Scott went even a step further in the case of The Ocean,[3] and held that a British-born subject who had settled as a partner in a house of trade in Holland, but upon the breaking out of war had made every arrangement for a dissolution of the partnership and a return to England, and was only prevented from removing by the forcible detention of all British subjects, had regained his British national character. This, however, was a prize case, and would probably not be followed as a precedent in any case not involving the question of national character in time of war. Indeed, the opposite view was held by Sir Cresswell Cresswell in Goods of Raffenel.

§ 140. **Id. id. Compulsion and Motive.** — A distinction must be noted between *compulsion* and a mere *motive* inducing one to change his place of residence. Thus the fact that residence is in deference to the wishes of another does not prevent domicil from attaching. This was early laid down by Lord Alvanley in Somerville *v.* Somerville:[1] "It is said his father's dying injunctions were that he should not dissolve his connection with Scotland. In the subsequent part of his life he most religiously adhered to those injunctions. But it is said that in conversation he manifested his preference of England; that if it had not been for those injunctions of his father, he would have quitted Scotland. Admit it. That in my opinion is the strongest argument in favor of Scotland; for whether willingly or reluctantly, whether from piety or from choice, it is enough to say he determined to keep up his connection with that country, and the motive makes not the least difference." So in Aitchison *v.* Dixon[2]

[3] 5 C. Rob. 90. But compare this with Goods of Raffenel, 3 Swab. & Tr. 49.

[1] 5 Ves. Jr. 750, 787.

[2] L. R. 10 Eq. Cas. 589. In Anderson *v.* Laneuville, 9 Moore P. C. C. 325; 2 Spinks, 41, the testator lived in France to be near a French lady of about his own age, who in his youth had saved his life, and to whom he was greatly attached; and although he had frequently declared his intention of returning to England, — where he had acquired a domicil, his domicil of origin having

it was held by James, V. C., that the fact that the residence of a Scotchman in England was out of deference to the wishes of his wife, who was an Englishwoman of wealth, and who provided a home for her husband and exercised great influence over him, rather strengthened than otherwise the inference of domicil there. On the other hand, in Hodgson *v.* De Beauchesne,[3] the Judicial Committee of the Privy Council, speaking through Dr. Lushington, held that the residence of General Hodgson in Paris for a long period (twenty-three years) was rendered less important, as evidence of his intention, by the fact that his residence there was in deference to the wishes of his wife, who was a Frenchwoman. These cases, however, are easily reconcilable upon their circumstances, and merely go to establish that residence, as evidence of intention, may, according to circumstances, be either weakened or strengthened by the fact that it is in deference to the wishes of another.

Except as an evidence of intention, motive is immaterial so long as the individual remains free to choose; but whenever the controlling influence becomes a *vis major* which shuts out the operation of choice, speaking generally at least, a change of domicil becomes impossible.

§ 141. Id. id. id. — The distinction between compulsion and motive has been further illustrated by the case of an invalid. The domicil of one who flies from the rapid approach of death to a more congenial climate, or of one who being abroad on account of ill health finally surrenders all hope of return, undergoes no change thereby; but where a preference for a particular climate operates merely as a motive inducing one to change his place of abode, a change of domicil is no more prevented thereby than by a preference for a place on account of the manners and customs of the inhabitants, or the superior business facilities which it affords.[1]

It must be conceded, however, that the distinction between

been Irish, — in event of her death, he was held to be domiciled in France. See also Attorney-General *v.* De Wahlstatt, 3 Hurl. & Colt. 374; and Haldane *v.* Eckford, L. R. 8 Eq. Cas. 631.

[3] 12 Moore P. C. C. 285.

[1] See cases referred to, *infra*, ch. 14.

motive and compulsion may become very shadowy, and in some cases hard to apply. It may become impossible to determine just where motive ends and compulsion begins, inasmuch as motive may, and frequently does, rise to the degree of strong moral compulsion, which shuts out practically, though not absolutely, the operation of choice. A sharp dividing line certainly cannot be drawn; but as we approach the middle ground each case must be determined upon its own peculiar circumstances.

§ 142. **Id. Motive immaterial if the proper Intention exist.** — And here another view of motive must be noticed. It is admirably stated by Morton, C. J., in a late Massachusetts case,[1] as follows: "A man has the right to change his domicil for any reason satisfactory to himself. In determining whether there has been such a change from one place to another, the test is to inquire whether he has in fact removed his home to the latter place with the intention of making it his residence [with the proper *animus manendi*]. If he has, he loses his old domicil and acquires a new one with all its rights and incidents; and the law does not inquire into the purposes or motives which induced him to make such change. It may be because he prefers the laws of the new place of domicil, or because he can diminish his taxes and other burdens,[2] or because he desires to bring a suit in a court which would not otherwise have jurisdiction.[3] His *status* as an inhabitant depends upon the fact that he has made a change of his home, and not upon the motives or reasons which influenced him to do so. In the case at bar, therefore, it being found as a fact that the respondent, Kelley, had become a resident of this State, he had the right to apply for the benefit of the insolvent laws, although his sole purpose in making the change was to enable himself to do so."

In Briggs *v.* French,[4] Story, J., says: "It is every day's

[1] McConnell *v.* Kelley, 138 Mass. 372.

[2] Draper *v.* Hatfield, 124 Mass. 53; Thayer *v.* Boston, id. 132.

[3] See next note.

[4] 2 Sumn. 251, 255. In Case *v.* Clark, 5 Mason, 70, Story, J., says: "If a person wishing to commence suits in the courts of the United States, instead of the State courts, chooses to remove into another State, and executes such intention *bona fide*, he may thereby change his citizenship. But his removal must be a real one *animo manendi*, and not

practice for a citizen of one State to remove to another State to become a citizen of the latter in order to enable him to prosecute suits in the courts of the United States. And provided the removal be real and not merely nominal, and he has truly become a citizen of another State, I have never understood that his motive would defeat his right to sue. It might be a circumstance to call in question the *bona fides* and reality of the removal or change of domicil. But if the new citizenship is really and truly acquired, his right to sue is a legitimate, constitutional, and legal consequence, not to be impeached by the motive of his removal."

§ 143. **Id. Actual Choice.** — *Third.* There must be actual choice. In order to effect a change of domicil a person must not only be capable of forming the proper intention and free to do so, but he must actually form such intention. This point has already been treated of.[1] Absence from a place of domicil and presence in another place if long continued is often strong evidence of a change, but it does not of itself constitute a change if the requisite *animus* be not present.[2] Some cases upon this point have been alluded to. The subject may be further illustrated by the case of an ambassador, consul, or other person abroad in the civil service.[3] There is nothing in the official character of such person which prevents him from acquiring domicil where he resides, but even when the residence is long continued the presumption of law founded upon the usual course of affairs, and therefore subject to rebuttal, is that he is abroad for a temporary purpose, subject momentarily to recall, and hence has not chosen his present abiding-place as a place of permanent abode.

§ 144. **Id. Requisite Animus not Intention to change Political Nationality.** — What then is the requisite *animus?*

First. It is not, in cases of national domicil, intention to change nationality. Allegiance and domicil are entirely dis-

merely an ostensible one." To the same effect are Pond *v.* Vermont Valley R. R. Co. 12 Blatch. 280, and Kemna *v.* Brockhaus, 10 Biss. 128. The Supreme Court of the United States appears to have taken the same view in Chicago & Northwestern Ry. Co. *v.* Ohle, 117 U. S. 123. See also Butler *v.* Farnsworth, 4 Wash. C. Ct. 101.

[1] *Supra*, §§ 125, 126, 135, 136. See authorities there cited.

[2] *Supra*, §§ 125, 135; and *infra*, ch. 20.

[3] *Infra*, chs. 16 and 17.

tinct things. They may exist apart; they may exist together; but the one does not necessarily involve the other. Thus a man may be at the same time a British subject and a domiciled American. Lord Westbury, in Udny *v.* Udny,[1] thus states the distinction: "The law of England and of almost all civilized countries ascribes to each individual at his birth two distinct legal states or conditions: one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status;* another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights and subject to certain obligations, which latter character is the civil *status*, or condition of the individual, and may be quite different from his political *status*. The political *status* may depend upon different laws in different countries; whereas the civil *status* is governed universally by one single

[1] L. R. 1 Sch. & Div. App. 441. And see, besides the cases cited in the succeeding notes, Haldane *v.* Eckford, 8 Eq. Cas. 631; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Von Glahn *v.* Varenne, 1 Dill. 515; Brown *v.* United States, 5 Ct. Cl. 571; Maltass *v.* Maltass, 1 Rob. Eccl. 67; Parke, B., *arg.* Attorney-General *v.* Dunn, 6 Mees. & W. 521; and Dicey, Dom. p. 81 *et seq.* Fœlix, in his work on Private International Law, throughout confuses domicil and nationality, and says expressly (tome 1, titre 1, sec. 1, no. 28), that "the expressions 'lieu du domicile de l'individu' and 'territoire de sa nation ou patrie' may be employed indifferently." The learned and judicious editor of the later editions of that treatise (Demangeat), while criticising the author's language, and declaring the idea that "a man can have his domicil only in the territory of the nation of which he is a member" "completely inadmissible" (3d ed. tome 1, p. 57, note; see also Fiore, Priv. Int. Law, Pradier-Fodéré's trans. no. 14 and note), adds (*loc. cit.*): "It is necessary to remember that almost always the language of M. Fœlix will be found exact in fact; that is to say, that in the great majority of cases the law of the domicil will be at the same time the law of the people of which the individual is a member;" in other words, domicil and nationality usually coincide. The language, however, is none the less misleading. The French Code plainly recognizes the distinction between *nationality* and national *domicil* (Art. 13, Code Civil; see *infra*, ch. 19). In Bate *v.* Incisa (59 Miss. 513), the court draws a distinction between national domicil and domicil for the purpose of succession, evidently misapplying the former term in the sense of nationality. It is there said: "Although the husband was a subject of the kingdom of Italy, and that was his national domicil, he and his wife made their home in Mississippi, which was their domicil for the purpose of succession." By this certainly is not meant that a person can have national domicil, in the sense in which that term is usually understood, in one country and *quasi*-national domicil in another.

principle, namely, that of domicil, which is the criterion established by the law for the purpose of determining civil *status*."

Formerly British statesmen and jurists clung with great tenacity to the doctrine of the indelibility of natural allegiance, applying sometimes with great rigor the maxim, "Nemo potest exuere patriam;" until in 1870 they yielded to more enlightened and modern views of international relations, and both by treaty with the United States and by statute totally and finally surrendered the doctrine. But long before that step was taken, changes of national domicil were held in English and Scotch cases. It was indeed doubted by Sir John Nichol, in Curling *v.* Thornton,[2] whether a man could so far *exuere patriam* as to accomplish a change of national domicil for testamentary purposes; but his Honor's doubts were expressly overruled by the High Court of Delegates in the subsequent case of Stanley *v.* Bernes,[3] and it was settled that a person might accomplish such change at pleasure. In America, too, it was formerly held that a person could not entirely rid himself of his natural allegiance,[4] but it has never been doubted that one might change his domicil at pleasure.

§ 145. **Id. id. Moorhouse v. Lord.** — The distinction has of late been brought into greater prominence by the criticisms which have been passed upon certain unfortunate expressions which fell from Lords Cranworth and Kingsdown in the case of Moorhouse *v.* Lord.[1] The language of the former was as follows: "In order to acquire a new domicil . . . a man must intend *quatenus in illo exuere patriam.* It is not enough that you merely mean to take another house in some other place, and that on account of your health, or for some other reason, you think it tolerably certain that you had better remain there all the days of your life. That does not signify: you do not lose your domicil of origin or your resumed domicil merely because you go to some other place that suits your health better, unless, indeed, you mean, either on account of your

[2] 2 Add. 6.

[3] 3 Hagg. Eccl. 373. See Marquis of Hertford *v.* Croker, 4 Moore P. C. C. 334.

[4] See 2 Kent's Comm. 43 *et seq.*

[1] 10 H. L. Cas. 272, 283, 292.

health or for some other motive, to cease to be a Scotchman and become an Englishman or a Frenchman or a German. In that case, if you give up everything you left behind you and establish yourself elsewhere, you may change your domicil." The expression used by Lord Kingsdown was to the same effect. The language thus used was not necessary to a decision of the case, but advantage was taken of the occasion to enunciate what Lord Cranworth denominated some "modern improved views of domicil."

The expressions of their lordships have been much criticised and perhaps to some extent misunderstood. Thus Bramwell, B., in *Re* Capdevielle,[2] says: "The expressions used appear to me, with great deference, far too extensive. To say that a man cannot abandon his domicil of origin without doing all that in him lies to divest himself of his country, is a proposition which, with great submission, I think cannot be maintained. In the ordinary case of the Irish or English laborer emigrating to the United States of America without any hope or intention of ever returning, but not naturalizing himself for fear of being subject to conscription; ready to claim the protection of the British ambassador to prevent his being made a conscript, but having no desire or intention whatever to remain a British subject, — I think that if he died in America it could scarcely be argued that America was not his place of domicil, although he had not done all that in him lay to abandon his native country. Therefore, assuming those noble and learned lords intended to overrule previous cases, I have great difficulty in supposing that they intended everything that would be comprehended within the very extensive expressions they used." Referring to Lord Kingsdown's expression (also used by Lord Cranworth) in Moorhouse *v.* Lord, that "a man must intend to become a Frenchman instead of an Englishman," Lord Westbury said, in Udny *v.* Udny:[3] "These words are likely to mislead if they were in-

[2] 2 Hurl. & Colt. 985, 1015. See also remarks of Martin, B., and Pollock, C. B., in the same case.

[3] L. R. 1 Sch. App. 441, 460. In the same case Lord Chancellor Hatherley said: "I think some of the expressions used in former cases as to the intent '*exuere patriam*,' or to become 'a Frenchman instead of an Englishman,' go beyond the question of domicil.

tended to signify that for a change of domicil there must be a change of nationality, — that is, of natural allegiance. That would be to confound the political and civil *status* of an individual, and to destroy the difference between *patria* and *domicilium*."

§ 146. Id. id. id. — But that Lords Cranworth and Kingsdown could not have meant that a change of national domicil involved a change of nationality in the sense in which Lord Westbury uses that term, is clear from the fact that the case of Moorhouse *v.* Lord was decided in 1863, and the doctrine of perpetual allegiance was not surrendered by Great Britain until 1870. The context shows that the strong expressions which they used were merely meant to convey the idea of a person incorporating himself as a permanent settler in another country, although Wickens, V. C., understood them to mean that intention to change civil *status* was necessary.

§ 147. Id. id. id. — In the late case of Brunel *v.* Brunel,[1] decided since the Naturalization Act, the exact question arose; and notwithstanding that the deceased had distinctly declared that he would not give up his French citizenship, and had declined to become a naturalized British subject, it was held by Bacon, V. C., that he had become a domiciled Englishman. The Vice-Chancellor in that case used this language: "To effect a change of domicil it is not necessary to obtain letters of naturalization. A permanent residence by a foreigner in this country with no intention of ever returning to his native country will be sufficient to create a domicil in this country. Udny *v.* Udny cuts down, or rather explains, the expressions in Moorhouse *v.* Lord, that for a change of national domicil there must be a definite and effectual change of nationality, that a man must intend *exuere patriam*, and I adopt what was said by Lord Westbury." It must be said, however, that

The question of naturalization and of allegiance is distinct from that of domicil. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. He cannot, at present at least, put off and resume at will obligations of obedience to the government of the country of which at his birth he is a subject, but he may many times change his domicil."

[1] L. R. 12 Eq. Cas. 298. See also Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441.

a change of allegiance accompanying or following a change of residence would be very strong evidence of intention to change domicil.[2]

§ 148. **Id. or Civil Status.** — *Second.* The requisite *animus* is not intention to change civil *status*. A change of civil *status* is, as has already been pointed out, one of the legal consequences of a change of national or *quasi*-national domicil, but it is a consequence which rarely presents itself to the mind of one contemplating a change of domicil. To hold, therefore, that in order to accomplish a change of domicil a man must have present in his mind, and must deliberately accept the notion of a change of civil *status*, would be practically to declare that a change of domicil rarely or never takes place, — a convenient rule, perhaps, as Wickens, V. C., points out, for courts to work by, but one entirely at variance with general principles, and, although supported by opinions of great weight, with almost all of the decided cases. In Douglas *v.* Douglas,[1]

[2] See *infra*, § 432 *et seq.*

[1] L. R. 12 Eq. Cas. 617. Besides the authorities cited by Wickens, V. C., in the above passage, the doctrine that intention to change *status* is necessary for a change of domicil is held by Fraser, 2 Husband and Wife, 2d ed. p. 1265. Westlake (Priv. Int. L. 2d ed. §§ 230 and 229 *a*) appears to hold a somewhat modified view, viz., that intention to become identified with, and a member of, a new civil society is necessary for the constitution of a domicil of choice; and he argues at length in favor of this view from various expressions which have fallen from English judges. But opposed to it are, as he admits, not only the long general current of authority, continental and British, but the clear language of Lord Westbury in Udny *v.* Udny, viz.: "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." The same learned writer, however, says elsewhere (L. Mag. & Rev. vol. cclii. p. 363, August, 1884), in a review of *Re* Tootal's Trusts (see *infra*, ch. 19): "That domicil of choice is merely permanent residence, viewed with the necessary technical precision, must be affirmed in Roman and in continental law, and has been the general doctrine of English law also. It may be otherwise expressed by saying that any question about the acquisition of a domicil of choice depends only on the facts about the person's residence, and about his intentions with regard to the duration of that residence. Those facts may be obscure, but all the elements of a solution lie in them." And after quoting the language of Lord Westbury (*suprà*), he adds: "If we said, 'derives *exclusively* from the fact, &c.' — which it is not quite certain was Lord Westbury's meaning, we should have an excellent statement of the doctrine now referred to." The American courts and text-writers have not gone into refinements of this sort, but have contented themselves with demanding intention substantially such as is described. *Infra*, § 170 *et seq.* Whether or not a different kind of *animus* is required for the constitution by

the learned judge named uses this language: "It is universally, or all but universally, true, that in order to prove that the domicil of an adult of sound mind has been changed an intention on his part must be shown. The question on which opinions have differed is as to what he must be shown to have intended. According to one view it is sufficient to show that he intended to settle in a new country; to establish his principal or sole and permanent home there, though the legal consequences of so doing on his civil *status* may never have entered his mind. According to the other view it is necessary to show that he intended to change his civil *status*, to give up his position as, for purposes of civil *status*, a citizen of one country, and to assume a position as, for the like purposes, the citizen of another. This stricter view is supported by opinions of great weight, among others by the Lord President in Donaldson *v.* McClure;[2] that of the Lord Chief Baron Pollock, in Attorney-General *v.* Countess De Wahlstatt,[3] and by some expressions used by the late Lords Cranworth and Kingsdown. And it would be an extremely convenient one since, if, for the purpose of showing that a man had changed his domicil, it were necessary to show that the notion of a change of the civil *status* had occurred to his mind and been accepted by his will, the attempt would in most cases fail. Few men think of or wish for a change of civil domicil as such, except perhaps in certain cases where a man desiring to change his political domicil contemplates the change of civil domicil as involved in it, and occasionally where the object of the change is to escape into a freer condition of marriage law. And cases like Haldane *v.* Eckford,[4] where the change of civil *status* can be shown to have been recognized and accepted by a person who had no special reason to desire it, and probably did not desire it, are very rare indeed. The stricter rule would therefore, in the great majority of cases, leave the domicil to be governed by origin, which it seems to me would be in every respect a convenient view. In this case, if

a European or an American of a domicil of choice in a country where European civilization does not prevail, is not clear. See *infra*, ch. 19.

[2] 20 D. (Sch. Sess. Cas. 2d ser. 1857) 307.

[3] 3 Hurl. & Colt. 374.

[4] L. R. 8 Eq. 631.

I considered the stricter rule as law, I should have no difficulty whatever in holding that the testator never changed his domicil. I feel sure that the idea of changing his civil *status* from that of a Scotchman, under the Scotch law, to that of an Englishman, under the English law, never occurred to him, and that if it had occurred to him he would have repudiated it. Probably the question as to his eldest son's legitimacy would of itself have been conclusive on this point. But I cannot satisfy myself that the stricter rule, as I have called it, can be considered as the law of England. It never was, I believe, the law of any other country, except perhaps Scotland, or recognized as law by any of the text-writers of European authority who have dealt with questions of domicil; and it is difficult to believe that the law of England has drifted so far from the general principles on which it professed to be founded and which it always professed to follow. It seems to me, as it did to Vice-Chancellor James, in Haldane *v.* Eckford, that the intention required for a change of domicil, as distinguished from the act embodying it, is an intention to settle in a new country as a permanent home, and that if this intention exists and is sufficiently carried into effect certain legal consequences follow from it, whether such consequences were intended or not, and perhaps even though the person in question may have intended the exact contrary. The case of a person wishing to settle permanently in a country different from that of his domicil, but to retain, as regards testamentary and matrimonial matters, and as regards civil *status* generally, the law of the country that he leaves, may have rarely arisen, and is perhaps not likely to arise. When it arises, if it ever should arise, the determination ought, I think, to be that the intention was sufficient to warrant a conclusion in favor of a change of domicil."

§ 149. Id. id. — In Steer's case,[1] the testator, whose domicil of origin was English, and who had resided upwards of forty years at Hamburg under circumstances which plainly showed his intention of permanent residence there, made a will in England which contained the following declaration: "Whereas, although I am now in England, my residence

[1] 3 Hurl. & Nor. 594.

recently was in Hamburg, of which for the purpose of enabling me to trade I was constituted a burgher and my intention is to return there; but I do not mean by such declaration of intention to renounce my domicil of origin as an Englishman." But in spite of this the Court of Exchequer held that he was domiciled in Hamburg and not in England.

We have already seen that a person may have in view, in settling in a new territory, the subjection of himself to the peculiar laws of that territory,[2] but it by no means follows that he must have such purpose in view. Furthermore, while the opinion of the person whose domicil is in question as to whether a change has been effected or not, may be some evidence of his intention,[3] it is of little value if contradicted by the facts and circumstances attending his residence.[4]

§ 150. **The Requisite Animus defined.** — The intention requisite for a change of domicil is (1) intention completely to abandon the former place of abode as a place of abode, and (2) to settle presently and permanently in another place. The subject naturally divides itself into the *animus non revertendi* and the *animus manendi*, which it is proposed to consider separately.

§ 151. (1) **Animus non revertendi.** — It results from the maxim, "No person can have more than one domicil at the same time," that before a new domicil can be established the old one must be abandoned;[1] and as the presumption of law is always against a change of a domicil,[2] abandonment

[2] *Supra*, § 142.

[3] Haldane *v.* Eckford, L. R. 8 Eq. Cas. 631; Hamilton *v.* Dallas, L. R. 1 Ch. D. 257. In Hodgson *v.* De Beauchesne the impression on the part of the daughter of General Hodgson (whose domicil was in question) is mentioned as a fact in support of his English domicil.

[4] *Re* Steer, 3 Hurl. & Nor. 594; Butler *v.* Hopper, 1 Wash. C. Ct. 499; Butler *v.* Farnsworth, 4 id. 101; Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673; State *v.* Hallet, 8 Ala. 159; and see cases of declaration in wills and other documents, *infra*, § 461 *et seq.*

[1] See cases cited in the succeeding notes, and *infra*, § 179.

[2] Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854, per Lord Wensleydale; Maxwell *v.* McClure, 6 Jur. (N. S.) 407; and see remarks of the Scotch judges in same case, *sub nom.* Donaldson *v.* McClure, 20 D. (Sc. Sess. Cas. 2d ser. 1857) 307; Moorhouse *v.* Lord, 10 H. L. Cas. 272, per Chelmsford; Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285; De Bonneval *v.* De Bonneval, 1 Curteis, 856; Attorney-General *v.* Rowe, 1 Hurl. & Colt. 31, per Pollock, C. B.; *Re* Capdevielle, 2 id. 985, per Martin & Channel, BB.; Attorney-General *v.* DeWahlstatt, 3 id. 274, per Pigott, B.; Lord Advocate *v.* Lamont, 19 D. (Sc. Sess. Cas. 2d ser. 1857) 779; Mitchell *v.* United States, 21 Wall. 350; Desmare *v.* United

must clearly appear,[3] and the *onus* is upon him who asserts it.[4] This burden is not discharged by merely showing absence, although for a long period. If the absence is such as is not inconsistent with an intention to return, the former domicil is retained,[5] and *a fortiori* it is retained where *animus revertendi* affirmatively appears. The fundamental idea of domicil is *home;* and as a man does not lose his home in fact by mere absence, so he cannot lose his home in law from the same cause. Indeed nothing is better settled than that absence for a temporary purpose *cum animo revertendi* is not sufficient to work a change of domicil.[6] And it makes no

States, 93 U. S. 605; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Burnham *v.* Rangeley, 1 Wood. & M. 7; Brewer *v.* Linnæus, 36 Me. 428; Harvard College *v.* Gore, 5 Pick. 370; Kilburn *v.* Bennett, 3 Met. 199; Chicopee *v.* Whately, 6 Allen, 508; Mooar *v.* Harvey, 128 Mass. 219; Nixon *v.* Palmer, 10 Barb. 175; Pilson *v.* Bushong, 29 Gratt. 229; Lindsay *v.* Murphy, 76 Va. 428; Barrett *v.* Black, 25 Ga. 151; Glover *v.* Glover, 18 Ala. 367; Kelley's Ex'r *v.* Garrett's Exr's, 67 Ga. 304; Plummer *v.* Brandon, 5 Ired. Eq. 190; Nugent *v.* Bates, 51 Iowa, 77; Keith *v.* Stetter, 25 Kans. 100; Williams *v.* Saunders, 5 Cold. 60; Tanner *v.* King, 11 La. Rep. 175; Voet, Ad Pand. l. 5, t. 1, nos. 92, 97, and 98; Zangerus, De Except. pt. 2, c. 1, no. 10 *et seq.* Zangerus says: "Quodlibet enim accidens præsumitur in eodem statu, in quo semel fuit, persistere, nisi contra probetur mutatio." And see authorities cited *supra*, § 115 and notes.

[3] See authorities cited in the preceding notes and also Munro *v.* Munro, 7 Cl. & F. 842, per Lord Brougham; Pitt *v.* Pitt, 4 Macq. 627; Crookenden *v.* Fuller, 1 Swab. & Tr. 441; Jopp *v.* Wood, 4 De G. J. & S. 616; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Curling *v.* Thornton, 2 Add. Eccl. 6; Smith *v.* The People, 44 Ill. 16.

[4] Authorities cited in note 2, *supra*, and Munro *v.* Munro, 7 Cl. & F. 842; Crookenden *v.* Fuller, 1 Swab. & Tr. 441; Douglas *v.* Douglas, *supra;* Burnham *v.* Rangeley, 1 Wood. & M. 7; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Kilburn *v.* Bennett, 3 Metc. 199.

[5] De Bonneval *v.* De Bonneval, *supra;* Plummer *v.* Brandon, *supra.*

[6] Authorities cited, *supra*, and The Friendschaft, 3 Wheat. 14; The Ann Green, 1 Gall. 274; The Joseph, 1 id. 545; Hylton *v.* Brown, 1 W. C. Ct. 298; Read *v.* Bertrand, 4 id. 514; United States *v.* Thorpe, 2 Bond, 340; *Ex parte* Kenyon, 5 Dill. 385; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; United States *v.* Penelope, 2 Pet. Ad. 438; Sackett's Case, 1 Mass. 58; Jennison *v.* Hapgood, 10 Pick. 77; Sears *v.* Boston, 1 Metc. 250; Collester *v.* Hailey, 6 Gray, 517; Matter of Fitzgerald, 2 Caines, 318; Cath. Robert's Will, 8 Paige Ch. 519; Crawford *v.* Wilson, 4 Barb. 504; Isham *v.* Gibbons, 1 Bradf. 69; Cadwallader *v.* Howell & Moore, 3 Harr. (N. J.) 138; Clark *v.* Likens, 2 Dutcher, 207; Miller's Estate, 3 Rawle, 312; Fuller *v.* Bryan, 8 Harris, 144; *Re* Lower Oxford Township Election, 11 Phila. 641; State *v.* Judge, 13 Ala. 805; Boyd *v.* Beck, 29 id. 703; State *v.* Grizzard, 89 N. C. 115; Eagan *v.* Lumsden, 2 Disney (Ohio), 168; Smith *v.* Dalton, 1 Cin. S.-C. Rep. 150; Yonkey *v.* The State, 27 Ind. 236; Maddox *v.* The State, 32 id. 111; Beardstown *v.* Virginia, 81 Ill. 541; Rue High, Appellant, 2 Dougl. (Mich.) 515; Smith

difference whether such absence is for business, pleasure, health, or personal security, nor to what length of time it is prolonged, intention to return at a future time, however remote, being sufficient to retain domicil.[7] Sailors absent on long voyages,[8] soldiers[9] or ambassadors[10] absent in the service of their sovereign, and fugitives from political persecution,[11] are examples of the application of the principle; they are presumed to retain their former domicil because their absence is not inconsistent with intention to return.

§ 152. **Animus non revertendi. Mere Absence does not destroy Domicil.** — In Aikman *v.* Aikman,[1] absence for forty-seven years, a part of which time was spent in the maritime service and a part in the pursuit of an illicit connection, was held not to have worked a change of domicil in the absence of proof of *animus non revertendi.* In De Bonneval *v.* De Bonneval[2] a refugee from the French Revolution was held to have retained his French domicil notwithstanding residence of twenty years in England, intention to return to France being presumed from the circumstances attending his departure. In Hodgson *v.* De Beauchesne[3] an Englishman was held to have retained his English domicil after a residence of twenty-three years in France, the circumstances attending it not being deemed sufficient to warrant the inference of *animus non revertendi.* In Jopp *v.* Wood[4] a Scotchman resident in

v. Smith, 4 Greene (Iowa), 266; Penley *v.* Waterhouse, 1 Iowa, 498; Love *v.* Cherry, 24 id. 204; Vanderpoel *v.* O'Hanlon, 53 id. 246; Bradley *v.* Fraser, 54 id. 289; Walker *v.* Walker, 1 Mo. App. 404; Stratton *v.* Brigham, 2 Sneed, 420; Cole *v.* Lucas, 2 La. An. 946; Hardy *v.* DeLeon, 5 Tex. 211; Gouhenant *v.* Cockrell, 20 id. 96; Voet, Ad Pand. l. 5, t. 1, nos. 94 and 98; Henry, For. Law, 202; Demolombe, Cours de Code Napoléon, t. 1, no. 354; Story, Confl. of L. § 44; Wharton, Confl. of L. § 56; Westlake, Priv. Int. L. 1st ed. no. 38; Dicey, Dom. p. 81. See also cases mentioned in the next section.

[7] See cases referred to in the next section. Lord Chelmsford, in Moorhouse *v.* Lord (10 H. L. Cas. 272, 287), says: "The question, therefore, which must first be determined is, whether Dr. Cochrane had purposely and actually abandoned his Scotch domicil with the intention never to return to it. If he had not, it is quite immaterial what was the character of his residence in France; for as long as his former domicil continued he could not acquire another which would supplant it."

[8] See *infra*, ch. 15.

[9] See *infra*, id.

[10] See *infra*, ch. 17.

[11] See *infra*, ch. 13.

[1] 3 Macq. H. L. Cas. 854.

[2] 1 Curteis, 856.

[3] 12 Moore P. C. C. 285.

[4] 34 Beav. 88, affirmed 4 De G. J. & S. 616.

India twenty-five years in business was held not to have lost his Scotch domicil, as it appeared that he intended to return to his native country after acquiring a fortune in India. In Capdevielle's case,[5] a Frenchman was held to have retained his French domicil after an absence in trade of twenty-nine years; and in White *v.* Brown,[6] an American was held not to have lost his domicil by forty-eight years' absence for business and pleasure. And so instances might be multiplied indefinitely. It is true that in almost all of the cases cited the absence was broken by occasional returns; but as will be seen hereafter, occasional returns will not of themselves retain domicil.[7]

§ 153. **Id. Abandonment not a mere Matter of Sentiment.** — As to the nature of abandonment, and the extent to which one must intend to break away from his former place of abode, there has been some difference of opinion. Abandonment is certainly not merely a matter of sentiment; a strong regret at being compelled to give up one's former place of abode, "a panting for one's native home," [1] "a yearning of the untravelled heart," [2] "a lurking desire to return," [3] or a vague and uncertain intention to do so depending upon some distant and improbable contingency, is not inconsistent with it. In Haldane *v.* Eckford,[4] the evidence showed that the testator retained the deepest affection for his native country, — Scotland, — its people and everything pertaining to it, which he manifested on all occasions and in the most touching ways; that he had a great longing to return, and desired to buy land there; yet as his intention of permanently residing in Jersey clearly appeared, a change of domicil was held. Such feelings, although they sometimes throw light upon the intention of the person whose domicil is in question, are generally too impalpable for courts to deal with. But exactly where the line is to be drawn to separate the feeling or intention which will not prevent a change of domicil from the intention which will, it is very difficult to say.

[5] 2 Hurl. & Colt. 985.
[6] 1 Wall. Jr. C. Ct. 217.
[7] § 160.
[1] Stanley *v.* Bernes, 3 Hagg. Eccl. 373.
[2] Barton *v.* Irasburgh, 33 Vt. 159.
[3] *In re* Steer, 3 Hurl. & Colt. 594.
[4] L. R. 8 Eq. Cas. 631.

§ 154. **Id. "Floating Intention to return." Story's Proposition.** — Story, in his work on the Conflict of Laws,[1] has made use of a phrase which has given rise to some criticism and difficulty. He says that "if a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, *notwithstanding he may entertain a floating intention to return at some future period.*" But the inquiry immediately suggests itself, What is meant by "a floating intention"? Certainly not that the period for the return is simply indefinite and as yet unfixed, for then the proposition would be in conflict with almost every case in which a change of domicil has been decided against, and would entirely destroy the distinction between temporary and permanent absence. If it means a vague, unsettled, flickering inclination, — "a lurking desire," or the like, — thus much of the proposition at least would not be disputed. If, however, it means that the question of return is to be determined by the happening or not happening of some future event which is looked forward to, it requires some discussion and more explicit statement.

§ 155. **Id. id. Examination of the Authorities upon which Story's Proposition was based.** — The proposition was predicated upon the cases of Bruce *v.* Bruce [1] and Stanley *v.* Bernes.[2] In the latter case the testator, an Irish Protestant by birth, went to Lisbon in 1770, and there established himself in business as a merchant. He soon afterwards married a lady who, though of Irish parentage, was a Portuguese subject by birth; and in order to contract that marriage, he professed the Roman Catholic religion. In 1798 he obtained letters of naturalization as a Portuguese subject, which letters declared that he had given satisfactory proof of his intention to reside for life in the kingdom of Portugal; and in fact he did reside within its territories for fifty-six years, until his death in 1826. On the other hand, during the later years of his life, he appears to have frequently expressed an earnest wish and intention

[1] § 46.
[1] 2 Bos. & Pul. 229, note to Marsh *v.* Hutchinson.
[2] 3 Hagg. Eccl. 373.

"to return to end his days in Ireland," and to have done certain acts which might be looked upon as evidence of *animus revertendi*. But this "floating intention" appears to have been formed after his acquired domicil had vested, and the case therefore cannot be considered as an authority for the proposition referred to. The case of Bruce *v.* Bruce was different. It was the first of that class of cases known as the Anglo-Indian cases,[3] in which it was held that one who went out to India from England or Scotland, in the service of the East India Company, for the purpose of making a fortune, thereby gained an Indian domicil, although there existed the ulterior intention of returning, when his object was accomplished, to his native land there to end his days, — a contingency which was not only not unlikely to happen, but which in fact was frequently fulfilled. It will be observed that this doctrine is in conflict with the most approved definitions of domicil, and particularly with that given with approbation by Story[4] himself from Putnam *v.* Johnson;[5] namely, "the habitation fixed in any place without any present intention of removing therefrom is domicil."

As the circumstances which gave rise to these cases and the doctrine contained in them have passed away, a detailed examination of them here would be without profit. It is sufficient to say that they gave rise to much discussion, and for many years continued to puzzle English jurists who sought to harmonize them with the general principles of domicil, until they were finally put upon what seems to be their proper ground, and is certainly a plausible ground; namely, that the East India Company was a *quasi*-foreign government, and that persons entering its service must be presumed to be

[3] See Bruce *v.* Bruce, *supra;* Whicker *v.* Hume, 7 H. L. Cas. 124; Moorhouse *v.* Lord, 10 id. 272; Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285; Craigie *v.* Lewin, 3 Curteis, 435; Munroe *v.* Douglas, 5 Madd. 379; Forbes *v.* Forbes, Kay, 341; Drevon *v.* Drevon, 10 Jur. (N. S.) 717; Cockrell *v.* Cockrell, 25 L. J. Ch. 730; Lyall *v.* Paton, id. 746; Allardice *v.* Onslow, 33 id. 434; *Re* Tootal's Trusts, L. R. 23 Ch. D. 532; Hepburn *v.* Skirving, 9 W. R. 764; Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733; Arnott *v.* Groom, 9 D. (Sc. Sess. Cas. 2d ser. 1846) 142; Wauchope *v.* Wauchope, 4 Rettie (Sc. Sess. Cas. 4th ser. 1877), 945; Dicey, Dom. pp. 140–143; Westlake, Priv. Int. L. 2d ed. §§ 249, 259.

[4] Confl. of L. § 43.

[5] 10 Mass. 488.

domiciled within its jurisdiction.[6] The doctrine of these cases, as originally (and in the time of Story) understood, has therefore been discarded in England, and has been pronounced by Kindersley, V. C., "anomalous, and an excrescence upon any principle as to domicil."[7] Accordingly, it has been decided that one who left England and went to India for the purpose of making his fortune in private business, intending finally to return, did not lose his English domicil, although he remained in India twenty-five years and died there.[8] And

[6] Jopp *v.* Wood, on appeal, 4 De G. J. & S. 616. Turner, L. J., says: "At the time those cases were decided, the government of the East India Company was in a great degree, if not wholly, a separate and independent government, foreign to the government of this country; and it may well have been thought that persons who had contracted obligations with such government for service abroad could not reasonably be considered to have intended to retain their domicil here. They in fact became as much estranged from this country as if they had become servants of a foreign government." And see Dicey, *ubi supra*.

[7] Drevon *v.* Drevon, 10 Jur. (N. S.) 717; see also S. C. 34 L. J. Ch. 129.

[8] Jopp *v.* Wood, 34 Beav. 88, affirmed 4 De G. J. & S. 616. In Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441, declarations of the testator, whose domicil of origin was French, to the effect that he would return to France when he had made his fortune, were relied upon to prove that he had not acquired an English domicil, notwithstanding his residence in business for twenty-seven years in England, etc. Jessel, M. R., and James, L. J., considered the declarations too indefinite and insufficient to outweigh the facts of the testator's life. Brett, L. J., however, used this language: "But it was said that he limited the time by reference to the performance of a condition; namely, making his fortune. I think such a condition is not sufficient; it ought to be a condition which limits the residence to a definite time; and when the condition refers only to a time as indefinite as it can possibly be, it cannot be said to confine the residence to a definite time. There can be nothing so indefinite as the time at which a man expects to make his fortune. Therefore, as the testator did not fix a date, or make any definite condition by which the residence was limited to a definite time, it must be taken that his intention was to make his residence in England permanent." James, L. J., said: "He is reported to have said that when he had made his fortune he would go back to France. A man who says that is like a man who expects to reach the horizon; he finds it at last no nearer than it was at the beginning of his journey. Nothing can be imagined more indefinite than such declarations; they cannot outweigh the facts of the testator's life." Malins, V. C., distinguishing the case from Jopp *v.* Wood, says: "Jopp *v.* Wood is a case relating to an Indian domicil which is quite different from all other cases of domicil, because it is well known that every one who goes to India does so for the express purpose of making money and returning as soon as possible." While the expressions of Brett, L. J., cannot be supported throughout, and the other judges of the Court of Appeals relied rather upon the insufficiency of the testator's declarations to show a sufficient *animus revertendi* in the face of the strong facts in evidence to the contrary, the case may be reconciled with Jopp *v.* Wood upon the ground which the Vice-Chancellor seems to suggest;

such was the doctrine of the Dutch jurists even with regard to persons who went to India in the service of the Dutch East India Company. Thus it was held by a high authority, Groenewegen, that a person whose domicil was at Delft, having, with a view to make his fortune, gone to the East Indies in the service of that company, and died there, was at the time of his death domiciled at Delft.[9] Such too was the opinion of John Voet.[10]

§ 156. **Id. Near and Remote Contingency. Lord Campbell in Aikman v. Aikman.** — In Aikman *v.* Aikman,[1] Lord Chancellor Campbell draws the distinction between a near and a remote contingency, remarking that "if a man is settled in a foreign country in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency will not prevent such residence in a foreign country from putting an end to his domicil of origin.[2]

inasmuch as it is a well-known fact that few persons who emigrate to a neighboring country for the purpose of making a fortune ever return after the accomplishment of their purpose; while on the other hand it is an equally well-known fact that a large proportion of those who go to Eastern countries for the same purpose do return. The inference, therefore, may be drawn that the *animus revertendi* in the former case is extremely vague and its fulfilment very improbable, while in the latter case the *animus revertendi* is distinct and fixed, and its accomplishment probable. In other words, the two cases are those of a probable and an improbable contingency.

[9] Henry, For. L. p. 203, from Hollandsche Consultatien, vol. vi. p. 651.

[10] Ad Pand. l. 5, t. 1, no. 98.

[1] 3 Macq. H. L. Cas. 854. See also remarks of Dr. Lushington in Anderson *v.* Laneuville, 9 Moore P. C. C. 325.

[2] "This," says the editor of the eighth edition of Story on the Conflict of Laws, "is probably what Story meant by 'a floating intention to return'" (p. 52). In Attorney-General *v.* Pottinger (as reported 30 L. J. Ex. 284, 292) Bramwell, B., says: "One word with regard to the intention. [The counsel for the defendant] says, and I think he errs there, that Sir Henry Pottinger did not intend to remain in England, because he contemplated that he might possibly go back to India. I think there is a very common mistake made in such cases, which is the assumption that a man must absolutely intend one of two things, for it may be that he has no absolute intention of doing either. It may be that Sir Henry Pottinger did not contemplate the case at all arising of an opportunity of going back to India. So that, if he had been suddenly appealed to upon the subject, he might have said, 'I have never thought of it.' I think, however, it appears that he had contemplated the possibility of returning to India. But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum*, in order to establish a domicil? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention, or expression of inten-

But a residence in a foreign country for pleasure, lawful or illicit, which residence may be changed at any moment without the violation of any contract or any duty, and is accompanied by an intention of going back to reside in the place of birth on the happening of an event which in the course of nature must speedily happen, cannot be considered as indicating the purpose to live and die abroad." And the same is doubtless true with regard to residence for purposes of business; if the event looked forward to, upon which the return depends, is likely to happen and to happen soon, it probably makes little difference whether residence is for pleasure or business. The remarks of Lord Campbell are made with reference to a change from the country of origin to a foreign country, but they would probably apply with equal force where the question was one of abandonment of an acquired domicil.

§ 157. **Id. id. Craigie v. Lewin.** — The distinction is illustrated by some of the East India cases. In Craigie *v.* Lewin,[1] Lieutenant-Colonel Craigie, a Scotchman by birth, at an early age entered the East India military service, and in 1837, having attained the rank of Lieutenant-Colonel, came to Scotland on leave of absence for three years, which could however be renewed for two years longer. It was evident from all the circumstances that he desired to settle permanently in Scotland, but unless he attained the rank of Colonel he was liable at the expiration of his leave of absence to be called back to India. As he had long been in the service of the Company, it was probable, though by no means certain, that he would attain that rank before his leave expired. He died, however, in 1840, before the expiration of his leave, and before he had attained the rank of Colonel. It was held by Sir Herbert Jenner Fust, that he retained his Anglo-Indian domicil. On the other hand, after attaining the regimental rank of Colonel, the military servants of the East India Company might reside abroad for an unlimited time, subject to recall only in cases of extreme emergency, which appear rarely to have happened.

tion, prevented a man having a fixed domicil, no man would ever have a domicil at all, except his domicil of origin."

This passage is not so fully reported in the regular report, 6 Hurl. & Nor. 747.

[1] 3 Curteis, 435.

Such remote possibility of return has not been considered by the English courts sufficient to prevent a change of domicil.[2]

§ 158. Id. id. — Although the distinction between a near and a remote contingency seems to be a safe enough one, if properly applied, it is difficult to say how far it would be recognized now in England in view of the later cases. Lord Wensleydale, in Aikman *v.* Aikman,[1] observed: "Every man's domicil of origin must be presumed to continue until he has acquired another sole domicil by actual residence with intention of abandoning his domicil of origin. This change must be *animo et facto*, and the burthen of proof unquestionably rests upon the party who asserts the change." This proposition is only a repetition in somewhat different phrase of the third rule of Lord Alvanley in Somerville *v.* Somerville,[2] but it seems henceforth to have attracted greater attention. It has been frequently repeated in the later cases, and seems to have been understood as shutting out all *animus revertendi*. In Capdevielle's case,[3] it was held by Martin and Channell, B.B., to be entirely in conflict with Story's proposition given above.

In Whicker *v.* Hume[4] and Moorhouse *v.* Lord,[5] very strong expressions were used, — that a man must intend *quatenus in illo exuere patriam;* "must mean to cease to be a Scotchman and become an Englishman or a Frenchman," etc.; in short, that he must do everything in his power to rid himself of his connection with his former domicil. In the latter case Lord Chelmsford declared his opinion that a change of domicil could not take place if any event, certain or uncertain, which might induce a subsequent change of residence were looked forward to. It will be observed that all the cases above referred to, except Whicker *v.* Hume, were cases in which an abandonment of domicil of origin was sought to be shown; but if the principles are correct, they are also applicable, though with somewhat diminished force, to the abandonment

[2] Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733; Forbes *v.* Forbes, Kay, 341.

[1] 3 Macq. H. L. Cas. 854, 877.

[2] 5 Ves. Jr. 750.

[3] 2 Hurl. & Colt. 985.

[4] 7 H. L. Cas. 124.

[5] 10 id. 272.

of acquired domicil.[6] It may therefore be possible to conceive a floating intention so vague and impalpable as to be able to run the gauntlet of the recent English decisions; but the contingency upon which it depends would have to be extremely remote, or the intention itself of a very shadowy character. It is true that in Udny *v.* Udny[7] and its sequents, the extreme expressions used in Whicker *v.* Hume and Moorhouse *v.* Lord are criticised, and the doctrine of those cases is somewhat modified; but there is every reason to believe that the English courts would not now hold a change of domicil, particularly to a foreign country, without the strongest and most unequivocal proof that the former place of abode had been completely and finally abandoned as a place of abode. In Brunel *v.* Brunel,[8] the deceased had declared that he might return to France; but all the *indicia* of *animus manendi* were so strong as to show that the *animus revertendi*, if entertained at all, was very vague, and a change of domicil was held.

§ 159. **Id. Story's Proposition in the American Cases.** — In America, Story's proposition has been received, and is quoted and approved in many cases,[1] without however any special attempt having been made to get at its meaning. Some confusion has been introduced in several cases involving the question of abandonment of *quasi*-national domicil, in which it is held that if the intention be to return at a future indefinite time it is not sufficient to prevent a change,[2] thus

[6] See, *e. g.*, Maxwell *v.* McClure, 6 Jur. (N. S.) 407, and the remarks of the Scotch judges in this case *sub nom.* Donaldson *v.* McClure, 20 D. (Sc. Sess. Cas. 2d ser. 1857) 307.

[7] L. R. 1 Sch. App. 411.

[8] L. R. 12 Eq. Cas. 298. See also Doucet *v.* Geoghegan, *supra*, § 155, note 8. In Anderson *v.* Laneuville, 9 Moore P. C. C. 325, it was held that a person whose domicil had been English gained a domicil in France by residence there with intention to remain during the life of another person of about the same age, and who actually survived him, notwithstanding he had expressed his intention to return to England in case she predeceased him. But see *Re* Capdevielle, 2 Hurl. & Colt. 985.

[1] Doyle *v.* Clark, 1 Flipp. 536; Hart *v.* Lindsey, 17 N. H. 235; Anderson *v.* Anderson, 42 Vt. 350; State *v.* Frest, 4 Harr. (Del.) 558; Ringgold *v.* Barley, 5 Md. 186; *Re* Toner, 39 Ala. 454; Rue High, Appellant, 2 Doug. (Mich.) 515; State *v.* Groome, 10 Iowa, 308; Stratton *v.* Brigham, 2 Sneed, 420; Kellar *v.* Baird, 5 Heisk. 39; and cases cited in next note.

[2] Holmes *v.* Greene, 7 Gray, 299; Sleeper *v.* Paige, 15 id. 349; Hallet *v.* Bassett, 100 Mass. 167; Venable *v.* Paulding, 19 Minn. 488; Graham *v.* Trimmer, 6 Kans. 230; and see *infra*, § 171.

breaking down the distinction between temporary and permanent absence. This doctrine is however confined to a few cases, and appears to have crept in from the cases of municipal domicil. But the great weight of the best-considered American cases seems to be that no change can occur where there is an intention to return, unless that intention be very vague or depend upon a remote contingency. Our courts, however, have not used language so strong as that of some of the late English cases.

§ 160. **Id. Occasional Visits to, and Retention of Dwelling-house at, Former Place of Abode.** — The former place of abode must be abandoned only as a place of abode. Therefore occasional returns,[1] or an intention to return for temporary purposes of business,[2] or pleasure, to remove one's family,[3] or the like, will not prevent a change of domicil. The mere retention of landed estate at the former place of abode is certainly not inconsistent with abandonment;[4] but whether the retention of a place of residence — a furnished house or the like — in which the person may, and probably does intend to, reside occasionally, is or is not consistent with abandonment, has been the subject of some difference of opinion. In Aikman *v.* Aikman,[5] Lord Campbell, and in Maxwell *v.* McClure,[6] Lords

[1] Anderson *v.* Laneuville, 9 Moore P. C. C. 325; Hoskins *v.* Mathews, 8 De G. M. & G. 13; Allardice *v.* Onslow, 9 L. T. (N. S.) 674; Platt *v.* Attorney-General, L. R. 3 App. Cas. 336; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; *Re* Steer, 3 Hurl. & Nor. 594; Gillis *v.* Gillis, Ir. R. 8 Eq. 597; Burnham *v.* Rangeley, 1 Wood. & M. 7; Kemna *v.* Brockhaus, 10 Biss. 128; Williamson *v.* Parisien, 1 Johns. Ch. 389; Hood's Estate, 21 Pa. St. 106; State *v.* Frest, 4 Harr. (Del.) 558; Swaney *v.* Hutchins, 13 Neb. 266; Russell *v.* Randolph, 11 Tex. 460.

[2] In State *v.* Frest, *supra*, the court said: "If a person intending to break up his business in Wilmington and remove to Philadelphia or elsewhere as a home, should go there and exercise his trade, this would be sufficient evidence of a change of domicil, even though he should before leaving secure a job of work at Wilmington, and intend to go back for the purpose of doing it. For it is not necessary that a man should determine never to go back, either temporarily or permanently, in order to lose his residence here." And see cases in preceding note.

[3] Burnham *v.* Rangeley, *supra*; Russell v. Randolph, *supra*.

[4] See *infra*, § 417 *et seq.*

[5] 3 Macq. H. L. Cas. 854; s. c. 7 Jur. (N. S.) 1017. Lord Campbell says: "I cannot accede to the doctrine that if a man has lost his original domicil by acquiring a domicil in a foreign country, he cannot recover his original domicil while he retains any place of residence in the foreign country. He certainly cannot have two domicils of succession at the same point of time, but the *animus* must determine the effect of a residence in the foreign country being retained."

[6] 6 Jur. (N. S.) 407. In this case the

Campbell and Cranworth, while admitting that the retention of such residence at the place of acquired domicil was a very

person whose domicil was in question, being originally a Scotchman, had gone to England while very young, and having established himself there in business had resided in that country for a number of years. His house having been taken by a railway company, after some unsuccessful attempts to procure a suitable residence in the neighborhood, he repaired a house which had been occupied by his father-in-law, and after having resided in it for a few months, removed his family to a mansion in Scotland, which he had erected there, leaving a housekeeper in charge of the house in England. Many strong circumstances combined to show his intention to return to England, and it was accordingly held that his Scotch domicil had not reverted. The retention of the repaired house in England, while commented upon, was not strongly relied upon as evidence of *animus revertendi*, there being abundant evidence without it. Lord Campbell said: "I think that although the residence remained in England, that would not absolutely and completely prevent a change of domicil to Scotland, for one can easily conceive evidence being produced to show that although the residence was retained in England the domicil was transferred; and in the course of the argument cases were put, in which I concurred, to show that that would be the result. But then the *onus* clearly lies upon the party who alleges the change of domicil. There being a residence in England still subsisting, and that residence being used from time to time by the party whose domicil is in question, it would require strong evidence to show that while that residence was retained and used, there had been a transfer of domicil." Lord Cranworth said: "I do not at all mean to say that he might not have changed his domicil even if he had retained his residence at Wigan. That would not be a case very easy of proof; but such a case might occur, as in one case which I suggested to the counsel in the course of the argument. A person might have a country residence at some watering-place on the French coast — at Boulogne, for instance — where he might have been living, not because he was embarrassed, but for some other reason he might have been so living there that *ex concessis* he was domiciled there. But he might have a magnificent estate left him in Yorkshire, which might induce him to quit Boulogne and come and live in Yorkshire; but nevertheless he likes Boulogne as a bathing-place, and retains his house there, and goes there every year. I should think it would be a difficult proposition to maintain that if he had retained that house and gone there every year for a month, having lived eleven months in the year in Yorkshire, and had so gone on for twelve years, his will executed according to the English Statute of Wills would not have passed his personal property. That, I think, never could be the law. At the same time it is perfectly true that when a residence is retained in a place where the party has been domiciled, it is a circumstance, and a very cogent circumstance, to show that that party does not mean to change his domicil." Lord Wensleydale said: "I cannot myself conceive a case in which it could happen that a man might be said to have intended to have abandoned his former domicil unless he had quitted the place where he had resided and ceased to reside there. If he still kept a residence in that place with the intention of residing there indefinitely at any time when he chose to reside there, I cannot conceive that in such a case as that (though I do not deny that such a case might happen) he could have abandoned his former domicil and acquired a new domicil. I confess I have difficulty in conceiving that case, although my noble and learned friend on the woolsack, and my noble and learned friend who last addressed your lordships conceived that there might be such a case."

cogent circumstance to show that the party did not intend to change his domicil, were of opinion that it would not be a bar to reverter of domicil of origin. On the other hand, Lord Wensleydale in the latter case declared himself unable to conceive a case in which a change of domicil could take place under such circumstances. In Forbes *v.* Forbes,[7] Wood, V. C., inclined to the opinion that the retention of such residence was not inconsistent with abandonment of a resumed domicil of origin in favor of a third place.

§ 161. **Animus non revertendi need not be Express or Conscious.** — Abandonment may be either express or implied; that is to say, a person may (*a*), upon leaving the place of his domicil (or afterwards), expressly and definitively determine not to return to it (and this may happen whether or not he selects a new place of abode), or (*b*) he may settle in a new place in a manner so permanent and exclusive as to be entirely incompatible with an intention to return, although he may never have consciously formed any resolution upon that particular point.[1] In other words, *animus non revertendi* may be implied in *animus manendi;* but when the latter is relied

[7] Kay, 341.

[1] How far the *animus* (either *non revertendi* or *manendi*) must be distinct and conscious, is by no means clear. Wickens, V. C., in Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617, 645, says: "It may perhaps be added, that to prove such an intention as is necessary to establish a change of domicil, and in the absence of evidence that the intention actually existed (which can be shown by express declaration, and in no other way), the evidence must lead to the inference that if the question had been formally submitted to the person whose domicil is in question, he would have expressed his wish in favor of a change. Possibly, where the actual residence in the acquired domicil has been very long, an unconscious change of mind may be inferred, though it may be doubtful whether it would have been declared or admitted if the question had been actually raised. Such unconscious changes of opinion on the most important subjects happen not unfrequently in such a space of time as the thirty-two years' residence in England, which occurred in Udny *v.* Udny, Law Rep. 1 H. L. Sc. 441. But in cases not involving a very long time, I apprehend that in order to establish a change of domicil it must be shown that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question had arisen in a form requiring a deliberate or solemn determination. What, therefore, has to be considered is, whether the testator, William Douglas, ever actually declared a final and deliberate intention of settling in England, or whether his conduct and declarations lead to the belief that he would have declared such an intention if the necessity of making his election between the countries had arisen." See also the remarks of Bramwell, B., in Attorney-General *v.* Pottinger, *supra*, § 156, note 2, and Dicey, Dom. pp. 78, 79.

upon to prove the former, the inference must be clear and unequivocal.[2]

§ 162. (2) **Animus Manendi.** — But the *animus non revertendi* is only one side of the *animus* which is required for the establishment of domicil of choice. When a person has abandoned his former place of abode, that is, has left it *cum animo non revertendi*, and has accomplished the *factum* of a change of bodily presence to another place in order to establish a domicil there, one further element is necessary; namely, intention to "settle" there (to use the significant word adopted by the recent English cases), — *animus manendi*. As temporary absence *cum animo revertendi* from a former place of abode does not destroy domicil there,[1] so temporary presence in a new place *sine animo manendi* does not establish domicil there;[2] and this is so even if *animus non revertendi* be

[2] In Moorhouse *v.* Lord (10 H. L. Cas. 272, 286), Lord Chelmsford says: "In a question of change of domicil the attention must not be too closely confined to the nature and character of the residence by which the new domicil is supposed to have been acquired. It may possibly be of such a description as to show an intention to abandon the former domicil; but that intention must be clearly and unequivocally proved." In Dupuy *v.* Wurtz, 53 N. Y. 556, 568, Rapallo, J., after reviewing a number of English cases, says: "In all these cases it was upon the ground of a clearly proved voluntary and intentional acquisition of a foreign domicil that the courts held the former domicil abandoned. The late cases of Jopp *v.* Wood and Moorhouse *v.* Lord proceed upon the ground that in order to acquire a new domicil there must be an intention to abandon the existing domicil. All the authorities agree that to effect a change of domicil there must be an intention to do both. Some of them hold that the intention to do one implies an intention to do the other."

[1] *Supra*, §§ 125, 126, 135, 136, 151.

[2] The authorities upon this point are very abundant? Among others are the following: Ommanney *v.* Bingham, Rob. Pers. Suc. 468 (s. c. partially given in argument of counsel in Somerville *v.* Somerville, 5 Ves. Jr. 757 *et seq.*); Bempde *v.* Johnstone, 3 Ves. Jr. 198; Pitt *v.* Pitt, 4 Macq. H. L. Cas. 627; Moorhouse *v.* Lord, 10 H. L. Cas. 272; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Udny *v.* Udny, id. 441; Jopp *v.* Wood, 34 Beav. 88; affirmed, 4 De G. J. & S. 616; Case *v.* Clarke, 5 Mas. 70; Read *v.* Bertrand, 4 Wash. C. Ct. 514; United States *v.* Thorpe, 2 Bond, 340; Kemna *v.* Brockhaus, 10 Biss. 128; United States *v.* Penelope, 2 Pet. Ad. 438; Jennison *v.* Hapgood, 10 Pick. 77; Sears *v.* Boston, 1 Met. 250; Shaw *v.* Shaw, 98 Mass. 158; Matter of Wrigley, 8 Wend. 134; Dupuy *v.* Wurtz, 53 N. Y. 556; Chaine *v.* Wilson, 1 Bosw. 673; Isham *v.* Gibbons, 1 Bradf. 69; Black *v.* Black, 4 id. 174; Ensor *v.* Graff, 43 Md. 391; Plummer *v.* Brandon, 5 Ired. Eq. 190; State *v.* Hallet, 8 Ala. 159; Veile *v.* Koch, 27 Ill. 129; Smith *v.* Smith, 4 Greene (Iowa), 266; State *v.* Minnick, 15 Iowa, 123; Church *v.* Crossman, 49 id. 447; State *v.* Dodge, 56 Wis. 79; Gravillon *v.* Richards Ex'rs, 13 La. Rep. 293; Cole *v.* Lucas, 2 La. An. 946; Republic *v.* Skidmore, 2 Tex. 261; Story, Confl.

made to appear.[3] "A person's being at a place is *prima facie* evidence that he is domiciled at that place;"[4] but this *prima facies* disappears whenever it is shown that he was formerly domiciled elsewhere, and is not where he is now found *cum animo manendi*.[5] With respect to the nature of the *animus manendi* there has been considerable confusion and conflict, particularly in this country, largely growing out of the practice among American judges of relying, without sufficient discrimination, upon cases of municipal domicil as authorities in cases involving questions of national or *quasi*-national domicil.

§ 163. **Id. Roman Law.** — The Roman law throws little light upon the nature of the *animus manendi*. It devotes itself to the enumeration of the most usual and striking, and therefore the most important, external physical evidences of domicil, rather than to a description of the *animus* requisite for the establishment of domicil. About the only direct light which it throws upon the inquiry is contained in the words used in the definition given in the Code, "Unde rursus non sit discessurus, si nihil avocet;"[1] and this light is but feeble and uncertain. Upon the whole, however, we are left to

of L. § 44; Wharton, Confl. of L. § 56; Dicey, Dom. p. 76 *et seq.* And see the authorities referred to, *supra*, §§ 125, 126, 135, 136, and notes.

[3] Although numerous other authorities might be cited, this point is sufficiently illustrated and enforced by the following cases: In Bell *v.* Kennedy, L. R. 1 Sch. App. 307, B., whose domicil of origin was in Jamaica, left that island "for good," with the intention of settling somewhere in Great Britain. He visited both England and Scotland, coming to the latter country with the intention of settling there, if he could purchase an estate to suit him. He looked after several, and made an offer for one — Enterkine — which was rejected. He finally leased a house for one year, and while residing in it his wife died. Subsequently he made a more favorable offer for Enterkine, which was accepted. The question being as to his domicil at the time of his wife's death, the Scotch Court of Session held it to be Scotch, but in this the interlocutor was reversed by the House of Lords, who held that at the point of time in question his domicil of origin continued. In Udny *v.* Udny (id. 441, see *infra*, § 192 *et seq.*), the House of Lords held that even if Colonel Udny had acquired an English domicil (to which view their lordships seem to have decidedly inclined), his Scotch domicil of origin reverted upon his quitting England *sine animo revertendi*, and that he did not acquire a domicil in France by residence there for nine years, there being no sufficient evidence of *animus manendi*. See also *infra*.

[4] Bruce *v.* Bruce, 2 Bos. & Pul. 229, note; Bempde *v.* Johnstone, 3 Ves. Jr. 198, and *infra*, § 375.

[5] See *infra*, § 376.

[1] Code 10, t. 39, l. 7. See *supra*, § 5, note 1.

infer that the domicil or home which it so pathetically describes, could not be a mere temporary abode, inasmuch as the evidences which it enumerates are in a general way evidences of permanency. And moreover the Code[2] contains a provision, following the Ordinance of Hadrian, that residence in a place for the sake of study should not be deemed to confer domicil there unless such residence had been continued for ten years; and the same rule was applied to the father of a student whose residence was chosen for the sake of being near his student son. According to Savigny,[3] such residence thus prolonged merely raised the presumption of a purpose of constant residence, and so it was understood by others.[4] By its terms this provision of the Code applied only to the cases of the student and his father; but this was probably only the particular application of the general principle that residence in a place for a special and temporary purpose does not constitute domicil; and thus understood it goes far to corroborate the inference above referred to, that permanency was an essential ingredient in the Roman idea of domicil.

§ 164. **Id. Continental Jurists.** — Menochius[1] remarks: "Et primum dicendum est habitationem et domicilium inter se differre. Nam domicilium habere quis dicitur in loco qui animo ibi commorandi perpetuo habitat. Is verò qui pro emptione aliquâ ex causâ, puta studiorum, vel litis, vel simili commoratur habitare dicetur."

Donellus[2] says: "Habitatio non est satis, animum consistendi accedere oportet; ut quis scilicet ita ibi inhabitet, ut ibi sedem sibi constituerit, id est, ut *ibi perpetuo consistat, non temporis causâ;* nisi aliquid inde avocet. Quisquis temporis causâ alicubi commoratur et consistit, ibi domicilium non habet. Veluti, si qui legationis causâ aliquo venerint, et dum legatione funguntur, ibi habitationem conduxerint; si qui venerint aliquo negotiandi, aut mercaturæ discendæ causâ. Ipsi adeo studiosi, qui aliquo venerint studiorum causâ, hoc

[2] Code 10, t. 39, l. 2. To this may be added the distinction which Ulpian draws between *habitatio* and *domicilium*. Dig. 47, t. 10, l. 5, § 5.

[3] System, etc. § 353 (Guthrie's trans. p. 98).

[4] *Infra*, § 383 *et seq.*

[1] De Præsumptionibus, l. 6, præs. 42, no. 2.

[2] De Jure Civili, l. 17, c. 12, p. 978, 40.

ipso, quod ibi ita consistant, ut post studia completa domum redeant; quantocunque tempore ibi constiterint; tamen ibi domicilium non habent."[2] John Voet[3] says: "Illud certum est . . . domicilium constitui, . . . neque solâ habitatione, *sine proposito illic perpetuo morandi.*" So Zangerus:[4] "Non enim ex eo, quod quis focum et ignem teneat, arguitur domicilii constitutio, utpote, quæ ex solo animo *perpetuo habitandi* in loco dependet."

The French, like the Roman, jurists have been more inclined to look at the external evidences which indicate the setting up of a "principal establishment" than to inquire into the nature of the *animus manendi.* Nevertheless they insist upon substantial permanency. Thus Demolombe,[5] in pointing out the similarity between the definition contained in the Roman Code and that of the Code Civil, — namely, "Le domicile de tout Français . . . est au lieu où il a son principal établissement," — says: "That is to say, at the place which he has made the centre of his affections, of his affairs, and of his habits, the seat, in fine, of his social existence, *rerum ac fortunarum suarum summam*, at the place where he is established in a manner permanent and durable, with the intention of being held there, of being there attached, of there returning sooner or later whenever he is absent." Again,[6] in arguing against the possibility of a Frenchman acquiring a foreign domicil in complete derogation of his French domicil, he says: "I add that the establishment of a Frenchman in a foreign country, so long as he has not been there naturalized, does not present the characteristics of duration and fixity which constitute domicil; the Frenchman is always presumed to preserve *l'esprit de retour*, and hence to be in a foreign country only more or less temporarily." And again,[7] in speaking of the circumstances which may take the place of formal declarations, he says: "That which is above all necessary, when the translation of domicil is in question, is that they should give evidence at once of the complete abandonment of the old place and the

[2] Ad Pand. l. 5, t. 1, no. 98.
[3] De Except. pt. 2, c. 1, no. 18.
[4] Cours de Code Napoléon, t. 1, no. 344.
[5] Id. no. 349.
[6] Id. no. 354.

definitive adoption of the new. It is then, particularly, that habitation in the new place ought to present the characteristics of legal possession; that is to say, they ought to have nothing transient, provisional, or accidental."

§ 165. **Id. id.** — Savigny[1] thus defines domicil: "That place is to be regarded as a man's domicil which he has freely chosen for his permanent abode, and thus for the centre at once of his legal relations and his business. The term 'permanent abode,' however, excludes neither a temporary absence nor a future change, the reservation of which faculty is plainly implied; it is only meant that the intention of mere transitory residence must not at present exist. . . . Residence not accompanied with the present intention that it is to be permanent and perpetual does not constitute domicil, even if by accident it continues for a long time, and therefore is not merely transient." Vattel[2] defines domicil to be "the habitation fixed in any place with an intention of always staying there;" and his definition has been very frequently cited, commented upon, and criticised in England and America. Calvo[3] quotes, as in his opinion the most exact, a definition which he attributes to Judge Rush, but which is in fact the definition of Judge Rush somewhat modified by Phillimore, — namely: "Domicil is a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time."

It will thus be seen that the continental jurists, although differing among themselves perhaps with respect to the *degree* of permanency, agree in requiring for the *animus manendi* the character of *substantial* permanency; and this they require for all grades of domicil, whether national, *quasi*-national, or municipal.

§ 166. **Id. British Authorities.** — In the British cases and by the British text-writers several forms of expression have been used to characterize the *animus manendi*, the one most frequently used being the word "permanent;"[1] and it has been

[1] System, etc. § 353 (Guthrie's trans. pp. 97, 98).

[2] Liv. 1, c. 19, no. 218.

[3] Manuel, § 197.

[1] Bempde *v.* Johnstone, 3 Ves. Jr. 198; Munro *v.* Munro, 7 Cl. & F. 842; Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Whicker *v.* Hume, 7 H. L. Cas.

found for practical purposes sufficiently explicit. "For an unlimited time" [2] and "for an indefinite time" [3] have been

124; Dolphin *v.* Robins, id. 390; Moorhouse *v.* Lord, 10 id. 272; Pitt *v.* Pitt, 4 Macq. H. L. Cas. 627; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; De Bonneval *v.* De Bonneval, 1 Curteis, 856; Laneuville *v.* Anderson, 2 Spinks, 41; Wilson *v.* Wilson, L. R. 2 P. & D. 435; Brown *v.* Smith, 15 Beav. 444; Jopp *v.* Wood (M. R.), 34 id. 88; Id. on appeal, 4 De G. J. & S. 616; Lord *v.* Colvin, 4 Drew, 366; Haldane *v.* Eckford, L. R. 8 Eq. Cas. 631; Brunel *v.* Brunel, 12 id. 298; Douglas *v.* Douglas, id. 617; King *v.* Foxwell, L. R. 3 Ch. D. 518; Doucet *v.* Geoghegan, 9 id. 441; Capdevielle *v.* Capdevielle, 21 L. T. (N. S.) 660; Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733; Gillis *v.* Gillis, Ir. R. 8 Eq. 597; see also *infra*, note. In Munro *v.* Munro, Lord Cottenham says: "To effect this abandonment of the domicil of origin and substitute another in its place, it required *le concours de la volonté et du fait; animo et facto;* that is, the choice of a place; actual residence in the place then chosen; and that it should be the principal and permanent residence; the spot where he had placed 'larem rerumque ac fortunarum suarum summam;' in fact, there must be both the residence and intention. . . . Mr. Burge in his excellent work cites many authorities from the Civilians to establish this proposition. It is not, he says, by purchasing and occupying a house or furnishing it, or vesting a part of his capital there, nor by residence alone, that domicil is acquired; but it must be residence with the intention that it should be permanent." In Bell *v.* Kennedy, their lordships throughout speak of permanent residence as necessary for the change of domicil. Lord Chelmsford says: "This case being one of alleged change of domicil, it is necessary to bear in mind that a domicil, although intended to be abandoned, will continue until a new domicil is acquired, and that a new is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there. It may be conceded that if the intention of permanently residing in a place exists, a residence in the pursuance of that intention, however short, will establish domicil." In De Bonneval *v.* De Bonneval, Sir Herbert Jenner says: "Another principle is that the acquisition of a domicil does not simply depend upon the residence of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicil, and of abandoning the former." In Brown *v.* Smith, Lord Langdale, M. R., said: "To constitute a new domicil in a place there must not only be the *factum* of residence there, but the *animus manendi;* that is, there must be a fixed resolution to have a permanent and continued residence in the place of actual residence." James, V. C., in Haldane *v.* Eckford, says that Udny *v.* Udny brought "back the law to that which," in his opinion, always was, before Moorhouse *v.* Lord and its sequents, "considered to have been the law, and evidently is the law as laid down by the treatise writers, viz., that domicil was to be considered as changed whenever there was a change of residence of a permanent character, voluntarily assumed." A high English authority, the late Lord Chief Justice Cockburn, in his work on Nationality (p. 203), says: "Domicil . . . in legal phraseology, is neither more nor less than a name for home, . . . the establishing of which may be said to be settling in a given locality with a present intention of permanently abiding there." See also Dicey, who generally uses the word "permanent" to describe the *animus manendi*, although he also uses "indefinite," *e. g.* Dom. pp. 73, 77, 80.

[2] Udny *v.* Udny, L. R. 1 Sch. App. 441; Platt *v.* Attorney-General, L. R.

[3] See *infra*, § 168, note 1.

also used; the latter in a few cases, and the former — through the influence of Phillimore's definition (given above), and more recently through the influence of Lord Westbury's remarks in Udny *v.* Udny — in a number.[4] But it will be found that both of these expressions have almost invariably been used as equivalents of "permanently."

In the earlier English cases, not so much stress was laid upon the character of the *animus manendi* as has been of late years insisted upon. The decisions in the cases of the Servants of the East India Company, if explained upon any other ground than that given above,[5] are not in accordance with the most approved definitions of domicil; and as we have already seen, the doctrine contained in them has been of late repudiated. Kindersley, V. C., who appears to have given a great deal of attention to the subject of domicil, in Lord *v.* Colvin,[6] framed the following definition for the express purpose of providing for them: "That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere temporary and special purpose, but with the present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home." If the word "improbable" were substituted for the word "uncertain," we should here have as accurate a definition of domicil of choice, at least so far as concerns the *animus manendi*, as it is probably possible to frame.

But the definition as given was disapproved by Lord Chelmsford in the same case on appeal in the House of Lords.[7] It was there argued by appellants' counsel that intention to remain for an indefinite time was sufficient; but this doctrine was expressly repudiated, Lord Chelmsford remarking: "The learned counsel for the appellants contended for a definition of domicil far less precise and exact than any which has ever been suggested. They argued that a domicil was acquired

3 App. Cas. 336; King *v.* Foxwell, L. R. 3 Ch. D. 518; Wilson *v.* Wilson, L. R. 2 P. & D. 435; Attorney-General *v.* Kent, 1 Hurl. & Colt. 12; Attorney-General *v.* Rowe, id. 31.

4 *Infra*, § 167.

5 *Supra*, § 155.

6 4 Drew. 366.

7 *Sub nom.* Moorhouse *v.* Lord, 10 H. L. Cas. 272, 285.

whenever a person went to reside in a place for an indefinite time.[8] Now, this definition and that of the Vice-Chancellor appear to me to be liable to exception in omitting one important element; namely, a fixed intention of abandoning one domicil and permanently adopting another. The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in contemplation some event, upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent. And even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that there has been a deliberate choice of a permanent home."

§ 167. Id. id. — These expressions and others in the same case and in the case of Whicker *v.* Hume[1] (decided by the House of Lords a few years before), in which Lord Wensleydale said: "One very good definition is this, 'Habitation in a place with the intention of remaining there forever, unless some circumstance should occur to alter his intention,'" as well as several decisions shortly afterwards made by the Court of Exchequer, seem to go to the full length of Vattel's definition; but in the latest cases there has been some recession from that extreme doctrine.

In Udny *v.* Udny, Lord Chancellor Hatherley says that the word "settling,"[2] as we speak of a colonist "settling" in Australia or Canada, more nearly describes the act which a man does in adopting a domicil of choice than any other word in our language. Lord Westbury in the same case says:

[8] This position was based upon the expression of Bramwell, B., in Attorney-General *v.* Pottinger. See *infra*, § 168, note 1.

[1] 7 H. L. Cas. 124.

[2] See also Lord Chancellor Cairns in Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Gillis *v.* Gillis, Ir. R. 8 Eq. 597, and the passage quoted from Cockburn on Nationality, *supra*, § 166, note 1; also Dicey, Dom. *passim*.

"Domicil of choice is a conclusion or inference which the law draws from the fact of a man fixing his sole or chief residence in a particular place, with an intention to reside there for an unlimited time; . . . it must be residence, fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation." And this is now generally acquiesced in as an accurate statement of the British doctrine upon the subject.

§ 168. **Id. id. Intention to remain "for an Indefinite Time."** — The phrase "indefinite time," so common in the American cases, is rarely used in the English, and then (except in Moorhouse *v.* Lord, where the idea is expressly repudiated, and in several cases by Bramwell, B., and Brett, L. J.) only as equivalent to unlimited time;[1] the sense in which it is used

[1] Bramwell, B., in Steer's Case (3 Hurl. & Nor. 594, 599), used language open to the construction that the *animus manendi* necessary for a change of national domicil is intention to remain "during life." In Attorney-General *v.* Pottinger, 6 id. 733, 748, in attempting to correct his former expression, he said: "I can easily understand that Sir Henry Pottinger contemplated the possibility of his being again employed in India; but that is immaterial. He intended to reside here where he had taken up his residence *permanently*, or (as I should perhaps say with the Attorney-General, as being a more correct expression than that which I used in Steer's case) *for an indefinite time*." Subsequently, during argument in Attorney-General *v.* Rowe, 1 Hurl. & Colt. 31, his expression in Attorney-General *v.* Pottinger having been urged by counsel as authority for rejecting the word "permanent" in describing the *animus manendi*, and substituting "for an indefinite time," he said: "I do not think the term 'permanent' is 'incorrect,' except that it is ambiguous. It may mean 'forever' or for 'an enduring time.'" If the learned Baron is correctly reported, he seems to have been hardly more fortunate this time than before. Probably what he meant to say was that the required *animus manendi* need not exclude the possibility of future change. Indeed, this he expressly said in Attorney-General *v.* Pottinger (see *supra*, § 156, note 2). But that he did not hold the view that intention to remain "for an indefinite time" (as that expression has sometimes been used in this country) is sufficient, is clear from the result of Attorney-General *v.* Rowe. In that case the person whose domicil was in question had been appointed Chief Justice of Ceylon *during the pleasure of the Crown*, and had resided in that island in the discharge of his official duties for several years, and died there. Upon these facts the Court of Exchequer, Bramwell, B., concurring, decided that his English domicil of origin continued. The other judges who took part in the decision of the case, Pollock, C. B., and Wilde, B., speak of intention to remain permanently as the necessary *animus manendi*. Bramwell, B., adds still further to the uncertainty of his views by using the following language: "[Counsel for defendant] relied on the definition in Phillimore on Domicil, founded on the *dicta* of American judges, — 'a residence at a particular place, accompanied by positive or presumptive proof of an intention to con-

in the American municipal domicil, and a few other cases, being expressed by Lord Wensleydale in Aikman *v.* Aikman,[2] as "residence for a definite time, though of uncertain duration." "And this," he adds, "would not, I conceive, confer a domicil."

§ 169. **Id. id. Intention to remain during the Life of Another.**— Whether intention to remain during the life of another person is a sufficient *animus manendi* for the constitution of a domicil of choice, is not settled. In Anderson *v.* Laneuville,[1] decided by the Privy Council, the affirmative was held under the following circumstances: A., whose domicil of origin was Irish, at the age of nineteen, being in France for his education, formed an attachment for L., who saved his life during the French Revolution and procured his escape to England. Forty years afterwards, having in the mean time acquired an English domicil, he ascertained the whereabouts of L., and joined her in France and lived there with her for thirteen years, until his death, in a house which he bought jointly with her. There was evidence that he had repeatedly declared his intention of returning to England in case L. predeceased him, and on the other hand his intention of remaining in France as long as she lived was clear. Dr. Lushington, speaking for the Privy Council, said: "It was contended that the testator only intended to remain during Madame Laneuville's lifetime. Assuming that to be the fact, assuming that he intended to quit when Madame Laneuville died, it does not at all follow that that will establish the conclusion that he had not acquired a domicil in France; because what is it that takes off the acquisition of a domicil by long residence in a country?

tinue there for an unlimited time.' If that means an endless time, it is scarcely an accurate expression; if it means a residence without any actual time assigned to it, it is probably more accurate. Another expression relied on is: 'an indefinite intention of remaining;' the next is: 'a permanent settlement for an indefinite time,' or probably it might be more correct to say, 'an indefinite permanency.' With these is coupled the expression: 'If a person has a vague and floating intention of returning, that will not prevent his acquiring a domicil.' Such definitions seem to me to arise from a vague notion of the term 'domicil.'" See the language of Brett, L. J., in Doucet *v.* Geoghegan, *supra*, § 155, note 8. See also the latter part of Lord Westbury's "description of the circumstances which constitute a domicil of choice," *supra*.

[2] 3 Macq. H. L. Cas. 854.

[1] 9 Moore P. C. C. 325; s. c. 2 Spinks, 41.

It is being there for a temporary purpose. It never can be said that residing in a country till the death of a party was a temporary purpose."

In Attorney-General *v.* Countess De Wahlstatt,[2] the Court of Exchequer took the opposite view. The testatrix, an unmarried woman, whose domicil of origin was English, had for fourteen years resided with her sister, who was married and domiciled at Baden-Baden, in Germany, and the evidence was uncontradicted that it was her intention to remain with her sister as long as the latter lived. In the view which the court took of the facts, the intention of the testatrix beyond the life of her sister was not clearly shown, if indeed any had been definitely formed. Upon these facts the domicil of origin of the testatrix was held to continue. It must be remarked, however, that this was one of "the intermediate cases" between Moorhouse *v.* Lord and Udny *v.* Udny, whose authority has been considerably shaken by the latter case and its sequents.

But whether Anderson *v.* Laneuville or Attorney-General *v.* Countess De Wahlstatt express the better doctrine, or whether they may be reconciled, it is clearly impossible to lay down a strict rule that intention to remain for the life of another is or is not a sufficient *animus manendi*. In each of the cases referred to, the person whose domicil was in question, and the *cestui que vie* were of about the same age. Suppose, however, that the expectation of life of the former had been greatly in excess of that of the latter, or the reverse. If a young and vigorous person go to reside with one who is old and feeble, intending to remain during the lifetime of the latter, and to return upon his death, would a change of domicil be held? Or take the converse, and suppose that an aged and infirm parent should follow a young and vigorous child to a new country, intending to end his days with him if possible, but without any intention of remaining in case his child should die first; would not, in such a case, a residence sufficiently permanent to constitute domicil be contemplated?

§ 170. **Id. American Authorities.** — In America there has been considerable conflict of opinion, and certainly much

[2] 3 Hurl. & Colt. 374.

looseness of expression, with respect to the requisite *animus manendi*. This has been due to several causes, the principal of which have been: (1) the application of the doctrine of domicil to a large variety of frequently very diverse subjects; (2) the legislative habit of using such words as "residence," "inhabitancy," and the like as approximate terms to describe connection between person and place, leaving to the courts the duty of determining their true meaning in accordance with the general tenor, object, and scope of the particular legislation in which they are used; and (3) the too frequent practice of relying upon cases of municipal domicil as authorities in cases of national and *quasi*-national domicil.

In most of the cases, however, in which the subject is at all considered, intention to remain *permanently* is either laid down or assumed as the necessary *animus manendi*.[1] In many it is strongly insisted upon, some cases even going to the extent of adopting Vattel's definition either in terms or in substance.

President Rush, in the leading case of Guier *v.* O'Daniel,[2] defines domicil to be "residence at a particular place accompanied with positive or presumptive proof of continuing it an unlimited time;" and through the influence of this definition, particularly in its modified form as given by Phillimore, intention to remain "for an unlimited time" has been adopted in a number of the American cases.[3]

[1] The Venus, 8 Cranch, 253; Ennis *v.* Smith, 14 How. 400; The Ann Green, 1 Gall. 274; Catlin *v.* Gladding, 4 Mason, 308; Burnham *v.* Rangeley, 1 Woodb. & M. 7; Butler *v.* Farnsworth, 4 Wash. C. Ct. 101; Castor *v.* Mitchell, id. 191; Butler *v.* Hopper, 1 id. 499; Read *v.* Bertrand, 4 id. 514; Prentiss *v.* Barton, 1 Brock. 389; Kemna *v.* Brockhaus, 10 Biss. 128; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; United States *v.* Penelope, 2 Pet. Ad. 438; Sears *v.* Boston, 1 Met. 250; Dupuy *v.* Wurtz, 53 N. Y. 556; *Re* Catharine Roberts' Will, 8 Paige Ch. 519; Crawford *v.* Wilson, 4 Barb. 504; Vischer *v.* Vischer, 12 id. 640; State *v.* Ross, 3 Zab. 517; Clark & Mitchener *v.* Likens, 2 Dutch. 207; Taylor *v.* Reading, 4 Brewst. 439; Lindsay *v.* Murphy, 76 Va. 428; Horne *v.* Horne, 9 Ired. 99; Plummer *v.* Brandon, 5 Ired. Eq. 190; Rue High, Appellant, 2 Doug. (Mich.) 515; Campbell *v.* White, 22 Mich. 178; Hayes *v.* Hayes, 74 Ill. 312; Dale *v.* Irwin, 78 id. 160; Johnson *v.* Turner, 29 Ark. 280; Gravillon *v.* Richards Ex'r, 13 La. An. 293; Heirs of Holliman *v.* Peebles, 1 Tex. 673; and see *infra*, § 173, note 4. See also remarks of Butler, P.J., in *Re* Lower Oxford Election, 11 Phila. 641.

[2] 1 Binney, 349, note.

[3] Mitchell *v.* United States, 21 Wall. 350; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Littlefield *v.* Brooks, 50 Me. 475; Stockton *v.* Staples, 66 id. 197; Crawford *v.* Wilson, 4 Barb. 504; Hege-

§ 171. **Id. id. Intention to remain for an Indefinite Time.** — In many of the cases intention to remain "for an indefinite time"[1] has been considered as sufficient. This phrase was originally used doubtless as synonymous with "unlimited time,"[2] but through the influence of the cases of municipal

man *v.* Fox, 31 id. 475; Long *v.* Ryan, 30 Gratt. 718; Dow *v.* Gould, 31 Cal. 629; and see Miller's Estate, 3 Rawle, 312 (a case of reverter).

[1] The Venus, *supra*, per Washington, J.; Ennis *v.* Smith, *supra*; White *v.* Brown, *supra*; Harris *v.* Firth, 4 Cranch C. Ct. 710; Jennison *v.* Hapgood, 10 Pick. 77; Sleeper *v.* Paige, 15 Gray, 349; McConnell *v.* Kelley, 138 Mass. 372; Hegeman *v.* Fox, *supra*; Venable *v.* Paulding, 19 Minn. 488; Johnson *v.* Turner, 29 Ark. 280; and see § 159, note 2, *supra*, and the remaining notes to this section.

[2] The Venus, *supra*; Ennis *v.* Smith, *supra*; White *v.* Brown, *supra*; McConnell *v.* Kelley, *supra*; Hegeman *v.* Fox, *supra*. In The Venus, Washington, J., says: "The writers upon the law of nations distinguish between a temporary residence in a foreign country for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, 'domicil,' which he defines to be, 'a habitation fixed in any place, with an intention of always staying there.' Such a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicil, he continues, is not established unless the person makes sufficiently known his intention of fixing there, either tacitly or by an express declaration. Vatt. pp. 92, 93. Grotius nowhere uses the word 'domicil,' but he also distinguishes between those who stay in a foreign country by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause. The former he denominates 'strangers' and the latter 'subjects;' and it will presently be seen, by a reference to the same author, what different consequences these two characters draw after them. . . . In deciding whether a person has obtained the right of an acquired domicil, it is not to be expected that much, if any, assistance should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts to establish rules for the proper application of those principles. The question whether the person to be affected by the right of domicil had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is that the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there, as to stamp him with the national character of the State where he resides. In questions on this subject, the chief point to be considered is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, *or for an indefinite time*, the right of domicil is acquired by a residence of a few days. This is one of the rules of the British courts, and it

domicil has sometimes received a much different construction. It is unfortunate that the word "indefinite" has been used at all in this connection, as it is at best a vague term, and may mean much or little, as happens.[3] For in a certain sense intention to remain for life is but intention to remain for an indefinite time, while in another sense residence for the merest temporary purpose may be residence for an indefinite time. Thus intention to remain during the building of a house,— though it took but twenty-nine days,[4] — or from spring to the fall or winter of the same year, until M. (a tin-pedler) could no longer travel on wheels,[5] has been held to fall within the meaning of the phrase, and to work a change of municipal domicil. From such cases this doctrine has crept into cases of *quasi*-national domicil. Thus, in Sleeper *v.* Paige,[6]

appears to be perfectly reasonable." In the same case, Marshall, C. J., in a dissenting opinion, remarks: "A domicil, then, in the sense in which this term is used by Vattel, requires not only actual residence in a foreign country, but 'an intention of always staying there.' Actual residence, without this intention, amounts to no more than 'simple habitation.' Although this intention may be implied without being expressed, it ought not, I think, to be implied, to the injury of the individual, from acts entirely equivocal. If the stranger has not the power of making his residence perpetual; if circumstances, after his arrival in a country, so change as to make his continuance there disadvantageous to himself, and his power to continue doubtful, — 'an intention always to stay there' ought not, I think, to be fixed upon him, in consequence of an unexplained residence previous to that change of circumstances. Mere residence, under particular circumstances, would seem to me, at most, to prove only an intention to remain so long as those circumstances continue the same, or equally advantageous. This does not give a domicil. The intention which gives a domicil is an unconditional intention 'to stay always.' . . . Let it be remembered that, according to the law of nations, domicil depends on the intention to reside permanently in the country to which the individual has removed; and that a change of this intention is, at any time, allowable." In Ennis *v.* Smith, Wayne, J., says: "It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicil of choice. But there must be, to constitute it, actual residence in the place, with the intention that it is to be the principal and permanent residence. . . . The removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time is not a change of it." And many other examples might be given.

[3] Possibly a distinction may be taken between "intention to remain for an indefinite time" and "intention to remain indefinitely." In Concord *v.* Rumney, 45 N. H. 423, Bell, C. J., defines the latter phrase as "a general intention to remain with no definite purpose to remove elsewhere."

[4] Jamaica *v.* Townshend, 19 Vt. 267.

[5] Mead *v.* Boxborough, 11 Cush. 362.

[6] 15 Gray, 349. The facts of this case are not fully reported, but it appears that the defendant had left Massachusetts, taking with him his family,

a Massachusetts case, we find it laid down, "If his residence out of the Commonwealth was but temporary, yet if the time of his proposed return was indefinite, he retained no domicil in the Commonwealth;" and to the like effect are several other cases.[7] It is obvious that these cases are in utter conflict with all the foreign authorities, British and Continental, as well as the best-considered American decisions; and if followed in cases involving questions of private international law, can only introduce confusion by wholly breaking down the distinction between domicil and temporary residence. Who, for instance, would seriously think of submitting to such a test questions of testamentary capacity, personal succession,

and retaining no dwelling-house or boarding-place in that State, but intending to return. The question was whether the time of his absence should be reckoned as a part of the time for the running of the statute of limitations. The court below substantially ruled that it should; and the Supreme Court, in reversing, used the language above quoted. In seeking for an explanation of this decision the learned editor of the Eighth Edition of Story on the Conflict of Laws holds (p. 60) that, although the court uses the term "domicil," the case is not one of domicil at all, but of residence less than domicil, and that the latter term is not used in its technical sense. However this may be, it is to be hoped that this case may never pass for an authority on *domicil* in the usual sense of that term.

[7] Holmes *v.* Greene, 7 Gray, 299; Venable *v.* Paulding, 19 Minn. 488; Graham *v.* Trimmer, 6 Kans. 230. See also Hallet *v.* Bassett, 100 Mass. 167. Holmes *v.* Greene was a singular case, and calls for some notice. The plaintiff, who was domiciled at Fall River, Mass., having been obliged to give up his house in that place, and being unable to secure another there, removed with his family across the State line to Tiverton, Rhode Island, giving notice at the time to the selectmen of both Fall River and Tiverton, that his removal was only for a temporary purpose, and that he intended returning to the former place. Thirteen months afterwards he did return to Fall River with his family, his office and place of business having continued there all the while. While living in Rhode Island he requested the restoration of his name to the list of voters of Fall River, it having been stricken off, and, upon the refusal of the selectmen to comply with his request, he brought suit against them for damages. It would seem upon these facts that there never was a clearer case of retention of domicil. Nevertheless, the court held the contrary, and in so doing used this language: "It is true that in cases where the domicil of a party is in issue, evidence of his intent may have an important and decisive bearing on the question, but it must be in connection with other facts, to which the intent of the party gives efficacy and significance. . . . But no case can be found where the domicil of a party has been made to depend on a bald intent, unaided by other proof. The *factum* and the *animus* must concur in order to establish a domicil. The latter may be inferred from proof of the former. But evidence of a mere intent cannot establish the fact of domicil." In striking contrast with this case is the decision of the House of Lords in Maxwell *v.* McClure, see *supra*, § 160, note 6. That domicil may be retained by intent alone, see *supra*, § 126.

capacity for legitimation *per subsequens matrimonium*, or the like?

But in the face of such loose views, it is not surprising to find several Maine judges[8] carrying them to their logical conclusion by suggesting that the true test is simply intention to remain, whether for a definite or an indefinite time, and that therefore residence, accompanied with intention to remain for a term of years, would work a change of *quasi*-national domicil.

§ 172. **Id. id. id.** — Much of the confusion on this subject in the American cases is traceable, directly or indirectly, to misconception of the meaning of Story's oft-quoted passage, given above.[1] But that that illustrious jurist did not use the phrase "indefinite time" in the sense of mere uncertainty of duration, is plain from the language which he uses throughout the chapter on domicil in his work on "The Conflict of Laws," and particularly from his definition of domicil (following Dr. Lieber) as a "true, fixed, and permanent home,"[2] as well as from the language which he used on the bench.[3]

§ 173. **Id. Intention to make the New Place the Home of the Party.** — Story says:[1] "Two things then must concur to constitute domicil: first, residence; and secondly, the intention of making it the *home* of the party." And a large number of authorities, British and American,[2] have followed him either

[8] Davis, J., in Gilman *v.* Gilman, 52 Me. 165, 173, says: "If a citizen of Maine, with his family, or having no family, should go to California to engage in business there with the intention of returning at some future time, definite or indefinite, and should establish himself there in trade or agriculture, it is difficult to see upon what principle his domicil could be said still to be here. His residence there, *with the intention of remaining there a term of years*, might so connect him with all the interests and institutions, social and public, of the community around him as to render it not only proper, but important for him to assume the responsibilities of citizenship, with all its privileges and its burdens. Such residences are not strictly within the terms of any definition that has been given; and yet it can hardly be doubted that they would be held to establish a domicil." See also Kent, J., in Church *v.* Rowell, 49 Me. 369, and Graham *v.* Trimmer, *supra*.

[1] *Supra*, § 154; Story, Confl. of L. § 46.

[2] Confl. of L. § 41.

[3] See, *e. g.*, The Ann Green, 1 Gall. 274; Catlin *v.* Gladding, 4 Mason, 308.

[1] Confl. of L. § 44.

[2] Whicker *v.* Hume, 7 H. L. Cas. 124; Moorhouse *v.* Lord, 10 id. 272; Jopp *v.* Wood, 34 Beav. 88, affirmed 4 De G. J. & S. 616; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; Lord *v.* Colvin, 4 Drew. 366; Douglas *v.* Douglas, L. R.

in words or in substance. "Home" itself, when properly understood, suggests the idea of permanency,[3] although, as the word has been frequently loosely used, some authorities, to prevent misconception, speak of "permanent home"[4] as the thing a person must intend to set up in acquiring a domicil of choice. Thus Lord Cranworth says, in Whicker *v.* Hume: "By domicil we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it." Wickens, V. C., in Douglas *v.* Douglas, says: "It seems to me . . . that the intention required for a change of domicil, as distinguished from the action embodying it, is *an intention to settle in a new country as a permanent home.*" And Story himself, as we have seen, defines domicil as a "true, fixed, permanent home, etc."[5]

§ 174. **Id. Negative View of Animus Manendi, — without any Present Intention of Removing.** — A negative view of the

12 Eq. Cas. 617; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Hart *v.* Lindsey, 17 N. H. 235; Wilson *v.* Terry, 11 Allen, 206; Perkins *v.* Davis, 109 Mass. 239; Dupuy *v.* Wurtz, 53 N. Y. 556; Chaine *v.* Wilson, 1 Bosw. 673; Fry's Election Case, 71 Pa. St. 302; Carey's Appeal, 75 id. 201; Horne *v.* Horne, 9 Ired. 99; Smith *v.* Croom, 7 Fla. 81; Hiestand *v.* Kuns, 8 Blackf. 345; McClerry *v.* Matson, 2 Ind. 250; McCollum *v.* White, 23 id. 43; Rue High, Appellant, 2 Doug. (Mich.) 515; State *v.* Dodge, 56 Wis. 79; Hayes *v.* Hayes, 74 Ill. 312; State *v.* Minnick, 15 Iowa, 123; Foster *v.* Eaton & Hall, 4 Humph. 346; Allen *v.* Thomason, 11 id. 536; Pearce *v.* State, 1 Sneed, 63; White *v.* White, 3 Head, 404; Kellar *v.* Baird, 5 Heisk. 39; Hairston *v.* Hairston, 27 Miss. 704; McIntyre *v.* Chappel, 4 Tex. 187; Hardy *v.* DeLeon, 5 id. 211.

[3] In Doucet *v.* Geoghegan, *supra*, Jessel, M. R., says: "In all cases a difficulty arises as to the meaning of the word 'domicil;' but it evidently implies the intention to make the place one's home, and a home itself is suggestive of permanency." See also remarks of Du Pont, J., in Smith *v.* Croom, *supra*.

[4] In addition to the English cases cited in note 2, Dupuy *v.* Wurtz, *supra;* Fry's Election Case, *supra;* Horne *v.* Horne, *supra;* Hayes *v.* Hayes, *supra;* Rue High, Appellant, *supra;* Pearce *v.* State, *supra;* Hairston *v.* Hairston, *supra*. See also Dicey, Dom. pp. 1, 3, 42 *et seq.*, and Foote, Priv. Int. Jur. p. 15. In Jopp *v.* Wood, *supra*, Turner, L. J., says: "The mere fact of a man residing in a place different from that in which he has been before domiciled, even although his residence there may be long and continuous, does not of necessity show that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home. But domicil, although in some of the cases spoken of as a home, imports an abiding and permanent home and not a mere temporary one."

[5] Confl. of L. § 41; see *supra*, § 65.

animus manendi has sometimes been put. This has been expressed in the form of a definition, thus: "That place is properly the domicil of a person in which his habitation is fixed without any present intention of removing therefrom."[1] That this is inaccurate as a definition either of domicil in general or of domicil of choice, could easily be shown. Indeed, it was originally intended hardly as a formal definition, but rather as a protest against, and an approximate correction of, the too narrow definition of Vattel. Its author was Parker, J., who, in Putnam *v.* Johnson, a case of municipal domicil, used the following language: "The definition of domicil, as cited from Vattel by the counsel for the defendants, is too strict, if taken literally, to govern in a question of this sort; and, if adopted here, might deprive a large portion of the citizens of their right of suffrage. He describes a person's domicil as the habitation fixed in any place, with an intention of always staying there. In this new and enterprising country it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain. Probably the meaning of Vattel is, that the habitation fixed in any place, without any present intention of removing therefrom, is the domicil. At least, this definition is better suited to the circumstances of this country."

But thus explained, however applicable to cases of municipal domicil, it is inapplicable to cases of national and *quasi-*

[1] Story, Confl. of L. § 43; Putnam *v.* Johnson, 10 Mass. 488, 501; Gilman *v.* Gilman, 52 Me. 165; Ryal *v.* Kennedy, 40 N. Y. Super. Ct. 347; Miller's Estate, 3 Rawle, 312; Carey's Appeal, 75 Pa. St. 201; Hindman's Appeal, 85 id. 466; Pilson *v.* Bushong, 29 Gratt. 229; Rue High, Appellant, 2 Doug. (Mich.) 515; Hardy *v.* De Leon, 5 Tex. 211. See also Heidenbach *v.* Schland, 10 How. Pr. 477, which is, however, a case of attachment, and consequently, according to the view held by the New York courts, not a case of domicil, but of residence less than domicil. It is, however, cited as an authority for this position in Ryal *v.* Kennedy, *supra*, a case of jurisdiction to grant administration, and, therefore, clearly one of domicil.

national domicil,[2] — a tentative settlement or contingent *animus manendi*, such as that referred to, being insufficient for the acquisition of such domicil;[3] and, *a fortiori*, the mere absence of intention as to future residence would be insufficient. For the acquisition of domicil there must be *animus manendi* of some description. It is possible that this is implied in the words "habitation fixed." But what are we to understand by these words? Certainly not mere physical presence; there must be something more than that. Would residence for a special and temporary purpose, there being no *animus revertendi*, and no intention of any kind with regard to the future, after the accomplishment of such purpose, be sufficient? Clearly not. For in such case, according to the great weight of the authorities, the prior domicil would be presumed to continue. Or do the words contemplate the manner of living? Probably not. It will be observed that in all the cases of national or *quasi*-national domicil in which this negative description of the *animus manendi* has been used, there has been evidence more or less strong of intention to remain for an unlimited time.[4]

[2] This is recognized, although somewhat confusedly, in Stratton *v.* Brigham (2 Sneed, 420), where Totten, J., says: "There is, no doubt, a distinction between residence and domicil. 'The domicil is the habitation fixed in any place with an intention of always staying there.' Vattel, 163. In this sense he who stops even for a long time in a place, for the management of his affairs, has only a simple habitation there, but has no domicil. Thus the 'envoy of a foreign prince has not his domicil at the court where he resides.' Vattel, 164. This is *national domicil*, in the sense of the public law, by which the national character of the person and the right of succession to movable property are determined. But when used in connection with subjects of *domestic policy*, as taxation, settlement, voting, and the attachment law, the term 'domicil' has a more confined and restricted import, and implies the same as *residence: That is, the home or habitation fixed in any place without a present intention of removing therefrom.*" The right of attachment, however, if dependent at all upon domicil, depends upon national or *quasi*-national domicil.

[3] See *infra*, § 176.

[4] See particularly Kennedy *v.* Ryal, 67 N. Y. 379 (affirming Ryal *v.* Kennedy, *supra*). In that case the plaintiff immigrated from England to the City of New York, and after having worked in that city for seven months was followed by his wife and two children. Upon the trial he testified "that he came to New York for the purpose of making it his home and living there." This was stricken out on motion of defendant's counsel, and the suit dismissed upon the ground that, the plaintiff not being domiciled in New York, the Surrogate had no jurisdiction to issue to him letters of administration upon the estate of his infant child, for whose death, through the negligence of defendant, damages were sought to be recovered.

§ 175. Id. Animus Manendi does not exclude the Possibility of Change. — But whatever may be the nature of the requisite *animus manendi*, it cannot be understood as excluding or even restricting the possibility of future change.[1] The power to

The General Term of the Superior Court granted a new trial; and in affirming this decision, Miller, J., speaking for the Court of Appeals, said: "At the time of the death of the child and for seven months prior thereto, his father, the plaintiff, was living there. He had previously resided in England, and his wife and the child came to join him and to live with him in New York. He testified that he came there for the purpose of making a home and a living. This evidence was erroneously stricken out; and as it was material upon the question of residence, and as the action can be maintained as already shown, this error would entitle the plaintiff to a new trial. But without regard to this testimony, and independent of it, the evidence upon the trial tends to show that his domicil was in New York. He had left or emigrated from his own country, located, and was at work in New York, thus showing an intention to establish a residence there, and so far as the evidence goes, evinced no intention or determination to reside anywhere else. Here was a *prima facie* evidence that he was domiciled there, and it was for those who claim otherwise to rebut this evidence. If he had not a domicil in New York, it would be difficult to say how a domicil could be proved where a person who had left his own country had thus settled." In Thorndike *v.* Boston (1 Met. 242), Shaw, C. J., says: "If the plaintiff had left Boston and actually taken up a residence with his family in Scotland, without any intention of returning, thereby assuming that country as his definite abode and place of residence, until some new intention had been formed or resolution taken, he had ceased to be an inhabitant of Boston, liable to taxation for his personal property." But he also says in another passage in the same case: "There was evidence tending to show that when the plaintiff removed with his family to Edinburgh in 1836, he did it with the intention of fixing his residence permanently in Scotland." Hindman's Appeal, *supra*, is probably an exception to the statement in the text; but upon the facts as they appear in the report and the opinion of the court, it is doubtful whether that case was rightly decided.

[1] "The term *permanent* abode, however, excludes neither a temporary absence nor a future change, the reservation of which faculty is plainly implied." Savigny, System, etc. § 353; Guthrie's trans. p. 97. "As a criterion, therefore, to ascertain domicil, another principle is laid down by the authorities as well as by practice, — it depends upon the intention, upon the *quo animo*, — that is the true basis and foundation of domicil: it must be residence *sine animo revertendi*, in order to change the *domicilium originis;* a temporary residence for the purposes of health or travel or business has not the effect; it must be a fixed and permanent residence, abandoning finally and forever the domicil of origin, *yet liable still to a subsequent change of intention.*" Per Sir John Nichol, Stanley *v.* Bernes, 3 Hagg. Eccl. 373. "If, in order to constitute a domicil, there were required an *animus manendi* so permanent and so absolute as to be independent of any possible change of circumstances, I do not understand how, in the constant uncertainty and transition of sublunary events, a domicil ever could be established." Per Lord Fullerton, in Commissioners of Inland Revenue *v.* Gordon's Ex'rs, 12 D. (Sc. Sess. Cas. 1850), 657, 662. "Now, what is a permanent abode? Must it be an abode which the party does not intend to abandon at

change, being of the essence of domicil, is always reserved, even if we adopt the strictest possible view of the *animus manendi*. Domicil is not only freely chosen, but freely changed, by one who is *sui juris;* and even though he intend to remain in a new place of abode always, or for life, he is at liberty to change his intention and adopt another place as circumstances may require or caprice suggest. It is, therefore, necessary in solving a question of change of domicil to confine ourselves closely to the point of time at which the change is alleged to have occurred, and to bear in mind that subsequently formed intention is not only not determinative, but is very frequently misleading.[2]

§ 176. **Id. Contingent Animus Manendi not sufficient.** — A mere conditional or contingent *animus manendi* is not sufficient.[1] Thus, where a citizen of Illinois went to Tennessee, intending to settle there, if the country suited him, it was held that he did not thereby gain a domicil in Tennessee.[2] So in the case of Bell *v.* Kennedy, in the House of Lords, B. left his domicil of origin in Jamaica and went to Scotland, intending to settle there permanently, if he could find an estate to suit

any future time? This, it seems to us, would be a definition too stringent for a country whose people and characteristics are ever on a change. No man in active life in this State can say, wherever he may be placed, 'This is and ever shall be my permanent abode.' It would be safe to say a permanent abode, in the sense of the statute, means nothing more than a domicil, a home which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it." Breese, J., in Dale *v.* Irwin, 78 Ill. 160, 181. So also the language of Marshall, C. J., in The Venus, *supra*, § 171, note 2. This possibility of future change is provided for in the definition which Lord Wensleydale quotes with approval in Whicker *v.* Hume (7 H. L. Cas. 124, 164): "Habitation in a place with the intention of remaining there forever, unless some circumstance should occur to alter his intention." It is also provided for in the definition framed by Kindersley, V. C., in Lord *v.* Colvin, *supra*, § 66. See also Butler, P. J., in *Re* Lower Oxford Election, 11 Phila. 641.

[2] A conspicuous example is that of Story himself, who was thus misled by what appears to have been the subsequently formed "floating intention" of the testator in Stanley *v.* Bernes, see *supra*, § 155.

[1] Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Craigie *v.* Lewin, 3 Curteis, 435; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; Ross *v.* Ross, 103 Mass. 575; Plummer *v.* Brandon, 5 Ired. Eq. 190; Smith *v.* Dalton, 1 Cin. S. C. Rep. 150; Smith *v.* People, 44 Ill. 16; Wilkins *v.* Marshall, 80 id. 74; Beardstown *v.* Virginia, 81 id. 541; Williams *v.* Henderson, 18 La. Rep. 557. See also Pfoutz *v.* Comford, 36 Pa. St. 420, and Reed's Appeal, 71 id. 378.

[2] Smith *v.* People, *supra*.

him; in this he failed up to the time when his domicil became important, and it was held that his domicil of origin continued, and this although he had no intention of returning to it in any event. This point is also illustrated by the case of Craigie *v.* Lewin, already referred to.[3]

§ 177. **Id. Intention to reside presently necessary.** — Again, it is necessary that the intention should be to reside *presently* as well as *permanently*.[1] Personal presence, coupled with intention to begin *in futuro* a residence of however permanent character, is not sufficient. Thus, in the case of Attorney-General *v.* Dunn, an Englishman went abroad and purchased the title, castle, and estate of R. in the Papal States, and expended a large sum of money in fitting up the castle for his future permanent residence. He died in Rome while the improvements were still going on, having in the mean time returned to England, and spent much of his time in travelling. The court held that, his intention having been only to take up his residence at R. at a future time, his English domicil continued. So in Carey's Appeal, the testator, who had lived in Pennsylvania upwards of forty years, but had subsequently become domiciled in Rhode Island, stopped at Philadelphia *en route* to the South, where he intended to spend the winter, and while in Philadelphia expressed his intention to return there to reside permanently, and directed his son-in-law to look for a house for him in that city, to be taken on his return from the South the next spring. But it was held that, as he contemplated, not an immediate, but a future settlement in Pennsylvania, his Rhode Island domicil remained. In Hall *v.* Hall, it was held that one who came into the State of Wisconsin and engaged a lodging-place, but without occupying it left the same day, intending to return, and went into other States to transact business, did not acquire a domicil in Wisconsin until his subsequent return.

[3] *Supra*, § 157.

[1] Attorney-General *v.* Dunn, 6 Mees. & W. 511; Arnott *v.* Groom, 9 D. (Sc. Sess. Cas. 2d ser. 1846) 142, per Lords Wood and Fullerton; Carey's Appeal, 75 Pa. St. 201; Smith *v.* Croom, 7 Fla. 81; State *v.* Hallett, 8 Ala. 159; Talmadge Adm'r *v.* Talmadge, 66 id. 199; Hall *v.* Hall, 25 Wis. 600. See also authorities cited, *supra*, § 176, note 1; and see apparently *contra*, Williams *v.* Roxbury, 12 Gray, 21, the facts of which, however, as well as the manner in which the case arose, are peculiar. See also Chicago & N. W. Ry. Co. *v.* Ohle, 117 U. S. 123.

Whether a married man who has gone into another State for the purpose of selecting and preparing a home for himself and family, and who has actually selected and prepared such home, thereby acquires a domicil, notwithstanding his intention to return for the purpose of bringing his family to the new place of abode, is a question left in some doubt by the apparent conflict of the decisions,[2] although the weight of authority appears to be in favor of the affirmative.

[2] Compare State *v.* Hallett, *supra*, and Talmadge's Adm'r *v.* Talmadge, *supra*, with Burnham *v.* Rangeley, 1 Woodb. & M. 7; Swaney *v.* Hutchins, 13 Neb. 266; Johnson *v.* Turner, 29 Ark. 280; Republic *v.* Young, Dallam, 464; Russell *v.* Randolph, 11 Tex. 460. State *v.* Hallett was a case of great hardship. The defendant, a citizen of Georgia, went to Alabama, declaring his intention to settle in the latter State, if he could procure a suitable site for an iron foundry. He did procure such site, and having set another person to work to get out timber for building, he returned to Georgia to bring his family. Having been delayed there several weeks, he got back to Alabama, Nov. 26, 1843, established his foundry, and continued to reside there up to the time the case was decided. He voted in Alabama, Nov. 11, 1844, and for this was convicted upon the ground that he had not resided in the State one year. His conviction was affirmed by a divided supreme court, two judges to one holding that he did not acquire a domicil until Nov. 26, 1843. In Talmadge's Adm'r *v.* Talmadge, the facts were that Talmadge, who was domiciled in Illinois, came to Alabama and purchased a tract of land, declaring at the time of the purchase, and previously and subsequently thereto, his intention to bring his family from Illinois and settle upon the tract so purchased. He thereupon procured the services of a workman to improve said property, superintending the improvement himself, and stating that he intended to occupy it for his home. Shortly afterward he returned to Illinois, declaring at the time his purpose to bring his family back with him to reside in Alabama on said property. Upon reaching Illinois he shipped a part of his goods to a railroad station, *en route* for Alabama; but before he finished shipping he died. While in Illinois, on his return from Alabama, he declared that he was a citizen of the latter State. Upon these facts it was held that he had not acquired a domicil in Alabama. In Burnham *v.* Rangeley, the defendant, whose domicil was in question, had removed the major part of his family from Maine to Virginia at the time inquired about, and had returned for the rest (his wife and one daughter). His domicil was held to have been changed. In Swaney *v.* Hutchins, S. went to Nebraska in May from Illinois, where he had previously resided, intending to reside permanently in Nebraska. He proceeded to erect a house on land belonging to his wife there, intending as soon as it was completed to bring his family to reside in it. The building was not completed until October. In August he returned to Illinois, in consequence of the sickness of his wife, and in October brought her and his family to Nebraska. In June an attachment was issued against him and his wife as non-residents. Held that they were not non-residents, and that attachment did not lie, the court putting the case upon the ground of domicil. In Johnson *v.* Turner, J., who was domiciled in Mississippi, sold his real estate there and went to Arkansas in the fall of 1859, and purchased real estate there; his wife and children going to her mother's in Kentucky. He cultivated his place in Arkansas, and in

§ 178. **Animus need not be Present at the Time of Removal; it may grow up afterwards.** — It is not necessary, however, that the *animus* should be present at the time of removal. It may grow up afterwards, and engraft itself upon a residence, originally taken for a special or temporary purpose, so as to transmute it into domicil.[1] In Udny *v.* Udny, Lord Westbury said: "Residence originally temporary, or intended for a limited period, may afterwards become general and unlimited; and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established."

§ 179. **At what Point of Time Domicil vests and is divested.** — All that is necessary for the acquisition of a domicil of choice is that the *factum* and the *animus* should at some time coexist, — that absence from the old place of abode and presence in the new should concur with intention to abandon the old and presently and permanently reside in the new. And as the new domicil vests instantly upon the concurrence of the elements which are necessary for its acquisition,[1]

the summer of 1860 went to Kentucky, with the avowed intention of bringing back his wife and family with him. In the fall of the same year he returned without them, alleging, as the reason for not bringing them, that his mother-in-law could not come and that his wife had remained to be with her. In 1861 he again went to Kentucky, and made his arrangements to bring back with him his wife and family, but was prevented from so doing by sickness, of which he subsequently died. He paid poll tax in Arkansas, had his land assessed on the citizens' list, and frequently declared his intention of residing permanently in Arkansas. Upon these facts it was held that he had acquired a domicil in Arkansas, and that his family were entitled to homestead under the laws of that State. In Russell *v.* Randolph, R. came to Texas in 1834, and in August, 1835, obtained a grant of land from the Republic. Afterwards he left for the State of Maine, where he had previously been domiciled, for the purpose of bringing out his family to settle upon the land conceded to him, and soon after reaching Maine he died. Held that he was domiciled in Texas, and his family were entitled to homestead under the laws of that State. Republic *v.* Young was a similar case. Brown *v.* Boulden, 18 Tex. 431 (municipal domicil), is apparently in conflict with the other Texas cases; but it was decided rather to carry out the spirit of a statute which seemed to require a notorious place of abode.

[1] Udny *v.* Udny, L. R. 1 Sch. App. 441; Platt *v.* Attorney-General, L. R. 3 App. Cas. 336; Haldane *v.* Eckford, L. R. 8 Eq. Cas. 631; Brunel *v.* Brunel, L. R. 12 Eq. Cas. 298; Hoskins *v.* Matthews, 8 De G. M. & G. 13; The Harmony, 2 C. Rob. 322; The Ann Green, 1 Gall. 274; Hampden *v.* Levant, 59 Me. 557; Carey's Appeal, 75 Pa. St. 201; Colburn *v.* Holland, 14 Rich. Eq. 176; Rue High, Appellant, 2 Doug. (Mich.) 515; Pothier, Int. aux Cout. d'Orléans, no. 15; Story, Confl. of L. § 45.

[1] *Supra*, § 134.

so too the old domicil is instantly divested.[2] This results necessarily from the application of the principle that "no person can have more than one domicil at the same time."

Whatever may be the mental processes of the person whose domicil is in question, in law the loss of the old and the acquisition of the new domicil are coincident as well as correlative. The one depends upon the other, and they happen at the same instant of time.[3]

[2] Opinion of the Judges, 5 Metc. 587; McDaniel *v.* King, 5 Cush. 469; Brown *v.* Ashbough, 40 How. Pr. 260; McDaniel's Case, 3 Pa. L. J. 315; State *v.* Frest, 4 Harr. (Del.) 558; Rue High, Appellant, 2 Doug. (Mich.) 515. In McDaniel *v.* King, Shaw, C. J., said: "The principle seems to be well settled that every person must have a domicil, and that he can have but one domicil for one purpose at the same time. It follows, of course, that he retains one until he acquires another, and that by acquiring another *eo instanti* and by that act he loses his next previous one."

[3] Such, at least, is the result of the British and American cases. This was expressed, although somewhat confusedly, by Lord Alvanley, M. R., in Somerville *v.* Somerville (5 Ves. Jr. 750) in these words: "The domicil of origin is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and taking another as his sole domicil." It might seem that in the opinion of his Honor the acquisition of the new domicil preceded and was independent of the loss of the old; but that such could not have been his meaning is evident from his express declaration in the same case, that for the solution of questions similar to those involved in that case (succession to personal estate) only one domicil can be acknowledged. Lord Wensleydale, in Aikman *v.* Aikman (3 Macq. H. L. Cas. 854), laid down the doctrine in somewhat different and clearer phrase (although to some extent open to the same construction): "Every man's domicil of origin must be presumed to continue until he has acquired another sole domicil by actual residence with intention of abandoning his domicil of origin." It is true that these expressions relate only to the displacement of domicil of origin by domicil of choice, and this is as far as the British authorities go upon this point; but the American authorities extend the doctrine also to the displacement of one domicil of choice by another. See particularly Opinion of the Judges, 5 Metc. 587.

CHAPTER VIII.

CHANGE OF MUNICIPAL DOMICIL.

§ 180. **Municipal Domicil more easily changed than National or Quasi-National Domicil.** — What has hitherto been said with respect to change of national or *quasi*-national domicil may with some exception be said with respect to change of municipal domicil; the principal difference consisting in this, that national and *quasi*-national domicil are more difficult to change than municipal domicil, and therefore the presumption against a change of the former is stronger than against a change of the latter. To state the question is to decide that it is far more difficult to change one's domicil from New York to England or Germany than from one municipal district to another within the same State; and such conclusion would be based upon both the greater frequency and the more important consequences of the one change than of the other. A change of national or *quasi*-national domicil involves, as we have seen, consequences of a very serious character. But with municipal domicil it is different. The question of a change of the latter is generally raised for the purpose of determining the place for the exercise of rights and the performance of duties which may or must be exercised or fulfilled somewhere within the State; for example, in cases involving questions of pauper settlement, eligibility to office, the right to vote, liability to taxation, militia and jury service, and the like. It is generally a question between neighboring divisions, — wards of the same city, election precincts of the same ward, or townships of the same county, — and involves no consequences of a specially serious nature. As might be expected, therefore, the courts lean strongly in favor of allowing the freest change of municipal domicil, and frequently hold such change to have been accomplished upon very slight circumstances. The notion of municipal domicil, as has been

pointed out, does not prevail in Great Britain, and the cases cited in this chapter are, therefore, exclusively American.

§ 181. **Presumption against Change.** — As we have already seen, it is a general rule that every person has a municipal domicil.[1] Says Shaw, C. J., in Otis *v.* Boston:[2] "We think the law assumes that if a person is an inhabitant of the State, he must be an inhabitant of some one town." The exceptions to this rule have already been noted.[3] In the same general way it may be said that every person receives a municipal domicil of origin,[4] and this continues until he acquires another domicil;[5] which in its turn continues until a third is substituted for it.[6] The presumption of law is against change, and the burden of proof rests upon him who asserts it.[7] Again, no person can have more than one municipal domicil at the same time;[8] and hence it results that the old domicil ceases upon the acquisition of the new.[9]

§ 182. **Factum et Animus necessary for a Change. — The requisite Factum.** — A change of municipal domicil is a question of act and intention (*factum et animus*).[1] On the one hand, mere absence from the former place of abode does not destroy domicil there;[2] nor does presence at a place for a temporary

[1] *Supra*, § 86.

[2] 12 Cush. 44, 48.

[3] *Supra*, §§ 87, 133.

[4] Littlefield *v.* Brooks, 50 Me. 475; Abington *v.* North Bridgewater, 23 Pick. 170; Crawford *v.* Wilson, 4 Barb. 504.

[5] Littlefield *v.* Brooks, *supra;* Abington *v.* North Bridgewater, *supra;* Opinion of the Judges, 5 Metc. 587; Kirkland *v.* Whately, 4 Allen, 462; Bangs *v.* Brewster, 111 Mass. 382; Crawford *v.* Wilson, *supra;* Cross *v.* Everts, 28 Tex. 523.

[6] Littlefield *v.* Brooks, *supra;* Abington *v.* North Bridgewater, *supra;* Kilburn *v.* Bennett, 3 Metc. 199; Opinion of the Judges, *supra;* Wilson *v.* Terry, 11 Allen, 206; Crawford *v.* Wilson, *supra;* Parsonfield *v.* Perkins, 2 Greenl. 411; Wayne *v.* Greene, 21 Me. 357; Anderson *v.* Anderson, 42 Vt. 350; State *v.* Steele, 33 La. An. 910; Shepherd *v.* Cassiday, 20 Tex. 24; Gouhenant *v.* Cockrell, id. 96.

[7] See cases cited *supra* in notes 5 and 6, and the following: Harvard College *v.* Gore, 5 Pick. 370; Cole *v.* Cheshire, 1 Gray, 441; Chicopee *v.* Whately, 6 Allen, 508; Tanner *v.* King, 11 La. R. 175; State *v.* Steele, 33 La. Ann. 910.

[8] See *supra*, § 97.

[9] Opinion of the Judges, *supra*. See also Monson *v.* Fairfield, 55 Me. 117.

[1] Greene *v.* Windham, 13 Me. 225; Wayne *v.* Greene, 21 id. 357; Stockton *v.* Staples, 66 id. 197; Rumney *v.* Camptown, 10 N. H. 567; Harvard College *v.* Gore, 5 Pick. 370; Lyman *v.* Fiske, 17 id. 231; Wilson *v.* Terry, 11 Allen, 206; Bangs *v.* Brewster, 111 Mass. 382; Crawford *v.* Wilson, 4 Barb. 504; Tanner *v.* King, 11 La. R. 175; McKowen *v.* McGuire, 15 La. An. 637.

[2] Knox *v.* Waldoborough, 3 Greenl. 455; Waterborough *v.* Newfield, 8 id.

purpose fix domicil there.[3] And, on the other hand, municipal domicil cannot be changed by mere intention; act must accompany it.[4] And this is so, even though the removal be prevented by causes beyond the control of the person.[5]

The act or *factum* necessary for a change of municipal domicil is the same as that necessary for a change of national or *quasi*-national domicil; namely, a complete change of bodily presence from the old place of abode to the new. Hence municipal domicil is not changed while the person is *in itinere*, nor until he has actually arrived at his destination.[6]

203; Corinth *v.* Bradley, 51 Me. 540; Phillips *v.* Kingfield, 19 id. 375; Wayne *v.* Greene, 21 id. 357; Brewer *v.* Linnaeus, 36 id. 428; Hampden *v.* Levant, 59 id. 557; Bump *v.* Smith, 11 N. H. 48; Barton *v.* Irasburgh, 33 Vt. 159; Abington *v.* Boston, 4 Mass. 312; Commonwealth *v.* Walker, id. 556; Granby *v.* Amherst, 7 id. 1; Lincoln *v.* Hapgood, 11 id. 350; Williams *v.* Whiting, id. 424; Harvard College *v.* Gore, 5 Pick. 370; Cole *v.* Cheshire, 1 Gray, 441; Clinton *v.* Westbrook, 38 Conn. 9; Crawford *v.* Wilson, 4 Barb. 504; State *v.* Judge, 13 Ala. 805; Henrietta *v.* Oxford, 2 Ohio St. 32; Bradley *v.* Fraser, 54 Iowa, 289; Babcock *v.* Cass, Twp. 65 id. 110; McGehee *v.* Brown, 4 La. An. 186; Folger *v.* Slaughter, 19 id. 323.

[3] See cases cited *supra*, notes 1 and 2, and Church *v.* Crossman, 49 Iowa, 447; State *v.* Dodge, 56 Wis. 79.

[4] Hallowell *v.* Saco, 5 Greenl. 143; Greene *v.* Windham, 13 Me. 225; Gorham *v.* Springfield, 21 id. 58; Rumney *v.* Camptown, 10 N. H. 567; Stoddert *v.* Ward, 31 Md. 562; and see generally the cases cited *supra*, note 1.

[5] Stoddert *v.* Ward, *supra*.

[6] Littlefield *v.* Brooks, 50 Me. 475; Harvard College *v.* Gore, 5 Pick. 370; Otis *v.* Boston, 12 Cush. 44. In the last-named case Shaw, C. J., said: "In general, it is laid down as a fixed rule on this subject, that every man must have a domicil; that he can have but one; and that of course a prior one will not cease until a new one is acquired. It is then asked, What is the condition of one who has purchased or hired a house, or otherwise fixed his place of abode in another place, left the town of his last abode, with all his property and furniture, and is on his way to his new abode? Is he an inhabitant of the place from which he has departed? If his removal were towards another town in this State, we think his place of being an inhabitant would not be changed. He would certainly continue to be an inhabitant of the State, and taxable in some town; and the only question would be, in which he was an inhabitant on the first of May. Three might claim him; the one he has left, the one he is in, and the one to which he is proceeding. In such case we think the rule would apply, and his home would not be changed, either to the place of his actual bodily presence, or of his destination, because in neither would the fact of actual presence and the intent to reside concur. Not the place where he was *in itinere*, for want of intent; nor of his destination for want of his actual residence." Bangs *v.* Brewster, 111 Mass. 382, is in apparent conflict with the doctrine that a domicil cannot be acquired *in itinere*, but its circumstances were peculiar. The facts were as follows: A mariner whose domicil was in the town of A. left that town in 1867, and went to sea with his wife, intending upon his return to the State to make his home in the town of B. In pursuance of that intent, before his voyage was completed, he sent his wife in 1868 to B., where she remained until he himself arrived there, in July,

§ 183. **The requisite Animus.** — With respect to the *animus* or intention, the same general characteristics are necessary whether the change be one of national, *quasi*-national, or municipal domicil. These are: —

(1) *Capacity to choose.*[1] Infants[2] and married women[3] are just as incapable of changing *municipal* domicil as any other. As to persons of unsound mind,[4] however, probably a distinction must be taken. It is probable that a degree of mental unsoundness which would incapacitate them from changing national or *quasi*-national domicil would not render them incapable of changing municipal domicil,[5] particularly if such change is made with the assent of their guardians or conservators.[6]

(2) *Freedom of choice.*[7] The remarks which have been heretofore made under this head apply also to municipal domicil. For example, a prisoner does not acquire a domicil in the place where he is imprisoned,[8] nor does a pauper in the place where he is kept.[9] The same may be said with regard to one who is forced to fly from his home by the dangers of war[10] or similar causes.

(3) *Actual choice.*[11] With regard to this nothing need be added to what has already been said. A mere voluntary transfer of bodily presence from one town to another does not work a change of domicil.[12]

But when we come to consider further the question of the necessary *animus*, in its two aspects of *animus non revertendi* and *animus manendi*, grave difficulties lie in the way of formulating any definite or general rules. Here we must have recourse above all things to the fundamental idea of domicil,

1869. Upon these facts it was held that in May, 1869, his domicil was in B., and he was therefore there taxable; the concurrence of his intent and his wife's presence in pursuance of that intent being relied upon as fixing his domicil. It is, however, improbable that this case will ever be followed further than its peculiar circumstances warrant.

[1] See *supra*, § 137.

[2] See *infra*, ch. 11.

[3] See *infra*, ch. 10.

[4] See *infra*, ch. 12.

[5] See *infra*, § 264.

[6] Probably, however, this merely resolves itself into the proposition that a guardian has the power to change the municipal domicil of his insane ward; and this, we shall hereafter see, has been held in a number of cases. See *infra*, §§ 264, 265.

[7] See *supra*, § 138.

[8] See *infra*, § 272.

[9] See *infra*, § 270.

[10] Folger *v.* Slaughter, 19 La. An. 323, and see *infra*, §§ 279, 284.

[11] See *supra*, § 143.

[12] See *supra*, § 182, note 3.

namely, *home;* and it will generally be found that as between several municipal divisions, a person who is *sui juris* has his municipal domicil in that place in which he has his home in fact.

§ 184. **Id. Animus non Revertendi.** — But how far must a person intend to abandon his former place of abode, as a place of abode, in order to effect a change of municipal domicil? This is a difficult question to answer, and the cases are apparently in considerable conflict with regard to it. We have seen that with respect to national and *quasi*-national domicil this abandonment must be final and complete. But the same cannot be affirmed with respect to municipal domicil. We shall see, further along,[1] that a person may have two residences in different places, as, for example, at different seasons of the year, and may shift his municipal domicil from one to the other without abandoning the former as a place of abode. This occurs not unfrequently, but the usual mode of changing municipal domicil is by the substitution of one place of abode for another; and in order to do this, the former place of abode must be abandoned as a place of abode. Hence, generally speaking, no change of municipal domicil can occur where there is an *animus revertendi* after the accomplishment of a particular purpose.[2] A mere contingent intention,[3] a vague and uncertain intention,[4] or, in the language of Story,[5] a "floating intention" to return, however, will not prevent a change.

§ 185. **Id. Animus Manendi.** It is equally clear that mere presence in a place for a temporary purpose is not sufficient to fix municipal domicil there.[1] There must also be intention to remain. And this is so, whether the former place of abode has or has not been abandoned. But to what extent must a person intend to remain in a place in order to acquire a municipal domicil there?

It is clear that for this purpose the intended residence need not be of the same permanent character as is demanded, as

[1] *Infra*, § 421.
[2] See cases cited, § 182, note 2.
[3] Barton *v.* Irasburgh, 33 Vt. 159.
[4] Id. and Hartford *v.* Hartland, 19 Vt. 392.
[5] Confl. of L. § 46. See *supra*, § 154 *et seq.*
[1] See *supra*, § 182, note 3.

we have seen in the last chapter, for a change of national or *quasi*-national domicil. Certainly Vattel's[2] definition of domicil — namely, "the habitation fixed in any place with an intention of always staying there" — is not applicable to municipal domicil. At least it is not suited to the circumstances of this country, the habits of whose people are migratory, and of very many of whom it cannot be affirmed that they fix their municipal abodes with any positive intention of always continuing there.[3]

In many cases of municipal domicil the requisite *animus manendi* is described as intention to remain for "an indefinite time."[4] That this is not a satisfactory test of national or *quasi*-national domicil, has already been pointed out.[5] When applied to municipal domicil it is probably less objectionable, although even here it is capable of misinterpretation and of being carried to an undue length. Such was the case in Jamaica *v.* Townshend,[6] where a person who resided in J. purchased a tract of land in the same town and set about building a house upon it. In the mean time he removed to the town of L., intending to remain there only during the building of his house and then to return to J. and occupy said house. Under these circumstances it was held that he had changed his domicil, although the building of the house occupied only twenty-nine days.

The distinction between national and municipal domicil with respect to the *animus manendi* was thus referred to by Foster, J., in Wilbraham *v.* Ludlow:[7] "Our own adjudged cases sufficiently establish the rule that one who is residing in a place with the purpose of remaining there for an indefi-

[2] Bk. 1, ch. 19, § 218.

[3] Putnam *v.* Johnson, 10 Mass. 488.

[4] Greene *v.* Windham, 13 Me. 225; Wilton *v.* Falmouth, 15 id. 479; Stocton *v.* Staples, 66 id. 197; Moore *v.* Wilkins, 10 N. H. 452; Mead *v.* Boxborough, 11 Cush. 362; Whitney *v.* Sherborn, 12 Allen, 111; Wilbraham *v.* Ludlow, 99 Mass. 587; Landis *v.* Walker, 15 La. An. 213. Most of these cases, however, demand clear proof of *animus non revertendi* in order to make intention to remain for an indefinite time the requisite *animus manendi*.

[5] See *supra*, § 171.

[6] 19 Vt. 267; see also Hill *v.* Fuller, 14 Me. 125. The exact contrary was held in Clinton *v.* Westbrook, 38 Conn. 9, where the facts were identical with those in Jamaica *v.* Townshend.

[7] 99 Mass. 587, 592. See also the remarks of Totten, J., in Stratton *v.* Brigham, 2 Sneed (Tenn.), 420, given *supra*, § 174, note 2.

nite period of time, and without retaining and keeping up any *animus revertendi*, or intention to return to the former home which he has abandoned, will have his domicil in the place of his actual residence. Where the question is one of national domicil, this statement may not be correct; for such a condition of facts might not manifest an intention of expatriation. But it is accurate enough for cases like the present, which relate to a change of domicil from one place to another within the same Commonwealth."

It is probable that to municipal domicil rather than to national or *quasi*-national domicil should be applied the oft-quoted language of Story:[8] "If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period."

§ 186. **Id. The Negative View of Animus Manendi.** — To municipal domicil also properly belongs the definition by Parker, J., in Putnam *v.* Johnson,[1] namely: "The habitation fixed in any place without any present intention of removing therefrom is the domicil." This language was used in a case of municipal domicil, and the remarks of the learned judge throughout show that he had particularly in mind that species of domicil. It must be remembered, however, that mere presence in a place without any special views as to future residence either there or elsewhere will not establish domicil there. In such case the former domicil would be presumed to continue. The phrase "habitation fixed" is probably to be construed as including *animus manendi* of some description; so that the definition above given seems to resolve itself substantially into that given by President Rush, in Guier *v.* O'Daniel,[2] — namely, "residence in a particular place accompanied with positive or presumptive proof of continuing it an unlimited time."

[8] Confl. of L. § 46.

[1] 10 Mass. 488, 501. This view of the necessary *animus manendi* is also taken in the following cases of municipal domicil: Turner *v.* Buckfield, 3 Greenl. 229; Whitney *v.* Sherborn, 12 Allen, 111; Parker City *v.* Du Bois (Pa.), 8 Cent. R. 207; Stratton *v.* Brigham, 2 Sneed (Tenn.), 420.

[2] 1 Binney, 349, note.

§ 187. **Id. Intention to make the new Place of Abode "Home."** — In many of the cases the requisite intention for a change of municipal domicil is said to be intention to make the new place of abode the "home" of the person,[1] meaning thereby, of course, not "home" in the loose and general sense in which any place of abode, whether of a temporary or permanent character, is sometimes spoken of as "home," but "home" in its more restricted sense, in which, as we have already seen, the idea of permanency is, at least to some extent, included.

§ 188. **Id. Contingent Animus Manendi.** — How far a merely contingent *animus manendi* will suffice for a change of municipal domicil is not at all clear. In Putnam *v.* Johnson,[1] Parker, J., said: "In this new and enterprising country it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of *always staying there.* They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position, if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain." But it certainly is not every contingent residence in a place which will establish a domicil there.[2] Much, doubtless, will depend upon the nearness or remoteness of the contingency, and upon the extent to which the former place of abode has been abandoned. If the latter clearly appear to have been finally abandoned, the courts are disposed to require *animus manendi* of much slighter character than if it remain in doubt or be mainly inferrible from the nature of the *animus manendi.*

§ 189. **Double Residence.** — In cases of double residence, when a change of domicil is alleged from one place of residence to that of the other, it is difficult, if not impossible, to

[1] Anderson *v.* Anderson, 42 Vt. 350; Wilson *v.* Terry, 11 Allen, 206; Bangs *v.* Brewster, 111 Mass. 382; Parker City *v.* Du Bois, *supra;* State *v.* Dodge, 56 Wis. 79.

[1] 10 Mass. 488, 501.

[2] *E. g.*, Williams *v.* Henderson, 18 La. R. 557, where the defendant resided in New Orleans for the purpose of *trying the commission business.* The case, however, turned much upon the retention of the former place of abode and the continuance of defendant's family there.

lay down any general rule. It is clear that a total abandonment of the former is not required, and the problem in such cases usually is to determine to which of the two residences belong more of the characteristics of "home." This subject will be further considered hereafter.[1]

[1] See *infra*, § 421.

CHAPTER IX.

REVERTER OF DOMICIL.

§ 190. THE maxim "Domicil of origin reverts easily," has already been discussed so far as it is a principle of evidence by which to decide between acquired domicil and domicil of origin. But there is in the principle of reverter also a technical and peculiarly artificial side, according to which the *factum* required in the ordinary change of domicil — to wit, a change of bodily presence from one place to another — is in part dispensed with.

§ 191. **The Rule of Reverter as laid down by Story.** — Story thus lays down the rule: "If a man has acquired a new domicil, different from that of his birth, and he removes from it with an intention to resume his native domicil, the latter is re-acquired even while he is on his way, *in itinere*, for it reverts from the moment the other is given up."[1] This he states as the rule applicable "to changes of domicil from one place to another within the same country or territorial sovereignty;" that is to say, *quasi*-national domicil.[2] With respect to changes between different countries or sovereignties, he lays down the following: "A national character, acquired in a foreign country by residence, changes when the party has left the country *animo non revertendi*, and is on his return to the country where he had his antecedent domicil. And especially, if he be *in itinere* to his native country with that intent, his native domicil revives while he is yet *in transitu;* for the native domicil easily reverts. The moment a foreign domicil is abandoned, the native domicil is re-acquired. But a mere return to his native country, without an intent to abandon his foreign domicil, does not work any change of his domicil."[3]

[1] Confl. of L. § 47.
[2] And perhaps, although not probably, municipal domicil.
[3] Confl. of L. § 48.

The only fair construction which can be put upon these passages is that reverter takes place only when the party has abandoned his acquired domicil and is *in itinere* to the place of his original domicil;[4] and this, as we shall see, is the American doctrine.[5] This is but reasonable and just; for it seems but right that a person who has turned his back upon his adopted country and his face toward his native country, should be deemed to intend to deliver himself from the dominion of the laws of the former and subject himself to the laws of the latter, and but right, further, for courts to give effect to such intention.

§ 192. **The British Doctrine. — Udny v. Udny.** — The British doctrine, however, goes further. It has already been referred to, and can now be best stated in the language of the judges who created it.

Udny *v.* Udny[1] was a case involving legitimation *per subsequens matrimonium*. It originated in Scotland, and came up from the Court of Session to the House of Lords on appeal. The facts were as follows: Colonel Udny, though born at Leghorn in 1779, where his father was consul, had by paternity his domicil in Scotland. He does not appear to have acquired any new domicil up to 1812, when he was married and took upon lease a house in London, where he resided for thirty-two years, paying occasional visits to Scotland. In 1844, having got into pecuniary difficulties, he broke up his establishment in London and repaired to Boulogne, where he remained for nine years, occasionally visiting Scotland as before. In 1846 his wife died. Some time after the death of his wife he formed an illicit connection at Boulogne with Miss A., which resulted in the birth in England of a son in 1853; Miss A. having come to England, and Udny having accompanied her, for the purpose of procuring the attendance of an English accoucheur. The parents of this child — who was the respondent in this case — were subsequently, in 1854,

[4] Although the first sentence of the last quotation would seem to contemplate reverter of acquired as well as original domicil. But this is inadmissible (see *infra*, § 208), and it is not certain that Story distinctly meant to lay down such doctrine.

[5] *Infra*, § 201.

[1] L. R. 1 Sch. App. 441; s. c. 7 Macph. (Sc. Sess. Cas. 3d ser. 1869) 89.

married in Scotland; and the question was whether respondent, under these circumstances, had become legitimate *per subsequens matrimonium.*

The Court of Session[2] decided that Colonel Udny's domicil of origin was Scotch, and that he had never subsequently lost it, notwithstanding his long absence from Scotland; and that his son, the respondent, "though illegitimate at his birth, was legitimated by the subsequent marriage of his parents." The House of Lords ordered and adjudged that the interlocutor of the Court of Session be varied by substituting for the words "that he never lost his said domicil of origin," these words, "and if such domicil of origin was ever changed, yet by leaving England in 1844 his domicil of origin reverted;" and with this variation affirmed the interlocutor.

It thus appears that the question of reverter was squarely before the House; and after the case had been argued by eminent counsel, the Law Lords delivered their opinions as follows. As the case is one of much importance they are here given at length.

§ 193. **Id. id. Lord Hatherley's Remarks.** — Lord Chancellor Hatherley said: "I am of opinion that the English domicil of Colonel Udny, if it were ever acquired, was formally and completely abandoned in 1844, when he sold his house and broke up his English establishment with the intention not to return. And, indeed, his return to that country was barred against him by the continued threat of process by his creditors. I think that on such abandonment his domicil of origin revived. It is clear that by our law a man must have some domicil, and must have a single domicil. It is clear, on the evidence, that the Colonel did not contemplate residing in France; and, indeed, that has scarcely been contended for by the appellant. But the appellant contends that when once a new domicil is acquired, the domicil of origin is obliterated, and cannot be re-acquired more readily or by any other means than those by which the first change of the original domicil is brought about, namely, *animo et facto.* He relied for this proposition on the decision in Munroe *v.*

[2] 5 Macph. (Sc. Sess. Cas. 3d ser. 1866) 164.

Douglas, where Sir John Leach certainly held that a Scotsman, having acquired an Anglo-Indian domicil, and having finally quitted India, but not yet having settled elsewhere, did not re-acquire his original domicil; saying expressly, 'I can find no difference in principle between an original domicil and an acquired domicil.' That he acquired no new domicil may be conceded; but it appears to me that sufficient weight was not given to the effect of the domicil of origin, and that there is a very substantial difference in principle between an original and an acquired domicil. I shall not add to the many ineffectual attempts to define domicil. But the domicil of origin is a matter wholly irrespective of any *animus* on the part of its subject. He acquires a certain *status civilis*, as one of your lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicil being simply determined by that of his father. A change of that domicil can only be effected *animo et facto*, — that is to say, by the choice of another domicil, evidenced by residence within the territorial limits to which the jurisdiction of the new domicil extends. He, in making this change, does an act which is more nearly designated by the word 'settling' than by any one word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England; and the word is frequently used as expressive of the act of change of domicil in the various judgments pronounced by our courts. But this settlement *animo et facto* by which the new domicil is acquired is, of course, susceptible of abandonment, if the intention be evidenced by facts as decisive as those which evidenced its acquirement.

"It is said, by Sir John Leach, that the change of the newly acquired domicil can only be evidenced by an actual settling elsewhere, or (which is, however, a remarkable qualification) by the subject of the change dying *in itinere* when about to settle himself elsewhere. But the dying *in itinere* to a wholly new domicil would not, I apprehend, change a domicil of origin if the intended new domicil were never reached; so that at once a distinction is admitted between what is

necessary to re-acquire the original domicil and the acquiring of a third domicil. Indeed, the admission of Sir John Leach seems to have been founded on the actual decision of the case of Colville *v.* Lauder,[1] cited in full in Munroe *v.* Douglas,[2] from the Dictionary of Decisions. In that case a person of Scottish origin became domiciled at St. Vincent, but left that island, writing to his father and saying that his health was injured, and he was going to America; and that if he did not succeed in America, he would return to his native country. He was drowned in Canada, and some memoranda were found indicating an intention to return to Scotland, and it was held that his Scottish domicil had revived.

"It seems reasonable to say that if the choice of a new abode and actual settlement there constitute a change of the original domicil, then the exact converse of such a procedure — namely, the intention to abandon the new domicil, and an actual abandonment of it — ought to be equally effective to destroy the new domicil. That which may be acquired may surely be abandoned; and though a man cannot, for civil reasons, be left without a domicil, no such difficulty arises if it be simply held that the original domicil revives. That original domicil depended not on choice, but attached itself to its subject on his birth; and it seems to me consonant both to convenience and to the currency of the whole law of domicil, to hold that the man born with a domicil may shift and vary it as often as he pleases, indicating each change by intention and act, whether in its acquisition or abandonment; and further, to hold that every acquired domicil is capable of simple abandonment *animo et facto*, the process by which it was acquired, without its being necessary that a new one should be at the same time chosen; otherwise one is driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely forsaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere. Why should not the domicil of origin, cast on him by no choice of his own, and changed for a time,

[1] Morrison, Dict. Dec. *Succession*, App. No. 1; Robertson, Pers. Suc. p. 166.
[2] 5 Madd. 379.

be the state to which he naturally falls back when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice?

"Lord Cottenham, in Munro *v.* Munro,[3] says: 'So firmly indeed did the Civil Law consider the domicil of origin to adhere, that it holds that if it be actually abandoned and a domicil acquired, but that again abandoned, and no new domicil acquired in its place, the domicil of origin revives.' No authority is cited by his lordship for this. He probably alluded to some observations which occur in the case of La Virginie,[4] where Sir William Scott said: 'It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicil in the case of a native subject than to impress the national character on one who is originally of another country.'

"In the case of The Indian Chief,[5] the question was whether the ship was the property of a British subject; for if so, her trading was illegal. The owner, Mr. Johnson, averred that he was an American. Sir William Scott held him to be an American by origin, but that, having come to England in 1783 and remained till 1797, he had become an English merchant. But he quitted England before the capture of the vessel, and letters were produced showing his intention to return to America, which he does not appear to have reached until after. And Sir William Scott says: 'The ship arrives a few weeks after his departure; and taking it to be clear that the natural character of Mr. Johnson as a British merchant was founded on residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that from the moment he turned his back on the country where he had resided on his way to his own country he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character, which no longer adheres to him from the moment that he puts

[3] 7 Cl. & F. 842.

[4] 5 C. Rob. Ad. 99. Lord Hatherley is probably mistaken in assuming that Lord Cottenham did not have in view civil-law authorities in using the language quoted. See *supra*, § 107, and *infra*, § 202, note 1.

[5] 3 C. Rob. Ad. 12.

himself in motion *bona fide* to quit the country *sine animo revertendi*.'

"Story, in his Conflict of Laws, sect. 47 (at the end), says: 'If a man has acquired a new domicil different from that of his birth, and he removes from it with intention to resume his native domicil, the latter is re-acquired even while he is on his way, for it reverts from the moment the other is given up.'

"The qualification that he must abandon the new domicil with the special intent to resume that of origin, is not, I think, a reasonable deduction from the rules already laid down by decision, because intent not followed by a definitive act is not sufficient. The more consistent theory is, that the abandonment of the new domicil is complete *animo et facto*, because the *factum* is the abandonment, the *animus* is that of never returning.

"I have stated my opinion more at length than I should have done were it not of great importance that some fixed common principles should guide the courts in every country on international questions. In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases as to the intent '*exuere patriam*,' or to become 'a Frenchman instead of an Englishman,' go beyond the question of domicil. The question of naturalization and of allegiance is distinct from that of domicil. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. He cannot, at present at least, put off and resume at will obligations of obedience to the government of the country of which at his birth he is a subject; but he may many times change his domicil. It appears to me, however, that each acquired domicil may be also successively abandoned *simpliciter*, and that thereupon the original domicil *simpliciter* reverts."

§ 194. **Id. id. Lord Chelmsford's Remarks.** — Lord Chelmsford said: "My lords, at the opening of the argument of this appeal for the respondent, his learned counsel were

informed that your lordships were of opinion that the domicil of Colonel Udny down to the year 1812 was his Scotch domicil of origin, and that the case was therefore narrowed down to the questions raised by the appellant, — whether that domicil had been superseded by the acquisition of another domicil in England, and whether such after-acquired domicil was retained at the time of the birth of the respondent, and continued down to the period of the marriage of the respondent's parents in Scotland.

"In considering these questions, it will be necessary to ascertain the nature and effect of a domicil of origin; whether it is like an after-acquired domicil, which, when it is relinquished, can be re-acquired only in the same manner in which it was originally acquired, or whether, in the absence of any other domicil, the domicil of origin must not be had recourse to for the purpose of determining any question which may arise as to a party's personal rights and relations.

"Story, in his Conflict of Laws (sect. 48), says: 'The moment a foreign domicil is abandoned, the native domicil is re-acquired.' Great stress was laid by the appellant in his reference to this passage upon the word 're-acquired,' which is obviously an inaccurate expression. For, as was pointed out in the course of the argument, a domicil of origin is not an acquired domicil, but one which is attributed to every person by law. The meaning of Story, therefore, clearly is, that the abandonment of a subsequently acquired domicil *ipso facto* restores the domicil of origin. And this doctrine appears to be founded upon principle, if not upon direct authority.

"It is undoubted law that no one can be without a domicil. If, then, a person has left his native domicil and acquired a new one, which he afterwards abandons, what domicil must be resorted to to determine and regulate his personal *status* and rights? Sir John Leach, V. C., in Munroe *v.* Douglas,[1] held that in the case supposed the acquired domicil attaches to the person till the complete acquisition of a subsequent domicil, and (as to this point) he said there was no difference in principle between the original domicil and an acquired

[1] See *supra*.

domicil. His Honor's words are: 'A domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicil be acquired, unless the party die *in itinere* towards an intended domicil.' There is an apparent inconsistency in this passage; for the Vice-Chancellor, having said that a domicil necessarily remains until a subsequent domicil be acquired *animo et facto*, added, 'unless the party die *in itinere* towards an intended domicil,'— that is, at a time when the acquisition of the subsequent domicil is incomplete and rests in intention only.

"I cannot understand upon what ground it can be alleged that a person may not abandon an acquired domicil altogether, and carry out his intention fully by removing *animo non revertendi;* and why such abandonment should not be complete until another domicil is acquired in lieu of the one thus relinquished.

"Sir William Scott, in the case of The Indian Chief,[2] said: 'The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to a person from the moment he puts himself in motion *bona fide* to quit the country *sine animo revertendi;*' and he mentions the case of 'a British-born subject, who had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country, but had got no farther than Holland, the mother country of those settlements, when the war broke out; and it was determined by the Lords of Appeal that he was *in itinere*,— that he had put himself in motion, and was in pursuit of his native British character.'

"Sir John Leach seems to me to be incorrect also in saying that in the case of the abandonment of an acquired domicil there is no difference in principle between the acquisition of an entirely new domicil and the revival of the domicil of origin. It is said by Story, in sect. 47 of his Conflict of Laws, that 'If a man has acquired a new domicil different from that of his birth, and he removes from it with an intention to resume his native domicil, the latter is re-acquired even while

[2] See *supra*.

he is on his way, *in itinere;* for it reverts from the moment the other is given up.' This certainly cannot be predicated of a person journeying towards a new domicil, which it is his intention to acquire.

"I do not think that the circumstances mentioned by Story in the above passage, viz., that the person has removed from his acquired domicil with an intention to resume his native domicil, and that he is *in itinere* for the purpose, are at all necessary to restore the domicil of origin. The true doctrine appears to me to be expressed in the last words of the passage: 'It' (the domicil of origin) 'reverts from the moment the other is given up.'

"This is a necessary conclusion, if it be true that an acquired domicil ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicil. The domicil of origin always remains, as it were, in reserve, to be resorted to in case no other domicil is found to exist. This appears to me to be the true principle upon this subject, and it will govern my opinion upon the present appeal."

§ 195. **Id. id. Lord Westbury's Remarks.** — Lord Westbury said: "The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status;* another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights and subject to certain obligations, — which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status.* The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, — namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status.* For it is on this basis that the personal rights of the party — that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy — must depend. International law depends on rules which, being in great measure derived from the

Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicil; and to secure this result the law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate, and the domicil of the mother, if illegitimate. This has been called the domicil of origin, and is involuntary. Other domicils, including domicil by operation of law, as on marriage, are domicils of choice. For as soon as an individual is *sui juris*, it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act. When another domicil is put on, the domicil of origin is, for that purpose, relinquished, and remains in abeyance during the continuance of the domicil of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animò et facto*, in the manner which is necessary for the acquisition of a domicil of choice.

"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness, and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence, originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established.

"The domicil of origin may be extinguished by act of law,

as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party. Domicil of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicil remains until another is acquired. This is true if applied to the domicil of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicil of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party until another domicil has *animo et facto* been acquired. The cases to which I have referred are, in my opinion, met and controlled by other decisions. A natural-born Englishman may, if he domiciles himself in Holland, acquire and have the *status civilis* of a Dutchman, which is of course ascribed to him in respect of his settled abode in the land; but if he breaks up his establishment, sells his house and furniture, discharges his servants, and quits Holland, declaring that he will never return to it again, and taking with him his wife and children, for the purpose of travelling in France or Italy, in search of another place of residence, is it meant to be said that he carries his Dutch domicil — that is, his Dutch citizenship — at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity, and, on the contrary, much reason, in holding that an acquired domicil may be effectually abandoned by unequivocal intention and act; and that when it is so determined the domicil of origin revives until a new domicil of choice be acquired. According to the *dicta* in the books and cases referred to, if the Englishman whose case we have been supposing, lived for twenty years after he had finally quitted Holland, without acquiring a new domicil, and afterwards died intestate, his personal estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition supposed to be authorized by one or more decisions involves absurd results,

there is great reason for believing that no such rule was intended to be laid down.

"In Mr. Justice Story's Conflict of Laws (the last edition), it is stated that 'the moment the foreign domicil (that is, the domicil of choice) is abandoned, the native domicil or domicil of origin is re-acquired.' And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicil.

"In adverting to Mr. Justice Story's work, I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed: 'The result of the more recent English cases seems to be, that for a change of national domicil there must be a definite and effectual change of nationality.' In support of this proposition, the editor refers to some words which appear to have fallen from a noble and learned lord in addressing this house in the case of Moorhouse *v.* Lord,[1] when, in speaking of the acquisition of a French domicil, Lord Kingsdown says, 'A man must intend to become a Frenchman instead of an Englishman.' These words are likely to mislead, if they were intended to signify that for a change of domicil there must be a change of nationality, — that is, of natural allegiance. That would be to confound the political and civil states of an individual, and to destroy the difference between *patria* and *domicilium*.

"The application of these general rules to the circumstances of the present case is very simple. I concur with my noble and learned friend, that the father of Colonel Udny, the consul at Leghorn, and afterwards at Venice, and again at Leghorn, did not by his residence there in that capacity lose his Scotch domicil. Colonel Udny was, therefore, a Scotchman by birth. But I am certainly inclined to think that when Colonel Udny married, and (to use the ordinary phrase) settled in life, and took a long lease of a house in Grosvener Street, and made that a place of abode of himself and his wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality; and when he had remained there for a period, I think, of thirty-two years, there being no obstacle in point of fortune, occu-

[1] 10 H. L. Cas. 272.

pation, or duty, to his going to reside in his native country, — under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udny deliberately chose and acquired an English domicil. But if he did so, he as certainly relinquished that English domicil in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving London in a manner which removes all doubt of his ever intending to return there for the purpose of residence. If, therefore, he acquired an English domicil, he abandoned it absolutely *animo et facto*. Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to Boulogne, and at the same time his domicil of origin revived. The rest is plain. The marriage and the consequences of that marriage must be determined by the law of Scotland, the country of his domicil."

§ 196. **Id. Doctrine of Udny v. Udny not drawn from the Civilians.** — From Lord Hatherley's criticism of the remark which fell from Lord Cottenham in Munro *v.* Munro, it is evident that the doctrine of Udny *v.* Udny was not influenced by the views held by some of the Civilians, with regard to the immutability of domicil of origin. So far as authority goes, it seems to have rested entirely upon the cases in the English Prize Courts; and aside from direct authority, it seems to have been tinctured very largely by the views then held in Great Britain with regard to perpetual allegiance.

§ 197. **Id. Domicil of Origin in the Early British Cases.** — It is noteworthy that in the earliest cases in the House of Lords, — Bruce *v.* Bruce,[1] Ommanney *v.* Bingham,[2] and Bempde *v.* Johnstone,[3] no special significance seems to have been attached to domicil of origin. Indeed, Lords Thurlow and Loughborough, who delivered the judgments in those cases, do not appear to have arrived at any very clear conception of domicil of origin, as it was then understood on the Continent, and subsequently came to be understood in Great Britain.

[1] 2 Bos. & P. 229 note.
[2] Robertson, Pers. Suc. pp. 152, 486.
[3] 3 Ves. Jr. 198.

The celebrated third rule of Lord Alvanley, in Somerville *v.* Somerville,[4] evidently was not extracted from those cases, but from the foreign authorities cited in the argument. It is the first distinct recognition which we have in English jurisprudence of any special adhesiveness of domicil of origin, and that of no artificial or technical kind, but one flowing naturally from the usual conduct, habits, and feelings of men, and entirely consistent with the complete obliteration of domicil of origin upon the acquisition of a new domicil.

§ 198. **Id. Udny v. Udny and the British Prize Cases.** — An examination of the English Prize Cases shows that the doctrine held in them goes even beyond that of Udny *v.* Udny. It is clear that in the latter case their lordships meant to go no further than to hold that domicil of origin reverts upon quitting *cum animo non revertendi* the country in which domicil of choice has been acquired. But the doctrine of Sir William Scott, in The Indian Chief,[1] requires only that the person should "put himself in motion *bona fide* to quit the country *sine animo non revertendi;*" whereupon the "adventitious character" gained by residence ceases, although he may be detained by matters of business or the like, and may not actually remove. In the case of The Snelle Zeylder,[2] which Sir William Scott relied upon, and which was referred to by Lord Chelmsford in Udny *v.* Udny, Mr. Curtissos, a British-born subject, went to the Dutch settlement of Surinam in 1766, and from thence to the island of St. Eustatius (also Dutch), where he remained until 1776; from thence he went to Holland to settle his accounts, with an intention, as was said, of returning afterwards to England, to take up his final residence there. He thus had passed from one part of the Dutch dominions to another, but had not quitted Dutch territory, and he did not return to England until 1781. While in Holland, however, war broke out, and his ship and goods were captured by the British and condemned in the Court of Admiralty as Dutch property. Upon his return to England he took an appeal, and his vessel and cargo were restored to

[4] 5 Ves. Jr. 750. See *supra*, § 114.
[1] 3 C. Rob. Ad. 12.
[2] The Lords, April 25, 1783, 3 C. Rob. 21, in The Indian Chief, and note.

him; the Lords of Appeal holding "that he was *in itinere*,— that he had put himself in motion, and was in pursuit of his original British character." The Ocean,[3] was the case of a vessel owned by a British-born subject who had settled in Holland in trade, and who, upon the approach of hostilities, arranged to return to England, and was only prevented from so doing by the violent detention of all British subjects who happened to be in the Dutch territories at the breaking out of the war. Under these circumstances, Sir William Scott held him entitled to restitution. In The President,[4] the same judge uses language to the effect that all that is necessary is to show "some solid fact showing that the party is in the act of withdrawing."

Such cases, if followed as authorities upon the general subject of domicil, are likely to introduce doctrine fraught with no little confusion and uncertainty in questions of *status*, personal succession, and the like.[5] For example, if Mr. Curtissos had died while in Holland, would his personal estate have been distributable according to the laws of England? Or would the majority or minority of his children, if he had any, have been determined by the laws of the latter country? It can hardly be thought so.

This line of discussion need not be pursued any further. What has been said has been for the purpose of showing, first, that, so far as Udny *v.* Udny rests upon authority at all, it rests upon that of the British Prize Cases; and, second, that those cases go too far to be followed in ordinary cases of domicil. Moreover, they are so mixed up with considerations (particularly the matter of allegiance) peculiar to themselves, and which do not apply to domicil in general, as to render them wholly unsafe as guides in any cases except those involving national character in time of war. Among others, Dr. Lushington has, in Hodgson *v.* De Beauchesne,[6] warned us against their use. He says: "This species of domicil is, it is true, in one sense, domicil *jure gentium*, but in many particulars it is governed by different considerations, and

[3] 5 C. Rob. 90.
[4] Id. 277.
[5] See *infra*, § 387.
[6] 12 Moore P. C. C. 285. See also Westlake, Priv. Int. L. 2d ed. p. 285, pp. 39, 40, 1st ed.; and *supra*, § 26.

decisions belonging to it must be applied with great caution to the questions of domicil independent of war."

§ 199. **Id. Objections on Principle to Udny v. Udny.**— On principle, however, there are many objections which can be urged against the doctrine of Udny *v.* Udny; the main one, besides what has been already said in the chapter on Domicil of Origin, being its extreme artificiality and the fact that it entirely loses sight of the essentially voluntary character of domicil.[1] It may be said, and with great force, that the adherence of a domicil of choice to a person after it has been abandoned would also be involuntary and artificial. The necessity of imputing to a person who is homeless in fact a domicil somewhere, compels a resort to some artificial rule, it is true; but it would seem most consonant with the general principles of the subject to restrict as far as possible the application of purely technical fictions. And of all the fictions relating to domicil, that of domicil of origin is the most highly technical; for a person may have a domicil of origin in a country without having ever had the least semblance of a home there.[2]

With respect to the remark of Lord Westbury, that if a

[1] Wharton thus combats the doctrine of Udny *v.* Udny (Confl. of L. § 60): "The consequences in the United States would be serious should the [doctrine of the revival of the original domicil when the elective domicil has been abandoned] be maintained. Foreigners come to us largely from countries subject to the modern Roman law, and make their domicil at their first port, often only to abandon it for another and then another until they reach a home which affords them a convenient settlement. Should they be held, on each abandonment, to renew their original domicil, their property and their persons would be placed under the control of a law utterly foreign to that which prevails in the country to which they emigrate. Abandoning a domicil in New York, for instance, in order to seek one as yet undetermined in the Northwest, might revive the Roman law of marital community, might turn major children back into minors, might make the parties incapable of any hypothecation of their property without delivery of possession, might subject them to their native municipal burdens, and throw their estate upon their death into foreign channels of succession. Certainly consequences so hostile to the intention of the parties will not be arbitrarily forced. But abandoning an elective domicil, coupled with a return to the original domicil, though without the intention of remaining, may revive that domicil; and so *a fortiori* may an abandonment with an intention to return to such original domicil."

[2] In Walcot *v.* Botfield, Kay, 534, Wood, V. C. (afterwards Lord Hatherley) says: "A person might be born in England, of parents whose domicil was Scotch, and he might never afterwards acquire a domicil of his own, and thus might have a Scotch domicil without ever having been in Scotland." See also the language of Lord Hatherley, *supra*, § 193.

natural-born Englishman domicil himself in Holland, and afterwards break up his establishment there and remove, intending never to return, it is absurd to suppose that his Dutch domicil clings to him until he has "set up his tabernacle" elsewhere, — it may be said that such a supposition is certainly no more absurd than to suppose that his domicil of origin, which is merely imputed to him by law, and into the constitution of which no act or intention of his own has entered, should cling and adhere to him in spite of every effort to rid himself of it, should continue to follow him around the world, and notwithstanding his fixed intention never to re-assume it, should persistently control his capacities during his life and the distribution of his estate after his death. We can suppose the case of one removed in infancy from his domicil of origin by his parents to another country, where they become naturalized citizens, and where he grows to manhood, and where he himself (if such be the requirement of the law of that country) on attaining his majority assumes citizenship. It does seem unreasonable to hold that upon quitting this acquired domicil with an intention of seeking an abode elsewhere, he should be relegated for his *status civilis* to a country to which he bears no allegiance, of which he may not have the slightest recollection, and with which he may be connected by no ties of kindred or association, — in short, a country with which his only bond of connection is that his parents happened to be domiciled there at the time of his birth. Or suppose a somewhat stronger case. The parents of A. are native-born Americans, and intending to set up a permanent abode in Russia they journey thither. While in England, *in itinere*, A. is born. Clearly his domicil of origin is American. His parents permanently establish themselves in Russia, and die there. A. grows to manhood, marries, raises a family, and accumulates property there. In middle life he quits that country, intending to settle in France, but dies *in itinere* in Germany. If the doctrine of Udny *v.* Udny is of universal application, the distribution of A.'s personal estate would be determined by the laws of some American State upon whose soil he may never have set foot, and with whose law he may be entirely unacquainted. This is indeed an extreme case, but not an

improbable one. In Udny *v.* Udny, Colonel Udny was not born at his domicil of origin; and for anything which is to be found in the books to the contrary, if he had grown up in Spain and had never seen Scotland, the doctrine of their lordships would have imputed to him a domicil in Scotland immediately upon quitting England.

§ 200. **Westlake on Reverter.** — Evidently impressed with the harshness of such results, Westlake[1] has sought to provide against them (1) by assuming as the domicil of origin (for the purpose of reverter) that domicil which the person had when he first acquired the power of changing his domicil for himself, and (2) by holding that reverter takes place only when (*a*) the person has set out to resume his domicil of origin, or (*b*) has abandoned his domicil of choice without any sufficient intention being directed towards any other country. The first position, however, is not only not supported by the authorities, but is directly contradicted by them; the plain result of the cases being that the domicil of origin of a person is that which attaches to him at birth, and no other.[2] The second position is equally untenable in view of Udny *v.* Udny. For their lordships there hold substantially that domicil of choice is an adventitious domicil which ceases upon abandonment, — that it "may be abandoned *simpliciter*, and that thereupon the original domicil *simpliciter* reverts." Indeed, no other construction can be put upon the language used in that case than that, upon the abandonment of one acquired domicil in order to establish another, the domicil of origin springs out of abeyance to fill up the gap between the two.

Westlake[3] assumes that "in the event of death *in itinere* the last domicil is that towards which the person is journeying." But suppose he does not die? (Can death make any difference?) Suppose, for example, a child is born of whom the person *in itinere* is the father. By what law would the capacity for legitimation of such child be determined? By that of the country towards which the father is journeying? Clearly not. Then we are driven for an answer either to the

[1] Priv. Int. L. 2d ed. §§ 244, 245.
[2] See *supra*, § 105.
[3] Priv. Int. L. 2d ed. § 244; and see *supra*, § 129 and note.

law of the domicil of origin, or that of the lately abandoned domicil. Suppose a wife die while her husband is thus *in itinere*. Can it be that her testamentary capacity or the distribution of her personal property would be governed by the law either of his intended domicil or of his domicil of origin? Suppose he be a Russian or an Italian who has become domiciled in New York, and has married a New York woman who has died while he is *in itinere*, — for example, to Canada, to establish his domicil there; or suppose that for some purpose his personal capacity is called in question; — is it not more reasonable to determine it by the laws of a country which he has once voluntarily chosen as his home, even though he has abandoned it, than by the laws of a country with which he may be connected only by ties which are wholly artificial and rest in pure fiction?

§ 201. **American Doctrine of Reverter.** — In this country the doctrine of reverter of domicil has been received substantially as stated by Story; namely, that domicil of origin re-attaches upon (1) abandonment of domicil of choice, and (2) setting out for the place of domicil of origin with intention to remain there. Lowell, J., thus states it in Walker's case:[1] "The general rule is that a domicil once acquired remains until a removal has been effected to some other place with intent to remain there. But there is an important exception in favor of the native domicil, by which a mere removal from the new and acquired home, with intent to return to that of origin, revives the latter *eo instanti*." It is true that there have been some *dicta*[2] in conflict with this view, but most of the cases

[1] 1 Lowell, 237; s. c. *sub nom. Ex parte* Wiggin, 1 Bank. Reg. 90. In Goods of Bianchi, 3 Swab. & Tr. 16, Sir C. Cresswell held similarly to the American cases, although it was not there necessary for him to go to the extent of the doctrine of Udny *v.* Udny. He said: "The deceased was originally domiciled in Genoa; he then became domiciled in the Brazils, and there is no doubt of the fact that he died *in itinere*, as he was returning to Genoa to resume his permanent residence there. Then it may be said that as soon as he had finally abandoned the acquired domicil by setting off on his journey to return to his domicil of origin, the latter revived."

[2] In The Venus, 8 Cranch, 253, a case involving national character in time of war, Washington, J., says: "National character which a man acquires by residence may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided on his way to another. To use the language of Sir W. Scott, it is an adventitious

have followed Story either in words or in substance.[3] Moreover, it is laid down in a large number of cases, and may be taken to be the *consensus* of American judicial opinion, that domicil once acquired continues until another is acquired *facto et animo*,[4] an exception being made in favor of reverter of domicil of origin, as above stated.

character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion *bona fide* to quit the country *sine animo revertendi*. 3 Rob. 17, 12. The Indian Chief." It must be remembered, however, as has been before pointed out, that different presumptions arise in cases of national character and domicil in general. Thus, for instance, greater stress is laid in the former class of cases than in the latter upon the mere fact of residence. The tendency, however, of the later American cases is to bring the doctrine of residence as determinative of national character more into conformity with the general doctrine of domicil. Thus, for instance, in the late cases of Mitchell *v.* United States, 21 Wall. 350; Desmare *v.* United States, 93 U. S. 605, national character in time of war is put squarely upon the ground of domicil. Gibson, C. J., in Miller's Estate, 3 Rawle, 312, 319, says: "His domicil of origin, *which was at most but suspended*, was instantly revived by his resumption of the character of an *American* citizen, — even before the dissolution of his connection with the foreign house. For an acquired character, depending, as it does, not on the existence of commercial relations, but actual residence without a present purpose of terminating or abridging it, is abandoned, for every purpose of legal effect, the instant a step is taken to abandon the country." But in this case (one of personal succession) the party had returned to his domicil of origin with the apparent intention of remaining there. Marshall, C. J., in Prentiss *v.* Barton, 1 Brock. 389 (Judicial Citizenship), says that domicil of origin "is recovered by any manifestation of a disposition to resume the native character; perhaps by a surrender of a new domicil. In fact it may be considered rather as suspended than annihilated." But he evidently had in mind the decisions in cases of national character, and particularly the views expressed by himself in The Venus (*q. v.*), where he was disposed to give great latitude to a person residing in a foreign country in the matter of throwing off national character gained by residence. In the Matter of Scott, 1 Daly, 534 (Naturalization), Daly, F. J., says: "It [domicil of origin] continues until he has acquired another, and revives if the acquired domicil has been totally abandoned without any intention of acquiring a new one, but not otherwise." For this he cites Craigie *v.* Lewin, 3 Curteis, 435; but that case simply holds that domicil of origin does not revive until the acquired domicil has been abandoned. Moreover, in Scott's case, there was a return to the domicil of origin.

[3] The Francis, 1 Gall. 614; Johnson *v.* Twenty-one Bales, Paine, 601; s. c. Van Ness, 5; *In re* Walker, *supra*; Bank *v.* Balcom, 35 Conn. 351; Matter of Wrigley, 8 Wend. 134, 140, per Walworth, Ch.; Reed's Appeal, 71 Pa. St. 378; Mills *v.* Alexander, 21 Tex. 154. See The Venus, as explained in the last note. Kellar *v.* Baird, 5 Heisk. 39, might seem to a certain extent to support the doctrine of Udny *v.* Udny.

[4] Mitchell *v.* United States, 21 Wall. 350; Desmare *v.* United States, 93 U. S. 605; *In re* Walker, *supra*; Littlefield *v.* Brooks, 50 Me. 475; Gilman *v.* Gilman, 52 Me. 165; Jennison *v.* Hapgood, 10 Pick. 77; Thorndike *v.* Boston, 1 Metc. 242; Opinion of the Judges, 5 Met. 587; McDaniel *v.* King,

§ 202. **Doctrine of Udny v. Udny not held on the Continent.** — The doctrine of reverter as announced in Udny *v.* Udny is not held at the present time upon the Continent.[1] Indeed, it may

5 Cush. 469 ; Shaw *v.* Shaw, 98 Mass. 158 ; Borland *v.* Boston, 132 Mass. 89 ; Bank *v.* Balcom, 35 Conn. 351 ; Hegeman *v.* Fox, 31 Barb. 475 ; Fiske *v.* Railroad, 53 id. 472 ; Ames *v.* Duryea, 6 Lans. 155; Brown *v.* Ashbough, 40 How. Pr. 260; Isham *v.* Gibbons, 1 Bradf. 69 ; Clark & Michener *v.* Likens, 2 Dutch. 207; Pfoutz *v.* Comford, 36 Pa. St. 420; Reed's Appeal, 71 id. 378 ; Hindman's Appeal, 85 id. 466 ; Ringgold *v.* Barley, 5 Md. 186 ; Pilson *v.* Bushong, 29 Gratt. 229; Lindsay *v.* Murphy, 76 Va. 428 ; Goodwin *v.* McCoy, 13 Ala. 271 ; Glover *v.* Glover, 18 id. 367 ; Talmadge's Adm'r *v.* Talmadge, 66 id. 199 ; Church *v.* Crossman, 49 Iowa, 447 ; Kellar *v.* Baird, 5 Heisk. 39 ; Cole *v.* Lucas, 2 La. An. 946 ; McIntyre *v.* Chappel, 4 Tex. 187 ; Hardy *v.* De Leon, 5 Tex. 211 ; Shepherd *v.* Cassidy, 20 id. 24 ; Gouhenant *v.* Cockrell, id. 96 ; *Contra* Hicks *v.* Skinner, 72 N. C. 1.

It is true that in many of the above cases the change alleged was between the place of origin and a new place, but the language used by the various judges is broad and general, and makes no distinction in this respect between domicil of origin and acquired domicil. In Thorndike *v.* Boston, Shaw, C. J., says : "It is a maxim that every man must have a domicil somewhere ; and also that he can have but one. Of course it follows that his existing domicil continues until he acquires another; and *vice versa*, by acquiring a new domicil, he relinquishes his former one." And almost this identical language is repeated in many of the cases. In Gilman *v.* Gilman, Davis, J., says : "In regard to questions of citizenship and the disposition of property after death, every person must have a domicil. For every one is presumed to be the subject of some government while living. And the law of some country must control the disposition of his property upon his decease. It is therefore an established principle of jurisprudence, in regard to succession of property, that a domicil, once acquired, continues until a new one is established." In the opinion rendered by the judges of the Supreme Court of Massachusetts, upon the right of students to vote at the place where they are attending an institution of learning, it is said : "Certain maxims on this subject we consider to be well settled, which afford some aid in ascertaining one's domicil. These are, that every person has a domicil somewhere ; and no person can have more than one domicil at the same time for one and the same purpose. It follows, from these maxims, that a man retains his domicil of origin till he changes it by acquiring another ; and so each successive domicil continues until it is changed by acquiring another. And it is equally obvious that the acquisition of a new domicil does, at the same instant, terminate the preceding one." The reader must be careful to distinguish between the rule of evidence which presumes a domicil once shown to continue until the contrary is shown, and the rule of law above stated. The rule of evidence ceases to be applicable whenever abandonment of acquired domicil is shown, without any reference to the substitution for it of a new domicil. The rule of law is not satisfied without the acquisition of a domicil elsewhere. The former is entirely consistent with the doctrine of Udny *v.* Udny, and is fully supported by the British authorities; the latter is not.

[1] Strictly speaking, it does not appear ever to have been held upon the Continent. We have seen that in the Roman Law the proper *forum* in which a law suit could be brought was determined, first, by the domicil of the defendant, if he had one ; and secondly, if he had no domicil, by his *origo* or

be said to be as distinctively British, as it is the outgrowth of the doctrine of perpetual allegiance, which Great Britain, last of all the European nations, clung to. But as it has been settled by a solemn judgment of the House of Lords, it must remain the British doctrine until overturned by act of Parliament.

§ 203. **Reverter will not be presumed. Burden of Proof upon him alleging Reverter.** — But the rule that the person who asserts a change of domicil must prove it, applies as well when the question is one of reverter as when it is one of the acquisition of a domicil of choice. Reverter, therefore, will not be presumed, and the *onus probandi* rests upon him alleging it.[1] Mere intention to return to the domicil of origin

municipal citizenship. In other words, if a person acquired a domicil, so long as it existed, it fixed the place where he might be sued; but if such domicil was abandoned the *forum* of the person reverted to the place of his *origo*. Substituting *domicilium originis* for *origo*, and *domicilium habitationis* for domicil, the same doctrine seems to have prevailed among the modern civilians. This will serve as an illustration of what might possibly be considered a modified form of reverter of domicil of origin; and it is not unlikely that this is what was referred to by Lord Cottenham in Munro *v.* Munro (*supra*, § 193). But it is apparent that in strictness the reverter was rather one of *forum* than of domicil. In the Roman Law, as has been pointed out, *origo* and *domicilium* might actively co-exist, especially with reference to municipal burdens; and such also was the doctrine of some of the modern civilians with respect to *domicilium originis* and *domicilium habitationis*. Thus, according to Bartolus, "Originis domicilium est immutabile, et ideo qui alibi habitat censetur habere duo domicilia." See opinion of Grotius, Hollandsche Consultatien, vol. iii. p. 528, Henry, For. L. p. 197. Domicil of origin, therefore, was not, according to this view, suspended or put in abeyance upon the acquisition of domicil of choice, as was held in Udny *v.* Udny, and, therefore, could not revert; although the application of domicil of origin to particular purposes (*e. g.*, *forum*, personal succession, etc.) was superseded by the application of domicil of choice, when the latter existed distinct from the former. For present continental opinion see *supra*, §§ 107, 108.

Savigny's view, (*a*) that a person may be entirely without a domicil, and that in such case the last domicil which he possessed is to determine his *forum* and his personal law, and (*b*) that domicil of origin is to be resorted to only when no previously existing self-elected domicil can be discovered, is farthest of all removed from the doctrine of Udny *v.* Udny. And yet, although theoretically different, it is in its practical results the same as the American doctrine above stated (see *supra*, §§ 81, 90).

[1] Maxwell *v.* McClure, 6 Jur. (N. S.) 407; S. C. *sub nom.* Donaldson *v.* McClure, 20 D. (Sc. Sess. Cas. 2d ser. 1857) 307; Lord Advocate *v.* Lamont, 19 id. 779; Harvard College *v.* Gore, 5 Pick. 370. In Maxwell *v.* McClure, where the person whose domicil was in question was Scotch by origin, but had concededly established an English domicil and had returned to Scotland, Lord Cranworth said: "Where it is admitted on both sides that a particular person has at one time a particular domicil, the *onus* of proof, to be deduced from all the circumstances and facts of the case, lies on the party who

at a future time is not sufficient,[2] nor is mere return without abandonment of the acquired domicil.[3]

§ 204. **The Requisite Factum for Reverter.** — The necessary *factum* to accomplish reverter is quitting the country of the acquired domicil; that is, passing beyond its territorial limits. This is illustrated by the decision of Sir Cresswell Cresswell in Goods of Raffenel.[1] In that case, an English woman by birth married a Frenchman, and lived with him at Dunkerque until his death. Several years after that event she left Dunkerque, and went to Calais with her children and baggage, intending to go to England, there to reside permanently. She embarked upon a steamer bound for England; but before it sailed she was taken ill, and was obliged to reland at Calais, where she remained for some months in the hope of recovering sufficiently to bear the voyage to England. She continued, however, too ill to risk the voyage, and returned to Dunkerque, where she died several months afterwards. Upon these facts her domicil was held to be French; Sir Cresswell Cresswell remarking that he could "not think there was a sufficient abandonment so long as the deceased remained within the territory of France, her acquired domicil." In the Alabama case of State *v.* Graham,[2] where the petitioner for discharge

has to show that the domicil has been changed. The presumption is that it continues till evidence has been given to show that it has been changed." And the other lords who took part in the decision of the case used similar language. In Harvard College *v.* Gore, Parker, C. J., said: "Undoubtedly it was incumbent upon the appellees to prove a change of domicil from that which arose from birth, education, business, and civil and political relations, for the burden of proof was upon them; but this they have done in the most satisfactory manner, according to all rules which govern the subject. The *onus probandi* is therefore shifted, and it has become the duty of the appellants to show, according to the same rules, that this second domicil has been unintentionally abandoned and the *forum originis* resumed."

[2] Stanley *v.* Bernes, 3 Hagg. Eccl. 373; Attorney-General *v.* Fitzgerald, 3 Drew. 610; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; State *v.* Graham, 39 Ala. 454.

[3] Maxwell *v.* McClure, 6 Jur. (N. S.) 407; Allardice *v.* Onslow, 34 L. J. Ch. 434; Craigie *v.* Lewin, 3 Curteis, 435; The Friendschaft, 3 Wheat. 14; The Ann Green, 1 Gall. 274; The Joseph, id. 545; Burnham *v.* Rangeley, 1 Woodb. & M. 7; Johnson *v.* Twenty-one Bales, *supra*; Kemna *v.* Brockhaus, 10 Biss. 128; Williamson *v.* Parisien, 1 Johns. Ch. 389; *In re* Catharine Roberts's Will, 8 Paige, Ch. 519; Russell *v.* Randolph, 11 Tex. 460; Mills *v.* Alexander, 21 id. 154.

[1] 3 Swab. & Tr. 49.

[2] 39 Ala. 454.

from military service appeared to have been prevented from leaving Alabama, where he had acquired a domicil, and returning to his native country, by the breaking out of the war and want of funds, it was held that his acquired domicil remained. These cases are in striking contrast with the English prize cases above referred to, but the doctrine contained in them appears to be entirely sound when applied to domicil, properly so called.

§ 205. **The Requisite Animus non Revertendi.** — Abandonment must clearly appear.[1] A mere contingent intention not to return to the acquired domicil is not sufficient; abandonment must be final and complete;[2] although a distant possibility of return to the place of the acquired domicil will not prevent reverter.[3]

§ 206. **The Transit to Domicil of Origin need not be Direct.** — Even upon the American theory of reverter, "it is of no consequence that the return home is not immediate, or by the shortest road. If the fact of final abandonment and the intention to return to the old concur, the domicil is changed from the time that the new is actually left."[1] Thus in Walker's case, in which the facts were that W., who was born in Boston and had become domiciled in California, left California intending not to return but to go to Boston and remain there, Lowell, J., held that his domicil of origin had reverted; although he journeyed from San Francisco to Boston by way of France, remaining in that country for eleven months. It is true that Judge Lowell relied upon Mr. Curtissos' case as an authority for this position, but it doubtless can be sustained on principle, and it is to be noted that while in the former case Mr. Curtissos remained within the Dutch dominions, W. had actually passed beyond the territorial limits of the State of California.

§ 207. **Quasi-National Domicil the Subject of Reverter. — Otherwise as to Municipal Domicil.** — It was said, in the Connecticut case of Bank *v.* Balcom,[1] that the doctrine of reverter

[1] Craigie *v.* Lewin, *supra*.

[2] Cases cited in § 203, note 3, and White *v.* Brown, 1 Wall. Jr. C. Ct. 217; *In re* Walker, 1 Lowell, 237; Matter of Scott, 1 Daly, 534.

[3] Attorney-General *v.* Pottinger, 30 L. J. (Exc.) 284, per Bramwell, B.

[1] *In re* Walker, *supra*.

[1] 35 Conn. 351.

does not apply to *quasi*-national domicil; but this position was not necessary to the decision of the case, and is inadmissible in view of the abundant authority to the contrary.[2]

There is no reason to suppose that the principle of reverter is applicable to municipal domicil.

§ 208. **Acquired Domicil not the Subject of Reverter.**— The principle of reverter, at least in its technical sense, is not applicable to acquired domicil. It is easy to understand that fewer circumstances may be required to show the re-acquisition of a former domicil of choice than the acquisition of an entirely new one. But it cannot thence be concluded that anything short of the complete *factum* of transfer of bodily presence to a former domicil of choice will suffice to re-acquire it. Since Udny *v.* Udny, there can be no doubt of the position of the British courts upon this point.

But in this country there have been some expressions used which might seem to give some countenance to such doctrine. In The Venus,[1] a prize case, Washington, J., said: "Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his native country, *or to that where he was naturalized*, or by commencing his removal, *bona fide* and without an intention of returning." This language is open to several different constructions, and by no means definitely asserts reverter of acquired domicil, at least without actual return; but it is evident that the learned judge was somewhat confusing national character and allegiance, and such may have been his thought. Moreover, it is possible to entertain such a view of reverter of national character, without putting it distinctly and entirely upon the ground of domicil. It was, however, apparently to meet this doctrine, that Story in his work on the Conflict of Laws[2] laid down the following: "A national character, acquired in a foreign country by residence, changes when the party has left the country *animo non revertendi*, and

[2] Udny *v.* Udny, L. R. 1 Sch. App. 441; *In re* Walker, *supra*; Reed's Appeal, 71 Pa. St. 378; Kellar *v.* Baird, 5 Heisk. 39. Such also is Story's opinion, Confl. of L. § 47.

[1] 8 Cranch, 253, 280. [2] § 48.

is on his return to the country where he had his antecedent domicil. And especially, if he be *in itinere* to his native country with that intent, his native domicil revives while he is yet *in transitu;* for the native domicil easily reverts." This language has been repeated in the Texas case of Mills *v.* Alexander;[3] but, so far as the writer is aware, the doctrine of reverter of acquired domicil has never been distinctly held in any case.[4]

[3] 21 Tex. 154.

[4] Unless, indeed, the case of Les Trois Frères, Stew. Ad. 1, decided by the Nova Scotia Court of Vice-Admiralty, may be so construed. The facts were that a Frenchman domiciled in the United States left this country, intending to return to France. But during his voyage he learned from a passing vessel that war had broken out between France and England; whereupon he immediately abandoned his intention of going to France, and turned back to the United States, *animo manendi*. The vessel with his goods on board was captured before arriving here. Held (per Dr. Croke, judge), 1st, that his native French character reverted from the time he put his foot on board the vessel to return to France; and 2d, that, upon turning back to the United States, he became re-invested with his former American character. Several observations upon this case are, however, pertinent: 1st, that the question involved was one of national character in time of war, and that therefore, although the case may have been rightly decided, it does not hence follow that the same doctrine would be applied when the question is purely one of domicil; and 2d, that the person whose national character was involved had not actually reached France, and hence a distinction may be taken between his case and that of a person who has in fact, as well as in legal fiction, regained his domicil of origin.

CHAPTER X.

DOMICIL OF PARTICULAR PERSONS, — MARRIED WOMEN.

§ 209. **General Doctrine.** — As a general rule, it has been universally held in all civilized countries, and in all ages, wherever the subject of domicil has been discussed, that, upon marriage, the domicil of the wife merges in that of the husband, and continues to follow it throughout all of its changes, so long as the marriage relation subsists.[1] This is put by various jurists upon

[1] Warrender *v.* Warrender, 2 Cl. & F. 488; Dolphin *v.* Robins, 7 H. L. Cas. 390; Geils *v.* Geils, 1 Macq. H. L. Cas. 254; *Re* Daly's Settlement, 25 Beav. 456; Whitcomb *v.* Whitcomb, 2 Curteis, 351; Chichester *v.* Donegal, 1 Add. Eccl. 5; Shackell *v.* Shackell, cited in Whitcomb *v.* Whitcomb; Niboyet *v.* Niboyet, L. R. 4 P. D. 1; Maghee *v.* McAllister, 3 Ir. Ch. 604; Gillis *v.* Gillis, Ir. R. 8 Eq. 597; Tulloh *v.* Tulloh, 23 D. (Sc. Sess. Cas. 2d ser. 1861) 639; Penna *v.* Ravenel, 21 How. 103; Barber *v.* Barber, id. 582; Burnham *v.* Rangeley, 1 Woodb. & M. 7; Kemna *v.* Brockhaus, 12 Biss. 128; Bennett *v.* Bennett, Deady, 299; Poppenhausen *v.* India-Rubber Comb Co., 11 Am. L. Rec. 696; Knox *v.* Waldoborough, 3 Greenl. 455; Greene *v.* Windham, 13 Me. 225; Greene *v.* Greene, 11 Pick. 410; Harteau *v.* Harteau, 14 id. 181; Hood *v.* Hood, 11 Allen, 196; Mason *v.* Homer, 105 Mass. 116; Ditson *v.* Ditson, 4 R. I. 87; Danbury *v.* New Haven, 5 Conn. 584; Guilford *v.* Oxford, 9 id. 321; Bank *v.* Balcom, 35 id. 351; Hunt *v.* Hunt, 72 N. Y. 217; Vischer *v.* Vischer, 12 Barb. 640; Lipscomb *v.* N. J. R. R. & Trans. Co. 6 Lans. 75; Paulding's Will, 1 Tuck. 47; Brown *v.* Lynch, 2 Bradf. 214; Hackettstown Bank *v.* Mitchell, 28 N. J. (Law) 516; Baldwin *v.* Flagg, 43 id. 495; McPherson *v.* Housel, 13 id. (Eq.) 35; Dougherty *v.* Snyder, 15 S. & R. 84; Dorsey *v.* Dorsey, 7 Watts, 349; School Directors *v.* James, 2 W. & S. 568; Hollister *v.* Hollister, 6 Pa. St. 449; Bishop *v.* Bishop, 30 id. 412; Ensor *v.* Graff, 43 Md. 391; Smith *v.* Moorehead, 6 Jones Eq. 369; Colburn *v.* Holland, 14 Rich. Eq. 16; Harkins *v.* Arnold, 46 Ga. 656; Hanberry *v.* Hanberry, 29 Ala. 714; McCollum *v.* White, 23 Ind. 43; Jenness *v.* Jenness, 24 id. 355; Davis *v.* Davis, 30 Ill. 180; Freeport *v.* The Supervisors, 40 id. 495; Babbett *v.* Babbett, 69 id. 277; Swaney *v.* Hutchins, 13 Neb. 266; Maguire *v.* Maguire, 7 Dana, 180; McAffee *v.* Kentucky University, 7 Bush, 135; Johnson *v.* Johnson, 12 id. 485; Williams *v.* Saunders, 5 Cold. 60; Johnson *v.* Turner, 29 Ark. 280; Dugat *v.* Markham, 2 La. R. 35; Succession of Christie, 20 La. An. 383; Succession of McKenna, 23 id. 369; Republic *v.* Young, Dallam, 464; Russell *v.* Randolph, 11 Tex. 460; Lacey *v.* Clements, 36 id. 661; Kashaw *v.* Kashaw, 3 Cal. 312; Dow *v.* Gould, 31 id. 629; Voet, Ad Pand. l. 5, t. 1, no. 95; Donellus, De Jure Civili, l. 17, c. 12, p. 978, no. 20; Zangerus, De Except. pt. 2, c. 1, no. 56 *et seq.* and no. 96; Burgundus, Ad Consuet. Fland. Tract. 2, no. 34; Lauterbach, De Domi-

various grounds, — namely, (*a*) the theoretical identity of husband and wife,[2] (*b*) the subjection of the latter to the former,[3] and (*c*) the duty of the wife to make her home with her husband.[4]

It must be apparent, at least as regards the constitution of the original matrimonial domicil, that, in most cases, the element of intention on the part of the wife is not wanting. It "is not a mere fiction; it is a literal and absolute fact. A woman when she marries a man does in the most emphatic manner elect to make his home hers;"[5] or as Cotton, L. J., expressed it in Harvey *v.* Farnie:[6] "When the lady [an English woman] married a Scotchman, she consented and agreed that her domicil from that time forth should be that of her husband." So that the domicil which a wife receives upon marriage usually is in a certain sense a domicil of choice, although not technically so. As regards subsequent changes, however, her will is subordinate to that of her husband, and, within reasonable limits, he is allowed to select for himself and his wife such domicil as his interests, his tastes, his convenience, or, possibly, under certain circumstances, even his caprice may suggest.[7] And, whatever may be the ground of

cilio, c. 3, § 73; Leyser, Medit. ad Pand. vol. ii. Spec. 72; Glück, vol. vi. §§ 512, 514; Savigny, System, etc. § 353 (Guthrie's trans. 100); Bar, § 29; Pothier, Intr. aux Cout. d'Orléans, no. 10; Merlin, Repertoire, t. 8, *verb.* Dom. § 5; Calvo, Manuel, § 198; Id. Dict. *verb.* Dom.; Burge, For. & Col. L. vol. i. p. 35; Westlake, Priv. Int. L. 1st ed. no. 42, rule 8; Id. 2d ed. § 241; Phillimore, Dom. no. 40 *et seq.*; Id. Int. L. vol. iv. no. 74 *et seq.*; Dicey, p. 104; Fraser, Husband & Wife, p. 867; Story, Confl. of L. § 46; Wharton, Confl. of L. § 43. See also the authorities cited in the following notes.

[2] Barber *v.* Barber, *supra*, per Daniel, J.; Harteau *v.* Harteau, *supra*; Hunt *v.* Hunt, *supra*; Dougherty *v.* Snyder, *supra*; Dorsey *v.* Dorsey, *supra*; School Directors *v.* James, *supra*; Jenness *v.* Jenness, *supra*; Pothier, *loc. cit.*

[3] Pothier, *loc. cit.*; Story, Confl. of L. § 46; Colburn *v.* Holland, *supra*; Barber *v.* Barber, *supra*, per Wayne, J.

[4] Warrender *v.* Warrender, *supra*; Hunt *v.* Hunt, *supra*; Hollister *v.* Hollister, *supra*; Bishop, Marr. & Div. § 728; Demolombe, Cours de Code Napoléon, nos. 357, 358; Glück, vol. vi. §§ 512, 514.

[5] Hannen, Pres. in Harvey *v.* Farnie, L. R. 5 P. D. 153.

[6] L. R. 6 P. D. 35 (on appeal). The expression quoted is perhaps too broad, inasmuch as the parties at the time of the marriage can hardly be presumed to have in contemplation any domicil other than the common domicil about to be established; which is, of course, in most cases, the present domicil of the husband.

[7] What are the limits within which the husband may exercise this power is a question involved in no little difficulty. Where there is a difference of opinion between husband and wife with respect to the location of their common home, it is clear that under ordinary circumstances the will of the wife must

the rule, the presumption of law that husband and wife dwell together is so strong, that proof to the contrary, either of fact

give way to that of the husband; and it is clear also that great latitude will be allowed him in the exercise of his discretion. And when the husband has thus selected a new home, the wife is bound to accompany him to it. If she fails to do so she will be guilty of desertion. Fraser, in his work on Husband and Wife (p. 867), takes the broadest possible ground upon this subject. He says: "The wife is bound to accompany the husband to any part of the world to which he chooses to wander. The mere circumstance of unhealthy climate, the inconvenience of travelling, the bad health or the weak constitution of the wife, will not free her from the obligation under which she lies of accompanying her husband." In Hair *v.* Hair, 10 Rich. Eq. 163, Dargan, Chancellor, used this language: "The husband has the right, without the consent of the wife, to establish his domicil in any part of the world, and it is the legal duty of the wife to follow his fortunes wheresoever he may go. The defendant, in the exercise of his undoubted prerogative, had determined to make his domicil in the parish of Bienville, in the State of Louisiana, and wished his wife to accompany him. She, preferring the society of her mother and her relatives, refused to go, — in opposition to his wishes, his importunate solicitations, his earnest entreaties. Considering the relative duties and obligations of husband and wife as defined by law, who, under the circumstances, is guilty of desertion? The wife assuredly." In this case the husband had before marriage promised not to remove the wife from the State nor from the neighborhood of her mother. Held, that the promise created a moral obligation only, and was in law a nullity. In Babbitt *v.* Babbitt, 69 Ill. 277, the facts were, that the parties were living together in Illinois until the removal of the husband to Michigan, the wife refusing to accompany him, although requested so to do. In a suit for alimony by the wife against the husband, Breese, C. J., said: "It was appellant's clear right to make Michigan his residence, and it was certainly the duty of his wife to accompany him there, which she was strongly invited to do. We understand the domicil of the husband is the domicil of the wife, and it is there she can claim and receive the protection and maintenance of her husband. He was not required to ask her consent to remove to Michigan. In this respect he was the master of his own actions, and it was her duty as a faithful and obedient wife to accompany him there. . . . It may emphatically be said of her, she is living separate and apart from her husband by her own fault, and in total disregard of the vow she made when wedded." On the other hand may be noticed the extreme case of Powell *v.* Powell, 29 Vt. 148. The facts were that the husband and wife having removed together from the State in which they had formerly been domiciled, to another State, and the husband having determined to return to their former place of abode, the wife refused to accompany him, or afterwards to join him there, assigning for a reason that she was unwilling "to live with him near his relatives." The court held that these facts did not constitute a wilful desertion by the wife of the husband within the meaning of the Vermont Statute. Redfield, C. J., said: "While we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and that it is in general the duty of the wife to submit to such determination, it is still not an entirely arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be

or of intention, will not be admitted in any but a few exceptional cases hereafter to be noticed.

jeoparded, or even where she seriously believes such results will follow which will almost of necessity produce the effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere wilfulness. . . . And in the present case, as the wife alleges the vicinity of the husband's relatives as a reason why she cannot consent to come to Milton to live with him, and as every one at all experienced in such matters knows that it is not uncommon for the female relatives of the husband to create, either intentionally or accidentally, disquietude in the mind of the wife, and thereby to destroy her comfort and health often, and as there is no attempt here to show that this is a simulated excuse, we must treat it as made in good faith; and, if so, we are not prepared to say that she is liable to be divorced for acting upon it." In Bishop v. Bishop, 30 Pa. St. 412, Thompson, J., said: "Would the facts disclosed by the witness justify the court in coming to a conclusion favorable to the complainant? They were: that the parties were married in England; after a time removed to Ireland; returned again to England, and the libellant, on account of ill health, it is said, determined to emigrate to America; up to this point of time they had lived together, and, for aught we know, lived happily; he determined on going; she would not consent to go; he left her, and emigrated. Is wilful and malicious desertion a natural and necessary inference from such a state of facts? The terms imply free election, to live with or not live with the party deserted, and determined upon against the marital obligation, impelled thereto by wilfulness and malice. The choice must be free, excepting so far as it may be controlled by these evil impulses. Can this be inferred by any fair process of reasoning from the facts sworn to here? The woman had for years followed the fortunes of her husband,—faithful in everything, as the testimony shows, as well as his anxiety to have her accompany him to this country evinces, if he were sincere in it. At this point, however, and in the face of this great trial, she fails! The leaving home and country, the dangers of a long ocean-voyage, the privations of a stranger in a strange land, may have overmastered her strongest desire to follow his footsteps further, and determined her to cling to her native country. This is the evidence and the fair inference from it, extending to her the legal presumption of innocence and honesty, until the contrary be made to appear, and does not necessarily, and in opposition to all other inferences, establish wilful and malicious desertion." This case, however, was decided upon other grounds. Agnew, J., in Colvin v. Reed, 55 Pa. St. 375, said: "If a wife enjoying here the comforts of home, friends, and refinement, should refuse to follow the whim or caprice of her husband in the western wilds, or to encounter the perils and hardships of a journey to the mines of California, on what principle of that natural justice which regulates interstate law shall the husband's new abode draw his wife's domicil thither? Clearly, no State right to regulate the *status* of its own citizens can justify this." Similar is the language of Zabriskie, Chancellor, in Boyce v. Boyce, 23 N. J. Eq. 337: "The wife is bound to follow her husband when he changes his residence, even without her consent, provided the change be made by him in the *bona fide* exercise of his power, as the head of the family, of determining what is best for it. Even this may have its limits, and it may be questioned whether a husband has a right to require his wife to leave all her kindred and friends and follow him to Greenland or Africa, or even to Texas, Utah, or Arizona. Clearly, he has no right to take her to such places as a punishment for her disobedience, ex-

§ 210. **Roman Law.** — In the Roman law the effect of marriage was, from the husband to the wife, *divini et humani juris communicatio.*[1] She was raised or lowered to the station of her husband, and participated in his honors and dignities, or lost hers if she married beneath her. Thus, on the one hand, a plebeian woman, by marriage with a senator, acquired senatorial rank, and became *clarissima;* and on the other, a patrician woman, upon marriage with a plebeian, lost her nobility and became plebeian. And in the same manner, upon marriage, the wife exchanged her domicil for that of her husband. "Mulieres honore maritorum erigimus, genere nobilitamus, et forum ex eorum persona statuimus; et domicilia mutamus. Sin autem minoris ordinis virum postea sortitæ fuerint; priore dignitate privatæ, posterioris mariti sequentur conditionem."[2]

It was apparently upon the theoretical identity of person, and the subjection of the wife to the marital power of the husband, that the identity of domicil was put. But the celebration of a valid marriage was a necessary condition. Therefore a woman did not change her domicil by the mere betrothal, — "Ea, quæ disponsa est, ante contractas suum non mutat domicilium,"[3] — nor by an invalid marriage.[4] The

travagance, or ungovernable temper." It may well be doubted, however, whether it would not be the duty of the wife to follow her husband to Texas, Utah, or Arizona, in case he, in the reasonable exercise of his discretion, determines to remove there for a reasonable purpose, such as engaging in business or the like. A more moderate, and probably the correct, doctrine is that stated by Brewster, J., in Cutler *v.* Cutler, 2 Brewst. 511, a case of divorce on the ground of desertion: "A husband cannot, from mere whim or caprice, remove his wife beyond the comforts of home, friends, and refinement, to take her beyond the jurisdiction of their former domicil; but he has the undoubted right to change his home as often as his business, his comfort, or health may require; and, so long as his conduct in this particular is free from the taint of cruelty, we have no authority to criticise it." And he adds, that in such case it is the duty of the wife to follow the husband to his new home. After all, however, it must not be too readily assumed that the identity of the wife's domicil with that of the husband depends entirely upon the duty of the former to dwell with the latter. See *infra*, §§ 226, 227.

[1] Dig. 23, t. 2, l. 1.

[2] Code 12, t. 1, l. 13. This passage appears in the same language, but with slightly inverted order, in Code 10, t. 39, l. 9. See also, on the subject of the domicil of the wife, the following passages, which are given *supra*, § 5, note 1; Dig. 5, t. 1, l. 65; Id. 23, t. 2, l. 5; Id. 50, t. 1, l. 38, § 3.

[3] Dig. 50, t. 1, l. 32; see also Voet, Ad Pand. l. 5. t. 11, no. 95; and Zangerus, De Except. pt. 2, c. 1, no. 61.

[4] Dig. 50, t. 1, l. 37, § 2. "Mulieres, quæ in matrimonium se dederint

French Code[5] provides: "A married woman has no other domicil than that of her husband." And in construing this provision, together with another, — namely, that a "major *interdit* shall have his domicil with his tutor,"[6] some French jurists hold that the wife of such *interdit* has her domicil with the tutor of her husband.[7]

§ 211. **Betrothal. Arnott v. Groom.** — If the doctrine of the Roman law, that a woman does not change her domicil by mere betrothal, needed any judicial affirmance or recognition to incorporate it into the modern law, it may be considered as having received such affirmance in the Scotch case of Arnott *v.* Groom,[1] where it was held that a Scotch lady, residing in England under circumstances which would not of themselves be considered sufficient to constitute domicil there, did not gain an English domicil by the fact of becoming engaged to be married to a domiciled Englishman.

non legitimum, non ibi muneribus fungendas, unde mariti earum sunt, sciendum est; sed unde ipsæ ortæ sunt." This language might appear equally applicable to liability to municipal burdens because of citizenship; but it is plain that throughout the whole passage, of which this is a part, Callistratus is speaking of *incolæ* and not of *cives*. See also Voet, *loc. cit.* and Zangerus, De Except. pt. 2, c. 1, no. 59. The latter says: "Quando ergo dicimus uxorem sequi domicilium mariti id primo intelligere oportet de vera, non etiam putativa uxore, de justa quæ ducta est secundum juris civilis leges et ritum; non etiam de injusta contra has leges et ritum ducta, cum nec uxor dicatur."

[5] Art. 108. "La femme mariée n'a point d'autre domicile que celui de son mari."

[6] Id.

[7] Demolombe, Cours de Code Napoléon, t. 1, no. 363; Duranton, Cours de Droit Français, t. 1, no. 371; Marcadé, Cours de Code Civil, art. 108, no. 1; Massé et Vergé sur Zachariæ, t. 1, § 89, no. 7, p. 123. *Contra*, Richelot, Principes de Droit Civil Francais, t. 1, no. 244; Aubry et Rau, sur Zachariæ, t. 1, § 143; no. 7, p. 580. Where, however, the wife has been appointed *tutrice* of her *interdit* husband, his domicil follows hers in reversal of the general rule. Demolombe, *loc. cit.*; Duranton, t. 1, no. 366; Mersier, Traité, etc., des Actes de l'État Civil, no. 139.

[1] 9 D. (Sc. Sess. Cas. 2d ser. 1846), 142. The Lord Ordinary (Lord Wood) seems to have put his decision (which was affirmed) upon the true ground. He said: "Nor does the matrimonial engagement indicate intention to change, for it is a mere intention to change *de futuro*, and that has no effect till it is actually accomplished; and it is fallacious to imagine that an engagement to marry an English merchant at some future time is equivalent to an engagement to settle permanently in England." Lord Fullerton, in delivering his opinion in favor of adherence, said: "Had there been anything to connect the removal of a residence in England with the intended marriage, — if, for instance, the fact had been that the marriage was to be immediately contracted with a gentleman fixed in England, and that the lady had gone to England in contemplation of the marriage, — there might have been some

§ 212. **Invalid Marriage.** — How far a valid marriage is necessary to give the woman the domicil of the man is not settled by modern authority. If the supposed marriage is for any reason invalid, it is clear that the domicil of the latter could not attach to the former by way of legal fiction, — by mere operation of law, — as in the case of a valid marriage. But if, in pursuance of such supposed marriage, the woman goes to dwell in the home of her supposed husband, is her domicil thereby changed? The affirmative view was held in a New Hampshire settlement case,[1] in which the facts were that the woman was insane at the time of her marriage and afterwards, and that the marriage had, in another proceeding, been declared to be null and void by reason of her insanity. Nevertheless the court held that the mere fact that the marriage was void did not prevent her from acquiring a settlement at the same place with her supposed husband, if she had sufficient reason and understanding to choose her place of residence; and in so deciding appears to lay down the same principle for cases of domicil generally. That this doctrine would be extended to cases of national and *quasi*-national domicil is by no means clear. In a Massachusetts case[2] it was held that a woman who married an insane man, and whose marriage was therefore void, did not follow his settlement. But, although the report of the case does not state specifically, it appears that she continued to reside in the town in which she was dwelling at the time of the marriage. The case seems therefore to be an authority only for the posi-

ground for connecting her removal to England with the prospect of permanently remaining there. But here the two circumstances have no connection with each other. It is not said that any time was fixed for the marriage; the parties are said to have been engaged, but an engagement is a term of indefinite continuance; and the statement is quite consistent with the supposition that she was to return and resume *de facto* her domicil in Scotland." Lords Boyle (President) and Mackenzie concurred with Lord Fullerton in adhering. Lord Jeffrey dissented, considering continued presence in England and engagement to marry there sufficient to constitute an English domicil. From this case we may reason *a fortiori*, as indeed it would be clear apart from all authority, that if the lady had not at the time of or subsequently to the engagement resided in any manner in England, a change of domicil would not have resulted from her mere engagement to marry an Englishman.

[1] Concord *v.* Rumney, 45 N. H. 423.

[2] Middleborough *v.* Rochester, 12 Mass. 363.

tion that an invalid marriage does not by mere operation of law confer upon the woman the domicil of the man.

§ 213. **Wife receives Domicil of Husband instantly upon Marriage.** — The domicil of the husband becomes that of the wife instantly upon the celebration of the marriage, and it is of no consequence that she has not yet arrived at the place of his domicil.[1] Indeed, the change takes place all the same, although she has never arrived there. Says Pothier:[2] "As the wife, from the instant of the celebration of the marriage, passes under the power of her husband, she ceases, to a certain extent, to have *propriam personam*, and she becomes one and the same person with her husband. She loses from that instant her domicil; that of her husband becomes hers, and she becomes from that day subject to the personal statutes of the place of that domicil, although she has not yet arrived there." James, L. J., in Harvey *v.* Farnie,[3] remarks: "If a domiciled foreigner comes here for the purpose of taking a wife from this country, the moment the marriage is contracted, the moment the *vinculum* exists, then the lady becomes to all intents and purposes of the same domicil as the husband, and all rights and consequences arising from the marriage are to be determined by the law of that which by the actual contract of marriage becomes the domicil of both parties, exactly to the same extent as if they had both been originally of the foreign country. It seems to me that there is no qualification to that rule. A wife's home is her husband's home; a wife's country is her husband's country; a wife's domicil is her husband's domicil; and any question arising with reference to the *status* of those persons is, according to my view, to be determined by the law of the domicil of those persons." And Cotton, L. J., said in the same case: "When a woman, domiciled in one country, marries in that country a man domiciled in another country, her domicil at once be-

[1] This assumes, of course, that the law regulating the marriage does not require for the completion of the marriage tie *deductio in domum*. If the applicatory law demands as an essential element of the marriage the arrival of the wife at the home of the husband, the statement in the text must, of course, be modified. But such is not, in general at least, the modern law. See Zangerus, De Except. pt. 2, c. 1, nos. 60–64.

[2] Intr. aux Cout. d'Orléans, no. 10.

[3] L. R. 6 P. D. 35.

comes that of her husband. That, I think, cannot be disputed or doubted. I know of no case which throws a doubt upon it."

Demolombe[4] illustrates the principle thus: "A woman, at present domiciled at Lyons, marries at Lyons a man domiciled at Paris. From the day of the celebration of the marriage, the domicil of the woman is in strict law transferred to Paris; and even though she should die at Lyons without ever having been at Paris, her domicil would be at Paris, and her succession would be opened there."

§ 214. **Domicil of Wife follows that of Husband whether or not she accompanies him to his New Place of Abode.** — In the same manner a domicil of the husband acquired after the marriage becomes that of the wife, notwithstanding her failure to arrive at the place where it is fixed.[1] The *factum* of a change of bodily presence, which is an indispensable element for the acquisition of domicil by an independent person, is not a necessary condition of a change of the wife's domicil, so long as it depends upon that of the husband.[2]

§ 215. **Wife cannot select a Domicil for herself, even with the Consent of her Husband.** — The wife is, except in the cases hereafter mentioned, powerless to select a domicil for herself, either with or without the consent of her husband.[1] So long as there exists no ground for legal separation she cannot law-

[4] Cours de Code Napoléon, t. 1, no. 357.

[1] Republic *v.* Young, Dallam, 464; Russell *v.* Randolph, 11 Tex. 460; Lacey *v.* Clements, 36 id. 661; Succession of Christie, 20 La. An. 383; Succession of McKenna, 23 id. 369; Johnson *v.* Turner, 29 Ark. 280; Burlen *v.* Shannon, 115 Mass. 438.

[2] Pothier adds to the passage last quoted: "This is not contrary to what will be hereafter said, that the translation of domicil from one place to another may be effected only when one has arrived there; for this principle has place with regard to the proper domicil which a person proposes to establish for himself and not with regard to that domicil which the wife does not herself establish, but which she holds of her husband."

[1] Warrender *v.* Warrender, 2 Cl. & F. 488; Dolphin *v.* Robins, 7 H. L. Cas. 390; *Re* Daly's Settlement, 25 Beav. 456; Bennett *v.* Bennett, Deady, 299; Greene *v.* Windham, 13 Me. 235; Greene *v.* Greene, 11 Pick. 410; Hood *v.* Hood, 11 Allen, 196; Jackson *v.* Jackson, 1 Johns. 424; Paulding's Will, 1 Tuck. 47; Yule *v.* Yule, 2 Stock. 138; Cox *v.* Cox, 19 Ohio St. 502; Davis *v.* Davis, 30 Ill. 180; Maguire *v.* Maguire, 7 Dana, 180; Sanderson *v.* Ralston, 20 La. An. 312; Republic *v.* Young, Dallam, 464; and see generally the authorities cited *supra*, § 209, note 1.

fully dwell apart from him against his will, and much less can she establish a separate domicil. Nor can she establish a domicil for herself, even when dwelling apart from him with his express consent. Said Lord Brougham, in the leading case of Warrender *v.* Warrender: "It is admitted on all hands that, in the ordinary case, the husband's domicil is the wife's also; that, consequently, had Lady Warrender been either residing really and in fact with her husband, or been accidentally absent for any length of time, or even been by some family arrangement, without more, in the habit of never going to Scotland, which was not her native country, while he lived generally there, no question could have been raised upon the competency of the action as excluded by her non-residence. For actual residence — residence in point of fact — signifies nothing in the case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law that she resides with her husband. Had she been absent for her health, or in attendance upon a sick relation, or for economical reasons, how long soever this separation *de facto* might have lasted, her domicil could never have been changed. Nay, had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances she would be, — with her husband."

§ 216. **Id. even though a Formal Deed of Separation has been executed.** — Nor does it matter that a formal deed of separation has been executed. This point was fully discussed in Warrender *v.* Warrender; and in Dolphin *v.* Robins it was assumed. In the former case, the distinguished judge already quoted said: "Does the execution of a formal instrument, recognizing such an understanding, make any difference in the case? . . . What is the legal value or force of this kind of agreement in our law? Absolutely none whatever, — in any court whatever, — for any purpose whatever, save and except one only, — the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust.* In no other point of view is any effect given by our

jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach, — no specific performance of its articles can be decreed. No court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common-law courts, that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife, — nay, even where he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him, — all is utterly insufficient to repel the claim which he makes for the loss of her society without doing any act, either in court or *in pais*, to determine the separation or annul the agreement. In other words, no fact and no contract, no matter *in pais*, and no deed executed, can rebut the overruling presumption of the law that the married persons live together, or, which is the same thing, that they have one residence, — one domicil. In the contemplation of the common law, then, they live together and have the same domicil." And Lord Lyndhurst fully concurred in this doctrine, using as strong, if not stronger, language.[1]

[1] "It is fully established by all the papers produced in the case, and was without hesitation admitted by counsel on both sides, in the preliminary argument, that Sir George Warrender has been a domiciled resident in Scotland during the whole period, from his marriage up to the commencement of the suit and to the present time. This is the basis of the whole case, and it therefore clearly follows that Lady Warrender became, as his wife, similarly domiciled in Scotland; for the principle of the law of both countries equally recognizes the domicil of the husband as that of the wife. No point of law is more clearly established; that point being established, the subsequent deed of separation amounts to nothing more than a mere permission to one party to live separate from the other, — not a binding obligation in the eye of the law, — and there the matter rests. It confers no release of the marriage contract on either party, and neither can thereupon presume to violate it. The letter of Sir George Warrender cannot alter the principle of law. The strongest articles of separation may be drawn up and signed with full acquiescence of husband and wife, yet he may sue her and she may sue him notwithstanding. It is at the most a mere temporary arrangement, a permission to live elsewhere; but the legal domicil remains as it was. One may pledge himself not to claim or in-

§ 217. **Wife divorced, either a Vinculo or a Mensa et Thoro, may establish a Domicil for herself.** — It is clear without authority, that a divorce *a vinculo matrimonii*, placing as it does the wife again in the position of *feme sole*, restores to her the power to establish for herself such domicil as she desires.[1] But the effect of a judicial decree of separation, short of an absolute severing of the matrimonial tie, requires some further discussion. Such decree, if pronounced by a court of competent jurisdiction, removes at least several of the grounds upon which the general rule of identity of domicil between husband and wife rests. It is no longer her duty to dwell with him, and, whatever mutual property rights may remain under the laws of the various States and countries, she is no longer *sub potestate viri*, but is freed from the control which has been abused, and is empowered to select such a residence and such associations as will be promotive of her safety and comfort. It would seem clear on principle, therefore, that, when the law has by its solemn judgment recognized the fact that they dwell apart, and has decreed that they be permitted to do so, it should no longer continue the fiction of identity of domicil between husband and wife upon the mere fiction of

stitute a suit for conjugal rights; but he cannot be bound by any such pledge, for it is against the inherent condition of the married state, as well as against public policy. It is said that Lord Eldon, in the case of Tovey *v.* Lindsay, in this House, threw some doubt on the principle, and seemed inclined to give effect to those deeds of separation; but I am of opinion, on the authority of cases deliberately decided by that noble lord himself, that the deed of separation here cannot affect the domicil, or any other condition inherent in the relation of husband and wife, or be any bar to the husband's suit."

But the language of their lordships, so far as it bears upon the effect of a deed of separation upon the right of either party to sue for restitution of conjugal rights, does not express the law as it is at present understood and practised in England. The history of the gradual evolution of the present doctrine is an interesting one, but it is wholly beyond the scope of this work to state it at length. It is sufficient to say that it is now thoroughly settled, that not only will a court of equity interfere by injunction to restrain either husband or wife from maintaining a proceeding for restitution of conjugal rights in violation of a covenant in a deed of separation, but since the Judicature Acts, the Court of Divorce will itself allow such covenant as an equitable defence in favor of either the husband or the wife. See particularly Wilson *v.* Wilson, 1 H. L. Cas. 538; s. c. 5 id. 40; Hunt *v.* Hunt, 4 De G. F. & J. 221; Besant *v.* Wood, L. R. 12 Ch. D. 605; Marshall *v.* Marshall, L. R. 5 P. D. 19.

[1] The point was, however, directly held in Bennett *v.* Bennett, Deady, 299. See also Wharton, Confl. of L. § 46.

identity of person. And the tendency, of late years, toward liberality with respect to the rights and capacities of married women, would seem to point in the same direction. There has, however, been some difference of opinion upon the subject. Pothier[2] thus lays down the French law prior to the adoption of the Code Civil: "Whenever a wife is separated from the habitation" [of her husband] "by a judgment which is not suspended by an appeal or opposition, she may establish for herself any domicil which becomes proper for her." Such was also the view of President Bouhier.[3]

§ 218. **Domicil of a Femme Séparée de Corps under the French Code Civil.** — The Code Civil lays down the law as to the domicil of a married woman in the general terms above given, and makes no reference to the case of a woman *séparée de corps;* and this has led several French jurists[1] to hold that in such case the separated wife retains the domicil of her husband and can establish no other for herself. But in the opinion of the great majority[2] this is simply a *casus omissus* in the Code, and upon principle, the wife being freed from the personal control of her husband, and being no longer under the duty of dwelling with him, may select and set up for herself a domicil wherever she sees fit.

§ 219. **Power of Wife divorced a Mensa et Thoro to establish a Domicil for herself. British Authorities.** — In England the question has undergone some discussion; and, although it is not yet settled by any authoritative decision, the weight of

[2] Int. aux Cout. d'Orléans, no. 10; also Du Mariage, no. 522.

[3] Cout du Bourgogne, c. 22, p. 447, ed. 1742.

[1] See particularly, Merlin, Répertoire, *verb.* Dom. § 5; Dalloz, Recueil Alphabétique, t. 6, *verb.* Dom. no. 9; Zachariæ, Handbuch des Französischen Civilrechts, t. 1, p. 280.

[2] Demolombe, Cours de Code Napoléon, t. 1, no. 358; Duranton, Cours de Droit Français, t. 1, no. 365; Demante, Cours Anyl. t. 1, no. 132 *bis;* Toullier, Le Droit Civil Français, t. 2, no. 773; Delvincourt, Cours de Code Civil, t. 1, p. 251; Proudhon, Traité de l'État des Personnes, t. 1, p. 121; Vallette sur Proudhon, t. 1, p. 244; Marcadé, Cours de Code Civil, art. 108, no. 1; Aubry et Rau sur Zachariæ, t. 1, § 143; Massé et Vergé sur Zachariæ, t. 1, § 89, note 4; Laurent, Principes de Droit Civil Français, t. 2, no. 85; Richelot, Principes de Droit Civil Français, t. 1, no. 243; Boncenne, Théorie de la Procéd. Civ. t. 2, p. 203; Mersier, no. 137; Du Caurroy, Bonnier et Roustain, Commentaire, etc. du Code, t. 1, no. 174; Blondeau, Revue de Droit Français et Étranger, t. 1, p. 650 *et seq.*

opinion appears to be in favor of allowing a wife divorced *a mensa et thoro* to gain a domicil for herself. In Williams *v.* Dormer,[1] it was held that a wife living apart from her husband, under a sentence of judicial separation, is not legally residing with her husband, for the purpose of founding jurisdiction against her in a suit of nullity of marriage. The real question, however, although the language of the judge, Sir John Dodson, is applicable generally to domicil, was one of inter-diocesan residence; and although the case has been cited as an authority upon the question now under discussion, how far it would be considered such by the English courts in cases of national or *quasi*-national domicil is not certain. Westlake[2] thinks it would not be considered an authority in favor of the power of the wife to change her domicil, upon the ground that jurisdiction in suits of nullity of marriage is not held in England to turn upon domicil. But in the first edition of his work he relies upon it. Sir Robert J. Phillimore, however, in Le Sueur *v.* Le Sueur,[3] refers to it as an authority on the general subject of domicil.

§ 220. **Id. id.** — In Dolphin *v.* Robins,[1] in the House of Lords, the power of a woman divorced *a mensa et thoro* to establish a domicil for herself was discussed by counsel, but as no such divorce or its equivalent was shown, the point was not passed upon by the House. Lord Cranworth, however, while disclaiming intention to give any authoritative utterance upon the subject, remarked: "The question where a person is domiciled is a mere question of fact; where has he established his permanent home? In the case of a wife, the policy of the law interferes, and declares that her home is necessarily the home of her husband; at least it is so *prima facie*. But where, by judicial sentence, the husband has lost the right to compel the wife to live with him, and the wife can no longer insist on his receiving her to partake of his bed and board, the argument which goes to assert that she cannot set up a home of her own, and so establish a domicil different from that of her husband, is not to my mind altogether satisfac-

[1] 2 Robertson, 505.

[2] Priv. Int. L. 2d ed. § 241; but see 1st ed. p. 42.

[3] L. R. 1 P. D. 139.

[1] 7 H. L. Cas. 390.

tory. The power to do so interferes with no marital right during the marriage, except that which he has lost by the divorce *a mensa et thoro*. She must establish a home for herself, in point of fact; and the only question is, supposing that home to be one where the laws of succession to personal property are different from those prevailing at the home of her husband, which law, in case of her death, is to prevail? Who, when the marriage is dissolved by death, is to succeed to her personal estate; those entitled by the law of the place where, in fact, she was established, or those where her husband was established." Lord Kingsdown declined to concur in the expressions of Lord Cranworth, and considered "it to be a matter, whenever it shall arise, entirely open for the future determination of the House." Whether his refusal to concur was based upon a difference of opinion, or a desire to leave the question unprejudiced by judicial utterances, does not clearly appear. The Lord Chancellor (Campbell) also left the question open, and Lords Brougham, Wensleydale, and Chelmsford, who heard the argument, took no part in the decision of the case.

Of English text-writers, Phillimore,[2] Westlake,[3] and Foote[4] hold the affirmative, while Dicey[5] considers the question an open one.

In Scotland it has been held, that upon a judicial decree of separation from bed and board, the domicil of the wife ceases to follow that of the husband.[6]

§ 221. **Id. American Authorities.** — In Barber *v.* Barber,[1] in the Supreme Court of the United States, the precise point was

[2] Dom. p. 29, no. 47; Id. Int. L. vol. iv. no. 81.

[3] Priv. Int. L. 1st ed. p. 42; Id. 2d ed. § 241.

[4] Priv. Int. Jur. p. 17.

[5] Dom. p. 105. In Geils *v.* Geils, 1 Macq. 254 (s. c. id. 36), Lord St. Leonards, Ch., refused to give an opinion as to whether an English divorce *a mensa et thoro* severed the wife's domicil from that of the husband. See also Le Sueur *v.* Le Sueur, *supra*.

[6] Allison *v.* Catley, 1 D. (Sc. Sess. Cas. 2d ser. 1839) 1025.

[1] 21 How. 582. In this case the facts were, that, husband and wife being domiciled in the State of New York, were by a court of competent jurisdiction there divorced *a mensa et thoro*, and an allowance of alimony was made. Subsequently the husband moved to Wisconsin, the wife remaining in New York, and alimony being in arrears, the wife, by a next friend, filed a bill in equity in the District Court of the United States for the District of Wisconsin, for the recovery of it. The main question involved was whether husband

raised and decided in the affirmative, and the same doctrine has been held in the New York courts.[2] In Pennsylvania, it

and wife divorced *a mensa et thoro* can become citizens of different States so as to give jurisdiction in suits between them to the United States courts. This question was resolved in the affirmative, Wayne, J., delivering the opinion of the court, in which he said: "The Constitution requires, to give the courts of the United States jurisdiction, that the litigants to a suit should 'be citizens of different States.' The objection in this case is, that the complainant does not stand in that relation to her husband, the defendant; in other words, it is a denial of a wife's right, who has been divorced *a mensa et thoro*, to acquire for herself a domiciliation in a State of this Union different from that of her husband in another State, to entitle her to sue him there by her next friend, in a court of the United States having equity jurisdiction, to recover from him alimony which he has been adjudged to pay to her by a court which had jurisdiction over the parties and the subject-matter of divorce, where the decree was rendered. We have already shown, by many authorities, that courts of equity have a jurisdiction to interfere to enforce a decree for alimony, and by cases decided by this court; that the jurisdiction of the courts of equity of the United States is the same as that of England, whence it is derived. On that score, alone, the jurisdiction of the court in the case before us cannot be successfully denied. But it was urged by the learned counsel who argued this cause for the defendant, that husband and wife, although allowed to live separately under a decree of separation *a mensa et thoro*, made by a State court having competent jurisdiction, are still so far one person, while the married relation continues to exist, that they cannot become at the same time citizens of different States, within the meaning of the Federal Constitution, and therefore the court below had no jurisdiction. It was also said, for the purpose of bringing suits for divorces, they may acquire separate residences in fact; but this is an exception founded in necessity only, and that the legal domicil of the wife, until the marriage be dissolved, is the domicil of the husband, and is changed with a change of his domicil. Such, however, are not the views which have been taken in Europe generally, by its jurists, of the domicil of a wife divorced *a mensa et thoro*. They are contrary, too, to the generally received doctrine in England and the United States upon the point. In England it has been decided, that where the husband and wife are living apart, under a judicial sentence of separation, the domicil of the husband is not the domicil of the wife (English Law and Equity Reports, vol. ix. 598, 2 Robertson, 545). When Mr. Phillimore wrote his treatise upon the law of domicil, he said he was not aware of any decided case upon the question of the domicil of a wife divorced *a mensa et thoro, but there can be little doubt that in England, as in France, it would not be that of her husband, but the one chosen for herself after the divorce.* In support of his opinion, he cites Pothier's Intr. aux Cout. p. 4; Marcadé in his Commentary upon the French Code, vol. i, p. 287; The French Code, tit. 111, art. 108; the Code Civile of Sardinia; and Cochin's Argument in the Duchess of Holstein's case, Œuvres, t. 2, p. 223. Mr. Bishop, in his Commentaries on the Law of Marriage and Divorce, has a passage so appropriate to the point we are discussing, that we will extract it entire. It is of the more value, too, because it comprehends the opinions entertained by

[2] Hunt *v.* Hunt, 72 N. Y. 217; Vischer *v.* Vischer, 12 Barb. 640; Paulding's Will, 1 Tuck. 47.

has been held[3] that a woman divorced *a mensa et thoro* might acquire in her own right a settlement entitling her to pauper

eminent American jurists and judges in respect to the domicil of a wife divorced *a mensa et thoro*. He says, in discussing the jurisdiction of courts where parties sought a divorce abroad for causes which would have been insufficient at home, that 'it was necessary to settle a preliminary question, namely, whether for the purpose of a divorce suit the husband and wife can have separate domicils; that the general doctrine is familiar, that the domicil of the wife is that of the husband. But it will probably be found, on examination, that the doctrine rests upon the legal duty of the wife to follow and dwell with the husband wherever he goes. If he commits an offence which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim to the remedy. In other words, she must establish a domicil of her own, separate from her husband, though it may be, or not, in the same judicial locality as his. Courts, however, may decline to recognize such domicil in a collateral proceeding — that is, a proceeding other than a suit for a divorce. But where the wife is plaintiff in a divorce suit, it is the burden of her application that she is entitled, through the misconduct of her husband, to a separate domicil. So *when parties are already living under a judicial separation, the domicil of the wife does not follow that of the husband.*' (Section 728). Chief Justice Shaw says, in Harteau *v.* Harteau, 14 Pick. 181, 185, the law will recognize a wife as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, *or so modified* as to establish separate interests, and especially a separate domicil and home. Otherwise the parties, in this respect, would stand upon a very unequal footing, it being in the power of the husband to change his domicil at will, but not in that of the wife. The cases which were cited against the right of a wife, divorced from bed and board, to choose for herself a domicil, do not apply (Donegal *v.* Donegal, in 1 Addam's Ecclesiastical Rep. pp. 8, 19). That of Shackell *v.* Shackell, cited in Whitcomb *v.* Whitcomb (9 Curteis' Ecclesiastical Rep. p. 352), are decisions upon the domicil of the wife, when living apart from her husband by *their mutual agreement*, but not under decrees divorcing the wife from the bed and board of the husband. The leading case under the same circumstances is that of Warrender *v.* Warrender, (9 Bligh, 103, 104). In that case, Lord Brougham makes the fact that the husband and wife were living apart by agreement, and not by a sentence of divorce, the foundation of the judgment. The general rule is that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers, and places her in a situation to sue him for a divorce *a mensa et thoro*, and to ask the court having jurisdiction of her suit to allow her from her husband's means, by way of alimony, a suitable maintenance and

[3] Williamsport *v.* Eldred, 84 Pa. St. 429.

support. The authority of these cases, together with the great liberality of the various States in investing a wife di-

support." Taney, C. J., and Campbell and Daniel, JJ., dissented, the last named filing a dissenting opinion, in which he said: "With respect to the authority of the courts of the United States to adjudicate upon a controversy and between parties such as are presented by the record before us. Those courts, by the Constitution and laws of the United States, are invested with jurisdiction in controversies between citizens of different States. In the exercise of this jurisdiction, we are forced to inquire, from the facts disclosed in the cause, whether, during the existence of the marriage relation between these parties, the husband and wife can be regarded as citizens of different States? Whether, indeed, by any regular legal deduction consistent with that relation, the wife can, as to her civil or political *status*, be regarded as a citizen or person? By Coke and Blackstone it is said: 'That by marriage, the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything. Upon this principle of union in husband and wife depend almost all the rights, duties, and disabilities that either of them acquire by the marriage. For this reason a man cannot grant anything to his wife, nor enter into a covenant with her, for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself; and therefore it is generally true that all compacts made between husband and wife, when single, are voided by the intermarriage' (Co. Lit. 112; Bla. Com. vol. i. p. 442). So, too, Chancellor Kent (vol. ii. p. 128): 'The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended during the existence of the matrimonial union.' Such being the undoubted law of marriage, how can it be conceived that, pending the existence of this relation, the unity it creates can be reconciled with separate and independent capacities in that unity, such as belong to beings wholly disconnected, and each *sui juris*? Now, the divorce *a mensa et thoro* does not sever the matrimonial tie; on the contrary, it recognizes and sustains that tie, and the allowance of alimony arises from and depends upon reciprocal duties and obligations involved in that connection. The wife can have no claim to alimony but as wife, and such as arises from the performance of her duties as wife; the husband sustains no responsibilities save those which flow from his character and obligations as husband, presupposing the existence and fulfilment of conjugal obligations on the part of the wife. It has been suggested that by the regulations of some of the States a married woman, after separation, is permitted to choose a residence in a community or locality different from that in which she resided anterior to the separation, and different from the residence of the husband. It is presumed, however, that no regulation, express or special, can be requisite in order to create such a permission. This would seem to be implied in the divorce itself; the purpose of which is, that the wife should no longer remain *sub potestate viri*, but should be freed from the control which had been abused, and should be empowered to select a residence and such associations as would be promotive of her safety and comfort. But whether expressed in the decree for separation, or implied in the divorce, such a privilege does not destroy the marriage relation; much less does it remit the parties to the position in which they stood before marriage, and create or revive antenuptial, civil, or political rights in the

vorced *a mensa et thoro*, or even one entitled to a divorce on the ground of the desertion or other misconduct of her husband, with power to act for herself under a variety of circumstances, leaves little room to doubt that the capacity of one so divorced to select for herself a domicil will be generally recognized in this country.

§ 222. **Domicil of Husband continues to be that of Divorced Wife or Widow until she has established another for herself.** — Marriage does not operate as a mere suspension of the maiden domicil of the wife, but as a substitution for it of the domicil of the husband. "The domicil which she had before marriage was forever destroyed by that change in her condition," said Lord Brougham, in Warrender *v.* Warrender; and the dissolution of the marriage, either by the death of her husband or by divorce, would not remit her to her former domicil. Her derivative domicil continues after the death of her husband,[1] or after divorce *a vinculo matrimonii*,[2] until she acquires a domicil of choice in the usual way, or obtains another derivative domicil by a second marriage. Such was also the doctrine of the Roman law: "Vidua mulier amissi mariti domicilium retinet, exemplo clarissimæ personæ per maritum factæ; sed utrumque aliis intervenientibus nuptiis permutatur."[3] Zangerus[4] holds that if the husband had several domi-

wife. Both parties remain subject to the obligations and duties of husband and wife. Neither can marry during the lifetime of the other, nor do any act whatsoever which is a wrong upon the conjugal rights and obligations of either. From these views it seems to me to follow, that a married woman cannot during the existence of the matrimonial relation, and during the life of the husband the wife cannot be remitted to the civil or political position of a *feme sole*, and cannot therefore become a *citizen* of a State or community different from that of which her husband is a member."

[1] Gout *v.* Zimmerman, 5 Notes of Cases, 440; Lockhart's Trusts, 11 Ir. Jur. (N. s.) 245; Pennsylvania *v.* Ravenel, 21 How. 103; Danbury *v.* New Haven, 5 Conn. 584; Ensor *v.* Graff, 43 Md. 391; Harkins *v.* Arnold, 46 Ga. 656; Voet, Ad Pand. l. 5, t. 1, no. 95; Donellus, De Jure Civili, l. 17, c. 12, p. 979, no. 20; Zangerus, De Except. pt. 2, c. 1, nos. 56 and 96–98; Pothier, Intr. aux Cout. d'Orléans, no. 12; Demolombe, Cours de Code Napoléon, t. 1, no. 370; Delvincourt, Cours de Code Civil, t. 1, p. 42, no. 12; Savigny, System, etc. § 353; Guthrie's transl. p. 100; Bar, § 29; Calvo, Dict. de Droit, Int. *verb.* Dom.; Phillimore, Dom. p. 27, no. 41 *et seq.*; Id. Int. L. vol. iv. no. 74 *et seq.*; Dicey, Dom. p. 108; Story, Confl. of L. § 46.

[2] Dicey, Dom. p. 109, and see *infra*, note 6.

[3] Dig. 50, t. 1, l. 22, § 1.

[4] De Except. pt. 2, c. 1, no. 98.

cils, upon his death his widow would retain them all, unless she has selected one of them in a certain place, and there dwells, with her family, "holding fire and light." The doctrine of the widow's title to the domicil of her deceased husband was successfully maintained by Sir Leoline Jenkins, against the lawyers of France, in the question of the disputed succession to the personal property of Henrietta Maria, widow of Charles I.[5]

It has been held in several cases in this country that a wife retains after divorce *a vinculo* the settlement of her husband, until she gains another for herself,[6] and the same doctrine would undoubtedly be applied in cases of domicil of whatever grade.

Demolombe[7] thus sums up the subject: "When the cause upon which is founded the legal attribution of a '*domicile de droit*' ceases, the person does not recover the old domicil which he formerly had; he preserves, on the contrary, his domicil in the place where the law had put it, until he has adopted another. It is thus that the wife, after the dissolution of the marriage or separation *de corps*, does not recover, '*de plein droit*,' the domicil which she had before she was married." It would seem that the burden of proof would be upon the party alleging a domicil for the widow or divorced woman different from that of her husband at the time of the dissolution of marriage.

§ 223. **Can a Wife who is entitled to a Divorce establish for herself a Domicil different from that of her Husband?** — We come now to consider briefly a subject involved in great difficulty, and about which there has been much conflict of opinion; namely, whether when a husband has deserted his wife or committed other acts which would entitle her to a divorce, but there having been no decree of dissolution or judicial separation by a court of competent jurisdiction, the wife is entitled to and may be considered as having an independent

[5] Wynne's Life of Sir Leoline Jenkins, vol. i. p. xix, vol. ii. pp. 665–670. See Phillimore, Dom. pp. 28, 29, no. 42 *et seq.*; Id. Int. L. vol. iv. no. 76 *et seq.*

[6] Royalton *v.* West Fairlee, 11 Vt. 438; Guilford *v.* Oxford, 9 Conn. 321; Buffaloe *v.* Whitedeer, 15 Pa. St. 182; Lake *v.* South Canaan, 87 id. 19.

[7] Cours de Code Napoléon, t. 1, no. 370.

domicil of her own. This question has generally arisen in cases involving jurisdiction to grant divorce.

We have already seen that, as a general rule, jurisdiction for the purpose named, according to the doctrine received in Great Britain and this country, and indeed in all other countries in which the principle of *nationality* has not been substituted, depends upon the domicil of the parties.[1] But suppose, for example, a husband domiciled and living with his wife in Pennsylvania, deserts her there and removes to Tennessee, where he becomes domiciled. If the husband deserts his wife without leaving the State, by the law of Pennsylvania the courts of that State have jurisdiction to grant to the wife a divorce after the lapse of two years. Does the husband's change of domicil to another State make any difference? Does it compel the wife to seek redress in a Tennessee court and oust the jurisdiction of the proper Pennsylvania court?

§ 224. **Id.** — To hold the affirmative, would be in most instances to deny all redress to the wife. That she may follow her husband to his new home and maintain proceedings there is held in some of the decided cases,[1] and denied in others,[2] — the denial usually, however, resting upon purely statutory grounds, such as the requirement of actual residence by the libellant. But however that may be, she is not bound to resort to the courts of her husband's new domicil for redress,[3] but may maintain her suit for divorce at the place where she was domiciled with her husband at the time his offence occurred.[4] But upon what ground is this jurisdiction to be predicated? It would seem sufficient to say that, while recog-

[1] *Supra*, § 39.

[1] Greene *v.* Greene, 11 Pick. 410; Masten *v.* Masten, 15 N. H. 159; Harrison *v.* Harrison, 20 Ala. 629; Smith *v.* Moorehead, 6 Jones Eq. 360; Davis *v.* Davis, 30 Ill. 180; Kashaw *v.* Kashaw, 3 Cal. 312; see Bishop, Marr. & Div. vol. ii. § 127, 4th ed.

[2] Hopkins *v.* Hopkins, 35 N. H. 474; Schonwald *v.* Schonwald, 2 Jones Eq. 367; Jenness *v.* Jenness, 24 Ind. 355; Dutcher *v.* Dutcher, 39 Wis. 651; Kruse *v.* Kruse, 25 Mo. 68; Pate *v.* Pate, 6 Mo. App. 49.

[3] Authorities cited *infra*, notes 4 and 5.

[4] Hopkins *v.* Hopkins, 35 N. H. 474; Harteau *v.* Harteau, 14 Pick. 181; Shaw *v.* Shaw, 98 Mass. 158; Dorsey *v.* Dorsey, 7 Watts, 349; Colvin *v.* Reed, 55 Pa. St. 375; Reel *v.* Elder, 62 id. 308; Van Storch *v.* Griffin, 71 id. 240; Platt's Appeal, 80 id. 501; Hull *v.* Hull, 2 Strob. Eq. 174; Hanberry *v.* Hanberry, 29 Ala. 719; Turner *v.* Turner, 44 id. 437. And the authorities cited *infra*, note 7, apply *a fortiori* in support of this position.

nizing the theoretical identity of domicil of husband and wife, the courts of the place last mentioned will assume jurisdiction of the case in order to prevent a failure of justice, — in order to prevent a husband who has committed a wrong against his wife and against the marriage relation from, at the same time, depriving her of the means of redress; in other words, that they will not suffer the theoretical ground of jurisdiction to be pressed to the extent of defeating the ends of justice.[5]

[5] This is substantially what was said by Shaw, C. J., in Harteau *v.* Harteau, *supra*, although he does in that case speak of the wife having a separate domicil under such circumstances. His opinion, which has been constantly referred to in the cases, and upon which much of the reasoning on these questions is built, is as follows: "The ground of defence to this libel is, that the parties were not within the jurisdiction or limits, nor subject to the laws of the Commonwealth, at the time of the act done, which is relied on as the cause of divorce. We consider it to be proved that these parties had *bona fide* changed their domicil, and become citizens of the State of New York, before the desertion charged. Such being the fact, it seems to us to be the same case as if they had never been inhabitants of this Commonwealth. As such, it seems to fall within the principle of the cases of Richardson *v.* Richardson, 3 Mass. R. 153, and Hopkins *v.* Hopkins, 3 Mass. R. 158. The true ground of argument in this case is, not that the parties did not live in this county, but that they were not then subject to the jurisdiction of the court, and their conjugal rights and obligations did not depend upon the operation of our laws.

"The right to a divorce, in the cases in which it shall be granted, are regulated by the St. 1785, c. 69, § 3. The seventh section regulates the place where the trial shall be had. It appears, from the preamble to this section, that two objects were to be accomplished by this act: the first, to transfer the jurisdiction from the governor and counsel to the Supreme Judicial Court; and the second, which resulted as a consequence from the other, to have the hearing in the several counties, instead of requiring all persons to attend at Boston, as they must when the jurisdiction was in the governor and counsel.

"The term 'live,' in this section, it appears to me, must mean where the parties have their domicil when the libel is filed, or the suit commenced.

"To test this, suppose parties live as man and wife in Suffolk, and adultery is committed by the husband, but it is unknown to the wife. They remove into Middlesex, *bona fide*, and whilst residing there the adultery is discovered. Must the wife libel in Suffolk? It may be said the fact was committed there; but the rule of locality applicable to a trial for crime does not apply. Suppose, in the above case, that while living at Boston, the husband had committed the offence in Providence, out of the jurisdiction of Massachusetts. Would not this be as much a good cause of divorce for the wife, as if done within the jurisdiction? The fact is to be tried, not because it is a violation of the law of the Commonwealth, which the State has a right to punish, but because it is a violation of the conjugal obligation, contract and duty.

"The wife is, in such case, entitled to a divorce; and if she continues to reside in the same county, her libel

But the doctrine of many of the American cases goes further, and assumes that under circumstances similar to those

would properly be brought in that county, though the parties do not live therein, within the literal construction of the statute. But suppose, in the mean time, for necessity or otherwise, she has taken up her abode in another county, she still has a right to a divorce, and the question is, in what county shall she file her libel. Neither of the parties now live in the county where they formerly lived together. It would seem to be a good compliance with the requisition of the statute, which cannot be construed literally, to construe it *cy pres*, and permit her to file her libel in the county where she has her abode at the time (Lane *v.* Lane, 2 Mass. R. 167). The statute directs that the suit shall be brought in the county where the parties live, for two reasons, — to save expense, and because the *truth can be better discerned*. This would in general be true, not only because, often, the fact would be done at such place, but also because the parties would there be better known. It clearly does not limit the place of trial to the county where the fact was committed, because that is often out of the State, or in the State, but in a county other than that where the parties *live*. Much obscurity has, we think, been thrown on the subject, by confounding the two questions, which are essentially different, viz., (1) in what cases a party is entitled to claim a divorce; and (2) in what county the libel should be brought.

"As it is a right conferred by statute, the one question may sometimes depend on the other; for if by the terms of the statute no suit can be instituted, it is very clear that no divorce can be had.

"But I think there may be cases where the statute confers a right to have a divorce, in which the statute gives a general jurisdiction to this court, and yet where the parties do not *live*, — that is, have their domicil, — either at the time of the *act done*, or at the time of the *suit commenced*, in any county in this Commonwealth. If so, there are cases where the statute cannot be literally complied with, and must be construed *cy pres* according to the intent.

"Suppose a husband commits adultery and then purchases a house and actually takes up his domicil in another State, but, before his wife has joined him, she is apprised of the fact, and immediately files a libel for a divorce, and obtains an order to protect her from the power of her husband, as by law she may. He is an inhabitant of another State, and can in no sense be said to *live* in any county in this State. And yet it would be difficult to say that she is not entitled to have a divorce here. Supposing, instead of the last case, he has actually purchased a house and changed his domicil to another State, and there commits adultery, and the wife, not having joined him, and not having left her residence in this State, becomes acquainted with the fact, and libels and obtains a similar order; could she not maintain it? Yet in the latter case, at the time of the *act done*, and in the other, at the time of the *suit instituted*, the respondent, *one of the parties*, certainly did not live in any county of this Commonwealth.

"This suggests another course of inquiry, — that is, how far the maxim is applicable to this case, 'that the domicil of the wife follows that of the husband.' Can this maxim be true in its application to this subject, where the wife claims to act, and by law, to a certain extent, and in certain cases, is allowed to act, adversely to her husband? It would oust the court of its jurisdiction in all cases where the husband should change his domicil to another State before the suit is instituted.

"It is in the power of a husband to change and fix his domicil at his will. If the maxim could apply, a man might go from this county to Providence, take

named a wife may have, at least for purposes of divorce, a domicil separate from and independent of that of her hus-

a house, live in open adultery, abandoning his wife altogether, and yet she could not libel for a divorce in this State, where, till such change of domicil, they had always lived. He clearly lives in Rhode Island; her domicil, according to the maxim, follows his; she therefore, in contemplation of law, is domiciled there too; so that neither of *the parties* can be said to live in this Commonwealth. It is probably a juster view to consider that the maxim is founded upon the theoretic identity of person and of interest between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail. But the law will recognize a wife as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicil and home, bed and board being put, a part for the whole, as expressive of the idea of *home*. Otherwise, the parties in this respect would stand upon very unequal grounds, it being in the power of the husband to change his domicil at will, but not in that of the wife. The husband might deprive the wife of the means of enforcing her rights, and in effect of the rights themselves, and of the protection of the laws of the Commonwealth, at the same time that his own misconduct gives her a right to be rescued from his power on account of his own misconduct towards her. Dean *v.* Richmond, 5 Pick. 461; Barber *v.* Root, 10 Mass. R. 260.

"The place where the marriage was had seems to be of no importance. The law looks at the relation of husband and wife as it subsists and is regulated by our laws, without considering under what law or in what country the marriage was contracted. The good sense of the thing seems to be, if the statute will permit us to reach it, that where parties have *bona fide* taken up a domicil in this Commonwealth and have resided under the protection and subject to the control of our laws, and during the continuance of such domicil one does an act which may entitle the other to a divorce, such divorce shall be granted and the suit for it entertained, although the fact was done out of the jurisdiction, and whether the act be a crime which would subject a party to punishment or not; that after such right has accrued, it cannot be defeated, either by the actual absence of the other party, however long continued *animo revertendi*, or by a colorable change of domicil, or even by an actual change of domicil; and that it shall not be considered in law that the change of domicil of the husband draws after it the domicil of the wife to another State, so as to oust the courts of this State of their jurisdiction, and deprive the injured wife of the protection of the laws of this Commonwealth and of her right to a divorce. But where the parties have *bona fide* renounced their domicil in this State, though married here, and taken up a domicil in another State, and there live as man and wife, and an act is done by one, which, if done in this State, would entitle the other to a divorce, and one of the parties comes into this State, the courts of this Commonwealth have not such jurisdiction of the parties, and of their relation as husband and wife, as to warrant them in saying that the marriage should be dissolved.

"The case of Barber *v.* Root is an authority for saying that such a divorce would not be valid in New York.

"It is of importance that such a question should be regulated, if possible, not by local law or local usage,

band;[6] and this doctrine has been carried to its logical conclusion in a large number of cases, in which it has been held that a wife may, after the commission by her husband of an act which will entitle her to a divorce, leave the place of their common domicil and become domiciled in another State, so as to give the courts there jurisdiction to grant her a divorce,[7] — and this even though the husband has never resided there.

§ 224 *a*. **Id.**—That this extreme doctrine is dangerous, and capable of misapplication and disastrous results, need hardly be said. It is not the unanimous opinion of American jurists, but, on the contrary, many dissenting voices have been raised against it.[1] Still it has been accepted by the courts of many

under which the marriage relation should be deemed subsisting in one State and dissolved in another; but upon some general principle which can be recognized in all States and countries, so that parties who are deemed husband and wife in one, shall be held so in all.

"So many interesting relations, so many collateral and derivative rights of property and of inheritance, so many correlative duties, depend upon the subsistence of this relation, that it is scarcely possible to overrate the importance of placing it upon some general and uniform principle which shall be recognized and adopted in all civilized States.

"It appearing that the alleged desertion would be no ground of divorce, by the laws of the State of New York, that at the time of the alleged desertion the parties had their home in that State and were not subject to the law and jurisdiction of this Commonwealth, and that when the suit was instituted the respondent still had his domicil in the State of New York, the court are of opinion that a divorce *a mensa* cannot be decreed, and that the libel be dismissed. If it be true, as stated by the respondent's counsel, that no evidence was given of the respondent's ability to support his wife, that would seem to be an additional reason why the libel cannot be maintained."

[6] See authorities cited in notes 4 and 7.

[7] Cheever *v.* Wilson, 9 Wall. 108; Harding *v.* Alden, 9 Greenl. 140; Frary *v.* Frary, 10 N. H. 61; Ditson *v.* Ditson, 4 R. I. 87; Sawtell *v.* Sawtell, 17 Conn. 284; Kinnier *v.* Kinnier, 45 N. Y. 535; State *v.* Schlachter, Phil. N. C. 520; Tolen *v.* Tolen, 2 Blackf. 407; Wright *v.* Wright, 24 Mich. 180; Craven *v.* Craven, 27 Wis. 418; Dutcher *v.* Dutcher, 39 id. 651; Fishli *v.* Fishli, 2 Littell, 337; Shreck *v.* Shreck, 32 Tex. 578; Moffatt *v.* Moffatt, 5 Cal. 280; and see Bishop, Marr. & Div. vol. ii. § 129.

[1] Dorsey *v.* Dorsey, 7 Watts, 349; Colvin *v.* Reed, 55 Pa. St. 375; Reel *v.* Elder, 62 id. 308; Prosser *v.* Warner, 47 Vt. 667; Neal *v.* Her Husband, 1 La. An. 315; Maguire *v.* Maguire, 7 Dana, 181; Bradshaw *v.* Heath, 13 Wend. 407; and see Jackson *v.* Jackson, 1 Johns. 424, and Borden *v.* Fitch, 15 id. 121.

Harteau *v.* Harteau, although usually cited to the contrary, appears to the writer, when closely scanned, really to belong to this class of cases.

A distinguished writer, the late Chief Justice Redfield, said in a learned article on Jurisdiction in Divorce (Am. Law Reg. vol. iii. (N. S.) pp. 193, 222): "The right of the wife to acquire a new domicil, even after the abandonment of her husband and before a ju-

of the States of the Union, and has received the express approval of the United States Supreme Court.

Said Swayne, J., in Cheever *v.* Wilson[2] (in which the facts were that the husband and wife having been together domiciled in the District of Columbia, and having there separated, the wife subsequently went to Indiana, and after a residence there of a few months procured a divorce on the ground of abandonment): "It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. The proceeding for a divorce may be instituted where the wife has her domicil. The place of the marriage, of the offence, and the domicil of the husband are of no consequence." A broad statement, certainly; but the case itself, in view of the facts as reported, is no less remarkable than the language quoted.

§ 225. **Id. English Cases.** — In England there has been no direct decision upon the point discussed in the preceding sections. In Deck *v.* Deck,[1] the facts were that the parties, both British subjects and domiciled in England, separated there by mutual agreement, and the husband subsequently became domiciled and married in the United States. The wife having always remained in England, applied there for a divorce *a vinculo* on the ground of adultery and bigamy, which was granted. The decision was, however, put by Sir Cresswell Cresswell, who delivered the opinion of the full court, upon the singular ground (for an English lawyer) of political

dicial separation, seems questionable. It has sometimes been so decided; but the better opinion is that she cannot, unless it be by way of a return to her ante-nuptial domicil, or that of the place of the marriage, or to some place where the parties have before lived together as husband and wife."

[2] 9 Wall. 108, 123.

[1] 2 Swab. & Tr. 90. The learned judge said: "Both parties were natural born English subjects; both, therefore, owed allegiance to the crown of England and obedience to the laws of England. That allegiance cannot be thrown off by a change of domicil. The husband, therefore, although he became domiciled in America continued liable to be affected by the laws of his native country."

nationality, to wit: that, although the husband had changed his domicil, he could not change and had not changed his allegiance, and he "therefore continued liable to be affected by the laws of his native country."

In Le Sueur *v.* Le Sueur,[2] the facts were, that the parties having been domiciled in Jersey, and the husband having committed adultery there and deserted his wife, became domiciled in the United States. Subsequently the wife removed to England, and there applied for a divorce on the grounds of adultery and desertion. Sir R. J. Phillimore, while "disposed to assume, in favor of the petitioner, the correctness of the opinion that desertion on the part of the husband may entitle the wife, without a judicial separation, to choose a new domicil for herself," held that she could not make her husband amenable to the *lex fori* of her new domicil, and refused to grant a divorce.[3]

§ 226. **The Doctrine, if at all admissible, does not extend beyond Cases of Divorce.** — But whatever may be the effect of the desertion of the wife by the husband, or the commission by the latter of any act which would entitle the former to a divorce, upon local jurisdiction, or — to use a form of expression frequently, but in the opinion of the writer unfortunately, used — upon the power of the wife to possess an independent domicil *for the purposes of divorce*, what would be the effect of the commission by the husband of such an act upon the domicil of the wife when viewed with reference to some other purpose; for example, personal succession, testamentary or other capacity, or the like? Here the language of Lord Cranworth in Dolphin *v.* Robins (where the question was with regard to the formal execution of a will by the wife) may again be quoted. He said: "Whatever might have been the case if such a decree had been pronounced, I am clearly of opinion that, without such a decree, it must be considered that the marital rights remain unimpaired. It was, indeed, argued strongly, that here the facts show that the husband never could have compelled his wife to return to him. The allegation of the appellant, it was

[2] L. R. 1 P. D. 139. [3] L. R. 4 P. D. 1.

contended, contains a distinct averment that the husband had committed adultery; and this would have afforded a valid defence to a suit for restitution of conjugal rights, and so would have enabled the wife to live permanently apart from her husband, which, it is alleged, he agreed she should be at liberty to do. But this is not by any means equivalent to a judicial sentence. It may be, that where there has been a judicial proceeding, enabling the wife to live away from her husband, and she has accordingly selected a home of her own, that home shall, for purposes of succession, carry with it all the consequences of a home selected by a person not under the disability of coverture. But it does not at all follow that it can be open to any one, after the death of the wife, to say, not that she had judicially acquired the right to live separate from her husband, but that facts existed which would have enabled her to obtain a decree giving her that right, or preventing the husband from insisting on her return. It would be very dangerous to open the door to any such discussions; and, as was forcibly put in argument at the bar, if the principle were once admitted, it could not stop at cases of adultery. For, if the husband, before the separation, had been guilty of cruelty towards the wife, that, no less than adultery, might have been pleaded in bar to a suit for restitution of conjugal rights. It is obvious, that to admit questions of this sort to remain unlitigated during the life of the wife, and to be brought into legal discussion after her death for the purpose only of regulating the succession to her personal estate, would be to the last degree inconvenient and improper."

§ 227. Id.—In Yelverton *v.* Yelverton,[1] Sir Cresswell Cresswell considered Dolphin *v.* Robins as fully establishing this position. He said: "The domicil of the husband is the domicil of the wife; and even supposing him to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not on that ground acquire another domicil for herself, as was recently held by the House of Lords in Dolphin *v.* Robins." But although the point was raised and strongly urged by

[1] 1 Swab. & Tr. 574; s. c. 1 L. T. R. 194; 29 L. J. (P. & M.) 34.

counsel, their lordships do not appear to have considered the facts upon which it was based properly before them under the pleadings in the case.[2] The remarks of Lord Cranworth above quoted, however, although perhaps technically *dicta*, are entitled to great weight, both because of their inherent reasonableness, and because they are the expressions of an eminent judge upon a question which had been fully discussed before him.

Dr. Bishop, a stout advocate of the extreme American rule in divorce cases above referred to, in his work on Marriage and Divorce,[3] says: "If the question should come up collaterally, where, in fact, the ill conduct of the husband had justified the wife in separating from him, — as, for example, if the domicil of the wife in the case of a will made by her should be important, — it certainly seems to the writer of these volumes, though he is not able to refer to a decision in point, that the wife's domicil must be taken to be the same with the husband's; because, in such collateral proceeding, the question whether the husband had been guilty of adultery, or of cruelty, or of any other offence having the same legal effect, could not be inquired into."

[2] See particularly Lord Kingsdown, p. 422.
[3] Vol. ii. § 129, 4th ed.

CHAPTER XI.

DOMICIL OF PARTICULAR PERSONS (*continued*). — INFANTS.

§ 228. We have already seen that at birth the infant, if legitimate, receives as his own the domicil of his father,[1] and how the question of legitimacy is to be determined has already been discussed.[2] If he is illegitimate or posthumous, he receives the domicil of his mother;[3] and if neither father nor mother be known, he is presumed to be domiciled where he is found — at least until his place of birth or his parentage be shown.[4] If he is born illegitimate, and is legitimated by the subsequent marriage of his parents, he thereupon receives the domicil of his father.[5] And such domicil, that is, domicil of origin or domicil conferred by subsequent legitimation, is presumed to continue until the contrary is shown. This leads us to inquire how the domicil of an infant may be changed.

§ 229. **Domicil of Infant cannot be changed by his own Act.** — And first, it cannot, at least ordinarily, be changed by his own act. Infants are deemed in law to be wanting in discretion, and, therefore, without capacity to form the intention requisite for the establishment of a domicil of choice. Hence it results that until they arrive at such age as is deemed by the particular law to which they are subject sufficient for the attribution to them of capacity to choose and act for themselves, they must either retain the domicil which they received at birth, or must depend upon other persons for a change of domicil. Indeed, it has been laid down by a good authority[1] as the undisputed position of all jurists, that a minor cannot of his own accord, or — to use the expression of Bynkershoek —

[1] *Supra*, § 105.
[2] *Supra*, § 30.
[3] *Supra*, § 105.
[4] Id.
[5] Monson v. Palmer, 8 Allen, 551; Dicey, pp. 69, 73, 97, 98; Westlake, § 235, 2d ed.
[1] Phillimore, Dom. p. 37, no. 56.

proprio marte, change his domicil.[2] This is undoubtedly the general rule, and it cannot be said that there are in the law as understood and administrated in England and America any well established exceptions.[3]

§ 230. **Roman Law.** — The Roman Law does not help us much on this subject. Although no text directly sustaining him can be cited, Savigny holds that "children born in wedlock, have unquestionably from their birth the same domicil as their father."[1] And he adds that "they unquestionably follow the father, if he establishes a new domicil after their birth, as long as they themselves still belong to his household."[2] This is undoubtedly true, but the Roman law allowed the child freely to choose a domicil for himself: "Placet etiam, filiosfamilias domicilium habere posse; Non utique ibi, ubi pater habuit, sed ubicunque ipse domicilium constituit;"[3] and did not hold the doctrine of derivative domicil as it prevails in modern law: "Filius civitatem, ex qua pater ejus naturalem originem ducit, non domicilium sequitur."[4] "Patris domicilium filium aliorum incolam civilibus muneribus alienæ civitatis non adstringit; cum in patris quoque persona domicilii ratio temporaria sit."[5] But in view of the extent to which

[2] Somerville *v.* Somerville, 5 Ves. Jr. 750; Forbes *v.* Forbes, Kay, 341; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Laneuville *v.* Anderson, 2 Spinks, 41; Lamar *v.* Micou, 112 U. S. 452; Hart *v.* Lindsey, 17 N. H. 235; Woodworth *v.* Spring, 4 Allen, 321; Ames *v.* Duryea, 6 Lans. 155; *Ex parte* Dawson, 3 Bradf. 130; Seiter *v.* Straub, 1 Demarest, 264; Blumenthal *v.* Tannenholz, 31 N. J. Eq. 144; Guier *v.* O'Daniel, 1 Binn. 349, note; School Directors *v.* James, 2 Watts & S. 568; *Re* Lower Oxford Township Election, 11 Phil. 641; Harkins *v.* Arnold, 46 Ga. 656; Metcalf *v.* Lowther's Ex'rs, 56 Ala. 312; Mears *v.* Sinclair, 1 W. Va. 185; Hiestand *v.* Kuns, 3 Blackf. 345; Warren *v.* Hofer, 13 Ind. 169; Maddox *v.* The State, 32 id. 111; Freeport *v.* Supervisors, 41 Ill. 495; Rue High, Appellant, 2 Dougl. (Mich.) 515; Allen *v.* Thomason, 11 Humph. 536; Grimmett *v.* Witherington, 16 Ark. 377; Johnson *v.* Turner, 29 id. 280; Powers *v.* Mortee, 4 Am. L. Reg. 427; Hardy *v.* De Leon, 5 Tex. 211; Russell *v.* Randolph, 11 id. 460; Trammell *v.* Trammell, 20 id. 406; Phillimore, Dom. *loc cit.*; Dicey, Dom. p. 106; Story, Confl. of L. § 46; Pothier, Intr. aux Cout. d'Orléans, no. 16; and authorities cited in the notes following.

[3] Under the Scotch law a child who has reached the age of puberty may change his domicil at pleasure. Arnott *v.* Groom, 9 D. (Sc. Sess. Cas. 2d ser. 1846) 142; Wallace's Case, Robertson, Pers. Suc. p. 201; Fraser, Pers. Relations, vol. ii. pt. 2, c. 1 and c. 3, § 1; Erskine, Principles of the Law of Scotland, bk. 1, tit. 7, § 1.

[1] System, etc. § 353 (Guthrie's trans. p. 100).

[2] Id. note (t).

[3] Dig. 50, tit. 1, ll. 3 and 4.

[4] Id. l. 6, § 1.

[5] Id. l. 17, § 11.

the doctrine of paternal power was carried in the Roman law, a residence upon which was based the domicil of the *filius-familias* must have been with the consent, express or tacit, of the father. However, inasmuch as the *patria potestas* extended not only to children of tender years, but also to those of mature age and to their children, and ended only with the death of the father or the emancipation of the child, the Roman law furnishes us on this subject no fair analogy, from which we can draw authority for the modern doctrine.

§ 231. **The Rule of Disability sometimes stated in this Country in a Qualified Form.** — The rule of disability has, in this country, been frequently stated, probably from an abundance of caution, as applicable to *un-emancipated* minors,[1] and in settlement cases it has been held that an emancipated minor may acquire a settlement for himself.[2] But the latter doctrine is a legacy of the English law of pauper settlements into which the doctrine of domicil does not enter, and which rests upon its own peculiar grounds, largely statutory. These cases are therefore not authorities even for the doctrine that an emancipated minor may change his municipal domicil; much less can they have any weight in determining the question of his capacity to change his national or *quasi*-national domicil. Emancipation, as understood in this country, relates mainly to the right of the minor to acquire a settlement for himself, and to his right to receive and dispose of his own earnings, and is not to be understood to clothe him with any legal capacity, except such as is actually necessary for his maintenance and protection, and, if married, for the maintenance and protection of his family. Whatever, therefore, might be held with regard to his power to change his municipal domicil,[3] the consequences

[1] *E. g.*, *Re* Lower Oxford Township Election, *supra*; Blumenthal *v.* Tannenholz, *supra*; Wheeler *v.* Burrow, 18 Ind. 14.

[2] Lubec *v.* Freeport, 3 Greenl. 220; St. George *v.* Deer Isle, id. 390; Wells *v.* Kennebunkport, 8 id. 200; Dennysville *v.* Trescott, 30 Me. 470; Charlestown *v.* Boston, 13 Mass. 468; Washington *v.* Beaver, 3 W. & S. 548.

[3] So far as the writer is aware, the only case which at all countenances the power of a minor *proprio marte* to change his municipal domicil is Roberts *v.* Walker, 18 Ga. 5, where it was held, with reference to a statutory provision regulating probate jurisdiction, that the residence of a guardian is not the residence of his ward, who has come to years of discretion, unless the latter choose to make it his residence. In this case the ward, being twenty years old,

of a change of national or *quasi*-national domicil are of such a serious nature that it seems dangerous to allow him to change such domicil until he has arrived at the full age of discretion.

§ 232. **Is there any Exception in favor of a Married Minor?** — Pothier,[1] while holding that a minor may not transfer his domicil at his will, says that he nevertheless may in certain cases, one of which is, when he marries with the consent of those under whose power he is; in which case he may transfer his domicil to the place where he takes his wife; and he may also, after he is married, transfer it wherever it seems good to him. And this seems to have been a well recognized principle in the old French law.

In a Texas case[2] this question was raised, but not directly decided. Among the English text-writers, Phillimore[3] goes beyond the doctrine of Pothier, and says: "It can scarcely be doubted that in Great Britain a minor once married, whether with or without the proper consent, would be held capable of choosing his domicil." Westlake,[4] in his first edition, holds it to be "clear that a married minor must be treated as *sui juris* in respect of domicil, since on his marriage he actually founds an establishment separate from the parental home." And Foote[5] approves this expression, adding that, "in such case the question would appear to be one of fact; and if the minor, after the ceremony of marriage, continued to reside with his or her parents, there would be no

removed from one county to another against the will of his guardian, and remained there in spite of the express commands of the latter to return. Notwithstanding which the Supreme Court held that the ward had acquired a residence in the latter county sufficient to found probate jurisdiction. If the case is to be considered as standing upon general grounds of municipal domicil, it certainly goes far beyond anything that has been held elsewhere. We shall see hereafter that the municipal domicil of a ward may be changed by his guardian, or by himself with the assent of the latter. But so far as the writer is aware, it is nowhere else held or intimated that such change may occur by the mere will of the minor and without the assent, express or implied, of those having authority over him. Contrast this case with Taunton *v.* Plymouth, *infra*, note 8.

[1] Intr. aux Cout. d'Orléans, no. 16. See also Merlin, Repertoire, *verb.* Dom. no. 5; Boullenois, Traité de la Personalité, etc., t. 2, obs. 32, and Denizart, *verb.* Dom. no. 9.

[2] Trammell *v.* Trammell, 20 Tex. 406.

[3] Dom. p. 50, no. 91; Id. Int. L. vol. iv. no. 126.

[4] Priv. Int. L. p. 36, no. 37.

[5] Priv. Int. Jur. p. 9.

occasion to consider it, inasmuch as there would be only one locality to which the domicil could possibly be attributed." In his second edition, Westlake [6] says: "If it is asked whether the condition of full age is necessary in the case of those who have once been emancipated by marriage, the answer will be that it must depend upon the personal law. A minor who, on marriage, is relieved by the law of his country from all incapacity, will, of course, be as capable for the purpose of changing his domicil as for any other purpose. Such, however, is not the law of England." And perhaps the true view could not be better stated than in his words.

Dicey [7] opposes the former view taken by Westlake, and declares that the reasoning, by which the suggested exception to the disability of the minor is supported, is unsatisfactory and unsound, inasmuch as "it involves some confusion between domicil and residence, and derives no support from the view taken by English law as to an infant's liability on his contracts, which is in no way affected by his marriage." He further holds the existence of the exception itself to be open to the gravest doubt. And certainly, unless we are prepared to hold that the place where a married man resides with his family is universally and necessarily the place of his domicil, there seems to be no good reason for attributing to a married minor the capacity to select for himself a domicil which is denied to an unmarried minor. This view is re-enforced by the Massachusetts settlement case of Taunton *v.* Plymouth, where it was held that a married minor cannot gain a settlement in a town by residence there.[8]

[6] Priv. Int. L. § 242, p. 274.

[7] Dom. pp. 106, 107.

[8] 15 Mass. 203. The following is the opinion of the court, delivered by Parker, C. J.: "The pauper for whose support the action is brought had no settlement in Plymouth, unless her father acquired one there by his residence for a year before the 10th of April, 1767. But to acquire a settlement by such residence, the party must be of full age during the term of his residence. It is agreed he was not of full age; but as he was married at Plymouth with the assent of his father, it is supposed that he became emancipated, so as to be capable of gaining a settlement by himself. Our laws, however, know of no such emancipation; or at least do not recognize such consequences of it. The marriage, in this case, may have removed the pauper's father, Abraham Tisdale, from the control of his father, and perhaps have given him a right, as against his father, to apply all his earnings to the support of his family. But it did not give him a capacity to make binding contracts,

§ 233. **Other Exceptions suggested.** — Pothier mentions[1] several other cases in which the minor is capable of changing his domicil; namely, (*a*) when he is provided with a benefice, or a charge, or other employment from which he is not removable, and which requires perpetual residence; or (*b*) when, with the consent of those under whose power he is, he establishes a house of commerce at a place. This last case has received some support in Great Britain from the Irish case of Stevens *v.* McFarland, the grounds of which, however, are somewhat obscure, and the case itself is inconclusive.

§ 234. **An Emancipated Minor an Exception under the French Code Civil.** — An emancipated minor may, under the modern French law, choose a domicil for himself. The Code provides:[1] "The minor not emancipated shall have his domicil at the home of his father and mother, or tutor;" and further, by its terms,[2] marriage operates as an irrevocable emancipation of a minor, and clothes him with large powers in the management of his affairs. By its terms also emancipation may be *conferred* upon a minor;[3] but this is revocable.[4]

§ 235. **The Domicil of the Minor follows that of his Father during the Life of the Latter.** — The father is the head of the family as long as he lives, and just as his domicil attracts to it that of his wife, so, too, it draws after it, through all of its changes, the domicil of his infant legitimate child.[1] This at-

beyond other infants; or any political or municipal rights, which do not belong by law to minors. We are all clear, therefore, that by his residence in Plymouth for the time mentioned, without being warned out, although married, he did not gain a settlement in that town; so that the present action cannot be maintained."

[1] Intr. aux Cout. d'Orléans, no. 16.

[1] Code Civil, art. 108.

[2] Id. art. 476, and authorities cited in notes of Sirey et Gilbert.

[3] Id. art. 477 *et seq.* and notes of Sirey et Gilbert.

[4] Id. art. 485 *et seq.* and notes of Sirey & Gilbert.

[1] Somerville *v.* Somerville, 5 Ves. Jr. 750; Forbes *v.* Forbes, Kay, 341; Goods of Patten, 6 Jur. (N. S.) 151; Sharpe *v.* Crispin, L. R. 1 P. & D. 611; Lamar *v.* Micou, 112 U. S. 452; Hart *v.* Lindsey, 17 N. H. 235; *Re* Hubbard, 82 N. Y. 90; Ryal *v.* Kennedy, 40 N. Y. Superior Ct. 347, affirmed 67 N. Y. 379; Crawford *v.* Wilson, 4 Barb. 504; Ames *v.* Duryea, 6 Lans. 155; *Ex parte* Dawson, 3 Bradf. 130; Blumenthal *v.* Tannenholz, 31 N.J. Eq. 144; Guier *v.* O'Daniel, 1 Binn. 349, note; School Directors *v.* James, 2 Watts & S. 568; Foley's Estate, 11 Phila. 47; Metcalf *v.* Lowther's Ex'rs, 56 Ala. 312; Kelley's Ex'r *v.* Garrett's Ex'rs, 67 id. 304; Mears *v.* Sinclair, 1 W. Va. 185; Wheeler *v.* Burrow, 18 Ind. 14; McCollum *v.* White, 23 id. 43; Freeport *v.* The Supervisors, 41 Ill. 495;

traction is the "conclusion or inference" which the law draws from the parental relation, and in general may be said to be wholly independent of the fact of the actual residence of the child.

So long as the child dwells with and is a member of the family of his father, it goes without saying that they have the same domicil.[2] Gibson, C. J., in the leading case of School Directors *v.* James, says: "No infant, who has a parent *sui juris*, can, in the nature of things, have a separate domicil. This springs from the *status* of marriage, which gives rise to the institution of families, the foundation of all the domestic happiness and virtue which is to be found in the world. The nurture and education of the offspring make it indispensable that they be brought up in the bosom, and as a part, of their parents' family; without which the father could not perform the duties he owes them, or receive from them the service that belongs to him. In every community, therefore, they are an integrant part of the domestic economy; and the family continues, for a time, to have a local habitation and a name, after its surviving parent's death. The parents' domicil, therefore, is consequently and unavoidably the domicil of the child."

§ 236. **Id. even though the Infant does not dwell with his Father.** — The result would be the same, even though father

Allen *v.* Thomason, 11 Humph. 536; Grimmett *v.* Witherington, 16 Ark. 377; Johnson *v.* Turner, 29 id. 280; Powers *v.* Mortee, 4 Am. L. Reg. 427; Hardy *v.* De Leon, 5 Tex. 211; Russell *v.* Randolph, 11 id. 460; Levy's Case, 2 Cong. El. Cas. 47; Story, Confl. of L. § 46; Wharton, Confl. of L. § 41; Dicey, Dom. pp. 6, 96, 97; Westlake, Priv. Int. L. 1st ed. p. 35, rule iii.; Id. 2d ed. § 237; Henry, For. L., citing Grotius, Int. to the Law of Holland, l. 2, pt. 26, no. 4; Burge, For. & Col. L. vol. i. p. 39; Foote, Priv. Int. Jur. p. 9; Denizart, *verb.* Dom. no. 9; Pothier, Intr. aux Cout. d'Orléans, no. 11; Calvo, Dict. *verb.* Dom.; Bouhier, Obs. sur la Cout. de Bourg. c. 21, p. 383, and c. 22, p. 447, ed. 1742; Merlin, Repertoire, *verb.* Dom. no. 5. And see Gout *v.* Zimmerman, 5 Notes of Cases, 440; Shrewsbury *v.* Holmdel, 42 N. J. Eq. 373; Madison *v.* Munroe, id. 493, and Adams *v.* Oaks, 20 Johns. 282.

[2] This qualification is sometimes made in stating the rule, apparently, however, for the purpose of guarding against too broad a statement. Thus in Gout *v.* Zimmerman, *supra*, Sir Herbert Jenner Fust lays it down that the domicil of an infant follows that of her father, "so long as she continues in his family and resides with him." But such qualification was not necessary for the decision of the case. See also Levy's Case, *supra*, where it is said that "the domicil of the father is the domicil of the son, during the minority of the son, if the son be under the control and direction of the father."

and child dwell apart. Although, as we have seen, this was not the rule in the Roman law, it is thoroughly settled in modern law that the domicil of the child follows the domicil of his father. If the child does not migrate with his father, it has never been held that the domicil of the former remains unchanged, neither has it been held that the father can set up for his child a domicil different from his own; and the language of the authorities is such and so strong that it seems impossible to put upon it any other construction than that the domicil of the child is necessarily that of the father,[1] at least

[1] See, *e. g.*, Story, Confl. of L. § 46; Westlake, Priv. Int. L. 1st ed. p. 35, rule iii.; Id. 2d ed. § 237; Burge, For. & Col. L. vol. ii. p. 39; Dicey, Dom. pp. 6, 96, 97; Bouhier, Obs. sur la Cout. de Bourg. c. 21, p. 383, ed. 1742; Calvo, Dict. *verb.* Dom. Gray, J., in Lamar *v.* Micou, quoted *infra*, § 241; Totten, J., in Allen *v.* Thomason, *supra;* and Von Hoffman *v.* Ward, 4 Redf. 244. Burge says (*loc. cit.*): "The domicil of the father, or of the mother, being a widow, is that of the child, and a change by either of those parents of their former domicil would necessarily operate as a change of the child's domicil." Westlake in his first edition lays down the rule: "The domicil of the unmarried infant, boy or girl, follows through all its changes that of the parent from whom it derived its domicil of origin;" and in his second edition, the following: "The domicil of a legitimate or legitimated unmarried minor follows that of his or her father, and the domicil of an unmarried minor born out of wedlock and not legitimate follows that of his or her mother through all the changes of such respective domicil." Calvo substantially repeats the latter passage from Westlake. Dicey says: "The domicil of a legitimate or legitimated infant is, during the lifetime of his father, the same as, and changes with, the domicil of his father." Bouhier says: "An infant has no other domicil than that of his father until he attains his majority, when he may select a domicil for himself" (c. 22, p. 447, ed. 1742). And again: "Although men have the liberty of changing their domicil as it pleases them, nevertheless, minors, who have not attained the age when they may use that liberty, are considered to be always dwelling in the domicil of their fathers, however long they may dwell elsewhere" (c. 21, p. 383). In Von Hoffman *v.* Ward, 4 Redf. 244, it was held that the domicil of an infant is necessarily that of his father, and that the separation of father and mother, the latter taking the child with her, does not overcome the presumption that the domicil of the father is that of the child. In Allen *v.* Thomason it is said: "If the parents change their domicil, that of the minor necessarily follows it, he being under their will and control, and without any power to choose a domicil for himself." The language of Gray, J., in Lamar *v.* Micou is perhaps as explicit upon this point as any that has been used. With these authorities Dr. Wharton is not in entire accord. He says (§ 41): "When the parents' domicil shifts, that of the minor child follows the change. But this rests upon the assumption that the child remains one of the parents' household. If he has been emancipated and by any process has acquired a domicil of his own, the rule does not apply." Conf., also Voet, Ad Pand. l. 5, t. 1, no. 100, quoted *infra*, § 238. The older continental authorities are apt to maintain the strictly Roman law idea, and there-

so long as the former remains in any manner under the guardianship and control of the latter.

§ 237. **Id. Possible Exception.** — A case may be supposed, however, in which it would seem unjust to apply this general rule of derivation; *e. g.*, where a father has abandoned his child and has emigrated to a foreign country or a distant State. Under extreme circumstances in such a case a court might, and probably would, refuse to seek in a distant land a domicil for the child with a parent who had been faithless to parental duty, or, if it did recognize such domicil, refuse to attach to it the usual legal consequences. And we might possibly go a step farther, and apply the same principle to cases of municipal domicil, where there has been desertion on the part of the father. But such doctrine would be applied, doubtless, only in extreme cases.

Upon the separation of the father and mother, the domicil of the father continues to be that of their child, even though the latter accompanies and dwells with his mother.[1]

§ 238. **Upon the Death of the Father the Domicil of the Infant follows that of his Mother.** — Upon the death of the father, usually the mother becomes the head of the family,[1] and it would seem but natural and proper that henceforth her infant children should depend upon her for their domicil, at least as long as she remains an independent person and capable of choosing her own domicil. And this, with certain qualifications and limitations, has generally been admitted, both by Continental and Anglo-American jurists,[2] although the question has been somewhat complicated by considering it along with the question of the power of a guardian to change the domicil of his minor ward. Indeed, little has been said against it, beyond

fore to hold the infant to be domiciled where he actually resides, with the assent of his parents.

[1] Von Hoffman *v.* Ward, *supra*.

[1] Pothier, Intr. aux Cout. d'Orléans, no. 18; Dedham *v.* Natick, 16 Mass. 135; Burrell Township *v.* Pittsburg, 62 Pa. St. 472.

[2] Voet, Ad Pand. l. 5, t. 1, no. 100; Bynkershoek, Quæst. Jur. Priv. l. 1, c. 16; Bouhier, Obs. sur la Cout. de Bourg. c. 2, p. 384, ed. 1742; Boullenois, Diss. de la Contrar. des Lois, quæst. 2, p. 61; Pothier, Intr. aux Cout. d'Orléans, no. 18; Burge, For. & Col. L. vol. i. p. 39; Westlake, Priv. Int. L. 1st ed. p. 35, rule iii.; Id. 2d ed. § 238; Dicey, Dom. pp. 6 and 96–100; Story, Confl. of L. § 46 and §§ 505, 506; Wharton, Confl. of L. § 41. But see *contra*, Bar, § 31, p. 97 (Gillespie's trans. p. 105). See also Denizart, *verb.* Dom. no. 9.

the denial implied in the assertion by some jurists that the infant child retains the domicil of the father after the death of the latter.[3] But this assertion has usually been made either carelessly, or in view of the fact of the father surviving the mother.

John Voet affirms the power of the mother as well as the father to change the domicil of the infant child: "Plane si etiamnum minorennis sit, patre vel matre vidua domicilium mutante, filium etiam videri mutasse, si et ipse translatus sit, nec ex prioris sed novi domicilii, a patre matreve recenter constituti, jure censeri in dubio debere, rationis est."[4] So also does Pothier,[5] speaking with his usual clearness and force. After denying the power of the guardian to change the domicil of his ward, he says: "It is not the same with the mother; the parental power being, in our law, different from that of the Roman law, common to the father and mother, the mother, after the death of her husband, succeeds to the rights and the quality of head of the family which her husband had with regard to their infant children. Her domicil, wherever

[3] Harkins *v.* Arnold, 46 Ga. 656; Grimmett *v.* Witherington, 16 Ark. 377; Johnson *v.* Turner, 29 id. 280; Hardy *v.* De Leon, 5 Tex. 211; Trammell *v.* Trammell, 20 id. 406; Powers *v.* Mortee, 4 Am. L. Reg. 427. Some of these authorities, however, distinctly admit the power of the mother to change the domicil of her infant child. See particularly Harkins *v.* Arnold and Powers *v.* Mortee. Moreover, they all directly or indirectly rely upon the following passage from Story: "Minors are generally deemed incapable, *proprio marte*, of changing their domicil during their minority, and therefore they retain the domicil of their parents; and if the parents change their domicil, that of the infant follows it; and if the father dies, his last domicil is that of the infant children" (Confl. of L. § 46). Taken altogether, this passage hardly warrants the inference that the learned commentator intended to deny the power of the surviving mother to affect the domicil of her infant child. If such, however, was his meaning, he is not borne out by the authorities which he cites, among whom are Pothier and John Voet, who distinctly maintain the opposite view; as also does the learned editor of the eighth edition of Story's work, p. 48, note (c). Denizart (*verb.* Dom. no. 9) apparently denies the power of the widow (see *infra*, § 251.)

[4] Ad Pand. l. 5, t. 1, no. 100. He qualifies this, however, by holding that the translation of domicil must be without fraudulent design to alter the personal succession of the infant.

[5] Intr. aux Cout. d'Orléans, no. 18. He adds: "There would be fraud if there appeared no other reason for the translation than that of procuring some advantages in the movable succession of her infants." Bouhier, however, holds that father, mother, or other ascendant, may change the domicil of a minor, because, by reason of their tender love, every fraudulent presumption is excluded (c. 22, p. 442, ed. 1742).

she determines to transfer it without fraud, ought then to be that of her infant children until they are able to choose one for themselves."

§ 239. **Id. British Authorities — Potinger v. Wightman.** — In England the question arose in the case of Potinger *v.* Wightman[1] at the Rolls before Sir William Grant, who held the mother competent to change the domicil of her children. It is true that she had been appointed, by the court of the domicil of the children, their guardian. His Honor, however, seems to have laid little stress upon this fact, but to have held the mother's competency *qua* mother. The facts were that the father, a native of England, died, domiciled in the Island of Guernsey, leaving a widow (pregnant of a child, who was afterwards born) and seven infant children, living at the time of his decease, four of them being his children by a former marriage. The widow was appointed, by the Royal Court of Guernsey, guardian of her own infant children, and afterwards removed to England, bringing them with her. Upon the subsequent death of two of her children in infancy, the question arose as to the distribution of their personal estate, — whether it was distributable according to the law of Guernsey where their father was domiciled at the time of his death, or according to that of England where their mother had subsequently become domiciled. In delivering his opinion, the learned Master of the Rolls said: "Here the question is, whether, after the death of the father, children remaining under the care of the mother follow the domicil which she may acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority is certainly in favor of the former proposition; it has the sanction both of Voet and Bynkershoek; the former, however, qualifying it by a con-

[1] 3 Mer. 67. The case was argued upon the foreign authorities and the cases of settlement under the English poor-laws. Among others the following cases hold that, after the death of the father, the settlement of the surviving mother is communicated to her unemancipated minor children: Inhabitants of Woodend *v.* Inhabitants of Paulspury, 2 Ld. Ray. 1473; s. c. Stra. 766; Rex *v.* Inhabitants of Barton Turfe, Burr. Sett. Cas. 49; Rex *v.* Inhabitants of Oulton, id. 64; Cumner *v.* Milton, 3 Salk. 259; Parish of St. George *v.* Parish of Catharine, 1 Sett. Cas. 72.

dition, that the domicil shall not have been changed, for the fraudulent purpose of obtaining an advantage by altering the rule of succession. Pothier, whose authority is equal to that of either, maintains the proposition as thus qualified. There is an introductory chapter to his treatise on the Custom of Orleans, in which he considers several points that are common to all the customs of France, and, among others the law of domicil. He holds, in opposition to the opinion of some jurists, that a tutor cannot change the domicil of his pupil; but he considers it as clear that the domicil of the surviving mother is also the domicil of the children, provided it be not with a fraudulent view to their succession that she shifts the place of her abode; and he says that such fraud would be presumed, if no reasonable motive could be assigned for the change. There never was a case in which there could be less suspicion of fraud than the present. The father and mother were both natives of England; they had no long residence in Guernsey; and, after the father's death, there was an end of the only tie which connected the family with that island. That the mother should return to this country, and bring her children with her, was so much a matter of course, that the fact of her doing so can excite no suspicion of an improper motive; and I think, therefore, the Master has rightly found the deceased children to have been domiciled in England. It is consequently by the law of this country that the succession to their personal property must be regulated."

This is the leading case upon the subject, and was declared by Lords Lyndhurst and Campbell, in Johnstone *v.* Beattie,[2] to be conclusive as to the mother's power to change the domicil of her minor children. The question has never since been

[2] 10 Cl. & F. 42. In the course of the argument Lord Lyndhurst, interrupting counsel who was attempting to explain Potinger *v.* Wightman upon the ground that the mother was also the guardian, said (p. 66): "The case of Potinger *v.* Wightman appears to have been well argued and well considered, and must be held conclusive as to the mother's power to change the domicil, — which is a novel point in the law of England, — unless there is some opposite decision." None, however, was adduced. Lord Campbell in delivering his opinion said (p. 138): "I think that the case of Potinger *v.* Wightman must be taken conclusively to have settled the general doctrine, that if after the death of the father an infant lives with her mother, and the mother acquires a new domicil, it is communicated to the infant."

re-opened in England. Lord Penzance, however, took occasion to say in the late case of Sharpe *v.* Crispin,[3] that, "The better opinion seems to be that, after the father's death, the mother may, by changing her domicil, affect the domicil of her minor children;" thus apparently going somewhat beyond the doctrine of Potinger *v.* Wightman, if the effect of that decision be strictly limited to the facts of the case, — namely, when the child accompanies the mother to her new place of abode.

In Scotland, in Arnott *v.* Groom,[4] the power of the mother was affirmed under circumstances somewhat similar to those of Potinger *v.* Wightman. The father, a Scotchman by birth, was an officer in the service of the East India Company, and therefore had an Anglo-Indian domicil. Upon his death his wife returned from India to Scotland, taking with her her infant daughter, aged about one year. The domicil of the child was subsequently held to be Scotch.

§ 240. **Id. American Authorities.** — The mother's power has been repeatedly affirmed in the American decisions,[1] the latest expression being by the Supreme Court of the United States, in Lamar *v.* Micou, where Gray, J., in delivering the opinion of the court, says: "As infants have the domicil of their father, he may change their domicil by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicil, change the domicil of the infants; the domicil of the children, in either case, following the independent domicil of their parent."

§ 241. **Id. Does the Domicil of the Infant necessarily follow that of his Widowed Mother, or may the Latter change hers without affecting that of her Infant Child?** — But how far the relation between the domicil of the mother and that of her child ex-

[3] L. R. 1 P. & D. 611.

[4] 9 D. (Sc. Sess. Cas. 2d ser. 1846) 142.

[1] Lamar *v.* Micou, 112 U. S. 452; Dedham *v.* Natick, 16 Mass. 135; Ryal *v.* Kennedy, 40 N. Y. Superior Ct. 347; Brown *v.* Lynch, 2 Bradf. 214; *Ex parte* Dawson, 3 id. 130; School Directors *v.* James, 2 Watts & S. 568; Harkins *v.* Arnold, 46 Ga. 656; Mears *v.* Sinclair, 1 W. Va. 185; Allen *v.* Thomason, 11 Humph. 536; Lacy *v.* Williams, 27 Mo. (6 Jones), 280; Succession of Lewis, 10 La. An. 789; Powers *v.* Mortee, 4 Am. L. Reg. 427. See also Bradford *v.* Lunenburgh, 5 Vt. 481, and Oxford *v.* Bethany, 19 Conn. 232.

tends does not seem to be well settled. The language of Gray, J., above quoted, and similar language used by others, seems to place the father and the surviving mother on the same footing with respect to the domicil of their infant children.[1] But, as we have seen, the domicil of the minor child follows that of his father, although the child does not accompany his father to the new abode of the latter. Would the same doctrine apply to the case of the surviving mother? In other words, is there anything in the relation of mother and child which raises a conclusive presumption of identity of domicil, notwithstanding the fact that they dwell apart? It has been said by respectable authority[2] that, "Where nothing

[1] Sharpe *v.* Crispin, *supra;* Lamar *v.* Micou, *supra;* Ryal *v.* Kennedy, *supra;* School Directors *v.* James, *supra;* Mears *v.* Sinclair, *supra;* Allen *v.* Thomason, *supra;* Powers *v.* Mortee, *supra;* Pothier, Intr. aux Cout. d'Orléans, no. 18; Burge, vol. i. p. 38; see also Story, § 46.

[2] Brown *v.* Lynch, *supra.* The facts were, that after the death of the father, who was domiciled in New York, the mother returned to her former home in Connecticut, taking with her their infant child. She subsequently married and removed with her second husband to New York, leaving her child with his grandmother in Connecticut. Upon these facts the Surrogate (Bradford) properly held the child to be domiciled in the latter State. The reasoning, however, by which he reached this conclusion is peculiar, and cannot be reconciled with that of other authorities hereafter to be referred to (*infra*, § 244, and notes), inasmuch as his reasoning is based upon the power (which for the purpose of his argument he assumes) of the re-married mother to fix the domicil of her infant child; whereas the true ground appears to be that the domicil of the child remains *in statu quo, ex necessitate*, because there is no longer any independent domicil for it to follow. Following is the opinion of the Surrogate: "There has been much learned discussion in relation to the residence of minors, especially among the civilians. Authorities of great weight and distinction have differed materially as to the manner in which a change of the minor's domicil may be effected, particularly as to the power of the guardian, or of the mother after the decease of the father (Phillimore on Domicil, § 57). I have no doubt, however, that the weight of modern authority is in favor of the proposition that the surviving mother may change the domicil of her minor children, provided it be without fraudulent views to the succession of their estate. This power did not exist in the Roman law, which may account for the resistance it has met. It is supported by the authority of Bynkershoek, Voet, and Pothier, Sir William Grant, Justice Story, and Chancellor Kent (Potinger *v.* Wightman, 3 Merivale, 67; 2 Kent's Comm. pp. 227, 430; Burge's Comm. 1, p. 39). To state, however, that the residence of the mother is necessarily the residence of the child is too broad a position; for the power of effecting the change may very well exist without being exercised, and the mother's residence may be altered, while at the same time she refuses to alter that of the child. Where, however, nothing more appears than the removal in fact of the mother and her children from one abode to another, the presumption would be that the domicil of the child has followed that of the parent. Applying these prin-

more appears than the removal in fact of the mother from one abode to another, the presumption would be that the dom-

ciples to the present case, it appears that the residence of the minor, Thomas R. Lynch, which, at the decease of his father, was in the city of New York, became changed to the State of Connecticut by the removal of his mother. The family establishment in this city was broken up, and she returned to the residence of her mother, the place of the nativity, and the State where she and her husband were domiciled at the time of their marriage. There certainly could have been no doubt then, and during the years that elapsed before her second marriage, that the child resided in Connecticut. That the mother should return to her home, after the only tie was dissolved which had bound her to a residence in New York, was the most natural thing in the world. All her interests and attachments were manifestly centred there; and after her removal, that must undoubtedly be considered as the place of her permanent abode. The domicil she had acquired in New York, by the occasion of the removal of her husband here after marriage, ceased, and her original domicil was restored. The case is obviously stronger than a change of domicil to some entirely new place of abode. But she marries again, and leaves Hartford to reside at New York with her husband. It is a universal maxim that the wife takes the domicil of the husband (Digest, 50, 1, 37; Code, 12, 1, 13, 10, 40, 9; Warrender *v.* Warrender, 9 Bligh, 89). But was the residence of the minor changed by that act? In the first place, if it were true that the domicil of the minor follows that of the surviving mother, *on her second marriage*, it seems to me plain that it is not a matter of legal necessity. The mother is not *compelled* to change the residence of her child. She may, from wise and prudential motives respecting the comfort, happiness, or education of her offspring, determine not to change his residence. And if such determination be evinced and acted upon, the inference that might be drawn, that the domicil of the child followed that of the parent, is rebutted and destroyed. The ordinary presumption of law (if it existed in such a case) would give way before express and positive acts subversive of all inferences and presumptions. If, while the mother continues in her widowhood, it is within the scope of the parental authority, when she changes her own domicil, not to change that of her child, the moral reasons for such a power would be much stronger in the event of a second marriage, supposing she still retained any capacity to effect a change of her own domicil. But she does not. By the act of marriage she takes the domicil of the husband; and to hold that the domicil of the child is drawn after hers, would be to establish an arbitrary train of sequences unsupported by reason. The mother subjects herself to the control of another husband, and adopts his home; and when she ceases to occupy an independent position as the head of the family, she cannot delegate to another a personal trust residing in her for the welfare of her children. I have no hesitation in saying that the proposition is unsound which maintains, as a necessary legal consequence, that the domicil of the child follows that of the step-father. Children, says Pothier, have the domicil their mother establishes, without fraud, so long as, remaining in widowhood, she preserves the quality of chief of the family; but when she re-marries, and thus acquires the domicil of her second husband, into whose family she passes, the domicil of the second husband does not become that of the children, who do not pass into the family of their step-father, but preserve their domicil where their mother had hers before she re-married, as they would have preserved it had she died (Pothier, Intr. aux Cout. p. 9, § 19; see Inhabitants of Freetown *v.* Inhabitants

icil of the child has followed that of the parent." But this appears to be nothing more than a presumption of fact, for in the same case it is said: "To state, however, that the residence of the mother is necessarily the residence of the child, is too broad a position; for the power of effecting a change may very well exist without being exercised, and the mother's residence may be altered, while at the same time she refuses to alter that of the child." But in this case the infant did accompany his widowed mother in her change of residence, and his domicil was held to have followed hers. The statement above quoted must be looked upon, therefore, as a mere statement of opinion, without reference to the facts of the case.

By other authorities, however, the dependence of the domicil of the child upon that of his widowed mother has been affirmed, with the proviso that the child accompany the mother to her new place of abode.[3] But is this essential, or is it

of Taunton, 16 Mass. R. 52; School Directors *v.* James, 2 Watts & Serg. 568). It may be said that these principles apply only to the domicil so far as relates to the question of succession, and that the *forum* of the minor is that of the surviving mother or guardian. Even if that were so, I think that on the decease of the mother it was restored to the place of the minor's domicil. But, however that may be, the jurisdiction of the Surrogate expressly depends, by the terms of the statute, on the *residence* of the minor. Here, in the lifetime of the mother, the court of the place where the minor had his domicil appointed the step-father guardian; and neither the mother nor guardian ever changed the residence of the child, in fact, or applied to the *forum* of the parents for judicial action. The actual and the legal domicil of the minor, and the *forum* appealed to, all unite to fix the place of residence in Connecticut, and not in this State. The mother, on her second marriage, came to an understanding with her husband that the boy should make his home with the grandmother, in whose house he had been living; and the subsequent conduct of the parties was invariably in harmony with this understanding. The arrangement was in consonance with the law and the rights of the minor, and was never disturbed. I am therefore of opinion that, on the marriage of his mother, the child's residence was not, by legal consequence, changed from Connecticut to New York, because his mother acquired the domicil of her second husband; and that if such change would have been effected in the absence of a contrary arrangement, it would have been prevented by the acts and conduct of all the parties, and the continued residence in fact, of the minor, in the State of Connecticut. The letters of guardianship issued by me must therefore be revoked."

[3] *E. g.*, Harkins *v.* Arnold, 46 Ga. 656; Voet, Ad Pand. l. 5, t. 1, no. 100; Wharton, § 41, and apparently Westlake, 1st ed. p. 35. Upon this point Dicey, pp. 98, 99, thus enlarges: "Difficult questions may, however, be raised as to the effect of a widow's change of domicil on that of her children, where she is not their guardian. Such questions may

stated merely out of an abundance of caution? Can she by carrying with her, or leaving behind her, her minor child, change or not his domicil, as she sees fit, while herself acquiring a new one? No direct answer has been given to this question by any authoritative decision, and the conflicting language of the courts, and of text-writers, leaves it an open one, although the weight of authority seems to be in the negative.[4] But furthermore, assuming that she can leave *in statu quo* the domicil of her infant child while changing her own, can she change his by sending him to reside at some new place, without at the same time changing her own? The two cases are not identical; for it will readily be seen that it is one thing for an English mother to leave her child domiciled in England, while she herself changes her domicil to France or one of the American States, or for a Pennsylva-

refer to the two different cases of infants who reside, and of infants who do not reside, with their mother. *First*, Suppose that an infant resides with his mother, who is not his guardian. The question may be raised whether the domicil of the infant is determined by that of the mother or by that of the guardian. No English case decides the precise point, but it may be laid down with some confidence that (even if a guardian can in any case change the domicil of his ward) yet the domicil of a child living with his mother, while still a widow, will be that of the mother and not of the guardian. *Secondly*, Suppose that an infant resides away from his mother, who is not his guardian. The question whether it is on his mother or his guardian that the change of the child's domicil depends, presents some difficulty. In the absence of decisions on the subject, it is impossible to give any certain answer to the inquiry suggested. It is quite possible that, whenever the point calls for decision, the courts may hold that there are circumstances under which an infant's domicil must be taken, even in the lifetime of the mother, to be changed by the guardian. These questions, and others of a similar character, really raise the general inquiry whether, as a matter of law, an infant's domicil is identified with that of the infant's widowed mother, to the same extent to which it is identified with that of his father during the father's lifetime. It may be doubted whether the courts would not under several circumstances hold that an infant, in spite of a change of domicil on the part of the child's mother, retained the domicil of his deceased father. Still, in general, the rule appears to hold good that the domicil of an infant whose father is dead changes with the domicil of the child's mother."

[4] Additional strength is given to the negative by the position taken by the authorities hereafter to be referred to; namely, that a minor does not take the domicil which his mother gains by a second marriage, even though he follows her to her new home and continues to reside with her there. The inference thence to be drawn is that the question whether the domicil of a minor, who has lost his father, is the same as that of his mother, does not depend upon the fact of their residing together, but upon something else, — to wit, probably the relation of the mother to her infant child as the head of the family to which he belongs.

nia mother to leave her child domiciled in that State, while she herself removes to Massachusetts; and quite another for a mother, by sending her child to another State or country, without herself accompanying him, to confer upon him a domicil there. In the one case she would be merely leaving *in statu quo* a dependent domicil derived by the child from herself or his father, and in the other she would be conferring upon him an entirely new domicil, and one which would be independent of the domicil of any one else. The latter position has, the writer believes, never been affirmed with respect to the father, and *a fortiori* can scarcely be held with respect to the mother.

§ 242. **Id. Is the Qualification that the Mother must "act without Fraud," a Valid One?** — Another qualification is frequently put by the authorities. It is frequently said that the surviving mother may change the domicil of her children, *if she act without fraud.* This qualification is stated by numerous jurists, and in many of the cases;[1] and the particular fraud, which is usually feared and pointed out to be guarded against, is a fraudulent attempt to alter the distribution of the infant's personal estate. The language which they use is applicable as well to the father as to the mother. But the authorities differ among themselves as to the extent to which such fraudulent intent must be shown, Pothier, perhaps, taking the most extreme position of any. He says: "There would be fraud if there should appear no other reason for the translation of her domicil than that of procuring some advantage in the personal succession of her infants;" thus, apparently, throwing the burden of proof, to show good faith on the part of the mother, upon those alleging the change of the child's domicil. John Voet puts the case of a minor who is in ill health at the time of his removal, and holds that such circumstance would of itself be indicative of fraud, if by the change of domicil the succession is altered.

[1] Potinger *v.* Wightman, *supra;* School Directors *v.* James, *supra;* Brown *v.* Lynch, *supra;* Ryal *v.* Kennedy, *supra;* Harkins *v.* Arnold, *supra;* Carlisle *v.* Tuttle, *supra;* Voet, *supra;* Pothier, *supra;* Burge, For. & Col. L. vol. i. p. 39. Bouhier holds, however, that on account of the "tendresse" of the parent for the child, fraud is not to be presumed (c. 22, p. 442, ed. 1742). Dicey states the qualification, but considers its existence open to doubt. Dom. p. 104.

§ 243. **Id. id.** — But with submission to the great learning and ability of the jurists who have held the opinion just referred to, it seems to the writer all important to distinguish between a change of domicil and the legal consequences of such a change. For it is one thing to hold that a change has taken place, and another thing to restrain the legal consequences of such change in the interests of justice, so that the fraud which was designed shall not be consummated. Suppose that, for the purpose of affecting the personal succession, a mother carries with her her infant child into another State or a foreign country, and the child, instead of dying there, should live and grow up to maturity. Can it be doubted that his general legal capacity would be determined by the laws of the new place? Can it be doubted that his personal property would be taxable there, etc.? If negative answers are given to these questions, they must be given upon the assumption that a change of domicil has taken place; and yet, as we have seen, a person cannot have a separate domicil for each particular purpose to which the principle of domicil is applicable. It seems, therefore, more logical to hold that, while courts would interpose to defeat the fraudulent design with which a parent had attempted to change the domicil of his or her infant child, they would not do so upon the ground that the change of domicil had not been accomplished, but rather upon the ground that, in the particular case, the usual legal effect could not be given to the change of domicil, so as to assist in the perpetration of the fraud.

§ 244. **The Power of the Mother does not extend beyond her Widowhood.** — But the surviving mother is capable of changing the domicil of her infant children only during her widowhood.[1] Upon her re-marriage, she loses her headship of the

[1] Lamar v. Micou, 12 U. S. 452; Ryal v. Kennedy, *supra*; *Ex parte* Dawson, 3 Bradf. 130; School Directors v. James, *supra*; Harkins v. Arnold, *supra*, per Montgomery, J.; Johnson v. Copeland, 35 Ala. 521; Mears v. Sinclair, *supra*; Allen v. Thomason, *supra*; Pothier, Intr. aux Cout. d'Orléans, no. 19; Phillimore, Dom. no. 62; Burge, For. and Col. L. vol. i. p. 39; Wharton, Confl. of L. § 41. See also the following settlement cases: Bradford v. Lunenburgh, 5 Vt. 481; Freetown v. Taunton, 16 Mass. 52; Walpole v. Marblehead, 8 Cush. 528; Oxford v. Bethany, 19 Conn. 229. Brown v. Lynch, *supra*, is also an authority on this point to the extent of holding that the domicil of the child does not necessarily follow that of his re-married mother. In

family of her former husband, and passes under the power of her second husband. Her domicil merges in his, and she is no longer legally competent to exercise the choice necessary for the establishment of a domicil. Her domicil is now itself derivative, and is, therefore, no longer capable of being communicated to her minor children. They retain the last domicil which they had during her widowhood.[2] Says Pothier: "But when she re-marries, although she acquires the domicil of her second husband, into whose family she passes, this domicil of her second husband will not be that of her infant children, who do not pass, as she does, into the family of their step-father. This is why they are considered to continue to have their domicil at the place where their mother had hers before she re-married, just as they would be considered to preserve it if she were dead." Gibson, C. J., in the case already quoted from, says: "A husband cannot properly be said to stand in the relation of a parent to his wife's children by a previous marriage, where they have means of support which are independent of the mother, in whose place he stands for the performance of her personal duties; because a mother is not bound to support her impotent children so long as they are of ability to support themselves. Neither can they derive the domicil of a subsequent husband from her, because her new domicil is itself a derivative one, and a consequence of the merger of her civil existence. Her domicil is his, because she has become a part of him; but the same thing cannot

Wheeler *v.* Hollis, 19 Tex. 522, Wheeler, J., takes the contrary view, and argues strongly and at length in favor of the power of the re-married mother to change the domicil of her minor child by her former marriage. In that case, however, the step-father was the guardian, and the court appears to put its decision upon the combined power of the guardian and the re-married mother to change the domicil of the child. See *infra*, § 258, note 6. See also Succession of Lewis, 16 La. An. 789, where it was held that a re-married mother, who was also the guardian of her child, might change the domicil of the latter. The child accompanied her mother to her new place of abode. To the same effect see Succession of Winn, 3 Rob. (La.) 303, where the mother, who had been confirmed as natural tutrix of her minor children, re-married, and the court held that both the mother herself and her minor children acquired immediately, by the very fact of the marriage, a domicil in the parish of the second husband. But this was put upon the peculiar provisions of the Louisiana Code.

[2] Lamar *v.* Micou, *supra*; School Directors *v.* James, *supra*; Pothier, Intr. aux Cout. d'Orléans, no. 19; Burge, *supra*; and generally the authorities cited in the last note, except Wheeler *v.* Hollis and the Louisiana cases.

be said of her children. Having no personal existence for civil purposes, she can impart no right or capacity which depends on a state of civil existence; and the domicil of her children continues, after a second marriage, to be what it was before it." In a West Virginia case[3] it was held that the domicil of the children of a re-married mother did not follow hers, even though she had been appointed by the will of their father their testamentary guardian.

It makes no difference that they continue to reside with her;[4] she has passed into another family, into which they do not follow her; and although they may reside with the family of their step-father, they do not become a part of it, and are not subject mediately or immediately to his control.

§ 244 *a*. **Domicil of Illegitimate Children.** — With respect to the illegitimate child, it is not only true that he takes his domicil of origin from his mother, but also that his domicil follows hers throughout all its changes, at least so long as she remains unmarried.[1] In France, however, the domicil of the natural child is held to depend upon his recognition by his parents, and follows the domicil of the parent who recognizes him.[2]

§ 245. **Upon the Death of both Parents, an Infant may acquire the Domicil of a Grandparent.** — Upon the death of his parents, the infant usually retains the last domicil which they, or the survivor of them, had;[1] but this is not always true. In the

[3] Mears *v.* Sinclair, *supra*.

[4] Lamar *v.* Micou, *supra*; Johnson *v.* Copeland, *supra*; Mears *v.* Sinclair, *supra*; Harkins *v.* Arnold, *supra*; Allen *v.* Thomason, *supra*.

[1] Savigny, System, etc. § 353 (Guthrie's trans. p. 100); Story, Confl. of L. § 46; Westlake, Priv. Int. L. 1st ed. nos. 35, 36; Dicey, Dom. pp. 4, 6, 97, 98; Wharton, Confl. of L. 37. This subject has been discussed in a number of American settlement cases, but as the discussion was put almost exclusively upon statutory grounds, they can hardly be said to furnish much authority upon the general principle.

[2] Duranton, Cours de Droit Français, t. 1, no. 368; Delvincourt, Cours de Code Civil, t. 1, p. 39; Demolombe, Cours de Code Napoléon, t. 1, no. 361; Laurent, Principes de Droit Civil Français, t. 2, no. 88; Mersier, Traité, etc., des Actes de l'État Civil, no. 138.

[1] School Directors *v.* James, *supra*; *Re* Lower Oxford Township Election, 11 Phila. 641; Matter of Afflick's Estate, 3 MacAr. 95; Harkins *v.* Arnold, *supra*; Hiestand *v.* Kuns, 8 Blackf. 345; Warren *v.* Hofer, 13 Ind. 167; Powers *v.* Mortee, 4 Am. L. Reg. 427; Grimmett *v.* Witherington, 16 Ark. 377; Johnson *v.* Turner, 29 id. 280; Hardy *v.* De Leon, 5 Tex. 211; Trammell *v.* Trammell, 20 id. 406; Story, Confl. of L. § 46; and see authorities cited *supra*, § 238, note 3.

late case of Lamar *v.* Micou[2] (on petition for a re-hearing), the Supreme Court of the United States held the domicil of infants, whose parents were both dead, to be changed by their going into another State to reside with their grandmother. Gray, J. (having held, when the case was previously before the court, that the ward derives his domicil from his natural guardian, and from none other), said: "Although some books speak only of the father, or, in case of his death, the mother, as guardian by nature, it is clear that the grandfather or grandmother, when the next of kin, is also such a guardian. In the present case, the infants, when their mother died and they went to the home of their paternal grandmother, were under ten years of age; the grandmother, who appears to have been their only surviving grandparent, and their next of kin, and whose only living child, an unmarried daughter, resided with her, was the head of the family; and upon the facts agreed, it is evident that the removal of the infants, after the death of their parents, to the home of their grandmother in Georgia, was with Lamar's [their guardian's] consent. Under these circumstances there can be no doubt that, by taking up their residence with her, they acquired her domicil in that State." The Supreme Court of Georgia, in Darden *v.* Wyatt,[3] held that the maternal grandfather of an infant, whose parents were both dead, might change the residence of the infant from one county to another, so as to vest in the ordinary of the latter county jurisdiction to appoint a guardian.

It must be observed, that in both of these cases the infant became actually resident with the grandparent, and a part of the family of the latter. Whether the power of the grandparent would extend to an infant not dwelling with such grandparent, may well be doubted. In a Louisiana case, minors were, by a family arrangement, taken from the State of Louisiana, where their parents had died domiciled, and

[2] 114 U. S. 218.

[3] 15 Ga. 414. Bouhier lays it down that the father, mother, *or other ascendant* may change the domicil of a minor, because, from their "tendresse," every fraudulent presumption is excluded (c. 22, p. 442, ed. 1742). To the contrary, however, apparently, is Marheineke *v.* Grothaus, 72 Mo. 204; although that case seemed to turn mainly upon the construction of a statute, still it can scarcely be reconciled with Lamar *v.* Micou, and Darden *v.* Wyatt. See further, Warren *v.* Hofer, *supra*.

placed to live with their father's brother and sister in other States, their paternal grandfather being alive and taking part in the arrangement. Upon these facts it was held that their domicil remained unchanged.[4] The case turned largely, however, upon a construction of the Louisiana Code.

As between two ancestors of equal degree, probably that one would have the power to change the domicil who first got possession of the infant, and with whom the latter actually resided.[5]

[4] Succession of Stephens, 19 La. An. 499.

[5] This is in accordance with the doctrine laid down by Mr. Hargrave, respecting guardianship by nature. After pointing out that much looseness exists in the books upon this subject, he says: "It seems that not only the father, but also the mother and every other ancestor may be guardians by nature, though with considerable differences, such as denote the superiority of the father's claim. The father hath the *first* title to guardianship by nature, the mother the second; and as to other ancestors, if the same infant happens to be heir apparent to two, as to both a paternal and a maternal grandfather, perhaps in this equality of rights priority of possession of the infant's person may decide the preference, according to the general rule, *in æquali jure melior est conditio possidentis.*" Co. Litt. Harg. & But. ed. 88 b, note 12. He further points out, however, that, "According to the *strict* language of our law, only an *heir apparent* can be the subject of guardianship by nature; which restriction is so true, that it hath even been doubted whether such a guardianship can be of a daughter, whose heirship, though denominated *apparent*, yet, being liable to be superseded by the birth of a son, is in *effect* rather of the *presumptive* kind. 3 Co. 38 b. ante 84 a. Therefore when the *guardianship by nature* is extended to children *in general*, or to any besides such as are *heirs apparent*, it is not conformable to the legal sense of the term amongst us, but must be understood to have reference to some rule independent of the common law. Thus, when in chancery the father and mother are styled the *natural* guardians of *all* their children born in marriage, or of *any* of their illegitimate issue, we should suppose those who express themselves so generally to refer to that sort of guardianship which the order and course of nature, as far as we are able to collect it by the light of reason, seem to point out, and to mean that it is a good rule to regulate the guardianship by, where *positive* law is silent, and it is in the discretion of the Lord Chancellor to settle the guardianship. So, too, when Lord Coke says that the custody of a *female* child under *sixteen*, to which the father, and after his death the mother, is entitled by the provisions of the statute of the 4 & 5 Philip and Mary, is *jure naturæ*, we should understand him to mean, not that such a custody was a *guardianship by nature* recognized by our common law, but merely that it was a statutory guardianship adopted by the Legislature in conformity to the dictates of nature, and upon principles of general reasoning." He concludes, therefore, that it is only of the *heir apparent* that the parent has the right to the custody until the age of twenty-one years, the law giving the custody of other children to their parents until the age of fourteen by the guardianship of *nurture*. But the nice distinctions of the common law upon this subject are not observed in this country, and "as all the children, male and female, equally inherit with

§ 246. **Domicil of an Apprentice.** — In Maddox *v.* The State,[1] a case involving the right to vote (in which class of cases residence, as we have seen, is equivalent to domicil), the Supreme Court of Indiana held that: "The residence of the master is the residence of the apprentice, for every purpose known to the law, and whilst a minor, the apprentice could not, by leaving his master and going to another State, change that residence."

§ 247. **Adopted Child.** — By adoption, as it is practised in many of the States of this Union, the adopted child passes into the family and under the control of the person or persons adopting him, and in his relations with them enjoys most of the rights and is subject to most of the duties which belong to a child born in lawful wedlock. It would seem to follow that such child, upon adoption, would receive as his own the domicil of his adoptive parents, and that his domicil would follow theirs throughout his infancy, in the same manner as if he were their child by nature. But reasonable as this conclusion appears, the writer has not been able to find any authority decisively in point.

The Roman law, under which adoption was extensively practised, is silent with regard to its effect upon domicil, although it treats of its effect upon *origo*, imposing upon the adopted son a double citizenship; viz,[1] both that of his father and that of the person adopting him. This rule was doubtless due to a desire to prevent a person from exchanging the more grievous burdens of one community for the lighter burdens of another. Therefore, while the Roman law refused to relieve an adopted person from the burdens which belonged to him by reason of his natural parentage, it considered the relationship of the adopting and adopted persons so close that it imposed upon the latter the citizenship, with all its grievous incidents, of the former. Probably the explanation of the silence of the Roman law with regard to the effect of adoption upon domicil is found in the fact, that, by that law, the domicil of the child did not necessarily follow that of his father by nature; and

us, the guardianship by nature would seem to extend to all the children." 2 Kent's Comm. 220.

[1] 32 Ind. 14.

[1] See *supra*, § 3, note 5.

hence could scarcely be held to follow that of his adoptive father. We have, therefore, no light from that law upon our subject, except such as is drawn by the *a fortiori* argument from the effect of adoption upon citizenship, keeping in view the altered modern rule of the dependence of the domicil of the child upon that of his parent.

After the downfall of the Roman Empire, adoption fell into desuetude in most of the European countries, especially in those (notably France and the Low Countries)[2] from which we have received the ablest and most elaborate discussions of the conflict of laws. As might be expected, these discussions are silent upon our subject. The Code Civil,[3] however, provides for adoption, as do the positive laws (some of them lately enacted) of many of the other European States. But while the jurists of these countries have considered its effect upon naturalization with somewhat conflicting results, they appear to be silent on the subject of its effect upon domicil.

§ 248. Id. — In this country, in the Massachusetts case of Ross *v.* Ross,[1] the language of Gray, J., in delivering the opinion of the court, incidentally assumes, that where the adoptive father has changed his domicil from one State to another, taking with him his adopted child, the domicil of the latter is thereby changed. In Foley's Estate,[2] in the Philadelphia Orphans' Court, a briefly reported case in which the question was as to the distribution of the personal estate of a minor, Dwight, J., said: "The decedent was a minor at the

[2] Denizart (*verb.* Adoption) says that adoption had place in France under the first race of kings, but subsequently fell into disuse even in the "pays de droit écrit," prior to the promulgation of the Code Napoléon, only a single custom in the realm permitting it; and even in that case the consequences of the adoption being restrained to the territory of that custom. See also Merlin, Repertoire, *verb.* Adoption; Christenæus, Decis. Curiæ Belgic. l. 4, decis. 185; Leeuwen, Cens. Forens. l. 1, ch. 4; Fiore, no. 150 *et seq.*, and Pradier-Fodéré's note; Lawrence sur Wheaton, vol. iii. p. 162 *et seq.*

[3] Art. 343 *et seq.*

[1] 123 Mass. 243, 245. In a recent case in the same State (Washington *v.* White, 140 Mass. 568), it was held that under the statute of 1871, c. 310, of that State, regulating adoptions, which provides *inter alia* that a "child or person so adopted shall be deemed, for the purpose of inheritance and all other legal consequences of the natural relation of parent and child, to be the child of the parent or parents by adoption, as if born to them in lawful wedlock," etc., an adopted child follows the settlement of her adoptive father.

[2] 11 Phila. 47.

time of her death in this city; Mary Hamblet, who had adopted her under the Massachusetts statute in 1858, was then, and also at the time of the deceased's death, domiciled in that State. So, too, Thomas Quinn, the father of the minor. In either case we think the minor also had her domicil in Masaachusetts." And he then proceeded to distribute the fund in court according to the Massachusetts law.

§ 249. **Has a Guardian Power to change the Domicil of his Minor Ward?** — We proceed now to consider the vexed question of the relation of a guardian to the domicil of his ward. This subject has been discussed with great learning and ability and at great length by the continental jurists, as well as by those of Great Britain and this country. The views expressed have been conflicting, and in many instances wholly irreconcilable, and the doctrine, notwithstanding the thorough discussion to which it has been subjected, still remains involved in difficulty and doubt.

§ 250. **Id. Continental Authorities in the Affirmative.** — Bynkershoek has discussed the subject at great length, having devoted a whole chapter of his *Quæstiones Juris Privati*[1] to it. He declares that he is not aware that the power of a guardian to change the domicil of his ward, just the same as a surviving parent may change that of a child, has been seriously doubted by any one, except where the question of personal succession is considered; for, he adds, where this question is considered, there is much dispute. He gives it as his own opinion that a guardian must be held to have such power, even in cases where the question of personal succession is raised; and moreover he refuses to admit an exception, even in cases of fraud. In this last respect, however, his opinion stands by itself, and is put upon the rather sophistical grounds, first, that the parents can, if they see fit, guard against a change in the succession by an ante-nuptial agreement or a testament; and second, that it is impossible from the nature of the case to lay down any general rule for determining what shall be sufficient evidence of a fraudulent change of domicil.

[1] L. 1, c. 16.

Burgundus,[2] upon the authority of Bartolus, appears to hold that the domicil of the guardian is also that of his ward, whether they dwell together or not. Rodenburg,[3] speaking with special reference to the law which determines minority and majority, holds that a guardian may change the domicil of his ward provided fraud or prejudice to third parties are absent. Brentonnier[4] holds that, with reference to testamentary capacity, the minor follows the domicil of his guardian. Cochin[5] is cited as an authority for the dependence of the domicil of the minor upon that of his guardian, but it is worthy of note that in the case of the Marquis St. Pater, in which he appears to assume this ground (although it was not material to the determination of the case) the guardian was the maternal grandfather of the ward. Voet, as we have already seen,[6] holds the same opinion with regard to the power of a guardian to change the domicil of his ward as he holds with regard to the power of a parent to change the domicil of his or her infant child; namely, that either of the persons named may, if acting without fraud, change the domicil of the minor by changing his or her own domicil and carrying the minor along to the new place of abode.[7]

The opinion of Boullenois is difficult to extract from his rather loose and apparently conflicting expressions. On the

[2] Ad Consuet. Fland. Tract. 2, no. 34.

[3] De Div. Stat. t. 2, c. 1, no. 6. He says: "Quæramus et illud quod frequentioris est incursionis; Hollandus major viginti, minor viginti quinque annis transfert domicilium Ultrajectum, ubi vigesimo anno tutela vel cura finitur. Quid dicemus preventurum illum suam in tutelam? Respondi ex facto consultus minori hodie constituendi domicilii, facultatem non esse, tutori esse; qui ut contrahere, ita et domicilium potest constituere, quod collocetur illud per contractum, de quo mox latiùs. Proinde in proposita mihi specie, cum mater, quæ tutrix esset, mutato à morte viri domicilio, Ultrajectum concessisset, ibique infans adolevisset; dixi ex Ultrajectinis legibus æstimandos perfectæ ætatis annos; dummodo fraus absit, aut præjudicium tertii, extra quod vix est ut non dixeris tutori, maximè matri locum ad habitandum, pupillumque educandum, elegendi jus esse, illudque ipsum dubii veriti Batavi Jurisconsulti tutori agnato auctores fuerunt, ut stipularetur à mâtre illa, cum cogitaret ex Hollandia concedere Trajectum, ne ea res infantis adspectu ullo modo domicilii mutationem induceret; quamquam fateor, si quid hoc ad rem pertinet, posita hâc sententia, in potestate tutoris fore, tutela semet ocius exuere, nisi tum potiùs super fraude quærendum foret."

[4] Sur Henrys, t. 1, p. 635.

[5] Œuvres, t. 6, p. 225 *et seq.*

[6] *Supra*, § 238.

[7] Ad Pand. l. 5, t. 1, no. 100.

one hand, he admits that there is no inconvenience in reputing a minor to be domiciled where his guardian is domiciled as to the particular faculties which the law of that domicil may give him, so that if by the law of the domicil of the guardian, he has the power to make a testament of his movables, he may make one conformable to that law; holding that it is but just that in such case one who is domiciled, even though a minor, should be subject to the purely real laws of the place where he is domiciled without fraud.[8] But, on the other hand, he denies the right to the guardian to change the personal succession of the minor, and lays down as a general rule: "A minor, out of the domicil of his father, with his tutor, dwells with him, but he is not properly domiciled with him; he sojourns there awaiting his majority;" and he likens him to a suitor awaiting the result of his lawsuit.[9]

The French Code[10] provides, as we have seen, that the unemancipated minor shall have his domicil at the home of his father and mother or tutor. The Louisiana Civil Code[11] contains a similar provision. But its effect is substantially restrained to municipal domicil,[12] it being held that, inasmuch as an appointed tutor forfeits his tutorship by removing from the State, the provision is inapplicable to a change of *quasi*-national domicil.[13]

Bar[14] holds that the alteration of the domicil of a minor

[8] Diss. de la Contr. des Lois, Quæst. 2, pp. 61, 62.

[9] Traité de la Personalité, etc., vol. ii. obs. 32, p. 53.

[10] Art. 108.

[11] Art. 48.

[12] Robins *v.* Weeks, 5 Mart. (N. s.) 379; State *ex rel.* Fuselier *v.* Judge of Probates, 2 Rob. (La.) 160; Same *v.* Same, id. 418; Succession of Stephens, 19 La. An. 499.

[13] Robins *v.* Weeks, *supra*. In that case, however, a distinction in this respect betweeen a tutor by mere appointment and a natural tutor was intimated; and in the case of Succession of Lewis, 10 La. An. 789, it was held that the mother having qualified as natural tutrix of her child and having changed her domicil to a foreign country, taking her child with her, the domicil of the latter was changed, although the mother had remarried.

[14] § 31 (Gillespie's trans. pp. 103–105). He says: "It is matter of dispute whether minors can change their domicil, and can emigrate to another State. Many assert that the minor retains the last domicil of his deceased father; others admit a change of domicil, so far as it is not effected by any treacherous purpose of the guardian, — *e. g.*, a design to profit by some different law of succession at the minor's expense; others declare themselves universally in favor of the possibility of such a change being effected by the guardian. The

ward can only take place with the approval of the supreme authority charged with the guardianship; but under this limitation a minor may undoubtedly change his domicil through his guardian.

§ 251. **Id. id. In the Negative.** — But, on the other hand, many of the continental jurists have denied the power of the guardian to change the domicil of his infant ward. Mornac,[1] speaking with special reference to personal succession, and while admitting the existence of authority on the other side, says: "Prævaluit vero eorum sententia, qui domicilium minoris præsertim eo casu in loco originis, id est, in ædibus paternis ac maternis collocandum dicerent. Cum enim domicilium quatuor modis contrahi soleat, natura, ac origine, item voluntate, ac consilio, deinde conventione, aut ex necessitate muneris. Solum ex his naturale domicilium minori superest, locus scilicet, in quo ipse creverit, parentesque defecerint; absurdumque aliud fuerit affingere minori in cæteris, quod ipse per ætatem non habeat eligendi nempe domicilii consilium. Imo et præstaretur ansa interdum tutoribus fraudandi

answer to this question must depend on whether the privilege of changing allegiance is to be considered a highly personal privilege, which a representative is not in a position to exercise. This question, again, must be answered in the negative, by reference to the fact that the domicil of minor children can be changed by their father. But this answer must always be qualified by the proviso that no statute shall expressly provide to the opposite effect. The alteration of domicil can, however, only take place with the approval of the supreme authority charged with guardianship; it is no act of regular administration, and may modify personal rights or personal *status*, matters of the greatest importance to the ward. Under this limitation a minor may indubitably change his domicil through his guardian. The ward, his heirs and relations, are, by the necessity of obtaining the consent of the supreme authority, protected against any fraudulent procedure of the guardian that might in some way be directed against the ward's inheritance; whereas the opposite doctrine, by which no change of domicil at all is permitted during minority, might no doubt be very prejudicial for the ward. The termination of majority is, in such a case, to be determined by the law of the State to which the individual belonged at the time, and not by the law of that State into which he proposes to enter. It is only possible to be received into another State if the connection of the person so to be received with the State to which he has hitherto belonged is severed; and that severance can only take place in accordance with the law of this latter State, except when these laws would come into conflict with universally recognized principles of international law, in which case they need not be recognized by the other State. That cannot, however, be the case with any laws that regulate the limits of minority."

[1] Obs. ad Cod. t. 3, l. 3. t. 20.

veros mobilium minoris intereuntis hæredes transferentibus scilicet domicilium in loca, quibus successura sibi viderent ex patriis moribus, intereunte valetudinario minore desideria." Christenæus[2] lays down the same doctrine, using almost the very words of Mornac. Bouhier[3] holds that the domicil of a minor cannot be changed by his guardian, unless the latter be an ascendant.

Denizart[4] says: "Minors, even after the death of their father, have no other domicil than that which their father had; this they retain always, until they become either majors or married, without their kinsfolk or guardian being able to change it, because they may not disturb the order of succession regulated by the domicil." Pothier,[5] speaking with his usual clearness, says, after citing the several authorities *pro* and *con:* "It suffices us to say that minors do not compose the family of their guardian as infants compose the family of their father; they are in the house of their guardian as in the house of a stranger; they are there *ad tempus*, for the time that the guardianship ought to last; consequently the domicil of their guardian is not their true domicil, and they cannot be considered to have any other than the parental domicil until they become of age to establish, and have effectively established, one for themselves by their own choice." And, according to Demolombe,[6] it was generally held, prior to the adoption of the Code Civil, that a guardian, the father or the mother excepted, was not able to change the domicil of his minor ward. Merlin[7] says that in the old law the only doubt was as to the power of a guardian who was an *ascendant;* for it was unanimously agreed that a guardian who was a stranger in blood, or a collateral relative, had no power to change the domicil of his ward.

§ 252. **Id. English Text-writers.** — In England, among the text-writers, Foote[1] affirms the dependence of the domicil of the minor ward upon that of his guardian; Dicey[2] considers

[2] Decis. Curiæ Belgic. decis. 166, t. 2, vol. ii. p. 204.

[3] Obs. sur la Cout. de Bourg. c. 21, p. 384; c. 22, p. 442, ed. 1742.

[4] *Verb.* Dom. no. 9.

[5] Intr. aux Cout. d'Orléans, no. 17.

[6] Cours de Code Napoléon, t. 1, no. 360.

[7] Repertoire, t. 8, *verb.* Dom. § 5.

[1] Priv. Int. Jur. p. 10.

[2] Dom. pp. 100, 101. He says: "It is possible that the domicil of an

it doubtful; and Westlake appears on both sides of the question. In his first edition,[3] he holds that "the domicil of an unmarried infant, boy or girl, . . . follows that of the mother or guardian after the father's death, and that of the guardian after the death of both parents;" while in his second edition[4] he says: "A guardian, whether appointed by the father under [the law of the father's domicil] or by that law or jurisdiction itself, cannot change his ward's domicil, except so far as he may be permitted to do so by the terms of his appointment, or by the law or public authority under which he holds his office;" admitting an exception, however, in the case of the mother, when she is the guardian, and the appointment or law under which she holds expresses nothing to the contrary.

§ 253. **Id. American Text-writers.** — In this country we have on the one side the high authority of Kent[1] declaring: "It would rather seem to me that, if there be no competent parent living and the guardian be duly appointed, he may and ought, when acting in good faith and reasonably in his character of guardian, to be able to shift the infant's domicil with his own, and that the foreign authorities to that point have the best reason on their side. The objection against the guardian's power, in such a case, appears to me to be too refined and speculative." On the other side, we have the equally high authority of Story,[2] who says: "In the case of

orphan follows that of his guardian; but whether this be so or not is an open question. In the first place, it may be doubted whether the rule is not, rather, that a ward's domicil can be changed in some cases by his guardian, than that it follows the domicil of his guardian. It is difficult to believe that the mere fact of D.'s guardian acquiring for himself a domicil in France can deprive D., the son of a domiciled Englishman, of his English domicil. In the second place, the power of a guardian to change at all the domicil of his ward is doubtful. In the one recorded English case on the subject, the guardian was also the mother of the children. As a matter of common sense, it can hardly be maintained that the home of a ward is in fact, or ought to be as a matter of convenience, identified with the home of his guardian, in the same way in which the home of a child is naturally identified with that of his father. Should the question ever arise, it will probably be held that a guardian cannot change the domicil of his ward, and almost certainly that he cannot do this unless the ward's residence is as a matter of fact that of the guardian."

[3] Priv. Int. L. 1st ed. p. 35, rule 3.

[4] Id. 2d ed. § 238.

[1] Comm. vol. ii. lect. 30, p. 227, note (a).

[2] Confl. of L. § 506, note 1.

a change of domicil by a mere guardian, not being a parent, it is extremely difficult to find any reasonable principle on which it can be maintained that he can, by any change of domicil, change the right of succession to the minor's property. The reasoning of Bynkershoek upon the point is very unsatisfactory, while that of Mornac, Bouhier, and Pothier, has solid reason and justice to sustain it." Wharton[3] also takes the negative side of the question, at least so far as it concerns succession; contending, however, that "the technical *forum* of the minor is always, and unquestionably, that of the parent or guardian."

It thus appears that the opinions of the text-writers are about equally divided, both in point of number and authority.

§ 254. **Id. No Direct Decision in England.** — English jurisprudence furnishes no decided case in elucidation of our subject. The case of Potinger *v.* Wightman[1] has been frequently cited in this country as though it decided that a guardian, *qua* guardian, could change the domicil of his ward from one State or country to another; but careful examination discloses that no such doctrine was there held. In that case the mother happened also to be the guardian, but it was *qua* mother that Sir William Grant held her entitled to change the domicil of her infant children. Moreover, it is noteworthy that, in reaching his conclusion, he relied strongly upon the authority of Pothier, and pointed out that while that jurist "considers it as clear that the domicil of the surviving mother is also the domicil of the children, provided it be not with the fraudulent view to their succession that she shifts the place of her abode," "he holds, in opposition to the opinion of some jurists, that a tutor cannot change the domicil of his pupil."

That this is the view of Potinger *v.* Wightman taken by the English judges is apparent from the remarks of Lords Lyndhurst and Campbell in Johnstone *v.* Beattie.[2] In Douglas *v.* Douglas,[3] Wickens, V. C., took occasion to say during the argument: "It seems doubtful whether a guardian can change

[3] Confl. of L. § 42.

[1] 3 Mer. 67; *supra*, § 239.

[2] 10 Cl. & F. 42, 66, 138. See language of Lords Lyndhurst and Campbell quoted *supra*, § 239, note 2.

[3] L. R. 12 Eq. 617, 625.

an infant's domicil. The difficulty is that a person may be guardian in one place and not in another."

§ 255. **Id. American Decisions. Natural Guardian may change the Domicil of his Infant Ward.** — The subject has been discussed in a number of cases in this country with much conflict of opinion as the result.

We have already seen that a natural guardian may change the domicil of his or her ward; and who are to be deemed natural guardians has already been stated.

§ 256. **Id. id. The Domicil of the Guardian is not necessarily that of his Infant Ward.** — The domicil of the guardian is not necessarily that of his ward;[1] this was decided in School Directors *v.* James,[2] Gibson, C. J., delivering an opinion of

[1] Besides cases cited *infra*, see Succession of Lewis, 10 La. An. 789, where Lea, J., says: "As a general rule the domicil of the minor cannot be changed by a departure of the tutor, or the removal of the minor from the State." But it is otherwise in Louisiana as to municipal domicil. See *supra*, § 250.

[2] 2 W. & S. 568. This case is so frequently cited, and the language of Chief-Justice Gibson so frequently quoted, that it is deemed proper here to give his opinion in full: "As this case has no precedent, we must decide it on grounds of reason and analogy; and in order to do so, it is necessary to premise certain principles about which there is no dispute. The domicil of an infant is the domicil of his father, during the father's lifetime, or of his mother during her widowhood, but not after her subsequent marriage; the domicil of her widowhood continuing in that event to be the domicil of her child. A husband cannot properly be said to stand in the relation of a parent to his wife's children by a previous marriage, where they have means of support which are independent of the mother, in whose place he stands for the performance of her personal duties, because a mother is not bound to support her impotent children so long as they are of ability to support themselves. Neither can they derive the domicil of a subsequent husband from her, because her new domicil is itself a derivative one, and a consequence of the merger of her civil existence. Her domicil is his, because she has become a part of him; but the same thing cannot be said of her children. Having no personal existence for civil purposes, she can impart no right or capacity which depends on a state of civil existence; and the domicil of her children continues, after a second marriage, to be what it was before it. Thus we see that when the defendant was appointed guardian of these minor children, their domicil was in the township of East Bradford, where they resided with their mother, if that were important, even after her second marriage; and as the *situs* of their movable property attended the domicil of their persons, it was taxable only there. So far, there is no dispute. But as a father, or a mother, *sui juris*, may change the domicil of the child by changing the domicil of the family, provided the change be induced for a disinterested motive, — not, for instance, to change the rule of succession in the event of the child's death, — the question is whether a guardian or tutor stands in the place of a parent, or has the same power; and it is still a vexed one with

great clearness and cogency, in which he said: "A ward is not naturally or necessarily a part of his guardian's family;

the civilians, who are equally divided in regard to it. Those who maintain the affirmative of it are corroborated by the Code Civil, which, though of positive enactment, is supposed to be founded, in this particular, on the established principles of civil jurisprudence; while those who maintain the negative have, on their side, among others, the authoritative name of Pothier. But the former are supported by the approbation of Mr. Burge, the learned British commentator on the Conflict of Laws, as well as by the opinion of Sir William Grant, in Potinger *v.* Wightman (3 Merivale, 67), and by the decisions of some of the American courts, which would be amply sufficient to turn the scale of authority, were it not for the powerful doubt thrown in on the other side by Mr. Justice Story. 'Notwithstanding,' says he, 'this weight of authority, which, however, with one exception, is applied solely to the case of *parents*, or of a surviving parent, there is much reason to question the principle on which the decision (in Potinger *v.* Wightman) is founded, when it is obviously connected with a change of succession to the property of the child. In the case of a change of domicil by the guardian, *not being a parent*, it is extremely difficult to find any reasonable principle on which it can be maintained that he can, by any change of domicil, change the right of succession to the minors' property.' Confl. of L. 2d ed. § 506, in notes. And there are reasons for this doubt which seem to bear it out. No infant, who has a parent *sui juris*, can in the nature of things have a separate domicil. This springs from the status of marriage, which gives rise to the institution of families, the foundation of all the domestic happiness and virtue which is to be found in the world. The nurture and education of the offspring make it indispensable that they be brought up in the bosom, and as a part, of their parents' family; without which, the father could not perform the duties he owes them, or receive from them the service that belongs to him. In every community, therefore, they are an integrant part of the domestic economy; and the family continues, for a time, to have a local habitation and a name, after its surviving parent's death. The parents' domicil, therefore, is consequently and unavoidably the domicil of the child. But a ward is not naturally or necessarily a part of his guardian's family; and though the guardian may appoint the place of the ward's residence, it may be, and usually is, a place distinct from his own. When an infant has no parent, the law remits him to his domicil of origin, or to the last domicil of his surviving parent; and why should this natural and wholesome relation be disturbed by the coming in of a guardian, when a change of the infant's domicil is not necessary to the accomplishment of any one purpose of the guardianship? The appointment of a new residence may be necessary for purposes of education or health; but such a residence being essentially temporary, was held, in Cutts *v.* Haskins (9 Mass. R. 543), insufficient to constitute a domicil. But, granting for the moment that a guardian may, for some purposes, change his ward's domicil, yet if he may not exercise the power purposely to disappoint those who would take the property by a particular rule of succession (and nearly all agree that even a parent cannot), how can he be allowed to exercise it so as obviously and unavoidably to injure the ward himself? It is true that what has been said on the subject has had regard to a change of national domicil, and that here we have to do with a supposed change, by implication of law, from one township to another in the same county; but the power of the guardian to do injury can be no greater in the one case than it is in the other.

and though the guardian may appoint the place of the ward's residence, it may be, and usually is, a place distinct from his own. When an infant has no parent, the law remits him to his domicil of origin or to the last domicil of his surviving parent; and why should this natural and wholesome relation be disturbed by the coming in of a guardian, when a change of the infant's domicil is not necessary to the accomplishment of any one purpose of the guardianship? . . . A guardian has indeed power over his ward's person and residence, but it follows not that the ward's domicil must attend that of his guardian, for there is nothing in a state of pupilage which requires it to do so. We are of opinion, then, that the domicil of a ward is not necessarily the domicil of his guardian." This was a case of municipal domicil, involving the question of taxation, and the precise point determined, was that the personal property of the wards was not taxable in the borough in which the guardian was domiciled, the wards residing with their mother in another municipal division, where also their father had been domiciled at the time of his death. In a late New York case,[3] involving a question of testamentary capacity, it was held that the domicil of the ward

The very end and purpose of his office is protection; and I take it that there is no imaginable case in which the law makes it an instrument of injury by implication. Where, indeed, he acts fairly and within the scope of his authority, the ward must bear the consequences, because he must bear those risks that are incident to the management of his affairs; but that is a different thing from burthening him with a loss as a mere technical consequence of the relation. But a guardian cannot convert his ward's money into land, or his land into money, except at his own risk; and, for a reason more imperative than any to be found in a case of mere conversion, he must not be allowed to burthen his ward with a certainty of loss by subjecting his property to taxation for purposes in which the ward has not an interest. It is said that these minors may receive an equivalent for their contributions to the school fund by participating in the instruction which it was intended to dispense; but the district in which their parents resided has elected to reject both the benefits and the burthens of it; and to say they are bound by the election made by the inhabitants of their guardian's district is to assume the ground in dispute — that their domicil has been changed. A guardian has indeed power over his ward's person and residence; but it follows not that the ward's domicil must attend that of his guardian, for there is nothing in a state of pupilage which requires it to do so. We are of opinion, then, that the domicil of a ward is not necessarily the domicil of his guardian; and that the personal property of these children was not taxable by the borough of West Chester."

[3] Seiter v. Straub, 1 Demar. 264.

does not follow that of the guardian. In this case the parents of the deceased ward were at the time of their death domiciled in New York, where she continued to reside until her death, her guardian being domiciled in New Jersey; and it was held that her domicil continued to be in New York, and that her testamentary capacity must be determined by the law of that State. This doctrine is still further re-enforced by the cases of Cutts *v.* Haskins,[4] and Holyoke *v.* Haskins,[5] in which the domicil of the guardian and that of his *non compos* ward were held to be different.

§ 257. **Id. id. Guardian may change the Municipal Domicil of his Ward.** — It appears to be pretty well settled that a guardian may change the municipal domicil of his infant ward. In *Ex parte* Bartlett[1] this point was raised, and Bradford, Surrogate, in a learned opinion, while doubting the authority of the guardian to change his ward's domicil from one State to another, held that he had authority to change her domicil from one county to another within the same State, so as to divest the Surrogate of the former county of jurisdiction to appoint the guardian's successor and to confer it upon the Surrogate of the latter county. In Kirkland *v.* Whateley,[2] the Supreme Court of Massachusetts held that a minor may, with the consent of his guardian, change his domicil from one town to another within the same State, and thus shift the place where he is liable to personal taxation. The doctrine of this case, although it was doubted by Gibson, C. J., in School Directors *v.* James, and to a certain extent contradicted by the Missouri case of Marheineke *v.* Grothaus,[3] is further supported by the cases of Cutts *v.* Haskins, Holyoke *v.* Haskins, and Anderson *v.* Anderson,[4] hereafter to be noticed, in which similar authority was held to belong to guardians of *non compotes*.

§ 258. **Id. id. Power to change National or quasi-National Domicil. Cases in the Affirmative.** — The cases in which it has been declared competent for the guardian to change the domicil of his ward from one State to another are indeed few,

[4] 9 Mass. 543.
[5] 5 Pick. 20.
[1] 4 Bradf. 221. See also the Louisiana cases cited *supra*, § 250, note 12.
[2] 4 Allen, 642.
[3] 72 Mo. 204.
[4] 42 Vt. 350.

although some of them assert such competency with great positiveness. In the Ohio case of Pedan *v.* Robb's Adm'r,[1] Grimke, J., says: "Although it was once a greatly controverted question, yet it is now settled that he [a guardian] has even a right to change the domicil of his ward (Potinger *v.* Wightman). The reason of the doubt was, that the exercise of the right would put it into the power of a guardian to change the succession to the personal property of his ward; a reason which, although it seems to have had great weight with some of the Civil law lawyers, has never entitled itself to much with English or American jurists." But the authority upon which he bases his opinion that the question has been settled in favor of the power of the guardian, namely, Potinger *v.* Wightman, has, as we have already seen, no direct bearing upon the subject. Moreover, the question before the court was the liability of the personal representative of a deceased guardian to be sued by the ward for an account in Ohio, the guardian having been appointed in Pennsylvania. Furthermore, it is noteworthy that in this case the guardian was also the father of the ward.

Similar language was used by Flandrau, J., in Townsend *v.* Kendall,[2] a case of false imprisonment against a foreign guardian for taking into his custody, and attempting to carry back to his domicil in Ohio, a ward who had been removed from that State by his re-married mother. He says: "It is quite well settled in England and the United States that a guardian may change the residence of his ward from one State or country to another, when that change will be for the benefit of the ward (Story's Conflict of L. sec. 506). And this, though it may change the nature of the succession of the infant's estate should he die in his new domicil; but the least suspicion of fraud would be closely scrutinized by a court of chancery. This consideration, however, does not affect the existence of the power in the guardian, but only goes to the proper and faithful exercise of it. The power has been clearly recognized in the following English and American cases: Potinger *v.* Wightman; Guier *v.* O'Daniel; Cutts *v.* Haskins; Holyoke *v.*

[1] 8 Ohio, 227.

[2] 4 Minn. 412.

Haskins; Wood *v.* Wood; Pedan *v.* Robb's Adm'r. The latter case is very much in point."

But the cases which he cites do not bear him out in his position. Potinger *v.* Wightman has already been discussed. Cutts *v.* Haskins and Holyoke *v.* Haskins were, as we have already seen, cases of municipal domicil. In Guier *v.* O'Daniel,[3] although it is sometimes cited as an authority upon this question, the power of a guardian over the domicil of his ward was not decided, discussed, or alluded to in any way. The language of Rush, President, was: "A minor, during pupilage, cannot acquire a domicil of his own. His domicil, therefore, follows that of his father, and remains until he acquires another, which he cannot do until he becomes a person *sui juris*." Which language, if it bears upon our subject at all, must be taken to deny rather than affirm the power of a guardian.

In Wood *v.* Wood,[4] a father, domiciled in New York at

[3] 1 Binn. 349, note.

[4] 5 Paige, Ch. 596. The Chancellor says: "It is very evident, from the will, that the decedent, for some reason which he has not explained, was very desirous that his widow and children should leave this State, where his, as well as her, relatives resided, and should remove with his brother, the trustee, to the State of Ohio; where, it is admitted, none of them had any relatives, or even acquaintances. The trusts of the will, which he probably supposed to be valid, were framed in reference to such a removal and location of his family in that State. It turns out, however, that the widow is not willing to remove with her infant children to so great a distance from the residence of her friends, and to locate herself entirely among strangers. And it appears to the court that her objections to such a change of residence are not unreasonable under the circumstances of this case. I have no doubt as to the right of a parent or guardian to change the residence of his infant children, or wards, from one State to another, provided such change of residence is made in good faith and with a view to their benefit; subject, however, to the power of this court to restrain an improper removal of an infant by his guardian, or even by his parent. It must be a very extreme or special case, however, which would induce this court to interfere with the natural rights of a parent in this respect. That such a power exists in the court of chancery was settled by Lord Thurlow in the case of Creuze *v.* Hunter (2 Cox's Ca. 242). The jurisdiction of the court on this subject was again exercised, by Lord Eldon, in De Manneville *v.* De Manneville (10 Ves. 52); where the father of the infant, a French emigrant, was restrained from removing the child out of the jurisdiction of the court. And in the recent case of the nephew of the Duke of Wellington, a son of Lord Maryborough, the House of Lords, with the entire concurrence of Lord Chancellor Lyndhurst, and of Lords Redesdale and Manners, two former Chancellors of Ireland, affirmed the decision of Lord Eldon, in refusing to a profligate father the custody and control of the persons of his infant children (see Wellesley *v.* Wellesley, 2 Bligh's Parl. Rep. (N. S.) 124; 1 Dow & Clark, 152, s. c.). This

the time of his death, appointed a testamentary guardian for his children who were of tender age, and directed him to remove them to the State of Ohio. The widow, refusing to accompany them to Ohio, and asking to have them remain with her in the State of New York, Walworth, Chancellor, restrained him from removing them from the latter until further order. The question of their domicil was not raised; but certain language used by the Chancellor has been thought by some to give support to the theory which maintains the power of the guardian to change his ward's domicil. It would seem, however, particularly in view of the authorities which he cites, and which relate to the custody and control of minors by their father and his right to appoint their place of residence, that the learned Chancellor had reference rather to a change of actual residence than to a change of legal residence or domicil.

In White *v.* Howard[5] the facts were somewhat similar to those of Wood *v.* Wood. A father domiciled, at the time of his death, in Connecticut, appointed a testamentary guardian for his daughter, and directed that the latter should, during her minority, reside in New York, under the care of her guardian, who also resided there, and there was no circumstance tending to show that the father expected his daughter ever to return to Connecticut. His direction having been carried out, and the daughter having died under age, it was held that her domicil had been changed to New York. But the court,

court has the same jurisdiction over a testamentary guardian as it has over a guardian in socage, or any other guardian; and in this case it would be improper to permit the testamentary guardian to take the infant complainants from their mother and carry them among strangers, several hundred miles from her residence, at their present tender ages. He must not take them from her, therefore, without the further order of the court; which order he is at liberty to apply for whenever it may be proper."

[5] 52 Barb. 294, 318. Sutherland, J., said: "I think the determination of the question as to the domicil of the testator's daughter at the time of her death does not depend upon the determination of any question as to her power while a minor and a ward, or the power of her guardian to choose or create a new or another domicil. It is manifest from the will that her father expected and intended that she should, upon and after his death, during her minority, reside in New York under the care and protection of her guardian residing there. It is evident that her father intended, by his will, upon and after his death to change her domicil from Connecticut to New York."

Sutherland, J., delivering the opinion, declined to put its decision upon the ground of the power of the guardian to change the domicil of his ward, basing it upon the manifest intention of the father to change the domicil of his child.

Wheeler *v.* Hollis[6] was in many respects a peculiar case.

[6] 19 Tex. 522. The utterances of the able judge who delivered the opinion of the court, even when his conclusions are apparently unsound, are usually entitled to consideration. His opinion is here given at some length, particularly as it is the strongest presentation of the affirmative side of the question which has come to the attention of the writer. He says: "The main question in the case is, whether the removal of Watson and wife, with his ward, Elizabeth Hamilton, from Mississippi to Texas, and hence to Arkansas, effected a change of the domicil of the ward; for it is not questioned, and is undeniable, that the law of her domicil at the time of her death must regulate the succession of her personal property. Judge Story, in his Conflict of Laws, has examined the authorities on the question whether a guardian has the power to change the domicil of his ward from one country to another, so as to change the rule of succession to his personal property in case of his death, at some length; and from his citations it appears that, while there is a difference of opinion among foreign jurists, the weight of authority is in favor of the power, if the change was without fraud. There certainly is a great weight of authority in favor of such a power in the parent; though some foreign jurists take a distinction between the case of a change of domicil by a parent and by a guardian, and while they admit the right in the former, deny it to the latter (Story's Confl. of L. §§ 505–507, and notes). 'The same question,' says Judge Story, 'has occurred in England; and it was on that occasion held that a guardian may change the domicil of his ward so as to affect the right of succession, if it is done *bona fide* and without fraud" (Id. § 506). The case referred to is Potinger *v.* Wightman, 3 Meriv. 67, decided by Sir William Grant. The case was one of the first impression, it seems, at that time, in England. It was argued with great learning by Sir Samuel Romilly and Mr. Swanston in favor of the power of the guardian, who was the mother, a widow, acting *sui juris* and for her children; and her power of effecting a change of domicil was sustained. From the opinion of the Master of the Rolls, however, it may be plainly inferred that if it had appeared that it was with a fraudulent view to the succession of her children and wards that the guardian had changed her abode, the decision in that case would have been different. (See this case referred to by Lord Campbell in the House of Lords in Johnstone *v.* Beattie, 10 Cl. & Fin. 138; and see the opinion of Lord Cottenham, to the effect that an infant may be taken out of the limits of the jurisdiction by permission of the Court of Chancery. Id. 106, s. c.) Judge Story says the doctrine of the case of Potinger *v.* Wightman, 3 Meriv. 67, has been recognized as the true doctrine in America. Nevertheless, he questions the power of the guardian (Story's Confl. of L. § 506, and notes). It is to be regretted that the question is left by the authorities in so much doubt and uncertainty. The opinions of American courts, as far as we have seen, appear to favor the power of the guardian, though the cases are not precisely in point to the present (Holyoke *v.* Haskins, 5 Pick. 20; Cutts *v.* Haskins, 9 Mass. 543; Guier *v.* O'Daniel, 1 Binn. 349, in note; Upton *v.* Northbridge, 15 Mass. 239). We will conclude our examination of authorities by reference to the opinion of Chief Justice Gibson in School Directors *v.* James, 2 Watts & S. 568. He considers

H., being domiciled in Mississippi, died, leaving a widow and a minor child, E. The widow married W., who was appointed

the civilians equally divided upon the question whether a guardian or tutor stands in the place of a parent, and has the same power as a father or mother, *sui juris*, to change the domicil of a child; and concludes that the English and American authorities support the affirmative, and would be amply sufficient to turn the scale of authority, 'were it not for the powerful doubt thrown in on the other side by Mr. Justice Story.' He thinks there are grounds for this doubt, and reasons thus: 'No infant who has a parent *sui juris* can, in the nature of things, have a separate domicil. This springs from the *status* of marriage, which gives rise to the institutions of families, the foundation of all the domestic happiness and virtue in the world. The nurture and education of the offspring make it indispensable that they be brought up in the bosom and as a part of their parents' family; without which the father could not perform the duties he owes them, or receive from them the service that belongs to him. In every community, therefore, they are an integral part of the domestic economy; and the family continues for a time to have a local habitation and a name after its surviving parent's death. The parent's domicil, therefore, is consequently and unavoidably the domicil of the child. But a ward is not naturally or necessarily a part of his guardian's family; and though the guardian may appoint the place of the ward's residence, it may be and usually is a place distinct from his own. When an infant has no parent, the law remits him to his domicil of origin, or to the last domicil of his surviving parent; and why should this natural and wholesome relation be disturbed by the coming in of a guardian, when a change of the infant's domicil is not necessary to the accomplishment of any one purpose of the guardianship?' But waiving the decision of the question, and granting the guardian may, for some purposes, change the ward's domicil, the judge says, applying the law to the case then before the court: 'Yet if he may not exercise the power purposely to disappoint those who would take the property by a particular rule of succession (and nearly all agree that even a parent cannot), how can he be allowed to exercise it so as obviously and unavoidably to injure the ward himself?' And it was on the ground here suggested that the decision turned. Where an infant has no parent, — the case supposed by the judge, — there may be much force in the reasoning; and there certainly is great justice in the sentiment and force in the argument in support of the authority of the parent. But may not the same reasoning be applied, and with equal propriety and force, to support the right of the surviving mother who has married the second time, especially where the nurture and education of a daughter is concerned? Should her marrying again deprive her of the right to have the custody, care, and supervision of the education of her infant children, or them of maternal sustenance and protection? Is it the less indispensable (in the very appropriate language of the learned judge) that the infant children, daughters especially, be brought up in the bosom and as part of the family of which the mother is one of the united head, without which she could not perform the duty she owes them, or receive from them the homage to which she is entitled? Maternal care and instruction are not the less her duty and their right in consequence of her second marriage. They are no less a part of the domestic economy, and equally entitled to membership in her family. There can be no reason why her domicil, the domicil of her choice, should not be theirs, if she and her husband unite in making it such. When an infant has no parent, the law, it is true, remits him to his domicil of origin, or to the last

guardian of E. Subsequently W. emigrated from Mississippi, to avoid payment of his debts, leaving his guardianship account

domicil of his parent. But when he has a surviving mother, it is difficult to perceive the justice or propriety there would be in not permitting her to make her domicil that of her children. It may be different to some extent in European society, but in the society of this country, the habits and sentiments of our people, our ideas of domestic economy, would be opposed to denying the mother, upon her second marriage, the custody of her infant children. In older communities it may not be unusual for children who have parents to have others appointed their guardians; and then it may be truly said that the ward is not naturally or necessarily a part of the guardian's family; and so it may be said where the ward has no parent. But in this country it cannot be said, I apprehend, in general, where the ward has a mother whose husband is the guardian of her child. There may be cogent reasons why, for the benefit of her ward, the mother may wish to change her abode and that of her ward. Immigration here from our old sister States is the natural order of things; and mothers who have married a second time may have as good reasons for changing the domicil of their children for their mutual advantage as others. If they, or their husbands, are the guardians of their children, it is difficult to assign any reason in support of the right of parents to change the domicil of their children which would not apply to them, where, for the mutual advantage of both parties, they desired the change. It is admitted that a widow, *sui juris*, may change the domicil of her children, she being their guardian. If she should marry after making the change of domicil, the law would not remit the children to her former domicil. Then why should their domicil be unalterably fixed by the fact of her marriage, when she may marry with a view to the same change of her place of abode which she would have effected had she remained a widow? There may be more reason to deny the right of a guardian to change the domicil of his ward in governments which deny the right and power of expatriation, and the obligation of allegiance is held to be perpetual, than in this country, where the right of expatriation is admitted. There doubtless is good reason and sound policy in requiring that the change be made *bona fide* and without fraud; and holding the change ineffectual where the guardian should change the domicil of a child who was sick, with no other apparent object than that of removing him from a place in which, according to the law of succession, the guardian would not succeed to the child's estate, to another place which admitted the guardian to such succession. Such a removal may be justly deemed a fraud upon those who would have succeeded if no removal had taken place. So if the removal be purposely to the detriment of the interest of the ward, or to enable the guardian to incumber or convert to his own use the property of his ward, it may be deemed fraudulent as to the ward himself, and may justly be held not to effect a change of his domicil. And to this effect, the case of The School Directors *v.* James, 2 Watts & S. 572, in which the opinion of Chief Justice Gibson (from which I have quoted at so much length) was delivered, is a strong authority. The court maintain decidedly that whatever may be the power of the guardian over the person and property of the ward, he cannot exercise it so as to injure the ward himself. The very end and purpose of his office is protection, and there is no imaginable case, the court say, in which the law makes it an instrument of injury by implication. Where the guardian acts fairly and within the scope of his authority, the ward must bear the consequences, because he must bear those risks that are incident to the

unsettled, and with his wife took up his residence, first in Texas, and afterwards in Arkansas, taking with him E. and

management of his affairs; but that is a different thing from burdening him with a loss as a legal consequence of the relation. And accordingly it was held, in a suit free from fraud, that the guardian could not change the domicil, so as to subject the property of the ward to liability for taxation in the domicil of the guardian. If the law will not permit the office of guardian to become the instrument of injury by any possible legal consequence or implication, much less will it by the intentionally wrongful, fraudulent, or unauthorized act of the guardian. He can acquire no right by such fraudulent or unauthorized act. But the charge of the court made the removal of the guardian from the State of Mississippi to avoid the payment of his own debts, coupled with the fact of his failure to settle his guardianship with the probate court before his removal, such a fraud, *per se*, as to prevent a change of the domicil of his ward. And the effect of this charge cannot be said to have been effaced by the instruction given at the instance of the defendant, with the subjoined qualification. The jury were still left at liberty to find that there was no change of domicil in contemplation of law, if the guardian left Mississippi to avoid the payment of his debts, and without settling with the probate court; or if there were 'other facts going to show a wrongful intent,' without being informed in what the wrongful intent must consist, otherwise than as they might deduce it from the preceding portions of the charge, which, taken altogether, was not quite consistent. The jury would very naturally infer from the charge that, if the guardian had acted in fraud of his own creditors, in effecting a change of domicil, they might find that the domicil of the ward was not changed by the removal, although the conduct of the guardian may not have been fraudulent as to those entitled to succeed to the property of the ward in case of her death, or fraudulent or injurious in relation to the ward herself. As there was evidence from which the inference might be very readily drawn that the guardian had acted fraudulently as to his creditors, the charge of the court in this respect was calculated to mislead. Its tendency as a whole, we think, was to mislead upon this point; and for that reason it must be held to be erroneous. The failure to account, as guardian, to the court in Mississippi, was a circumstance which might be looked to in connection with others to ascertain the purpose of the guardian; so might his after management and dealing with the property of his ward; but his failure to give an account in Mississippi of his guardianship cannot be deemed conclusive evidence of a change of domicil purposely to defraud those entitled to the succession, or that in its consequences it was intentionally or necessarily injurious to the ward herself. Although it may be true that the guardian left Mississippi to avoid the payment of his debts, that could not be otherwise material than as showing that the primary object he had in view was not the benefit of his ward. It does not follow that there was an intention to defraud her, or those who might succeed to her rights of property, or that the removal was injurious to her. That fact, and the circumstance of the failure of the guardian to account, were not sufficient, in themselves, to prevent a change of the ward's domicil; yet the charge of the court was calculated to induce that belief on the part of the jury; and as it may have been the cause of their verdict, the judgment must be reversed and the cause remanded."

This case seems to be supported by Succession of Lewis, 10 La. An. 789, where the child accompanied her re-married mother, who was also her guardian. The Louisiana Court, however, denies the general power of a guardian to

her personal property. Under these circumstances, the Supreme Court of Texas held that the domicil of E. was changed. But the court, Wheeler, J., delivering the opinion, after arguing strongly and at considerable length in favor of the power of a re-married mother to change the domicil of her child by her first marriage, seems to put the decision upon a concurrence of the maternal control with that of the guardian, apparently relying, however, more strongly upon the former than the latter.

In Afflick's Estate,[7] Wiley, J., without giving reasons or authorities, declares his opinion that a ward's domicil may be changed by his guardian as it may be by his parent. But in that case the change of domicil was decided against, the guardian having been appointed by a court without jurisdiction. Olin, J., who dissented, declined to express any opinion as to the true domicil of the infant.

In none of these cases, however, notwithstanding the strong expressions of opinion contained in some of them, was the power of the guardian to change the national or *quasi*-national domicil of his ward directly and squarely decided.

§ 259. **Id. id. id. Cases in the Negative.** — On the negative side of the question, as it relates to national and *quasi*-national domicil, are several cases. In *Ex parte* Bartlett,[1] as we have seen, the power of the guardian was doubted. The same doubt was expressed in Seiter *v.* Straub,[2] and in School Directors *v.* James [3] was extended even to cases of municipal domicil. In Colburn *v.* Holland,[4] Dunkin, C. J., declares the question to be unsettled. In Mears *v.* Sinclair,[5] the Supreme Court of West Virginia held that a testamentary guardian could not change the domicil of her infant ward from one State to another, even though such guardian was the mother, — she having re-married.

change the domicil of his ward, and rests its decision upon the ground that the guardian in that case was the mother of the ward. And see *supra*, § 250.

[7] 3 MacAr. 95.

[1] 4 Bradf. 221.

[2] 1 Demar. 264.

[3] *Supra.*

[4] 14 Rich. Eq. 176.

[5] 1 W. Va. 185. This case is squarely in the face of Wheeler *v.* Hollis. The minors accompanied their mother from West Virginia, where their father was domiciled at the time of his death, to Ohio, where their mother became domiciled.

In Daniel *v.* Hill,[6] the Supreme Court of Alabama met the question squarely, and decided against the power of the guardian under these circumstances. The parents of McA. died, domiciled in Alabama, when he was only a few months old; his maternal aunt, upon the death of his parents, in pursuance of their request, took the care and control of him, and shortly afterwards her husband, D., was appointed guardian of the infant by the proper court, and McA. remained in their family until his death. After being appointed guardian, D. removed to Mississippi, taking with him his ward, who shortly before his death, and at the age of eighteen or nineteen years, made a will in favor of D. and wife. By the laws of Alabama he was capable, and by those of Mississippi incapable, of making a will of his personal property at that age. Under these circumstances the court held him to be domiciled in Alabama, and the will to be valid. Brickel, C. J., in delivering the opinion, remarked: "It is settled in this court that a guardian cannot change the domicil taken by his ward at the place of his birth, or acquired from the father at his death. The testator was born in this State, his parents had their last domicil here, and guardianship of his person and estate was granted by a court of this State. Though he accompanied his guardian to Mississippi, on his change of residence to that State, he retained the domicil of his birth, and his testamentary capacity must be measured by the law of this State." Mears *v.* Sinclair, and Daniel *v.* Hill, must both be regarded as direct decisions upon the question under discussion.

The latest utterance upon this subject is from the Supreme Court of the United States, in Lamar *v.* Micou;[7] to the able opinion of Gray, J., in which case, reference has already been made. He says, further: "The ward does not derive a domicil from any other than a natural guardian. A testamentary guardian, nominated by the father, may have the same control of the ward's domicil that the father had. And any guardian, in the State of the domicil of the ward, has been

[6] 52 Ala. 430.

[7] 112 U. S. 452, 471; Succession of Lewis, 10 La. An. 789, may also be cited to the effect that none but a natural guardian can change the domicil of his ward.

generally held to have the power of changing the ward's domicil from one county to another within the same State, and under the same law. But it is very doubtful, to say the least, whether even a guardian appointed in the State of the domicil of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicil beyond the limits of the State in which the guardian is appointed, and to which his legal authority is confined. And it is quite clear that a guardian appointed in a State in which the ward is temporarily residing cannot change the ward's permanent domicil from one State to another."

§ 260. **Id. id. id. General Results of the American Cases.** — The doctrine which we may extract from the American cases may be thus stated: (1) That a guardian has the power to change the municipal domicil of his ward. (2) That the domicil of the ward is not necessarily that of his guardian. (3) That the natural guardian certainly, and the testamentary guardian probably,[1] has the power to change the national or *quasi*-national domicil of his ward, unless expressly prohibited by a competent court. (4) That the power of an appointed guardian to change the national or *quasi*-national domicil of his ward is, to say the least, very doubtful.

§ 261. **General Reasons against the Power of the Guardian to change the National or quasi-National Domicil of his Infant Ward.** — It will be observed that most of the discussions on this subject have had, for their ultimate point of controversy, the power of the guardian to affect the personal succession of his ward, and it is customary for those who maintain the negative to argue that he cannot be allowed to change his ward's domicil, because he could thereby control the distribution of the personal estate of the latter in case of his death. But this method of reasoning, as has already been pointed out, is illogical, and gives but a limited view of the subject. There are difficulties back of the danger of fraudulent design on the part of the guardian. One of them is that already

[1] Mears *v.* Sinclair is apparently an authority to the contrary. But the attention of the court does not seem to have been directed to the distinction between testamentary and appointed guardians with reference to their power over the domicil of their wards.

alluded to in the language of Wickens, V. C.[1] The parental relation is natural and universal, while that of guardianship is artificial, and, to a certain extent at least, local and limited. It is true that among continental jurists it is generally accepted as settled that the guardian appointed by competent authority at the place of the ward's domicil[2] is to be everywhere recognized as by right entitled to the care and custody of the ward's person and movable property;[3] yet this view, in the language of Story, "has certainly not received any sanction in America, in the States acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators."[4]

It is true that such domiciliary appointment will be considered as an important element in determining the custody of the child; yet the grant of such custody to the foreign guardian is purely in the discretion of the court within whose jurisdiction the child may be found, and will be made or not, according to circumstances, as it appears to be for the best interests of the child.[5] And this is substantially the British doctrine also.[6]

§ 262. **Id.** — Again, the authority of a guardian is not only local, but it is also limited. A guardian is but an officer of the court appointing him, is subject to its control and supervision in all things, and has no powers except such as are

[1] See *supra*, § 254.

[2] Of course this statement extends only to those jurists who adhere to domicil as the basis of private international rights, the new school of European jurists substituting nationality for domicil.

[3] Savigny, § 380 (Guthrie's trans. p. 303); Bar, § 106 (Gillespie's trans. p. 431 *et seq.*); Story, §§ 495–498 and 500 *et seq.*, and authorities cited; Wharton, Confl. of L. § 259 *et seq.*, and authorities cited; Westlake, Priv. Int. L. 2d ed. § 6; Dicey, Dom. p. 172 *et seq.*; Hoyt *v.* Sprague, 103 U. S. 613, 631; Woodworth *v.* Spring, 4 Allen, 321; Morrell *v.* Dickey, 1 Johns. Ch. 153; Kraft *v.* Wickey, 1 Gill & J. 322.

[4] Story, Confl. of L. § 499; Milliken *v.* Pratt, 125 Mass. 374, 378, and the cases cited in last note.

[5] Woodworth *v.* Spring, *supra*; Milliken *v.* Pratt, *supra*.

[6] Johnstone *v.* Beattie, 10 Cl. & Fin. 42, as modified by Stuart *v.* Bute, 9 H. L. 440; Dawson *v.* Jay, 3 De G. M. & G. 764; Nugent *v.* Vetzera, L. R. 2 Eq. 704; Di Savini *v.* Lousada, 18 W. R. 425; Westlake, *loc. cit.*; Dicey, *loc. cit.*

conferred upon him by his appointment, or by the laws of the place where his appointment is made. The ward is thus under the care of the court; and that it would, under ordinary circumstances, decree, or even sanction a change of his domicil, and thus deliver him over to the jurisdiction of foreign laws, seems doubtful. It will allow him to be taken abroad for the benefit of his health, for education, and sometimes even for nurture; but in some cases, only on security being given that he shall be brought back within the jurisdiction when required.[1] It by no means follows that such a change of residence will accomplish a change of domicil.[2]

Nor will the domiciliary court alone take such view. The courts of the place where the ward is found, having due regard, however, to the welfare and interests of the ward, will sometimes, even though another guardian has been there appointed for him, restore him to the custody of his domiciliary guardian, in order that he may be returned to his own State or country,[3] or will, under proper circumstances, carry out the directions of the domiciliary court with respect to him, so far as may be consistent with the laws of their own country.[4]

But as applications in such matters are not grantable of right, but rather addressed to the discretion of the court, it is apparent that conflict may arise between the courts of several States or countries with respect to the guardianship, custody, and residence of the same minor, — as actually occurred in the Dawson case[5] between the New York courts and the English Court of Chancery, — and if under such circumstances necessity should arise for the application of the principle of domicil, — for example, to determine his general testamentary capacity, or, in event of his death, his personal succession, — conflicting views with regard to his domicil would doubtless be held by such courts.

[1] Jeffreys *v.* Vanswartswarth, Barnardiston, 144; Johnstone *v.* Beattie, 10 Cl. & Fin. 42, 128, 139.

[2] See Lord Campbell's remarks in Johnstone *v.* Beattie, 10 Cl. & Fin. 42, 139, 140.

[3] Nugent *v.* Vetzera, *supra*; Woodworth *v.* Spring, *supra*.

[4] Di Savini *v.* Lousada, *supra*; see also Nugent *v.* Vetzera, *supra*.

[5] *Ex parte* Dawson, 3 Bradf. 130; Dawson *v.* Jay, 3 De G. M. & G. 764.

§ 263. Id. — To avoid such perplexities, it seems better to hold strictly to the view that an appointed guardian has no power to change the national or *quasi*-national domicil of his infant ward, without the express direction or consent of the proper domiciliary tribunal appointing him. With respect, however, to a testamentary guardian, it seems reasonable to hold that he may, especially in pursuance of the direction of the deceased father (as was the case in White *v.* Howard) change the domicil of his infant ward to another State or country, unless expressly prohibited by a competent domiciliary tribunal.

CHAPTER XII.

DOMICIL OF PARTICULAR PERSONS (*continued*),— NON COMPOTES AND PAUPERS.

(a) *Non Compotes.*

§ 264. THE general principles relating to the domicil of persons *non compotes* are substantially the same as those relating to the domicil of minors. Much, therefore, that has been heretofore said with regard to the latter subject may be applied to the former.

As a general rule, one who is of unsound mind is incapable of choosing a domicil for himself, because he is incapable of forming the intention requisite to acquire a new domicil.[1] This is particularly true with regard to persons who are usually classed as idiots and lunatics, and are wholly, or almost entirely, bereft of reason and understanding. But it does not follow that the same incapacity would attach to all degrees of mental disturbance, and it would be difficult indeed to lay down any general rule which would serve to fix the line dividing capacity to change domicil from incapacity.

This subject was considered at some length in the New Hampshire settlement case of Concord *v.* Rumney,[2] where Bell, C. J., says: "Insanity may exist in various degrees, from the slight attacks which are hardly distinguishable from eccentricity, to the most raving and uncontrollable madness. It may be general, seeming to affect all the operations of the mind upon all subjects, or it may exist only in reference to a small number of subjects, or a single subject; the mind in such cases of partial insanity seeming to be in its habitual and natural condition as to all subjects and matters which do

[1] Sharpe *v.* Crispin, L. R. 1 P. & D. 611; Hepburn *v.* Skirving, 9 W. R. 764; Strong *v.* Farmington, 74 Me. 46; Washington *v.* Beaver, 3 W. & S. 548; Payne *v.* Dunham, 29 Ill. 125; Anderson *v.* Anderson, 42 Vt. 350.

[2] 45 N. H. 423.

not come within the scope of the partial disease. In no case at the present day is it a mere question whether the party is insane. The point to be established is, whether the party is so insane as to be incapable of doing the particular act with understanding and reason. This would be the essential question now, where marriage is alleged to be void by reason of insanity, and the same test would be applied in determining the question of capacity to change the domicil: Had the party at the time sufficient reason and understanding to choose her place of residence?" In that case a woman, insane at the time of her marriage and afterwards, and whose marriage was declared in another proceeding to be null and void for that cause, was held to have gained a settlement by her residence in the house of her supposed husband, it being found that she had intellect sufficient to choose a home.

In Culver's Appeal,[3] a person of weak mind, but not to a degree which prevented him from distinguishing between right and wrong, or from determining where he preferred to reside and have his home, and for whom a conservator was appointed, changed his place of abode from one town to another within the State, and continued to reside in the latter town, with the consent of his conservator, and it was held that his domicil was thereby changed. The same doctrine was held by Wilde, J., in Holyoke *v.* Haskins,[4] also a case of municipal domicil, and has been applied in a number of settlement cases;[5] but it has never been extended to cases of national or *quasi*-national domicil.

§ 265. **Relation of Guardian to the Domicil of his Insane Ward.** — The relation of a guardian to the domicil of his insane ward is substantially the same as the relation of a guardian to that of his minor ward.

[3] 48 Conn. 304. Loomis, J., says: "Although a person lawfully under a conservator must be presumed incapable of managing his affairs, so that he can make no binding contract with another, yet it seems to us it does not necessarily imply that the person is incapable of exercising such intent and performing such acts as may, with the simple assent of his conservator, result in establishing a domicil sufficient to enable the court, after his decease, to probate his will."

[4] 5 Pick. 20.

[5] *E. g.*, Corinth *v.* Bradley, 51 Me. 540; Ludlow *v.* Landgrove, 42 Vt. 137; Auburn *v.* Hebron, 48 Me. 332; Buckland *v.* Charlemont, 3 Pick. 173, and others.

First. The domicil of the guardian is not necessarily that of his ward.[1]

Second. He appears to have the power to change his ward's municipal domicil.[2] The Vermont case of Anderson *v.* Anderson was somewhat peculiar. The facts were that A., who, prior to his insanity, resided with his wife in Woodstock, was removed by his guardian to the lunatic asylum in Brattleboro; after which the guardian, who was also the father-in-law of A., took his daughter, A.'s wife, to his own home in Montpelier, where she remained until A.'s death in the asylum. Upon these facts it was held that A.'s domicil at the time of his death was at Montpelier, and that the probate court there had jurisdiction of his estate.

Third. With respect to the power of the guardian to change the national or *quasi*-national domicil of his insane ward, much that has already been said with respect to the guardianship of minors is applicable. It does not appear ever to have been held, either in this country or in England, that he has such power. Phillimore[3] thinks he has, and rests his opinion upon several Scotch cases,[4] which, however, do not seem to bear him out. Westlake[5] and Dicey[6] maintain the opposite view, and upon general principles there appears no good reason why the guardian should be held to possess such power.

§ 266. **French Law.** — In France under the old law, when that country was broken up into numerous legal territories, each having its own customary law, according to Merlin,[1] the domicil of the *interdit* was not changed by his removal from one territory to another, but he retained either his domicil of

[1] Holyoke *v.* Haskins, *supra;* Cutts *v.* Haskins, 9 Mass. 543; Anderson *v.* Anderson, *supra;* Culver's Appeal, *supra.*

[2] Anderson *v.* Anderson, *supra;* Cutts *v.* Haskins, *supra;* Holyoke *v.* Haskins, *supra.*

[3] Dom. no. 101, p. 55; Int. L. vol. iv. no. 91.

[4] Morrison's Case, Robertson, Pers. Suc. pp. 113, 114, and Leith *v.* Hay, id. p. 114, note. Robertson, however, does not consider them authorities to this effect.

[5] Priv. Int. L. 1st ed. no. 52, p. 48; Id. 2d ed. § 239.

[6] Dom. pp. 132, 133. Wharton appears to concur in the same opinion. Confl. of L. §§ 52 and 42. Lord Penzance, in Sharpe *v.* Crispin, *supra*, says: "It is not difficult to conceive cases in which great injustice might be done to the interests of others if the general proposition were admitted that the custody of a lunatic necessarily carried with it the power of changing his domicil at will."

[1] Repertoire, *verb.* Dom. § 5, no. 4.

origin, or that which he had chosen before his interdiction. But under the Code Civil,[2] which applies domicil mainly to purposes of domestic law, it is otherwise, the provision being: "The major *interdit* shall have his [domicil] with his tutor;" and this is understood by French jurists to be a dependent domicil, irrespective of the actual residence of the *interdit*. To such an extent have some carried this principle that they hold that the domicil of the wife of the *interdit* is necessarily that of her husband's *tuteur*.[3] Demolombe demonstrates the proposition with the remorseless logic of a syllogism, thus: "A married woman has no other domicil than that of her husband; now the *interdicted* husband has his domicil with his *tuteur;* therefore the wife has her domicil with the *tuteur* of her husband." This doctrine is denied by others;[4] and it is generally held that if the wife of one who is *interdit* for the cause of insanity has been appointed his *tutrice* she has the power to change his domicil by changing her own.

§ 267. **Relation of Father to the Domicil of his Insane Major Child.** — With respect to the relation of a father to the domicil of an insane major, two propositions may be laid down: —

First. The domicil of a lunatic who has become such after reaching his majority is not changed by the change of his father's domicil, even though he be at the time a member of his father's family, but remains that which it was at the commencement of his insanity. This was expressly decided in the Massachusetts settlement case of Buckland *v.* Charlemont,[1] and has the support of Lord Penzance in Sharpe *v.* Crispin,[2] and of Westlake.[3]

§ 268. **Id.** But, *second*, the domicil of a son, who has never been of sound mind since attaining his majority, continues to follow the changes of his father's domicil, particu-

[2] Art. 108.

[3] Demolombe, Cours de Code Napoléon, t. 1. no. 363; Duranton, Cours de Droit Français, t. 1, no. 371; Massé et Vergé sur Zachariae, t. 1, § 89, note 7, p. 123; Marcadé, Explication, etc., du Code Napoléon, art. 108, no. 1; Richelot, t. 1, no. 244; and Aubry et Rau sur Zachariae, t. 1, § 143, note 7, p. 580.

[4] Duranton, Cours de Droit Français, t. 1, no. 366; Demolombe, Cours de Code Napoléon, t. 1, no. 363; Mersier, Traité, etc. des Actes de l'État Civil, no. 139.

[1] 3 Pick. 173.

[2] L. R. 1 P. & D. 611, 618.

[3] Priv. Int. L. 2d ed. § 239.

larly if he continues to be a member of his father's family; "the incapacity of lunacy being a mere prolongation of the incapacity of minority."[1] This has been laid down by Lord Penzance in the case just referred to, and has been expressly decided in several American settlement cases.[2] Lord Penzance says: "I can find no authority which defines the effect of a change of domicil in the father upon a lunatic son. It would probably depend upon circumstances. If a man had grown up, married and established himself in business in the country of his original domicil, and had afterwards become lunatic, and in that state had been taken charge of by his father, the emigration of his father to a foreign country with the view of becoming domiciled there, taking his son with him, might fail to work a change in the domicil of that son. It is not difficult to conceive cases in which great injustice might be done to the interests of others, if the general proposition were admitted that the custody of a lunatic necessarily carried with it the power of changing his domicil at will. But the hypothesis under which I am now considering the circumstances of the present case is free from the necessity of asserting any such general proposition. For I am assuming that George Crispin was of unsound mind throughout his majority; in other words, that there never was a period during which he could think and act for himself in the matter of domicil otherwise than as a minor could. And if this be so, it would seem to me that the same reasoning which attaches the domicil of the son to that of his father, while a minor, would continue to bring about the same result after the son had attained his majority, if he was continuously of unsound mind. The son in this case continued under the control of his father, was presumably supported by him, and if he had not already been in England when his father returned hither in 1843, would, it may reasonably be presumed, have been brought with him. At no period could he, according to the hypothesis, have acted

[1] Westlake, Priv. Int. L. 2d ed. § 240. So also Wharton, Confl. of L. § 53.

[2] Wiscasset v. Waldoborough, 3 Greenl. 388; Tremont v. Mt. Desert, 36 Me. 390; Corinth v. Bradley, 51 id. 540; Oxford v. Rumney, 3 N. H. 331; Upton v. Northbridge, 15 Mass. 237; Washington v. Beaver, 3 W. & S. 548.

for himself in choosing a domicil, and if his next of kin and those who had control of his movements and life were not capable of changing his domicil, that domicil would, from the moment of his majority, have become indelible. The better opinion, in my judgment, is, that the incapacity of minority, never having in this case been followed by adult capacity, continued to confer upon the father the right of choice in the matter of domicil for his son, and that in 1843, if not before, that right was exercised by the adoption of an English domicil for himself, which drew with it a similar domicil for his son."

§ 269. **Domicil of Insane Person not changed by Removal to Asylum.** — An insane person does not change his domicil by being removed to an insane hospital in another town or county,[1] no matter whether he is placed there by his guardian, or by the authorities of the municipal division charged with his support. And upon the same principle in an Iowa case,[2] it was held that an insane and helpless pauper, who, after for some years dwelling with her brother in B. County, moved with him, with the consent of the poor-authorities of said county who were charged with her support, to F. County, where they for some time continued to support her, did not thereby change her settlement.

(b) *Paupers.*

§ 270. **Domicil of Pauper not changed by Removal to Poor-house.** — Analogous to the case of persons of unsound mind who are confined in an insane hospital, is that of paupers who are maintained at the public charge at a county poor-house. This involves only municipal domicil. It has been frequently held in American cases that a pauper in such circumstances neither gains a new domicil in the municipal division in which the poor-house is located, nor loses his domicil in that from which he has been removed.[1] The grounds upon which this

[1] Pittsfield *v.* Detroit, 53 Me. 442; Dexter *v.* Sangerville, 70 id. 441; Strong *v.* Farmington, 74 id. 46; Anderson *v.* Anderson, 42 Vt. 350; Clark *v.* Whitaker, 18 Conn. 543; Freeport *v.* The Supervisors, 41 Ill. 495; Washington Co. *v.* Mahaska Co., 47 Iowa, 57; Fayette Co. *v.* Bremer Co., 56 id. 516.

[2] Fayette Co. *v.* Bremer Co., *supra.*

[1] Yarmouth *v.* North Yarmouth, 44 Me. 352; Freeport *v.* The Supervisors, *supra;* Dale *v.* Irwin, 78 Ill. 160; Clark *v.* Robinson, 88 id. 498; Covode

rule is put are well stated by Walker, C. J., in Freeport *v.* The Supervisors. He says: "As a general rule, persons under legal disability or restraint, persons of non-sane memory, or persons in want of freedom, are incapable of losing or gaining a residence by acts performed by them under the control of others. Thus the residence of the wife or minor child usually follows that of the husband or parent. There must be an exercise of volition by persons, free from restraint, and capable of acting for themselves, in order to acquire a residence. A person imprisoned under the operation of law does not thereby change his residence. So of a lunatic legally confined in an asylum. As these acts are involuntary, there can be no presumption of the necessary intention to change the residence. So of *femes covert* and minors. And no reason is perceived why the maintenance of a pauper at the poor-house should form an exception to the rule. He is placed there by the officers of the law, and in pursuance of its requirements. The act cannot be said to be voluntary, but is induced from necessity. Inability for self-support renders it necessary that the pauper should be supported as a public charge, and the law has designated what political division of the people shall be charged with the support, and has, therefore, given the body the means of controlling the acts of the pauper to the extent necessary to render it convenient for his support. So soon as he becomes a charge, and while he remains so, he ceases to be a free agent, but is in the hands, and to a certain extent under the control, of the public officers intrusted with the execution of the poor-laws. . . . By being removed to the county poor-house these persons did not lose their residence in the town of Freeport, nor did they gain a settlement in the town of Silver Creek."

A former pauper in an almshouse, who has been discharged as such, but who remains in the institution under contract of service for hire, may thereby gain a domicil in the place where the almshouse is located.[2]

§ 271. **Inmates of Hôtel des Invalides in France, and of Soldiers' Homes in this Country.** — In France it has been decided

v. Foster, 4 Brewst. 414; Munroe *v.* Jackson, 2 Cong. El. Cas. 101.

[2] *Re* Registry Lists, 10 Phila. 213.

that the Hôtel des Invalides "forms the domicil and permanent habitation of those who are admitted to it, there to pass the rest of their lives, and there to enjoy the repose which their honorable services have merited."[1] This doctrine might be of some importance in this country in its application to the inmates of soldiers' homes, whose legal position with respect to domicil can hardly be said to be identical with that of paupers, the inmacy of the former being largely the result of choice.

[1] Demolombe, Cours de Code Napoléon, t. 1, no. 354; Sirey et Gilbert, Code Civil Annoté, art. 102, note 13.

CHAPTER XIII.

DOMICIL OF PARTICULAR PERSONS (*continued*), — PRISONERS, EXILES, REFUGEES, ETC.

§ 272. **Domicil not changed by Imprisonment.** — As a general rule, a person does not acquire domicil in the place where he is imprisoned, but retains the domicil which he had at the time of his imprisonment;[1] and this is so, whether he is imprisoned in pursuance of a criminal conviction or on civil process; as, for example, for debt. There is no English decision upon this subject, but the rule has been recognized by text-writers generally, and by numerous decided cases in Ireland, Scotland, France, and this country. It has been put upon several grounds, one (which, however, would not apply to imprisonment for life) being that, inasmuch as the presence of the prisoner at the place of his confinement is but temporary, he must be presumed to preserve the hope of return.[2]

Another ground which has been assigned for the rule, and probably the only true one, is that the presence of the prisoner

[1] Burton *v.* Fisher, Milward, 183; Sharpe *v.* Orde, 8 S. (Sc. Sess. Cas. 1st ser. 1829), 49; Pittsfield *v.* Detroit, 53 Me. 442; Topsham *v.* Lewiston, 74 id. 236; Amherst *v.* Hollis, 9 N. H. 107; Pawlet *v.* Rutland, Bray. 175; Manchester *v.* Rupert, 6 Vt. 291 (citing also St. Albans *v.* Huntington, unreported); Danville *v.* Putney, id. 512; Woodstock *v.* Hartland, 21 id. 563; Northfield *v.* Veshire, 33 id. 110; Baltimore *v.* Chester, 53 id. 315; Grant *v.* Dalliber, 11 Conn. 234; Freeport *v.* The Supervisors, 41 Ill. 495; Hardy *v.* De Leon, 5 Tex. 211; Covode *v.* Foster, 4 Brewst. 414; Denizart, *verb.* Dom. no. 20; Merlin, Repertoire, *verb.* Dom. § 3, no. 4; Domat, Pub. L. bk. 1, t. 16, § 3, no. 14; Sirey et Gilbert, Code Civil Annoté, art. 102, and authorities cited, notes 16–19; Phillimore, Dom. no. 146; Story, Confl. of L. § 47; Westlake, Priv. Int. L. 1st ed. no. 52 (but see also no. 53); Dicey, Dom. p. 129; Wharton, Confl. of L. § 53. See also Holbeck *v.* Leeds, 20 L. J. (N. S.) (M. C.) 107. Most of the American cases cited above are cases of pauper settlement, but the principles which they decide apply *a fortiori* to domicil. Apparently to the contrary are Reading *v.* Westport, 19 Conn. 561, and Washington *v.* Kent, 38 id. 249; but these cases rest upon statutory provisions.

[2] See, *e. g.*, Merlin, Denizart, and Wharton, *loc. cit.*, and Northfield *v.* Veshire and Baltimore *v.* Chester, *supra*.

is not of his own volition but by constraint, and that, therefore, one of the main requirements for the acquisition of a new domicil, that is, that it be freely chosen, is not fulfilled.[3] This ground, which seems to be supported by the reasoning in the analogous cases of the pauper maintained in an almshouse, and the insane person confined in an insane asylum, would extend to cases as well of imprisonment for life as of a temporary nature. As was well said by Church, J., in Grant *v.* Dalliber, "The State prison [is] not his place of abode, but his place of punishment, and while there he [is] absent from home."

§ 273. **Prisoner may acquire a Domicil where he is imprisoned.** — It doubtless would be held that, notwithstanding his compulsory presence, a prisoner might acquire a domicil where he is confined, if it could be shown that he had formed the intention of remaining after he became free to control his movements; but in such case very clear proof of such intention would be required.[1]

§ 274. **Prisoner for Life.** — With respect to the prisoner for life, the doctrine does not appear to be settled. If the second ground of the general rule stated above is the true one, it would seem that his domicil is unchanged. Several cases may be supposed; namely, of (1) a person domiciled in Massachusetts who is imprisoned for life in New York or Canada; (2) a person domiciled in one town or county who is imprisoned in another town or county of the same State; (3) a domiciled Englishman who is transported to a penal colony for life. In the first two cases it is difficult, in the entire absence of

[3] Westlake, Story, and Dicey, *loc. cit.*, and Topsham *v.* Lewiston, Danville *v.* Putney, Woodstock *v.* Hartland, Grant *v.* Dalliber, and Freeport *v.* The Supervisors, *supra*.

[1] In Woodstock *v.* Hartland, *supra*, a prisoner on civil process for debt, who was admitted to the liberties of the prison upon executing a jail bond to the sheriff, hired a house in Woodstock, where the jail was located, and moved his family thither. He there supported his family nine years, and paid taxes during those years. Held that he had gained no settlement in Woodstock. But suppose the case of a prisoner serving a sentence for a definite time, who takes a lease of a house at the place of his confinement for a term exceeding that of his imprisonment, and whose family is by his direction there established in a permanent manner, or who gives other unmistakable evidence of his intention to remain there after the expiration of his sentence; in such case would not his domicil be held to be changed?

authority in the affirmative, to believe that such imprisonment would work a change of domicil.

§ 275. **Transported Convict.** — With respect to the domicil of a transported convict there appears to have been much doubt in France until the law was recently settled by a statute [1] which provides that, as to those who are condemned to simple transportation, "Leur domicile pour tous les droits civils dont ils ont l'exercise aux colonies est au lieu où ils subissent leur peine." On the contrary, convicts who do not enjoy the exercise of their civil rights are, subject to the law of 31st May, 1854, impressed with legal interdiction, and as *interdits* are domiciled, not in the colony where they are found, but with their tutors.[2] In England, Phillimore [3] lays it down as beyond doubt that a person transported for life would lose his original domicil, and Westlake [4] and Dicey [5] follow him; the latter, however, with some hesitation, and suggesting that: "Supposing, however, that a sentence to transportation destroys a man's domicil of origin, it is probable that no courts, other than those of the sovereign inflicting the sentence, would give this effect to the sentence. French *émigrés* were treated by our courts as retaining their domicil of origin."

§ 276. **The "Relegatus" in the Roman Law.** — The Roman law furnishes us with two apparently contradictory texts con-

[1] 25th Mar., 1873, but Merlin lays it down that *déportés par jugement à vie* do not preserve their former domicil, but gain one in the place to which they are transported. But it seems to be otherwise with regard to political exiles (Merlin, Repertoire, *verb.* Dom. § 4, no. 3).

[2] De Fongaufier, Thèse pour le Doctorat, pp. 147, 148.

[3] Dom. no. 151; Id. Int. L. vol. iv. no. 191.

[4] Priv. Int. L. 1st ed. no. 53.

[5] Dom. p. 129. He says: "A person transported to a particular country for life absolutely loses (it is said) his original domicil. It is certainly possible that, in this instance, 'the domicil of origin may be extinguished by act of law.' A sentence, further, to be transported to Van Diemen's Land, may probably be looked upon as an order that the convict shall reside, and make his home, in Van Diemen's Land, that is, be domiciled there; but there seems to be no English decision on the subject, and in the absence of any such decision, doubt may be entertained whether there be any real distinction between the position of a convict and of a prisoner. A person, at any rate, transported for years, ought, it would seem, like a prisoner, to retain the domicil which he possessed at the beginning of his imprisonment. Supposing, however, that a sentence to transportation destroys a man's domicil of origin, it is probable that no courts other than those of the sovereign inflicting the sentence would give this effect to the sentence. French *émigrés* were treated by our courts as retaining their domicil of origin."

cerning the "*relegatus*," who was partly exile and partly prisoner. Paulus declares, "Relegatus in eo loco, in quem relegatus est, interim necessarium domicilium habet;"[1] and Ulpian, "Domicilium autem habere potest et relegatus eo loco, unde arcetur, ut Marcellus scribit."[2] Savigny[3] harmonizes the texts by holding that the latter means merely that the *relegatus* is not freed by his punishment from discharging his former municipal burdens. But Merlin,[4] pointing out that there were two kinds of *relegatio*, temporary and perpetual, holds that the text of Paulus applies to both kinds, and that of Ulpian only to the latter; so that one who was condemned to permanent relegation could have domicil only in the place to which he was relegated, while one who was condemned to temporary relegation had a necessary domicil in the place of his punishment, and might at the same time preserve his former domicil, in view of his presumed intention to return after the expiration of the term of his punishment. John Voet[5] also makes the retention of the prior domicil dependent upon intention to return, while Corvinus,[6] without distinction or qualification, sees in the text only general authority for double domicil in the case of a *relegatus*.

§ 277. **Exiles.** — In Udny *v.* Udny,[1] Lord Westbury, in developing the extreme theory maintained in that case of the adhesion of domicil of origin, used this language: "The domicil of origin [and *a fortiori* an acquired domicil] may be extinguished by act of law; as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal." Whether such effect would be given by foreign courts to such sentence may well be doubted,[2] and certainly, if the period of exile be shorter than for life, or be uncertain in its duration, the domicil of the exile would not be held to be changed unless he appears, abandoning all hope

[1] Dig. 50, t. 1, l. 22. § 3.
[2] Id. l. 27, § 3.
[3] System, etc., § 353, note q (Guthrie's trans. p. 99).
[4] *Verb.* Dom. § 4, no. 3.
[5] Ad Pand. l. 5, t. 1, no. 93.
[6] Jur. Rom. l. 10, t. 39.
[1] L. R. Sch. App. 441.

[2] That the penal laws and judgments of a country have no extra-territorial force see Story, Confl. of L. §§ 91, 92, and 620 *et seq.*; Wharton, Confl. of L. §§ 4, 108 and 833; Westlake, Priv. Int. L. 2d ed. §§ 18 and 345; and Dicey, Dom. p. 162.

and intention to return, to have adopted another domicil.[3] Denizart[4] says: "Thus one may say that an exile is not considered to be domiciled in the place of his exile, and that if he died there, his succession ought not to be regulated by the laws of the country of such residence; because, in order to fix a domicil, it is necessary that there should be a choice manifested by an express intention, and the exile is not allowed that liberty. Hope and intention of return ought always to be presumed in a *relégué*, and consequently it may be said that, during his exile, he preserves the domicil which he had at the moment when he was banished. It is necessary to say the same thing of prisoners," etc.

§ 278. **Id.** — The case of the exile (using that word as we speak, for instance, of an exile to Siberia[1]) presents two aspects of compulsion; namely, compulsory absence from one place and compulsory presence in another; and it is easy to see that the presumption would be very strong against the voluntary adoption of the place of exile as the place of domicil. In the case of banishment, or prohibition to remain in a place or country, we have only one aspect of compulsion; that is, compulsory absence, leaving the person free to settle where he pleases. It is apparent that, in the first case, a change of domicil can very rarely take place, or at least be proven, unless it be held to occur by operation of law. But in the second case, it is possible to conceive of circumstances which would show that the person had so accepted the situation, and so set himself up in the new place or country, as to raise the presumption that he has no other intention or idea than to remain there permanently.

[3] See *infra*, § 285.

[4] *Verb.* Dom. no. 20.

[1] There is an unfortunate looseness in the use of the term "exile." The older French writers seem to have employed it in the sense of one relegated to a particular place, and "banishment" with reference to one prohibited from remaining in a particular place. See Denizart, *verb.* "Exil," and "Ban," "Banissement." Phillimore uses "exile" in the sense above indicated. Dom. nos. 148–151. But in English and American usage there seems to be little that is definite by way of distinction, except that, in common parlance, "exile" is sometimes applied to voluntary absence, although more frequently to that occasioned by fear of personal danger. Story apparently uses "banishment" in the sense of exile, as given above; namely, as including confinement at a particular place (Confl. of L. § 47).

§ 279. **Refugees.** — It is a general rule that a person who is impelled by fear to flee from his place of abode does not thereby lose his domicil, nor does he gain a domicil in the place where he has taken refuge, unless it appear that he has settled there *animo manendi;* and the presumption is, until the contrary appears, that such person retains the expectation and intention of returning, when the impelling cause has disappeared. Mascardus,[1] upon the authority of Ubaldus, says: "Quando quis aliquo metu impulsus, res familiamque suam alibi transtulerit, non enim ibi durante metu domicilium contraxisse præsumitur." This principle has been applied to several classes of refugees.[2]

§ 280. **Political Refugees.** — The most familiar class is that of the political refugee. A striking instance of this class is given by Boullenois,[1] in the case of the fugitives who accompanied James II. to France, and who were treated by the French jurists as retaining their English domicil. And on the other hand, the same doctrine was recognized by the English courts in the case of the French emigrants or refugees during the period of the French Revolution, and since.[2]

§ 281. **De Bonneval v. De Bonneval.** — The leading case is that of De Bonneval *v.* De Bonneval, in which Sir Herbert Jenner, J., delivered an opinion which has been much referred to. He says: "There is no doubt that the domicil of origin of the deceased was France, for there he was born and continued to reside from 1765 to 1792, and he left that country only in consequence of the disturbances which broke out there. He came here in 1793, but he came in the character of a Frenchman, and retained that character till he left this country in 1814; for he received an allowance from our government as a French emigrant. Coming with no intention of residing

[1] De Probationibus, concl. 535, no. 26.

[2] See Phillimore, Dom. no. 152 *et seq.*; Westlake, Priv. Int. L. 1st ed. no. 38, 2d ed. § 262; Dicey, Dom. pp. 130, 131; Wharton, Confl. of L. § 54; and authorities cited in the remaining notes of this chapter. As to fugitive from justice, see Barrett *v.* Black, 25 Ga. 151.

[1] Traité de la Réalité et Personalité des Statuts, tome 1, t. 2, c. 3; and to the same effect see Denizart, *verb.* Anglois, no. 1.

[2] De Bonneval *v.* De Bonneval, 1 Curteis, 856; Goods of Duchess d'Orléans, 1 Swab. & Tr. 253. In the latter case there was a decree of banishment by the French Republic.

here, did anything occur while he was resident here to indicate a contrary intention? It is clear to me that, as in the case of exile, the absence of a person from his own country will not operate as a change of domicil; so, where a party removes to another country to avoid the inconveniences attending a residence in his own, he does not intend to abandon his original domicil, or to acquire a new one in the country to which he comes to avoid such inconveniences. At all events, it must be considered a compulsory residence in this country; he was forced to leave his own, and was prevented from returning till 1814. Had his residence here been, in the first instance, voluntary; had he come here to take up a permanent abode in this country, and to abandon his domicil of origin, that is, to disunite himself from his native country, the result might have been different. It is true that he made a long and continued residence in this country, but I am of opinion that a continued residence in this country is not sufficient to produce a change of domicil; for he came here avowedly as an emigrant, with an intention of returning to his own country so soon as the causes ceased to operate which had driven him from his native home. He remained a Frenchman, and if he had died during the interval between 1793 and 1815, his property would have been administered according to the law of France."

§ 282. **White v. Brown.** — In the American case of White *v.* Brown,[1] this doctrine was expounded by Grier, J., in his charge to the jury. It appeared in evidence that the testator, being a Pennsylvanian by birth, had, during the Revolution, adhered to the King of Great Britain, and in 1776, having sold part of his real estate in this country, had sailed for England. In 1781 he was proclaimed a traitor, and his real estate was confiscated. In 1788 he received compensation from Great Britain as a suffering loyalist. A greater part of his time from the close of the war, to his death in 1824, was spent in England; he returned, however, to this country several times after the close of the war, remaining in all about two years. It appeared also that he had used very strong

[1] 1 Wall. Jr. C. Ct. 217, 265.

expressions indicating a desire and intention to return to, and remain in, America. In view of these facts the learned judge charged the jury as follows: "A fugitive from his country on account of civil war still retains his domicil, unless he shows an intention of a total abandonment of his country by the acquisition of a new domicil of choice. Nor will the confiscation of his property by the new government, in the case of a revolution effected after civil conflict, nor the attainder of his person, of themselves put an end to his domicil of origin. If he elect to adhere to the old sovereign or government, looking forward with hopes of its re-establishment, his domicil of origin is not necessarily abandoned by such election. Allegiance to the existing government, or the exercise of political rights, constitute no part of the definition of domicil. These facts may nevertheless be of great importance in judging of the intention. Consequently, adherence to the King of Great Britain in our Revolutionary War, although it might have caused the forfeiture of the life or property of an American citizen, was not of itself an abandonment of his domicil. The estates of those persons who fled from England with the Stuarts, and died in France, were administered by the French courts according to the law of England as their domicil." The jury found in favor of the American domicil, and, on the motion for a new trial, the court sustained their finding.

§ 283. **Ennis v. Smith.** — The general doctrine was also recognized by the Supreme Court of the United States in Ennis *v.* Smith[1] (Kosciusko's case); but we may draw from that case the doctrine that voluntary exile because of unwillingness to live under a particular government does not prevent a change of domicil, even though the hope be entertained of a change of government such as will permit a return without violence to the feelings of the person so circumstanced.

§ 284. **Fugitives from the Horrors and Dangers of War.** — The general rule has also been applied to persons who have fled to

[1] 14 How. 400. In Hardy *v.* De Leon, 5 Tex. 211, the facts were that De Leon was removed by the military authorities of that State to Louisiana, contrary to his will, and that he constantly retained an intention to return. Held that his domicil was not changed. See also White *v.* Burnley, 20 How. 235.

avoid the horrors and dangers of war, particularly civil war.[1] The passage above quoted from Mascardus has reference to such case.

This doctrine has been applied also to municipal domicil in this country.[2]

§ 285. **Exile or Fugitive may acquire Domicil at the Place where he takes Refuge.** — It is scarcely necessary to cite authority that an exile or fugitive may acquire domicil at the place where he takes refuge, if he sees fit to do so, and that he may be assumed to do so if he continues settled there in a permanent manner after his restoration to his own home has become possible.[1]

§ 286. **Absconding Debtors.** — In Udny *v.* Udny,[1] Lord Westbury said, speaking of domicil of choice: "There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness." In that case, however, the English acquired domicil which Colonel Udny left on account of pecuniary embarrassments was held to have been completely and finally abandoned and lost; and Lord Chancellor Hatherley seemed to consider it a circumstance in favor of such abandonment that his return to England "was barred against him by the continued threats of process by his creditors." Here there was evidently no *animus revertendi;* but in several other cases of similar absence it has been held that no change of domicil takes place if there is *animus revertendi.* Thus in Pitt *v.* Pitt,[2] in the House of Lords, all the facts tended to show the intention of Colonel Pitt to return, if, and whenever, he could get rid of his liabilities. In Briggs *v.* Briggs,[3] Hannen, President, held that absence to avoid cred-

[1] Baptiste *v.* De Volunbrun, 5 Harr. & J. 86; De Fontaine *v.* De Fontaine, id. 99 note. The defendant in the former case was driven from St. Domingo by the servile war, and took refuge in Baltimore, intending to return to her own country as soon as she could do so with safety. Held that she was not "resident" in Maryland within the provisions of the law prohibiting the importation of slaves into that State, but a mere sojourner. In De Fontaine *v.* De Fontaine the facts were similar, and the result the same.

[2] Folger *v.* Slaughter, 19 La. An. 323.

[1] Dicey, p. 131; Wharton, § 54; Pothier, Intr. aux Cout. d'Orléans, no. 15.

[1] L. R. 1 Sch. App. 441; and *supra*, § 195.

[2] 4 Macq. H. L. 627.

[3] L. R. 5 P. D. 163.

itors worked no change of domicil where there was an *animus revertendi* in case the party could make enough money to pay off his debts. And to the same effect was the Virginia case of Lindsay *v.* Murphy.[4] In Jennison *v.* Hapgood,[5] the testator, domiciled in Massachusetts, left that State to avoid his creditors. But he did not remove with him his family, who continued to reside where he had left them; and upon this "important fact" the court based the presumption of *animus revertendi*, and held that his domicil was not changed. In all these cases in which a change has been decided against, it appears to have been upon the ground of express or presumed *animus revertendi*, and hence that the new residence was more or less temporary, while Udny *v.* Udny itself seems to be a refutation, or at least a contradiction, of the doctrine of Lord Westbury.

[4] 76 Va. 428.

[5] 10 Pick. 77. Besides the authorities cited *supra*, see on this subject Sharpe *v.* Orde, 8 S. (Sc. Sess. Cas. 1st ser. 1829) 49, and Rumney *v.* Camptown, 10 N. H. 567.

CHAPTER XIV.

DOMICIL OF PARTICULAR PERSONS (*continued*), — INVALIDS.

§ 287. REFERENCE has already been made to the "health cases," that is, those involving or discussing the domicil of invalids. They are not numerous, nor can it be said that the actual results reached in any of them are justly open to criticism; but they have given some difficulty by reason of the apparently conflicting expressions of opinion used by judges who took part in their discussion and decision. It will be well to look at the most important of them in detail.

§ 288. **Lord Campbell, in Johnstone v. Beattie.** — About the earliest discussion of the subject of the domicil of an invalid was by Lord Campbell, in Johnstone *v.* Beattie,[1] where he used this language: "It must be remembered . . . that she came to England only on account of her health, and her child's. . . . I see no reason to think that in case she should recover her health . . . she had permanently adopted England as her place of residence, although her father resided at Chester. She undoubtedly expected to die in England, and she gave directions that her body should be buried in England; but this was in her last sickness, of the fatal termination of which she had a foreboding. The question is, whether she had taken up her permanent residence in England in case she should recover her health and strength? If, instead of remaining in Albion Street, Hyde Park, she had gone for her health to the Island of Madeira, where her husband died, and had written letters stating that she should die there, and had given directions that she should be buried there, although she had died and been buried there, unquestionably her Scotch domicil would never have been superseded."

§ 289. **Lord Kingsdown, in Moorhouse v. Lord.** — The case supposed by Lord Kingsdown, in Moorhouse *v.* Lord,[1] is quite

[1] 10 Cl. & Fin. 42, 138.

[1] 10 H. L. Cas. 272, 292.

similar: "I can well imagine a case in which a man leaves England with no intention whatever of returning, and not only with no intention of returning, but with a determination and certainty that he will not return. Take the case of a man laboring under a mortal disease. He is informed by his physicians that his life may be prolonged for a few months by a change to a warmer climate — that at all events his suffering will be mitigated by such change. Is it to be said that if he goes out to Madeira he cannot do that without losing his character of an English subject, without losing the right to the intervention of the English laws as to the transmission of his property after his death, and the construction of his testamentary instruments? My Lords, I apprehend that such a proposition is revolting to common sense and the common feelings of humanity."

§ 290. **Sir John Dodson, in Laneuville v. Anderson.** — Sir John Dodson, in Laneuville *v.* Anderson,[1] puts the opposite phase of the subject: "It is said that the mere going for health, or the mere going for purposes of that sort, — for a better climate, — cannot have the effect of fixing his domicil; for if persons go to places merely for the benefit of their health, for a temporary purpose, — such as going to watering-places, — going to Cheltenham or Bath or the Continent, — that does not effect a change of domicil. But where a man fixes his home on account of its being more beneficial to his health, that is as good a motive, that will have as much effect, I apprehend, as any other cause for being desirous of remaining in the same place."

§ 291. **Hoskins v. Matthews.** — In the case of Hoskins *v.* Matthews,[1] the testator, M., a born Englishman, having passed middle age and being in ill health, left England in 1838, under the advice of physicians, and, after travelling for some time on the Continent, and visiting various watering-places, finally located in Tuscany, where, principally on account of the suitableness of the climate, in 1839 he purchased a villa and set up an establishment. His declarations as to his intention of permanent or temporary residence were somewhat conflicting;

[1] 2 Spinks, 41.

[1] 8 De G. M. & G. 13, 28.

but he purchased at different times additional land to be used in connection with his villa, in which he continued to reside uninterruptedly, — except during annual visits to watering places, — up to the time of his death in 1850. In his will he provided for the residence of his favorite son and his daughters in his villa after his death. Upon these and other facts Wood, V. C., held his domicil to be Tuscan, and on appeal his decree was affirmed by a division of the Court of Appeal, composed of Turner and Knight-Bruce, L. JJ. The former, agreeing with the conclusion of the Vice-Chancellor said: "It was contended on the part of the appellant — and this was the great staple of the argument on his part — that Mr. Matthews's residence out of England was a matter of necessity, and not of choice; that his health compelled him to reside abroad, and that domicil cannot be founded on such compulsory residence. That there may be cases in which even a permanent residence in a foreign country occasioned by the state of the health may not operate a change of domicil, may well be admitted. Such was the case put by Lord Campbell, in Beattie *v.* Johnstone. But such cases must not be confounded with others, in which the foreign residence may be determined by the preference of climate, or the hope or the opinion that the air or the habits of another country may be better suited to the health or the constitution. In the one case the foreign abode is determined by necessity; in the other it is decided by choice. In this case I find nothing in the evidence to show that Mr. Matthews, when he left England, was in any immediate danger or apprehension. He was no doubt out of health, and he went abroad for the purpose of trying the effect of other remedies and other climates. That he would have preferred settling in England I have little doubt; but I think he was not driven to settle in Italy by any cogent necessity. I think that, in settling there, he was exercising a preference, and not acting upon a necessity; and I cannot venture to hold that in such a case the domicil cannot be changed. If domicil is to remain unchanged upon the ground of climate being more suitable to health, I hardly know how we could stop short of holding that it ought to remain unchanged also upon the ground of habits being more suitable to fortune. There is in both cases a degree of

moral compulsion." Lord Justice Knight-Bruce did not discuss the ground of his dissent.

§ 292. **Hegeman v. Fox.** — The subject was discussed by the Supreme Court of New York, in the case of Hegeman *v.* Fox.[1] The facts were that M., whose domicil of origin was in Massachusetts, went to New York City and engaged in business there, and after having accumulated considerable property, he went to reside in Williamsburgh, in the same State; but subsequently falling into ill health, he went to Florida, where he purchased a plantation, set up a household establishment, and in various ways manifested an intention of permanent residence, which, but for the question of health, would have been undoubtedly sufficient to establish a change of domicil. Emott, J., speaking for the court, said: "It is said that all the acts and manifestations of purpose which are proved in the case are deprived of their effect, and that whatever the testator did could not legally produce a change of his domicil, because these acts were done under the stress of impaired health, and the change which he made was compelled by that reason. It may be conceded that Mr. Moore broke up his establishment in Williamsburgh in consequence of his enfeebled health, and went South in order to its restoration, or rather to the prolongation of his life in a milder climate, and that if it had not been for this, he would never have left this State. It is said that absence from an established domicil will not effect its loss if such absence be compulsory, and that it is compulsory if occasioned by ill health. The case of the invalid is likened to that of the exile, the soldier, or the ambassador. To a certain extent these propositions are undeniably true. Mere absence, when compelled by the urgency of sickness that will admit of no delay to avert an immediate fatal termination, cannot take away a man's residence in the home which he leaves, or fix it in the place to which he goes. A man who flies from the rapid approach of death has no other motive, and does not exercise the choice which is necessary in a change of his home and permanent abode. But the whole matter is a question of intention, and no arbitrary rule

[1] 31 Barb. 475.

is to be laid down in relation to it. . . . Mr. Moore, when he left New York, was not in any immediate danger, . . . or at least, which is the material point, did not suppose he was. He was not like a man fleeing a pestilence, or an attack of disease threatening instant death, and therefore leaving no space for choice, and no motive but necessity. It is altogether going too far . . . to say that ill health, the necessity of finding a milder or a better climate, to live comfortably or to live at all, is not to be admitted as a motive for a change of residence. Such circumstance may create a sort of necessity, but it is a moral necessity acting upon the will. And whenever there is an act of volition, a determination to abandon the old home and make a new one, it is not material what motives have induced the choice. Undoubtedly there may be cases in which even a permanent residence in a foreign country, occasioned by the state of the health, may not operate a change of domicil. But in these questions every case must stand upon its own circumstances. The cases in which the residence of an invalid in a foreign country, or even in a distant portion of his own country, will not create a domicil, may be understood by comparing them with the case of the exile, or, as the text-writers denominate him, "the emigrant," which they more nearly resemble. The fugitive from revolution or civil war comes to his new abode with no intention of abandoning his country, or of permanently remaining abroad. He is coerced by causes which approach to, if they do not constitute, actual physical compulsion, and his manifest purpose is only to remain in his new abode as long as these causes operate, and when the necessity for absence is removed, to return. There may be cases of instant fear of death by sickness which resemble this; but where a man deliberately breaks up his residence, purchases a new mansion, engages in new occupations, and acts in every respect as a man would who was settling himself altogether from choice and free will, he must be acting under the control of motives and not of necessity, and he looks forward to no return. He goes to another region to obtain that health which he is convinced he cannot enjoy where he is, and he is much more like the man who changes his abode in quest of fortune, that he

may gain a living or a competence which he sees he cannot get at his present home. If there be satisfactory evidence in the case, as we all think there is, of Mr. Moore's intention to break up his residence in King's County, and subsequently to make Florida his home, we think the force of this evidence is not destroyed by the fact that he was driven to the step, by what he considered the necessity of preserving his health or his life. We might as well hesitate to say that he lost his domicil of origin when he removed from Massachusetts to New York, doubtless under the belief that he must do so in order to earn the fortune which he sought, or perhaps the very means of living." The court accordingly held that domicil had been changed.

§ 293. **Isham v. Gibbons.** — In another New York case,[1] the testator was a native of Georgia, but had become domiciled in New Jersey. Falling into ill health, he went to New York City for medical treatment and to secure the daily attendance of an eminent physician. He there hired a house, and partly furnished it; but, although describing himself in deeds as of New York City, and paying personal taxes there under protest, he constantly declared his intention to return to New Jersey in event of his recovery, and, in the mean time, kept up his establishment there. He died in New York after a residence of two years. The Surrogate held his domicil to be in New Jersey, remarking: "There is a clear distinction between the surrender of a hope of ever being able to return to your home, and the absolute abandonment of your home. Many an invalid leaves his bones upon a foreign soil, who, after a long absence from home, has given up the prospect of a return, and yet who has not taken the first step towards the surrender of his domicil."

§ 294. **Dupuy v. Wurtz.** — Somewhat similar to this was the case of Dupuy *v.* Wurtz,[1] in the New York Court of Appeals. The testatrix and her husband being domiciled in New York, in 1859 went to Europe for their health, expecting ultimately to return. In 1861 her husband died in Rome, and thereafter the testatrix continued abroad, spending her

[1] Isham *v.* Gibbons, 1 Bradf. 69.

[1] 53 N. Y. 556.

time in various places in Europe, though apparently the most of it at Nice, until her death in 1871. During the greater part of this period she did not look upon her absence as permanent, and kept her house in New York City unoccupied, ready for her return; but in 1868 she rented her house, and in view of the advice of her physicians that her health would not permit her to make the voyage home, she finally surrendered all hope of return and made up her mind to live and die abroad. The court held her domicil to be unchanged, but put the decision mainly upon the ground that there was not sufficient evidence of intention to settle permanently in any particular place, quoting, however, with approbation, the remarks (already given) of Lord Kingsdown, in Moorhouse *v.* Lord.

§ 295. **Still v. Woodville.** — Similar also was a case [1] in the Supreme Court of Mississippi. The facts were that the testator, a native of Mississippi and domiciled there, being in ill health, sold his plantation and slaves and left the State. He went to Bayou Sara, in Louisiana, where he remained several months, and thence to New Orleans, remaining there for a month or two in the house of a friend and under the care of a physician. Thence he went to Texas, and there he died a few weeks after his arrival. In his will, made at New Orleans, he described himself as of W. County, Mississippi. He appointed his executor there, and directed that his estate should be sent there along with his will. It is true that he made some declarations of his purpose never to return to that State, even in the event of his recovery, but (in the language of the court) "the whole scope of the evidence showed that his health induced him to abandon his business and home in W. County, not with a view to a permanent abode elsewhere, but only to regain his health and prolong his life by travel." It was accordingly held that his domicil was not changed. It is, indeed, plain, on general principles and wholly without authority, that one who is temporarily absent for the sake of his health, and who intends to return [2] to his former place of abode, or who,

[1] Still *v.* Woodville, 38 Miss. 646.

[2] The following, however, may be cited: Story, Confl. of L. § 45; Crawford *v.* Wilson, 4 Barb. 504; Rue High, Appellant, 2 Doug. (Mich.) 515; Kellogg *v.* Oshkosh, 14 Wis. 625.

being permanently absent, does not permanently fix himself elsewhere, does not lose his domicil.[3]

§ 296. **Lord Westbury, in Udny v. Udny.** — Of all the expressions upon this subject, that of Lord Westbury, in Udny *v.* Udny,[1] is most liable to misconception. In speaking of dom-

[3] Dupuy *v.* Wurtz, *supra*; Still *v.* Woodville, *supra*.

[1] L. R. 1 Sch. App. 441. Dicey, Dom. p. 134, after noticing the English authorities, thus remarks: "The apparent inconsistency between these doctrines may be removed, or explained, if we dismiss all reference to motive, to external necessity, and so forth; avoid the use of the misleading terms 'voluntary' and 'involuntary,' and recurring to the principle that residence, combined with the purpose of permanent or indefinite residence, constitutes domicil, apply it to the different cases or circumstances under which a domiciled Englishman may take up a foreign residence for the sake of his health. These cases are three: *First case:* D. goes to France for relief from sickness, with the fixed intention of residing there for six months and no longer. This case presents no difficulty whatever. D. does not acquire a French domicil, any more than he does if he goes to France for six months on business or for pleasure. The reason why he does not acquire a domicil is that he has not the *animus manendi*, but the quite different intention of staying for a determinate time or definite purpose. *Second case:* D., finding that his health suffers from the English climate, goes to France and settles there; that is, he intends to reside there permanently or indefinitely. D. in this case acquires a French domicil. Here, again, there is no deviation from general principle. D. acquires a French domicil because he resides in France with the *animus manendi*. *Third case:* D. goes to France in a dying state, in order to alleviate his sufferings, without any expectation of returning to England. This is the case which has suggested the doctrine that a change of residence for the sake of health does not involve a change of domicil. The doctrine itself, as applied to this case, conforms to common sense. It would be absurd to say that D., who goes to Pau, to spend there in peace the few remaining months of his life, acquires a French domicil. But the doctrine in question, as applied to this case, is in conformity, not only with common sense, but with the general theory of the law of domicil. D. does not acquire a domicil in France, because he does not go to France with the intention of permanent or indefinite residence, in the sense in which these words are applied to a person settling in another country, but goes there for the definite and determinate purpose of passing in France the few remaining months of his life. The third case, now under consideration, is, in its essential features, like the first, and not like the second, of the cases already examined. If D. knew for certain that he would die on the day six months after he left England, it would be apparent that the first and third cases were identical. That the definite period for which he intends to reside is limited, not by a fixed day, or by the conclusion of a definite piece of business, but by the expected termination of his life, can make no difference in the character of the residence. In neither the first nor the third case is the residence combined with the proper *animus manendi*. In no one of the three cases we have examined is there any necessity, in order to arrive at a right conclusion, for reference to the motive, as contrasted with, what is quite a different thing, the purpose or intention of residence. We may now see that the contradictory *dicta* as to the effect of a residence for the sake of health do not of necessity imply any fundamental difference of opinion

icil of choice, he says: "There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or *the relief from illness.*" His lordship, however, probably had in view the extreme cases, such as those supposed by Lord Campbell in Johnstone *v.* Beattie, and Lord Kingsdown in Moorhouse *v.* Lord, and not such cases as Hoskins *v.* Matthews and Hegeman *v.* Fox.

among the high authorities by whom these *dicta* were delivered. All these authorities might probably have arrived at the same conclusion if they had had the same circumstances before their minds. The court which gave judgment in Hoskins *v.* Matthews had to deal with the second of our supposed cases, and arrived at what, both according to common sense and according to theory, is a perfectly sound conclusion. The *dicta*, on the other hand, of the authorities who lay down that a residence adopted for the sake of health does not involve a change of domicil, are obviously delivered by persons who had before their minds the third, not the second, of our supposed cases. These *dicta*, again, embody what, in reference to such a case, is, as we have shown, a perfectly sound conclusion. Their only defect is, that they are expressed in terms which are too wide, and which therefore cover circumstances, probably not within the contemplation of the authorities by whom they were delivered; and, further, that, while embodying a sound conclusion, they introduce an unnecessary and misguiding reference to the motives which may lead to the adoption of a foreign domicil."

CHAPTER XV.

DOMICIL OF PARTICULAR PERSONS (*continued*), — SOLDIERS AND SAILORS.

(a) *Soldiers and Sailors in the War Marine.*

§ 297. **Roman Law.** — In the Roman law a soldier was considered as domiciled at the place where he served, unless he possessed property in the place where he held citizenship. "Miles ibi domicilium habere videtur ubi meret, si nihil in patria possideat."[1] Donellus,[2] in citing this passage, adds by way of explanation, "Quasi animo ad eum locum adjecto, in quo ad militandum consistère, et stipendium accipere cogitur."

§ 298. **French Jurists.** — Such, however, is not the modern view. The French jurists, with few exceptions, hold that a soldier preserves his domicil of origin until he has manifested a contrary intention.[1] Demolombe, holding that the residence of a soldier in a garrison does not give him domicil there, classes it among "pure residences *ad tempus*, which are far from excluding the hope of return, and which, besides, not having the effect of the choice and will of the persons, are not able to furnish proof of intention to change domicil." A soldier may, however, it has been held,[2] establish his domicil where he is stationed in a garrison by the regular formal acts for which the French law makes provision, and when he has done so he preserves that domicil notwithstanding he becomes stationed

[1] Dig. 50, t. 1, l. 23, § 1.

[2] De Jure Civili, l. 17, c. 12, p. 978 b, no. 70. See also J. Voet, Ad Pand. l. 5, t. 1, no. 93; Corvinus, Jur. Rom. l. 10, t. 39, p. 46; Savigny, System, etc. § 353 (Guthrie's trans. p. 99).

[1] Demolombe, Cours de Code Napoléon, t. 1, no. 354; Duranton, Cours de Droit Français, t. 1, no. 360; Marcadé, Cours de Code Civil, art. 108, no. 2; Boncenne, Procédure Civile, p. 204; Proudhon, Traité de l'État des Personnes, t. 1, p. 249, and others cited, Sirey et Gilbert, Code Civil Annoté, art. 102, note 8.

[2] See Sirey et Gilbert, Code Civil Annoté, art. 102, note 11.

elsewhere, so long as the indication of another domicil does not result from a subsequent formal act.

§ 299. **Does a Soldier necessarily become domiciled within the Territory of the Sovereign whom he serves?** — It has been held in England,[1] by a confusion of the ideas of domicil and alle-

[1] President of United States *v.* Drummond, 33 Beav. 449. In that case Lord Romilly, M. R., said: "He obtained a commission in the English army, which would give him an English domicil." Tending in the same direction was the language of Lord Justice Turner in Jopp *v.* Wood, 4 De G. J. & S. 616. He said: "In the course of the argument on the part of the appellant, reliance was placed on the cases which have been decided as to covenanted servants of the East India Company. But there are considerations connected with that class of cases which have no bearing on a case like the present. At the time when those cases were decided, the Government of the East India Company was in a great degree, if not wholly, a separate and independent government, foreign to the government of this country; and it may well have been thought that persons who had contracted obligations with such government for service abroad could not reasonably be considered to have intended to retain their domicil here. They in fact became as much estranged from this country as if they had become servants of a foreign government." Formerly, Sir Charles Douglas's case was considered as directly establishing the doctrine referred to in the text. Phillimore, in his work on Domicil (no. 119), so understood it; but in this he has fallen into an error by relying too closely upon the statement of that case contained in the argument of plaintiff's counsel in Somerville *v.* Somerville, 5 Ves. Jr. 750, 757 *et seq.* Indeed, he quotes as a part of the language of the Lord Chancellor in Ommanney *v.* Bingham, what upon examination plainly appears to be only the statement of the inferences which they draw from that case. In his later work (Int. L. vol. iv. no. 159) he properly attributes the language quoted to counsel, but considers the position taken by them (in accordance with the statement above in the text) to be a correct exposition of the law. It is somewhat singular that Dr. Lushington, in Hodgson *v.* DeBeauchesne (12 Moore P. C. C. 285, 317), falls into the same error in attributing the language mentioned to the Lord Chancellor in Ommanney *v.* Bingham, instead of to counsel in Somerville *v.* Somerville. Mr. Robertson, however, in the appendix to his valuable work on Personal Succession, prints in full the judgment of Lord Loughborough, in Ommanney *v.* Bingham, from a note which was understood to have been furnished by his lordship himself to the parties. By this report it appears that no such point was held in that case, but that on the contrary the following language was used by the Lord Chancellor: "In viewing the life of the late Sir Charles Douglas, your lordships will find it a life of bustle and adventure. The scenes of activity in which he was almost constantly engaged, and in the course of which he distinguished himself so remarkably for courage and good conduct, afforded him but little opportunity to settle long in any particular place. Independent of the services he rendered to this country, your lordships will find him in the employment of two Courts, the allies of Britain; viz., Holland and Russia. In the Empress's service he was entrusted with a very high command, which did not continue, however, for any great length of time; but in the service of Holland he continued for a much longer period, — three or four years, — and it has been argued that he acquired a domicil in each of these countries, a question which I am not now called upon to discuss." West-

giance, that a person who enters the military or naval service of a foreign sovereign thereby acquires a domicil within the territories of that sovereign. It is upon this ground that the anomalous cases of involving the domicil of the servants of the East India Company have been explained.[2]

In this country, in an Alabama case[3] involving liability for military service in the Confederate army (which was put upon the ground of domicil), it was held that the presumption of domicil arising from unexplained residence is greatly strengthened by enlistment in the military service of the government; Walker, C. J., remarking, "A temporary military service may not be conclusive evidence of domicil, but it is certainly a fact powerfully contributing to establish the domicil."

§ 300. **Id.** — And this seems a much more reasonable doctrine than that apparently adopted in Great Britain, inasmuch

lake, in his first edition (Priv. Int. L. no. 44, p. 43), says: "By entering the permanent military service of any government, a domicil in the territory of that government is acquired, and is retained notwithstanding a cantonment at a foreign station; for such cantonment is subject throughout to the contingency of abrupt termination, and the only lasting attachment is to the employing country. The same is true of a naval service, when the officer has his dwelling on shore in the territory of the government he serves; and, on principle, perhaps even without that circumstance, as the ships of a nation are equivalent to its soil. But if the employing nation include several jurisdictions, the native subject who enters its military or naval service retains, in general, the character of that subdivision to which he previously belonged; and this is the true meaning of what, in a certain case, appears to be said, namely, that naval employment cannot change the domicil. In that case the person was Scotch by origin, as well as by residence during the intervals he passed on shore, and could not lose that character by a service which was not English but British; had he entered a foreign navy, his Scotch domicil would doubtless have been lost. On the other hand, the British service did not restrain the power he would otherwise have had to transfer his domicil to England, and it was necessary to examine his acts during the intervals of duty, in order to ascertain whether he had exercised it." But in his second edition (§ 261) he appears to think that the question whether a person by accepting a military commission in the service of a foreign country gains a domicil in such country is to be determined by the circumstances. Dicey speaks with hesitation on the subject, admitting the lack of authority in the decided cases, but holds (Dom. p. 139) that "a person who enters the military or naval service of a foreign sovereign (probably) acquires a domicil in the country of such sovereign." He admits, however, that "there may be a difficulty in applying this doctrine in the case of States made up of several countries" (p. 140, note *s*).

[2] Turner, L. J., in Jopp *v.* Wood, *supra*. See also Phillimore, Dom. p. 76; Westlake, Priv. Int. L. 1st ed. no. 44; Dicey, Dom. pp. 140–143.

[3] State *v.* Graham, *In re* Toner, 39 Ala. 454.

as it leaves the fact of enlistment or accepting a commission open to explanation, as any other fact. It never was imagined, for example, that the large number of European officers [1] who came to our assistance in our war of independence and accepted commissions in the Continental army, became thereby domiciled in this country; although some weight would doubtless have been attached to such fact in the case of a person of foreign birth who had previously been residing in the Colonies, or who continued to reside here after his term of service was at an end.

A powerful difficulty seems to lie in the way of applying the British doctrine to the case of one who enters the military service of a country composed of several States having different systems of laws. By what law would his civil *status*, or, in case of his death, his personal succession, be determined? On the other hand, there is no such difficulty in applying the doctrine of the Alabama case, inasmuch as it supposes other facts which would serve to locate the domicil within some particular legal territory.

But whichever doctrine may be accepted as correct, it can only be applicable to the case of one who voluntarily enters the military service.[2]

§ 301. **Can a Soldier acquire a Foreign Domicil? Hodgson v. De Beauchesne.** — If the British doctrine is sound, the converse should follow; namely, that one in the military or naval service of a country cannot, while in that service, acquire a domicil in a foreign country. This point was raised but not settled in the case of General Hodgson,[1] who was a colonel in the service of the East India Company and a general in her Majesty's service, limited to India, and who for twenty-three years resided in France under circumstances in many respects strongly indicative of domicil. Dr. Lushington, speaking for the Privy Council, said: "We do not think it necessary, for the

[1] Or take the case of the French princes in the Union service during our late Civil War.

[2] This is clear without authority. See, however, State *v.* Adams, 45 Iowa, 99, which, though not precisely in point, is analogous. It was there held that involuntary service in the army of a foreign government, and acceptance of bounty, does not deprive one of his citizenship in this country.

[1] Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285.

decision of this case, that we should lay down as an absolute rule that no person being the colonel of a regiment in the service of the East India Company, and a general in the service of her Majesty, can legally acquire a domicil in a foreign country. It is not necessary, for the decision of this case, to go so far; but we do say that there is a strong presumption of law against a person so circumstanced abandoning an English domicil and becoming the domiciled subject of a foreign power."

Dicey[2] remarks upon this language of the Privy Council: "The matter becomes, in short, a question of evidence. There is the strongest presumption that D., who is in the service of the English Crown, does not, even though he resides in France, mean to reside there permanently; but this presumption probably might be rebutted by sufficiently strong evidence."

Great effect, however, appears to have been given to the fact of General Hodgson's military connection and the fact that France was a foreign country, Lord Cranworth remarking during the course of the argument: "If the deceased had gone to Scotland on furlough and resided there as long as he did in France, it would be difficult to say that he had not acquired a Scotch domicil."

§ 302. **Id. East India Cases.** — It has been held in some of the East India cases that officers in the military service of the company may acquire domicil in England or Scotland. But these cannot be accepted as authorities upon the general subject, inasmuch as (1) the East India Company was at best but a *quasi*-sovereignty, and the countries mentioned were with it subject to the same supreme authority; and (2) because, by a regulation of the company, officers who had attained a certain rank were expressly allowed to reside where they pleased, subject to the company's orders for return to duty, which, however, were rarely issued.[1]

§ 303. **Quasi-National and Municipal Domicil not affected by Military Service.** — The principle before discussed, whether it operates as a conclusive presumption of law or only as a presumption of fact, has application only to national domicil.

[2] Dom. p. 140.

[1] See Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733; Craigie *v.* Lewin, 3 Curteis, 435.

Neither the *quasi*-national nor the municipal domicil of a person is affected by his enlistment or acceptance of a commission in the military or war-marine service of his country. He does not thereby either lose the *quasi*-national or municipal domicil which he had when he entered the service, nor does he acquire a domicil at the place where he serves.[1] The reason is twofold; namely, (*a*) because his presence at the place where he is stationed is not of his own volition, but in obedience to the orders of his superiors; and (*b*) because it is presumably but temporary, and in the absence of proof to the contrary he is presumed to retain the *animus revertendi* when his term of service is at an end. In a recent English case[2] it was attempted to limit this doctrine to domicil of origin, but the court (Pearson, J.) held that it applies also to acquired domicil.

But, on the other hand, it is equally clear that he may by the proper act and intention change his domicil within the territory of the sovereign or country in whose service he is employed.[3] Said Lord President Hope, in Clark *v.* New-

[1] Dalhousie *v.* McDoual, 7 Cl. & F. 817; The Lauderdale Peerage, L. R. 10 App. Cas. 692; Attorney-General *v.* Napier, 6 Ex. 217; Brown *v.* Smith, 15 Beav. 444; Yelverton *v.* Yelverton, 1 Swab. & Tr. 574; Firebrace *v.* Firebrace, L. R. 4 P. D. 63; *In re* Patience, L. R. 29 Ch. D. 976; *In re* Macreight, 30 id. 165; Goods of West, 6 Jur. (N. S.) 831; Goods of Patten, id. 151; Brewer *v.* Linnæus, 36 Me. 428; Hampden *v.* Levant, 59 id. 557; Sears *v.* Boston, Met. 250; Crawford *v.* Wilson, 4 Barb. 504; Graham *v.* Commonwealth, 51 Pa. St. 255; Covode *v.* Foster, 4 Brewst. 414; Williams *v.* Saunders, 5 Cold. 60; Blucher *v.* Milsted, 31 Tex. 621; Phillimore, Dom. nos. 125–131; Id. Int. L. vol. iv. no. 163 *et seq.*; Westlake, Priv. Int. L. 1st ed. no. 44; Id. 2d ed. § 257; Dicey, Dom. p. 139; Wharton, Confl. of L. § 50. And see *Re* Phipps, 2 Curteis, 368, and White *v.* Repton, 3 id. 818. In Attorney-General *v.* Napier, Parke, B., said: "If a natural-born subject, domiciled in England, enters into her Majesty's service, and goes abroad at the Queen's command into foreign service, it is quite clear that his original domicil has not been parted with by him. He goes for a temporary purpose, and is supposed to be there for a time only, but not for the purpose of fixing his permanent abode abroad." In The Lauderdale Peerage it was held that the fact that a person is in the military service is *prima facie* unfavorable to his acquiring a domicil at the place of his service.

[2] *In re* Macreight, *supra*.

[3] Hodgson *v.* De Beauchesne, *supra* (per Lord Cranworth, *supra*, § 301); Tovey *v.* Lindsay, 1 Dow, 117; The Lauderdale Peerage, *supra*; Attorney-General *v.* Pottinger, *supra*; Cockrell *v.* Cockrell, 25 L. J. Ch. 730; s. c. 2 Jur. (N. S.) 727 (officer on half-pay); Clark *v.* Newmarsh, 14 S. (Sc. Sess. Cas. 1st ser. 1836) 488; Mooar *v.* Harvey, 128 Mass. 219; Ames *v.* Duryea, 6 Lans. 155; Westlake, Priv. Int. L. 1st ed. no. 44; 2d ed. § 257; Wharton, Confl.

marsh: "It may happen, though a military appointment be the cause of residence, that the residence is of that fixed and permanent sort which excludes the idea of any other domicil remaining, and necessarily induces a new domicil in the country where the residence is established." Said Morton, J., in Mooar *v.* Harvey: "The defendant was in the military service subject to the orders of his superior officers; but it is not true, as contended by his counsel, that therefore he could not gain a new domicil in any place to which he was ordered. In all matters not involved in his military duties he was *sui juris*, and had the capacity to change his domicil to any place if he saw fit."

(b) *Sailors in the Merchant Marine.*

§ 304. There is little that is peculiar with respect to the domicil of a sailor in the merchant marine, except that his mode of life furnishes fewer facts from which to judge of his *animus* than are usually furnished in the lives of other people, and therefore perhaps greater importance is to be attached to certain facts when they appear in his case than in the cases of others. But this is a matter of evidence solely.

§ 305. A sailor in the merchant marine does not lose his domicil by following the sea, even though his absence is prolonged for years.[1] But, on the other hand, there is nothing in the vocation of the sailor which of itself prevents him from changing his domicil to whatever place he sees fit.[2] It has been said that "a foreigner continuously and exclusively employed in the vessels of a nation may by length of time acquire a residence in that nation as effectually as though he had remained upon the land within its boundaries."[3] But it will be

of L. § 50. In The Lauderdale Peerage, *supra*, Lord Selborne said that a military officer may acquire a domicil at the place where he serves, if his "residence be accompanied and explained by clear proof of an intention to settle there permanently, *sine animo revertendi*."

[1] Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Porterfield *v.* Augusta, 67 Me. 556; Granby *v.* Amherst, 7 Mass. 1; Thorndike *v.* Boston, 1 Metc. 242; Sears *v.* Boston, id. 250; Matter of Scott, 1 Daly, 534; Guier *v.* O'Daniel, 1 Binn. 349, note.

[2] Bangs *v.* Brewster, 111 Mass. 382; Sherwood *v.* Judd, 3 Bradf. 267; Matter of Bye, 2 Daly, 525.

[3] Matter of Bye, *supra*. In this

seen that this is merely a principle of evidence. Such length of service, like length of residence on land, may be evidence of

case the subject of the domicil of sailors was ably and fully considered by Daly, First Judge. He said: "The applicant is a native of Holland, and is now forty-nine years of age. He came to this country thirty years ago as the steward of an American vessel, and remained residing here continuously for nine years. He then went to sea, and twenty years ago was married at Mastenbroek in Holland, where his wife and two of her children have ever since resided. For five years thereafter he sailed in foreign vessels, chiefly from ports to and from Holland, occasionally visiting his family for short periods as his occupation would permit. About fifteen years ago he returned to the United States, and has ever since been employed as a mariner in the merchant marine of this country, sailing for the last six years exclusively in vessels belonging to the port of New York, during which time he has seen his wife and family but twice, upon leave of absence granted to him while employed on board American vessels that were temporarily at the ports of Rotterdam and Antwerp. He has had no rupture with his wife and family, but, on the contrary, has transmitted to them regularly an adequate portion of his wages for their support. He has repeatedly solicited his wife to come with her children to this country and live in the city of New York, which is now and has been practically his home when upon shore for the last fifteen years; but she has preferred to remain at Mastenbroek, where she was born and married, having, in addition, a natural repugnance to or fear of venturing upon the sea. His return to this country was induced by the circumstance that he could do better here than in Holland, and it is now and has long been his intention to continue here for the remainder of his life, being very much attached to a country where his industry has met with a greater reward, and where his prospects for the future are better, than in the country of his birth. Three years ago his eldest child was sent here at his request, voluntarily, by his wife, and is now supported by him in this city. In November, 1861, he declared his intention in this court to become a citizen of the United States. He was then employed as the chief mate of a vessel belonging to this port, in which he has continued ever since. The owners of this vessel wish and intend, if he becomes a citizen of the United States, to appoint him to the responsible position of master. They give him a high character for fidelity, integrity, industry, and capacity. We have repeatedly held, in this court, that a mariner of foreign birth, who has been employed exclusively in American vessels for five years continuously prior to his application to be admitted a citizen, and who, for the last year of that term, has shipped only in vessels belonging to the port of New York, is, within the meaning of the naturalization laws, to be deemed a resident, during that term, of the United States, and a resident of this State for one year, unless there are circumstances which show that he has maintained and kept up his previous residence (In the Matter of Scott, 1 Daly, 534; In the Matter of Hawley, id. 531; Dunlap's Laws of the United States, pp. 307, 493, 494, 1167; Story's Conflict of Laws, secs. 42 to 48). A foreigner continuously and exclusively employed in the vessels of a nation may, by length of time, acquire a residence in that nation as effectually as though he had remained upon the land within its boundaries; for vessels are subject to the jurisdiction of the country to which they belong, and, for certain purposes, are regarded as part of its territory; as in the case put by Vattel of a child born in the vessel of a nation upon the high seas, which he says may be reputed to be born in its territories (Vattel, B. 1, c. 19, sec. 216, and see Lawrence's Wheaton, p. 209). Every

intention, but is not equivalent to it; and a change of domicil could not be held under such circumstances if *animus rever-*

human being has a fixed domicil. Originally it is the place where his parents lived at the time of his birth, which continues until he has acquired another; for although there are supposed exceptional cases (Vattel, B. 1, c. 19, sec. 219; Cochin, t. 1, p. 184; Fœlix, Droit Int. Privé, t. 1, sec. 29, n. 2), as gypsies, vagrants, or those wandering vagabonds or outcasts who do not know where or when they were born, it is not so in fact; for the place of birth when known is the domicil (1 Bl. Com. 366, 369; Story's Conflict of Laws, sec. 48); or if not known, then it is the place of which the individual has the earliest recollection, where he was first seen and known by others. Unless an individual is controlled by circumstances, his residence, using that term in the sense of domicil, is the result of his own voluntary acts; and the question whether he has or has not acquired one depends less upon the application of any general rules than upon a consideration of the circumstances of his individual case. It is, as Lord Loughborough said in Bempde v. Johnstone (3 Ves. 251), more a question of fact than of law. If he is a mariner, his calling is one that compels him, as a means of livelihood, to traverse the sea from one port or place to another; and while the voyage continues for which he has shipped, his place of abode is the vessel to which he belongs, whether she is temporarily in port or pursuing her course over the ocean. In the short intervals that elapse, in following such a vocation, between the termination of one voyage to the beginning of another, his place of abode is necessarily upon the land; but he does not change his domicil or acquire a new one, unless his acts clearly indicate that he has done so by making some one particular place or country his residence, with no present purpose of changing it. If it is usual with him, when out of employment, to ship in any vessel the master of which will engage him, wholly indifferent as to the place or country to which she belongs, or as to the part of the world in which he may find himself when the contract is at an end, then it is inferable that no intention existed to acquire a new domicil, but to suffer that to continue which he had when he commenced his vocation as a mariner. Another circumstance, and generally a controlling one, is that he is a married man whose residence is naturally at the place and in the country where his wife and family dwell (Pothier's Coutumes d'Orléans, c. I. secs. 20, 15). But this is not conclusive in all cases (Forbes v. Forbes, Kay, 341; Phillimore on Domicil, sec. 203; Story's Conflict of Laws, sec. 46), for it is not in the power of a man's wife or family to control his free right to fix his residence and place of permanent abode in any part of the world to which his interests or his inclination may lead him. It is the wife's duty to follow the fortunes of the husband; to go 'whither he goeth' and abide in that place where it is most convenient for him to enjoy her society, and where he is able and willing to make provision for her support and that of his children. The circumstances of the present case show that the applicant, Bye, is not to be classed with those mariners who are indifferent to the nationality of the vessel they engage in; to whom any ship is acceptable when the stipulated wages are paid, wherever she is found, whatever may be the flag she bears, or whither she may be going. On the contrary, he has limited himself, for the last fifteen years, in the pursuit of his calling, to the vessels of the United States. He has done so from interest and inclination; he has resided here for nine years in the youthful part of his life, and now, after the test of fifteen years of service in the merchant marine of this country, it is his fixed intention to continue here for

tendi appears. It was held in an English case,[4] that where no other facts appear a mariner will be considered a resident at the port to which his ship belongs. But this is only a *prima facies* which is very easily overcome. It has been held that a sailor is domiciled where he spends most of his time on shore;[5] and doubtless this is usually true, but it is far from being universal or conclusive. For instance, in Aikman *v.* Aikman, a Scotchman during a maritime service of upwards of thirty years spent most of the intervals (which were often long) between his voyages in London, although occasionally visiting Scotland; and he was held to have retained his Scotch domicil.

§ 306. **Residence of Wife of Great Importance in determining the Domicil of a Sailor.** — Greater stress seems to be laid upon the residence of the wife as evidence of domicil in the case of a sailor than in other cases.[1] But, as in other cases, the residence of the wife is not conclusive. In Bye's case it was held that a sailor had changed his domicil from Holland to New York, although his wife and family remained behind him and he supported and occasionally visited them, it appearing that he had constantly but unavailingly endeavored to induce his wife to remove to America.

the remainder of his life, — an intention not simply gathered from his avowal now, but one repeatedly expressed heretofore to the owners of the vessel by whom he is at present employed, which he has also expressed to his wife, and manifested by his efforts to induce her to come over to this country with the younger children and live with him here. If, as is evidently the case, he finds it to his interest to continue here in the employment in which he has been engaged for so many years he should not be deprived of the benefits and advantages attendant upon a continuous residence in this country, among which is the right of becoming a naturalized citizen, because his wife is unwilling to come here and take up her abode with him. In my judgment he has been for the last fifteen years a resident of this country, and for the last five a resident of this State, and is entitled to be naturalized (Guier *v.* O'Daniel, 1 Binn. R. 349; Kotza's Case Sen. Doc. 1)."

[4] Blaaw *v.* Charters, 6 Taunt. 458. See also Matter of Bye, *supra*.

[5] Sherwood *v.* Judd, *supra*. See also Boothbay *v.* Wiscasset, 3 Greenl. 354.

[1] Sherwood *v.* Judd, *supra*; Matter of Scott, *supra*. See also Bangs *v.* Brewster, 111 Mass. 382.

CHAPTER XVI.

DOMICIL OF PARTICULAR PERSONS (*continued*), — PUBLIC CIVIL OFFICERS.

§ 307. THE domicil of one class of public servants — namely, soldiers and sailors in the war-marine service — has already been considered.[1] Another class — to wit, ambassadors and consuls — will hereafter be considered by itself.[2] It is necessary, however, here to treat in a general way of persons in public civil office or employment; and concerning them several general rules may be laid down: —

§ 308. **Life Functionaries.** — *First.* If an office the duties of which are to be performed at a particular place be irrevocably[1] conferred upon a person for life, the law fixes his domicil at the place where the functions are to be performed.[2] In such case the law presumes *animus manendi;* and this is so, no matter whether the official constantly reside at the place or not, and even if he has a habitation elsewhere.[3] This, however, must not be understood to apply to an office whose duties require only the occasional presence, but to one whose duties require substantially constant presence.[4] Denizart, who has treated of the domicil of public officers at (for him) unusual length, says:[5] "Those who are attached to a residence by a perpetual title are considered to be domiciled at the place of their functions, whatever place of abode they may have elsewhere; even when this abode (which they have elsewhere) has all the characteristics of their principal habitation, one

[1] *Supra*, ch. 15.

[2] *Infra*, ch. 17.

[1] That is, substantially and practically so conferred, *e. g.*, during good behavior.

[2] Pothier, Intr. aux Cout. d'Orléans, nos. 15, 16; Merlin, Repertoire, *verb.* Dom. § 3; Denizart, *verb.* Dom. no. 21 *et seq.*; Calvo, Dict. *verb.* Dom.; Phillimore, Dom. no. 113 *et seq.*; Id. Int. L. vol. iv. no. 149 *et seq.*; Westlake, Priv. Int. L. 1st ed. no. 44; Wharton, Confl. of L. § 51; Code Civil, art. 107; Commonwealth *v.* Jones, 12 Pa. St. 365, per Gibson, C. J.

[3] Denizart, *verb.* Dom. no. 21.

[4] Denizart, *loc. cit.*; Cochin, Œuvres, t. 9, p. 124; Merlin, Repertoire, *verb.* Dom. § 3; Demolombe, Cours de Code Napoléon, t. 1, no. 365.

[5] *Loc. cit.*

may not attribute to them an intention contrary to duty. Thus, a magistrate is always presumed to be domiciled in the place where he exercises his functions." He includes also in the same category bishops, cures, canons, and other ecclesiastics, subject to residence.[6] The Code Civil[7] provides: "The acceptance of functions conferred for life will import immediate translation of the domicil of the functionary into the place where he ought to exercise such functions." Tribune Mouricault, in his speech to the Tribunat,[8] explains this provision thus: "The law ought to presume that the citizen who accepts perpetual functions wishes to devote himself resolutely to them, to perform his duties with exactness, to establish himself for that purpose at the place of their exercise, to live at least principally in that place. It cannot admit any other presumption with regard to the life functionary, to the extent of intending to give countenance to a different course of conduct. It would be a calumny upon it to suppose of it such inconsequence or such feebleness."

§ 309. **Id.** — There is some difference of opinion as to the point of time at which the law ascribes to a life functionary a domicil at the place where he is required to exercise his functions. Pothier[1] fixes it at the time of arrival; but later French jurists,[2] considering the language of the article (already given) definitive, hold that the translation of domicil results solely and immediately from the acceptance, — that is to say, from the taking of the oath. And this is the generally received opinion, notwithstanding the possibility of such anomalous results as that pointed out by Valette.[3] He supposes the case of a functionary dying at Paris after having accepted functions from which he is not removable, and taken the oath; and says it is certainly strange that his succession should be

[6] Id. nos. 22–26.

[7] Art. 107.

[8] Séance du 18 Ventôse, An 11.

[1] Intr. aux Cout. d'Orléans, no. 15. He says: "Intention to transfer our domicil into another place ought to be justified. It is not equivocal when it is a benefice or charge or any other employment *non amovible* which calls us there. In this case, from the time we are there arrived, we there acquire a new domicil and lose the old."

[2] Demolombe, Cours de Code Napoléon, t. 1, no. 364; Duranton, Cours de Droit Civil Français, t. 1, no. 361; Delvincourt, Cours de Code Civil, t. 1, p. 42, note 3; Marcadé, Cours de Code Civil, t. 1, art. 107; Aubry et Rau, sur Zachariae, t. 1, 143.

[3] Explic. Somm. l. 1, p. 61.

opened at the extremity of France, maybe in a place where he has never appeared and where is not found any paper or document relative to his succession. But in the absence of any positive law on the subject, the doctrine of Pothier seems to be the only safe one.

§ 310. **Holders of Temporary or Revocable Offices or Employments.** — *Second.* A public office or employment of a temporary or revocable character does not fix the domicil of the holder at the place where its duties are to be performed, even though he may reside there in the performance of them for a long time; but, on the contrary, he is presumed to retain his former domicil.[1] In the case of a temporary office or employment there can be no difficulty, inasmuch as temporary residence, whatever may be its cause or purpose, cannot confer domicil. But with regard to an office or employment which, though granted for an indefinite time, is in its nature revocable, the rule is the same. In such case the residence, however long it may last, being constantly liable to be ended, and being referable solely to the duties of the office or employment, no inference can be drawn from it of such *animus manendi* as is necessary for the establishment of domicil, — especially national or *quasi*-national domicil; and upon the principle that domicil once shown to exist remains until it is shown to have been changed, the person retains the domicil which he had when he entered upon such office or employment, unless other circumstances than mere residence appear. In general, it may be said that the official in such cases is presumed to intend to return to his former place of abode

[1] Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733; Attorney-General *v.* Rowe, 1 Hurl. & Colt. 31; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Ryan *v.* Malo, 12 L. Can. 8; Woodworth *v.* St. Paul M. & M. Ry. Co. 18 Fed. Rep. 282; Atherton *v.* Thornton, 8 N. H. 178; Harvard College *v.* Gore, 5 Pick. 370; Commonwealth *v.* Jones, 12 Pa. St. 365; Dauphin County *v.* Banks, 1 Pears. 40; Tyler *v.* Murray, 57 Md. 418; State *v.* Grizzard, 89 N. C. 115; State *v.* Dennis, 17 Fla. 389; Yonkey *v.* State, 27 Ind. 236; Venable *v.* Paulding, 19 Minn. 488; Zangerus, De Except. pt. 2, ch. 1, nos. 52, 53; Denizart, *verb.* Dom. no. 27 *et seq.*; Bouhier, Obs. sur la Cout. de Bourg. ch. 22, p. 443, ed. 1742; Pothier, Intr. aux Cout. d'Orléans, no. 15; Phillimore, Dom. no. 113; Id. Int. L. vol. iv. no. 149; Westlake, Priv. Int. L. 2d ed. § 257; Dicey, Dom. p. 137. The *dictum* of Lord Westbury in Udny *v.* Udny, L. R. 1 Sch. App. 441, 458 (see *supra*, § 195), doubtless had reference to temporary or revocable office.

whenever his tenure of office is at an end; but even if it appear that he intends in such event to settle in a third place, the result would be the same.

§ 311. **Id. Continental Authorities.** — Zangerus[1] says: "Andreas Alciatus interrogatus respondit, non contraxisse domicilium, cum ob causam præfecturæ, vel aliam, eo loci commoretur et finito officio præsumatur rediturus ad locum sui domicilii; quam sententiam veram esse existimo, nisi aliæ concurrant conjecturæ, ex quibus manifestum sit, prius domicilium esse relictum. Si enim res, quas alibi possidebat, vendiderit et cum familia in eum locum demigraverit et habitet, sane ibidem domicilium contraxisse meo judicio videtur, per ea qua tradita sunt supra. Secus vero si alibi bona, præsertim immobilia retinuisset et ibidem instructus esset, per ea quæ dixi supra." Denizart[2] says: "It is otherwise concerning those who, instead of a perpetual title, have only momentary occupation in the place which they inhabit; their habitation is regarded as a consequence of their employment, of their business, or their occupation; it is presumed that they have always preserved the intention of returning to their former domicil at the time when their business shall be finished, even when they have not preserved a dwelling-house there; when, on the contrary, they have at the place whence their business has attracted them, a considerable dwelling-house, all their movables, their domestic servants, and all that which may contribute to the convenience of life, they are considered to have retained their former domicil."

Denizart cites a number of cases which had been decided by the French courts; one of special interest being that of Sieur Garengeau,[3] who was born at Paris, but died, at the age of ninety-four years, in the exercise of the office of director of the fortifications in Brittany, where he had resided sixty-four years, — namely, nine years at Brest, and fifty-five years at St. Malo, dying at the latter place. Notwithstanding this long residence, he was presumed to be domiciled at Paris where he was born.

The French Code provides[4] that "the citizen called to a

[1] *Loc. cit.*
[2] *Verb.* Dom. no. 27.
[3] Id. no. 33.
[4] Art. 106.

public function, temporary or revocable, shall preserve the domicil which he already had, if he has not manifested any contrary intention."

§ 312. **Id. English Cases.** — In England and America the doctrine is well settled as above stated. In Attorney-General *v.* Pottinger,[1] the Court of Exchequer held that one who resides in a colony as governor, to which position he has been appointed for a fixed time, does not thereby gain a domicil there. Attorney-General *v.* Rowe,[2] in the same court, furnishes an example of a revocable office. R., whose domicil of origin was English, was appointed Chief Justice of Ceylon during the pleasure of the Crown. His commission contained a clause obliging him to actual residence within the said island, and to execute the said office in his person; and in consequence of such appointment he went to Ceylon, taking with him his family, and continued to reside there in the discharge of his official duties until his death, about four years afterwards. Under these circumstances, his domicil was held to have continued up to the time of his death. Wilde, B., said: "The testator went as a judge to Ceylon; but the case is devoid of any expressions or act of his, from which the court can draw a conclusion that he intended to make that place his domicil. The fact that he left his library in England, points the other way. The *onus* is on those who wish to establish a foreign domicil; and they have nothing to rely upon but the isolated fact that the testator accepted a judicial office and went to Ceylon. England was his domicil of origin; he had lived there all his life, and he left on his appointment as Chief Justice of Ceylon. There was nothing permanent in the nature of that appointment, nothing inconsistent with his domicil of origin. If regarded strictly, and without the knowledge which we extra-judicially possess, it was a colonial office during the pleasure of the Crown, and therefore of a temporary nature; if regarded with the light of that knowledge, it was an office to be enjoyed for a limited time, after which a pension would probably have been granted to him. It is, therefore, a case of residence adopted for a special and

[1] 6 Hurl. & Nor. 733. [2] 1 Hurl. & Colt. 31.

temporary purpose, and for a time which, though not definitely fixed, was not likely to be indefinitely prolonged. Such a residence does not, in my opinion, of itself create a domicil, though possibly a domicil might emanate from such a residence, if protracted for a considerable time. In this case there was no such lapse of time, and therefore, in my opinion, no new domicil was acquired."

In Douglas *v.* Douglas,[3] Wickens, V. C., held that one whose domicil of origin was Scotch did not gain an English domicil by ten years' residence in London as a clerk in the Home Office, there appearing no evidence of "any intention to settle finally and for life in England."

§ 313. **Id. American Cases.** — In Yonkey *v.* State,[1] it was held that an assistant doorkeeper of the United States House of Representatives (whose tenure of office cannot, without re-appointment, exceed the life of the House itself, or two years) does not, by reason of his presence at Washington during the sittings of Congress, lose the legal residence which he had at the time of his appointment. In Dauphin County *v.* Banks,[2] it was held that the Auditor-General of Pennsylvania, whose official tenure was for three years, did not by virtue of his office acquire a domicil at Harrisburg, the seat of government, although the law required his office to be kept and his official duties to be performed there.

Instances of revocable offices are furnished in the cases in which the question of the domicil of clerks and other employees in the government departments at Washington has been discussed. It has been uniformly held that such persons do not acquire a domicil there by their presence in discharge of their official duties, nor do they lose thereby the domicil which they had at the time of their appointment.[3]

[3] L. R. 12 Eq. Cas. 617.

[1] 27 Ind. 236.

[2] 1 Pears. 40.

[3] Woodworth *v.* St. Paul M. & M. Ry. Co. 18 Fed. Rep. 282; Atherton *v.* Thornton, 8 N. H. 178; Tyler *v.* Murray, 57 Md. 418; State *v.* Grizzard, 89 N. C. 115; State *v.* Dennis, 17 Fla. 389; Venable *v.* Paulding, 19 Minn. 488. Speaking of Department Clerks at Washington, Shiras, J., said, in Woodworth *v.* St. Paul M. & M. Ry. Co.: "They may be even commissioned for a given length of time or for an indefinite time; still they ordinarily remain citizens of the State from which they started, and they are supposed generally, when they leave their situations, to return to the State which they left." In Atherton *v.* Thornton, Parker, J., said:

§ 314. **Public Officer may acquire Domicil where the Duties of his Office are to be performed.** — *Third.* There is nothing in the fact of holding a public office or employment which prevents the holder from acquiring a domicil at the place where his duties are performed.[1] He may acquire a domicil there if he sees fit to do so; and whether he does so or not is to be determined in substantially the same manner and by the same methods of proof as in other cases, except that in his case no inference is to be drawn from length of residence, nor, at least generally, from the presence of his wife and family, nor from such similar circumstances as usually accompany residence, whether temporary or permanent.

Article 106 of the French Code provides for cases of this kind by the exception, "if he has not manifested any contrary intention."

§ 315. **Public Officer remaining after Expiration of Office.** — If a person who has come to reside in a place where his official duties are performed, remains there after his term of office has expired, or his appointment has been revoked, such continued residence is evidence of the acquisition of domicil there.[1]

§ 316. **American State Constitutions.** — Many of the State constitutions contain, with reference to voting, a provision that "No person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service, either civil or military, of this State or of the United States."[1] This provision has been

"It has generally been considered that persons appointed to public office under the authority of the United States, and taking up their residence in Washington for the purpose of executing the duties of such office, do not thereby, while engaged in the service of the Government, lose their domicil in the place where they before resided, unless they intend, on removing there, to make Washington their permanent residence."

[1] Goods of Smith, 2 Robertson, Eccl. 332; Comm'rs of Inl'd Rev. *v.* Gordon's Ex'rs, 12 D. (Sc. Sess. Cas. 2d ser. 1850) 657; Dauphin County *v.* Banks, *supra*; People *v.* Holden, 28 Cal. 123; Wood *v.* Fitzgerald, 3 Or. 568; Zangerus, De Except. pt. 2, c. 1, no. 53; Denizart, *verb.* Dom. no. 21 *et seq.*; Pothier, Intr. aux Cout. d'Orléans, no. 15; Phillimore, Dom. no. 113 *et seq.*; Id. Int. L. vol. iv. no. 149 *et seq.*; Westlake, Priv. Int. L. 2d ed. § 257; Dicey, Dom. p. 137.

[1] Pothier, Intr. aux Cout. d'Orléans, no. 15.

[1] The above is from the Pennsylvania Constitution of 1874. Similar provisions occur in the Constitutions of California, Colorado, Kansas, Michigan, Minnesota, Missouri, Nevada, New York, and Oregon.

held to be declaratory of the unwritten law, and not to alter it, in several cases in which the employment was temporary and revocable.[2] What effect it might have upon the case of one who held a life office, seems not to have been discussed.

[2] People *v.* Holden, *supra*; Wood *v.* Fitzgerald, *supra*.

CHAPTER XVII.

DOMICIL OF PARTICULAR PERSONS (*continued*), — AMBASSADORS AND CONSULS.

(a) *Ambassadors.*

§ 317. **The Domicil of a Person is not affected by entering the Diplomatic Service of his Country abroad.** — It is a well-settled general rule that an ambassador does not gain a domicil in the country to which he is accredited, even though his residence there is long continued;[1] and this rule extends as well to his suite as to himself. But there is some difference of opinion as to the grounds upon which the rule rests. By some writers it is put upon the ground of special privilege and the fiction of extra-territoriality,[2] by which an ambassador, "though actually in a foreign country, is supposed still to remain within the territory of his own sovereign."[3] Upon this theory the necessary *factum* of change of bodily presence is presumed to be wanting, and hence no change of domicil can occur. This view is maintained by Phillimore, Wharton, and apparently by Westlake in the first edition of his work on Private International Law, but is discarded by him in his second edition.[4] It has also, apparently, the support of a re-

[1] Attorney-General *v.* Kent, 1 Hurl. & Colt. 12; Sharpe *v.* Crispin, L. R. 1 P. & D. 611; Bruce *v.* Bruce, 2 Bos. & P. 229, note; Crawford *v.* Wilson, 4 Barb. 504; Commonwealth *v.* Jones, 12 Pa. St. 365; Voet, Ad Pand. l. 5, t. 1, no. 98; Donellus, De Jure Civili, l. 17, c. 12, p. 978 *b*, no. 50; Vattel, bk. 1, c. 19, §§ 217, 218; Wolf, Jus Gent. c. 1, § 187; Henry, For. Law, p. 206; Phillimore, Dom. no. 132 *et seq.*; Id. Int. L. vol. iv. no. 171 *et seq.*; Westlake, Priv. Int. L. 1st ed. no. 47; Id. 2d ed. §§ 257, 258, and 261; Dicey, Dom. pp. 137, 138; Story, Confl. of L. § 48; Wharton, Confl. of L. § 49.

[2] Phillimore, Dom. no. 132; Id. Int. L. vol. iv. no. 171; Wharton, Confl. of L. § 49; Westlake, Priv. Int. L. 1st ed. no. 47.

[3] Wheaton, Int. L. pt. 3, ch. 1, § 15.

[4] § 261. He says: "Certainly the diplomatic service presents a much stronger case than any other against the acquisition of a foreign domicil. The fiction that the hotel of an embassy is a part of the soil of the ambassador's country would formerly, no doubt, have been used as an argument against the existence of the fact, which is no less necessary than the intention; but if

mark thrown out during the course of the argument in Attorney-General *v.* Pottinger,[5] by Pollock, C. B., who, however, took a different view in the subsequent case of the Attorney-General *v.* Kent.[6]

§ 318. **Id. Attorney-General v. Kent.** — In the latter case the extra-territorial theory was put forward for the defendant, and was argued with great learning and ingenuity by eminent counsel, among whom was Dr. Phillimore. They contended on this theory: (1) that an ambassador and his suite are incapable of acquiring a domicil in the country to which the former is accredited; and (2) that a person who, having his domicil of origin in one country, and having acquired a domicil of choice in another, is appointed by the government of the former country to its diplomatic service in the latter, *ipso facto*, and immediately regains his domicil of origin; the domicil of a person in the diplomatic service, according to their contention, not depending upon the *factum* or *animus*, but being a domicil cast upon the party by operation of law. And this no doubt is the logical result of the application of the principle of extra-territoriality.

It is true that this was a case in which the person whose domicil was in question had acquired a domicil in England before he entered the diplomatic service there of his native country; but it is difficult to see how the application of the principle of extra-territoriality, if valid at all, can stop short of reaching the conclusion that the domicil of one in such service does not depend upon *factum* or *animus*, but is cast upon him by operation of law. If valid at all, it must apply to all cases of persons in the diplomatic service, without regard to where they were domiciled at the time they entered such service; and, conversely, if invalid in one case, it must be invalid in all.

§ 319. **Id. id.** — But the view urged by counsel for defendant was wholly repudiated by the Court of Exchequer, Bramwell, B., saying: "It is said that the effect of his accepting the office of *attaché* was, that notwithstanding the *factum* and

the question should now arise, it will probably be discussed on real and not on fictitious grounds."

[5] 6 Hurl. & Nor. 733, 740.

[6] 1 Hurl. & Colt. 12.

animus — his continuous residence in England for a series of years, and his evident desire to retain an English domicil — the fact of his having become an *attaché* would cause him to lose that domicil; because an ambassador and his suite are extra-territorial, and therefore, as soon as the testator was appointed *attaché*, he became, as it were, out of England and in Portugal. I am clearly of opinion that it is not so, and I cannot help adverting to what was said by Lord Mansfield in Mostyn *v.* Fabrigas:[1] 'It is a certain rule that a fiction of law shall never be contradicted to defeat the end for which it was intended, but for every other purpose it may be contradicted.' Assuming that the Portuguese ambassador and his suite are exempt from local jurisdiction, because they may be considered as residing in Portugal; that is only for the purpose of their protection, dignity, and comfort, not for the purpose of rendering their property free from legacy duty after their death. We must not be supposed to be deciding contrary to the comity of nations. We do not say that if a foreigner came to England and resided here as ambassador for forty or fifty years, he would thereby, *simpliciter*, acquire an English domicil, and his property become subject to legacy duty. What we say is, that a foreigner, having acquired an English domicil, does not lose it, *ipso facto*, by accepting a diplomatic appointment." Wilde, B., remarked also: "The question is whether the fact of the testator having filled the office of *attaché* from the year 1857 until his death altered the domicil which he had previously acquired. It has been argued that it did, because by a fiction of law it put him out of England and into Portugal. But I agree with my brother Bramwell, that is straining the fiction of law to a purpose which was never intended. I am fortified in that opinion by a passage in Wheaton on International Law, which was relied on by the defendants' counsel: 'From the moment a public minister enters the territory of the state to which he is sent, during the time of his residence until he leaves the country, he is entitled to entire exemption from local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of the sovereign or state by whom

[1] Cowp. 177.

he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign.' To the same effect is the passage cited from Grotius, in which he uses the words '*quasi extra territorium;*' meaning only that such is the sacredness of the person of an ambassador, and his immunity from the civil and criminal law of the country in which he resides, that he is to be regarded as residing within his own country. It may be observed that subjection to the civil and criminal law does not depend upon domicil. A foreigner who comes to this country is subject to the civil and criminal law of England, though he may not be domiciled here; and as the obligation of those laws upon him does not depend on his domicil, so the immunity from them does not show that he is not domiciled in this country. It seems to me that the argument has wholly failed to establish that the testator ceased to be domiciled in England, because he enjoyed those immunities." And substantially in these views the whole court concurred.

§ 320. Id. — The true principle seems to be that one who is sent abroad as ambassador or *attaché* by the government in whose territory he is domiciled, does not thereby acquire a domicil in the country to which he is sent, because his residence there is referable to his official duties, and from it can be drawn no inference of *animus manendi.* It is temporary and for a special purpose. He is subject to recall at any time at the pleasure of the government in whose service he is, and he is presumed to intend to return whenever his service is at an end. He therefore stands in the same position as the holder of any other temporary or revocable office. Donellus[1] says: "Quisquis temporis causa alicubi commoratur et consistit, ibi domicilium non habet. Veluti, si qui legationis causa aliquo venerint, et dum legatione funguntur, ibi habitationem conduxerint." And the language of John Voet[2] is to the same effect.

[1] De Jure Civili, l. 17, c. 12, p. 978 *b*, no. 50.

[2] Ad Pand. l. 5, t. 1, no. 98.

Lord Penzance remarked, during the argument in Sharpe *v.* Crispin:[3] "I take it to be clear that a person domiciled in England, and going abroad either as an ambassador or consul, would not in any way, by the fact of his residence in a foreign country, alter his domicil. That residence would be referred to his official duties, and would have no influence on the question of domicil."

Paige, J., in Crawford *v.* Wilson,[4] says: "Domicil, it is said, means something more than residence; that it includes residence with an intention to remain in a particular place. Thus a foreign minister has not his domicil where he resides. . . . The residence of a foreign minister at the court to which he is accredited is only a temporary residence. He is not there *animo manendi;*" and again: "A foreign minister actually resides and is personally present at the court to which he is accredited, but his legal residence or inhabitancy and domicil are in his own country. His residence at the foreign court is only a temporary residence. He is there for a particular purpose."

§ 321. **Can an Ambassador acquire a Domicil in the Country to which he is accredited?** — But can one who is sent by the country of his domicil as ambassador or *attaché* acquire a domicil in the country to which he is sent during his term of service? The answer depends upon our acceptance of the one or the other of the theories above stated. If the extra-territorial theory is the true one, he cannot. If, on the other hand, the theory of intention is accepted, he probably can. It has been suggested that the acquisition of such domicil might perhaps be deemed incompatible with his public duties.[1] But why incompatible? and particularly, why more incompatible to acquire a domicil in the country where he serves than to retain one already acquired there before his appointment? The language of Bramwell and Wilde, BB., above quoted, seems conclusively to answer this doubt.

In Heath *v.* Sampson,[2] a Sardinian who had long resided in

[3] L. R. 1 P. & D. 611, 613.

[4] 4 Barb. 504.

[1] Westlake, Priv. Int. L. 2d ed. § 257. This, however, is a mere suggestion. The learned writer appears to incline to the opinion that an ambassador may acquire a domicil at the place of his service. See *supra*, § 317, note 4.

[2] 14 Beav. 441.

England was appointed, by the Sardinian Government, minister plenipotentiary and envoy extraordinary to England. There were circumstances tending to show the acquisition of a domicil in England before his appointment, and there were circumstances, occurring during his diplomatic service, strongly tending to show his intention to remain there permanently in any event. Sir John Romilly, M. R., without delivering any opinion, held his domicil to be English. Although it is impossible, in the absence of any intimation of the ground upon which the decision was made, to say whether it is an authority to the effect that one who, being of foreign origin, is already domiciled in a country and is appointed an ambassador to that country, does not thereby become divested of this acquired domicil, or that an ambassador may acquire domicil in the country to which he is accredited; yet in either view the decision is completely destructive of the extra-territorial theory.

§ 322. **Id.** — A third case might happen; namely, a person domiciled in one country might be appointed by the government of another country to represent it in a third. Upon accepting the appointment and entering upon the discharge of his new functions, would his domicil be thereby changed? This case is to be determined upon the same principle as the other.

(b) *Consuls.*

§ 323. **A Person does not change his Domicil by Residence abroad in the Consular Service of his Country.** — There is little difficulty with regard to consuls. There seems to be no good reason why any rule should be applied to them different from those applied to other public officers. Usually their residence in a foreign country is referable to their public duties, and they do not thereby acquire a domicil there;[1] nor is any inference of domicil or of *animus manendi* to be drawn from such

[1] Udny *v.* Udny, L. R. 1 Sch. App. 441; Sharpe *v.* Crispin, L. R. 1 P. & D. 611; Niboyet *v.* Niboyet, L. R. 4 P. D. 1; Maltass *v.* Maltass, 1 Robertson Eccl. 67; Gout *v.* Zimmerman, 5 Notes of Cases, 440; Wooldridge *v.* Wilkins, 3 How. (Miss.) 360; Henry, For. Law, p. 204 *et seq.*; Westlake, Priv. Int. L. 1st ed. no. 47; Id. 2d ed. § 257; Dicey, Dom. p. 138; Wharton, Confl. of L. § 49.

residence, even though long continued. Henry[2] cites a case from the Nieuw Nederland's Advys Boek, in which a Dutch consul at Smyrna was held to have retained his domicil at Amsterdam. The language of the opinion is directly in point. It was there said, "that since A. was born at Amsterdam, and only residing at Smyrna in the service of Government, he must be considered as still residing at Amsterdam; since it is clear in law, that by residence in a foreign country under a commission, especially when this is only for some years and not perpetual, no domicil is contracted; the reason of which is evident, namely, that to the constituting of a fixed domicil, it is not sufficient that a person resides in this or that place, but that he must have the intention at the time of making it his fixed and permanent abode during his life; . . . and even were a man to remain ten or more years in a place, still he cannot be said to have had there his fixed domicil, so long as it was considered by him as a temporary residence (*mansio temporaria*), as by example in a commission; whence it follows that the marriage celebrated by A. at Smyrna, the place of his residence, so far as concerns the community of profit and loss during this marriage, must be considered as having taken place at Amsterdam."

§ 323 *a*. **Nor by a Consular Appointment in his own Country in the Service of a Foreign Government.** — But, on the other hand, a person who is already domiciled in a country does not lose such domicil by being appointed to a consular office there by the government of another country.[1] "Residence in a foreign country as a consular officer gives rise to no inference of a domicil in that country. But if already there domiciled and resident, the acceptance of an office in the consular service of another country does nothing to destroy the domicil."[2]

§ 324. **A Consul may acquire a Domicil in the Foreign Country in which he serves.** — There seems to be no difficulty in holding that one who goes to a foreign country as consul may acquire a domicil there if he forms the necessary *animus manendi*. The difficulty in such case would lie in the proof of intention.

[2] For. Law, p. 204.

[1] Sharpe *v.* Crispin, *supra*; Westlake, Priv. Int. L. 1st ed. no. 47; Id. 2d ed. § 258; Dicey, Dom. pp. 138, 139; Wharton, Confl. of L. § 49.

[2] Lord Penzance in Sharpe *v.* Crispin.

While the party remains in the consular service, residence, however long continued, would go for nothing. But if the *animus manendi* be made clearly to appear by acts and declarations, there seems to be no good reason for holding that a change would not take place.[1] In opposition to this view has been suggested the duty of consuls as well as ambassadors "to act for the interests, and remain identified with the feelings, of the country by which they are accredited."[2] Little weight, however, can be attached to this suggestion in view of the constant practice among almost all nations of selecting for consular office persons already domiciled in, and subjects of the countries in which they are appointed to serve.

[1] Westlake, Priv. Int. L. § 257; Wharton, Confl. of L. § 49. It is said that by engaging in trade in the country to which he is sent, a consul necessarily acquires a domicil there. Wharton, *loc. cit.* and Phillimore, Dom. no. 140; Id. Int. L. vol. iv. no. 170. This doctrine appears to remount to Lord Stowell's decision in The Indian Chief, 3 C. Rob. Ad. 22, a case of national character in time of war. But as we have already seen, national character under the English decisions depends upon considerations which do not apply to ordinary cases of domicil.

[2] Westlake, Priv. Int. L. 1st ed. no. 47. But in his second edition the same learned writer says (§ 257): "There would seem to be nothing to prevent a person in the consular service from acquiring a domicil, if so minded, in the country where he is employed, it being of frequent occurrence that foreigners are chosen for such employment in their respective countries."

CHAPTER XVIII.

DOMICIL OF PARTICULAR PERSONS (*continued*), — STUDENTS.

§ 325. **General Statement.** — One who goes to a place for the sole purpose of attending a school or university, intending to remain for a limited time, does not thereby gain a domicil.[1] His stay is only temporary, and is to be treated like any other temporary residence. It sometimes happens, however, that when study is one of the purposes, or even the main purpose, of residence in a place, there exists the ulterior intention of remaining there permanently after the period of study is at an end. In such case there can be no doubt that domicil is acquired.[2] Up to this point the case of a student differs in nothing from that of any other person. He does not gain a domicil by intention to reside temporarily, and he does gain a domicil by intention to reside permanently; and where his intention clearly appears, the fact of his studentship is of no significance whatever. But when we come to consider residence as a proof of *animus manendi*, we are met by the fact that the residence of a student is usually temporary; and as hence results the presumption that the residence of the *particular* student is also temporary, it is necessary, in order to

[1] Sanders *v.* Getchell, 76 Me. 158; Hart *v.* Lindsey, 17 N. H. 235; State *v.* Daniels, 44 id. 383; Granby *v.* Amherst, 7 Mass. 1; Putnam *v.* Johnson, 10 id. 488; Opinion of the Judges, 5 Met. 587; White *v.* Howard, 52 Barb. 294; Matter of Rice, 7 Daly, 22; Fry's Election Case, 71 Pa. St. 302; *Re* Lower Oxford Township Election, 11 Phila. 641; Kelley's Ex'r *v.* Garrett's Ex'rs, 67 Ala. 304; Dale *v.* Irwin, 78 Ill. 160; Vanderpoel *v.* O'Hanlon, 53 Iowa, 246; Wallace's Case, Robertson's Pers. Suc. p. 201, note (*k*); Phillimore, Dom. no. 98; Westlake, Priv. Int. L. 1st ed. no. 51; Wharton, Confl. of L. § 48. See also Farlee *v.* Runk, 2 Cong. El. Cas. 87; Letcher *v.* Moore, 1 id. 715; Rep. of Jud. Comm. Cush. Mass. El. Cas. 436; Bell *v.* Kennedy, L. R. 1 Sch. App. 307, and The Benedict, Spinks Prize Cas. 314.

[2] Sanders *v.* Getchell, *supra*; Putnam *v.* Johnson, *supra*; Opinion of the Judges, *supra*; *Re* Lower Oxford Township Election, *supra*; Dale *v.* Irwin, *supra*; Vanderpoel *v.* O'Hanlon; Wallace's Case, *supra*; Westlake, Priv. Int. L. 1st ed. no. 51; Cooley's Const. Lim. 1st ed. 600.

show the acquisition of domicil in the particular case, to overcome this presumption by suitable evidence.[3] This is the ratio of all the cases in which the question of the domicil of students has been considered.

§ 326. **Roman Law.** — The Roman law furnishes us several texts with regard to the domicil of students. In one of them (contained in the Code) it is laid down that those who for the sake of study dwell in any place are not considered to have domicil there, unless, ten years having been completed, they shall have set up a seat for themselves in that place; and the same principle is extended to a father who frequents a place on account of his son's studying there. "Nec ipsi, qui studiorum causa aliquo loco morantur, domicilium ibi habere creduntur, nisi decem annis transactis eo loco sedes sibi constituerint, secundum epistolam Divi Hadriani; nec pater qui propter filium studentem frequentius ad eum commeat."[1] Ulpian (in a passage handed down in the Digest[2]), in commenting upon the Cornelian law, uses the residence of the student as an illustration of the distinction between *habitatio* and *domicilium*.

§ 327. **Id.** — It is not entirely clear what effect should be given to the clause relating to the lapse of ten years. Hadrian probably intended by it to furnish a rule of evidence, which was to operate in the absence of other proofs concerning the *animus* of the student; and therefore, on the one hand, a domicil might be gained by a student without decennial residence if his intention was made sufficiently apparent by other circumstances, and, on the other, residence for such time would not *ipso facto* confer domicil if *animus revertendi* appeared. And this is the view which seems generally to have been held by the commentators, although not without dissent.

[3] Sanders *v.* Getchell, *supra;* Opinion of the Judges, *supra;* *Re* Lower Oxford Township Election, *supra;* Dale *v.* Irwin, *supra.*

[1] Code 10, t. 39, l. 2.

[2] Dig. 47, t. 10, l. 5, § 5. See *supra*, § 5, note 1. See also on this subject, Voet, Ad Pand. l. 5, t. 1, nos. 94, 96, 98; Donellus, De Jure Civili, l. 17, c. 12, p. 978 *b*, no. 50; Corvinus, Jur. Rom. l. 10, t. 39; Zangerus, De Except. pt. 2, c. 1, nos. 20 and 50, 51; Mascardus, De Probat. concl. 535, no. 14 *et seq.*; Menochius, De Arbit. Jud. l. 2, cas. 86, no. 5 *et seq.*; Christenæus, Decis. Curiæ Belgic. vol. v. decis. 34; Burgundus, Ad Consuet. Fland. Tract. 2, nos. 33, 34; Pothier, Intr. aux Cout. d'Orléans, no. 15; Denizart, *verb.* Dom. no. 20; Demolombe, Cours de Code Napoléon, t. 1, no. 354.

The subject will be further considered when we come to discuss time as a criterion of intention.[1]

§ 328. **Domicil of Student as viewed in this Country.** — In this country[1] the subject has been discussed in a number of cases, usually with reference to the elective franchise. Dr. Wharton[2] appears to intimate that for this reason the results reached are the less valuable as authorities. But in all of the States in which these reported discussions have taken place, the right to vote is put upon the ground of domicil, and precisely the same principles are applied as in other cases of domicil.

§ 329. **Id. Massachusetts Cases. Opinion of the Judges.** — The whole subject was gone over thoroughly and accurately by the justices of the Supreme Court of Massachusetts,[1] in an opinion rendered by them to the House of Representatives of that State in answer to the following question: "Is a residence at a public institution, in any town in this Commonwealth, for the sole purpose of obtaining an education, a residence within the meaning of the Constitution, which gives a person, who has his means of support from another place, either within or without this Commonwealth, a right to vote, or subjects him to the liability to pay taxes in such town?" Much that is contained in the opinion relates to the *indicia* of domicil, and would be properly considered hereafter in the part of this work treating of that subject; but as all that was said has direct bearing upon the question of the domicil of students, the opinion is here given at length: "We feel considerable difficulty in giving a simple or direct answer to the question proposed, because neither of the circumstances stated constitutes a test of a person's right to vote, or liability to be taxed; nor are they very decisive circumstances bearing upon the question. On the contrary, a person may, in our opinion, reside at a public institution for the sole purpose of obtaining an education, and may have his means of support from another place, and yet he will, or will not, have a right to vote in the town where

[1] See *infra*, §§ 383–385.

[1] There can hardly be said to have been any discussion of the subject in the British courts. Bell *v.* Kennedy, *supra*, The Benedict, *supra*, and Wallace's Case, *supra*, may, however, be referred to.

[2] Confl. of L. § 48.

[1] 5 Met. 587.

such institution is established, according to circumstances not stated in the case on which the question is proposed. By the Constitution it is declared, that, to remove all doubts concerning the meaning of the word 'inhabitant,' every person shall be considered an inhabitant, for the purpose of electing and being elected into any office or place within this State, in that town, district, or plantation, where he dwelleth or hath his home. In the third article of the amendments of the Constitution, made by the Convention of 1820, the qualification of inhabitancy is somewhat differently expressed. The right of voting is conferred on the citizen *who has resided* within this Commonwealth, and *who has resided* within the town or district, etc. We consider these descriptions, though differing in terms, as identical in meaning, and that 'inhabitant,' mentioned in the original Constitution, and 'one who has resided,' as expressed in the amendments, designate the same person. And both of these expressions, as used in the Constitution and amendment, are equivalent to the term 'domicil,' and therefore the right of voting is confined to the place where one has his domicil, his home or place of abode.

§ 330. Id. id. id.—"The question, therefore, whether one residing at a place where there is a public literary institution, for the purposes of education, and who is in other respects qualified by the Constitution to vote, has a right to vote there, will depend on the question whether he has a domicil there. His residence will not give him a right to vote there, if he has a domicil elsewhere; nor will his connection with a public institution, solely for the purposes of education, preclude him from so voting, being otherwise qualified, if his domicil is there.

"The question, what place is any person's domicil, or place of abode, is a question of fact. It is in most cases easily determined by a few decisive facts; but cases may be readily conceived where the circumstances tending to fix the domicil are so nearly balanced that a slight circumstance will turn the scale. In some cases, where the facts show a more or less frequent or continued residence in two places, either of which would be conclusively considered the person's place of domicil but for the circumstances attending the other, the intent of the party to consider the one or the other his domicil will deter-

mine it. One rule is, that the fact and intent must concur. Certain maxims on this subject we consider to be well settled, which afford some aid in ascertaining one's domicil. These are, that every person has a domicil somewhere; and no person can have more than one domicil at the same time, for one and the same purpose. It follows, from these maxims, that a man retains his domicil of origin till he changes it by acquiring another; and so each successive domicil continues until changed by acquiring another. And it is equally obvious that the acquisition of a new domicil does, at the same instant, terminate the preceding one.

§ 331. Id. id. id.—"In applying these rules to the proposed question, we take it for granted that it was intended to apply to a case where the student has his domicil of origin at a place other than the town where the institution is situated. In that case we are of opinion that his going to a public institution, and residing there solely for the purpose of education, would not, of itself, give him a right to vote there, because it would not necessarily change his domicil; but in such case his right to vote at that place would depend upon all the circumstances connected with such residence. If he has a father living; if he still remains a member of his father's family; if he returns to pass his vacations; if he is maintained and supported by his father,—these are strong circumstances, repelling the presumption of a change of domicil. So, if he have no father living; if he have a dwelling-house of his own, or real estate, of which he retains the occupation; if he have a mother or other connections, with whom he has before been accustomed to reside, and to whose family he returns in vacations; if he describes himself of such place, and otherwise manifests his intent to continue his domicil there,—these are all circumstances tending to prove that his domicil is not changed.

"But if, having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent; or if, having no parent, or being separated from his father's family, not being maintained or supported by him; or if he has a family of his own, and removes with them to such town; or by pur-

chase or lease takes up his permanent abode there, without intending to return to his former domicil; if he depend on his own property, income, or industry for his support, — these are circumstances, more or less conclusive, to show a change of domicil, and the acquisition of a domicil in the town where the college is situated. In general, it may be said that an intent to change one's domicil and place of abode is not so readily presumed from a residence at a public institution for the purposes of education, for a given length of time, as it would be from a like removal from one town to another, and residing there for the ordinary purposes of life; and therefore stronger facts and circumstances must concur to establish the proof of change of domicil in the one case than in the other. But where the proofs of change of domicil, drawn from the various sources already indicated, are such as to overcome the presumption of the continuance of the prior domicil, such preponderance of proof, concurring with an actual residence of the student in the town where the public institution is situated, will be sufficient to establish his domicil, and give him a right to vote in that town, with other municipal rights and privileges. And as liability to taxation for personal property depends on domicil, he will also be subject to taxation for his poll and general personal property, and to all other municipal duties in the same town."

§ 332. **Id. id. Granby v. Amherst.** — In an early Massachusetts settlement case[1] it was held that one who being domiciled in B. became a student of Dartmouth College, and so continued for four years, passing his vacations in B., and after graduation remaining there to reside, did not lose his domicil in B. during his four years' absence at college, Parsons, C. J., remarking, "His absence was occasional, and for a particular purpose," and therefore "there was no change of domicil."

§ 333. **Id. id. In Putnam v. Johnson,**[1] a student of full age, upon a charity foundation in Andover Seminary, who had severed himself from his father's family, and between the time of his leaving home and the time of coming to Andover had

[1] Granby v. Amherst, 7 Mass. 1. [1] 10 id. 488.

resided in another town, S., where he had been taxed and had voted, there being no evidence as to his intention subsequent to graduation, was held to be domiciled and entitled to vote at Andover. It was in this case that Parker, J., made his celebrated qualification of Vattel's definition, and laid down doctrine which would clearly not be applicable to cases of national or *quasi*-national domicil. It is probable that Putnam *v.* Johnson will not stand as an authority in any cases other than those of municipal domicil.

§ 334. **Id. Fry's Election Case**[1] arose upon a case stated, in which it was admitted that certain students whose right to vote was in question, were citizens of Pennsylvania; that they claimed that their residence was in Muhlenberg College, where they had lived from one to three years; that they came to the town where the college was located for no other purpose than to receive a collegiate education, but intended to leave after graduating; that they were assessed and paid taxes before the election. A clear and able opinion was delivered by Agnew, J., in which, after demonstrating the identity of domicil and residence within the meaning of the constitutional provision relating to the qualifications of voters, and discussing and defining domicil, he said: "The stated case expressly declares that the students referred to in it came to Allentown from other counties, for *no other* purpose than to receive a collegiate education, but *intended to leave* after graduating. It is evident that the college was not their true and permanent home; their stay there was not to be indefinite, as the place of a fixed abode, until future circumstances should induce them to remove. Their purpose was indefinite[2] and temporary, and when accomplished they intended to leave. They retained their original domicil, for the facts stated show that they never lost it. On this point the authorities are in entire accord."

§ 335. **Id. id.** — After citing authorities, and further discussing some of the general principles of domicil, he proceeded to say: "The principles enable us now to dispose of the first of the two classes into which the stated case divides these students, viz.: 'Those who support themselves, or are assisted pecuniarily by persons other than their parents, are emanci-

[1] 71 Pa. St. 302.

[2] So in the report. *Definite* (!).

pated from their fathers' families; have left the home of their parents, and never intend to return and make it a permanent abode.' Having, as the case states, come to Allentown for *no other* purpose than to receive a collegiate education, and intending to leave after graduating, they have not lost their home domicil, and could vote there on returning to it, though they should not re-enter their father's house. Emancipation from their father's family, and independent support, and the leaving of the home belonging to their parents, have not forfeited their own domicil. Their father's house is not necessarily their home, but the place is where it is. Though not in the bosom of that family, the place of their residence is not lost to them until they have voluntarily changed it and found a new home. Upon the terms of the stated case, it cannot be said they have abandoned their original home, and actually obtained another. The second class needs no comment. They are those students 'who are supported by their parents, visit their parents' home during vacation, and may or may not return there after graduating.' It is clear as to both classes, the college is not their home. They are not members of the community among whom they sojourn. They have no common interest; do not intend to live with, or to cast their lot among them. They have no proper motive to interfere in their local affairs. On no proper principle of a true residence should the student vote to-day and fasten on the community officers whom the majority do not desire, then graduate to-morrow and be gone."

§ 336. **Id. Sanders v. Getchell,**[1] is a recent case decided by the Supreme Court of Maine, in which Peters, C. J., said: "Another question is to be considered, and that is, Under what circumstances does a student at a seminary of learning acquire a voting residence in the place where such seminary is situated? The constitutional interdiction is in these terms: 'The residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary is situated.' It is clear enough that residing in a place merely as a student does not confer the franchise. Still, a student may obtain a voting residence if other conditions

[1] 76 Me. 158.

exist sufficient to create it. Bodily presence in a place coupled with an intention to make such place a home will establish a domicil or residence. But the intention to remain only so long as a student, or only because a student, is not sufficient. The intention must be not to make the place a home temporarily, not a mere student's home, a home while a student, but to make an actual, real, permanent home there; such a real and permanent home there as he might have elsewhere. The intention must not be conditioned upon or limited to the duration of the academical course. To constitute a permanent residence, the intention must be to remain for an indefinite period, regardless of the length of time the student expects to remain at the college. He gets no residence because a student, but being a student does not prevent his getting a residence otherwise. The presumption is against the student's right to vote, if he comes to college from out of town. Calling it his residence, does not make it so. He may have no right to so regard it. Believing the place to be his home is not enough. Swearing that it is his home must not be regarded as sufficient, if the facts are averse to it. Deception or misconstruction should not be encouraged. The constitutional provision should be respected. Each case must depend largely upon its peculiar facts. The question is not always of easy solution. One difficulty is this, that all the visible facts may be apparently consistent with either theory, — that of a temporary or a permanent home."

§ 337. **Id. id.** — The facts as stated by the court were as follows: "The plaintiff was thirty-two years old; left his father's house in Patten, in this State, when nineteen; never afterwards received parental support or was under parental control; visited home afterwards only occasionally and briefly; his father's home was, soon after his leaving, changed from Patten to other places; at the age of nineteen he was in business for himself in Foxboro, Massachusetts; after coming of age he was taxed and voted for several years in that place; in 1875, at the age of twenty-four, he entered a classical school at Waterville, and in 1878 entered college there, graduating in 1882; in 1879 he formed the purpose of making Waterville his home for an indefinite period of time, and was taxed and

voted there from that date until 1882, when, against his protest, his name was by the defendants omitted from the lists; he has ever since claimed and regarded Waterville as his home, a friend's house being open to him when there, though possessing no property there of consequence, and entering a theological institute at Newton, Massachusetts, in 1882, where he has since remained as a student." The act complained of was in 1882.

§ 338. **Id.** Many of the cases above referred to were cases of municipal domicil; but their principles are for the most part general, and the subject has been discussed and decided the same way in several cases in which *quasi*-national as well as municipal domicil was involved.[1]

§ 339. **Id. State Constitutions.** — Many of the State Constitutions contain provisions relating to the residence of, *inter alios*, students as a qualification for voting. Thus, the Constitution of Pennsylvania[1] contains the following: "For the purpose of voting no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence . . . while a student of any institution of learning." That of Maine has been given above, and those of many other States are similar. These provisions, however, are merely declaratory of the law as already understood, and introduce no new rule.[2] In Rice's case,[3] the following statutory provision, "No person shall be deemed to have lost or acquired a residence by being a student in a college, academy, or seminary of learning," was held to be "but a recognition or affirmance of the rule at common law."

§ 340. **Presumption in favor of Acquisition of Domicil by Student who remains after Completion of his Studies.** — If a student after completing his education remains at the place where he

[1] See particularly Sanders *v.* Getchell, *supra*; Opinion of the Judges, *supra*; *Re* Lower Oxford Township Election, *supra*.

[1] Art. 8, sec. 13. See also the Constitutions of California (1849), art. 2, sec. 4; Colorado (1876), art. 7, sec. 4; Kansas, Amendment to art. 5, sec. 3, ratified 1864; Maine (1820), art. 2, sec. 1; Michigan (1850), art. 7, sec. 5; Minnesota (1857), art. 7, sec. 1; Missouri (1875), art. 8, sec. 2; New York (1846), art. 2, sec. 3; Oregon (1857), art. 2, sec. 2.

[2] See similar provision with reference to civil and military officers, *supra*, § 316.

[3] Matter of Rice, 7 Daly (N. Y. C. P.), 22. The New York Constitution also contains a similar provision.

has been attending an institution of learning, his continued residence there is strong evidence of domicil, the usual presumption of *animus revertendi* being overthrown by his remaining after the time when his return would ordinarily be expected.[1] The temporary cause of sojourn having ceased, the fact of remaining, according to Pothier,[2] raises a strong presumption of intention to remain permanently.

[1] This is clear on principle apart from authority; but see Wallace's case, *supra;* Pothier (next note), and Westlake, Priv. Int. L. 1st ed. no. 51. See also the same principle applied to public officers and refugees, *supra*, §§ 285, 315. In Wallace's case the Lord Ordinary (Cringletie) said: "Residence merely for education may be questionable how far it constitutes a domicil to govern succession. But when education is over, when a man attains majority, and still resides in England, making only short visits to Scotland; having no house of his own in which he lives in Scotland, and dies in England in a house of his own, — the Lord Ordinary confesses that he thinks that there is little room for doubting what must be held to be his domicil."

[2] Intr. aux Cout. d'Orléans, no. 15. This he understands to be the principle of the Ordinance of Hadrian, *supra*, § 326.

CHAPTER XIX.

DOMICIL IN PARTICULAR PLACES.

(a) *Domicil of Foreigners in France.*

§ 341. **Art. 13 of the French Code Civil.** — The question has arisen, Can a foreigner without authorization establish his domicil in a country whose laws provide for authorization by the Government of that country to establish domicil there? And upon this question there has been considerable discussion and difference of opinion. It has particularly arisen under the French law, in the construction and application of Art. 13 of the Code Civil, which is as follows: "The foreigner who shall have been admitted by the Government to establish his domicil in France, shall enjoy there all civil rights so long as he shall continue to reside there."

Two remarks must be premised: (1) that prior to the adoption of the French Code the right of a foreigner to acquire in France a domicil carrying with it all the incidents which usually belong to international domicil was universally recognized;[1] and (2) that there is not in the French Code, or in any of the French positive laws, any express provision which prohibits a foreigner from acquiring a domicil in that country without authorization. Whatever is found in the Code upon the subject is found by implication, and mainly, according to most of the authorities, in the article above quoted.

§ 342. **The Difficulty attending the Subject largely one of Method.** — If, therefore, the question is considered by what appears to be the more logical method, namely, by first inquiring whether a foreigner may establish a domicil in France without authorization, leaving the legal consequences of such domicil

[1] See Merlin, Repertoire, *verb.* Divorce, § 10, no. 4; *verb.* Domicil, § 13.

for subsequent determination, there would seem to be little or no doubt that an affirmative answer should be given, — the ancient law on the subject having been as we have seen it, and there existing in the French law no prohibition against the establishment in that country of a domicil by a foreigner in the ordinary way, *facto et animo*. But unfortunately the French jurists have followed the very illogical method of considering whether a person can, without authorization, acquire a domicil for this or that particular purpose, *e. g.*, domicil for the purpose of succession, etc.; thereby confusing in a single inquiry both the constitution and the legal effects of domicil. It is to this method of inquiry and the confusion of ideas consequent thereupon that the great perplexity and conflict of opinion which have apparently surrounded the subject are mainly due.

It is not for an American text-writer, even if the scope of this work permitted a sufficiently extended examination of the subject, to attempt to reconcile the conflicting views of French jurists concerning French law: it will be sufficient to point out briefly and generally some of the different opinions which have been held by the courts and text-writers of that country, and then to consider the views held by the courts of this country and Great Britain. Apology for occupying even so much space as is here devoted to the subject is found in the fact that already a number of cases have arisen in the English and American courts in which have been discussed the true construction and legal effect of Art. 13, and the further fact that, by reason of the large and increasing number of Englishmen and Americans resident in France, the Anglo-American courts are likely to have frequent occasion to turn their attention again and again to the subject.[1]

§ 343. **Various Opinions held in France: (1) that a Foreigner cannot establish a Domicil in that Country even with Authoriza-**

[1] In spite of the large number of Englishmen and Americans resident in France, it is well known that few of them avail themselves either of naturalization or of authorization to establish domicil. From 1851 to 1861 in that country only ninety-two Englishmen obtained such authorization, and only four were naturalized. The necessity of government authorization to establish domicil, and the effect of its absence are therefore live questions, which are likely to come before our courts frequently.

tion. — In France, according to Demolombe,[1] three general opinions have been maintained: *First*, that a foreigner cannot in any case establish a domicil in that country, either with or without authorization. This view, which is clearly inadmissible, inasmuch as it is equally opposed to all international change of domicil, seems to be based upon the theory that a foreigner, no matter how apparently permanent may be his establishment in France, must be presumed always to intend sooner or later to return to his native country, unless he has actually and formally become a French citizen by naturalization. We have already seen that there is a strong presumption against an international change of domicil, and this is based mainly upon the well-known habits and feelings of men, inducing them generally, in spite of prolonged residence and apparently permanent interests in foreign lands, to retain the *animus revertendi;* but to carry it to the extent of conclusiveness is to ignore the equally well-known fact that in modern times very many persons do, without seeking naturalization, voluntarily establish themselves in foreign countries without the slightest intention or hope of return.

Those who hold this extreme doctrine are probably led to it in part by a consideration of the very serious consequences attending the establishment of a Frenchman in a foreign land *sans esprit de retour*.[2]

§ 344. **Id. (2) that a Foreigner may establish a Domicil in France only with Authorization.** — The second opinion is, that a veritable domicil cannot be established by a foreigner in France without authorization. It has the sanction of many distinguished names among the French jurists,[1] and is supported by various arguments, among which are the following:

It is said that, in general, French laws are made for Frenchmen only, and not for foreigners; and in particular, Art. 102, which defines domicil, contemplates only the domicil of Frenchmen, — "Le domicil de tout Français, quant à l'exercice

[1] Cours de Code Napoléon, t. 1, no. 268. He there also states some of the arguments given above, by which the various views are sought to be maintained.

[2] Art. 17, Code Civil.

[1] Demolombe, t. 1, no. 268; Duranton, t. 1, no. 358; Aubry et Rau, t. 1, p. 576; Demangeat, Condition Civile des Étr. en France, no. 81; Coin De Lisle, Jouiss. et Priv. des Droits Civils, art. 13, no. 11.

de ses droits civils, est au lieu où il a son principal établissement;" and the articles which follow, construed with Art. 102, provide only for the ascertainment of the domicil of Frenchmen. Furthermore, although a foreigner may establish himself during a long period in France and in a manner apparently fixed and stable, yet in truth his residence cannot be said to be permanent, inasmuch as he may at any time be sent out of the country by the Government. Authorization is indeed revocable, but it, nevertheless, gives a certain security in fact, and is a guaranty which it is natural to seek when a person wishes to permanently establish himself.

Again, domicil is itself a civil right; and as Art. 13, which is the only one that treats of the domicil of foreigners, contemplates authorization as a condition precedent to the enjoyment by them of civil rights, it follows, by necessary implication, that domicil cannot be acquired without it. It is said substantially, further, that as Art. 13 plainly contemplates that without authorization permanent establishment in France shall not carry with it the full legal consequences which follow when authorization is added, and as a supposed domicil, which does not carry with it all the legal consequences of domicil, properly so called, cannot be a true domicil, therefore, while a permanent establishment by a foreigner in France is susceptible of certain consequences, it is not to be construed as a "true" or "veritable" domicil. The distinction is hence taken between a domicil *de fait* and a veritable or legal domicil.

§ 345. Id. id. And finally, the advocates of this theory fortify their reasoning by what they consider authoritative utterances upon the subject. They cite first the language of the *orateur du Tribunat* (Gary) in his *discours* at the sitting of the Corps Legislatif of 17 Ventôse, An 11 (when Art. 13 was under discussion) which was as follows: "J'observe sur l'article 13 qu'il n'y a eu aucune objection contre la disposition qui veut que l'étranger ne puisse établir son domicile en France, s'il n'y est admis par le gouvernement. C'est une mesure de police et de sûreté autant qu'une disposition législative. Le gouvernement s'en servira pour repousser le vice et pour accueillir exclusivement les hommes

vertueux et utiles, ceux qui offriront des garanties à leur famille adoptive."

They cite also an "Avis du Conseil d'État" (20 Prairial, An 11) as follows: "Le Conseil est d'avis que, dans tous les cas où un étranger veut s'établir en France, il est tenu d'obtenir la permission du gouvernement." These authorities they say conclusively establish their position.

§ 346. **Id. (3) that a Foreigner may establish a Domicil in France without Authorisation.** — The third opinion is, that a foreigner may establish a domicil in France without authorization. This view also has the sanction of a number of distinguished names among French jurists,[1] and is supported as follows. Its advocates rely, first of all (in addition to the *jus gentium*), upon the customary law of France as it stood before the adoption of the Code; and they contend that there is no provision to be found in the Code which ordains, expressly or by fair implication, otherwise. On the contrary, Art. 102 expressly fixes domicil "at the place of the principal establishment," and it cannot be doubted that a foreigner may have his "principal establishment" in France.

If it be said that Art. 102 contemplates only the domicil of the *Français*, it is answered that the history of the preparation and adoption of that article shows that the purpose was to distinguish, not between the domicil of Frenchmen and foreigners, but between political and civil domicil. The original draft declared the domicil of the *citoyen* to be "the place where he may exercise his political rights," and that of other individuals, such as unmarried females or widows, who do not enjoy the political rights of the *citoyen*, to be "the place where the individual has fixed his [or her] principal establishment," the word "*citoyen*" being manifestly used in the sense of "*citoyen actif*." The form which was definitively adopted after discussion was therefore intended to remove the distinction (contained in the first draft) between the "*citoyen*" and "other individuals" so far as concerns the

[1] Merlin, Repertoire, 5th ed. *verb.* Dom. § 13; Valette sur Proudhon, t. 1, p. 237; Id. Cours de Code Civil, t. 1, p. 69; Richelot, t. 1, p. 312, note 1; Demante, t. 1, no. 128 *bis*; Laurent, t. 2, no. 68; Brocher, Cours de Droit Int. Priv. t. 1, no. 79.

determination of domicil for civil purposes, and not to draw any distinction between Frenchmen and foreigners. If the latter had been the intention, some traces of it would have remained in the discussions, which is not the case.[2]

But admitting that Art. 102 relates solely to Frenchmen and not to foreigners, and that no principle can be drawn therefrom even by analogy, we are then thrown back upon Art. 13 as the only one in the Code having any reference to the domicil of the latter; and this has for its object to determine, not in what cases a foreigner may or may not be domiciled in France, but in what cases he may enjoy there civil rights. If the former object had been intended, it would have been very easy to have expressed it; and that the latter object was intended is shown not only by the text itself, but also by the fact that the article appears under the title treating exclusively of the enjoyment and privation of civil rights.[3]

§ 347. Id. id. — With respect to the "Avis du Conseil," relied upon by the advocates of the second opinion, it is said by those who uphold the third: (1) that it was intended solely for the guidance of the Minister of the Interior to whose inquiry it was a reply; that it was never inserted in the bulletin of laws, or legally published in any manner, and has therefore no binding force upon the tribunals; and (2) that, although the language of the "Avis" is broad, it must be construed with reference to the subject-matter of the inquiry to which it was a reply, namely, whether under the provisions of Art. 8 of the Constitutional Act of 22 Frimaire, An 8, a foreigner could become a French citizen without having received authorization to establish his domicil in France.

The words of the tribune Gary also, it is said, are to be restrained to the subject-matter under discussion at the time they were uttered, namely, the acquisition of civil rights by foreigners, and are not to be taken in their general and unrestricted sense.

It was the language of Gary and the "Avis du Conseil d'État" which constrained Merlin, in the fourth edition of his Repertoire, in spite of his own evident opinion to the con-

[2] For this argument, see particularly Brocher, *loc. cit.*

[3] Liv. 1, t. 1, "De la Jouissance et de la Privation des Droits Civils."

trary, to adopt the view that authorization is necessary for the establishment of a domicil *proprement dit* in France by a foreigner. In his fifth edition, however, finding that these authorities were otherwise explicable, he re-wrote his section on this subject, and adopted and enforced by various arguments the opposite view.

Such are the most prominent arguments advanced by the French text-writers in support of the several principal views on this subject.

§ 348. **Decisions of the French Courts.** — It is impossible to examine here in detail the decisions of the French courts. They are numerous, and in some instances apparently irreconcilable.[1] It is sufficient to say that in spite of considerable conflict existing in them, there is a large preponderance, particularly among the later cases, in favor of the opinion that a foreigner can acquire a true domicil, or domicil *de droit* only by virtue of authorization, but that without authorization he may acquire a domicil *de fait*, carrying with it a part of the legal consequences generally produced by domicil *de droit*. But this preponderance, although great, cannot be looked upon as conclusively settling the question, inasmuch as in France far less respect is paid to judicial decisions[2] as determinative of the law than in this country and Great

[1] The following may be referred to: Princess Poniatowska, Sir. 1811, II. 446; s. c. Dall, Rec. Alph. III. 348, and Jour du Pal. t. 32, 871; Berembrock, Sir. 1822, I. 413; Da Costa, Sir. 1825–1827, 579; Thornton, Jour du Pal. Nov. 7, 1826; s. c. Sir. 1825–1827, 442, and Dall, 1827, II. 49; Drivier-Cooper, Sir. 1828, I. 212; Onslow, Dall, 1836, II. 57; s. c. Sir. 374; D'Abaunza, Sir. 1842, II. 372; Dremmler, Sir. 1844, II. 617; Lloyd, Sir. 1849, II. 420; Lynch, Sir. 1851, II. 791; Connolly (De Veine *v.* Routledge) Sir. 1852, 289; Id. (Browning *v.* De Veine) Dall, 1853, I. 217; Breul, Sir. 1854, II. 105; Olivarez, Le Droit, Oct. 11, 1854; Baron de Mecklembourg, Le Droit, July 27, 1856; Comm. de Trevilliers, Sir. 1860, II. 591; and 1863, I. 79; Cazanova, Sir. 1861, I. 800; Frentzal, Sir. 1861, II. 65; Melizet, Sir. 1869, I. 138; s. c. Dall, I. 294, and Bull. des Arrêts, Cass. Jan. 1869, p. 16; Ott, Sir. 1868, II. 193; Id. 1869, I. 138; Bull. des Arrêts, Cass. Jan. 1869, p. 17; Da Gama Machado, reported with Ott; Bergold, Sir. 1871, II 141; Craven, Sir. 1872, I. 238; Myers, Sir. 1872, II. 313; Sussman, Dall, 1872, II. 65; Specht, Dall, 1872, II. 255; s. c. Sir. 1875, I. 19; Morand, Sir. 1873, II. 148; Rieffel, Sir. 1873, II. 265; Lethbridge, Dall, 1874, I. 465; Forgo, Sir. 1875, I. 409; Bull. des Arrêts, Cass. May, 1875, p. 138; Cuirana, Journ. du Droit Int. Priv. 1882, p. 194.

[2] Upon a question concerning which there is no explicit provision in the Code or other positive legislation, and about which there is room for difference of opinion, it is generally very difficult to determine what is the French law.

Britain; and, moreover, it is well known that the French Court of Cassation has at different times changed its opinion in matters of private international law.

The question therefore naturally arises, whether, when the subject which we have been considering comes before a British or an American tribunal for adjudication, it is bound to adopt the view at the time prevailing in the French Court of Cassation, or whether it should take the existing French legislation, and with the best lights available independently construe it.

§ 349. **English Cases: Collier v. Rivaz.** — In England the subject has been considered in several cases. The first case was Collier *v.* Rivaz,[1] which involved the validity of certain

The decisions of even the highest courts of that country have not the binding force as precedents which is attributed to like decisions in this country and Great Britain. Indeed, there is a maxim among French lawyers that "decisions are good for those who obtain them;" and although some respect is paid to them as containing the expression of opinion of learned men, yet the doctrine and reasoning contained in them are constantly brushed aside and disregarded by both courts and text-writers in a manner almost incomprehensible to lawyers schooled in the case system of Great Britain and America; and it thus not unfrequently happens that the opinion of a text-writer of acknowledged eminence is more highly regarded as evidence of what the law is than a solemn decision of the Court of Cassation.

[1] 2 Curteis, 855. Sir Herbert Jenner, in the course of his opinion, said: "I cannot think it necessary to go at any length into the facts of the case, because they are all admitted; there is no dispute as to them, the only question is as to the result of them. Now, I cannot but think that all the facts, with respect to the abandonment of the old domicil and the acquisition of a new one, indicate not only an intention to reside at Brussels and make that place his home, but that the fact and intention concur together, which is all that is necessary to constitute a domicil. Length of time will not alone do it; intention alone will not do; but the two taken together do constitute a change of domicil. No particular time is required, but when the two circumstances of actual residence and intentional residence concur, there it is that a change of domicil is effected. In this case I can have no doubt, from the facts, that this was the deceased's selected place of domicil; though from 1803 to 1814 it was a forced residence, yet from that time (1814) he became habituated to the manners of Brussels and the inhabitants of Brussels, and preferred to make his continental residence in that place to a return to his original domicil. I am, therefore, of opinion, under the whole circumstances of the case, that the testator must be considered to have been domiciled at Brussels at the time of his death. The question, however, remains to be determined, whether these codicils, which are opposed, are executed in such a form as would entitle them to the sanction of the court which has to pronounce on the validity of testamentary dispositions in Belgium, in the circumstances under which they have been executed. Because it does not follow that, Mr. Ryan being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the

codicils to the will of one whose domicil of origin was Irish, but who had subsequently acquired an English domicil, and still later had settled in Belgium, where he continued to reside up to the time of his death, without, however, obtaining authorization. The codicils were executed in accordance with the law of England, and not in accordance with that of Belgium. Sir Herbert Jenner held, (1) that the facts clearly

law of Belgium requires from its own native-born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence; that is, foreigners who come to reside under certain circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects, and the subject of another country; and the court sitting here to determine it must consider itself sitting in Belgium under the particular circumstances of the case. Now, three witnesses have been examined with respect to the law of Belgium, as applying as well to the acquiring of a domicil in Belgium as to the law with respect to the execution of testamentary instruments. With respect to domicil acquired, it is quite clear, according to the evidence of these persons, that no domicil according to the law of Belgium can be acquired unless the authority of the ruling powers is obtained, to authorize the persons who apply for that authority to continue in that country; that unless that authority is obtained, he is liable to be removed at any time; that having obtained that authority, he then becomes to all intents and purposes a subject of Belgium, and has a right to remain there and enjoy the privileges of a natural-born subject. But it may be a different question, whether a person who has not obtained that authority, a mere resident there, is to be considered as a foreigner simply having a residence and not a domicil. I think it is very doubtful whether the Dutch and Belgian lawyers understand the same thing, — from the evidence given with respect to domicil, — whether they do not consider that a person to become domiciled must have denization, that which is equivalent to our naturalization, and they do not mean simply domicil for the purpose of succession or anything of that description, but they consider that a person in order to become domiciled must place himself by the authority of the Government in the same situation as a Belgian subject, and have the rights and privileges of that country. But I think it is not necessary to inquire into this, because I think we have the conclusive evidence of two witnesses as to that which is necessary to give validity to the testamentary dispositions of persons who reside there, but have not acquired all the rights of Belgian subjects." After referring to the testimony of the expert witnesses concerning the effect of residence in Belgium without authorization to establish domicil there, he concluded: "Therefore I am of opinion that notwithstanding the domicil of Mr. Ryan must be considered to have been in Belgium, and that he had in point of law abandoned his original domicil, and had acquired *animo et facto* a domicil in a foreign country, yet that foreign country in which he was so domiciled would uphold his testamentary disposition if executed according to the forms required by his own country. I am therefore of opinion that I am bound to decree probate of the will and all the codicils."

showed the testator to be domiciled at the time of death in Belgium; (2) that therefore the English court sitting to determine the validity of his testamentary dispositions must consider itself as sitting in Belgium, and must apply the same law that the courts of that country would be bound to apply; and (3) that inasmuch as the Code Napoléon (which was in force in Belgium) conferred full civil rights on those foreigners only who had received authority from the King to establish their domicil there, and as therefore the succession of a foreigner who had not obtained such authority must be determined by the laws of his own country, it followed that the codicils in question were valid, because executed in accordance with the laws of England, where the testator was last domiciled before coming to Belgium.

The construction put by the learned judge upon the provisions of the Code Napoléon was based upon the testimony of two Dutch lawyers (pronounced by Lord Wensleydale to be "short and unsatisfactory"), and has been criticised and dissented from in subsequent cases.

§ 350. **Id.** — Anderson *v.* Laneuville[1] was the case of one who, being Irish by origin, had acquired a domicil in England, and subsequently went to France, and there resided without having received authorization for thirteen years (up to the time of his death), under circumstances which were deemed sufficient to show permanent establishment. He left two wills, one executed in England in accordance with the English law, and the other, which was the later of the two, in France in accordance with the French law. The question was as to the validity of the latter will in point of formal execution. The case was first heard by Sir John Dodson, who held the testator to be domiciled in France, and his will, executed in accordance with the laws of that country, valid. Upon appeal this decision was affirmed by the Privy Council. But although the point was distinctly raised by counsel in the Appellate Court that the testator could not have a domicil in France by reason of his failure to obtain authorization, it was not discussed in the judgment (delivered by Dr. Lushington). The point was, however, in effect decided against them.

[1] 2 Spinks, 41; 9 Moore P. C. C. 325.

§ 351. **Id. Bremer v. Freeman.** — In Bremer *v.* Freeman,[1] the subject was considered fully and with great care, and with the assistance of a number of the most eminent lawyers of France, who testified with regard to the French law.[2] The

[1] 1 Deane, 192; on appeal, 10 Moore P. C. C. 306.

[2] In Bremer *v.* Freeman, Frignet, one of the French lawyers called on the part of the appellant, testified: "It is the opinion of very eminent French advocates and writers of eminence on French law, and it is also my opinion, that by this article foreigners who have not obtained the authorization of the Government for establishing their domicil in France are considered in law not domiciled, though resident in France; but the French, not the English, signification of the term 'domicil' must be carefully borne in mind." And he drew this distinction: "In France the term 'domicil' carries two meanings, or rather is divisible into two classes, — one, domicil in its strict sense (*proprio sensu*), the other, domicil in its broad sense (*lato sensu*). Domicil, in its strict sense, is that applicable to questions as to the rights of a party, such as the place where he may legally exercise his municipal rights; and this domicil is determined exclusively by the declarations at the Mairies as to the place the party desires to be considered as his legal domicil. The party makes a formal declaration on this head at the Mairies of the Communes from which he came and to which he goes; and the place set forth in these declarations is then, for the purposes I have above stated, held in strictness to be his domicil; and as regards a Frenchman, if no such declarations have been made, the court will infer his place of domicil from circumstances. Such questions are frequently brought for adjudication before the Court of Cassation, in which I practise, and before that court only; and this distinction is, therefore, not generally known. Domicil, in its other and broad sense (*lato sensu*), has reference to the obligations of a party, one of which is the mode in which he shall make his will; and this domicil is to be determined by circumstances, and cannot be arbitrarily decided upon in the negative by any such particular formal act. Thus, as regards foreigners, the authorization of the Government to establish a domicil is considered indispensable when the foreigner claims right, *i. e.*, to enjoy *les droits civils*, but it is not so considered when Frenchmen, or others duly authorized, claim rights against him. So in matters relating to a foreigner's will, by which, of course, rights are conferred on other parties, it may be said, accepted by the Testator, the broad, not the strict sense of the term 'domicil' is applied; and, therefore, independent of any authority of the Government to the foreigner to establish his domicil, the court will infer that domicil to have existed or not, according to the circumstances of the case. The French law applies the technical expression, 'opening the succession,' to all cases in which a person has died testate or intestate. The succession is considered as opened at the very instant of the death of the deceased, independently of any formality, and the succession is called testamentary or legal, according to whether the deceased died testate or intestate. The tribunals do not fix the opening of the succession at any certain day, but must declare it opened from the day of the death, and all the consequences thereof take effect from that time. The rules in France, which govern the laws of successions, are very complicated; but the question of the domicil does not affect the question of succession, except in one point, namely, the determining the Tribunal having jurisdiction to adjudicate on the question of succession, and that jurisdiction is always determined by the place of the domicil (*lato*

question was in this case also as to the formal execution of a will. The testatrix, whose domicil of origin was English,

sensu) of the deceased. The personal rights and remedies of a Frenchman against other Frenchmen do, according to the laws of France, follow him into a foreign country as dependent on the personal law; but his remedies must, of course, be exercised according to the Tribunals of the country in which he resides. As regards foreigners, however, we do not give them the same rights we claim for Frenchmen; for a foreigner, simply as such, and without having obtained the authorization of the French Government before referred to, has no right of instituting proceedings against another foreigner in this country." He further held that "domicil (*lato sensu*) is independent of the authority of the Government, and that it is within the province of the Tribunal to judge of the value of the circumstances in reference to which the foreigner must be considered as having or not having his domicil in France." And further, that a person could, in his "opinion, acquire a domicil (*lato sensu*) by mere residence in France, but she cannot by virtue of that domicil claim civil rights without having obtained the authorization of the Government to establish her domicil in France (13th Art. Code Napoléon). A prolonged residence in this country, with an intention manifested of remaining permanently here, would be sufficient, according to the law of France, to establish a French domicil." And further, that "A foreigner permanently residing in France, having a fixed establishment there, and expressing an intention of permanently residing there, is considered, according to the French law, as having his domicil in France. No authorization of the Government is necessary for a foreigner to acquire such a domicil in France. In the absence of any expressed intention by the party of permanent residence, circumstances may afford evidence of that intention in virtue of Article 105 of the Code Napoléon. In fact, no authorization of Government is necessary towards the acquisition by a foreigner of French domicil, conferring the obligations of legal domicil." And further, that in his opinion, Articles 103, 104, and 105 of the Code Civil apply "not to French subjects only who may change their domicil, but to foreigners also, who have fixed their permanent abode or domicil in France;" and the French "courts would have no difficulty in applying the law as expressed in these articles indifferently to French subject or foreigner."

Senard, another French lawyer, called as a witness by appellants, said: "According to my opinion, a foreigner who has a fixed establishment in France, permanently resides there, and expresses his intention of continuing to do so, would, incontestably, be considered, according to French law, as domiciled in France. No authorization of Government is necessary for a foreigner to acquire a domicil in France. The authorization of Government is only necessary, in order to add the enjoyment of the civil rights defined by the Code to those which naturally attach to domicil. In default of an express declaration by the foreigner of such intention of permanent residence, the proof of such an intention will be inferred from circumstances; see the 105th Article of the Code." And having been referred to Articles 103, 104, and 105 of the Code, he said: "These articles are only, as it seems to me, the expression of the reason and general principles of the law of common right, and, therefore, they rule all the questions of domicil, whatever may be the condition of the parties, whether Frenchmen, domiciled foreigners, or mere strangers." Upon the 13th Article of the Code, he said: "There has been a considerable controversy among eminent advocates and jurists in France, relative to the question whether a stranger can

had resided in France a number of years under circumstances which in the opinion of the Judicial Committee were clearly

acquire in France a legal domicil without the authorization of the Government. This difficulty results from the terms of the 13th Article of the Code Napoléon, and is caused, as it appears to me, by confounding the distinction between the enjoyment of civil rights, which can only spring from the authorization of the Government, with the consequences of domicil, properly so called, which naturally result from the fact of a party having taken up his principal abode in France, with the intention of permanently residing there. For a stranger to be a guardian of the children of another, a witness to instruments, a witness in a court of justice, as experienced in any particular art (*expert en justice*), and other purposes, it is not sufficient that he may be domiciled, he must have a domicil authorized by the Government; but in order to the due service upon him of process at his residence, or in order to the determination on his death of the Tribunal competent to take cognizance of the question of his succession, it is sufficient that he possess such a domicil as is constituted by the fact of his having established his principal residence in France, with the intention of remaining in this country. I desire to add, that this distinction is more especially proper and apparent when the law of England, as to the form in which a will should be made, comes to be considered."

The third professional witness examined on the part of appellant was Paillet, who testified that "To constitute the domicil of a foreigner in France, residence there, *de facto*, is necessary, joined with an intention of permanently residing there;" and further, "There is no formal provision in the Code as to whether a foreigner who has taken up his residence in France, with an intention expressed of permanently residing there, is to be considered as domiciled in France, but, according to French jurisprudence, such a person is considered as domiciled in France. It is a question much controverted in our jurisprudence, whether the authorization of the Government is necessary to enable a foreigner to acquire a domicil in France; but I think that, in accordance with numerous and recent decisions of the superior courts (*arrêts*), a domicil is acquired, in such cases, without any authorization of the Government, though that authorization is indispensable to the foreigner's acquiring certain civil rights, according to Article 13 of the Code Napoléon. In the absence of any expressed intention of permanent residence, circumstances may afford evidence of that intention; and in that case it will belong to the tribunal to judge from the circumstances as to the existence, or not, of such intention." Upon the Articles 103, 104, and 105 of the Code Napoléon, he said: "The law does not expressly state that the provisions of those articles apply to foreigners domiciled here under the circumstances I have deposed to, but they are held by inference to do so, as well as to French subjects. Such a fixed residence in France, joined with an intention of permanently remaining there, would oblige a foreigner to conform, not only to the laws of police, but likewise to the civil laws generally, and especially to those regulating the form of acts and contracts." In support of the opinion he had already expressed on the 13th Article, he said: "That it is considered that domicil appertains more to the law of nations than the municipal law (*loi civile*), and that, if the contrary of the opinion he had given were held, the foreigner who has left his country, and takes up his abode in another, *animo non revertendi*, would be without any domicil at all;" he further said, that in his opinion a person could, "by taking up her principal residence in France, and manifesting an intention of permanently remaining there (the two conditions must go to-

sufficient for a change of domicil, but without having obtained authorization for the purpose. She died, leaving a will executed in France according to the English law, and not in accordance with the requirements of the French law.

The case was first heard by Sir John Dodson, who, although holding the testatrix domiciled in France according to the *jus gentium*, decided against the validity of the will on the ground of want of authorization; but his decision was, on appeal, reversed by the Privy Council. The judgment was delivered by Lord Wensleydale,[3] who, after finding the evi-

gether), establish a domicil in France. The law does not determine the length of residence necessary for that purpose. That is a point to be appreciated by the judge, among the circumstances of the case leading him to his decision."

On the other hand, Marie, examined on the part of respondents, testified that the cases pointed out in the 11th and 13th Articles of the Code Civil are the only two cases in which a foreigner can obtain in France a legal domicil; the first case being one of international reciprocity, and the second one of express authorization by the Government; and without these two the foreigner can have only a *de facto* domicil. And he cited several cases to show that a foreigner cannot acquire a legal domicil in France without authorization.

Blanchet, another of respondent's witnesses, also a French advocate, confirmed the reasoning and conclusions of Marie.

Coin De Lisle, another of respondent's witnesses, declared his opinion "that a foreigner never can acquire a domicil of succession in France, except in conformity with Article 13 of the Code Napoléon." He admitted the definition of domicil by Pothier, "le lieu où une personne a établi la siège principal de sa demeure et ses affaires;" but observed that definition was given before the promulgation of the Code Napoléon, and was applicable to the then existing state of government in France. He added: "I form my opinion that such domicil — that is, domicil as defined generally by writers on international law — is not, by the law of France, a sufficient domicil to render the estate of a deceased foreigner, who had such domicil, subject to the French law of succession, on the ground that the law of succession is purely a municipal law, 'Lex quæ pertinet tantum ad jus civile, non ad jus gentium.'" The other two witnesses, Hebert and De Vatismesnil, concurred with respondent's witnesses already cited, in holding that a foreigner cannot acquire a domicil of succession in France without authorization.

[3] The following is the part of the judgment bearing upon the subject of this chapter:—

"On the whole, their lordships entirely concur with the learned judge in his opinion that the deceased was domiciled, according to the law of nations, at Paris, both at the time of her death and the time of making her will, if that is at all material; and we think it is not.

"This domicil being established in evidence, the burden is thrown on the respondent to prove that the will, in the English form, is sanctioned by the municipal law of France. He must show, upon the balance of the conflicting evidence in the cause, that the wills of persons, so domiciled, in that form are allowed by that law.

"This is the important question, and the only one of any difficulty in the case.

"Much evidence was produced of the law of France on both sides; the

dence of the French law produced to be very unsatisfactory, confused, and conflicting, proceeded to make an independent

vivâ voce testimony of experts in the science and practice of the law, vouching and referring to the Code Napoléon, decrees, and to known treatises. Some of those last have been since brought forward and referred to without objection on either side, and their lordships have to decide on the whole of this (for the most part) very unsatisfactory, confused, and conflicting evidence, whether they are convinced that this will, executed in France in the English form, is valid.

On the part of the respondents five persons practising in the French courts, stating themselves to be experienced in the law of France, were examined; on the part of the appellant, three. It is to be lamented that from the very nature of the case we cannot satisfy ourselves by the personal examinations of those witnesses as to the weight due to each of them, and a proper sense of professional delicacy precludes them from giving evidence as to the merits of each other. We are compelled, therefore, to decide the disputed question with inadequate means of judging of their professional eminence, their skill and knowledge. It is to be remarked, speaking with all respect to those gentlemen, that the rule of international law which all English lawyers consider as now firmly established, namely, that the form and solemnities of the testament must be governed by the law of the domicil of the deceased, does not appear to be recognized, or at least borne in mind by any of them. Nay, in Quartin's case (Dalloz, 147, 1, p. 273), both the Cour Royale and the Cour de Cassation expressly decided that the will must be in the form and with the solemnities of the place where it was made, on the principle that '*locus regit actum;*' an error which is ably exposed in the opinion of M. Target in the Duchess of Kingston's case (*Coll. Juridica*, 323). The three witnesses called for the appellant, Messrs. Frignet, Senard, and Paillet, all maintain the same doctrine. If this position were really true, the case of the appellant would prevail; but the other witnesses do not maintain the same doctrine. Of the five experts examined for the respondents, three, Messrs. Blanchet, Hebert, and De Vatismesnil, all think that the will, either in the form required by the law of the domicil of origin, or the place where the party dwells, is valid; a position which, by English lawyers, is certainly now considered to be exploded since the case of Stanley *v.* Bernes. The whole of these five experts give their opinion that the deceased never was domiciled *de facto*, according to the law of nations, in France, upon the facts stated to the case. In that respect their lordships have already intimated that they entertain a contrary opinion, and that circumstance, although it is quite consistent with their being right in their opinion of the law, a little diminishes the reliance to be put upon it. These five witnesses all say, some less decidedly than others, that to gain a legal domicil in France, the authorization of the Emperor was necessary. Some admit that there are contrary *dicta* and decisions. The other three experts, those examined on behalf of the appellant (namely, Frignet, Senard, and Paillet), give their opinion that to acquire a legal domicil, such as will cause the succession to open in France, the imperial authorization is not necessary; but most of these experts also admit that it is a disputed question.

"This difference between the learned experts arises upon the construction of the 13th article of the Code Napoléon, upon which we can form some opinion ourselves. It is to this effect: 'The foreigner who shall have been admitted by authorization of the Emperor to establish his domicil in France shall enjoy there all civil rights, so long as he shall continue to reside there.' It is

examination of the French authorities, including judicial decisions and text-writers, and after a careful review, arrived

said that the rights of testacy and succession are civil rights, and that a domiciled foreigner cannot enjoy those rights without this authorization. Pothier, in his treatise "De la Communauté," part 1, cap. 1, art. 1, classes the right of testacy and succession among civil rights which strangers have, though not domiciled, and contracts among the '*droits des gens*' which strangers have; and in his "Traité des Testaments," cap. 3, § 1, art. 1, p. 309, he says: 'Le testament appartient au droit civil, d'où il suit qu'il n'y a que ceux qui jouissent des droits de citoyens qui puissent tester,' and therefore '*aubains*,' or strangers not naturalized, are regularly incapable of bequeathing the goods they have in France.

"The affirmative provision that every foreigner who shall be authorized to fix his domicil in France shall have all the civil rights, though it does not explicitly say so, no doubt means that the foreigner, to enjoy all, must have that authorization; but it does not follow from that provision alone that he cannot enjoy any one or more of those rights without it; he may, quite consistently with that article, have the power of testacy and the power of leaving his succession to devolve on his family. But assuming that the 13th article prohibits the exercise of any civil right to one who is domiciled but has not an authorization from the Emperor, and therefore denies the right of testacy altogether, what is the consequence? Is it that the foreigner cannot make any will at all of his personal goods wherever situated, or only of his personal goods situated in France? If the former is to be considered as the true construction, then the consequence is that a stranger, if he elects to domicil himself in, and dies in, France without authorization, loses his power of making a will altogether, and his effects by the law of nations will not pass under his will, according to the rule already stated. What rights his relatives would have is another question. If he should be domiciled in a country where, on death, by law all his effects go to the sovereign by a '*droit d'aubaine*' more extensive than that of old France, which applied only to personal effects within the kingdom, that law must prevail, and his will would be of no validity, and his relatives, by the law of his domicil of origin, would lose all their rights. In this view of the 13th article this will cannot be admitted to probate. If the meaning is, as seems probable (see Merlin, Rep. ed. 1812, *Étranger*, § 11), that he shall have no power, unless so authorized, to make a will of personal effects situate in France, but he may for those elsewhere, still his will, to have any effect, must be in the form and with the solemnities of his domicil according to the general rule, otherwise it cannot be admitted to proof, and the property in France would not pass by it. So that upon any construction of this article, on the assumption that the power of making a will is one of the civil rights on which it operates, the will in question is not valid. There seems strong ground to contend that the restraint upon the power of testacy and of the right of devolving personal effects upon relatives, is done away with altogether by subsequent legislation. By the law of the 14th of July, 1819, foreigners are entitled to succeed, and to dispose and receive in the same way as French subjects in all the extent of the kingdom. If a stranger can dispose of his personal property in France or anywhere else by will, why should he be the less able to do it because he is domiciled in France? Be that as it may, if the power of testacy is still restrained by the 13th article of the Code Napoléon, and if the only effect of that article is that a foreigner may be legally domiciled, but yet not enjoy the civil right of making a will, this will ought not to be admitted to proof. But it is then contended, on the part of the respondent, that by the law of France no domicil,

at the conclusion that no authorization is necessary for the establishment of domicil by a foreigner in France, at least for

for any purpose whatever, can be obtained there except by the previous authorization of the Government. The witnesses differ on this point, and it will be proper to take a short review of the decided cases and the principal text authorities cited at the bar on both sides, and it will be found that they, on the whole, confirm the opinion that a domicil which regulates the succession may be obtained without such authorization.

"And first let us examine the decided cases. These decisions are not treated with the same respect, and are not of so much authority, in France, as the decisions of English courts are in England. By one gentleman (M. Marie) there is said to be an adage that "the decrees are good for those who obtain them;" and it is said that considerations of equity prevail too often in the decisions of the French courts, and that they often vary. But we must consider these decisions, pronounced by sworn judges, under their judicial responsibility, as of more weight than the opinions of advocate witnesses, or even than some text-writers. Of these decisions part are inapplicable, as they relate, not to testacy or succession, but to civil rights, clearly such, which strangers, and even domiciled strangers, are not entitled to, unless they have the required authorization; such as the right to be free from personal arrest (D'Abaunza's case; the case of the Princess Poniatowska, and in Sirey, 1811, fol. 455, Dremmler's case); some relate to rights of action in French courts (see cases of Rowland and Son, Sirey, 1844, p. 756; id. 1848, p. 417; Kirby and others, id. 1853, p. 714), to which the mere domicil can give no right unless the authorization of Government be added; others, part of the cases cited, relate to contracts which belong to the *droit des gens*, which are impliedly governed by the law of the place of residence, independently of domicil, such as Lloyd's case, and Breul's case, where domiciled foreigners were held bound by an implied contract to have a *communauté des biens*, upon the principle that the contracts of residents are impliedly made according to the usage of the place where they reside. The case of D'Herwas is upon a question of contract (Sirey, 1833, 1, 663). None of these cases have any bearing on the present. Those which have, are cases where the succession is held to be regulated by the domicil of the deceased, though such domicil was unauthorized by the Government."

"The first is Gil d'Olivares (Le Droit, 11 October, 1854), in which it was expressly decided, in 1854, by the civil tribunal of Bordeaux, that a foreigner may acquire a domicil, without the authorization of the Government, so as to regulate the succession; that the question of domicil belongs to the law of nations, and the succession is regulated by it; and that the 13th article of the Code Napoléon did not apply to such a case. There was an appeal to the Cour Impériale, who expressly decided the same way, and that the 13th article, requiring the Emperor's authorization, applied only to the acquisition of civil rights, and did not prevent the acquisition of a domicil by a foreigner, so as to regulate his succession. The only observation to be made against the authority of this case is, that the parties consented to the court winding up the account, and that the personalty should be governed by the law of domicil, which the court observed is the consequence of a principle generally inculcated by almost every author and admitted in law. We do not think that this consent weakens the authority of that decree. In this decision the previous authority of a decision at Riom in 1835 is cited. It was Onslow's case (Dalloz, 1836, 2, 57). Onslow, the deceased, had established himself in France before April 7, 1790, and before the promulgation of the Code Napoléon, and was entitled to the exercise of civil rights by virtue of

the purpose of succession; that the testatrix was domiciled in that country both at the time of her death and at the time of

that law, and therefore the 13th article did not deprive him of them; but the court expressly decided that he might be domiciled notwithstanding the 13th article, and that the authorization of Government was not necessary to a domicil which regulated the law of succession.

"The next case cited was that of Baron de Mecklembourg, decided first by the Tribunal of the Seine and afterwards by the Imperial Court of Paris (Le Droit, 27 July, 1856). The Court of First Instance at Paris determined that, though he had never had the authorization of the Government to enjoy civil rights, yet the legal enjoyment of those rights was independent of domicil, and the deceased being domiciled at Paris, his succession opened there. The Imperial Court reversed this judgment, on the ground that the deceased had never abandoned his domicil of origin, and that all his heirs were foreigners; and the court appears to have mentioned the want of an application for an authorization to establish his domicil in France, as evidence that he never meant to acquire one there, — no more. It does not say that the want of authorization at once put an end to the right of domicil.

"In Lynch's case (Sirey, 1851, 2, 791), the fact of Lynch not being domiciled in France at the time of his death, but in Ireland, is the ground of the decision. Whether the fact of his not having ever obtained authority to establish his domicil is used as evidence of having no intention to acquire one, or that he had no domicil for the want of it, is difficult to decide. The case cannot, at all events, be considered as contrary to that of D'Olivarez.

"The case of Connolly was also cited; it occurred in 1853. It is reported by the name of 'De Veine *v.* Routledge' in Sirey's Reports, 1852, and has been referred to on both sides at the bar. It involves other points besides that of the validity of the will. Madame de Veine, a natural daughter of the testator, cited the legatees before the civil tribunal of Fontainebleau, to set aside the will, as being void according to the law of France, and to have her share of the succession. That tribunal decided that Madame de Veine had not established her case as a legitimate daughter, and that, the testator having an English domicil, the will was valid. On appeal, the Superior Court reversed this decision. It seems that the court held that the testator was domiciled in France (though it is never stated that he obtained the authorization of the Emperor); that his succession opened there; that his natural daughter was legally recognized by him, and, being a French woman by marriage, had a right to claim a part of the succession; and the will being invalid by the French law, not being in the proper form, Madame de Veine was entitled to recover in her suit. The court add (incorrectly, as has been said before), that the form of the will must be regulated by the law of the place where it is made.

"Upon a review of these decisions upon the material question in this case, the effect of a domicil by the law of nations upon the law of succession, it is clear that the great weight of authority is in favor of the position that the authorization of the Emperor is not necessary in order to establish a domicil for the purpose. There is no one decision that it is necessary; for it is by no means clear that Lynch's case so decides, and the case of Olivarez, and the principles laid down in the others clearly support the opposite doctrine.

"It remains for their lordships to observe on the text-writers referred to on both sides. The authority of Merlin has been cited on the interpretation of Article 13 of the Code Napoléon. It was referred to in the case of the Princess Poniatowska, as laying down the

making the will in question (although the latter point of time was rejected as of no value), and that therefore the will was

proposition that no domicil could be acquired without the authorization of Government (Sirey, 1811, p. 553 ; Merlin, Repertoire, 'Domicil,' ed. 1824, s. 13, pp. 16, 17; Repertoire, ed. 1812, 'Étranger,' s. 11 ; ed. 1824, Art. 'Étranger,' s. 1, no. 6, p. 531) ; where he lays down that proposition, against the proposition of M. Proudhon. In the edition of 1830 this article has been re-written, and a perfectly different view of the law taken. The question Merlin considers is whether authorization is necessary to gain a domicil. He says it was universally allowed to be unnecessary before the Code Civil. He discusses the question for what purposes it was rendered necessary by the Code. Certainly, he says, to enjoy the civil rights reserved to Frenchmen. He could not sue other strangers, not domiciled, upon contracts made with them in France or abroad, for he could not claim any privilege of exemption from the rule '*actio sequitur forum rei.*' It is not required to render him liable to be sued in his domicil in France. It is not required in the computation of ten years, rendered necessary to obtain naturalization. He concludes that the Code has not changed the nature of the domicil at all. He refers to the *avis* of the Conseil d'État of the 18 Prairial, An 11, which was that in every case where a stranger wishes to establish himself in France, he is in all cases bound to obtain the permission of the Government, and that these permissions being, according to circumstances, subject to modifications, and even revocations, cannot be determined by general rules.

"Merlin says that this opinion was given in answer to a question to the Conseil d'État, whether the authorization by the 13th article, giving the foreigner the power to acquire all civil rights, also gives the power of obtaining, by Article 3 of the Acte Constitutionnel, 22 Frimaire, An 8, the rights of a French citizen; and he says the answer is to be understood according to the subject-matter, namely, the question put to them, and that the expression *en tous cas* refers to the cases the subject of the inquiry. And besides, he says that this opinion was never inserted in the Bulletin of Laws, and did not bind the courts of justice, and was merely meant to govern the conduct of the Minister of the Interior with respect to foreigners who, having lived ten years in France, wished to be recognized as citizens ; and he concludes by stating it as his opinion that a foreigner who establishes his domicil in France without the permission of the Government submits himself by that act alone to the jurisdiction of the French tribunals, acquiring by that act alone the power to marry in the place which he chooses for his habitual residence, and determines by that act alone the competence of the judge who, after his death, takes cognizance of his succession that he leaves in France. This latest opinion of Merlin seems to be fully warranted by the reasons he gives, and to be perfectly satisfactory.

"The statement of Legat, 'Code des Étrangers,' pp. 287, 288, founded on the construction of the same *avis* of the Conseil d'État, that a stranger, unless authorized, cannot have a domicil, appears not to be maintainable ; nor the same statement by Demangeat, 'Histoire de la Condition Civile des Étrangers en France,' p. 369.

"A passage was referred to in Zachariae, 'Cours de Droit Civil,' part 1, ch. 4, p. 280, 'that the establishment by a stranger of his domicil in France, with the authorization of the Government, has, the effect of submitting his *succession mobilière* to the application of the French law.' Of that there is no doubt ; but it does not follow that it is not true if he is domiciled without it. In the same treatise (p. 278), referring to a prior note (262), it is said that a stranger requires the same au-

invalid. It was further held that the failure of the testatrix to procure authorization, and the fact of her making her will in English form, were "some evidence that she did not mean to abandon her English domicil," yet they were of little weight, as it "was highly probable that she knew nothing of the provisions of the Code Napoléon, or of the necessity of making her will in any but the ordinary English form."

It must be observed that so far as concerns the testimony of the French lawyers, the case was much complicated by the views which they advanced with respect to the rule applicable

thorization to establish his domicil in France as to enjoy civil rights. He states that this opinion is corroborated by the *avis* of the Conseil d'État, 18–20 Prairial, An 11, importing that in every case where a stranger wishes to establish himself in France, he is bound to obtain the authorization of Government. The satisfactory explanation given by Merlin, above referred to, does away with the authority of that opinion of the Council of State, and shows that no reliance can be placed on this opinion of Zachariae.

"Troplong, in his Commentary (Sur la Contrainte par Corps, sec. 596), inquires who is a stranger domiciled in France, and says that the 13th article of the Code gives the answer, — 'He who has received the authorization of the King to fix his domicil there, and by that right enjoys civil rights.' He is speaking of the liability to arrest, *contrainte par corps*, and of that there is no question; but it has no bearing on this case.

"On the whole, then, on a review of all this evidence of the law of France, their lordships are clearly of opinion that it is not established that for the purpose of having a domicil which would regulate the succession, any authorization of the Emperor was necessary; that a legal domicil for this purpose was clearly proved, and that consequently, if the testatrix had the power to make a will at all, the will in this form was invalid.

"There are still two English cases to be noticed. The respondent relies on Collier *v.* Rivaz (2 Curteis, 855), in which Sir Herbert Jenner Fust decided that, on the evidence before him, an Englishman domiciled in Belgium by the law of nations, but not authorized by the Government, according to the 13th article of the Civil Code of France, in force there, might make a will in the English form. The case was not regularly contested, which makes it of less authority. It was a mere question on the parol evidence of the Belgian law, which was very short and unsatisfactory. Their lordships have referred to the depositions, and doubt whether the learned judge was warranted by the evidence contained in them in coming to the conclusion which he did. In this case the evidence on both sides is very full, and leads to a different conclusion. On the other hand, there may be cited for the appellant the case of Anderson *v.* Laneuville (9 Moore P. C. Cases, 325), where the Judicial Committee decided that a domicil was acquired in France, though the deceased had not complied with the 13th section of the Code Napoléon, and that objection was distinctly taken (p. 336). That point, however, does not appear to have been much considered. Their lordships are of opinion that the judgment of the learned judge of the Prerogative Court was unsupported by the evidence, and will advise her Majesty to reverse it, and recall the probate."

for the determination of the validity of the will in point of formal execution; the witnesses for the appellant holding to the maxim "*locus regit actum*," and the majority of those examined by respondent holding a will in the form required by the law of either the domicil of origin or the place where the party dwells to be valid; all of these views, however, being rejected by the court as inconsistent with the English decisions. Moreover, Lord Wensleydale expressly declares the reliance of their lordships upon the opinions of the law entertained by the expert witnesses of the respondent to be somewhat diminished by the fact that the latter held, in opposition to the clear opinion of their lordships, that the facts shown were insufficient to prove the establishment in France of even a *de facto* domicil by the deceased.

Subsequently an unsuccessful attempt was made to oppose the practical execution of the sentence in this case, by tendering proof that the Privy Council had erred in its exposition of the law of France.[4] To this end was procured the sworn statement of ten of the most eminent advocates of the French bar[5] (named by the President of the Tribunal of the Seine for that purpose), to the effect that upon the admitted facts they were "positively of the opinion that according to the French law the deceased had never acquired in France a domicil of a nature to cause her testament, or the form of her testament, to be ruled by the laws of that country, and that consequently, if that testament was made in conformity with the English law, the deceased would not be judged to have died intestate." But this statement, which was *ex parte* in its character and made after sentence pronounced, was not permitted to be produced before the Privy Council.

§ 352. **Id. Hodgson v. De Beauchesne.** — The question was again raised in Hodgson *v.* De Beauchesne.[1] Sir John Dodson, upon the authority of Bremer *v.* Freeman, and in spite of the testimony of French lawyers, held the deceased, who had not obtained authorization from the French Gov-

[4] See Phillimore, Int. L. vol. iv. pp. 219, 235.

[5] The French lawyers who signed the statement were Berryer, Demangeat, Marie, De Vatismesnil, Dupin, Bethmont, Lionville, Barrot, Villeneuve, and D'Est Ange.

[1] 12 Moore P. C. C. 285.

ernment, to be domiciled in France. His decision was reversed, on appeal, by the Privy Council, but the reversal was put upon the ground that the evidence did not sufficiently make out the requisite *animus manendi;* the failure of the deceased to obtain authorization being relied upon, however, as one circumstance to show that his establishment in France was not permanent. While this case cannot be considered as direct authority upon the subject here discussed, it is important because of some remarkable language used by Dr. Lushington in delivering the judgment of the Privy Council. He said: "In solving these difficulties we must always look to the *jus gentium;* this proposition, however true, requires some explanation. The tribunal which tries a question of this description is necessarily bound by the law of the country in which it is situate and by which it is constituted. That law, whatever it may be, it must necessarily obey; but it is not bound to respect the laws of a foreign country save so far as they are in accordance with the *jus gentium.*"

§ 353. **Id. Hamilton v. Dallas.** — The question again arose in Hamilton *v.* Dallas,[1] a case of intestate succession and leg-

[1] L. R. 1 Ch. D. 257. The Vice-Chancellor said: "Then it was suggested that by the French law it was not competent for Lord Howden to acquire a domicil. The 13th section of the Code Napoléon, which has been referred to for that purpose, in my opinion, bears no such construction as is sought to be put upon it. It cannot be said that he could not acquire the right to reside in France."

His lordship, after referring to Art. 13, proceeded: "In the first place, I ask myself, — there being no questions of testacy as in Bremer *v.* Freeman, — has he asserted any right? He has asserted no right that I know of, except the right of residing; and that he has a right to reside by the law of nations, by the law of France, and by every law of reason and good sense, is not to be disputed; but a right to succeed to the property of which he has died intestate is not comprehended in or covered by the 13th article. On the contrary, turning to that chapter of the Code which treats of the domicil, Art. 102 provides that the domicil of every Frenchman as to the exercise of his civil rights is in the place in which he has his principal establishment. Then it speaks of the change of domicil, and so on; and it speaks of other persons than Frenchmen, saying that a married woman has no other domicil than that of her husband, a minor not emancipated shall live with his father or mother, or his tutor, who may be a foreigner, — the minor may be a foreigner, — and minors who serve or travel habitually with another person shall have the same domicil as the person they serve, with whom they work, and as long as they remain in the same house; so that the fact that a foreigner can acquire a domicil *de facto* in France is not for a moment to be called in question. It requires no provision in the Code for that; it is a law paramount to the law of the Code, not provided against

acy duty. The deceased, Lord Howden, was established in France for sixteen years prior to his death, under circumstan-

nor provided for in the Code, but a natural and national right, against which there is no interdiction or prohibition. Now, that this must be the law will be found on referring to Cole on Domicil, in which the matter is treated, and by the authorities to which he refers there; and without adopting Mr. Cole's conclusion, which I have no right to do, — that is, to treat it as an authority, whatever respect I may feel for it, — the passage in Merlin upon this subject of domicil is, in my opinion, quite conclusive upon the question now before me. He says: —

"'Disons donc que l'étranger qui, sans la permission du Gouvernement, établit son domicile en France, se soumet par cela seul à la juridiction des Tribunaux Français, comme il acquiert par cela le droit de se marier, dans le lieu qu'il choisit pour sa résidence habituelle; comme il détermine par cela seul la compétence de juge qui, après son décès, devra connaître de la succession qu'il laissera en France.'

"So that if I am to take that as an exposition of the law, without referring to particular cases, it is plainly announced as being the law that a foreigner who, without any authority of the Government, shall establish his domicil, becomes entitled to enjoy certain civil rights; and, more than that, he submits to the authority of the judge of the place which he shall inhabit, and that judge shall have jurisdiction over the question of the succession to his property. That this is plainly the law is not disputed in any of the cases that have been referred to. It may be observed that it is not entirely lost sight of in Udny *v.* Udny, that very valuable case which has been so often referred to, where Lord Westbury expresses himself, after distinguishing between the political and the civil *status*, which has been gone into at length, and I need not, therefore, refer to it further than to quote this passage: 'The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend.' The cases which have been referred to are not, any one of them, in the slightest degree at variance with that. Forgo's case must be considered to be at present not in the shape of a binding authority, as it is still subject to appeal. That Forgo was a resident in France is beyond all doubt, and that Forgo died intestate is likewise clear. The question was, Who was to succeed to his property? The Government said, We succeed, because he had not the authority of the Government to live in France; it must have gone as far as that. That is, however, discountenanced by the Court of Cassation, and it is discountenanced by, and inconsistent with, every other authority that has been referred to. Spech's case is a direct authority against it. In Spech's case, if the want of authorization by the Government to a man's residence in France, and to making his holograph will in France, would have been enough, the Spanish consul was right in insisting upon the administration of his goods. It was plain, from the decision of the Court of Cassation, that the Spanish consul was not right, that he had no right whatever to interfere in the administration of his goods, although the testator in that case (the will not being in question as far as the case goes, that I know of), not having any authority from the French Government, yet enjoyed civil rights to the day of his death, and the persons who claimed the succession were not impeded in the slightest degree by the restric-

ces which left no doubt of his intention of permanent residence there, but he had not procured authorization. The case was heard by Bacon, V. C., who, after carefully considering the authorities, and referring particularly to the latest French cases, said: "Under these circumstances, I entertain no doubt whatever upon the question which has been argued. I have no doubt of Lord Howden's competency to acquire a French domicil. I have no doubt that he did acquire that domicil, beyond all possibility of question." He therefore held that the portion of the estate of Lord Howden, which was undisposed of by will, was (1) distributable according to the French law, and (2) was not subject to legacy duty. He, however, also concluded that Art. 13, "neither in its terms, nor in its sense and spirit, has anything to do with the rights of the person who comes to claim the property [of the deceased] at a time when he and all *droits civils* to be exercised by him are extinguished and gone;" thus holding, in effect, that personal succession concerns the rights, not of the deceased, but of those in the line of succession.

§ 354. **Results of the English Cases.** — It is clear, from the above cases, that the English courts will hold (1) that a foreigner may, without authorization, establish in France a domicil in the sense in which that term is ordinarily understood

tions of the 13th article. Another clause referred to was Art. 110, which provides that the place where the succession shall open shall be determined by the domicil. Spech's case and Sussman's case established, as I take it, clearly this, that upon the intestacy of a foreigner, who has not obtained the authority of the Government, the succession shall open in the place where he had established his domicil, and shall be determined by the local judge in the first instance, and (subject, of course, to any appeal that might be brought before a higher authority) that where the succession opens there it shall be determined, and there the persons who, according to French law, are entitled to claim his property, may come and have their rights determined. As far as Forgo's case goes, the notion that the Government can lay hands upon all the property and consider it theirs, for want of the formalities of the 13th clause being complied with, is wholly discountenanced. Under these circumstances, I entertain no doubt whatever upon the question which has been argued. I have no doubt of Lord Howden's competency to acquire a French domicil. I have no doubt of the fact that he did acquire that domicil beyond all possibility of question. I have no doubt that the 13th article, which speaks of the enjoyment by him or any other foreigner of *droits civils*, neither in its terms nor in its sense and spirit, has anything to do with the rights of the person who comes to claim his property at a time when he and all *droits civils* to be exercised by him are extinguished and gone."

in English jurisprudence; and (2) that, as they at present understand the French law, a person so domiciled will, with respect to his succession and his testamentary acts, be subject to the same law as a French citizen domiciled in France.

§ 355. **American Cases: Dupuy v. Wurtz.** — In this country, the New York Court of Appeals, in Dupuy *v.* Wurtz,[1] while holding upon general principles that the deceased, who at the time of her death resided in France, had retained her original New York domicil, and that, therefore, her will executed in conformity to the laws of that State was valid, considered the question, whether she could without authorization establish in France a domicil which would subject her, in matters of personal succession, to the laws of that country, and, upon the sole authority of Melizet's case, arrived at a negative conclusion. It was further held by the court, that the failure of the testatrix to obtain authorization was a circumstance to be considered, along with other circumstances tending to show the absence of the *animus* requisite for the establishment of a French domicil.

§ 356. **Id. Harral v. Harral.** — The subject was somewhat considered in the New Jersey case of Harral *v.* Harral,[1] in which a French woman, the widow of an American who had resided in France, where also he had been married to her, claimed community of goods under the French law. The precise question in the case was, however, one of matrimonial domicil, which is not — at least as understood in this country — necessarily domicil at all, but *intended* domicil, and is resorted to for the purpose of ascertaining the intention of the parties with reference to their mutual property rights.[2] But the actual domicil of the parties, and particularly that of the

[1] 53 N. Y. 556. See also Tucker *v.* Field, 5 Redf. 139, where the Surrogate, relying upon the opinion of the French advocate Clunet, and upon Dupuy *v.* Wurtz, held that without authorization a person cannot establish a domicil in France. This case appears to be directly in point, inasmuch as the person whose domicil was in question appeared, from motives of economy, permanently to have settled in that country.

[1] Harral *v.* Wallis, 37 N. J. Eq. 458; s. c. on appeal Harral *v.* Harral, 39 id. 279.

[2] See the following and the authorities by them cited: Story, Confl. of L. § 191 *et seq.*; Kent, Comm. vol. ii. p. 93, note; Wharton, Confl. of L. § 190 *et seq.*; Dicey, Dom. pp. 268–270; Mason *v.* Homer, 105 Mass. 116; Mason *v.* Fuller, 36 Conn. 160; and see *supra*, § 37.

husband at the time of marriage and immediately afterwards, is often an important element in determining the matrimonial domicil, and was so used in this case. The court, therefore, held that the domicil of the deceased, who had not obtained authorization, was, by the *jus gentium*, in France, and thus arrived at the location in that country of the matrimonial domicil, and the consequent subjection of the husband's property to the French law of community.

§ 357. **Are the Consequences of Authorization Personal, or do they extend to Wife and Family?** — A further question is raised among French jurists; namely, whether the legal consequences of authorization are strictly personal to the foreigner himself who obtains it, or whether they extend also to his wife and infant children. Zachariae[1] holds the latter position; while Demolombe[2] holds the contrary, remarking that if a foreigner desires authorization for his whole family, it is permissible for him to ask for it. However, upon the principles established in our jurisprudence with respect to domicil and to naturalization, it seems hardly conceivable that our courts could do otherwise than hold that wife and children are included in the authorization, unless, perhaps, in case it is, by the terms of the authorization, expressly provided otherwise.

(b) *Domicil in Eastern Countries.*

§ 358. **Different Rules for the Determination of Domicil applicable to Eastern and to Western Countries.** — The principles which we have been considering are applied usually with reference to the countries in which European civilization prevails; to wit, the Christian countries of the world. Are they also applicable to countries in which such civilization does not prevail? In other words, will an American or European court hold an American or European person to be domiciled in Turkey or China, or one of the barbarous countries of Africa? and if so, will it apply the same rules for the determination of the establishment of domicil in the latter class of countries as in the former?

[1] T. 1, p. 162. See also Aubry et Rau, t. 1, p. 281; Demante, t. 1, no. 28 *bis*, iii.
[2] Cours de Code Napoléon, t. 1, no. 269.

A negative answer to the latter question needs no argument to support it. It is apparent to every one that, for example, the presumption against the establishment by an Englishman of his domicil in France or Italy is not nearly so strong as that against the establishment by the same person of his domicil in Turkey or China, and that fewer and less cogent facts would suffice as proof in the one case than in the other. In an oft-quoted passage in The Indian Chief,[1] Lord Stowell says: "In the western parts of the world alien merchants mix in the society of the natives; access and intermixture are permitted; and they become incorporated to almost the full extent. But in the East, from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were, — *Doris amara suam non intermiscuit undam;* not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade."[2]

§ 359. **Id. Maltass v. Maltass.** — In Maltass *v.* Maltass,[1] the deceased, born at Smyrna, of English parents, continued to reside there, with the exception of a few years of his boyhood passed in England for the purpose of education, up to his death. He engaged in trade at Smyrna, married there, and at his death left his family there residing. The Turkish law not conferring upon those subject to it the power of testacy, the question in the case was whether the will of the deceased was valid. Dr. Lushington held that it was; but although considering the deceased domiciled in England, he held that

[1] 3 C. Rob. Ad. 22.

[2] This, of course, applies only to national character, and not to domicil in the proper sense of that term. The Indian Chief was a prize case in which M., the American consul at Calcutta, long resident and engaged in trade in the British factory there, was held to be a British merchant, and the cargo belonging to him was therefore condemned as taken in trade with the enemy. If, however, he had died at Calcutta, there is no reason to believe that his personal succession would have been held to be governed by British law.

[1] 1 Robertson Eccl. 67, 80.

to be immaterial, inasmuch as, if domiciled in Turkey, the English law was applicable by virtue of the treaties between Great Britain and the Porte, and, if domiciled in England, the same law was applicable *proprio vigore*. The learned judge added this language: "I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicil; but this I must say: I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte. As to British subjects, originally Mussulmen, as in the East Indies, or becoming Mussulmen, the same reasoning does not apply to them as Lord Stowell has said does apply in cases of a total and entire difference of religion, customs, and habits."

§ 360. **Can an American or European acquire a Domicil in an Eastern Country? Re Tootal's Trusts.** — In the very recent case of Tootal's Trusts,[1] the English Court of Chancery has had occa-

[1] L. R. 23 Ch. D. 532. Chitty, J., said: "The first and principal question, then, is where the testator was domiciled at the time of his death.

"It is admitted that his domicil of origin was in England. The burden of proof that he had acquired a new domicil of choice, therefore, rests on the petitioners.

"The facts are not in dispute. After some previous changes of residence, which it is unnecessary to trace, the testator, in 1862, went to reside in Shanghai in the Empire of China, and, with the exception of some visits to England in 1864 and 1873, for health and business, he continued to reside at Shanghai till his death, which occurred in 1878. During his residence there he very extensively engaged in business in connection with newspapers, being the manager and part proprietor of the 'North China Herald' and the 'North China Daily News,' and other publications and periodicals, all of which were published at Shanghai, and he was also a partner in a printing business there.

"Evidence has been adduced on the part of the petitioners showing that for some years before his death he had determined to reside permanently at Shanghai, and had relinquished all intention of ever returning to England, and that he had, in fact, on several occasions, expressed his intention of not returning to England. This evidence remains uncontradicted on the part of the Crown. In his will he describes himself as of Shanghai in the Empire of China. In these circumstances it was admitted by the petitioners' counsel that they could not contend that the testator's domicil was Chinese. This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in The Indian Chief, and by Dr. Lushington in Maltass *v.* Maltass.

"But it is contended on the part of the petitioners that the testator's domicil was what their counsel termed 'Anglo-Chinese,' a term ingeniously invented in analogy to the term 'Anglo-Indian.'

"To make this contention intelli-

sion to consider the subject of domicil at a Chinese treaty port. T., whose domicil of origin was English, went to Shanghai

gible, it is necessary to state some further facts. Under the treaties between her Majesty and the Emperor of China, of 1842, 1843, and 1858, British subjects with their families and their establishments are allowed to reside for the purpose of carrying on their mercantile pursuits without molestation at Shanghai and certain other cities, and to establish warehouses, churches, hospitals, and burial-grounds. By the 15th clause of the treaty of 1858, it is stipulated that all questions in regard to rights of property or persons arising between British subjects shall be subject to the jurisdiction of the British authorities. By the same treaty provision is made for the settlement of disputes between British subjects and Chinese, by the joint action of the British consul and the Chinese authorities, and also for the Chinese authorities themselves affording protection to the persons and properties of British subjects.

"The treaties do not contain any cession of territory so far as relates to Shanghai, and the effect of them is to confer in favor of British subjects special exemptions from the ordinary territorial jurisdiction of the Emperor of China, and to permit them to enjoy their own laws at the specified places. Similar treaties exist in favor of other European Governments and the United States.

"By virtue of these treaties and of the statutes 6 & 7 Vict. c. 80, and c. 94, the Crown has, by the Order in Council of the 9th of March, 1865, constituted a Supreme Court at Shanghai.

"The first of these statutes, intituled 'An Act for the better Government of her Majesty's Subjects resorting to China,' enables her Majesty, by Order in Council, to ordain 'for the government of her subjects within the dominion of the Emperor of China, or being within any ship or vessel at a distance of not more than one hundred miles from the coast of China,' any law or ordinance as effectually as any such law or ordinance could be made by her Majesty in Council, for the government of her subjects within Hong-Kong, which had been ceded to her Majesty. The second of the statutes, commonly known as the Foreign Jurisdiction Act, after reciting that by treaty, capitulation, grant, usage, sufferance, and other lawful means, her Majesty had power and jurisdiction within divers countries and places out of her dominions, and that doubts had arisen how far the exercise of such powers and jurisdiction was controlled by and dependent on the laws and customs of the realm, enacts that her Majesty may exercise any power or jurisdiction which she then had, or at any time thereafter might have, within any country or place out of her dominions, in as ample a manner as if she had acquired such power or jurisdiction by the cession or conquest of territory. The Order in Council by which the Supreme Court was established, provides that all her Majesty's jurisdiction exercisible in China for the judicial hearing and determination of matters in difference between British subjects, or between foreigners and British subjects, or for the administration or control of the property or persons of British subjects, shall be exercised under or according to the provisions of the order and not otherwise. It further provides that subject to the provisions of the order, the civil jurisdiction shall, as far as circumstances admit, be exercised upon the principles of, and in conformity with, the common law, the rules of equity, the statute law, and other law for the time being in force in and for England. The Supreme Court is a Court of Law and Equity, and a Court for matrimonial causes, but without jurisdiction as to dissolution or nullity or jactitation of marriage. It is a Court of Probate, and as such, 'as far as circumstances admit,' has for and within China, with respect to the property of British sub-

in 1862, where he became extensively engaged in newspaper and printing business, and where he continued to reside,

jects having at the time of death 'their fixed places of abode in China,' all such jurisdiction as for the time being belongs to the Court of Probate in England. It has jurisdiction for the safe custody of the property of British subjects not having at the time of death their fixed abode in China or Japan.

"The exceptions from the jurisdiction of the court as a matrimonial court in regard to dissolution, nullity, or jactitation of marriage are important, and the effect of them is apparently to leave Englishmen subject to the jurisdiction of the Court for Matrimonial Causes in England in respect of the excepted matters.

"Upon these facts it is contended for the petitioners that there exists at the foreign port of Shanghai an organized community of British subjects independent of Chinese law and exempt from Chinese jurisdiction, and not amenable to the ordinary tribunals of this country, but bound together by law which is English law, no doubt, but English law with this difference, that the English revenue laws do not form part of it, and that by residence and choice the testator became a member of this community, and as such acquired an Anglo-Chinese domicil.

"The authorities cited in support of this contention for an Anglo-Chinese domicil relate to the Anglo-Indian domicil of persons in the covenanted service of the East India Company. These authorities are generally admitted to be anomalous. They are explained by Lord Hatherley, in his judgment in Forbes *v.* Forbes, and by Lord Justice Turner, in Jopp *v.* Wood. The point that the *animus manendi* was inferred in law from the obligation to serve in India as stated by Lord Hatherley, has no bearing on the case before me, in which the evidence is sufficient for general purposes to establish the *animus manendi*. But the observations of Lord Justice Turner that the East India Company was regarded as a foreign Government are material. He says: 'At the time when those cases [on Anglo-Indian domicil] were decided, the Government of the East Indian Company was in a great degree, if not wholly, a separate and independent government foreign to the Government of this country, and it may well have been thought that persons who had contracted obligations with such Government for service abroad could not reasonably be considered to have intended to retain their domicil here. They, in fact, became as much estranged from this country as if they had become servants of a foreign Government.'

"Lord Stowell, in his judgment in The Indian Chief, shows that in his time the sovereignty of the Great Mogul over the British territories in India was merely nominal, being, as he says, occasionally brought forward for purposes of policy, and that the actual authority of government over these territories was exercised with full effect by this country, and the East India Company, a creature of this country. His observation as to the authority of government being exercised by this country is not really inconsistent with the passage above cited from Lord Justice Turner's judgment. Lord Stowell was not addressing himself to the particular point for which I have quoted Lord Justice Turner's judgment. Although the Government of British India was English, being carried on principally by the agency of the chartered company, it was for all practical purposes a distinct Government from that of Great Britain, and in that sense it was, as Lord Justice Turner says, regarded as a foreign Government. At Shanghai there is a British consul, residing there by virtue of the treaties; but there is no government by British authority existing there, and there is nothing which can be regarded as a separate or independent Govern-

with the exception of several visits to England for health and business, up to his death in 1878. In his will he described

ment, and the analogy which the petitioners seek to establish with an Anglo-Indian domicil is not made out.

"On principle, then, can an Anglo-Chinese domicil be established? The British community at Shanghai, such as it is, resides on foreign territory; it is not a British colony, nor even a Crown colony, although by the statutes above referred to, the Crown has as between itself and its own subjects there a jurisdiction similar to that exercised in conquered or ceded territory.

"Residence in a territory or country is an essential part of the legal idea of domicil. Domicil of choice, says Lord Westbury in Udny *v.* Udny, is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. He speaks of residence in a particular place, and not of a man attaching himself to a particular community resident in the place. In Bell *v.* Kennedy he uses similar expressions. Domicil is an idea of the law: 'it is the relation which the law creates between an individual and a particular locality or country.' He refers to locality or country, and not to a particular society subsisting in the locality or country. The difference of law, religion, habits, and customs of the governing community may, as I have already pointed out, be such as to raise a strong presumption against the individual becoming domiciled in a particular country; but there is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign territorial power. There may be, and indeed are, numerous examples of particular sects or communities residing within a territory governed by particular laws applicable to them specially. British India affords a familiar illustration of this proposition. But the special laws applicable to sects or communities are not laws of their own enactment; they are merely parts of the law of the governing community or supreme power.

"It may well be that a Hindoo or Mussulman settling in British India, and attaching himself to his own religious sect there, would acquire an Anglo-Indian domicil, and by virtue of such domicil would enjoy the civil *status* as to marriage, inheritance, and the like accorded by the laws of British India to Hindoos or Mussulmans, and such civil *status* would differ materially from that of a European settling there and attaching himself to the British community. But the civil *status* of the Hindoo, the Mussulman, and the European would in each case be regulated by the law of the supreme territorial power.

"In the case before me the contention is for a domicil which may not improperly be termed extra-territorial. The sovereignty over the soil at Shanghai remains vested in the Emperor of China with this exception, that he has by treaty bound himself to permit British subjects to reside at the place for the purposes of commerce only, without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects, but over no other persons.

"According to the petitioner's argument, the subjects or citizens of all the foreign States who enjoy similar treaty privileges would (subject to any particular exceptions arising from the law of their own country in relation to domicil), acquire, under circumstances similar to those in the present case, a new domicil of choice. If, for instance, a citizen of the United States were to reside at Shanghai with the intention of remaining there permanently, but not under such circumstances as would be sufficient to rebut the strong presumption against a Chinese domicil, and were to attach himself so far as he could to

himself as "of Shanghai, in the Empire of China." Evidence, which was uncontradicted, was adduced showing that for some years before his death he had determined to reside permanently at Shanghai, and had relinquished all intention of ever returning to England. Under these circumstances (the question being one of legacy duty, which was due if T.'s domicil was English at the time of his death), counsel who opposed the English domicil "admitted that they could not contend that the testator's domicil was Chinese;" and this admission was held by Chitty, J., who decided the case, to have been rightly made. Counsel, however, set up the theory of an "Anglo-Chinese" domicil, in analogy to "Anglo-Indian" domicil, upon the ground of the existence at Shanghai of an English community under treaty stipulations. But the court repudiated this theory, and held the domicil of the testator to be English.

§ 361. Id. — Here, then, we have, according to the uncontradicted evidence, (1) complete abandonment of the English

one of the European communities there, say, for an instance, the British community, he would, according to the petitioner's contention, have lost his domicil of origin, and would have acquired an Anglo-Chinese domicil, which for most practical purposes would be equivalent to an English domicil. In my opinion he would not acquire such a domicil.

"It appears to me that there is no substantial difference as to the question I am considering between the residence of a British subject at Shanghai, or at any factory in Turkey or elsewhere, or the East, whether by virtue of special treaties, capitulations, sufferance, or the like. But such factories are not regarded as colonies or foreign countries for the purpose of domicil. There may be commercial domicil there in times of war with reference to the law of capture, but that is altogether a different matter.

"No authority except those relating to Anglo-Indian domicil has been cited in support of the petitioner's contention as to domicil. In Maltass *v.* Maltass, already cited, Dr. Lushington admitted to probate the will, valid according to the law of England, of an English merchant resident at a British factory at Smyrna. He held that if the treaty between England and the Porte was applicable to British merchants resident or domiciled in the ordinary acceptation of the term in Smyrna, the provisions of the treaty decided what was to be done in the case of succession to personal estate; namely, that it was to follow the law of England. But he considered that the deceased was domiciled, not in a colony, but in England. . . . For these reasons I hold that there is no such thing known to the law as an Anglo-Chinese domicil, that the testator's domicil remained English, and that the circumstances are not sufficient to create any exception from the broad principle that legacy duty is payable when the domicil is British." Dr. Westlake reviews this decision at length (Law Mag. & Rev. 4th ser. vol. ix. p. 363, August, 1884), and dissents from the apparent conclusion that an Englishman cannot acquire a domicil at a Chinese treaty port.

domicil of origin, and (2) residence in China with intention to remain there permanently. If this case is to be accepted as an authority upon this point, therefore, something more is necessary for the establishment by an American or a European of his domicil in a country in which European civilization does not prevail, than abandonment of his domicil of origin, and mere residence with intention to remain permanently. What more is necessary has never been pointed out, although, doubtless, as Dr. Lushington intimates,[1] a change of religion would be deemed sufficient.

[1] *Supra*, Maltass *v.* Maltass.

CHAPTER XX.

CRITERIA OF DOMICIL; OR THE EVIDENCE BY WHICH DOMICIL IS SHOWN.

§ 362. **Recapitulation of General Principles of Evidence already referred to.** — It has been frequently remarked that domicil is a mixed question of law and of fact. Having disposed of that branch of the subject which may be more properly termed the law of domicil, having discussed its definition, its nature and classification, its attribution by law, and its acquisition by choice, its relation to particular classes of persons and to particular places, etc., we come now to consider the evidence by which it is shown. And it may be well here to recapitulate a few principles of evidence already referred to; namely, (1) Domicil of origin is *prima facie* at the place of birth, subject to correction upon proof that the parent was domiciled elsewhere at the time of the birth of the child.[1] (2) The domicil of origin of a foundling is *prima facie* where he is found, subject to correction upon discovery that he was born elsewhere, or upon discovery of his parents domiciled elsewhere.[2] (3) Domicil once shown to exist is presumed to continue, and the burden of proof rests upon him who asserts a change.[3] (4) It requires fewer circumstances to show a change of municipal than of national or *quasi*-national domicil.[4] (5) The same is true as between *quasi*-national and national domicil, though in a less degree; slighter proofs being required to show a change of the former than of the latter.[5] (6) It requires stronger proofs to show the acquisition of a domicil of choice, in derogation of a domicil of origin, than the substitution of one domicil of choice for another;[6] and slighter proofs than either to show a reverter

[1] *Supra*, § 105.
[2] Id.
[3] *Supra*, §§ 115, 122 *et seq.*, 151.
[4] *Supra*, § 180.
[5] *Supra*, § 123.
[6] *Supra*, § 115 *et seq.*

of domicil of origin, — "domicil of origin clings closely," and "reverts easily." [7]

§ 363. **The Discussion relates directly to the Domicil of Independent Persons.** — With respect to the domicil of dependent persons there need be no discussion here. To ascertain the domicil of such a person, all that is necessary, the dependence being shown, is to go a step farther back in the inquiry, and to ascertain the domicil of the independent person upon which depends the domicil of the person in question. The discussion here will relate to the evidence by which the acquisition and loss of domicil of choice by independent persons are usually shown.

§ 364. **The Necessary Factum Simple and Easy to prove.** — We have seen that into a change of the domicil of an independent person two elements enter, — *factum et animus*.[1] The *factum*, which is the transfer of bodily presence from one place to another, is usually capable of easy proof. It is purely a physical fact, generally open and notorious, and rarely in dispute, and there is, therefore, no need for resort to inference, presumption, or a nice balancing of conflicting proofs. "Residence and change of place are obvious, and cannot be mistaken." [2]

§ 365. **The Necessary Animus Complex and often Difficult to prove.** — But with regard to the *animus* or intention with which the change of bodily presence is made, it is otherwise. That is a mental fact, and, therefore, more difficult to discover, and liable to misconception and dispute. It is provable in two ways; namely, (1) by the testimony of the person himself, and (2) inferentially or inductively by the proof of other facts, which are physical in their character, and, therefore, capable of proof by means other than his testimony, and which tend more or less strongly to indicate the mind of such person. "Acta exteriora indicant interiora secreta."

But when we come to inquire what facts are to be taken as indicative of intention, we are met by great difficulty; so great that, to use the language of Shaw, C. J.,[1] "The ques-

[7] *Supra*, §§ 110 *et seq.*, 119 *et seq.*, 190 *et seq.*

[1] *Supra*, § 125 *et seq.*

[2] Tenney, J., in Wayne *v.* Greene, 21 Me. 357.

[1] Thorndike *v.* Boston, 1 Met. 242,

tions of residence, inhabitancy, or domicil . . . are attended with more difficulty than almost any other which are presented for adjudication."

§ 366. **Each Case must be determined upon its own Circumstances.** — The circumstances which go to make up the lives of different individuals differ so widely that no two can be judged precisely alike. What would be highly important and of great probative force in the case of one, may be trifling and meaningless in the case of another. Said Rush, President, in Guier *v.* O'Daniel:[1] "Employments of the most opposite character and description may have the same effect to produce a domicil. A man may be alike domiciled, whether he supports himself by ploughing the fields of his farm or the waters of the ocean. It is not exclusively by any particular act that a domicil, generally speaking, is acquired, but by a train of conduct manifesting that the country in which he died was the place of his choice, and, to all appearance, of his intended residence. The sailor who spends whole years in combating the winds and waves, and the contented husbandman whose devious steps seldom pass the limits of his farm, may, in their different walks of life, exhibit equal evidence of being domiciled in a country."

Hence it is impossible to lay down any positive rule upon the subject, but each case must be judged by its own facts and circumstances.[2]

§ 367. **Id.** — Lord Penzance, in Sharpe *v.* Crispin,[1] remarks: "Did he voluntarily adopt England as his home and domicil

245. In McDaniel *v.* King, 5 Cush. 469, 473, the same judge said: "The question of residence or domicil is one of fact, and often a very difficult one; not because the principle on which it depends is not very clear, but on account of the infinite variety of circumstances bearing upon it, scarcely one of which can be considered as a decisive test." And again, in Abington *v.* North Bridgewater, 23 Pick. 170: "As a question of fact it is often one of great difficulty, depending sometimes upon minute shades of distinction which can hardly be defined." See also Lord Chelmsford, in Pitt *v.* Pitt, 4 Macq. H. L. Cas. 627; Grier, J., in White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Eustis, C. J., in Cole *v.* Lucas, 2 La. An. 946; Sanderson *v.* Ralston, 20 id. 312; Colburn *v.* Holland, 14 Rich. Eq. 176.

[1] 1 Binn. 349 note.

[2] Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285; Cockrell *v.* Cockrell, 2 Jur. (N. S.) 727; Ennis *v.* Smith, 14 How. 400; Lyman *v.* Fiske, 17 Pick. 231; Sears *v.* Boston, 1 Met. 250; Dupuy *v.* Wurtz, 53 N. Y. 556; Hegeman *v.* Fox, 31 Barb. 475; Dupuy *v.* Seymour, 64 id. 156; Guier *v.* O'Daniel, *supra*; Hairston *v.* Hairston, 27 Miss. 704.

[1] L. R. 1 P. & D. 611.

with the intention of renouncing and abandoning the Portuguese domicil which his origin had conferred upon him? I was much struck with the argument that such a resolve ought to be indicated by some acts or words of a marked character, from which definite intentions of a permanent nature might be safely collected. But while admitting this as a general proposition, it is, I think, sufficiently obvious that the mode in which a man may be expected to evidence his intentions on such a subject must vary indefinitely with the age, character, circumstances, and general conduct of the individual. In canvassing the words and actions of a youth just emerging from minority, and still wholly dependent on his father, one would not expect the intention, if it existed, of making England his home to be evidenced by such acts as would be likely to attend the resolve of a matured man of business. Nor would it be reasonable to look for conduct such as might be evinced by a healthy, energetic youth, in the full use of his faculties, in one who was neither healthy nor energetic, and whose mental faculties were weak, if not yet unsound. I am far from saying that this last condition dispenses with the proof of the intention in question, or that the existence of the intention, in all its fulness and completeness, must not be arrived at by the court before a change of domicil can be declared. But I am speaking of the *media* of proof, and I hold it to be unreasonable to require any further proof to this end, than the individual, such as he really was, might fairly be expected to have furnished in the circumstances in which he was placed, if he had, in fact, really and truly entertained the intention of which we are in quest."

§ 368. **Id.** — To the same effect was the language of Dr. Lushington, speaking for the Privy Council in Hodgson *v.* De Beauchesne:[1] "With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case; and each case must vary in its circumstances; and, moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight."

[1] 12 Moore P. C. C. 285, 330.

§ 369. **All the Facts of a Man's Life Evidence of his Domicil.** —It frequently happens that there appear a few simple and decisive facts which relieve a case of any difficulty; but, on the other hand, it also frequently happens that the prominent facts in a man's life are so nearly *in equilibrio* that resort must be had to the closest scrutiny of his whole life and conduct before any definite result can be reached. There is, therefore, no fact which is of itself conclusive evidence of intention; and, on the other hand, there is scarcely any fact too trivial to be of service on occasion. "We must look to all the facts down to the last moment of his life."[1] "Acts and declarations,"[2] "conduct,"[3] "mode of life,"[4] "habits,"[5] "disposition,"[6] "character,"[7] "age,"[8] "circumstances,"[9] "pursuits,"[10] "domestic relations,"[11] "family, fortune, and health;"[12] and, in short, "the whole history of the man from his youth up,"[13] furnish the *criteria* by which intention is to be determined, and the determination is to be from the preponderance of evidence.[14]

§ 370. **Id.**—Kindersley, V. C., who has considered this subject in a number of cases, says with great force, in Drevon *v.* Drevon:[1] "But, whatever is the definition, if you could

[1] Bramwell, B., in Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733.

[2] Drevon *v.* Drevon, 34 L. J. Ch. 129; The Venus, 8 Cranch, 253; Burnham *v.* Rangely, 1 Wood. & M. 7; Read *v.* Bertrand, 4 Wash. C. Ct. 514; Prentiss *v.* Barton, 1 Brock. 389; Dupuy *v.* Wurtz, 53 N. Y. 556; Hegeman *v.* Fox, 31 Barb. 475; Dupuy *v.* Seymour, 64 id. 156; State *v.* Frest, 4 Harr. (Del.) 558; Hairston *v.* Hairston, 27 Miss. 704; Verret *v.* Bonvillain, 33 La. An. 1304.

[3] Ommanney *v.* Bingham, Rob. Pers. Suc. 468; Lord *v.* Colvin, 4 Drew. 366; Cockrell *v.* Cockrell, 2 Jur. (N. S.) 727; Sharpe *v.* Crispin, L. R. 1 P. & D. 611; Richmond *v.* Vassalborough, 5 Greenl. 396; Crawford *v.* Wilson, 4 Barb. 504; Guier *v.* O'Daniel, 1 Binn. 349, note.

[4] Wayne *v.* Greene, 21 Me. 357.

[5] Ommanney *v.* Bingham, *supra;* Wayne *v.* Greene, *supra;* Hallet *v.* Bassett, 100 Mass. 167.

[6] Wayne *v.* Greene, *supra.*

[7] Sharpe *v.* Crispin, *supra;* Hallet *v.* Bassett, *supra.*

[8] Sharpe *v.* Crispin, *supra.*

[9] Id.; Wayne *v.* Greene, *supra.*

[10] Hallet *v.* Bassett, *supra;* and see Ommanney *v.* Bingham, *supra.*

[11] Hallet *v.* Bassett, *supra;* Wayne *v.* Greene, *supra.* Whether married or single. Barton *v.* Irasburgh, 3 Vt. 159.

[12] Hoskins *v.* Mathews, 8 De G. M. & G. 13.

[13] Hallet *v.* Bassett, *supra.*

[14] Abington *v.* North Bridgewater, 23 Pick. 170; Blanchard *v.* Stearns, 5 Met. 298; Hallet *v.* Bassett, *supra;* Dauphin Co. *v.* Banks, 1 Pears. 40; Sanderson *v.* Ralston, 20 La. An. 312.

[1] 34 L. J. Ch. 129.

give one, of domicil, what are the acts which are sufficient to constitute a change of domicil? It leaves you much in the same difficulty even as you are in as to its definition. I think the court has been under the necessity of doing this in all cases, taking all the acts of every kind, more or less important, throughout the man's life, upon which you can have evidence; taking not only his acts, but his declarations *valeant quantum*, and then judging whether the testator did or did not mean to give up his domicil of origin and adopt a new one. I may say with regard to the evidence of acts, there is no one circumstance that has ever been brought to the attention of the court in any of the cases, as to which I think it may not be truly said that in some of the cases that occur, that act or that circumstance which has been treated as of great importance, in other cases that same act or circumstance has been treated as of very little importance. For example, the first fact generally brought forward, and, of course, which is brought forward and relied upon in this case, is length of residence. Length of residence has in many cases, both by English and foreign jurists, been considered a very important ingredient in the question; and in other cases it has been considered of as little importance, that is, as compared with and brought into connection and contact with other circumstances of which evidence is given in the case. I think with regard to that point, the true conclusion is this: not that any one act or any one circumstance is necessarily *per se* of vast importance and other circumstances of little importance, but it is a question what is the relative importance of the different acts; whether some acts tending one way are of greater weight than those tending the other as to the *animus manendi*, or the *animus revertendi*, or the *animus*, as to changing domicil. I think this also may be said: there is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicil. A trivial act might possibly be of more weight with regard to determining this question, than an act which was of more importance to a man in his lifetime."

§ 371. **Probabiles Conjecturæ.** — John Voet[1] remarks, with reference to the determination of domicil: "Quoties autem non certo constat, ubi quis domicilium constitutum habeat, et an animus sit inde non discedendi, ad conjecturas probabiles recurrendum, ex variis circumstantiis petitas, etsi non omnes æque firmæ, aut singulæ solæ consideratæ non æque urgentes sint, sed multum in iis valeat judicis prudentis et circumspecti arbitrium."

In this connection Kindersley, V. C.,[2] may again be quoted: "There must be the act, and there must be the intention; and in order to decide the question of intention there are undoubtedly a number of circumstances which are considered by the law of this country, and probably by the law of almost all other countries, as affording certain *indicia* or *criteria*, from which you may infer the intention one way or the other. But it is obvious that some of the circumstances may have a tendency one way and some the other way; and very often it is extremely difficult to come to a determination among the conflicting tendencies of the different circumstances on the different *indicia* of intention. . . . In all questions of this sort you are obliged to resort to what are called by some of the jurists *probabiles conjecturæ* (probable conjectures) as to

[1] Ad Pand. l. 5, t. 1, no. 97. With respect to the criteria of domicil, Donellus is frequently quoted. He says (De Jure Civili, l. 17, c. 12, p. 978, no. 60): "Quod si dubitabitur, quis sit animus in ea re cujusque, de eo duabus his ex rebus æstimandum est; ex muniis vitæ quotidianæ, quæ quis alicubi obeat; tum ex ordine et conditione personæ. Ex muniis vitæ; si quis aliquo in loco ea faciat, quem facere ejus loci cives et incolæ solent: puta, si in eo loco semper agat; in illo emat, vendat, contrahat; in eo foro, balneis, et aliis locis communibus utatur; ibi festos dies celebret; omnibus denique commodis loci fruatur, ut Ulpiani descriptio est in *leg. ejus* 27 § 1 D. *ad municip.* Ex conditione personæ; si cujus ea conditio sit, propter quam eum in aliquo loco semper consistere necesse sit. Cui rei exemplo sunt tres; senator, miles, relegatus." Zangerus says that in the absence of express declarations made before the cause of action has arisen, the *animus* is to be ascertained "ex conjecturis et presumptionibus" (De Except. pt. 2, c. 1, no. 14 *et seq.*); and among most conspicuous grounds of conjecture he instances seven; viz., (1) the location of the "lares" of the Romans, or the "fire and light" of the Germans; (2) the possession of the major part of one's property in any place; (3) the sale of one's property in the place of former domicil and emigration with one's family to another city or country; (4) constant residence in a place; (5) obtaining citizenship; (6) in the case of a secular priest, obtaining a benefice which requires residence; and (7) in the case of a woman, marriage.

[2] In Cockrell *v.* Cockrell, 2 Jur. (N.S.) 727.

what his intention was, to be inferred from circumstances. Perhaps the more correct expression would be 'probable prescriptions,' rather than 'probable conjectures,' though those prescriptions are in great degree founded upon conjectural reasoning upon the circumstances."

§ 372. **Facts to be construed untechnically and according to their Natural Import.** — Lord Cranworth, speaking on this subject, in Maxwell *v.* McClure, said the question of domicil turns entirely "upon the facts of the case, and upon the construction which, as men of the world, we should put upon the acts of parties as disclosed in the evidence."[1] Demolombe,[2] after pointing out a few of the usual *indicia* of domicil, concludes: "It belongs, then, to the magistrate to appreciate the importance, the priority, the isolation or the concourse, and the force, more or less probative, of all these elements constitutive of the domicil of each one, regard being had to his particular position and personal habits."

§ 373. **Certain Facts usually entitled to more Weight than others.** — But whatever difficulty there may be in laying down any positive rule which will fit all cases, or which will give to certain facts, under all circumstances, greater probative force than to others, courts and jurists have laid stress on certain facts, either when standing by themselves or when corroborated by, or opposed to, certain other facts, leaving their force to be strengthened, diminished, or entirely destroyed in other cases by the appearance of new circumstances. Indeed, the great bulk of what has been said in the decided cases has been by way of appreciation of given facts as determinative of intention; and while they are to be used with caution and tested thoroughly by the circumstances of each particular case, certain approximate values have been set upon certain things as *indicia* of intention, or, as they are sometimes called, *criteria* of domicil.

§ 374. **The Definitions of Domicil in the Roman Law mainly Formulæ of Evidence.** — The so-called definitions of domicil which are to be found in the Roman law are for the most part *formulæ* for the ascertainment of the necessary element of in-

[1] 6 Jur. (N. S.) 407.

[2] Cours de Code Napoléon, t. 1, no. 345. See also Pothier, Intr. aux Cout. d'Orléans, no. 15.

tention; and while they are largely figurative, they point out certain *criteria* of fact, which doubtless must have had a much more definite meaning to the Roman mind than to ours. Thus, the definition of the Code[1] puts the location of the "lares" and "rerum ac fortunarum suarum summa" as tests: "In eodem loco singulos habere domicilium, non ambigitur, ubi quis larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet: unde cum profectus est, peregrinari videtur: quod si rediit, peregrinari jam destitit."

Alfenus Varus[2] puts the location of the "sedes et tabulæ" and the "suarum rerum constitutio" as the test: "Sed de ea re constitutum esse, eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet, suarumque rerum constitutionem fecisset."

But Ulpian,[3] most of all, lays down a formula of *criteria* as follows: "Si quis negotia sua non in colonia, sed in municipio semper agit, in illo vendit, emit, contrahit, eo in foro, balneo, spectaculis utitur: ibi festos dies celebrat: omnibus denique municipii commodis, nullis coloniarum, fruitur, ibi magis habere domicilium, quam ubi colendi causâ diversatur."

[1] Code 10, t. 39, l. 7. [2] Dig. 50, t. 16, l. 203. [3] Id. t. 1, l. 27, § 1.

CHAPTER XXI.

CRITERIA OF DOMICIL (*continued*), — RESIDENCE AND LAPSE OF TIME.

§ 375. **Presence at a Place prima facie Evidence of Domicil there.** — When it becomes necessary to consider whether or not a person was domiciled at a given place, the most usual and obvious fact which meets us is personal presence. If we know nothing of a man save that at a given time he was at a particular place — his circumstances and antecedents being wholly unknown — and it is necessary to determine, for some purpose or other, where he was then domiciled, we cannot but conclude that he was domiciled where he was found. Lord Thurlow, in Bruce *v.* Bruce,[1] said: "A person's being at a place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence." Lord Loughborough used similar language in Bempde *v.* Johnstone:[2] "The actual place where he is, is *prima facie* to a great many given purposes his domicil." And, apparently using residence in the sense of mere physical presence, Sir John Nicholl remarks, in Stanley *v.* Bernes:[3] "*Prima facie*, he is domiciled where he is resident."

§ 376. **Such Prima Facies subject to Rebuttal.** — But it is apparent that this is the merest *prima facies*, and is not only susceptible of explanation, but is easily destroyed. Lord Thurlow adds to his remarks above quoted: "It may be rebutted, no doubt: a person travelling; on a visit, — he may be there for some time on account of his health or business; a soldier may be ordered to Flanders, and be detained at one place there for many months; the case of ambassadors, etc." And Lord Loughborough adds to his remarks above given: "You

[1] Reported in a note to Marsh *v.* Hutchinson, 2 Bos. & P. 229.

[2] 3 Ves. Jr. 198. See also Wharton, Confl. of L. § 55 a.

[3] 3 Hagg. Eccl. 373.

encounter that, if you show it is either constrained, or from the necessity of his affairs, or transitory, — that he is a sojourner; and you take from it all character of permanence."

But in the case which we have supposed it is not even necessary to explain the character or intention of the presence, if it can but be shown that the person whose domicil is in question was formerly domiciled elsewhere. In event of such proof, the presumption of the continuance of such domicil would apply, and wholly destroy the effect of the bald fact of bodily presence elsewhere.[1] The principle seems to have been so understood in Bradley *v.* Lowery,[2] where Johnston, Ch., after citing the remarks of Lords Thurlow and Loughborough and Sir John Nicholl, said: "That is to say, if we had never been apprised that the testator had before been elsewhere domiciled, we should be bound to consider him domiciled in Alabama, from the mere fact of finding him there."

§ 377. **Residence as Evidence of Domicil.** — It seldom happens, however, that the only criterion presented is the naked fact of presence at a place. Such presence usually appears under circumstances which show it to be more or less habitual and continuous; in which case it rises to the degree of residence. Dicey[1] has defined residence as "habitual physical presence in a place or country;" which definition, although not entirely correct, is approximately so, and sufficiently so for the present purpose. Thus understood, residence corresponds with the "*assidua habitatio*"[2] or "*conversatio assidua*"[3] of the Civilians.

It is laid down in many cases that residence is *prima facie* evidence of domicil,[4] or, in other words, that the fact that a

[1] See on this subject, Dicey, Dom. pp. 116–118, and *infra*, § 377, note 4.

[2] Speer's Eq. 1.

[1] Dom. p. 76. He adds: "The word, however, 'habitual,' must not mislead. What is meant is not presence in a place or country for a length of time, but presence there for the greater part of the time, be it long or short, which the person using the term contemplates."

[2] Mascardus, De Probat. concl. 535, no. 8; Corvinus, opinion quoted in Henry, For. Law, p. 194.

[3] Zangerus, De Except. pt. 2, c. 1, *passim*; Corvinus, *op. cit.* p. 193.

[4] Bempde *v.* Johnstone, *supra*; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Stanley *v.* Bernes, 3 Hagg. Eccl. 373; De Bonneval *v.* De Bonneval, 1 Curteis, 856; King *v.* Foxwell, L. R. 3 Ch. D. 518; The Venus, 8 Cranch, 253; Ennis *v.* Smith, 14 How. 400; Mitchell *v.* United States, 21 Wall. 350; Johnson *v.* Twenty-one Bales, 2 Paine, 601, s. c. Van Ness, 5; Kemna *v.* Brockhaus, 10 Biss. 128; Hart *v.* Lindsey, 17 N. H.

man is habitually and continuously present at a place is evidence that he intends to remain there permanently. But beyond this it is difficult to deduce any general principle from the decided cases, or from the reasoning by which they are supported. It is apparent that little importance can be attached to residence, if at the time to which the inquiry concerning domicil is directed, residence has just begun, or if it is under circumstances which are in themselves equivocal or which tend to show *animus revertendi;* as in the case of a public officer, an ambassador or a consul, a soldier, an exile or a prisoner, or the like, or in the case of a married man who, being previously domiciled elsewhere, comes to a country without his wife and family, and at the time inquired about has spent but a short time there, boarding at hotels, either without any apparent business, or with business of short or doubtful duration. On the other hand, if residence is long continued and is accompanied by other circumstances indicating intention to remain permanently, it is of great weight in determining the question of *animus manendi.* This is no more than saying that residence is by itself only a single fact, which may or may not indicate *animus manendi*, according to circumstances.[5] And

235; Elbers & Krafts *v.* Ins. Co. 16 Johns. 128; Crawford *v.* Wilson, 4 Barb. 504; Vischer *v.* Vischer, 12 id. 640; Ames *v.* Duryea, 6 Lans. 155; Ryal *v.* Kennedy, 40 N. Y. Super. Ct. 347; Cadwallader *v.* Howell & Moore, 3 Harr. (N. J.) 138; Guier *v.* O'Daniel, 1 Binn. 349, note; Carey's Appeal, 75 Pa. St. 201; Hindman's Appeal, 85 id. 466; State *v.* Frest, 4 Harr. (Del.) 558; Horne *v.* Horne, 9 Ired. 99; Bradley *v.* Lowery, Speer's Eq. 1; *Re* Toner, 39 Ala. 454; Kellar *v.* Baird, 5 Heisk. 39; Hairston *v.* Hairston, 27 Miss. 704; Johnson *v.* Turner, 29 Ark. 280; Alter *v.* Waddel, 20 La. An. 246; Mills *v.* Alexander, 21 Tex. 154; *Ex parte* Blumer, 27 id. 735; Dow *v.* Gould, 31 Cal. 629; Miller *v.* Thompson, 2 Cong. El. Cas. 120. See also Story, Confl. of L. § 46; Dicey, Dom. p. 122 *et seq.*; Mascardus, De Probat. concl. 535, no. 8; Demolombe, Cours de Code Napoléon, t. 1, no. 345; and see Lord Cottenham, in Munro *v.* Munro, 7 Cl. & F. 842, and Lord Kingsdown, in Moorhouse *v.* Lord, 10 H. L. Cas. 272. It results, of course, that the burden of proof is upon those who deny residence to be domicil. Ennis *v.* Smith, *supra;* Burnham *v.* Rangeley, *supra;* Prentiss *v.* Barton, *supra;* Ryal *v.* Kennedy, *supra;* State *v.* Frest, *supra.* But this burden is discharged by showing that the person was formerly domiciled elsewhere; in such case the presumption being that the former domicil continues. Maxwell *v.* McClure, 6 Jur. (N. S.) 407; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285; Mitchell *v.* United States, 21 Wall. 350; Brewer *v.* Linnæus, 36 Me. 428; Nixon *v.* Palmer, 10 Barb. 175; Ames *v.* Duryea, *supra;* Quinby *v.* Duncan, 4 Harr. (Del.) 383; Glover *v.* Glover, 18 Ala. 367; and see *supra*, § 151.

[5] See Munro *v.* Munro, 7 Cl. & Fin.

this is substantially all that can be said of it; for it will be found that whenever particular stress has been laid upon residence, it has been either because it was long continued or because it was accompanied by other circumstances which tended to show *animus manendi*.

§ 378. **Id. Wayne, J., in Ennis v. Smith.** — In some cases strong expressions have been used with regard to residence. In Kosciusko's case,[1] Wayne, J., used language which, perhaps, states the effect of residence too strongly: "But what amount of proof is necessary to change a domicil of origin into a *prima facie* domicil of choice. It is residence elsewhere, or where a person lives out of the domicil of origin. That repels the presumption of its continuance, and casts upon him who denies the domicil of choice the burden of disproving it. Where a person lives, is taken *prima facie* to be his domicil until other facts establish the contrary. It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicil of choice. But there must be to constitute it actual residence in the place, with the intention that it is to be a principal and permanent residence. That intention may be inferred from the circumstances or condition in which a person may be as to the domicil of his origin, or from the seat of his fortune, his family, and pursuits of life. A removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, it does change the domicil. The result is, that the place of residence is *prima facie* the domicil, unless there be some motive for that residence not inconsistent with a clearly

842; Bruce *v.* Bruce, 2 Bos. & P. 229, note; Bempde *v.* Johnstone, 3 Ves. Jr. 198; Moorhouse *v.* Lord, 10 H. L. Cas. 272, 292; De Bonneval *v.* De Bonneval, 1 Curteis, 856; Sears *v.* Boston, 1 Met. 250; Dupuy *v.* Wurtz, 53 N. Y. 556; Guier *v.* O'Daniel, 1 Binn. 349, note; Horne *v.* Horne, 9 Ired. 99; *Re* Toner, 39 Ala. 454; Kellar *v.* Baird, 5 Heisk. 39; Johnson *v.* Turner, 29 Ark. 280; Mills *v.* Alexander, 21 Tex. 154; and also authorities in last note.

[1] Ennis *v.* Smith, 14 How. 400.

established intention to retain a permanent residence in another place."

But it must be observed that in this case other facts besides residence tended to show *animus manendi*. Kosciusko had resided nineteen years in France, under circumstances and with declarations showing, on the one hand, his abandonment of his domicil of origin, and, on the other, his intention to remain in France permanently, or at least until the happening of an improbable event.

§ 379. **Id. Residence by itself Equivocal.** — But, on the other hand, in Isham *v.* Gibbons,[1] it was held that naked residence amounts to nothing unless accompanied with evidence of intention; and in Jopp *v.* Wood,[2] it was said to be at least equivocal. In the latter case, Turner, L. J., said: "Although residence may be decisive as to the *factum*, it cannot, when looked at as to the *animus*, be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place different from that in which he has been before domiciled, even although his residence there may be long continuing, does not of necessity show that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home. But domicil, although in some of the cases spoken of as a home, imports an abiding and permanent home, and not a mere temporary one."

§ 380. **Id. Sir Herbert Jenner, in De Bonneval v. De Bonneval.** — In De Bonneval *v.* De Bonneval,[1] Sir Herbert Jenner said: "I apprehend that it being *prima facie* evidence only, that where a person resides, there he is domiciled, it is necessary to see what was the domicil of origin of the party. Having first ascertained the domicil of origin, that domicil prevails till the party shall have acquired another, with an intention of abandoning the original domicil. That has been the rule since the case of Somerville *v.* Somerville. Another principle is, that the acquisition of a domicil does not simply depend upon the residence of the party; the fact of residence must

[1] 1 Bradf. 69. [2] 4 De G. J. & S. 616. [1] 1 Curteis, 856.

be accompanied by an intention of permanently residing in the new domicil, and of abandoning the former; in other words, the change of domicil must be manifested, *animo et facto*, by the fact of residence and the intention to abandon. A third principle is, that the domicil of origin having been abandoned, and a new domicil acquired, the new domicil may be abandoned and a third domicil acquired. Again, the presumption of law being that the domicil of origin subsists until a change of domicil is proved, the *onus* of proving the change is on the party alleging it, and this *onus* is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicil; for the change must be demonstrated by fact and intention."

The rule laid down by Lord Alvanley, in Somerville *v.* Somerville,[2] although his language is somewhat obscure, would seem to mean that clear proof must be made of abandonment of domicil of origin before any value can be attached to residence.

§ 381. **Id. Lord Westbury, in Bell v. Kennedy, and Sir John Nicholl, in Moore v. Darrell.** — In Bell *v.* Kennedy,[1] Lord Westbury used language in marked contrast with that of Wayne, J., above quoted. Lord Westbury said: "Although residence may be some small *prima facie* proof of domicil, it is by no means to be inferred from the fact of residence that domicil results; even although you do not find that the party had any other residence in existence or in contemplation." In this case there was sufficient proof of abandonment of domicil of origin, but it also appeared that residence was in pursuance of a contingent *animus manendi*.

In Moore *v.* Darrell and Budd,[2] Sir John Nicholl said: "Cases of domicil do not depend upon residence alone, but on a

[2] 5 Ves. Jr. 750. "The third rule I shall extract is, that the . . . domicil of origin is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and taking another as his sole domicil." That Lord Alvanley could not have contemplated the co-existence of two domicils is evident from his declaration that a man can have only one domicil for the purpose of succession, which was the matter involved in the case.

[1] L. R. 1 Sch. App. 307, 321.

[2] 4 Hagg. Eccl. 346, 352.

consideration of all the circumstances of each particular case."

§ 382. **Length of Residence or Time.** — As the value of residence as evidence of intention depends largely upon the length and the manner of the residence, it is proper to consider these elements somewhat in detail; and,

First, as to length of residence or time. Length of residence as a substitute for intention has already been considered in its appropriate place;[1] it is proposed now to discuss it as evidence of intention. If a man leaves his domicil of origin, and going into another country dwells there for a considerable length of time, — for ten, twenty, or thirty years, — it needs no authority for saying that, in the absence of explanatory evidence, he will be presumed to intend to remain there permanently. Great weight has therefore been attached by the authorities to length of residence as evidence of *animus manendi*;[2] not only where it is unexplained and uncontradicted by other facts, but also in many cases where it is contradicted by facts which would otherwise be taken as indicating *animus revertendi*. But if the purpose of residence, however long, appears to be consistent with *animus revertendi* (as in the case, for example, of an ambassador or consul), the presumption of *animus manendi* fails, and the stronger presumption of the continuance of the former domicil prevails; and, *a fortiori*, if sufficient evidence of *animus revertendi*

[1] *Supra*, § 135 *et seq.*

[2] Moorhouse *v.* Lord, 10 H. L. Cas. 272 (per Lord Kingsdown); Anderson *v.* Laneuville, 9 Moore P. C. C. 325; Hodgson *v.* De Beauchesne, 12 id. 285; Stanley *v.* Bernes, 3 Hagg. Eccl. 373; Lyall *v.* Paton, 25 L. J. Ch. 746; Drevon *v.* Drevon, 34 id. 129; Lord *v.* Colvin, 4 Drew. 366; Cockrell *v.* Cockrell, 2 Jur. (N. S.) 727; Attorney-General *v.* Kent, 1 Hurl. & Colt. 12; Bremer *v.* Freeman, 1 Deane, 192, on appeal, 10 Moore P. C. C. 306; Haldane *v.* Eckford, L. R. 8 Eq. Cas. 631; Brunel *v.* Brunel, L. R. 12 Eq. Cas. 298; King *v.* Foxwell, L. R. 3 Ch. D. 518; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; Gillis *v.* Gillis, Ir. R. 8 Eq. 597; The Ann Green, 1 Gall. 274; White *v.* Brown, 1 Wall. Jr. C. Ct. 217; Johnson *v.* Twenty-one Bales, 2 Paine, 601, s. c. Van Ness, 5; Knox *v.* Waldoborough, 3 Greenl. 455; Hulett *v.* Hulett, 37 Vt. 581; Easterly *v.* Goodwin, 35 Conn. 279; Elbers & Krafts *v.* Ins. Co. 16 Johns. 128; Dupuy *v.* Wurtz, 53 N. Y. 556; Hood's Estate, 21 Pa. St. 106; Bradley *v.* Lowery, Speer's Eq. 1; Hairston *v.* Hairston, 27 Miss. 704; D'Argentré, Consuet. Brit. art. 449; Pothier, Intr. aux Cout. d'Orléans, nos. 15 and 20; Henry, For. Law, pp. 208, 209; Phillimore, Dom. no. 259 *et seq.*; Id. Int. L. vol. iv. no. 299 *et seq.*; Dicey, Dom. p. 123; and see *infra*, § 97 *et seq.*

appear, the presumption from time, of course, fails. Length of time is, therefore, strong evidence of intention,[3] but by no means conclusive.[4]

§ 383. **Id. Roman Law and Continental Jurists.** — This criterion was so conspicuous as to call forth a declaration concerning it in the Roman law;[1] namely, in the case of the student, concerning whom it was declared, by the letter of Hadrian, that he was not to be supposed to be domiciled at the place of his studies, unless, ten years having elapsed, he had set up for himself a habitation there. Concerning the precise meaning and effect of this provision (which has been applied by Modern Civilians to persons in general), there has been much discussion;[2] some of the Civilians,[3] among whom were Accursius and Baldus, apparently holding that residence in a place for ten years created a legal presumption of domicil there; while others, including Alciatus,[4] Mascardus,[5] Menochius,[6] Zangerus,[7] Burgundus,[8] Molinæus,[9] and, apparently, Bartolus,[10] held that, while decennial residence was evidence of the establishment of domicil, it was not conclusive, but was to be left, together with all the other facts of the case, to the discretion of the judge to determine "according to the condition and quality of the person and the place."[11]

[3] See cases cited in last note.

[4] Hodgson *v.* De Beauchesne, *supra;* Jopp *v.* Wood, 4 De G. J. & S. 616; Stanley *v.* Bernes, *supra;* Collier *v.* Rivaz, 2 Curteis, 855; *Re* Capdevielle, 2 Hurl. & Colt. 985; Cockrell *v.* Cockrell, *supra;* Doucet *v.* Geoghegan, *supra;* Bremer *v.* Freeman, *supra;* Gillis *v.* Gillis, *supra;* The Ann Green, *supra;* White *v.* Brown, *supra;* Knox *v.* Waldoborough, *supra;* Hulett *v.* Hulett, *supra;* Easterly *v.* Goodwin, *supra;* Bank *v.* Bascom, 35 Conn. 351; Dupuy *v.* Wurtz, *supra;* Vischer *v.* Vischer, 12 Barb. 640; Horne *v.* Horne, 9 Ired. 99; Bradley *v.* Lowery, *supra;* Eagan *v.* Lumsden, 2 Disn. 168; Kellar *v.* Baird, *supra;* Dicey, Dom. pp. 123, 124; Wharton, Confl. of L. § 66; and see *infra*, §§ 388 *et seq.*, 393 *et seq.*

[1] Code 10, t. 39, l. 2. See *supra*, § 5, note 1.

[2] The views of different writers are set forth by Zangerus, De Except. pt. 2, c. 1, no. 45 *et seq.*; Mascardus, De Probat. concl. 535, no. 6 *et seq.*; Lauterbach, De Domicilio, § 27. See also Phillimore, Dom. no. 261; Id. Int. L. vol. iv. no. 301. Phillimore, however, seems to be in error with regard to the opinion of Bartolus.

[3] See Zangerus, De Except. pt. 2, c. 1, no. 45 *et seq.*, and Mascardus, De Probat. concl. 535, no. 6 *et seq.*

[4] In Dig. 50, t. 16, l. 203, De Verborum Significatione.

[5] *Loc. cit.*

[6] De Arbitr. Jud. lib. 2, cent. 1, cas. 86.

[7] De Except. pt. 2, c. 1, no. 47.

[8] Consuet. Fland. Tract. 2, no. 34.

[9] Opera, t. 2, p. 903, ed. 1681, cons. 31, no. 21.

[10] In Code 10, t. 39, l. 2.

[11] Zangerus, *loc. cit.*; Mascardus, *loc. cit.* nos. 9 and 10; Lauterbach, De

§ 384. Id. id. — Most of the Civilians also took the position that, even in the case of the student, a domicil might be acquired without decennial residence. Burgundus[1] says: "Nec ipsi qui studiorum causâ aliquo loco morantur, domicilium ibi habere creduntur, nisi decem annis transactis eo loco sedes sibi constituerint. Sed hoc intellige, re dubiâ, ut puta quod uxorem ibi duxerit, possessiones emerit, professionem adepti sint. Alioquin quoties de contraria voluntate constat, decennali spatio domicilium non constituitur. Ideoque mercenarius, studiosus, mercator, quamdiu animum redeundi habent, domicilium acquirere non possunt. Animum verò redeundi habere non videntur, qui transportatis bonis, quæ in patria habebant, alio domicilium transferunt, sicut nec ille, qui in alia regione degens, bona ibi emit, privilegium civitatis impetrat, uxorem ducit, decennii spatio habitat; sed hoc ultimum in scolastico non aliter accipiendum erit, quam si aliquo alio signo perseverandi animum demonstret. Quamdiu enim liquet in patriam meditari reditum, et absoluta studiorum periodo remigrare velle, nullo temporis spatio domicilium constituitur. Domicilium ergo vel solo momento figi potest, si appareat de voluntate quæ ex conjecturis non inepte probabitur." Corvinus says:[2] "Nec etiam sola habitatio per se, etiamsi sit longissimi temporis, domicilium constituit. Qui tamen per

Domicilio, § 27. The latter thus speaks of the controversy on this subject: "Quodnam autem temporis spatium, aut quantus annorum numerus ad hunc diuruitatem requiratur, doctores valde inter se digladiantur. Pleriqne judicis arbitrio id relinquunt, ut ex loci et personarum conditione ac qualitate vel breviori vel longiori termino dijudicet. [Zangerus and Menochius are here cited, and compared with Mascardus and Mævius.] Quidam existimant etiam solo decennio domicilium contrahi, et ad hoc probandum adducunt (2 C. de incolis), cui hanc rationem jungunt, quod per diuturnum tempus, decem scilicet annorum, domicilium præscriptum esse censeatur, Ernest. Cothm. vol. i. resp. 21, b. 4 et Warmser, exerc. 4, q. 10, p. m. 152. Qui etiam argumentis Zangeri ita respondet: 'Non imus inficias, minori etiam tempore domicilium constitui posse ita tamen, ut aliæ conjecturæ et circumstantiæ tacite contracti domicilii concurrant. Tunc autem non tam ex temporis ratione, quam potius ex ipsis conjecturis et circumstantiis tacite contractum æstimabitur. Verum impræsentiarum quando queritur, an decennium, ad contrahendum domicilium necessarium sit; aliis conjecturis minime opus est, sed sufficit solius temporis decursus.' Sed priorem sententiam tutiorum esse arbitratur etiam D. Carpsov. l. 2, t. 2, resp. 22, no. 5."

[1] Consuet. Fland. Tract. 2, no. 34.

[2] Jur. Rom. l. 10, t. 39, pt. 2, p. 45 b.

decem annos alicubi moratur, præsumitur ibi domicilium elegisse et incola existimatur. Nisi de occasione temporaria et animo revertendi ad pristinum locum constet." Grotius, in an opinion quoted by Henry,[3] from the "Hollandsche Consultatien," argues: "Neither, again, is it any objection 'quod decennio quæratur domicilium;' since it does not thence follow 'quod minore tempore non quæratur; sed quod in dubio decennium per se sufficiat ad probandum domicilium. Alioqui si de voluntate appareat, vel uno momento domicilium constitutum intelligitur.'" D'Argentré[4] remarks: "Justa præsumtio est de eo qui totos decem annos alicubi desedit; nam nulla tempora domicilium constituunt aliud cogitanti." Savigny[5] says: "The ten years are indeed only a presumption of a purpose of constant residence."

§ 385. **Id. id.** — It is clear, therefore, that, on the one hand, whatever importance may have been attached to decennial residence, the presumption arising from it was not a conclusive presumption of law, but one of fact merely, which gave way to other facts tending to show *animus revertendi;* and, on the other, ten years' residence was not necessary for the establishment of domicil if other facts showed the requisite *animus manendi.*

§ 386. **Id. Lord Stowell, in The Harmony.** — Lord Stowell, in a celebrated passage in the case of The Harmony,[1] spoke thus as to the effect of time: "Of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects. In most cases it is unavoidably conclusive. It is not unfrequently said that if a person comes only for a special purpose *that* shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that *may probably*, or *does actually* detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special pur-

[3] For. Law, p. 198.
[4] Consuet. Brit. art. 449.
[5] System, etc. § 353 (Guthrie's trans. p. 98).
[1] 2 C. Rob. Ad. 322.

pose may lead a man to a country where it shall detain him the whole of his life. A man comes here to follow a lawsuit; it may happen, and indeed is often used as a ground of vulgar and unfounded reproach (unfounded as matter of just reproach, though the fact may be true) on the laws of this country, that it may last as long as himself. Some suits are famous in our judicial history for having even outlived generations of suitors. I cannot but think that against such a long residence the plea of an original special purpose could not be averred; it must be inferred, in such a case, that other purposes forced themselves upon him, and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes and other means, to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there *must* be.

"In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a domicil in a certain space of time, would nevertheless have that effect if distributed over a larger space of time. Suppose an American comes to Europe with six contemporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe with one cargo, and fixing himself there to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time. Be the occupation what it may, it cannot hap-

pen, but with few exceptions, that mere length of time shall not constitute domicil."

§ 387. **Id. Criticism of Lord Stowell's Remarks.** — These remarks have been often quoted, and in some cases adopted and to some extent followed. But it must be borne in mind that they were uttered in a case involving national character in time of war, and that the principles laid down in this class of cases must be used with great caution in cases involving the general doctrine of domicil. The laws of nations guard with great jealousy the right of capture by belligerents, both because prize cases are for the most part decided in the courts of the belligerents themselves, and because by capture commercial nations are brought more easily to terms, and thus fighting is abridged, and life and property are saved.[1] It is well to remember also that Lord Stowell leaned very strongly in favor of the rights of captors, and therefore we may naturally expect to find his views somewhat tinctured by his prejudices.[2] His remarks concerning the lawsuit as applied to the general subject of domicil clearly are not sound,[3] nor are those concerning mercantile venture.[4] These illustrations seem to have been chosen with singular misfortune.

§ 388. **Id. If Time is Conclusive Evidence of Domicil, what Length of Time?** — It is pertinently asked by Sir John Nicholl, in Stanley *v.* Bernes:[1] If time is conclusive, where shall the

[1] See *supra*, § 26.

[2] Id.

[3] Voet, ad Pand. l. 5, t. 1, no. 98; Corvinus, Jur. Rom. l. 10, t. 39, pt. 2, p. 45 *b*; Molinæus, Opera, t. 2, p. 903, ed. 1681, cons. 31, no. 21; Menochius, De Præsump. Præs. 42, no. 2. The last-named says: "Et primum dicendum est *habitationem et domicilium* inter se differe. Nam *domicilium* habere quis dicitur in loco qui animo ibi commorandi perpetuo habitat. Is vero qui pro emptione aliquâ ex causâ, puta studiorum, vel litis vel simili commoratur, *habitare* dicitur."

[4] See authorities cited in last note. De Witt, in an opinion quoted by Henry (For. Law, p. 202) from the Hollandsche Consultatien, says: "A man is understood only to live at a particular place, and not to found his domicil in that spot, who only resides there, though for several years, for the mere purpose of trade or business or to effect any particular object." The English authorities, too, upon the point are numerous. Many of them are noticed in this chapter. It is sufficient to refer specifically only to Jopp *v.* Wood, 4 De G. J. & S. 616.

[1] 3 Hagg. Eccl. 373. He says: "For certain purposes a man takes his character, *prima facie*, from the place where he is domiciled, and, *prima facie*, he is domiciled where he is resident, and the force of residence, as evidence of domicil, is increased by the length of time during which it has continued. All these principles are clear; but time alone is not

line be drawn? It is impossible to fix any period, as Lord Stowell himself admits. If a man goes to England for the purpose of conducting a lawsuit which actually requires, for example, but one year, has he gained a domicil? If he has, clearly it is not because of length of residence. If he has not, would he have gained a domicil if the suit had occupied five, ten, twenty-five, or fifty years? If five years' time is not sufficient, what length of time would be? The Civilians speak, as we have seen, with no uncertain sound upon this subject, and declare that no length of time is sufficient if there be an intention to return.

§ 389. **Id. Dr. Lushington, in Hodgson v. De Beauchesne.** — A much more reasonable doctrine is that which has generally been acted upon in the cases, and which has been set forth with great clearness and force by Dr. Lushington in Hodgson *v.* De Beauchesne,[1] and Kindersley, V. C., in Cockrell *v.* Cockrell.[2] The former said, speaking for the Privy Council: "We concur in opinion that great weight is to be attributed to length of residence, but we think that other matters must be taken into consideration. . . . We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicil. The residence may be such, so long and so continuous, as to raise a presumption nearly, if not quite, amounting to a presumption *juris et de jure;* a presumption not to be rebutted by declarations of intention or otherwise than by actual removal. Such was the case of Stanley *v.* Bernes. The foundation of that decision in this respect was that a Portuguese domicil had been acquired by previous residence and facts, and that mere declarations of intention to return could not be sufficient to

conclusive; for where is the line to be drawn? Will the residence of a month, or a year, or five years, or fifty years, be conclusive? As a criterion, therefore, to ascertain domicil, another principle is laid down by the authorities quoted as well as by practice, — it depends upon the intention, upon the *quo animo*, — that is the true basis and foundation of domicil; it must be a residence *sine animo revertendi*, in order to change the *domicilium originis*. A temporary residence for the purposes of health or travel or business has not the effect; it must be a fixed and permanent residence, abandoning finally and forever the domicil of origin, yet liable still to a subsequent change of intention."

[1] 12 Moore P. C. C. 285. For facts, see *infra*, § 395.

[2] 2 Jur. (N. S.) 727.

prove an intention not to acquire a Portuguese domicil. In short, length of residence *per se* raises a presumption of intention to abandon a former domicil, but a presumption which may, according to circumstances, be rebutted. It would be a dangerous doctrine to hold that mere residence, apart from the consideration of circumstances, constitutes a change of domicil. A question which no one could settle would immediately arise; namely, What length of residence should produce such consequence? It is evident that time alone cannot be the only criterion. There are many cases in which a very short residence would constitute domicil; as in the case of an emigrant who, having wound up all his affairs in the country of his origin, departs with his wife and family to a foreign land and settles there. In a case like that, a residence for a very brief period would work a change of domicil. Take a contrary case, where a man for business, or pleasure, or mere love of change, is long resident abroad, occasionally returning to the country of his origin, or maintaining all his natural connections with that country; the time of residence would not, to the same extent or in the same degree, be proof of a change of domicil. We concur, therefore, in the doctrine held in many previous cases, that to constitute a change of domicil, there must be residence, and also an intention to change."

§ 390. **Id. Kindersley, V. C., in Cockrell v. Cockrell.** — Kindersley, V. C., in the case above mentioned, says: "Length of time is considered one of the *criteria* or one of the *indicia* from which the intention to acquire a new domicil is to be inferred, and it is considered a very material ingredient in the consideration of the question. In the case of The Harmony, Lord Stowell says: 'Of the few principles that are laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil.' Some foreign jurists have suggested, if they have not actually laid it down, that a period of ten years ought of itself to be a sufficient indication of the intention to acquire a new domicil. But certainly that is not the view of the law that has been adopted by English jurists, nor do I think it is the rule adopted by jurists generally; and I think it is impossible to lay down any precise period which

per se is to constitute domicil. At the same time, if a man goes to another country and continues to reside there for a considerable period, as in this case for ten years, without saying that a residence of ten years is necessary, or that ten years is the period sufficient, still the fact of his residing there for ten years is a very strong indication of his intention to establish his home and his domicil in that place."

§ 391. **Id. Poland, J., in Hulett v. Hulett.** — But the doctrine has been nowhere better stated than by Poland, J., in Hulett *v.* Hulett:[1] "One may remain for a long time in a place without having it become his domicil, and be all the while a mere temporary sojourn. But where one's stay in a place is short, and then he returns to his former home, it affords some presumption or evidence that he went there for a temporary purpose, with no intent to remain, while if his stay or residence is protracted and long continued, it furnishes a corresponding presumption that he designed to remain from the beginning. Other facts and evidence may overcome the presumption in either case, and show that the short stay was of a legally permanent character, and that the longer one was but a mere absence from home, working no legal change of residence. But this by no means prevents the permanence and duration of the stay from being admissible and important evidence on the question. Whenever the intent or mental purpose of a person becomes a question to be proved, his acts and conduct are admissible evidence, and often the best and only evidence of it; and his acts and conduct subsequent to the point of time when such intention is to be shown, are more satisfactory than those which precede or co-exist with it."

§ 392. **Id. Story, J., in The Ann Green.** — In a prize case,[1] Story, J., used this language: "As to domicil, it is undoubtedly true that length of time, connected with other circumstances, may go very far to constitute a domicil. 'Time,' says Sir William Scott, 'is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects. In most cases it is unavoidably conclusive.' Upon a

[1] 37 Vt. 581.

[1] The Ann Green, 1 Gall. 274.

residence, therefore, for temporary purposes, there may be engrafted all the effects of permanent settlement, if it be continued for a great length of time and be attended with conduct which demonstrates that new views and new connections have supervened upon the original purposes; but, on the other hand, mere length of time cannot of itself be decisive, where the purpose is clearly proved to have been temporary, and still continues so, without any enlargement of views; and even the shortest residence, with a design of permanent settlement, stamps the party with the national character."

It has already been pointed out that the American courts are much more disposed than those of Great Britain to place the doctrine of national character upon the broad basis of domicil.

§ 393. **Id. Cases in which Long Residence was held insufficient to change Domicil. Sieur Garengeau's Case; White v. Brown.** — It may be well now to consider a few of the cases in which time has been either relied upon or rejected as determining the question of intention. Allusion has already been made to the case of Sieur Garengeau, reported by Denizart,[1] in which it was decided that residence of sixty-four years was not sufficient to show the requisite intention, in the absence of "any act declarative of his will;" his presence being in the performance of the duties of an office from which he was removable.

White *v.* Brown[2] was the case of one who having his domicil of origin in Pennsylvania was, by reason of his adherence to the British king in our Revolutionary struggle, forced to leave his native State in 1776. He went to England, and remained there (with the exception of two or three years spent in visiting the United States and in journeys to the Continent for health and amusement) forty-eight years, — until his death. There were declarations and acts tending both ways; and Grier, J., left the question of his domicil to the jury, charging them, *inter alia:* "Did he go to England with the intention of making it his home? If not, did he at any time while there change his intention, so that the *ani-*

[1] *Verb.* Dom. no. 33. See *supra*, § 311. [2] 1 Wall. Jr. C. Ct. 217.

mus manendi concurred with the act of inhabitancy so as to constitute a change of domicil? The leading fact that he spent the greater part of his life in England and died there, raises a violent presumption that his intention corresponded with his acts. But as I have before said, in questions of succession, even forty-eight years spent in a foreign country may possibly be accounted for, and the inference drawn from length of time rebutted." The jury having found in favor of his American domicil, upon a motion for a new trial, the court, expressing satisfaction with their finding, refused to set it aside.

§ 394. **Id. id. In re Capdevielle; Jopp v. Wood.** — *In re* Capdevielle[1] was the case of a Frenchman who had resided and engaged in business in England for twenty-nine years. But this was considered by a majority of the Court of Exchequer to be overborne by other evidence, principally declarations, which showed *animus revertendi.*

In Jopp *v.* Wood,[2] a domiciled Scotchman went to India, and, engaging in private business, remained there twenty-five years, with the exception of one year which he spent in Scotland. He purchased land in India, as a necessary incident to his business, and also a dwelling-house in Calcutta, and described himself in a will and in other instruments as "of Calcutta." But this evidence was not allowed to weigh against his retention and improvement of landed estate in Scotland, and his frequent and continued declarations (principally in his correspondence with persons in Scotland) of his intention to return to that country; and his domicil of origin was held by Lord Romilly, M. R., and by Knight-Bruce and Turner, L. JJ., on appeal, not to have been changed, — considerable weight being given to the fact that his domicil of origin was Scotch. In this case, Turner, L. J., incidentally expressed his opinion that seven years' residence in India would have been too short to have operated to change the domicil in the absence of any other evidence of intention to change it. It has been suggested, however, that this case stands upon peculiar grounds, in view of the well-known custom of Eng-

[1] 2 Hurl. & Colt. 985. [2] 4 De G. J. & S. 616.

lishmen and Scotchmen, who go to India for the express purpose of making money, and returning as soon as possible.[3]

§ 395. **Id. id. Hodgson v. De Beauchesne; Capdevielle v. Capdevielle.** — Perhaps in no case has the effect of time been more thoroughly discussed than in Hodgson *v.* De Beauchesne,[1] decided by the Privy Council; and that case has come to be looked upon as a leading one upon the subject. Hodgson, a colonel in the East India service, whose domicil of origin was English, having married a French wife and being on furlough, in deference to the wishes of his wife went to Paris, where he took lodgings and continued to reside twenty-three years, — until his death. Upon the death of his wife he purchased a burial-place in France, and had inscribed upon it "Famille Hodgson," and there was some evidence that he expressed an intention to be buried there. There was also other evidence, of, however, no very strong character, tending to show permanent residence in France. During his residence in France he was appointed a major-general in her Majesty's service, limited to India, and subsequently promoted to a lieutenant-generalship. His property, with the exception of his household furniture, was all in England, where he kept his accounts and from time to time invested his savings. He made several wills in English form, and was married to his second wife in the chapel of the British ambassador, when he declared his domicil to be English. He never applied to the French Government for authorization to become domiciled in France, and expressed great indignation at being called upon to serve in the National Guard. Under these circumstances, it was held that he did not acquire domicil in France. It was admitted that great weight is to be attributed to length of residence, and that length of residence *per se* raises a presumption of intention; but it was held that the circumstances of this case were sufficient to rebut such presumption, great weight being attached to General Hodgson's military *status*, which was here looked upon as an evidence of *animus non manendi* rather than as a bar to the acquisition of domicil in a foreign country.

[3] Malins, V. C., in Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441.

[1] 12 Moore P. C. C. 285. For remarks of Dr. Lushington, see *supra*, § 389.

In Capdevielle *v.* Capdevielle,[2] Malins, V. C., held, in the case of one who was French by origin, that twenty years' residence in England, engaging in trade, purchase of real estate, building of a dwelling-house at an expense of £5,000, and burial of his wife and child there, were insufficient to show intention of permanent residence, it appearing, from his declarations mainly, that his views were uncertain and his mind vacillating.

§ 396. **Id. id. Gillis v. Gillis; West's Case; Munro v. Munro.** —In Gillis *v.* Gillis,[1] in the Irish Court of Probate and Matrimonial Causes, Warren, J., while admitting that long residence is calculated to create a strong impression in favor of the acquisition of a new domicil, and sufficient *prima facie* to show such acquisition, held, in the case of one whose domicil of origin was Irish, that residence abroad for health, which was "consistent with the hope of a change which would enable him to return and reside in Ireland," was not sufficient to work a change of domicil, even though it continued nineteen years in France, and, during the last twelve years, in a purchased house in that country. In this case the person whose domicil was in question had, before anticipation of suit, executed four wills, in which he described himself as domiciled in Ireland; and the court held that this, in connection with his own testimony that health was the motive for his residence abroad, rebutted the presumption flowing from long residence in France and the purchase of a house at Pau.

In West's case,[2] Sir C. Cresswell held residence by an Englishman for fourteen years in France, after a previous residence out of England for eleven years, insufficient evidence to show that the testator had renounced his domicil of origin and acquired a French domicil; there being opposed to length of residence other facts and declarations showing *animus revertendi.*

In Munro *v.* Munro,[3] Lord Cottenham, while considering residence of seven years by a Scotchman in England as im-

[2] 21 L. T. (N. S.) 660.
[1] Ir. R. 8 Eq. 597.
[2] In Goods of West, 6 Jur. (N. S.) 831.
[3] 7 Cl. & Fin. 842.

portant evidence of intention to reside there permanently, held it to be overborne by other proofs in the case; the principal of which were his ownership of an entailed estate in Scotland, his repeated declarations in his correspondence of his intention to return, his preparations for his return by giving directions for the fitting up of his family residence, accompanied by the shipment of large quantities of furniture, and his actual return after the time to which the inquiry concerning his domicil was directed. Lord Brougham concurred.

§ 397. **Id. Cases in which Length of Residence was held sufficient to change Domicil: Stanley v. Bernes; Anderson v. Laneuville; Attorney-General v. Kent; Brunel v. Brunel; Hood's Estate.** — On the other hand, in the following cases the change of domicil was held to have taken place. In Stanley *v.* Bernes,[1] Sir John Nicholl looked upon fifty-six years' residence of an Englishman in Portugal, coupled with marriage and naturalization, as strong evidence of his intention to renounce his domicil of origin and acquire a domicil in the latter country.

In Anderson *v.* Laneuville,[2] the Privy Council, Dr. Lushington delivering the opinion, held with respect to one whose domicil of origin was Irish, but who had resided in England for forty-two years, "the domicil of origin was lost, and an English domicil acquired by long residence in England."

In Attorney-General *v.* Kent,[3] the Court of Exchequer held domiciled in England a Portuguese who had resided in England thirty-nine years, during the first fifteen of which he was engaged in trade; and this conclusion was reached in spite of his declaration in his will that he had always intended returning to his own country, the declaration being obviously made for the purpose of avoiding legacy duty, liability to which was the question involved in the case. The court, in reaching its conclusion, seems to have relied mainly, if not entirely, upon the fact of long-continued and unexplained residence.

In Brunel *v.* Brunel,[4] the domicil of a Frenchman who had resided thirty-five years in England (during thirty-two years

[1] 3 Hagg. Eccl. 373.
[2] 9 Moore P. C. C. 325; s. c. 2 Spinks, 41.
[3] 1 Hurl. & Colt. 12.
[4] L. R. 12 Eq. Cas. 298.

of which he was engaged in business there), had married an English wife, had purchased a family grave in an English cemetery, and had taken various long leases of real estate in London, was held to be English in spite of his declaration that he might return to France, and his refusal to become a naturalized British subject or to give up his citizenship in Paris. The grounds of his decision were not fully stated by Bacon, V. C., but it is apparent that length of residence was one of the main determining facts.

In Hood's Estate,[5] the testator, whose domicil of origin was Pennsylvanian, had resided and engaged in trade in Cuba for upwards of thirty years, occasionally visiting this country for business and pleasure. Being originally a Protestant, he professed the Roman Catholic religion, and obtained letters of naturalization from the Spanish Government. He purchased several sugar plantations in Cuba, and owned other property there; although, on the other hand, he owned property, real and personal, and was interested in a mercantile house in this country, and had expressed a desire to be buried here. Under these circumstances the Supreme Court of Pennsylvania held his domicil to be in Cuba, giving considerable weight to his long residence on that island.

§ 397 *a*. **Id. id. Williamson v. Parisien; Doucet v. Geoghegan; Haldane v. Eckford; Allardice v. Onslow; Lyall v. Paton.** — In Williamson *v.* Parisien,[1] the plaintiff, Scotch by birth, came to New York during the Revolutionary War, and there, in 1780, married an American wife. In 1784 he deserted her and went to the West Indies, where he remained, with the exception of a visit to New York in 1792, until 1813, during which year he again returned and began proceedings in divorce. Upon these facts, Kent, Ch., held that a presumption of change of domicil arose, which it was for the plaintiff to rebut, the facts concerning his residence being in his possession; and the bill was dismissed for want of jurisdiction. Plaintiff's New York domicil prior to his departure in 1784 was assumed.

In Doucet *v.* Geoghegan,[2] the testator, a Frenchman by

[5] 21 Pa. St. 106. [1] 1 Johns. Ch. 389. [2] L. R. 9 Ch. D. 441.

birth and a Catholic, resided and engaged in business in England twenty-seven years, married successively two English Protestant women, and had his children brought up in the Protestant religion. On the other hand, were his refusal to be naturalized, his frequent returns to France, and his declaration of his intention to finally return to and reside in that country as soon as he had made a fortune. Malins, V. C., held his domicil to be English, and was affirmed by Jessell, M. R., and James and Brett, L. JJ.; great stress being laid on the fact of long residence as evidence of intention to reside permanently.

In Haldane *v.* Eckford,[3] residence "for a great number of years" (twenty-five) was, *inter alia*, relied upon by James, V. C., for holding one whose domicil of origin was Scotch, domiciled in Jersey; and in Allardice *v.* Onslow,[4] Kindersley, V. C., held one whose domicil of origin was also Scotch, domiciled in India, upon the fact of twenty years' residence in the latter country as a coffee-planter, and his description of himself in his will as so resident. In Lyall *v.* Paton,[5] Kindersley, V. C., again held to the same effect under almost precisely similar circumstances.

§ 398. **Id. id. Ennis v. Smith; King v. Foxwell; Bremer v. Freeman.** — Ennis *v.* Smith[1] has already been referred to. It was there held by the Supreme Court of the United States that the domicil of Kosciusko was, at the time of his death in 1817, French. The facts of the life of the Polish patriot do not appear to have been very fully before the court; but of the proofs which were before it, particular weight appears to have been attached to the fact of residence of seventeen or eighteen years in France, which the court considered sufficient to rebut the presumption of continuance of domicil of origin, and to create the contrary presumption of *animus manendi*, to the extent, at least, of casting the burden of proof upon the person alleging that the residence was for a temporary purpose.

Similar to the doctrine of Ennis *v.* Smith was that of Jessell, M. R., in King *v.* Foxwell,[2] in which the testator, an

[3] L. R. 8 Eq. Cas. 631.
[4] 10 Jur. (N. S.) 352.
[5] 25 L. J. Ch. 746.
[1] 14 How. 400.
[2] L. R. 3 Ch. D. 518.

Englishman, emigrated to the State of New York and there resided fifteen years, engaging in business as a shoemaker, and becoming a naturalized citizen of the United States. He was held to have acquired a domicil in New York, the Master of the Rolls saying: "You must therefore show permanent residence in a new country. Neither of these is a simple fact; for I take it that all these questions of *status* involve a good deal more than can be seen by the eye. Residence is not eating, drinking, and sleeping at a particular house; all these things may be done for years, while a person is travelling. On the other hand, a person may have a residence, and yet not visit it for a number of years; that may be his only residence; he may have no other home. It is, therefore, difficult to say what residence is; but that is what the law requires. Again, what is the meaning of permanent residence? That is a question which cannot be decided by mere length of time; the answer to it must involve the consideration of the intention of the person. That being the state of the law, did this shoemaker intend to reside permanently in the United States? There can be no question as to residence; he had a shop and house in Syracuse for fifteen years, and during those years he had no other place of abode. Then did he reside there permanently, or was it the intention on his part to reside for a limited period only? If you show that a man resides in one place for a length of time, the inference is that he intends to reside there permanently, unless there is something to rebut it; and here, therefore, the testator having lived in the United States for fifteen years, must be taken to have resided there permanently, unless some evidence is produced to the contrary."

In Bremer *v.* Freeman,[8] the testatrix, an English woman by birth, resided in Paris for fifteen years without any business or occupation and without quitting it, taking apartments on leases and furnishing them herself, and making occasional declarations that "she would never return to England, and that she wished to be buried near her sister in the cemetery of Père La Chaise." Her domicil was held by the Privy Council to be French, notwithstanding the fact that she had

[8] 10 Moore P. C. C. 306.

never obtained authorization from the French Government to fix her domicil in France.

§ 399. **Id. id. Cockrell v. Cockrell; Attorney-General v. Fitzgerald; Weston v. Weston; Shelton v. Tiffin; Easterly v. Goodwin; Hawley's Case.** — Cockrell *v.* Cockrell[1] was the case of an English officer in the navy upon half pay, who went to India and engaged in a very lucrative business. He married there, had children born, and continued there in business for ten years until his death, receiving half pay and applying from time to time for fresh leaves of absence. Kindersley, V. C., held him to be domiciled in India, laying great stress upon the fact of his long residence, remarking: "The fact of his residing there for ten years is a very strong indication of his intention to establish his home and his domicil in that place." In Attorney-General *v.* Fitzgerald,[2] the same Vice-Chancellor considered residence for nine years in a leased house in England sufficient evidence of a change of domicil, by one whose domicil of origin was Irish, but who had resided for ten years in India. The facts of this case are, however, but meagrely reported.

In Weston *v.* Weston,[3] W., whose domicil of origin does not appear, but who had resided sixteen years in New York, and who there owned land, the ownership of which he retained up to the time of his death, departed from that State, leaving behind him his wife, and went to Ohio, where he resided ten years and died. His wife continued to reside in New York up to the time of his death. Under these circumstances the Supreme Court of New York held him domiciled, at the time of his death, in Ohio; Spencer, J., remarking: "His long residence in Ohio, separated from his wife, and the absence of all proof that he intended to return to this State, are decisive circumstances to show that there was a change of domicil, and he must be regarded as an inhabitant of the State of Ohio." In Shelton *v.* Tiffin,[4] the Supreme Court of the United States considered residence of two years, coupled with the purchase and cultivation of a plantation, as raising a strong presumption of change of domicil from one State to another.

[1] 2 Jur. (N. S.) 727.
[2] 3 Drew. 610.
[3] 14 Johns. 428.
[4] 6 How. 163.

In Easterly *v.* Goodwin,[5] where E. went to California in 1850 on business, and resided there at intervals until 1858, the Supreme Court of Connecticut, speaking through Park, J., said: "No doubt the length of time the plaintiff remained in California, and his exercise of the elective franchise there, were important facts upon the question of citizenship, and unless controlled by evidence of a superior character, would have been sufficient to warrant the court in finding that he was a citizen of that State."

In Hawley's case,[6] a person of Irish birth came to this country when he was thirteen years of age, and remained here until he was twenty-three, when he returned to Ireland to see his father, who was ill, and remained there, following his calling as a mechanic, for seven years, when he returned to this country and attempted to be naturalized. Daly, First Judge, who in this and other cases put the "residence" required by the naturalization laws upon the ground of domicil, held that he had lost his "residence" in this country, although at the time of leaving he had expressed his intention to return, and had previous to leaving made a formal declaration of intention to become a citizen.

§ 400. **Id. Result of the Decisions.**— And so cases might be multiplied indefinitely; but enough have been cited to show that the real *ratio* of the decisions is that long-continued residence, although not conclusive, creates a strong presumption of intention to reside permanently, and shifts the burden of proof upon him who alleges otherwise; which burden may, however, be discharged by proof of superior facts showing *animus revertendi*.

[5] 35 Conn. 279.

[6] 1 Daly, 531.

CHAPTER XXII.

CRITERIA OF DOMICIL (*continued*), — RESIDENCE OF WIFE AND FAMILY.

§ 401. **A Man is presumed to be domiciled where his Wife and Family reside.** — In the case of a married man one of the most usual and cogent *indicia* of his domicil is the dwelling-place of his wife and family. A late English judge,[1] in attempting to translate and apply to the conditions of our own times the definition of the Code, — "ubi quis larem ac fortunarum suarum constituit," — finds in the wife the modern equivalent of the Roman "lares." Certainly, apart from any rule or presumption of law, nothing so serves to fix the location of the home of a married man as the habitual presence of those to whom he is united by the closest ties of blood and affection. The wife and family are usually placed at home, and it is to that point that the husband and father when absent usually intends to return. From such place "he is not about to depart unless something calls him away; when he has left it, he appears to have wandered abroad, and when he has returned to it he has ceased wandering." The law supposes, unless the contrary be shown, that husband and wife live together.[2] Even though separated — for how long soever a time — the presumption is that the husband and father does not intend to abandon his wife and family, but intends to return to them after the temporary causes which require his absence are at an end. And this presumption is so strong that it requires the most cogent proof to remove it.[3] It is therefore held in

[1] Wood, V. C. (afterwards Lord Hatherley), in Forbes *v.* Forbes, Kay, 341.

[2] Prieto *v.* Duncan, 22 Ill. 26.

[3] Jennison *v.* Hapgood, 10 Pick. 77. In that case Wilde, J., said: "There is certainly no direct evidence of the testator's intention to abandon his domicil in this State, and we think the contrary may be reasonably presumed. The principal ground of this presumption is the important fact that he did not remove his family. The presumption is, that he did not intend to abandon them; and this presumption is so strong that it requires most cogent proof to remove it."

numerous cases that a married man is generally to be deemed domiciled at the place where his wife and family dwell.[4]

§ 402. Id. — The residence of the wife is at least *prima facie* evidence of the domicil of the husband,[1] and in the absence of any proof to the contrary is to be deemed conclusive.[2] Of course, it must be understood that this residence must itself have the character of permanency;[3] for the mere transient presence of a wife and family in a place proves nothing. As was recently said in a Kansas case,[4] "The residence of a man who has a family which he maintains and which has an established home is *prima facie* with that family. Wherever he locates that family in anything like a fixed and permanent residence, it is presumptively his chosen place

[4] Ommanney *v.* Bingham, Robertson, Pers. Suc. Appendix, p. 468; Platt *v.* Attorney-General, L. R. 3 App. Cas. 336; Hoskins *v.* Matthews, 8 De G. M. & G. 13; Forbes *v.* Forbes, Kay, 341; Aitchison *v.* Dixon, L. R. 10 Eq. Cas. 589; Burnham *v.* Rangeley, 1 Wood. & M. 7; Catlin *v.* Gladding, 4 Mas. 308; Hylton *v.* Brown, 1 Wash. C. Ct. 298; Cooper *v.* Galbraith, 3 id. 546; United States *v.* Thorpe, 2 Bond, 340; Knox *v.* Waldoborough, 3 Greenl. 455; Greene *v.* Windham, 13 Me. 225; Brewer *v.* Linnæus, 36 id. 428; Topsham *v.* Lewiston, 74 id. 236; Shattuck *v.* Maynard, 3 N. H. 123; Rumney *v.* Camptown, 10 id. 567; Anderson *v.* Anderson, 42 Vt. 350; Williams *v.* Whiting, 11 Mass. 424; Jennison *v.* Hapgood, 10 Pick. 77; Greene *v.* Greene, 11 id. 410; Bangs *v.* Brewster, 111 Mass. 382; Grant *v.* Dalliber, 11 Conn. 234; Fiske *v.* Chicago, &c. R. R. 53 Barb. 472; Ames *v.* Duryea, 6 Lans. 155; Lee *v.* Stanley, 9 How. Pr. 272; Chaine *v.* Wilson, 1 Bosw. 673; Sherwood *v.* Judd, 3 Bradf. 267; Roberti and Wife *v.* Methodist Book Concern, 1 Daly, 3; Matter of Scott, id. 534; Matter of Bye, 2 id. 525; Cadwallader *v.* Howell & Moore, 3 Harr. (N. J.) 138; Brundred *v.* Del Hoyo, Spencer (N. J.) 328; Dauphin County *v.* Banks, 1 Pears. 40; Burch *v.* Taylor, 1 Phila. 224; Plumer *v.* Brandon, 5 Ired. Eq. 190; Colburn *v.* Holland, 14 Rich. Eq. 176; Cunningham *v.* Maund, 2 Ga. 171; Gilmer *v.* Gilmer, 32 id. 685; Daniel *v.* Sullivan, 46 id. 277; Smith *v.* Croom, 7 Fla. 81; Riggs *v.* Andrews, 8 Ala. 628; Yonkey *v.* State, 27 Ind. 236; Prieto *v.* Duncan, 22 Ill. 26; Penley *v.* Waterhouse, 1 Iowa, 498; State *v.* Groome, 10 id. 308; Nugent *v.* Bates, 51 id. 77; Keith *v.* Stetter, 25 Kans. 100; Williams *v.* Henderson, 18 La. R. 557; Hill *v.* Spangenburg, 4 La. An. 553; Brown *v.* Boulden, 18 Tex. 431; Blucher *v.* Milsted, 31 id. 621. Pothier, Intr. aux Cout. d'Orléans, no. 20; Mascardus, De Probat. concl. 535, no. 2; Voet, ad Pand. l. 5, t. 1, no. 97; Burgundus, Ad Consuet. Fland. Tract. 2, no. 34; Henry, For. Law, pp. 192, 198; Story, Confl. of Law, § 46; Wharton, Confl. of L. § 67. See also Tabbs *v.* Bendelack, 4 Esp. 108, and Whithorne *v.* Thomas, 7 M. & G. 1.

[1] Catlin *v.* Gladding, *supra*; Brewer *v.* Linnæus, *supra*; Topsham *v.* Lewiston, *supra*; and generally the authorities cited *supra*.

[2] Brewer *v.* Linnæus, *supra*.

[3] Forbes *v.* Forbes, *supra*; Grant *v.* Dalliber, *supra*; Daniel *v.* Sullivan *supra*; Nugent *v.* Bates, *supra*; Keith *v.* Stetter, *supra*; Pearce *v.* State, 1 Sneed (Tenn.), 63.

[4] Keith *v.* Stetter, *supra*.

of residence. Wherever he may go for business or pleasure, he resides at home, and home is where the family dwell."

When a man's wife and family reside in one place and he does business in another, returning to them at intervals, it is clear that he is domiciled where they dwell, and not where he does business.[5] But even when he has been absent from them for a long time, the presumption that he intends to return to them and dwell with them applies with great force.[6]

§ 403. **Id. Bangs v. Brewster and Anderson v. Anderson.** — The effect of the presence of the wife at a particular place in fixing the domicil of her husband there, has been in several cases of municipal domicil carried to great lengths, — to the extent, indeed, not only of holding her presence to be strong evidence that he is domiciled there, but of dispensing with the *factum* usually demanded for a change of his domicil, that is, the transfer of the bodily presence of the person himself. In Bangs *v.* Brewster,[1] the husband, being a mariner, left the town of A., in which he was domiciled, and went to sea with his wife, intending upon his return to make his home in the town of B. In pursuance of this intent, before his voyage was completed, he sent his wife to the town of B., where she remained, and whither he followed her six months afterwards. Upon these facts the Supreme Court of Massachusetts held that the husband was domiciled in B. from the time of the arrival of his wife there; Morton, J., saying: "By sending his wife to Orleans with the intent to make it his home, he thereby changed his domicil. The fact of removal and the intent concurred. Although he was not personally present, he established his home there from the time of his wife's arrival." In Anderson *v.* Anderson,[2] the facts were, that a *non compos*,

[5] Cooper *v.* Galbraith, *supra;* United States *v.* Thorpe, *supra;* Shattuck *v.* Maynard, *supra;* Williams *v.* Whiting, *supra;* Greene *v.* Greene, *supra;* Fiske *v.* Chicago, &c. R. R., *supra;* Chaine *v.* Wilson, *supra;* Roberti and Wife *v.* Methodist Book Concern, *supra;* Brundred *v.* Del Hoyo, *supra;* Dauphin County *v.* Banks, *supra;* Colburn *v.* Holland, *supra;* Cunningham *v.* Maund, *supra;* Daniel *v.* Sullivan, *supra;* Yonkey *v.* State, *supra;* Williams *v.* Henderson, *supra;* Hill *v.* Spangenburg, *supra;* Blucher *v.* Milsted, *supra;* Story, Confl. of L. § 46; Wharton, Confl. of L. § 67.

[6] See, *e. g.*, Brundred *v.* Del Hoyo, *supra.*

[1] 111 Mass. 382.

[2] 42 Vt. 350. In this case the guardian was also the father-in-law of the *non compos*, and his daughter moved to

whose domicil prior to losing his mind was in W., was placed by his guardian in an asylum in B. Subsequently his wife, with the assent of the guardian, removed to M., continuing to reside there until the death of her husband in the asylum. Upon these facts the Supreme Court of Vermont held that the *non compos* was at the time of his death domiciled in M.

While the circumstances of these cases are somewhat anomalous, the doctrine held appears to be in conflict with the general tenor of the authorities, may well be doubted, and probably will never be extended to cases of national and *quasi*-national domicil.[3]

§ 404. **But a Wife cannot control the Domicil of her Husband.** — But the presumption is one of fact, and not of law.[1] "The wife's domicil may be governed by that of the husband, but the reverse is not true."[2] The wife cannot be allowed to control the domicil of her husband. Thus in a New York case,[3] B., a native of Holland, came to America and remained nine years, when he returned to Holland and married there, and there his wife and two children ever afterwards resided. Some time after his marriage he again came to this country, and engaged in the American merchant marine for fifteen years, during the last six of which he sailed exclusively in vessels belonging to the port of New York. He visited his wife and family twice, furnished money for their support, and constantly endeavored to induce his wife to remove to America, which she declined to do. Eight years prior to the

his home in Montpelier in order to avoid paying rent. The fact that the domicil of the guardian was in Montpelier does not appear to have had any weight with the court in deciding that of the *non compos* to be there. The sole ground appears to have been the residence of his wife.

[3] Indeed, the contrary has been held in several cases of *quasi*-national domicil; namely, Penfield *v.* Chesapeake, &c. R. R. Co., 29 Fed. R. 494; Casey's Case, 1 Ashm. 126. In the former case the plaintiff, a resident of St. Louis, Mo., formed the intention of changing his residence to Brooklyn, N.Y., in pursuance of which, in August, 1883, he sent his wife and children to Brooklyn. Upon arriving there his wife leased a house in which she and her children thereafter lived. The plaintiff himself did not come to Brooklyn until January, 1884. It was held that he was not a resident of New York prior to Nov. 30, 1883, that being the date inquired about; the question being one of limitation. Casey's case was almost identical. See *supra*, § 126.

[1] Pearce *v.* State, 1 Sneed (Tenn.), 63; and see authorities cited *infra*, § 405, note 1.

[2] McDaniel *v.* King, 5 Cush. 469.

[3] Matter of Bye, 2 Daly, 525. For fuller statement of facts and opinion of the court, see *supra*, § 305, note 3.

question being raised, he declared in legal form his intention to become a citizen of the United States. Upon application for naturalization he was held to be domiciled in New York. Daly, J., in a learned opinion, in which the subject of domicil is considered at some length, said: "Another circumstance, and generally a controlling one, is that he is a married man whose residence is naturally at the place and in the country where his wife and family dwell. But this is not conclusive in all cases, for it is not in the power of a man's wife or family to control his free right to fix his residence and place of permanent abode in any part of the world to which his interests or his inclination may lead him. It is the wife's duty to follow the fortunes of the husband; to go 'whither he goeth,' and abide in that place where it is most convenient for him to enjoy her society, and where he is able and willing to make provision for her support and that of her children." Porterfield *v.* Augusta[4] serves as a further illustration. In that case the husband, a shipmaster, was domiciled in Brooklyn, New York. During his absence at sea his wife went to Augusta, Maine, taking with her her children, and there remained until summoned to meet him in Brooklyn on his return from his voyage. It was held that the husband did not thereby become domiciled in Augusta.

§ 405. **The Presumption that a Man is domiciled where his Wife and Family reside is not conclusive.** — However cogent may be the fact of the wife dwelling at a place as proof that he is domiciled there, it is by no means conclusive. The domicil of a married man is not necessarily with his wife and family.[1] "The effect of the residence of the wife being after

[4] 67 Me. 556.

[1] Warrender *v.* Warrender, 2 Cl. & F. 488; Forbes *v.* Forbes, Kay, 341; Douglas *v.* Douglas, L. R. 12 Eq. C. 617; Burnham *v.* Rangeley, 1 Wood. & M. 7; Blair *v.* Western Female Seminary, 1 Bond, 578; Penfield *v.* Chesapeake, &c. R. R. Co., 29 Fed. R. 494; Richmond *v.* Vassalborough, 5 Greenl. 396; Greene *v.* Windham, 13 Me. 225; Parsons *v.* Bangor, 61 id. 457; Cambridge *v.* Charlestown, 13 Mass. 501; McDaniel *v.* King, 5 Cush. 469; Weston *v.* Weston, 14 Johns. 428; Williamson *v.* Parisien, 1 Johns. Ch. 389; Matter of Bye, 2 Daly, 525; McPherson *v.* Housel, 13 N. J. Eq. 35; Casey's Case, 1 Ashm. 126; Reed *v.* Ketch, 1 Phila. 105; Bradley *v.* Lowery, Speer's Eq. 1; Gilmer *v.* Gilmer, 32 Ga. 685; Smith *v.* Croom, 7 Fla. 81; Prieto *v.* Duncan, 22 Ill. 26; Wells *v.* People, 44 id. 40; Scholes *v.* Murray Iron Works Co., 44 Iowa, 190; Nugent *v.* Bates, 51 id. 77; Exchange Bank *v.* Cooper, 40 Mo. 169; Pearce *v.* State, 1 Sneed (Tenn.), 63; Hairston *v.* Hairston, 27 Miss. 704; Sanderson *v.* Ral-

all but evidence of intention may be rebutted by evidence of a stronger character."[2] If it clearly appears that the husband has deserted his wife or the wife her husband, or if they have separated and are living apart under a mutual understanding or agreement, of course the residence of the wife is not determinative of the domicil of the husband. So, too, where a man goes to a new place intending to settle there and to prepare a home for his family, leaving the latter behind at the old place of abode (to follow him at such time as he shall be prepared to receive them), it has been held in numerous cases that he may gain a domicil in the new place even before their arrival,[3] — in many cases, moreover, although it appears that he intends returning to bring them to the new place of abode.

§ 406. **Residence of Children, Grandchildren, and other Relatives.** — In Stevenson *v.* Masson,[1] the testator, whose domicil of origin was Canadian, retired from business there, sold his house and burial-place, and went to France for the purpose of

ston, 20 La. An. 312; Russell *v.* Randolph, 11 Tex. 460; Lacey *v.* Clements, 36 id. 661; Story, Confl. of L. § 46; Dicey, Dom. p. 125. In Pearce *v.* The State, Totten, J., thus states the doctrine: "It is not true that the residence of a married man's family is necessarily to be deemed his domicil. For besides the supposed case of a separation there may be a temporary residence only for the family or for transient purposes at a place which is not his permanent residence and home. It is true that the residence of a married man's family is in general to be deemed his domicil, because they usually reside at his permanent home; the place to which whenever he is absent for business or pleasure, he has the intention to return. The residence of the family is a fact from which the domicil may be presumed; and this is a presumption of fact and not of law, as was erroneously stated by the judge. The presumption may be removed by proof to the effect that the true domicil is at a different place from that of the family residence."

[2] Wood, V. C., in Forbes *v.* Forbes, Kay, 341. He said: "The effect of the residence of the wife being after all but evidence of intention may be rebutted by evidence of a stronger character. If, as in Sir George Warrender's case, the husband were living apart from the wife, — if, perhaps, some particular state of health required the wife to reside in a warmer climate not agreeable to her husband, or the like, so that he was obliged to visit his wife away from home, — he might still be domiciled at a residence of his own apart from her."

[3] Burnham *v.* Rangeley, *supra;* Blair *v.* Western Female Seminary, *supra;* Parsons *v.* Bangor, 61 Me. 457; Cambridge *v.* Charlestown, 13 Mass. 501; Reed *v.* Ketch, 1 Phila. 105; Wells *v.* People, 44 Ill. 40; Swaney *v.* Hutchins, 13 Neb. 266; Johnson *v.* Turner, 29 Ark. 280; Republic *v.* Young, Dallam, 464; Russell *v.* Randolph, 11 Tex. 460; Lacey *v.* Clements, 36 id. 661. See, *contra*, State *v.* Hallett, 8 Ala. 159; Talmadge's Adm'r *v.* Talmadge, 66 id. 199, and Brown *v.* Boulden, 18 Tex. 431; and see *supra*, § 177, note 2.

[1] L. R. 17 Eq. Cas. 78.

educating his children. Subsequently, his wife having died, he went to England, and purchased a leasehold house in London, in which he continued to reside until his death. His daughter married an Englishman and settled in London. Testator apprenticed his son to a London merchant, and agreed to purchase for him a share in said merchant's business. While residing in France and in England he made several visits to Canada, and there made a will in Canadian form, in which he described himself as of Montreal, and even, during one of his visits there, declared his intention to return permanently to Canada. Vice-Chancellor Bacon held his domicil to be English, and in so doing relied strongly upon the settlement of testator's children in England. He said: "He takes a house there; he settles his children there. The marriage of his daughter and the apprenticeship of his son, in the first instance, and the subsequent buying of a partnership for him, are as serious events in the course of a man's life as can well be considered with reference to his domicil."

In Haldane *v.* Eckford,[2] James, V. C., laid great stress upon the presence of the testator's grandchildren, to whom he was greatly attached, with him in Jersey, where he had resided for a number of years, and where he desired one of them to reside permanently, as evidence of the testator's own intention of permanent residence there.

In Hodgson *v.* De Beauchesne,[3] Dr. Lushington, speaking for the Privy Council, in the case of an English officer residing with his wife and child in France, considered the strong attachment of the deceased to his relatives and friends in England, evidenced by his frequent visits to them, as a proof of his intention to retain his English domicil of origin.

§ 407. **National Character and Religion of Wife, Form of Marriage Ceremony, etc.** — The national character of the wife, the performance of the marriage ceremony in accordance with the rites of her religion and the laws of her country, together with residence of husband and wife in that country, have been relied upon as some evidence of the domicil of the husband in some cases. In Drevon *v.* Drevon,[1] a Frenchman went

[2] L. R. 8 Eq. Cas. 631.
[3] 12 Moore P. C. C. 285.
[1] 34 L. J. Ch. 129.

to England and there married an English woman according to English rites. Their children, although educated in France, were baptized according to English forms. Kindersley, V. C., held his domicil to be English, mainly upon other evidence; remarking, however, upon this subject: "I do not mean to say that that at all constitutes an Englishman, but it is a circumstance to be taken in connection with other circumstances. Now, of course it would be said, and very fairly said, that if an English woman marries a Frenchman, or if an Englishman marries a French woman, that it does not change his domicil; nor does any one fact change his domicil *per se*, but it is one of a number of facts which must not be left out of consideration altogether."

In Doucet *v.* Geoghegan,[2] the facts of which have already been cited at large, a French Catholic married in England successively two Protestant women, and allowed his children to be brought up in the Protestant religion; and in holding his domicil to be English, James, L. J., said: "I wish to add that I am disposed to think that when the testator entered the English Church and declared that he knew of no impediment to his lawful marriage, he must be taken to have made a solemn declaration that he had an English domicil." In Stanley *v.* Bernes,[3] Sir John Nicholl seems to have attached some importance to the fact that the testator, an Irishman by birth, married in Portugal (where he resided before and for many years after his marriage) a Portuguese lady, according to the Roman Catholic forms, and in order to do so, embraced the Roman Catholic religion.

§ 408. **Relation of Place of Marriage and Residence of Wife to quasi-National Domicil.** — The principle that marriage in a country to a woman domiciled there is evidence as to the domicil of the husband, applies to some extent also to cases of *quasi*-national domicil. Thus, in Cockrell *v.* Cockrell,[1] where an officer of the Royal Navy, on half pay, went to India and engaged in mercantile business, married there, had children, and continued in business there for ten years, until his

[2] L. R. 9 Ch. D. 441.

[3] 3 Hagg. Eccl. 373.

[1] 2 Jur. (N. S.) 727. See also Burgundus, Ad Consuet. Fland. Tract. 2, no. 34.

death, Kindersley, V. C., in holding his domicil to be Anglo-Indian, considered his marriage in India, and his continued residence there, strong evidence that he was domiciled there.

But the weight to be given to this species of evidence depends upon the other facts in the case, and may, according to circumstances, be of much or little importance.[2]

§ 409. **Betrothal as Evidence of Domicil.** — We have already seen that betrothal does not, *ipso facto*, change the domicil of the woman betrothed. But if a woman domiciled in one country comes into another, and after residing there for some time becomes betrothed to one whose domicil is in the latter country, shall not this fact have weight in determining her *animus manendi* or *animus revertendi?* This question was somewhat considered in the Scotch case of Arnott *v.* Groom.[1] The facts were that a lady, whose domicil of origin was Anglo-Indian, and who, after the death of her father in India, was brought at a tender age by her mother to Scotland, and was kept there till the expiration of the age of pupillarity (after which time, according to the Scotch law, she might change her domicil at pleasure), subsequently went with her mother

[2] See (*e. g.*) Munro *v.* Munro, 7 Cl. & Fin. 842; Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Wallace's Case, Robertson, Pers. Suc. p. 201. In the latter case the Lord Ordinary (Cringletie) said: "The Lord Ordinary regrets that the parties have thought it necessary to detail the circumstances of Capt. Wallace's marriage with Miss Oliver in England, and the terms of his contract of marriage with that lady, as, to the Lord Ordinary, they appear to have not the least bearing on the cause. A man, by marrying in England an English woman, does not thereby become domiciled there; nor is it necessary that he should reside a day there for that purpose; far less does he make his children domiciled there by the mere act of marrying in England. The lady must reside in a certain parish for a specified time, to enable her to be married in the church of it, and an oath must be made that such is her residence and domicil; otherwise she requires a special license to be married. Of this the Lord Ordinary can inform the parties, for he knows it personally; he married a lady born under English law, and who had resided all her life in and near London; he had to make oath that she had lived in the parish of Acton for a certain time, and he entered into a contract of marriage in the English form; but that had no more effect in fixing his domicil than the winds of heaven. Captain Wallace, having been a Scotchman in the army, did not acquire any domicil by marrying there, but returned to Edinburgh, where he sold out of the army, lived here for some time, and died here. There can therefore be no doubt that he died here domiciled as a Scotchman."

[1] 9 D. (Sc. Sess. Cas. 2d ser. 1846) 142. See *supra*, § 211.

to the Continent, where she resided for a year, and afterwards to England, where she continued for five years till her death, with the exception of a visit of a few months to Scotland; never having, after first leaving Scotland, any permanent place of residence, but living in furnished lodgings and hotels and sometimes with friends, both when on the Continent and in England. Upon these facts it was held that she had acquired a Scotch domicil before leaving Scotland for the first time, and that she retained this domicil at her death, notwithstanding the fact "that she was under an engagement to be married to a gentleman in England a considerable time before she died." The Lord Ordinary (Lord Wood) said: "Nor does a matrimonial engagement indicate intention to change, for it is a mere intention to change *de futuro*, and that has no effect till it is actually accomplished; and it is fallacious to imagine that an engagement to marry an English merchant at some future time is equivalent to an engagement to settle permanently in England." The court (Lord Jeffrey dissenting) adhered; Lord Fullerton remarking: "Had there been anything to connect the removal to a residence in England with the intended marriage,—if, for instance, the fact had been that the marriage was to be immediately contracted with a gentleman fixed in England, and that the lady had gone to England in contemplation of the marriage,—there might have been some ground for connecting her removal to England with the prospect of permanently remaining there. But here the two circumstances have no connection with each other. It is not said that any time was fixed for the marriage; the parties are said to have been engaged, but an engagement is a term of indefinite continuance; and the statement is quite consistent with the supposition that she was to return and resume *de facto* her domicil in Scotland." Lord Jeffrey, on the other hand, thought continued presence in England and engagement to marry there sufficient to constitute domicil.

CHAPTER XXIII.

CRITERIA OF DOMICIL (*continued*),—RESIDENCE AND ENGAGING IN BUSINESS, MODE OF LIVING, OWNERSHIP OF REAL ESTATE, ETC.

§ 410. **Residence and Engaging in Business.** — Residence in a place and engaging in business there have generally been considered as evidence of *animus manendi*,[1] the value depending much, however, upon the length of the residence and the nature of the business. If the latter be of an apparently permanent character, or — as in Cockrell *v.* Cockrell[2] — of great lucrativeness, the presumption is strong. But in many cases engaging in business for even a long time has been held insufficient to show a change of domicil. Thus, in Jopp *v.* Wood,[3] it was held that a Scotchman engaging in business in India for twenty-five years did not thereby change his domicil; and in *Re* Capdevielle[4] it was similarly held with regard to a Frenchman who had resided and engaged in business in England for twenty-nine years; and for further illustrations the learned reader is referred to the cases already mentioned under the discussion of the effect of length of residence.[5]

With regard, however, to the case of Jopp *v.* Wood, it may be said that in order to raise a presumption of *animus manendi*

[1] Cockrell *v.* Cockrell, 2 Jur. (N. S.) 727; Allardice *v.* Onslow, 33 L. J. Ch. 434; Drevon *v.* Drevon, 34 L. J. Ch. 129; King *v.* Foxwell, L. R. 3 Ch. D. 518; Moore *v.* Darell and Budd, 4 Hagg. Eccl. 346; Shelton *v.* Tiffin, 6 How. 163; Mitchell *v.* United States, 21 Wall. 350; Kennedy *v.* Ryal, 67 N. Y. 379; Matter of Hawley, 1 Daly, 531; Hood's Estate, 21 Pa. St. 106; Smith *v.* Croom, 7 Fla. 81; White *v.* White, 3 Head, 404. Engaging in business is a particularly valuable test in the case of an unmarried man. Story, Confl. of L. § 47; Rue High, Appellant, 2 Doug. (Mich.) 515; State *v.* Frest, 4 Harr. (Del.) 538. In Bremer *v.* Freeman, 10 Moore P. C. C. 306, the fact of long residence "without any business or occupation" was relied upon by the Privy Council as a significant fact tending to show acquisition of domicil.

[2] *Supra.*

[3] 34 Beav. 88; affirmed 4 De G. J. & S. 616.

[4] 2 Hurl. & Colt. 985.

[5] *Supra*, § 393 *et seq.*

in India, or indeed in any other Eastern country, somewhat different and more cogent facts are necessary than would be required to found a similar presumption with respect to any European or American State; the general presumption of fact founded upon the usual practice in such cases, being that an European residing in an Eastern country expects ultimately to return to his native country.

§ 411. **Id. Opinions of the Civilians.** — The Civilians seem to have been inclined to look upon the fact of engaging in trade as an indication of temporary residence rather than otherwise.[1] This was doubtless mainly because formerly residence for such purpose was usually but temporary, — permanent settlement in trade being an exception and very far from the rule. But with the development of international law, and the greater protection given to the rights and property of foreign subjects by the governments of almost all countries in the most modern times, the disposition of men to settle permanently for purposes of commerce in foreign countries has increased, and has occasioned a modification of these views.

§ 412. **Id. Municipal Domicil.** — In cases of municipal domicil, residence and engaging in business is ordinarily accepted as strong proof of *animus manendi*.

§ 413. **Place of Residence preferred to Place of Business.** — As between residence and place of business, the former is preferred as the domicil,[1] particularly as we have seen in the case of a married man who resides with his family or returns to them at intervals.[2] In determining the effect of residence, the sleeping-place is an important element.[3] If a person have more than one dwelling-house, the one in which he sleeps or passes his nights will govern.[4] If he works and

[1] Voet, Ad Pand. l. 5, t. 1, no. 98; Donellus, De Jure Civili, l. 17, c. 12, p. 978 *b*, no. 50; Zangerus, De Except. pt. 2, c. 1, nos. 31–54; Van Leeuwen, Cens. Forens. l. 3, c. 12, no. 5; Henry, For. Law, pp. 193, 194, 197, 201 *et seq.*; Mascardus, De Probat. concl. 535, no. 23.

[1] Dinning *v.* Bell, 6 Low. Can. 178; Cooper *v.* Galbraith, 3 Wash. C. Ct. 546; Greene *v.* Greene, 11 Pick. 410; Abington *v.* North Bridgewater, 23 Pick. 170; Hill *v.* Spangenberg, 4 La. An. 553; McKowen *v.* McGuire, 15 id. 637.

[2] *Supra*, § 402.

[3] Abington *v.* North Bridgewater, *supra*; Commonwealth *v.* Kelleher, 115 Mass. 103; and Cooper *v.* Galbraith, 3 Wash. C. Ct. 546.

[4] Abington *v.* North Bridgewater, *supra*; and see Commonwealth *v.* Kelleher, *supra*.

boards in one town and sleeps in another, the latter is to be preferred.[5]

§ 414. **Mode of Living.** — In Moorhouse *v.* Lord,[1] Lord Chelmsford says: "In a question of change of domicil, the attention must not be too closely confined to the nature and character of the residence by which the new domicil is supposed to have been acquired." "Domum autem accipimus, sive in propria domo, quis habitet, sive in conducta, sive gratis, sive hospitio receptus sit;"[2] and what is here said of *domus* might with equal propriety be said of *domicilium*. "Le vieux garçon a son principal établissement dans sa petite chambre solitaire, comme le plus opulent père de famille dans son hôtel, comme le négociant dans sa maison de commerce."[3] "The apparent or avowed intention of constant residence, not the manner of it, constitutes the domicil," says President Rush in an oft-quoted passage in Guier *v.* O'Daniel;[4] and he goes even so far as to say, "On a question of domicil the mode of living is not material, whether on rent, at lodgings, or in the house of a friend." But this last expression is not strictly accurate; for while the mode of living is often of little importance, yet it is not always so, inasmuch as it sometimes, indeed often, serves to throw light upon the intention of the person whose domicil is in question. Thus it is much easier to presume a change of domicil, when a person goes to a new place and there buys land and erects for himself and occupies a dwelling-house, particularly if at great expense in proportion to his means, or if he buys a dwelling-house and fits it up to suit the wants and tastes of his family, than if the same person — the other circumstances remaining the same — took lodgings in a hotel or boarding-house.

§ 415. **Residence in Hotels or Temporary Lodgings.** — There is nothing in the latter mode of living *per se* inconsistent with an intention to remain permanently,[1] but it is not as strongly indicative of such intention as the former.[2] This subject was

[5] Commonwealth *v.* Kelleher, *supra*.

[1] 10 H. L. Cas. 272, 286.

[2] Inst. 4, tit. 4, § 8.

[3] Demolombe, Cours de Code Napoléon, t. 1, no. 344.

[4] 1 Binn. 349, note.

[1] Castor *v.* Mitchell, 4 Wash. C. Ct. 191; Burch *v.* Taylor, 1 Phila. 224; Hart *v.* Horn, 4 Kans. 232.

[2] Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Dupuy *v.* Wurtz, 53 N. Y. 556.

discussed to some extent in Aikman *v.* Aikman,[3] where Lord Wensleydale used this language: "I do not say that in order to obtain a domicil in a country a man must necessarily have a house of his own and reside in it. Circumstances may be so strong as to show a fixed purpose of abandoning his own country and making his home in another, and to show also the accomplishment of that object, though he lives in inns or temporary lodgings; but such cases are rare." Lord Cranworth said, in the same case: "I will not say in point of law that a person may not acquire a domicil by residence at a hotel; but it can rarely happen, as a matter of fact, that such residence is intended to be of a permanent character." But in view of the fact that at the present time so many persons permanently resident live in hotels and boarding-houses, the ground taken by their lordships seems too strong, particularly as applied to *quasi*-national and municipal domicil; and it might be better to say that such mode of living is in itself but equivocal.

§ 416. **Residence in Leased Houses or Lodgings.** — The same may be said of leases of dwelling-houses or lodgings for short terms; no evidence of *animus manendi* can ordinarily be drawn from such source,[1] although the opposite inference does not necessarily result.[2] However, the leasing may be attended by such circumstances as would show great uncer-

[3] *Supra.* The Lord Chancellor, Campbell, said in the same case: "A new domicil might certainly be acquired by a person who might be living in lodgings or in a hotel."

[1] Whicker *v.* Hume, 7 H. L. Cas. 124; Moorhouse *v.* Lord, 10 id. 272; Pitt *v.* Pitt, 4 Macq. H. L. Cas. 627; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Somerville *v.* Somerville, 5 Ves. Jr. 750; Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617; Isham *v.* Gibbons, 1 Bradf. 69.

[2] Munro *v.* Munro, 7 Cl. & Fin. 842; Bremer *v.* Freeman, 10 Moore P. C. C. 306; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441. In Munro *v.* Munro, the report does not state the length of the lease, but the house was in fact occupied about five years. Lord Cottenham said: "That he took a lease of the house in Gloucester Place, and formed an establishment there, has been much relied upon, and in the absence of better evidence of intention as to his future domicil, might be important as affording evidence of such intention, but cannot be of any avail when from the correspondence the best means are afforded of ascertaining what his real intentions were. The having a house and an establishment in London is perfectly consistent with a domicil in Scotland." In Bremer *v.* Freeman, the testatrix took apartments upon short leases, renewed repeatedly for a period of fifteen years, and furnished them herself. So in Doucet *v.* Geoghegan, the testator refused to take a lease for a longer term than three or four years; but this he renewed repeatedly.

tainty of purpose, and to that extent aid in defeating the proof otherwise tending to show a change of domicil. Thus, in Whicker *v.* Hume,[3] the fact that the testator, a domiciled Englishman, upon going to Paris, took a lease of a house there for three, six, or nine years, with the option of quitting it at any time upon six months' notice, was relied upon to some extent in the House of Lords as indicating temporary *animus manendi.* On the other hand, taking a lease for a long term, building a large and expensive house and residing in it with wife and family, were relied upon in Platt *v.* Attorney-General[4] as strong evidence of permanent residence. In De Bonneval *v.* De Bonneval,[5] Sir Herbert Jenner considered the leasing of a dwelling-house in England for eight years strong evidence of *animus manendi* if followed up by continued residence, but held it to be overbalanced in that case by other circumstances.

§ 417. **Ownership of Dwelling-house or other Real Estate.** — Papinian[1] says: "Sola domus possessio, quæ in aliena civitate comparatur, domicilium non facit." The mere fact of ownership of a house or other real estate at a particular place is of little importance; but the manner of, and circumstances attending, the acquiring or disposing of it, the treatment of it, and in some cases the failure to get rid of it, serve to some extent to let us into the mind of the owner. When the question is as to the abandonment of the domicil of origin, the ownership and retention of real estate there — particularly a dwelling-house, however acquired — is of some value,[2]

[3] *Supra.* Similar was Moorhouse *v.* Lord, where a lease was taken for three years, determinable at three months' notice.

[4] L. R. 3 App. Cas. 336.

[5] 1 Curteis, 856. So also Drevon *v.* Drevon, 34 L. J. Ch. 129; Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733; and Stevenson *v.* Masson, L. R. 17 Eq. Cas. 78. In Drevon *v.* Drevon, Kindersley, V. C., says respecting the fact of taking a long lease for business purposes: "That is a circumstance certainly not necessarily importing that he ceased to be a Frenchman and became an Englishman, but at the same time it is a circumstance to be taken into consideration."

[1] Dig. 50, t. 1, l. 17, § 13.

[2] Munro *v.* Munro, 7 Cl. & Fin. 842; Moorhouse *v.* Lord, 10 H. L. Cas. 272; Somerville *v.* Somerville, 5 Ves. Jr. 750; Curling *v.* Thornton, 2 Add. 6; Forbes *v.* Forbes, Kay, 341; Butler *v.* Hopper, 1 Wash. C. Ct. 499; Dupuy *v.* Wurtz, 53 N. Y. 556; Barton *v.* Irasburgh, 33 Vt. 159; Heirs of Holliman *v.* Peebles, 1 Tex. 673. In Butler *v.* Hopper, Washington, J., said: "But will it be contended that if a man removes from one

inasmuch as it adds another tie by which the person is bound to the home of his youth, and to that extent strengthens the presumption of non-abandonment. And the value of such evidence is increased when the person whose domicil is in question improves such property, or renders it more fit for occupancy, or adds to it by the purchase of neighboring real estate.[3] The same rule applies to a certain extent also to acquired domicil. Thus, in Maxwell *v.* McClure,[4] the retention of a dwelling-house at the place of acquired domicil was considered a strong circumstance against reverter. The importance of ownership of real estate as evidence of *animus revertendi* is, however, affected so much by special circumstances, often slight, that it is impossible to draw any lines or lay down any definite rule with regard to it. It has been frequently held to be destroyed by proof of purchase of real estate, accompanied by residence, elsewhere.[5]

§ 418. **Sale of Dwelling-house or other Real Estate.** — The sale of real estate, particularly a dwelling-house, at the place of domicil, whether acquired or of origin, accompanied by removal elsewhere, is some evidence of *animus non revertendi*,[1] but is not conclusive.[2]

§ 419. **Purchase of Dwelling-house or other Real Estate.** — The purchase of real estate at a new place, accompanied by

State to another, with an intention of making the latter his permanent abode, he is not domiciliated there, because he has left behind him an estate which he cultivates, sometimes visits (no matter how often, or how long in each year), and whilst there, keeps house, and is even elected into the Legislature of the State he has left? These circumstances are of prodigious weight, I admit, to repel the idea of a change of domicil; but strong as they are, evidence might have been given to the jury, sufficient to warrant them in the conclusion they have drawn"

[3] Munro *v.* Munro, *supra;* Somerville *v.* Somerville, *supra;* Moorhouse *v.* Lord, *supra;* Forbes *v.* Forbes, *supra.*

[4] 6 Jur. (N. S.) 407. See also Isham *v.* Gibbons, 1 Bradf. 69.

[5] Anderson *v.* Laneuville, 9 Moore P. C. C. 325, s. c. 2 Spinks, 41; Platt *v.* Attorney-General, L. R. 3 App. Cas. 336; Hairston *v.* Hairston, 27 Miss. 704; Succession of Franklin, 7 La. An. 395; New Orleans *v.* Shepherd, 10 id. 268. See also Weston *v.* Weston, 14 Johns. 428, where the retention of the ownership of real estate and the continuance of the wife at the place of former domicil were held to be overborne by other evidence. Similar cases are numerous.

[1] Udny *v.* Udny, L. R. 1 Sch. App. 441; Stevenson *v.* Masson, L. R. 17 Eq. Cas. 78; Hamilton *v.* Dallas, L. R. 1 Ch. D. 257; King *v.* Foxwell, 3 id. 518; Hindman's Appeal, 85 Pa. St. 466.

[2] Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673; White *v.* White, 3 Head, 404.

residence there; has been accepted in many cases as evidence of *animus manendi*,[1] particularly where the person whose domicil is in question has expended a considerable sum of money in improving such estate and in fitting it up in a manner suitable for the permanent residence of himself and family.[2] But such evidence is not decisive, if from the other facts in the case *animus revertendi* appears.[3] Thus, for instance, in Gillis *v.* Gillis, a person was held to have retained his Irish domicil of origin notwithstanding that he had resided in France for nineteen years, during the last twelve of which he had lived in a house purchased by him there; it sufficiently appearing to the court that his residence in France was for the benefit of his health, for the improvement of which, to the extent of permitting him to return to and remain in his native country, he had constantly hoped. The same may be said in case the purchase is for the purpose of *future* and not *present* residence,[4] or for a mere investment and not for a home.[5] The purchase of real estate at the place of domicil of origin will naturally strengthen the presumption of *animus revertendi*,[6] but will not necessarily render it conclusive.[7]

§ 420. **Location of Personal Property.** — The location of one's personal property is a circumstance to which in modern law usually little weight is attached in determining his domicil. In the Roman Law probably it was different; the location of the "fortunarum summa" being one of the chief tests of domicil laid down in the definition contained in the Code;

[1] Anderson *v.* Laneuville, 9 Moore P. C. C. 325, s. c. 2 Spinks, 41; Platt *v.* Attorney-General, L. R. 3 App. Cas. 336; Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733; Hoskins *v.* Matthews, 8 De G. M. & G. 13; Drevon *v.* Drevon, 34 L. J. Ch. 129; Shelton *v.* Tiffin, 6 How. 163; Williamson *v.* Parisien, 1 Johns. Ch. 389; Hegeman *v.* Fox, 31 Barb. 475; Hood's Estate, 21 Pa. St. 106; New Orleans *v.* Shepherd, 10 La. An. 268. Some of the English cases above are cases of long leases, but of course the efficacy of such evidence cannot depend upon whether the interest in lands is freehold or less than freehold.

[2] See generally the cases cited in the last note, but particularly Platt *v.* Attorney-General.

[3] Gillis *v.* Gillis, Ir. R. 8 Eq. 597; and see Crookenden *v.* Fuller, 1 Swab. & Tr. 441.

[4] Attorney-General *v.* Dunn, 6 Mees. & W. 511; State *v.* Hallett, 8 Ala. 159; and see *supra*, § 177.

[5] Hayes *v.* Hayes, 74 Ill. 312.

[6] Moorhouse *v.* Lord, 10 H. L. Cas. 272; Succession of Franklin, 7 La. An. 395.

[7] Drevon *v.* Drevon, *supra*.

and doubtless the phrase was largely applicable to movable possessions. The conditions of life were then very different, and the means of personal locomotion and of transferring personal property from place to place and from country to country are now so much improved as to render the same principle no longer applicable. Still, like other circumstances in the life of a man, the collection of his personal property at a particular point may give some indication of his intention with respect to his residence there.

CHAPTER XXIV.

CRITERIA OF DOMICIL (*continued*), — DOUBLE RESIDENCE.

§ 421. **Difficult to determine the Domicil of a Person who resides in different Places.** — It is sometimes very difficult to locate the domicil of a person who has domestic establishments in different places, or who resides in different places at different seasons of the year. We have seen that among the Roman jurists there was a difference of opinion concerning the case of one who appeared to be equally established in several places; some holding that he had several domicils, while Labeo held that he had none, and Celsus that the location of his domicil depended upon his choice and intention.[1] The remarkable case of two contemporary residences put by Lord Alvanley at the conclusion of his judgment in Somerville *v.* Somerville[2] has already been referred to and discussed. In the same case he lays it down that "a merchant whose business lies in the metropolis shall be considered as having his domicil there, and not at his country residence;" while "a nobleman or gentleman having a mansion-house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country." But this distinction, which was doubtless founded upon the usual habits and customs of persons belonging to the two classes mentioned, is far from being applicable to all cases. And, indeed, no definite rule upon the subject has been or perhaps can be laid down.

§ 422. **National Domicil.** — Where the question is one of national domicil no doubt the principle that the former place of abode must be completely abandoned as a place of abode before a new domicil can be acquired,[1] should be applied with great strictness; and hence, where a person has domestic

[1] *Supra*, § 88. [2] 5 Ves. Jr. 750. [1] *Supra*, 151 *et seq.*

establishments in several countries, he must be presumed to retain his former domicil as long as he retains a domestic establishment in the country where such domicil was. This, however, probably would not exclude the possibility of change in case an establishment is kept up in such country merely for his accommodation upon occasional visits.[2] But upon this point there was, as we have already seen, considerable diversity of opinion among the law lords who took part in the decision of Maxwell *v.* McClure, Lord Wensleydale expressing himself as unable to conceive a case in which a change of domicil could occur so long as a residence was retained at the place of former domicil.

§ 423. **Municipal Domicil.** — The greatest difficulty in ascertaining which of two contemporaneous residences shall be considered the domicil arises in cases of municipal domicil. The presumption of continuance of an ascertained or admitted domicil, of course, applies in cases of this class,[1] although

[2] See Lord Campbell in Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; and Lords Campbell and Cranworth in Maxwell *v.* McClure, 6 Jur. (N. S.) 407; *supra*, § 160, notes 5 and 6.

[1] Gilman *v.* Gilman, 52 Me. 165. Davis, J., said: "A person may have two places of residence, for purposes of business or pleasure. But in regard to the succession of his property, as he must have a domicil somewhere, so he can have only one. It is not very uncommon for wealthy merchants to have two dwelling-houses, one in the city and one in the country, or in two different cities, residing in each a part of the year. In such cases, looking at the domestic establishment merely, it might be difficult to determine whether the domicil was in one place or the other. In the case of Somerville *v.* Somerville, it is stated as a general rule, 'that a merchant whose business is in the metropolis shall be considered as having his domicil there, and not at his country residence.' But no such rule can be admitted. The cases differ, and are distinguished by other facts so important that the domicil cannot always be held to be in the city. It is frequently the case that the only real home is in the country; so that while some such merchants talk of going into the country to spend the summer, others with equal propriety speak of going into the city to spend the winter. If any general rule can be applied to such cases, we think it is this: *that the domicil of origin, or the previous domicil, shall prevail.* This is in accordance with the general doctrine that the *forum originis* remains until a new one is acquired. And this would generally be in harmony with the other circumstances of each case. If the merchant was originally from the country, and he keeps up his household establishment there, his residence in the city will be likely to have the characteristics of a temporary abode; while if his original domicil was in the city, and he purchases or builds a country-house for a place of summer resort, he will not be likely to establish any permanent relations with the people or the institutions of the town in which he is located." See also Harvard College *v.* Gore, 5 Pick. 370.

not with the same force or to the same extent as in cases of national or even *quasi*-national domicil. And therefore, while the burden of showing a change of municipal domicil rests upon him who alleges it, it is discharged by showing slighter facts than, and without the necessity of proving abandonment to the same extent as, in the cases of national domicil.[2] Thus a person, under some circumstances, may change his domicil from one municipal district to another, although he has not abandoned the former as a place of abode, but still retains a household establishment there, and resorts thither to spend a large portion of his time.[3] But what circumstances shall control or what shall be the extent of the abandonment, if at all, of the one place, or establishment in the other, it is impossible to state in advance. Each case must be determined by its own circumstances, and that place must be adjudged to be the domicil which bears, most of all, the characteristics of "home."

§ 424. **May a Person having two Residences select his Place of Domicil?** — Into the determination of the question the choice and selection of the person often enter largely; but such choice and selection must usually be evidenced by acts, and will not be permitted to control a preponderance of evidence in favor of another place.[4] It is sometimes said that

[2] See *supra*, § 180.

[3] Cabot *v.* Boston, 12 Cush. 52; Thayer *v.* Boston, 124 Mass. 132. The same is true to a certain extent in cases of *quasi*-national domicil. New Orleans *v.* Shepherd, 10 La. An. 268. See also Succession of Franklin, 7 id. 395.

[4] Thayer *v.* Boston, *supra*. In that case (an action to recover back tax paid under protest) the subject was considered at some length. At the trial in the Supreme Court before Morton, J., "it appeared that in 1869 the plaintiff was an inhabitant of Boston, where, since his coming of age, he had lived with his family and paid taxes; that he there had a dwelling-house and an office for business, where his account-books and valuable papers were kept; that he complained of the increase of his taxes in the previous year, and informed the assessors that if they were again increased, he would pay no more taxes in Boston; that in the assessment of the following year his taxes were increased, and he accordingly gave notice to the assessors of Boston and to the assessors of Lancaster that he had removed his residence to the latter place, where he should be thereafter taxed; that the plaintiff was born in Lancaster, in 1808, and, at the time of giving the notice, owned the place formerly belonging to his father, where he was born; that upon this place in 1860 he had erected a new dwelling-house, and afterwards lived there a portion of each year with his family, going from his house in Boston early in June, and returning in October or November following; that, after giving the notices he continued to live there with his family as before, for a part of each year, voting and being taxed only in that town, taking part in town-meetings and

in cases of doubt the person may select either place as his domicil,[1] but this is true only in a qualified sense; and, more-

occasionally serving on town committees; that on May 1, 1876, he was, with his family, in actual occupation of his house in Boston; that at this time, and since 1865, when he retired from business, he had been engaged in no business except looking after his property; that he had, for some years before 1869, entertained the idea and intention, and declared the intention, of at some time removing his residence from Boston to Lancaster, but had not, before 1869, fixed a time in his mind. The plaintiff, on cross-examination, testified that Boston was, and had been, ever since he was married, the principal place of his social and domestic life; and that the greater part of his family expenditures had been there made; that he thought he did no act to change his residence in 1869, except to give the notices, and that he may have voted in Lancaster the following year; and that the mode of life and habits of himself and family in regard to living in Lancaster were very much the same after giving the notice as before."

In his charge to the jury, Morton, J., said: "In very many cases, certainly in the case of a very large majority of the people of this Commonwealth, there is no question about where a man's home is. Most of us have but one dwelling-house; most of us have our business, our family, connected solely with one town or city of the Commonwealth, and everybody recognizes at once that that is our home. But there are a great many cases where a man has one place, where he and his family reside, in one town, and he does business in another. For instance, the observation and experience of all of us teach us that the daily trains running to and from the city of Boston carry and return thousands of people who live in the adjoining towns, and yet who do their business in Boston. Having their place of business there, the centre of their business, their whole business there, does not make them inhabitants of Boston. They are still inhabitants of that town where they have their home; where they have established a permanent home for themselves, their wives, their children, their families; the town with which they are identified as being inhabitants, as exercising municipal duties, as holding municipal offices, as having their abiding-place; the place, in other words, where they have their home: I am compelled to come back to the same word, because neither in the English nor any other language do I know of a synonym or equivalent for the homely Saxon word 'home.' Suppose a third case. Suppose a man lives in one of the country towns adjoining Boston, and has a house in the city which he occupies during the winter months. Or reverse the supposition, and suppose that a man has a house in Boston, and has another house by the seaside, or in some country town, which he occupies during the summer months. Which is his home? Now, you come to a case where it is a little more difficult to decide. A man can have but one home; he cannot be an inhabitant of two places at the same time. But in the case which I am now supposing, where a man has two houses, it depends very largely indeed upon the question, What is the honest purpose and intention of that man himself? Which of the two places does he in good faith and honestly regard and recognize as the home of himself and his family,

[1] Burnham *v.* Rangeley, 1 Woodb. & M. 7; Lyman *v.* Fiske, 17 Pick. 231. The better doctrine, however, appears to be that when the rights of other persons are affected, they should have the privilege of treating either place as the domicil. This is expressly provided by the Louisiana Civil Code, art. 38 (Rev. Civil Code, art. 42). See Villere *v.* Butman, 23 La. An. 515.

over, it is applicable only to cases of doubt, strictly speaking. Said Shaw, C. J., in Lyman *v.* Fiske: "It is often a question

if he has one? And that question can be substantially decided by the question of the intention or purpose—in other words, the choice — of the man. Suppose a little closer case than either of these, which will come very close to the case at bar; suppose a man has two houses, one in a country town, as in Lancaster, and one in the city, which he occupies, perhaps, about an equal number of months and weeks during the year. Which of these is his home, and how are you to determine that question? As I have said, he can have but one home. And here, too, the answer will depend very largely upon the honest intention and purpose of the man. Of course, each case, as it comes before the jury, will have its peculiar circumstances. There will be something of greater or less weight to indicate what is his true and real home, such as, perhaps, paying taxes, acting in municipal offices, voting in the one town or the other, and in various ways identifying himself with the town, and recognizing it as his established, real, substantial, and permanent home. I cannot, in any more definite words, define what is meant by 'home.' You all understand it. It is not capable of definition, but you all understand what is meant by a man's home. It is not exactly equivalent to residence, but it is the place where he has established a home for himself and his family. Now, you will apply these general principles, which I have endeavored to illustrate by supposing a variety of cases, to this case; and you will bear in mind that the question is, whether or not the plaintiff was an inhabitant of Boston on May 1, 1876. It is admitted here that, prior to 1869, the plaintiff was, and had been for a number of years, an inhabitant of Boston, and, as contended by defendant, the burden is upon him to show that he has, either in 1869, or at some time since, prior to May 1, 1876, changed his home or domicil to Lancaster. It is very clear that the mere intention or purpose formed, or expressed and declared, to change his home is not enough. He must do something which actually works a change of home. The act of change, and the intention of change, must concur. What particular acts would be sufficient to constitute a change of home, I am not at liberty to state to you, or to express any opinion about, because I should be encroaching upon the duties and rights which the law confers upon you. Generally, where the question is whether a man has changed his home, it is easy to determine; because, ordinarily, a man has either to build or buy or hire a house for himself and his family in the new town to which he intends and proposes to remove; and that fact would ordinarily be so significant a fact of his intention, and where he moves into the house, that fact would be so significant of his actual change of his home, as would compel the mind to the conclusion that he had changed his domicil, and that he intended to do so. The plaintiff was under no such necessity, because he had two establishments at the time, one in Boston and one in Lancaster, both, according to the evidence, complete establishments, fit to move into at a moment's notice. But still, before he could effect a legal change of his domicil, he must have done something; and it is for you to inquire whether he has shown to you that he took steps the effect of which was, really and in fact, to change his domicil or his home to Lancaster. And, as I said before, in regard to one of the other cases which I supposed, what was his honest purpose and intention is of very great consequence in passing upon this question; because, if you are satisfied that a man has an honest intention and purpose to change his home from Boston to Lancaster, under the circumstances in which the plaintiff was placed, that intention would be very significant, as illustrating and giving character to even trifling acts that he might have

of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a

done in carrying out that intention, — trifling acts which he might have done to remove his domicil in pursuance of that intention. He was not, in this case, under the necessity of establishing a home there, in the sense of purchasing or building a house, because he had one; but has he shown to you that, after 1869, and prior to May 1, 1876, he did acts which fairly amounted to a change of his home from Boston to Lancaster, accompanied on his part with an honest purpose and intention to make Lancaster his home in the future? Now, if he did, then he established a home in Lancaster, according to his choice, and he has a right to maintain it there as long as he may see fit. In the first place, in determining this question, where was the plaintiff's residence, or domicil, or home, on May 1, 1876, the fact of his personal presence in Boston at that time is not conclusive. A man may have his home in one place, and yet may be personally present in Boston. So that the fact that he was personally present and living in his house in Boston, with his family, would not of itself be conclusive that Boston was at that time his residence. It is for you to take that fact into consideration, and to say what bearing it has upon the question where was his real, substantial, and permanent home. Whatever bearing you think it has upon that, you have a right to give it; but further than that, the fact is not of any consequence. So, in regard to the fact that the plaintiff has, during the last five or six years, spent a large part of the time, with his family, in Boston, during the winters and springs, that is not conclusive that he was an inhabitant of Boston; but, like the other fact to which I have referred, it is a fact which you are to consider, and inquire how far it fairly bears upon the question which you are to pass upon. The fact that any man changes his home or his domicil for the purpose of avoiding, or escaping, or lessening his taxes, is of no consequence whatever. If he does, with an honest intention and really and actually, change his home, the motive with which he does it is of no consequence. How far the fact in this case, if such a fact be proved to your satisfaction, that that was the purpose or motive of the plaintiff in making this change, bears upon the question whether he did honestly and fairly make the change, is a matter in regard to which I have no right to say anything. It is solely for your consideration. You are, therefore, to take all the evidence which has been put into this case, . . . and give it such weight as you think it ought to have on the issue upon which you are to pass. You are to take all the evidence and consider it, and say whether or not the plaintiff has satisfied you, that on May 1, 1876, he was not an inhabitant of Boston. If he has failed to satisfy you of that fact, then you should find a verdict for the defendant. But if, on the other hand, you are satisfied, by a fair preponderance of the evidence, that he was not an inhabitant of Boston on May 1, 1876, then it follows that Boston had no right to tax him, and you should return a verdict in his favor."

The jury having returned a verdict for the plaintiff, and the case having been reported for the determination of the full court, judgment was entered on the verdict. Colt, J., delivering the opinion of the court, said: "It is always a question of fact where the place of a man's domicil is. As to most persons it is determined at once by the decisive facts which show permanent and unchanging residence in only one place. As to such persons, the question of domicil — that is, the question where they are to be taxed, or where they have a right to vote — presents no difficulty. There can be no right of election to the tax-payer between two places, when one is already fixed by the actual facts which go to establish domicil. It is only when the facts which

slight circumstance may turn the balance. In such a case the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home, would be sufficient to turn the scale. But it is a

establish permanent residence and domicil are ambiguous and uncertain, in the absence of any settled abode, and when the real intention of the party cannot be ascertained, that the question becomes difficult. It may then require an examination into the motives of the man, his habits and character, his domestic, social, political, and business relations, for a series of years; and the answer will depend in the end upon the weight of evidence in favor of one of two or more places. It is evident that, with the increasing number of those who live each year in different places, the increased facilities for travel, and the great temptation to escape taxation by a change of domicil, cases of the latter description are becoming more common. . . . It is evident that the choice of the tax-payer, as between two places of residence, is an element to be considered in determining which is the real domicil; but a choice in favor of one place will not be permitted to control a preponderance of evidence in favor of another. The place of domicil, upon which so many important municipal obligations and privileges depend, is not left by the law to the choice of the citizen, except only as such choice may give character to existing relations and accompanying acts of residence which are not in conflict with it. As between different places, it may depend on a mass of evidence, which will generally include as one of its items the declared intention and choice of the party himself. The weight to be given to that intention, however honest, will depend largely upon the condition of all the evidence. If the evidence be equivocal and uncertain, then the choice may be sufficient to turn the scale; if the weight of it be one way, then an opposite intention or wish will be of little or no avail. Holmes *v.* Greene, 7 Gray, 299. The true rule was plainly recognized in Chenery *v.* Waltham, 8 Cush. 327. The judge was there asked by the plaintiff, who sought to recover back a tax paid to the defendant, to rule that if the true dividing line between two towns passed through an integral portion of the dwelling-house occupied by him and his family, then he had a right to elect in which town he would be assessed on his personal property and become a citizen. This was refused, and it was ruled that if the house was so divided by the line as to leave that portion of it in which the occupant mainly and substantially performed those acts and offices which characterized his home (such as sleeping, eating, sitting, and receiving visitors), in one town, then the occupant would be a citizen of that town, and no right of election would exist; and that if the house was so divided by the line as to render it impossible to determine in which town the occupant mainly and substantially performed the acts and offices before referred to, then the occupant would have a right of election, and his election would be binding on both towns. The rule thus laid down was declared by the full court to be sufficiently favorable to the plaintiff, on the question of his right to elect. In the law of domicil, it is settled that a person can have but one domicil at the same time for the same purpose; that domicil, once acquired, remains until a new one is acquired; and that a new one is acquired only by a clear and honest purpose to change, which is carried into actual execution. Applying these maxims to the facts, in all disputed cases, it is the duty of the court to submit each case to the jury with instructions adapted to its peculiar aspects." See also Weld *v.* Boston, 126 Mass. 166, where a similar election was made without avail.

question of fact for the jury, to be determined from all the circumstances of the case. So it was left in the case of Makepeace *v.* Lee, cited by the Chief Justice in 5 Pick. 378. The election of a man to pay taxes in one town rather than another may be a good motive and a justifiable reason for changing his habitancy; and if such election is followed up by corresponding acts, by which he ceases to be an inhabitant of the one, and becomes an inhabitant of the other, his object may be legally accomplished. But such an election to be taxed in one town rather than another is only one circumstance bearing upon the question of actual habitancy, and to be taken in connection with the other circumstances, to determine the principal fact. But the court are of opinion that the effect of the instruction of the court on the trial of this cause was to withdraw all the evidence from the consideration of the jury, except the election of the plaintiff to be taxed in Boston; that this direction was not correct, and that the question whether the plaintiff was an inhabitant of Waltham should have been left to the jury, upon all the facts and circumstances of the case."

§ 425. **Domicil of a Person whose Dwelling-house is on the Dividing Line of two Districts.** — Another aspect of double residence presents some difficulty, and has been treated very differently by different jurists; namely, when the dwelling-house of a person is upon the dividing line of two districts. According to the French authorities,[1] the principal entrance determines the domicil, little importance being attached to the question in which district the greater part of the house is found. The Massachusetts cases,[2] based upon the English cases of settle-

[1] D'Argentré, Consuet. Brit. art. 265; Merlin, Repertoire, *verb.* Dom. § 111; Toullier, Droit Civil Français, t. 1, no. 78; Demolombe, Cours de Code Napoléon, t. 1, no. 346; Duparc-Poullain, Principes de Droit, t. 2, p. 202.

[2] Abington *v.* North Bridgewater, 23 Pick. 170; Chenery *v.* Waltham, 8 Cush. 327; Thayer *v.* Boston, 124 Mass. 132. In Abington *v.* North Bridgewater, Shaw, C. J., thus remarked: "It depends, not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicil in one place, overbalance all the like proofs tending to establish it in another; such an inquiry, therefore, involves a comparison of proofs, and in making that comparison there are some facts, which the law deems decisive, unless controlled and counteracted by others still more stringent. The place of a man's dwelling-

ment and court leet, hold the person to be domiciled in that district in which he mainly and substantially performs the

house is first regarded, in contradistinction to any place of business, trade, or occupation. If he has more than one dwelling-house, that in which he sleeps or passes his nights, if it can be distinguished, will govern. And we think it settled by authority, that if the dwelling-house is partly in one place and partly in another, the occupant must be deemed to dwell in that town in which he habitually sleeps, if it can be ascertained. Lord Coke, in 2 Inst. 120, comments upon the statute of Marlbridge respecting courts leet, in which it says that none shall be bound to appear, *nisi in balivis ubi fuerunt conversantes;* which he translates, 'but in the bailiwicks, where they be dwelling.' His lordship's comment is this: 'If a man have a house within two leets, he shall be taken to be conversant where his bed is, for in that part of the house he is most conversant, and here conversant shall be taken to be most conversant.' This passage, at first blush, might seem to imply that the entire house was within two leets. But no man can be of two leets. 2 Doug. 538; 2 Hawk. P. C. c. 10, § 12. Indeed, the whole passage, taken together, obviously means, a house partly within one leet and partly within another; otherwise, the bed would be within the two leets, as well as the house. It is then an authority directly in point to show that if a man has a dwelling-house situated partly within one jurisdiction and partly in another, to one of which the occupant owes personal service as an inhabitant, he shall be deemed an inhabitant within that jurisdiction within the limits of which he usually sleeps. The same principle seems to have been recognized in other cases, mostly cases of settlement depending on domicil. Rex *v.* St. Olaves, 1 Str. 51; Colechurch *v.* Radcliffe, 1 Str. 60; Rex *v.* Brighton, 5 T. R. 188; Rex *v.* Ringwood, 1 Maule & Selw. 381. I am aware that the same difficulty may arise, as before suggested, which is, that the occupant may not always, or principally, sleep in one part of his house; or if he sleeps in one room habitually, the dividing line of the towns may pass through the room or even across his bed. This, however, is a question of fact depending upon the proofs. When such a case occurs, it may be attended by some other circumstance, decisive of the question. If the two principles stated are well established, and we think they are, they are, in our opinion, sufficient to determine the present case. It becomes, therefore, necessary to see what were the facts of this case, and the instructions in point of law upon which it was left to the jury. The plaintiffs contended that two monuments pointed out by them were true and genuine monuments of the Colony line, and if so, a straight line drawn from one to the other, would leave the house in North Bridgewater; and the jury were instructed, if they so found, to return a verdict for the plaintiffs. But the jury stated, on their return, that on this point they did not agree, and therefore that part of the instruction may be considered as out of the case. It is therefore to be taken, that in point of fact the line ran through the house, leaving a small part in Randolph and a large part in North Bridgewater. In reference to this, the jury were instructed that if that line would leave a habitable part of the house in Randolph, the verdict should be for the defendants; otherwise, for the plaintiffs. The jury were also directed to find, specially, whether the beds of the family in which they slept, and the chimney and fireplace, were or were not in North Bridgewater. The jury found a verdict for the plaintiffs, which in effect determined, in point of fact, that the line did run through the house, leaving a small part in Randolph; that the beds and fireplaces of the house were on the

acts and offices which characterize his home, such as eating, sleeping, sitting, and receiving visitors, but, above all, where

North Bridgewater side of the line, and that there was not a habitable part of the house in Randolph. What was the legal effect of this instruction to the jury? To understand it we must consider what was the issue. The burden of proof was upon the plaintiffs to prove that Hill had his settlement in North Bridgewater. But proving that he had a dwelling-house standing partly in North Bridgewater and partly in Randolph would leave it wholly doubtful whether he had his domicil in the one or the other, provided that the line passed the house in such a direction as that either would have been sufficient for the purpose of a habitation; because it would still be doubtful whether he dwelt upon one or the other side of that line. But if the line ran in such a direction as to leave so small a portion on one side, that it could not constitute a human habitation, then the position of the dwelling determined the domicil. In any other sense, we see not how the correctness of the instruction could be maintained. If the term, 'habitable part of the house,' was intended to mean a portion of the house capable of being used with the other part, for purposes of habitation, and the whole constituting together a place of habitation, then every part of the house capable of being used, would be a habitable part. The instruction was, that if a habitable part was in Randolph, the occupant did not acquire a domicil in North Bridgewater; it would be equally true in law, that if a habitable part was in North Bridgewater, he did not acquire a domicil in Randolph. If the term 'habitable,' then, were used in the restricted sense, capable of being used as a part, and not as the whole of a human habitation, the instruction would amount to this, that living ten years in a dwelling-house divided by an imaginary line into parts, both of which are useful and capable of being used as parts of a dwelling-house, the occupant would acquire no domicil. But this is utterly inconsistent with the principles of domicil. By leaving his domicil in Abington, and living in the house in question, Hill necessarily lost his domicil in Abington, and necessarily acquired one by living in that house; and this must be in either Randolph or Bridgewater, and not in both. It may be impossible from lapse of time, and want of evidence, to prove in which, and therefore the plaintiffs, whose case depends on proving affirmatively that it was in North Bridgewater, may *fail*; nevertheless it is equally true, in itself, that he did acquire a domicil in one, and could not acquire one in both of those towns. Suppose the proof were still more deficient; suppose it were proved beyond doubt, that Hill lived in a house, situated on a cleared lot of an acre, through which the town line were proved to run, but it were left uncertain in the proof, on which part of the lot the house was situated. It would be true that he lost his domicil in Abington, and acquired one in Randolph or North Bridgewater; but it being entirely uncertain which, the plaintiffs would fail of proving it in North Bridgewater, and therefore could not sustain their action. So if the line ran through a house in such a manner that either side might afford a habitation, then dwelling in that house would not of itself prove in which town he acquired his domicil, though he must have acquired it in one or the other. In this sense we understand the instruction to the jury, and in this sense we think it was strictly correct. If they should find that the line so ran through the house as to leave a part capable, of itself, of constituting a habitation in Randolph, then dwelling in that house, though partly in North Bridgewater, did not necessarily prove a domicil in North Bridgewater. Under this instruction the jury found a verdict for the plaintiffs, and we think it is evi-

he habitually sleeps, if that can be ascertained. A similar view has been taken in Maine.[3]

The Supreme Court of Pennsylvania,[4] in a recent case,

dent from this verdict that they understood the instruction as we understand it. The jury find that one corner of the house, to the extent of two feet and one inch, was in Randolph, but that no habitable part of the house was in Randolph; not, as we think, no part capable of being used with the rest of the house, for the purpose of habitation, but no part capable, of itself, of constituting a habitation; from which they draw the proper inference that the habitation and domicil, and consequently the settlement, was in North Bridgewater. And if we look at the fact, specially found by the jury, we are satisfied that they draw the right conclusion, and could come to no other. If the line had divided the house more equally, we think, on the authorities, that if it could be ascertained where the occupant habitually slept, this would be a preponderating circumstance, and, in the absence of other proof, decisive. Here it is found that all the beds, the chimney, and fireplace were within the North Bridgewater side of the line, and that only a small portion of the house, and that not a side but a corner, was within the Randolph side, and that so small as to be obviously incapable of constituting a habitation by itself. We think, therefore, that the instruction was right, and the verdict conformable to the evidence."

In Chenery *v.* Waltham, the plaintiff requested the trial judge to instruct the jury "that if the true dividing line between the two towns passed through an integral portion of the dwelling-house occupied by Phelps and his family, then he had a right to elect in which town he would be assessed on his personal property and become a citizen." This he refused to do, but did instruct them "that if the house was so divided by the line as to leave that portion of it in which the occupant mainly and substantially performed those acts and offices which characterized his home (such as sleeping, eating, sitting, and receiving visitors), in one town, then that the occupant would be a citizen of that town, and that no right of election would exist; and that if the house was so divided by the line as to render it impossible to determine in which town the occupant mainly and substantially performed the acts and offices before referred to, then the occupant would have a right of election in which town he would be a citizen; that his election would be binding on both towns; and that the jury, in passing on the question of fact, must take into consideration the uses of the different rooms in the house, and of the different parts of the several rooms." Upon verdict for the defendant the Supreme Court overruled the exception of the plaintiffs, saying: "The other ruling of the court was surely sufficiently favorable to the plaintiff. It might, perhaps, be difficult to maintain the entire accuracy of the ruling in regard to the right of a party to elect where he would be assessed, in the general and unqualified terms in which it is stated; but if there be any error it is in favor of the plaintiffs, and is one to which they cannot except."

[3] Judkins *v.* Reed, 48 Me. 386, — a tax case in which it was decided that, when the dividing line of two districts passes through the dwelling-house of a person, his residence will be held to be in that town in which the most necessary and indispensable part of his house is situated, especially if the outbuildings and other conveniences are in that town.

[4] Follweiler *v.* Lutz, 112 Pa. St. 107. This case was peculiar. The house, which was used as a tavern, lay upon the line of S. and L. counties; according to the testimony most favor-

adopted a rule apparently different from either of the foregoing; namely, that the domicil is in such a case to be determined by "the acts, declarations, and intentions" of the person, showing in which district he elects to fix and maintain his residence.

able to the defendants, only an inconsiderable strip (about five feet out of fifty-six) lying in the former. Otherwise the evidence did not show in which county the person whose domicil was in question, and his family, ate, slept, etc. It appeared, however, that he had obtained his tavern license from the court of S. County, and had repeatedly voted in said county. Upon these meagre facts the jury found in favor of residence in S. County; and the Supreme Court, in affirming the judgment of the court below, said: "The evidence shows that the line of separation between the two counties passes through the house occupied by the person who made the voluntary assignment. This fact created doubt as to the county in which he actually resided. Evidence was therefore admissible to show by his acts, declarations, and intentions, in which county he elected to fix and maintain his residence. The evidence given to establish it was sufficient to submit to the jury, and it was so done in a correct charge." Whatever may be said of the actual result reached in the case upon the meagre facts in evidence, it is safe to assume that it was so reached only because of the absence of *criteria* such as those mentioned in the Massachusetts cases. It would certainly be unsafe and unsound to allow a person, in opposition to the facts of his daily and domestic life, to select for himself a domicil in a county in which an inconsiderable and uninhabitable portion of his dwelling-house happened to lie. Compare this case with Ellsworth *v.* Gouldsboro, 55 Me. 94, where it was held that a person does not acquire a settlement in a town by voting and paying taxes there under an erroneous belief that his dwelling-house is within the limits of that town.

CHAPTER XXV.

CRITERIA OF DOMICIL (*continued*),— PLACE OF DEATH AND BURIAL.

§ 426. **Place of Death.** — The place of a man's death is of little, if any, practical importance in determining his domicil.[1] It certainly has no significance whatever in case any of the prominent facts of his *life* are known. Theoretically, no doubt, if nothing were known about him except the fact that he died in a particular place, he would be assumed to have been domiciled there, upon the principle that the place where a person is found is *prima facie* his domicil;[2] but it is scarcely possible to conceive of a judicial inquiry concerning domicil in which no other fact than the place of death is brought forward. The result of every such inquiry must almost necessarily be either entire failure to fix the domicil of the deceased, or the fixing of it by some of the facts of his life or of the lives of his parents.

It has indeed been said that the place of death is *prima facie* the domicil,[3] and the language of President Rush[4] has sometimes been quoted upon this subject. He said: "*A man is prima facie domiciled at the place where he is resident at the time of his death;* and it is incumbent on those who deny it, to repel this presumption of law, which may be done in several ways. It may be shown that the intestate was there as a traveller, or on some particular business, or on a visit, or for the sake of health; any of which circumstances will remove the presumption that he was domiciled at the place of his death." The learned judge might, however, have gone a step farther, and have said that such presumption would be

[1] Ommanney *v.* Bingham, Robertson, Pers. Suc. Appendix, p. 468; Johnstone *v.* Beattie, 10 Cl. & Fin. 42, 139, per Lord Campbell; Somerville *v.* Somerville, 5 Ves. Jr 750; Craigie *v.* Lewin, 3 Curteis, 435; Donaldson *v.* McClure, 20 D. (Sc. Sess. Cas. 2d ser. 1857) 307, 315, per McNeil, Lord Pres.; Harvard College *v.* Gore, 5 Pick. 370.

[2] See *supra*, § 375.

[3] Guier *v.* O'Daniel, 3 Binn. 349, note; Kellar *v.* Baird, 5 Heisk. 39; Laneuville *v.* Anderson, 2 Spinks, 41.

[4] Guier *v.* O'Daniel, *supra*.

removed by merely showing a domicil formerly existing somewhere else; the presumption of continuance applying and shifting the burden of proof upon those who allege a change.[5]

In Somerville *v.* Somerville,[6] Lord Alvanley, speaking particularly with reference to the ascertainment of domicil for purposes of succession in cases where the person has had two residences, observed: "There is not a single *dictum* from which it can be supposed that the place of the death, in such a case as that, shall make any difference. Many cases are

[5] See *supra*, §§ 115, 151. It may be added that the use by the learned judge of the phrase, "where he is resident," seems to indicate that he had in his mind the case in which something more is known of the deceased person than the mere fact of his death in a particular place.

[6] *Supra.* In Ommanney *v.* Bingham, *supra*, Lord Loughborough, in pronouncing judgment, said: "The first circumstance is, *that he died in Scotland, where some of his children were boarded.* This, however, of some of the children being boarded in Scotland, is not mentioned as the *ratio decidendi*, but is thrown in along with the circumstance of his death. On that circumstance, however, no stress can be laid, for nothing is more clear than that residence, purely temporary, has no effect whatever in the creation of a domicil. Precisely of this kind was the residence of Sir Charles Douglas, in Scotland, at the period of his death. He had been appointed to the command on a foreign station, and went down to Scotland to take leave of such of his children as happened to be there, with all the hurry which was the necessary consequence of a speedy and immediate return. When he set out for Scotland, he was actually appointed. He had, therefore, so very short a time to continue, that it is impossible to say or imagine that he had the remotest thought of settling or remaining in Scotland at the time when, unfortunately, his life was closed. The time he had to spend in Scotland, at that period, was limited; his stay was circumscribed; an immediate return was indispensably requisite; and, lastly, the object he had in view, in this journey to Scotland, was definable, and is defined. He was there, therefore, without idea or intention to remain; and, consequently, his last visit to Scotland, and unexpected death, can have no influence on the point of his domicil." In Donaldson *v.* McClure, Lord President McNeil remarked: Actual residence at a place at the time of death "is a fact to be taken into consideration in such cases, but is not of itself a very strong fact. It depends for its strength upon the circumstances that surround it. It may derive strength from the circumstances that surround it; but that is a strength which belongs to the circumstance more than to the mere fact that Laurel Mount was the place where she happened to die. In every case of double residence, when the party resides one period of the year at one place, and another period of the year at another place, the mere fact of dying at one of the places will not fix the domicil of the party to be there." In Laneuville *v.* Anderson, 2 Spinks, 41, Sir John Dodson said: "The place of death, it was said, is to be considered as decisive, or nearly decisive, on the point; but that, I think, has been ruled quite otherwise. *Prima facie* it certainly is; but it may be repelled, like any other circumstances. The presumption arising from the place of death is not very strong of itself. It is only in a case of doubtful domicil that that would have effect."

cited in Denizart[7] to show that the death can have no effect; and not one that that circumstance decides between two domicils.[8] The question in those cases was, which of the two domicils was to regulate the succession; and without any regard to the place where he died."

The writer may add, that so far as he is aware the place of death has been relied upon in no British or American case as in any degree contributing to determine the domicil.[9]

§ 427. **Place of Burial.** — The place of burial of a person is of no consequence in the ascertainment of his domicil,[1] unless it has been selected by himself; and then its value depends much upon circumstances. The mere desire or direction to be buried in a particular place has not been given much weight in cases in which the question has arisen.[2] Said Lewis, J., in a Pennsylvania case:[3] "His desire to be buried in his native

[7] *Verb.* Dom. nos. 16 and 17, and *passim*.

[8] Here using "domicil" really in the sense of "residence." See *supra*, § 94.

[9] Cochin, in the case of the Marquis de Saint-Pater, laid some stress upon the fact of the deceased person dying at the place of his origin, as evidence that his original domicil had never been changed, but only in connection with the fact that he had passed the last days of his life there (he had resided in Maine during the entire eighteen months preceding his death). He said: "Secondement, le Marquis de Saint-Pater est mort dans cette même province du Maine, après y avoir passé les derniers tems de sa vie. Si, dans l'intervalle, il y avoit des preuves d'un domicile fixé à Paris, la circonstance de l'habitation dans les derniers tems, et de la mort dans le domicile d'origine, suffiroit pour prouver un esprit de retour à ce domicile, et pour effacer les preuves contraires qui s'élèveroient dans les tems intermédiares. La nature éclateroit dans ses dernières démarches; et ses opérations sont si vives que la loi ne balanceroit pas un moment à en reconnoître toute l'autorité."

[1] The Dutch jurist De Witt, however, held, in Van Leeuwen's case (Hollandsche Consultatien, vol. v. p. 309; Henry, For. Law, p. 200 *et seq.*), that the burial at Utrecht of one whose domicil of origin was there, but who had resided ten years at Amsterdam for the purpose of trade, was evidence that he had retained his domicil of origin at the time of his death. Henry, in a note, remarks that the burial at Utrecht was "most probably by his direction, but this does not appear in the case."

[2] Platt *v.* Attorney-General, L. R. 3 App. Cas. 336; Attorney-General *v.* De Wahlstatt, 3 Hurl. & Colt. 374; Hood's Estate, 21 Pa. St. 106; and see *infra*, Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285, and Lord Campbell, in Johnstone *v.* Beattie, 10 Cl. & Fin. 42, 139.

[3] Hood's Estate, *supra*. Lord Campbell, in Johnstone *v.* Beattie (*supra*), said: "If, instead of remaining in Albion Street, Hyde Park, she had gone for her health to the island of Madeira, where her husband died, and had written letters stating that she should die there, and had given directions that she should be buried there, although she had died and been buried there, unquestionably her Scotch domicil never would have been superseded."

country, and the execution of that wish by his executor after his death in France, whither he had gone for medical aid, cannot change the state of the case as it actually existed in his lifetime. A residence is established by acts and intentions while the body and soul are united. When they are separated, the question of domicil is at an end. No disposition of the inanimate corpse can affect it. Graves and sepulchres are resting-places for the dead, not dwelling-houses for the living."

In Bremer *v.* Freeman,[4] the Privy Council considered the declarations of an English woman who had resided fifteen years in France, that "she would never return to England, and that she wished to be buried near her sister in the Cemetery Père la Chaise," as, among others, strong circumstances to show her acquisition of a French domicil. But what weight would have been given to her desire to be buried in France if it had not been coupled with the declaration of her intention never to return to England, or with the other circumstances relied upon as strong in the case, does not appear. In the very similar case of Attorney-General *v.* De Wahlstatt,[5] a contrary view was taken by the Court of Exchequer.

§ 428. **Purchase of Burial-place. Haldane v. Eckford.** —The purchase by a person of a burial-place for himself and family has, under some circumstances, been considered strong evidence of domicil.[1] In Haldane *v.* Eckford,[2] a Scotchman who had spent thirty-three years in India in the Company's service, subsequently, after a brief residence in France, settled with his family in the island of Jersey, where he resided for twenty-five years. He purchased ground and built a vault in a burial-ground in Jersey, and removed to it the bodies of two of his children who had been buried in

[4] 10 Moore P. C. C. 306. For the facts of this case, see *supra*, §§ 351, 398.

[5] *Supra.* It is proper, however, to say that this case was decided under the influence of the extreme expressions as to change of domicil used in Whicker *v.* Hume, and Moorhouse *v.* Lord. See *supra*, §§ 145, 148.

[1] Haldane *v.* Eckford, L. R. 8 Eq. Cas. 631; Succession of Franklin, 7 La. An. 395. See Heath *v.* Sampson, 14 Beav. 441; and Brunel *v.* Brunel, L. R. 12 Eq. Cas. 298. In the latter two cases this fact is not mentioned by the court as influencing the decision, but it doubtless had its weight.

[2] *Supra.*

France during his residence there. Upon this last circumstance James, V. C., dwelt strongly in pronouncing judgment in favor of domicil in Jersey. He said: "Add to that the very important fact of his bringing the remains of his children from a cemetery in France to be buried in Jersey. I think that is by no means the immaterial fact as it was pressed upon me that it was by counsel for the respondents. I can conceive nothing which indicates so completely an intention to make a permanent residence as the selection of a burial-place for his children, to whom he was attached, and who were actually already buried elsewhere. I do not think that the force of that fact, and the inference I should draw from it of his intention to make that his permanent residence, is in any way diminished by the consideration that the immediate cause of the removal was his fear that the remains, or the burial-place in France, where they were placed, might be desecrated. He would not have removed them to Jersey, unless he were satisfied as to Jersey being their permanent resting-place, and the place in which he himself expressed his wish to be buried."

§ 429. **Id. Succession of Franklin.** — In a Louisiana case,[1] one whose domicil of origin was in that State, and where he acquired immense estates, engaged in business in Tennessee, purchased land there and erected upon it a costly house,

[1] Succession of Franklin, 7 La. An. 395. Rost, J., upon this point, said: "In that will he also ordered his executors to consecrate at least one acre of ground on the Fairview Estate to the erection of an expensive family vault, in which his remains, those of his wife and children, and of such other members of his family as might choose to be entombed there might be deposited, and requested them, if he should die at any other place, to have his remains removed there without unnecessary delay. I take this disposition to be strong evidence against Mrs. Acklen. The belief of the Romans that the souls of the departed abided near their earthly remains, and under the name of *lares* were the guardian spirits of their descendants, was a beautiful superstition, and even Christians may hope, without sin, that they will be permitted in another life to watch over and protect their offspring. The reason of the civil law, which made the presence of the *lar* indicative of the place of domicil, has survived the superstition that gave it birth. The place selected by the testator, in this case, for the final resting-place of himself and his family was, I cannot doubt, the home of his choice; the place where his spirit dwelt during life, and whence, in the language of the Roman Code, he had no desire to depart, unless compelled by business, and was a wanderer when he left it, but ceased to be so when he returned to it."

which was shown to be the finest country residence in that State. He furnished it sumptuously, and adorned the grounds surrounding it at great expense. He thenceforth resided there about five months in the year. Upon his Louisiana estate he resided but little, the house which he occupied when there being old and out of repair. The balance of the year he spent in New Orleans, mostly in a rented house. His declarations were conflicting, and his veracity doubtful. He made the judicial declaration of domicil in Louisiana provided for by the Code of that State, but on the other hand brought suits in the Federal courts as a citizen of Tennessee. He voted in both States. In his will he directed his executors to provide a burial-place in Tennessee for himself and family. And upon this last circumstance, in the great conflict of evidence, the court relied greatly in holding his domicil to be in Tennessee.

§ 430. **Id. Hodgson v. De Beauchesne.** — Upon the other hand, we have the case of Hodgson *v.* De Beauchesne,[1] where the testator, whose domicil of origin was English, and who was an officer in the East India Company's service and a general in that of her Majesty, after a service of thirty years in India went to France and there resided with his family for twenty-three years, — until his death. Upon the death of his wife he purchased a burial-place there, and had inscribed upon it "Famille Hodgson." He never obtained authorization to become domiciled in France; and without stating them in detail, it may be said that the circumstances tending to show an English domicil were indeed strong. The Privy Council so held, and in discussing the effect of the purchase of the burial-place, Dr. Lushington, in delivering the opinion, said: "It is expedient to examine into the circumstances attendant on the purchase of this burial-ground with some particularity. First, as to the time of the purchase. This is not immaterial. General Hodgson did not, as many persons do, prepare a burial-

[1] 12 Moore P. C. C. 285. In Capdevielle *v.* Capdevielle, 21 L. T. (N. S.) 660, the case of a Frenchman who resided twenty years in business in England, purchased real estate there and erected upon it a costly house, the burial of his wife there was given little weight, his French domicil of origin being held to continue.

place for himself in anticipation of his own decease, and of his death in the vicinity of that spot; he bought that burial-ground in consequence of the exigency of the moment, upon the death of his first wife, and not before, and when it became imperatively necessary that he should prepare a proper place for her interment. In order to attain that end, and to prevent the operation of the French law, — that fresh interments might take place after five years on ground not purchased, — he was compelled to make a purchase of a certain extent of burial-ground. This he did; but he limited his purchase to two mètres, the smallest extent allowed by law to be bought for the purpose sought to be attained. Looking at the circumstances under which the ground was purchased, and to the necessity of the purchase for the decent interment of his wife, we cannot consider this fact, standing alone, as any cogent evidence of an intention to acquire a French domicil by showing a determination to live and die in France. Indeed, the extent of the ground bought, and that it would be capacious enough to hold other bodies, is no proof of an intention to be buried there himself. It was a necessary effect of any purchase at all; a consequence necessarily flowing from the attainment of the object, the acquisition of a fit place for the interment of his wife; and the obtaining this extra room was compulsory, not voluntary, on the part of the testator. It is true that the General caused or permitted an inscription to be placed on the ground. That inscription was 'Famille Hodgson.' This it appears from the evidence was a mere matter of form, usually incidental to all such purchases."

§ 431. **Sale of Burial-place.** — The sale of a burial-place at the place of one's domicil of origin, acompanied by removal elsewhere, is a fact of some importance showing *animus non revertendi*.[1]

[1] Stevenson v. Masson, L. R. 17 Eq. Cas. 78.

CHAPTER XXVI.

CRITERIA OF DOMICIL (*continued*), — PUBLIC ACTS: NATURALIZATION, VOTING, PAYMENT OF TAXES, HOLDING OFFICE, ETC.

§ 432. **Naturalization.** — We have already seen that a change of nationality is not necessary for the accomplishment of a change of national domicil,[1] but, on the contrary, in modern law a change of domicil is generally a condition precedent to a change of national citizenship. For usually sovereign States will not admit to citizenship aliens who are not permanently established, that is to say, domiciled, within their territories. Thus, under the Act of Congress of 14th April, 1802, it is provided[2] that "The court admitting such alien shall be satisfied that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held one year at least;" and residence here is construed to mean domicil.[3] So in France, by the law of 29th June, 1867, "The foreigner who, after having arrived at the age of twenty-one years, has obtained authorization to establish his domicil in France and has there resided three years, may be admitted to enjoy all the rights of a French citizen."

Moreover, in the ordinary case, what stronger evidence can we have of the intention of a person permanently to reside in a country than the fact that he has sought for and obtained an act of the government of that country conferring upon him the rights and subjecting him to the duties of a native, and therefore incorporating him into the body of its citizens?

§ 433. **Id. Continental Jurists.** — For these reasons naturalization when accompanied by actual residence has long been considered as evidence of domicil. Mascardus[1] lays it down: "Præterea mutare, et constituere domicilium, in ea urbe is

[1] *Supra*, § 144 *et seq.*

[2] § 1, vol. ii. p. 153; Rev. Stats. § 2165.

[3] Matter of Scott, 1 Daly, 534; Matter of Bye, 2 id. 525. See *supra*, § 27.

[1] De Probat. concl. 535, no. 4.

præsumitur, qui privilegium impetravit, quo jus civitatis petebat;" and Corvinus, in an opinion cited by Henry from the Hollandsche Consultatien, mentions as one of various modes of proving a change of domicil, "Si privilegium impetravit, quo jus civitatis petebat."[2] Other Civilians insist strongly upon proof of actual residence, in addition to the acquisition of citizenship, inasmuch as formerly citizenship was frequently conferred upon non-residents. Zangerus[3] says: "Quinta conjectura contracti domicilii ducitur ex eo, quod quis in aliqua civitate jus civitatis, quod nos vulgo vocamus *das Bürgerrecht* impetrarit et ibidem habitaverit. Sola enim illa impetratio juris civitatis, domicilium ibidem contractum esse non arguit, cum etiam civis sine domicilio esse possit." And Lauterbach,[4] in his work on Domicil, says: "Dictæ expressæ declarationi domicilii constituendi equipollet illa, si quis in civitate aliquâ jus civitatis, *das Bürgerrecht*, impetraverit et ibi habitaverit, vulgo *da einer verbürgerte oder Erbschuldigung geleistet häuslich und beständig gesessen ist.* Requiritur autem copulativè, ut quis ibidem, non solum jus illud impetraverit, sed etiam actualiter habitet."

§ 434. **Id. British and American Authorities.** — In Stanley *v.* Bernes,[1] the testator, an Irishman by birth, had become a naturalized subject of Portugal, and there resided for many years; and in the opinion of Westlake, naturalization was probably the circumstance which chiefly outweighed the evidence of an intention to return to his native country. In Hood's Estate,[2] the testator, whose domicil of origin was in Pennsylvania, went to Cuba, and there resided for many years, purchasing and cultivating land, embracing the Catholic religion, and taking out letters of naturalization; the latter facts were strongly relied upon for holding him to be domiciled in Cuba. Lewis, J., who delivered the opinion of the Supreme Court of Pennsylvania, remarking: "The will contains a particular and carefully worded recital of his profession of the faith so indispensable to the security of his rights, and is equally particular in declaring that he is 'authorized to dis-

[2] Henry, For. Law, p. 192.
[3] De Except. pt. 2, c. 1, no. 54.
[4] De Domicilio, no. 30.

[1] 3 Hagg. Eccl. 373.
[2] 21 Pa. St. 106.

pose freely of his property, *by virtue of the letters of naturalization which he has obtained from the Government.*' These solemn professions of his religious faith and of his political allegiance are acts of a character too decisive to be repelled by slight evidence. There is nothing whatever to justify the belief that these professions were falsehoods, designed only to defraud the Spanish Government, and to evade its laws. But if this were the case, it would be contrary to that elevated rule of morality which regulates the conduct of civilized nations, for a State to claim the advantages of a fraud perpetrated by one of her own citizens upon a friendly nation. The testator derived great advantages from his domicil in Cuba and the profession of his allegiance to Spain. By means of that profession he had the opportunity of amassing his fortune, and the privilege of disposing of it by will. All who claim benefits derived from his acquisitions in Cuba are bound to treat his professions as true. The validity of the will, and the rights of the legatees under it, depend upon the existence of his domicil in Cuba. We have no doubt of its existence there in good faith."

In Drevon *v.* Drevon,[3] the case of a Frenchman resident in

[3] 34 L. J. Ch. 129, 136. The Vice-Chancellor said: "Now we come to a circumstance . . . which, I must say, appears to me to be entitled to great weight in the consideration of the question. It is this: in May, 1848, the testator consulted his solicitor, Mr. Walters, who deposes to all that passed on that occasion, as to his obtaining letters of naturalization, or whatever would constitute the naturalization of a foreigner or alien. Now, a Frenchman coming to this country, and residing here for a great number of years, carrying on business here exclusively, and having no home in France at all or in any other part of the world, and actually entertaining the idea and intention so strongly as to become a naturalized Englishman, — it appears to me to be a circumstance of great weight, and is indicative of as strong an intention on the subject as you could well have in any case. I have not found any case in which that circumstance occurred. He did not obtain letters of naturalization, — he never became naturalized; but the question which I have to determine is, What was his design and intention? What was his view? Did he desire to abandon France, and cease to be a Frenchman and become an Englishman? Now, that circumstance appears to me to be a circumstance of very great weight indeed as indicating intention. Not only did he on that occasion, in May, 1848, consult Mr. Walters upon the subject, but he spoke to Mr. Fynn, his brother-in-law, about it. Mr. Fynn states: 'He repeatedly expressed to me his intention to make England his permanent abode, and he never expressed to me, or in my hearing or to my knowledge, any desire or intention to return to and remain in France; but, on the contrary, I say that he on several occasions during the latter part of his life

England, Kindersley, V. C., relied, for holding his domicil to be English, upon the fact that he had consulted his solicitor with reference to obtaining letters of naturalization, and had stated to others his desire and intention to become naturalized, as particularly important, although he never obtained such letters. The Vice-Chancellor said: "That intention and desire on the part of the testator to acquire naturalization in this country . . . is a fact of the greatest possible importance in coming to a conclusion upon the question; and it is a fact which would require very strong evidence of acts on the other side to outweigh it."

In Ennis *v.* Smith,[4] the Supreme Court of the United States, in determining the domicil of Kosciusko to be French, relied, *inter alia*, upon the fact that he had been made a French citizen by a decree of the National Assembly.

§ 435. **Voting.** — We have seen that in the United States the right of suffrage depends upon residence, and that, as used

spoke to me upon his desire and intention to obtain letters of naturalization in this country, of the mode of obtaining which he was ignorant; and he several times told me he should go and see about it, but postponed so doing on account of his engagements in his business, in which, as is usual with silk-dyers, he himself actively assisted; and I verily believe he was only prevented applying for such letters of naturalization by the sudden illness which terminated in his death.' Furthermore, he spoke to Cayzer in such a manner as to lead Cayzer to suppose that he had actually obtained letters of naturalization, and had become naturalized; and he also told Flint that he considered he was a naturalized Englishman; that he had settled and intended to remain in this country, and had married an English woman, and he fully considered himself to have been and become naturalized here. I refer to those, because, although there is evidence of conversations and expressions and declarations, they are something more than the mere vague general declarations of an intention to remain here or to go back. Taking the evidence of Mr. Walters, Mr. Fynn, Mr. Cayzer, and Mr. Flint, it is evident to my mind that although the testator, partly because he was so much occupied that he could not give his attention sufficiently to the matter, and, probably, partly with reference to the question of expense, — for, I believe, there is some considerable expense attending naturalization, — never did become naturalized; yet the testator had it clearly in his mind to do the act which would constitute him an Englishman, although he never did it; and the question, of course, is, What was his intention in residing here, and carrying on his business here? Was it his intention to become an Englishman and cease to be a Frenchman? Now, that intention and desire of the testator to acquire naturalization in this country does, I confess, appear to me, not only to be clearly proved by Mr. Walters's evidence, which, of course, is beyond all question, but it is a fact of the greatest possible importance in coming to a conclusion upon the question; and it is a fact which would require very strong evidence of acts on the other side to outweigh."

[4] 14 How. 400.

in this connection, the term "residence" is generally construed to mean domicil.[1] The act of voting at a place has, therefore, usually and properly been received as important evidence of domicil.[2] It is at least evidence that the person exercising such act considers himself to be there resident and domiciled.[3] To assume the contrary would be to assume that he has been guilty of a deliberate fraud upon the public and a crime. His act may therefore be usually looked upon as a deliberate declaration that he is domiciled at the place where he casts his vote,[4] and has in some cases been considered conclusive on the subject.[5] But not always; for while the

[1] *Supra*, § 53; and in addition to cases there cited, State *v.* Aldrich, 14 R. I. 171, and State *v.* Griffey, 5 Neb. 161.

[2] Shelton *v.* Tiffin, 6 How. 163; Mitchell *v.* United States, 21 Wall. 350; Blair *v.* Western Female Seminary, 1 Bond, 578; United States *v.* Thorpe, 2 id. 340; Woodworth *v.* St. Paul, &c. Ry. Co., 18 Fed. R. 282; East Livermore *v.* Farmington, 74 Me. 154; Hulett *v.* Hulett, 37 Vt. 581; Harvard College *v.* Gore, 5 Pick. 370; Cabot *v.* Boston, 12 Cush. 52; Weld *v.* Boston, 126 Mass. 166; Easterly *v.* Goodwin, 35 Conn. 279; Fiske *v.* Chicago, etc. R. R. Co., 53 Barb. 472; State *v.* Ross, 3 Zab. 517; Guier *v.* O'Daniel, 1 Binn. 349, note; Carey's Appeal, 75 Pa. St. 201; Follweiler *v.* Lutz, 112 id. 107; Dauphin County *v.* Banks, 1 Pears. 40; Commonwealth *v.* Emerson, id. 204; Smith *v.* Croom, 7 Fla. 81; Yonkey *v.* State, 27 Ind. 236; Kellogg *v.* Oshkosh, 14 Wis. 623; State *v.* Groome, 10 Iowa 308; Venable *v.* Paulding, 19 Minn. 488; Hairston *v.* Hairston, 27 Miss. 704; Hill *v.* Spangenburg, 4 La. An. 553; McKowen *v.* McGuire, 15 id. 637; Sanderson *v.* Ralston, 20 id. 312; State *v.* Steele, 33 id. 910.

[3] Guier *v.* O'Daniel, *supra*; Hill *v.* Spangenburg, *supra*.

[4] In Hill *v.* Spangenburg, *supra*, it is said: "Voting in the parish of Jefferson was his own deliberate act, clearly implying a declaration that he resided in that parish, and involving a fraud upon the public if that declaration was untrue."

[5] Kellogg *v.* Oshkosh, *supra*, and see Shelton *v.* Tiffin. In the last-named case it was said by McLean, J., in delivering the opinion of the court: "On a change of domicil from one State to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained may be sufficient." This language is somewhat obscure, and it is difficult to determine exactly what the learned judge meant by it. It has been understood by some as maintaining that the exercise of the right of suffrage is conclusive as to domicil. Such, however, does not appear to have been his thought, but rather that, assuming a change of domicil from one State to another to have taken place, something further is necessary for a change of citizenship; to wit, intention to become a citizen of the latter State. It may be objected that this construction would bring the view of Judge McLean into conflict with the received doctrine as to what constitutes judicial citizenship (see *supra*, § 48; and besides the cases there cited, see Chicago & N. W. Ry. Co. *v.* Ohle, 117 U. S. 123); but, on the other hand,

presumption is undoubtedly in favor of the innocence and knowledge of the voter, his ballot may have been cast fraudulently or through mistake of his legal rights; in either of which events his act of voting could not be accepted as determinative of his domicil.[6]

to assume that he meant to say that voting is, either always or as a general rule, conclusive as to domicil, is to bring him into conflict with a number of adjudged cases (see following note), as well as to make him hold a doctrine which is not tenable on rational grounds. It may be added, however, that the language of Judge McLean is wholly *obiter*, inasmuch as he himself says in the same opinion: "There is no proof that he [the appellant, whose citizenship was in question] has voted at any election in Louisiana" (where he was held to have acquired citizenship). The act of voting may well be held in many cases conclusive evidence against the voter, that his domicil is at the place where he exercises the right of suffrage, but the writer believes it has never been so held in his favor or, when standing by itself, against the rights of a third person. In Kellogg *v.* Oshkosh, Dixon, C. J., said: "He says he came to Oshkosh in the spring of 1855, and remained until December, 1856. He voted there in the fall of 1856, and a large share of his time has since been spent there, the winter season being passed at different places abroad on account of his health; most of his property has been there and in that vicinity, and that has been his principal, if not his only, place of business, and he has never removed or gone elsewhere with the intention of remaining or exercising the rights or privileges of a citizen in any other place. This clearly made him a resident of Oshkosh. The act of voting was the highest evidence that he had changed his domicil and made Oshkosh his home in intent as well as in fact. In some cases it is regarded as conclusive on the subject." But here the evidence was used against the voter. In Dauphin County *v.* Banks, *supra* (a tax case), Pearson, J., who, although he sat in a court of inferior jurisdiction, won, by a long and honorable service, a distinguished reputation as a learned and accurate judge, said: "Had Mr. Banks exercised the right of suffrage here, it would have been a strong circumstance to show that this was his place of residence; in fact, he would probably have been estopped from denying it, as the Constitution requires a residence of ten days in the district immediately pending the election at which he offers to vote, and a person has no right, under any circumstance, to vote in any district except where he is resident at the time, and has resided for ten days next preceding." "Residence" was in this case used in the sense of domicil. In Commonwealth *v.* Emerson, where the defendant in a writ *de inebriato inquirendo* raised the question of the jurisdiction of the County Court upon the ground of non-residence, the same learned judge (after stating the facts) said: "This statement of facts we consider shows decidedly that his residence was in Dauphin County when the petition was presented. Voting at the election in October unequivocally shows his own opinion and intention, as he could not lawfully vote at any other place than where he resided. We have no right to presume that he committed a fraud, and he is estopped from averring it. Had the proceeding been commenced in Perry County, this same evidence (although less conclusive for than against the party) would have caused the proceedings to be set aside."

[6] Ellsworth *v.* Gouldsboro, 55 Me. 94; East Livermore *v.* Farmington, 74 id. 154; Lincoln *v.* Hapgood, 11 Mass. 350; Easterly *v.* Goodwin, 35 Conn. 279; Hayes *v.* Hayes, 74 Ill. 312; Mandeville *v.* Huston, 15 La. An. 281; Folger *v.* Slaughter, 19 id. 323; Villere

It having been the practice in many towns in Massachusetts to allow any citizen of the State, otherwise qualified, to vote in the election of governor, although not an inhabitant of the town where he offers to vote, upon the theory that as that officer presides over the whole State, every citizen ought to be permitted to vote for him, although notoriously being in the town without any intention of remaining there; it was held,[7] in the case of one who was born and always had resided in the town of P., but who voted at a gubernatorial election in the town of B., where he was temporarily employed at work for a period of ten weeks, that such voting did not operate to change his legal residence so as to deprive him of the right of voting in the town of P. for representatives in the legislature.

Similar was the case of Clarke *v.* The Territory,[8] in which the facts were that H., a citizen of Washington Territory, on the breaking out of the Indian war, went to California, and there remained for two years, always intending to return. He voted in California for President of the United States, and the court held, the question being as to his eligibility to serve on a jury in Washington Territory, that little weight was to be given to these circumstances; Fitzhugh, J., remarking: "The circumstance which is claimed to have established his residence in California is his voting there for President of the United States. Had he voted for State officers, it would have had more weight; but voting for President only, it cannot be considered as establishing a residence in California, contrary to his oath that it was his fixed intention to return, and that he considered his home here in the Territory." But inasmuch as the appointment of presidential electors belongs as much to the several States of the Union as the selection of their own governors

v. Butman, 23 id. 515; Clarke *v.* Territory, 1 Wash. Ter. 68. In East Livermore *v.* Farmington (a settlement case), Appleton, C. J., used language which is applicable to all cases of domicil. He said: "The fact of voting in a town, while of importance as bearing on the question of settlement, is by no means conclusive. The vote may be without right and fraudulent. It may be through mistake on the part of the voter as to his legal rights. The fraud or the mistake may be that of the voter, or of the officers of the town, or of both. It is obvious that the fact of voting in the place is not, and cannot be, conclusive of the fact of residence. It is not binding on the town contesting his settlement. It is simply a fact, with the other facts in the case to be weighed by the jury."

[7] Lincoln *v.* Hapgood, *supra.*

[8] *Supra.*

or other State officers, the only ground upon which the above language seems tenable is, that by reason of the national character of the presidential office, the citizen is more likely to be mistaken as to his right of suffrage than in the case of elections for State or local officers.

Another example of mistake is furnished in Ellsworth *v.* Gouldsboro,[9] where it was held that a person does not acquire a settlement in a town by voting and paying taxes there under the erroneous belief that his dwelling-house is within the limits of that town.

However, even though the fact of voting remained unexplained satisfactorily, it is but a circumstance which although strong is usually liable to be overcome by other circumstances which tend to contradict the inference apparently to be drawn from it.[10]

§ 436. **Offering to Vote.** — Offering to vote at a place, although the ballot be rejected by the election officers, is also evidence of domicil there. This point was early held in the case of Guier *v.* O'Daniel,[1] in which Rush, President, said: "It appears Guier was present at *one* election, and offered his ticket, which, though not received, is a striking fact to show he considered himself in the light of a citizen. The ticket not being received does not alter the nature of the transaction on the part of Guier; the evidence resulting from it, of intention to settle and reside, is the same as if it had been actually received."

§ 437. **Refusing to Vote.** — Refusal to vote at a place on the ground that the person is not domiciled there is doubtless important evidence of such fact.[1] It certainly strongly reinforces a declaration of that fact, but it is not conclusive;[2] and, moreover, such refusal is of no consequence, if made after the bringing of a suit in which the question of domicil is raised.[3] So also refusal to be registered as a voter is not conclusive.[4]

[9] *Supra.*

[10] See cases cited in note 6, *supra.*

[1] 1 Binn. 349, note.

[1] Heirs of Holliman *v.* Peebles, 1 Tex. 673; New Orleans *v.* Shepherd, 10 La. An. 268.

[2] Heirs of Holliman *v.* Peebles, *supra.*

[3] Shelton *v.* Tiffin, 6 How. 163.

[4] Hindman's Appeal, 85 Pa. St. 466.

§ 438. **Failure to Vote.** — The mere omission to vote is admissible as cumulative evidence,[1] but its value must be appreciated according to circumstances. Thus, in the case of a seafaring man, the omission to vote at the place where other circumstances tend to show him domiciled, is of little weight, particularly when taken in connection with the fact that he never voted elsewhere.[2]

§ 439. **Absence of the Right to Vote.** — The absence of the right to vote does not necessarily indicate absence of domicil.[1] Under the American system, which requires residence for a specified length of time as a condition precedent to the right of suffrage, it is necessary that domicil should precede the right to vote. Moreover, the right of suffrage depends upon age, and generally upon citizenship and sex, and may also depend upon property or other qualifications, apart from or in addition to domicil.

§ 440. **Voting, etc. English Cases.** — The subject has been considered in England also. In De Bonneval *v.* De Bonneval,[1] it appeared, on the one hand, that the testator, who was French by origin, had "exercised his political rights as a French subject," and, on the other, that during his residence in England his name was included in the list of persons entitled to vote at the election of members of parliament in the borough in which he resided. Upon these facts, Sir Herbert Jenner remarked: "I am inclined to pay very little attention to the statements as to his exercise of political rights in France, or to his being registered as a voter here; being a housekeeper, he was registered here as a matter of course." It does not, however, appear what political rights he exercised in France. Drevon *v.* Drevon[2] was a case of an unnaturalized Frenchman,

[1] Mooar *v.* Harvey, 128 Mass. 219; Dauphin County *v.* Banks, 1 Pears. 40. In Mooar *v.* Harvey, it was relied upon as a significant fact pointing to a change of domicil.

[2] Hallet *v.* Bassett, 100 Mass. 167; Guier *v.* O'Daniel, 1 Binn. 349, note.

[1] See Guier *v.* O'Daniel, *supra*, § 436, and *infra*, § 443, note 1.

[1] 1 Curteis, 856. For the other facts of this case, see *supra*, § 281. The case is probably authority for nothing more upon this point than that the mere registration of a person as a voter by the public officers is of little or no weight in defining his domicil, it not appearing that the registration was made at his request, or that he availed himself of the privilege of suffrage thus accorded him.

[2] 34 L. J. Ch. 129.

long resident in England, who there voted for members of parliament. He appears to have voted but once. In holding his domicil to be English, Kindersley, V. C., strongly relied upon this fact, remarking: "It is true, in some of the cases it is said that voting is not considered a matter of very great weight — he may have voted; he was rated, and he voted according to his rating. But we have the testator here exercising the functions belonging to a citizen of England and not belonging to an alien. I think that is a very important fact."

§ 441. **Id. French Authorities.** — In France, also, voting is looked upon as evidence of domicil, although it has not as much weight as with us; inasmuch as a Frenchman may transfer his "domicile politique" (which is at best but a figurative expression) to a place different from that in which he has his "domicile réel." The exercise of political rights at a place is, however, considered as at least *prima facie* evidence that the person is domiciled there.[1] It has been decided that inscription upon the electoral list does not of itself change the domicil of a Frenchman.[2]

§ 442. **Payment of Personal Taxes.** — As personal taxes are usually payable at the place of domicil, the payment of such tax without resistance or protest is evidence of domicil.[1] But it is otherwise if the payment be made under protest,[2] or under a misapprehension as to residence,[3] or if payment of tax at a particular place be by law made to depend upon residence which is short of domicil.[4] So, too, if it appear that a

[1] Demolombe, Cours de Code Napoléon, t. 1. no. 345; Ancelle, Dom. pp. 98, 201 *et seq.*; Chavanes, Dom. pp. 113, 208 *et seq.*; and see authorities cited by Sirey et Gilbert, Code Civil Annoté, art. 102, note 4, and art. 103, note 19.

[2] Sirey et Gilbert, art. 103, note 12.

[1] Mitchell *v.* United States, 21 Wall. 350; Hulett *v.* Hulett, 37 Vt. 581; Cambridge *v.* Charlestown, 13 Mass. 501; Harvard College *v.* Gore, 5 Pick. 370; Weld *v.* Boston, 126 Mass. 166; Carey's Appeal, 75 Pa. St. 201; Yonkey *v.* State, 27 Ind. 236; State *v.* Steele, 33 La. An. 910; Wharton, Confl. of L. § 65; Pothier, Intr. aux Cout. d'Orléans, no. 20; Denizart, *verb.* Dom. no. 17; Merlin, Repertoire, *verb.* Dom. § 7; Demolombe, Cours de Code Napoléon, t. 1, no. 345; Sirey et Gilbert, Code Civil Annoté, art. 102, note 4–6, and art. 103, notes 17, 19, and authorities cited.

[2] Isham *v.* Gibbons, 1 Bradf. 69.

[3] Ellsworth *v.* Gouldsboro, 55 Me. 94. In this case a person paid taxes in a town under the erroneous belief that his dwelling-house was located within its limits. See also McKowen *v.* McGuire, 15 La. An. 637.

[4] Dale *v.* Irwin, 78 Ill. 160.

person elects to be taxed in one place rather than another for the purpose of escaping a heavier burden, or for similar reasons, such payment would not only not be conclusive upon the question of domicil, but might be held to have little or no effect.[5] Said Shaw, Chief Justice, in Lyman *v.* Fiske: "The election of a man to pay taxes in one town rather than another may be a good motive and a justifiable reason for changing his habitancy; and if such election is followed up by corresponding acts, by which he ceases to be an inhabitant of the one and becomes an inhabitant of the other, his object may be legally accomplished. But such an election to be taxed in one town rather than another is only one circumstance bearing upon the question of actual habitancy, and to be taken in connection with the other circumstances, to determine the principal fact." A tax-list bearing the name of a person, with a memorandum of "paid" against it, is not evidence of domicil.[6]

§ 443. **Omission or Refusal to pay Taxes.** — On the other hand, the mere non-payment of taxes at the place of alleged domicil is usually of little weight against it,[1] particularly if it

[5] Lyman *v.* Fiske, 17 Pick. 231.

[6] Sewall *v.* Sewall, 122 Mass. 156.

[1] De Bonneval *v.* De Bonneval, 1 Curteis, 856; Hallet *v.* Bassett, 100 Mass. 167; Guier *v.* O'Daniel, 1 Binn. 349, note. In De Bonneval *v.* De Bonneval, Sir Herbert Jenner said: "It is stated that he resisted with success the contribution to some of the French rates, which a person resident in France was liable to; but the grounds are not stated, and it is too loose a reasoning that because all French subjects are liable to such rates, and he successfully resisted them, therefore he was not domiciled in France. It must be shown that the question came regularly before the French tribunals, and he was held to be not a domiciled subject of France." In the case of the Marquis of Saint-Pater it was argued that the imposition of personal tax at Paris was evidence that he was there domiciled; but Cochin (Œuvres, t. 6, p. 266 *et seq.*) turns this point the other way by showing that he never paid it. The petition, however, of the Marquis to the King for relief from payment was based upon the fact that he was not domiciled at Paris. This circumstance, therefore, met the objection made by Sir Herbert Jenner. In Guier *v.* O'Daniel, Rush, President, remarked: "It is, I think, extremely doubtful whether voting and paying taxes are in any case necessary to constitute a domicil, which, being a question of general law, cannot depend on the municipal regulations of any State or nation. Voting is confined to a few countries, and taxes may not always be demanded. Guier was a seafaring man, and one of the witnesses says that between the 14th January, 1800, and the 15th October, 1801, he sailed six or seven times. Is it any wonder a single man thus engaged in trade should escape taxation? It frequently happens that young men who never go abroad are not discovered to be objects of taxation till they have reached the age of five or six and twenty. If Guier escaped taxation through the neglect of the offi-

appear that they were not paid elsewhere. The failure may be through lack of vigilance on the part of the public officers or (for example, in the case of a mariner) by reason of the frequent and prolonged absence of the person whose domicil is in dispute. But in Mooar *v.* Harvey,[2] the case of a Massachusetts man who resided in Washington for fifteen years in government employ, the Supreme Court of Massachusetts held his failure to vote or pay taxes at the place of his former domicil in that State a significant fact pointing to a change of domicil.

In Hindman's Appeal,[3] the decedent's domicil of origin was in West Virginia, whence he removed to Pennsylvania. After coming into the latter State he refused to be either assessed or registered, and declared his intention of never paying any tax there. But this was held to be of no importance, inasmuch as after his removal he was not assessed and paid no tax in West Virginia, and moreover declared his intention never to do so.

§ 444. **Holding Office an Important Criterion, but not Conclusive.** — The holding of a local office is also an important *criterion*.[1] In Drevon *v.* Drevon, Kindersley, V. C., held that the fact that a Frenchman served in the office of head-borough in an English borough was an important fact tending to show his domicil in England, although not so important as voting. In Maxwell *v.* McClure, the fact that a Scotchman who was long resident and engaged in business in England, and who subsequently returned to Scotland, had become a town councillor and magistrate of an English borough, and after his return still retained those offices, was relied upon in the House of Lords as a circumstance to negative reverter.

But the holding of a local office is by no means conclusive. Thus it was held, in Butler *v.* Hopper,[2] that election to the legislature of a State does not fix domicil there in the face of clearly contradicting proof of *animus manendi* elsewhere. Still less does mere candidacy for such office.[3]

cers of government, it is impossible to conceive how their neglect can have any effect on the question of domicil."

[2] 128 Mass. 219.

[3] 85 Pa. St. 466.

[1] Maxwell *v.* McClure, 6 Jur. (N. S.) 407; Drevon *v.* Drevon, 34 L. J. Ch. 129; Harvard College *v.* Gore, 5 Pick. 370; Cole *v.* Cheshire, 1 Gray, 441.

[2] 1 Wash. C. Ct. 499.

[3] Mandeville *v.* Huston, 15 La. An. 281.

Moreover, absence of a right to hold office does not necessarily indicate absence of domicil,[4] for substantially the same reasons as those given above with respect to absence of the right to vote.

§ 445. **Treatment by Public Officers.** — The treatment of a person by public officers, for example, the assessment of taxes against him, placing his name on the voting-list or neglect or refusal to do either of these acts, etc., has no bearing upon the question of his domicil, unless it be shown that the act was done or omission made at his request or by his consent.[1]

§ 446. **Jury Service.** — Service upon juries was relied upon in a Louisiana case [1] as strong evidence of domicil, the court remarking that it was an "important public and notorious act of citizenship, implying a residence" where it was performed. Its value, however, may be greatly diminished by circumstances; as, for instance, where one travels back and forth between a new place of abode and his former place of abode, service on a jury at the latter place does not necessarily imply a retention of his former domicil.[2]

§ 447. **Militia Service.** — We have seen that service in the army or navy of a sovereign State is evidence of national domicil, although how far it is to be considered conclusive is not settled.[1] Probably service in the local militia, at least where liability to such service depends upon domicil, would be evidence of *quasi*-national or municipal domicil. It is so held in France.[2]

[4] Burnham *v.* Rangeley, 1 Woodb. & M. 7.

[1] Mead *v.* Boxborough, 11 Cush. 362; Fisk *v.* Chester, 8 Gray, 506; Sewall *v.* Sewall, 122 Mass. 156. But see West Boylston *v.* Sterling, 17 Pick. 126, where written notices to the person whose domicil was in question to attend school-district meetings in a town where he was alleged to have been domiciled were held to be competent evidence, it having been proved that the notices were delivered to him. Possibly the fact of service of the notices may distinguish this case from the later Massachusetts cases; if not, it is overruled by them.

[1] Sanderson *v.* Ralston, 20 La. An. 312. But it is not conclusive. Villere *v.* Butman, 23 id. 515.

[2] State *v.* Groome, 10 Iowa, 308.

[1] *Supra*, §§ 299, 300.

[2] Demolombe, Cours de Code Napoléon, t. 1, no. 345; Sirey et Gilbert, Code Civil Annoté, art. 102, note 4, and authorities cited.

§ 448. **Taking Part in Town Meetings.** — Attending town meetings and taking part in the discussions there, is competent evidence of domicil,[1] but not so the discussion in a private conversation of the affairs of a town by a person who has one of his several residences there, particularly if offered in his own favor.[2]

[1] Weld v. Boston, 126 Mass. 166. [2] Id.

CHAPTER XXVII.

CRITERIA OF DOMICIL (*continued*), — DECLARATIONS, ORAL AND WRITTEN; TESTIMONY OF PERSON WHOSE DOMICIL IS IN QUESTION AS TO HIS INTENTION.

§ 449. **General Remarks.** — The declarations, both oral and written, of the person whose domicil is in question are frequently resorted to for the purpose of discovering his intention. When he is himself a party to the controversy, it is scarcely necessary to observe, his declarations, when voluntarily made, are always admissible in evidence against him.[1] How far they are admissible in his favor or in controversies between strangers needs to be stated somewhat at large.

§ 450. **Formal Declarations of Domicil.** — The French Code Civil,[1] and others[2] modelled after it, provide for the proof of intention to change domicil by express and formal declarations made at the place from which and the place to which the change is to be made. But while such declarations, when made, are entitled to very great weight in determining the intention, on the one hand, they are not conclusive,[3] nor, on the other, are they absolutely necessary for a change, it being expressly provided that in default of such formal declarations proof of intention shall depend upon other circumstances.[4]

§ 451. **Declarations accompanying and explanatory of Acts admissible as a Part of the Res Gestæ.** — As a general rule it

[1] Especially if other persons have been misled by them. Commercial Bank *v.* King, 3 Rob. (La.) 243.

[1] Art. 104. "La preuve de l'intention résulterad'une déclaration expresse, fait tant à la municipalité du lieu qu'on quittera, qu'à celle du lieu où aura transféré son domicile."

[2] *E. g.*, Sardinian Code (Codice Civile), t. 3, art. 68; Louisiana Civil Code, t. 2, art. 44 (Rev. Civil Code, art. 44).

[3] Waller *v.* Lea, 8 La. R. 213; Nelson *v.* Botts, 16 id. 596; Judson *v.* Lathrop, 1 La. An. 78; Succession of Franklin, 7 id. 395; Yerkes *v.* Brown, 10 id. 94; Sirey et Gilbert, Code Civil Annoté, art. 103–105, notes 3–8, and authorities cited.

[4] French Code Civil, art. 105; Sardinian Codice Civile, art. 69; Louisiana Civil Code, art. 42 (Rev. Civil Code, art. 44); Evans *v.* Payne, 30 La. An. 498.

may be laid down that declarations accompanying and giving character to any act are admissible in evidence whenever the act itself is admissible, upon the principle that they constitute a part of the *res gesta*.[1] Declarations accompanying and explaining any act tending to throw light upon the intention of the person whose domicil is in question may therefore be given in evidence;[2] and inasmuch as hardly any act of a man's life, as we have already seen, is too trivial to be of some account in determining the question of his domicil, perhaps even greater latitude in the admission of declarations is allowed in cases of domicil than in other cases.[3]

[1] Bateman *v.* Bailey, 5 T. R. 512; Rawson *v.* Haigh, 2 Bing. 99; Stansbury *v.* Arkwright, 5 C. & P. 572; Haynes *v.* Rutter, 24 Pick. 242; Salem *v.* Lynn, 13 Met. 544; Lund *v.* Tyngsborough, 9 Cush. 36; Cole *v.* Cheshire, 1 Gray, 441; Monson *v.* Palmer, 8 Allen, 551; Wright *v.* Boston, 126 Mass. 161; Brookfield *v.* Warren, id. 287; Cherry *v.* Slade, 2 Hawks. 400; Griffin *v.* Wall, 32 Ala. 149; 1 Greenl. Ev. § 108; 1 Starkie Ev. § 28; 1 Whart. Ev. § 258 *et seq.*, and authorities cited. See also the cases cited in next note, and see particularly the discussion of the subject of declarations as part of the *res gestæ*, by Fletcher, J., in Lund *v.* Tyngsborough, *supra*.

[2] Moorhouse *v.* Lord, 10 H. L. Cas. 272; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Udny *v.* Udny, id. 441; Bremer *v.* Freeman, 10 Moore P. C. C. 306; Hodgson *v.* De Beauchesne, 12 id. 285; Attorney-General *v.* De Wahlstatt, 3 Hurl. & Colt. 374; Drevon *v.* Drevon, 34 L. J. Ch. 129; Hamilton *v.* Dallas, L. R. 1 Ch. D. 257; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; Crookenden *v.* Fuller, 1 Swab. & Tr. 441; Lowndes *v.* Douglas, 24 D. (Sc. Sess. Cas. 2d ser. 1862), 1391; The Venus, 8 Cranch, 253; Ennis *v.* Smith, 14 How. 400; Pennsylvania *v.* Ravenel, 21 id. 103; Mitchell *v.* United States, 21 Wall. 350; Burnham *v.* Rangeley, 1 Woodb. & M. 7; Castor *v.* Mitchell, 4 Wash. C. Ct. 191; Prentiss *v.* Barton, 1 Brock. 389; Johnson *v.* Twenty-one Bales, 2 Paine, 601; s. c. Van Ness, 5; Doyle *v.* Clark, 1 Flip. 536; Tobin *v.* Walkenshaw, McAll. 186; Woodworth *v.* St. Paul, &c. Ry. Co., 18 Fed. R. 282; Gorham *v.* Canton, 5 Greenl. 266; Thomaston *v.* St. George, 5 Shep. (17 Me.) 117; Wayne *v.* Greene, 21 Me. 357; Leach *v.* Pillsbury, 15 N. H. 137; Derby *v.* Salem, 30 Vt. 722; Hulett *v.* Hulett, 37 id. 581; Thorndike *v.* Boston, 1 Met. 242; Kilburn *v.* Bennett, 3 id. 199; Salem *v.* Lynn, 13 id. 544; Cole *v.* Cheshire, 1 Gray, 441; Monson *v.* Palmer, 8 Allen, 551; Wilson *v.* Terry, 9 id. 214; 11 id. 206; Reeder *v.* Holcomb, 105 Mass. 93; Wright *v.* Boston, 126 id. 161; Brookfield *v.* Warren, id. 287; Dupuy *v.* Wurtz, 53 N. Y. 556; *Re* Cath. Roberts' Will, 8 Paige Ch. 519; Hegeman *v.* Fox, 31 Barb. 475; Liscomb *v.* N. J. R. R. & Trans. Co. 6 Lans. 75; Brundred *v.* Del Hoyo, Spencer, 328; Clark and Mitchener *v.* Likens, 2 Dutch. 207; Guier *v.* O'Daniel, 1 Binn. 349, note; Cherry *v.* Slade, 2 Hawks. 400; Fleming *v.* Straley, 1 Ired. 305; Griffin *v.* Wall, 32 Ala. 149; Burgess *v.* Clark, 3 Ind. 250; Hairston *v.* Hairston, 27 Miss. 704; Beason *v.* State, 34 id. 602; Cole *v.* Lucas, 2 La. An. 946; Gardner *v.* O'Connel, 5 id. 353; Verret *v.* Bonvillain, 33 id. 1304; *Ex parte* Blumer, 27 Tex. 735. This list might be greatly increased; in fact, declarations have been in evidence and have been relied upon either by court or counsel in almost all of the reported cases.

[3] See Salem *v.* Lynn, *supra*.

§ 452. **Declarations immediately explanatory of the Act of Removal.** — The act which is most usually interpreted by the aid of declarations is the removal itself, — the *factum* necessary for a change of domicil. It has been uniformly held that "what a party says on leaving home or immediately previous thereto, or while on a journey, explanatory of the act or object of leaving home or performing such journey, is admissible in evidence, as a part of the *res gesta*."[1] But it is necessary that the declarations should be substantially contemporaneous with the act which they explain.[2] It will not do to receive such as are made a long time prior or subsequent to the removal as immediately explanatory of that act. If made long prior they at best but declare a present state of mind which is subject to change,[3] and if made long subsequent either a past state of mind which may or may not be accurately interpreted and reported,[4] or a present state of mind which may be different from that existing at the time of removal. No length of time, however, can be fixed which must elapse between the removal and the declarations, or the contrary, in order to make the latter inadmissible.[5] Substantial contemporaneity is all that is required to render them part of the *res gesta*, and this depends much upon the circumstances of each particular case.[6]

§ 453. **Declarations mediately explanatory of the Act of Removal.** — But declarations made either before or after may relate *mediately* to the time and act of removal; as, for instance, where a person residing in one town negotiates for a

[1] Griffin *v.* Wall, *supra*. To the same effect, Bateman *v.* Bailey, 5 T. R. 512; Rawson *v.* Haigh, 2 Bing. 99; Lowndes *v.* Douglas, *supra;* Burnham *v.* Rangeley, *supra;* Doyle *v.* Clarke, *supra;* Woodworth *v.* St. Paul, &c. Ry. Co., *supra;* Gorham *v.* Canton, *supra;* Leach *v.* Pillsbury, *supra;* Derby *v.* Salem, *supra;* Kilburn *v.* Bennett, *supra;* Salem *v.* Lynn, *supra;* Monson *v.* Palmer, *supra;* Wilson *v.* Terry, *supra;* Reeder *v.* Holcomb, *supra;* Brookfield *v.* Warren, *supra;* Brundred *v.* Del Hoyo, *supra;* Clark *v.* Likens, *supra;* Burgess *v.* Clark, *supra;* Beason *v.* State, *supra;* Gardner *v.* O'Connel, *supra;* *Ex parte* Blumer, *supra*.

[2] See cases cited in § 451, note 2, and § 452, note 1, *supra*, and 1 Greenl. Ev. § 110; 1 Wharton Ev. § 258 *et seq.*

[3] Brookfield *v.* Warren, 128 Mass. 287; and see Washington, J., in The Venus, 8 Cranch, 253, 281.

[4] Declarations to past purposes are inadmissible. Salem *v.* Lynn, 13 Met. 544. And see the cases cited *infra*, § 454, note 3.

[5] See 1 Wharton Ev., *ubi supra*, and Lund *v.* Tyngsborough, 9 Cush. 36.

[6] Id.

home in another, his declarations during such negotiations, although made several months before the contemplated and actual removal, are admissible.[1] Again, residence abroad is evidence of a change of domicil, and it follows that any declarations made during its continuance, explanatory of it or of the present intention of the party with regard to it, may be given in evidence.[2]

§ 454. **Declarations not Evidence of Facts, but only explanatory of them.** — Declarations are not evidence of facts relating to domicil, but only explanatory of them when otherwise shown;[1] thus the declaration of a party that he has lived in a particular place or country is not evidence of that fact when the question arises between other parties,[2] and *a fortiori* would not be evidence in his own favor. Declarations which are simply narrative of a past act or transaction are not admissible.[3] Whether the oral declarations of a person are

[1] Cole *v.* Cheshire, 1 Gray, 441; and see Kilburn *v.* Bennett, 3 Met. 199, where declarations made at the time of giving notice of removal to the owner of the house in which the person whose domicil was in question lived, were held to be admissible.

[2] Munro *v.* Munro, 7 Cl. & Fin. 842; Whicker *v.* Hume, 7 H. L. Cas. 124; Moorhouse *v.* Lord, 10 H. L. Cas. 272; (see also the same case before the Vice-Chancellor, *sub nom.* Lord *v.* Colvin, 4 Drew. 366); Bremer *v.* Freeman, 10 Moore P. C. C. 306; Hoskins *v.* Matthews, 8 De G. M. & G. 13; Attorney-General *v.* De Wahlstatt, 3 Hurl. & Colt. 374; Hamilton *v.* Dallas, L. R. 1 Ch. D. 257; Lowndes *v.* Douglas, 24 D. (Sc. Sess. Cas. 2d ser. 1862) 1391; Ennis *v.* Smith, 14 How. 400; Thorndike *v.* Boston, 1 Met. 242; Dupuy *v.* Wurtz, 53 N. Y. 556; *Re* Cath. Roberts' Will, 8 Paige Ch. 519; Cherry *v.* Slade, 2 Hawks. 400; and many other cases might be cited. Another reason is given for the admission of such declarations; namely, that the removal and absence are looked upon as one continuing act. 1 Greenl. Ev. § 110; Rawson *v.* Haigh, 2 Bing. 99. But the view stated in the text appears to the writer to be the sounder, inasmuch as it confines the admission of declarations to those which state the present mind of the person, and rejects those which attempt to state a past mental condition, the recollection of which may be imperfect or colored by subsequently acquired views.

[1] Londonderry *v.* Andover, 28 Vt. 416; Derby *v.* Salem, 30 id. 722; Monson *v.* Palmer, 8 Allen, 551; Griffin *v.* Wall, 32 Ala. 149.

[2] Id. So also the place of birth cannot be proved by hearsay; *i. e.*, either by the declarations of the party himself or by reputation. Braintree *v.* Hingham, 1 Pick. 245; Wilmington *v.* Burlington, 4 id. 174; Union *v.* Plainfield, 39 Conn. 563; Robinson *v.* Blakeley, 4 Rich. 586; Brooks *v.* Clay, 3 A. K. Marsh. 545; Shearer *v.* Clay, 1 Litt. 260; 1 Greenl. Ev. § 104, note 1; 1 Whart. Ev. § 208.

[3] Cases cited *supra*, note 1, and Haynes *v.* Rutter, 24 Pick. 242; Salem *v.* Lynn, 13 Met. 544; People *v.* Davis, 56 N. Y. 95, 102; 1 Greenl. Ev. § 110; 1 Whart. Ev. § 261, and authorities cited.

evidence of the fact of even his present residence may well be doubted.[4]

The impression made upon a witness by declarations is not evidence; the declarations themselves must be given.[5]

§ 455. **Declarations not Conclusive; their Weight depends upon Circumstances.** — The declarations of the person whose domicil is sought to be fixed are certainly not conclusive upon the question of his intention;[1] but with respect to the weight which is to be given them it is difficult to lay down any rule. Acts are regarded as more important than declarations,[2] and written declarations are usually more reliable than oral ones.[3]

[4] See Derby *v.* Salem, 30 Vt. 722. On principle they should not be so considered.

[5] Moorhouse *v.* Lord, 10 H. L. Cas. 272, 290, per Lord Chelmsford.

[1] Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Anderson *v.* Laneuville, 9 Moore P. C. C. 325; Hodgson *v.* De Beauchesne, 12 id. 285; Stanley *v.* Bernes, 3 Hagg. Eccl. 373; De Bonneval *v.* De Bonneval, 1 Curteis, 856; Hoskins *v.* Matthews, 8 De G. M. & G. 13; Brown *v.* Smith, 15 Beav. 444; Drevon *v.* Drevon, 34 L. J. Ch. 129; Crookenden *v.* Fuller, 1 Swab. & Tr. 441; *Re* Steer, 3 Hurl. & Nor. 594; Attorney-General *v.* De Wahlstatt, 3 Hurl. & Colt. 374; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; Lowndes *v.* Douglas, 24 D. (Sc. Sess. Cas. 2d ser. 1862) 1391; The Venus, 8 Cranch, 253; Shelton *v.* Tiffin, 6 How. 163; Butler *v.* Farnsworth, 4 Wash. C. Ct. 101; Doyle *v.* Clark, 1 Flip. 536; Thomaston *v.* St. George, 5 Shep. (17 Me.) 117; Holmes *v.* Greene, 7 Gray, 299; Dupuy *v.* Wurtz, 53 N. Y. 556; Hegeman *v.* Fox, 31 Barb. 475; Isham *v.* Gibbons, 1 Bradf. 69; Sherwood *v.* Judd, 3 id. 267; Hindman's Appeal, 85 Pa. 466; Smith *v.* Croom, 7 Fla. 81; Wooldridge *v.* Wilkins, 3 How. (Miss.) 360; Beason *v.* State, 34 Miss. 602; Verret *v.* Bonvillain, 33 La. An. 1304; and many other cases might be cited.

[2] Anderson *v.* Laneuville, *supra;* Stanley *v.* Bernes, *supra;* Drevon *v.* Drevon, 34 L. J. Ch. 129; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; Shelton *v.* Tiffin, 6 How. 163; Butler *v.* Farnsworth, 4 Wash. C. Ct. 101; Dupuy *v.* Wurtz, 53 N. Y. 556; Isham *v.* Gibbons, 1 Bradf. 69; Sherwood *v.* Judd, 3 id. 267.

[3] Dupuy *v.* Wurtz, *supra;* Lowndes *v.* Douglas, *supra.* In the latter case, Inglis, Lord Justice Clerk, said: "I confess I think that more weight is due to written declarations of intention than to oral declarations; because the terms of such oral declarations are given us by witnesses who heard them, and the value of their testimony must depend on their accuracy of observation at the time the declarations were made, on the precision of their apprehension of the testator's mind, and on the fidelity of their memories. Written declarations of intention are not open to exactly the same objection, but it so happens that in this case even the written declarations of the testator's intention are by no means satisfactory. There is a singular variance between the character the testator assumed to his proposed residence in Jamaica, according as he writes to one person or to another. To his wife's relatives he represents that his residence in Jamaica is only temporary and short. But when he writes to Mr. Blackburn, he speaks of his intended residence in Jamaica as of a more permanent kind."

The value of declarations depends upon a variety of considerations, and must be determined in each case by its own circumstances. The time,[4] occasion,[5] and manner[6] of making them, their reasonableness and consistency with themselves[7] and with the other proven facts in the case,[8] the presence or absence of the suspicion of sinister purpose in making them,[9] the character and temper of the person,[10] as well as (if they are oral) the length of time which has elapsed between the time of their alleged utterance and the time when they are testified to,[11] etc., enter materially into the estimation of their value. If they are not inconsistent with acts, and are faithfully reported, they often serve to turn the scale; but it is otherwise if they are contradicted by the acts and general conduct of the person making them.[12] The peevish outbursts of a person of irascible temper, or the careless expressions of one whose habits are unstable and whose purposes are vacillating, are entitled to less weight than the deliberate utterances of a person of known firmness of character.[13] So, too, expressions in casual conversation[14] are of less value than repeated declarations made to proper persons,[15] or declarations made in the

[4] *E. g.*, whether made *ante litem motam*, at a time not suspicious or otherwise. The Venus, 8 Cranch, 253; Ennis *v.* Smith, 14 How. 400; Burnham *v.* Rangeley, 1 Woodb. & M. 7; Tobin *v.* Walkenshaw, McAll. 186; Thorndike *v.* Boston, 1 Met. 242; Cole *v.* Lucas, 2 La. An. 946; Gardner *v.* O'Connel, 5 id. 353. Further, as to time, see *supra*, § 452, notes 2–5.

[5] See *supra*, note 4, and *infra*, notes 14, 15.

[6] See *infra*, notes 13–15.

[7] Griffin *v.* Wall, 32 Ala. 149; Lowndes *v.* Douglas, 24 D. (Sc. Sess. Cas. 2d ser. 1862) 1391.

[8] Anderson *v.* Laneuville, 9 Moore P. C. C. 325; Stanley *v.* Bernes, 3 Hagg. Eccl. 373; Butler *v.* Farnsworth, 4 Wash. C. Ct. 101; Isham *v.* Gibbons, 1 Bradf. 69; Sherwood *v.* Judd, 3 id. 267; Verret *v.* Bonvillain, 33 La. An. 1304; and see *infra*, note 12.

[9] See cases cited in *supra*, note 4, and Butler *v.* Farnsworth, *supra*; Doyle *v.* Clark, 1 Flip. 536, and Watson *v.* Simpson, 13 La. An. 337.

[10] Wayne *v.* Greene, 21 Me. 357. See *infra*, § 458.

[11] Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285.

[12] Hoskins *v.* Matthews, 8 De G. M. & G. 13; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; Holmes *v.* Greene, 7 Gray, 299; and cases cited *supra*, note 8.

[13] Wayne *v.* Greene, *supra*. See remarks of Tenney, J., in that case, quoted *infra*, § 458.

[14] Moorhouse *v.* Lord, 10 H. L. Cas. 272, 288; Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Hoskins *v.* Matthews, 8 De G. M. & G. 13; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; Brookfield *v.* Warren, 126 Mass. 287; Sherwood *v.* Judd, 3 Bradf. 267.

[15] Moorhouse *v.* Lord, *supra*, per Lord Chelmsford.

usual course of business.[16] Mere declarations that a person prefers a residence in one country to another, it has been said, will not be regarded by a court, except in a nicely balanced case.[17] Calling a place "home" is not entitled to much weight.[18]

§ 456. **Value of Declarations. Remarks of Chancellor Walworth.** — It may be well now to give a few judicial expressions of opinion as to the value of declarations as *criteria* of intention.

In an often quoted passage in his opinion in *Re* Cath. Roberts' Will,[1] Walworth, Ch., said: "These were not mere declarations of a future intention to change an actual residence, from Staten Island to the Island of Cuba, for the purpose of changing her domicil. Such declarations, I admit, would not, without an actual removal from the former place of residence, be sufficient to constitute a change of domicil. But in this case it must be recollected that at the time the declarations were made her husband was dead; and she, having no family, was actually residing in Cuba, where she declared it to be her intention to fix her permanent residence for the remainder of her life. Although it may be difficult to give any general definition of a domicil which will apply to all cases, and Lord Alvanley thought Bynkershoek was wise in not hazarding a definition of the term, I think it cannot be doubted that the

[16] Thorndike *v.* Boston, 1 Met. 242; Kilburn *v.* Bennett, 3 id. 199; Cole *v.* Cheshire, 1 Gray, 441; Brookfield *v.* Warren, 126 Mass. 287. And see Munro *v.* Munro, 7 Cl. & Fin. 842; Moorhouse *v.* Lord, *supra;* Hamilton *v.* Dallas, L. R. 1 Ch. D. 257.

[17] De Bonneval *v.* De Bonneval, 1 Curteis, 856; Somerville *v.* Somerville, 5 Ves. Jr. 750; Moorhouse *v.* Lord, *supra.* See also Hoskins *v.* Matthews, 8 De G. M. & G. 13. In De Bonneval *v.* De Bonneval, Sir Herbert Jenner said: "I do not consider that, in this case, any more than in Somerville *v.* Somerville, the declarations made by the deceased at different times that he preferred a residence in this country can be a ground upon which the court is to rest its judgment; the domicil cannot depend upon loose declarations of this sort, where there are documents which show that the party looked to France as his home. Unless the evidence was nicely balanced, the court would pay no regard to such declarations, showing a preference for a residence in this country, and not a decided intention to abandon his native land and take up his sole residence here."

[18] Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854, per Lord Cranworth; and see remarks of Lord Hatherley in Udny *v.* Udny, L. R. 1 Sch. App. 441, and Bramwell, B., in Attorney-General *v.* Rowe, 1 Hurl. & Colt. 31.

[1] 8 Paige Ch. 519.

actual residence of an individual at a particular place, with the *animus manendi*, or a fixed and settled determination to make that his permanent residence for the remainder of his life, constitutes that place his domicil; at least until there is some evidence that his intention to remain there has been abandoned. And the declarations of the party himself, where he can have no object or inducement to falsify the truth or to deceive those to whom such declarations are made, are the best evidence of his intention to make his actual residence his permanent residence also. Here the declarations of the decedent appear to have been repeatedly and deliberately made, at different times and to various persons; and I think there can be no reasonable doubt that she intended what she said."

§ 457. **Id. Dr. Lushington in Hodgson v. De Beauchesne.** — On the other hand, in an equally well-known passage, Dr. Lushington said, in Hodgson *v.* De Beauchesne:[1] "With respect to verbal declarations made to witnesses who depose thereto, no doubt such declarations are admissible evidence in these questions of domicil; but the weight to be attributed to them entirely depends on circumstances, — especially the time which has elapsed since they were made, and the circumstances under which they were made. To entitle such declarations to any weight, the court must be satisfied not only of the veracity of the witnesses who depose to such declarations, but of the accuracy of their memory, and that the declarations contain a real expression of the intention of the deceased. Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence, especially when, as in this case, encountered by conflicting declarations."

§ 458. **Id. Tenney, J., in Wayne v. Greene; Emmot, J., in Hegeman v. Fox.** — The expressions of several other judges may serve still further to illustrate the subject. Said Tenney, J., in Wayne *v.* Greene:[1] "An individual under excitement and the dominion of angry feelings may express a full determination to leave his residence and the town in which it is situated, and a temporary absence may thereupon follow, and

[1] 12 Moore P. C. C. 285.

[1] 21 Me. 357.

still his domicil may not be changed thereby. Those knowing his temper and habits may be thoroughly satisfied that his intention was not such as he declared. Early attachments to a place of residence, connections of blood or affinity, ties growing out of the acquaintances formed in youth, often bind one to a particular spot and induce him there to pass his moments of leisure, especially when he has no family located in another place. And these are circumstances material in determining the intention of the individual thus influenced when he may move from one place to another. The character of his home, his mode of life, his habits, and his disposition, may be important aids in coming to a result on the question of intention. The removal, accompanied with the declaration of a resolution to abandon his residence, of a person possessing known decision of character, firmness of purpose, not subject to sudden excitement, generally believed to carry into effect his expressed intentions, would and ought to make an impression on the mind different from similar declarations and acts of one of an opposite character." Emmot, J., in Hegeman *v.* Fox,[2] remarked: "To the evidence of what he said at various times I attach little importance. It comes to us impressed with the character of the particular mood of the man when he uttered it, which no doubt varied and was affected by the condition of his health, by his family circumstances, and by other causes. It is colored more or less by the medium through which it comes, and it depends altogether upon the recollection of the witnesses."

§ 459. **Id. Lord Justice Turner, in Hoskins v. Matthews; Lord Chelmsford, in Moorhouse v. Lord.** — Said Turner, L. J., in Hoskins *v.* Matthews:[1] "What was said by Mr. Matthews in his conversations with Mrs. Stephens is, I think, entitled to but little weight. The expressions which are let fall in the course of such conversations are so much influenced by the tone of the mind and the state of the temper at the time, that they cannot, I think, safely be relied on, and certainly cannot be weighed against a series of deliberate acts." In Moorhouse *v.* Lord,[2] Lord Chelmsford said: "There are proved on

[2] 31 Barb. 475. [1] 8 De G. M. & G. 13, 30. [2] 10 H. L. Cas. 272, 288.

this occasion, as there usually are in such cases, written and oral declarations which conflict with each other. I lay no great stress, as your lordships probably would not incline to do, upon casual expressions of preference for one country over another at different periods. The feelings at the moment may dictate them, or the changing circumstances of life; even a change of weather, the difference between a bright and gloomy day, may make all the difference in the expressions of attachment to one place or to another. But I do lay very considerable stress upon declarations made to parties to whom he would be likely to reveal his intentions, those declarations not being casual and occasional, but repeated from time to time, and evincing a strong determination to carry into effect the objects which he states."

Most of what is said in the above-quoted passages has reference particularly to oral declarations, but much of it is applicable also with proper qualifications to such written declarations as are not of a specially formal character.[3]

§ 460. **Written Declarations: Letters.** — The declarations contained in the letters of the person whose domicil is in question have frequently been relied upon[1] to explain his intention with reference to his absence from his former place of abode, and great stress has been laid upon them in many cases, especially when the letters were written in the usual course of business, or to give directions concerning the care or disposition of property left behind him.[2]

§ 461. **Id. Description in Deeds.** — The description of his residence given by a person in deeds or other legal documents has often been received as evidence that he is there domiciled.[1] This is mentioned by Pothier as one of the circum-

[3] See, *e. g.*, Lowndes *v.* Douglas, 24 D. (Sc. Sess. Cas. 2d ser. 1862) 1391.

[1] Munro *v.* Munro, 7 Cl. & Fin. 842; Aikman *v.* Aikman, 3 Macq. H. L. Cas. 854; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Lord *v.* Colvin, 4 Drew. 366; Hoskins *v.* Matthews, 8 De G. M. & G. 13; Hamilton *v.* Dallas, L. R. 1 Ch. D. 257; Thorndike *v.* Boston, 1 Met. 242; Cabot *v.* Boston, 12 Cush. 52; Cole *v.* Cheshire, 1 Gray, 441.

[2] Munro *v.* Munro, *supra;* Lord *v.* Colvin, *supra;* Thorndike *v.* Boston, *supra;* Cabot *v.* Boston, *supra;* Cole *v.* Cheshire, *supra.* But see *contra*, Wright *v.* Boston, 126 Mass. 161, and Weld *v.* Boston, id. 166. In these cases, however, the letters were written too late.

[1] Jennison *v.* Hapgood, 10 Pick. 77; Ward *v.* Oxford, 8 Pick. 476; Smith *v.* Croom, 7 Fla. 81; Davis *v.* Binion, 5

stances to which recourse may be had to fix the place of domicil.[2] Such recitals are not subject to the rule above stated with reference to declarations; namely, that they must accompany some act which they tend to explain. "The designation of his residence," says Parker, C. J., in Ward *v.* Oxford, "in a solemn instrument such as a deed or a will, is in the nature of a fact rather than a declaration; being made when there is no controversy, and where no possible interest could exist to give a false designation." But such evidence is merely presumptive, and does not conclude anybody,[3] not even the person whose deed it is when domicil is not one of the elements of the contract;[4] nor does it conclude the grantee who accepts the deed.[5] A recital in a recent deed, however, is not evidence in the party's favor,[6] but is admissible against

La. An. 248; New Orleans *v.* Shepherd, 10 id. 268. Kindersley, V. C., in Lord *v.* Colvin, 4 Drew. 366, 409, said: "It is always considered that the manner in which a man describes himself in solemn acts and legal documents is an important point in reference to the question of his domicil."

[2] Intr. aux Cout. d'Orléans, no. 20. See also Cochin, Œuvres, t. 6, p. 231; Denizart, *verb.* Dom. *passim;* Demolombe, Cours de Code Napoléon, t. 1, no. 345.

[3] Ward *v.* Oxford, *supra;* Wright *v.* Boston, 126 Mass. 161; Isham *v.* Gibbons, 1 Bradf. 69; Smith *v.* Croom, 7 Fla. 81; Hill *v.* Spangenburg, 4 La. An. 553; Davis *v.* Binion, 5 id. 248; New Orleans *v.* Shepherd, 10 id. 268; Tillman *v.* Mosely, 14 id. 710; Sanderson *v.* Ralston, 20 id. 312; Ricard *v.* Kimball, 5 Rob. (La.) 142 (affidavit).

[4] Davis *v.* Binion, *supra;* New Orleans *v.* Shepherd, *supra;* Tillman *v.* Mosely, *supra.* In Ricard *v.* Kimball, *supra*, the defendant, a ship-owner, in an affidavit made for the purpose of procuring an enrolment of his vessel, described himself as having his "usual place of abode or residence in New Orleans." In a suit brought against him as owner of said vessel, witnesses testified to his residence in Natchitoches Parish. It was contended, on behalf of plaintiff, that in all matters relating to the vessel his description in the affidavit was conclusive. But the court held that it was not, and that his domicil was in Natchitoches Parish.

[5] Thus, in Wright *v.* City of Boston, *supra* (a suit to recover back tax paid under protest), a deed made by the plaintiff to the defendant more than a year before the controversy arose, and in which he described himself as "of Nahant in the County of Essex," was held to be inadmissible in the plaintiff's favor; Morton, J., remarking: "The acceptance of a deed by a grantee is slight evidence that the description of his residence therein is correct. He is presumed to know his own residence, and to have an interest in having it correctly stated. But a grantee cannot be presumed to know the residence of the grantor, and his acceptance of the deed, therefore, cannot be held to be an implied admission that the grantor's residence is correctly stated." This is of course true, but it does not thence follow that the deed is admissible. But see next note.

[6] Wright *v.* Boston, *supra;* Weld *v.* Boston, 126 Mass. 166. It seems difficult upon any other grounds to reconcile these cases with the general current of

him.[7] The acceptance of a deed by a grantee is slight evidence that his own residence is correctly stated therein.[8]

§ 462. **Id. Description in Wills.** — The description which a person gives of his residence in his will has almost always been received in evidence,[1] and generally considerable weight has been attached to it, especially where the controversy is concerning the estate of the testator. Such recitals have been said to be sufficient *prima facie* to establish domicil.[2] They may be admitted even in favor of the party making them.[3] Thus, in Gillis *v.* Gillis, a divorce case, the petitioner, whose domicil of origin was Irish, having resided nineteen years in France, during twelve of which he lived in a house which he had purchased there, the court laid great stress upon the fact that in four wills, executed before anticipation of the suit, he had described himself as domiciled in Ireland,

the decisions, and particularly with Ward *v.* Oxford, *supra*. In Wright *v.* Boston, Morton, J., thus distinguishes Ward *v.* Oxford: "In that case the question was as to the settlement of a pauper who, it was claimed, derived his settlement through his father from his grandfather. It was held that, as evidence tending to show that the settlement of the grandfather was in Oxford, office copies of a deed and a will made by the grandfather more than seventy years before the trial, in which he described himself as 'now resident in Oxford,' were admissible. The declarations admitted were not the declarations of a party to the controversy. Though such evidence may be competent in proof of an ancient transaction, in regard to which, as in questions of pedigree, the rule against hearsay evidence is relaxed, the case cannot be regarded as an authority to the point that the recitals in a recent deed or will are competent evidence in favor of the party making them, in a suit against him or his executor."

[7] Weld *v.* Boston, *supra*.

[8] Wright *v.* Boston, *supra*; Weld *v.* Boston, *supra*.

[1] Attorney-General *v.* Pottinger, 6 Hurl. & Nor. 733; Lyall *v.* Paton, 25 L. J. Ch. 746; Drevon *v.* Drevon, 34 id. 129; Goods of West, 6 Jur. (N. S.) 831; Allardice *v.* Onslow, 10 id. 352; Crookenden *v.* Fuller, 1 Swab. & Tr. 441; Attorney-General *v.* Fitzgerald, 3 Drew. 610; Hoskins *v.* Matthews, 8 De G. M. & G. 13; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; Gillis *v.* Gillis, Ir. R. 8 Eq. 597; Ennis *v.* Smith, 14 How. 400; Ward *v.* Oxford, 8 Pick. 476; Jennison *v.* Hapgood, 10 id. 77; Wilson *v.* Terry, 9 Allen, 214; Carey's Appeal, 75 Pa. St. 201; Horne *v.* Horne, 9 Ired. 99; McKowen *v.* McGuire, 15 La. An. 637. But see Wright *v.* Boston, 126 Mass. 161.

[2] Ennis *v.* Smith, *supra*.

[3] Gillis *v.* Gillis, *supra*; Wilson *v.* Terry, *supra*. The latter case, however, is overruled by Wright *v.* Boston, *supra*. But the doctrine of Wilson *v.* Terry appears to be in conformity with the general current of authority upon the subject of declarations in formal documents. It is indeed difficult to perceive why declarations as to residence made in deeds or wills, if admissible at all, are not evidence in favor of the party making them, provided they be made at a time sufficiently remote from the origin of the controversy to render them free from suspicion.

and held that this, in connection with his own testimony that his residence abroad was on account of his health and that he intended to return as soon as his health was restored, rebutted the inference of a change of domicil flowing from long residence in France and the purchase of a dwelling-house there.

§ 463. **Id. Description in Deeds and Wills not Conclusive.**— But although such recitals are important either when standing by themselves or when corroborating other evidence, particularly in a nicely balanced case, they are by no means controlling when contradicted by other facts and circumstances.[1]

They are frequently made in both deeds and wills without any special importance being attached to them; and sometimes are introduced by scriveners without the attention of the grantor or testator being particularly called to them. Great caution should therefore be used against giving them too great weight, or attaching to them a meaning which was not intended. Said Surrogate Bradford, in a learned opinion in Isham *v.* Gibbons:[2] "The declarations of the deceased in his will and in the deed of manumission furnish the only evidence pointing to [the acquisition of a new domicil]. In a nicely balanced case they might be decisive; but great caution should be used in not giving them too great weight, or attaching to them a meaning not designed by the testator. . . . The truth is, after all, that such written declarations, even of the most solemn character, are but facts to enable the court to discover the intention of the party. It is in this light alone that they are to be received and weighed. At the best, the *animus* of the party is only to be *inferred* from them. In this respect they are like any other facts. Declarations of any kind are not controlling, but may be, and frequently are, overcome by other and more reliable indications of the true intention."

§ 464. **Id. Description in Judicial Proceedings.**— What has been said of recitals in deeds and wills may also be applied to the description which a party gives of his residence in judi-

[1] Whicker *v.* Hume, 7 H. L. Cas. 124; Jopp *v.* Wood, 4 De G. J. & S. 616; *Re* Steer, 3 Hurl. & Nor. 594; Attorney-General *v.* Kent, 1 Hurl. & Colt. 12; Gilman *v.* Gilman, 52 Me. 165; Ward *v.* Oxford, 8 Pick. 476; Wright *v.* Boston, *supra;* Isham *v.* Gibbons, 1 Bradf. 69.

[2] *Supra.*

cial proceedings. It is some evidence of domicil,[1] but is not conclusive,[2] even against himself, in another proceeding.[3]

§ 465. **Omission to Speak.** — The silence of a person is sometimes significant upon the question of his intention.[1] That intention "is manifested by what he does, and by what he says when doing; and sometimes as significantly by what he omits to do or to say."[2] Demolombe[3] mentions as an illustration of this point, the appearance of a defendant before a tribunal whose jurisdiction depends upon his domicil, without entering a declinatory plea.

§ 466. **Form of Will. Spelling of Name.** — Before quitting this subject allusion may be made to another matter of evidence, which in a certain sense may be considered as a declaration of domicil; namely, the form in which a person makes and executes his will. This has been considered important evidence in some of the English cases.[1] So also has been considered the fact that the provisions of a will were valid according to the law of one country and invalid according to the law of another.[2] And in Drevon *v.* Drevon,[3] Kindersley, V. C., thought the fact that the name of the testator (a Frenchman by origin) was spelled in his will in the English instead of the French form, was some evidence of his intention to become an Englishman.

§ 467. **Person whose Domicil is in Question may testify to his Intent.** — A person whose domicil is in question may, subject to the ordinary rules of exclusion on the ground of interest

[1] Cavendish *v.* Troy, 41 Vt. 99; Hegeman *v.* Fox, 31 Barb. 475; Succession of Franklin, 7 La. An. 395; New Orleans *v.* Shepherd, 10 id. 268.

[2] De Bonneval *v.* De Bonneval, 1 Curteis, 856; Hegeman *v.* Fox, *supra*; New Orleans *v.* Shepherd, *supra*.

[3] New Orleans *v.* Shepherd, *supra*.

[1] Guier *v.* O'Daniel, 1 Binn. 349, note; Cole *v.* Cheshire, 1 Gray, 441.

[2] Thomas, J., in Cole *v.* Cheshire.

[3] Cours de Code Napoléon, t. 1, no. 345.

[1] Attorney-General *v.* De Wahlstatt, 3 Hurl. & Colt. 374; Drevon *v.* Drevon, 34 L. J. Ch. 129; Doucet *v.* Geoghegan, L. R. 9 Ch. D. 441; Hodgson *v.* De Beauchesne, 12 Moore P. C. C. 285. In Attorney-General *v.* De Wahlstatt, Pollock, C. B., said during the argument: "Surely the fact of the testatrix making her will in England, and according to the law of England, was the strongest declaration that she considered she had an English domicil." But see, *contra*, Bremer *v.* Freeman, 10 Moore P. C. C. 306, where the Privy Council considered the fact that an English woman long resident in France made her will in English form as of little weight in showing that she retained her English domicil.

[2] Doucet *v.* Geoghegan, *supra*.

[3] 34 L. J. Ch. 129

and the like, where they prevail and are applicable, testify concerning his intention at the time of removal, or during his absence, or, indeed, in explanation of the purpose with which any act in evidence was done.[1] The weight to be given to his testimony is, of course, to be determined by circumstances, and in accordance with the general rules applicable to cases other than those of domicil. Such testimony cannot be accepted as conclusive upon the question of intention if contradicted by the acts and general conduct of the party.[2] It is, indeed, to be received with caution in all cases, whether or not the person be interested in the proceeding, particularly if given after the lapse of considerable time, because of "the natural, though it may be unconscious, tendency to give to his bygone feelings a tone and color suggested by his present inclinations."[3]

[1] Maxwell *v.* McClure, 6 Jur. (N. S.) 407; Bell *v.* Kennedy, L. R. 1 Sch. App. 307; Wilson *v.* Wilson, L. R. 2 P. & D. 435; Gillis *v.* Gillis, Ir. R. 8 Eq. 597; Kemna *v.* Brockhaus, 10 Biss. 128; Woodworth *v.* St. Paul, etc. Ry. Co. 18 Fed. R. 282; Parsons *v.* Bangor, 61 Me. 457; Stockton *v.* Staples, 66 id. 197; Hulett *v.* Hulett, 37 Vt. 581; Fisk *v.* Chester, 8 Gray, 506; Hallet *v.* Bassett, 100 Mass. 167; Reeder *v.* Holcomb, 105 id. 93; Thayer *v.* Boston, 124 id. 137; Wright *v.* Boston, 126 id. 161; Weld *v.* Boston, id. 166; Mooar *v.* Harvey, 128 id. 219; Hall *v.* Hall, 25 Wis. 600; Keith *v.* Stetter, 25 Kans. 100; Venable *v.* Paulding, 19 Minn. 488; Clarke *v.* Territory, 1 Wash. Ter. 82.

[2] Wilson *v.* Wilson, *supra;* Hulett *v.* Hulett, *supra;* Wright *v.* Boston, *supra;* Weld *v.* Boston, *supra;* Mooar *v.* Harvey, *supra;* Keith *v.* Stetter, *supra.* In Wilson *v.* Wilson, Lord Penzance said: "The court must not take his word as conclusive proof of the fact; and if there are circumstances in the case which tend to show that what he says is not true or likely to be true, they may influence the conclusion at which the court would arrive." In Hulett *v.* Hulett, Poland, J., thus discusses the subject: "This defendant was allowed to testify as to his design and intent in coming to Fairhaven, that it was for a temporary purpose, with no design to remain and make that his home. This was objected to on the ground that a party should not be allowed to swear to his intent or mental purpose, because it is not in the power of the other party to contradict him by similar evidence. Of course the workings and purposes of the mind and will of a person are not known by mere consciousness to any one but the person himself; but still, where a person's intent in a particular transaction is a question in issue to be tried, we see no ground on which he can be excluded from testifying to his intent. He can be contradicted only by his acts and conduct or declarations. But where a party swears to his intent, if his acts and conduct are shown to be wholly at variance and inconsistent with the intent he swears to, his own testimony in his own favor would ordinarily obtain very little credit with the jury; and but little danger need be apprehended from such testimony unless his acts and conduct are consistent with it."

[3] Lord Colonsay, in Bell *v.* Kennedy, L. R. 1 Sch. App. 307.

INDEX.

A.

ABANDONMENT, Section
of old domicil necessary for the acquisition of the new 151
presumption always against 151
must clearly appear 151, 205
burden of proof on him asserting it 151
not discharged by merely showing absence 151
not a mere matter of sentiment 153
former place of abode need be abandoned only as a place of abode 160
therefore occasional returns or the retention of landed estate will not prevent a change of domicil 160
effect of retention of dwelling-house or other place of residence upon 160
need not be express or conscious 161
may be implied from intention to remain elsewhere 161
but in such case the inference must be clear and unequivocal . 161
of former place of abode not always necessary for a change of municipal domicil 184
of acquired domicil must clearly appear in order to accomplish reverter of domicil of origin 205
must be final and complete 205

ABSCONDING DEBTORS,
domicil of 286

ABSENCE,
temporary, *cum animo revertendi*, no change of domicil . 151, 182
illustrative cases 152

ACQUIRED DOMICIL,
not the subject of reverter 208
(See also DOMICIL OF CHOICE.)

ACQUISITION OF DOMICIL,
does not depend upon residence alone 380
(See also CHANGE OF DOMICIL.)

ACT AND INTENTION,
necessary for a change of domicil . . . . . 125 *et seq.*, 182 *et seq.*
(See also ANIMUS ET FACTUM.)

ACTIONS, LIMITATION OF. Section
(See LIMITATION.)

ACTS,
more important as evidence of domicil than declarations . . . 455

ADOPTED CHILD,
domicil of 247, 248
(See also INFANT.)

ADOPTION,
relation of domicil to 82

ALLEGIANCE,
and domicil distinct 144–147, 193
change of, not involved in a change of domicil 195

AMBASSADORS,
domicil of 317–322
the domicil of a person is not affected by entering the diplomatic service of his country abroad 317–320
this principle placed on several grounds
(*a*) the fiction of extra-territoriality 317–319
(*b*) the presumption of temporary residence 320
Attorney-General *v.* Kent 318, 319
can an ambassador acquire a domicil in the country to which he is accredited? 321

AMERICAN JURISPRUDENCE,
domicil in 20

ANGLO-INDIAN CASES . . . . . 155, 157, 360 note

ANIMUS,
character of (national and *quasi*-national domicil) . . . 137 *et seq.*
implies (1) capacity to choose 137
(2) freedom of choice 138
compulsory change of bodily presence no change of domicil (see SOLDIER, PRISONER, EXILE, PAUPER, REFUGEE, FUGITIVE FROM JUSTICE, etc.).
where absence is originally voluntary, but party is unable to return, no change of domicil ensues . 139
motive distinguished from compulsion 140–142
(See MOTIVE.)
(3) actual choice 143
mere absence from former place of abode does not *per se* affect domicil 143, 151
nor presence in another place 143, 162
the requisite *animus* is not intention to change political nationality . . . . . 144 *et seq.*
allegiance and domicil entirely distinct 144
Lord Westbury, in Udny *v.* Udny 144, 195
Lords Cranworth and Kingsdown, in Moorhouse *v.* Lord 145, 146
Bacon, V. C., in Brunel *v.* Brunel 147

ANIMUS — continued. Section
nor intention to change civil *status* 148, 149
Wickens, V. C., in Douglas *v.* Douglas 148
Steer's case 149
the requisite *animus* defined 150
need not be present at time of removal ; may grow up afterwards 178, 392
complex and often difficult to prove 365
how provable . . . . . 365 *et seq.*
requisite for change of municipal domicil.
(See MUNICIPAL DOMICIL.)

ANIMUS ET FACTUM,
necessary for a change of domicil . . . 125 *et seq.*, 182 *et seq.*, 380
(See ANIMUS, ANIMUS MANENDI, ANIMUS NON REVERTENDI, and FACTUM.)

ANIMUS MANENDI,
in national and *quasi*-national domicil . . . . . 162 *et seq.*
as necessary for the accomplishment of a change of domicil as *animus non revertendi* 162
therefore temporary presence in a place *sine animo manendi* does not establish a domicil there 143, 162
the Roman law throws little light upon the nature of the . . . 163
but permanency was apparently an essential ingredient in the Roman idea of domicil 163
expressions of continental jurists concerning 164, 165
although differing with respect to the requisite degree, they all insist upon substantial permanency 165
British authorities 166–169
insist upon substantial permanency 166
intention to remain "for an unlimited time" . . 166, 167, 195
intention to "settle" 167, 193
intention to remain for an indefinite time 168
intention to remain during the life of another 169
American authorities . . . . . 170 *et seq.*
much confusion and looseness of expression among them with respect to the *animus manendi* 170
intention to remain permanently usually laid down or assumed 170
intention to remain "for an unlimited time" 170
"for an indefinite time" considered sufficient by many . 171
objections to the use of this phrase with respect to national or *quasi*-national domicil 171, 172
intention to make the new place of abode the "home" of the party 173
negative view of the *animus manendi* 174
residence in a place "without any present intention of removing therefrom" 174
objections to this view 174
animus manendi does not exclude the possibility of future changes 175

ANIMUS MANENDI — continued. Section
mere conditional or contingent *animus manendi* not sufficient . 176
intention to reside presently necessary 177
animus manendi necessary for change of municipal domicil.
(See MUNICIPAL DOMICIL.)

ANIMUS NON REVERTENDI,
old domicil must be abandoned before a new one can be acquired 151
presumption always against abandonment 151
which must therefore clearly appear 151
burden of proof on him asserting it 151
not discharged by merely showing absence 151
temporary absence *cum animus revertendi* no change of domicil . 151
illustrative cases 152
abandonment not a mere matter of sentiment 153
"floating intention to return, — Story's proposition . . 154 *et seq.*
examination of the authorities upon which Story's proposition was based 155
Anglo-Indian cases 155
near and remote contingency 156–158
Lord Campbell, in Aikman *v.* Aikman 156
Craigie *v.* Lewin 157
how far applicable in view of the recent English cases . . 158
Story's proposition in the American cases 159
occasional returns to former place of abode do not prevent a change of domicil 160
nor does retention of landed estate there 160
as to the effect of retention of dwelling-house or other place of residence, *quære* 160
animus revertendi need not be express or conscious 161
may be implied in intention to remain elsewhere 161
but in such cases the inference must be clear and unequivocal 161
necessary for accomplishment of reverter of domicil of origin . 205
must clearly appear 205
contingent *animus non revertendi* not sufficient 205
unless the contingency be a distant or improbable one . . 205
(See also ABANDONMENT and MUNICIPAL DOMICIL.)

APPRENTICE,
domicil of 246
(See also INFANT.)

ASSIGNMENTS OF MOVABLES,
particular and general . . . . . 40 *et seq.*
(See also MOVABLES.)

ATTACHMENTS, FOREIGN,
relation of domicil to jurisdiction in 49

AUTHORIZATION TO ESTABLISH DOMICIL,
domicil of foreigners in countries whose laws provide for . 341 *et seq.*
(See also FRANCE.)

B.

BETROTHAL, Section
does not *per se* work a change of domicil 210, 211
as evidence of domicil 409

BIBLIOGRAPHY OF DOMICIL . . . . . 22 *et seq.*

BIRTH,
domicil of.
(See DOMICIL OF ORIGIN.)
place of, *prima facie* domicil of origin 105, 362
but not necessarily 105, 362
place of, cannot be proved by hearsay . . . . . 454, note 2

BRITISH JURISPRUDENCE,
domicil in . . . . . 17 *et seq.*
only lately introduced 17
early English cases 18
early Scotch cases 18*a*
Bruce *v.* Bruce and its sequents 19

BURDEN OF PROOF,
on him asserting abandonment of former domicil 151
which is not discharged by merely showing absence . . . 151
on him alleging a change of domicil generally 181, 362
on him alleging a change of domicil of origin . 115–118, 122, 380
which is not discharged by showing mere residence elsewhere 380
contra 378
on him asserting reverter of domicil of origin 203

BURIAL,
place of 427

BURIAL-PLACE,
purchase of 428–430
sale of 431

BUSINESS,
residence and engaging in, as evidence of domicil 410–412
place of residence preferred to place of business as domicil . . 413

C.

CAPACITY, PERSONAL.
(See WIFE, INFANT, MARRIAGE, SUCCESSION.)

CHANGE OF BODILY PRESENCE,
necessary for a change of domicil . . . . . 125 *et seq.*, 182
but will not of itself constitute a change of domicil . . 125, 126, 135, 136, 182
how far necessary for reverter of domicil of origin 191 *et seq.*, 204, 206
(See also FACTUM.)

CHANGE OF DOMICIL, Section
a question of act and intention *(factum et animus)* 125 *et seq.*, 182 *et seq.*
neither act nor intention by itself sufficient . 125 *et seq.*, 182 *et seq.*
the requisite act or *factum* for.
(See FACTUM.)
the requisite intention or *animus* for.
(See ANIMUS, ANIMUS MANENDI, ANIMUS NON REVERTENDI.)
residence in a definite locality not necessary for 133
at what point of time domicil vests and is divested 179
new domicil vests instantly upon the concurrence of the requisite *animus et factum* 179
old domicil is divested instantly upon the vesting of the new . 179
a serious matter and presumed against 124
burden of proof on him asserting 124, 181, 362
how proved . . . . . 362 *et seq.*
proof of, relative; each case depends upon its own circumstances . . . . . 366 *et seq.*
probabiles conjecturæ to be resorted to for determination of . . 371
relative amount of proof required to show change of national, *quasi*-national, and municipal domicil 362
id. domicil of origin and domicil of choice 362
domicil cannot be changed *in itinere* . . . . . 130 *et seq.*
contrary view maintained by some in event of death *in itinere* 128, 129
exception in favor of reverter of domicil of origin 127, 190 *et seq.*
a fortiori no change takes place when the territorial limits of the old domicil have not been passed 132
change of national or *quasi*-national domicil . . . . . 121 *et seq.*
change of municipal domicil . . . . . 180 *et seq.*
reverter of domicil of origin . . . . . 190 *et seq.*
(See REVERTER, etc.)

CHILDREN,
residence of, evidence of the domicil of parent 406
(See also INFANT.)

CHOICE, DOMICIL OF.
(See DOMICIL OF CHOICE.)

CITIZENSHIP,
in general.
(See NATIONALITY and NATURALIZATION.)
judicial.
(See JUDICIAL CITIZENSHIP.)
municipal, in the Roman law . . . . . 2 *et seq.*
(See also ORIGO.)

CIVIL OFFICERS.
(See PUBLIC CIVIL OFFICERS.)

CIVITATES,
in the Roman law 1

CIVITATIS, JUS. Section
(See CITIZENSHIP.)
CLASSIFICATION OF DOMICIL 102, 103
CLIMATE,
preference for a particular, on account of health does not prevent a change of domicil 141
(See also INVALIDS.)
CODE, ROMAN,
definition of domicil contained in.
(See DEFINITIONS.)
CODIFICATION,
effect of, upon the application of domicil to the determination of legal relations 16
COLONIÆ,
in the Roman municipal system 1
COMPULSION AND MOTIVE,
distinction between 140, 141
sometimes very shadowy and hard to apply 141
COMPULSORY CHANGE OF BODILY PRESENCE,
no change of domicil . . . . . 138 *et seq.*, 183, 270, 272 *et seq.*
(See also EXILES, PAUPERS, PRISONERS, REFUGEES, SOLDIERS, etc.)
CONSTRUCTION,
of marriage contracts.
(See MARRIAGE.)
of wills.
(See SUCCESSION.)
CONSULS, DOMICIL OF 323, 324
a person does not change his domicil by residence abroad in the consular service of his country 323
nor by accepting a consular appointment in his own country in the service of a foreign country . . . . . 323 *a*
a consul may acquire a domicil in the foreign country in which he serves 324
CONTINGENCY,
near and remote 156–158
CONTINGENT INTENTION,
animus manendi, in national and *quasi*-national domicil . . . 176
in municipal domicil 188
animus non revertendi 156–158
CONTINUANCE OF DOMICIL,
presumption of . . . . . 115, 122 *et seq.*, 151, 362
"*CONVERSATIO ASSIDUA*,"
equivalent to "residence" 377
evidence of domicil 377
CRITERIA OF DOMICIL.
(See EVIDENCE.)
CUSTOMS, LOCAL.
(See LOCAL LAWS AND CUSTOMS.)

D.

Section

DEATH *IN ITINERE* . . . . . 128 *et seq.*, 193, 194, 200

DEATH, PLACE OF,
theoretically *prima facie* evidence of domicil 426
but practically of little or no significance if any of the facts of the person's life be known 426

DEBTOR, ABSCONDING,
domicil of 286

DECLARATIONS . . . . . 449 *et seq.*
admissible against the party making them 449
accompanying and explanatory of acts admissible as part of the *res gestæ* 451
immediately explanatory of the act of removal 452
must be substantially contemporaneous with the act 452
mediately explanatory of the act of removal 453
explanatory of absence 453
not evidence of facts 454
impression made upon witness by declarations not evidence . . 454
not conclusive; their weight depends upon circumstances . . 455
acts more important than declarations 455
written declarations more reliable than oral ones 455
remarks of various judges upon the value of declarations in cases of domicil 456–459
Chancellor Walworth, in *Re* Cath. Roberts' Will 456
Dr. Lushington, in Hodgson *v.* DeBeauchesne 457
Tenney, J., in Wayne *v.* Greene 458
Emmot, J., in Hegeman *v.* Fox 458
Lord Justice Turner, in Hoskins *v.* Matthews 459
Lord Chelmsford, in Moorhouse *v.* Lord 459
written declarations 460–464
letters 460
descriptions in deeds 461
descriptions in wills 462
descriptions in deeds and wills not conclusive 463
descriptions in judicial proceedings 464
omission to speak; silence 465
form of will 466
spelling of name 466
formal declarations of domicil 450

DEED OF SEPARATION,
domicil of wife not affected by living apart from her husband under a 216
effect of, upon the right of either party to sue for restitution of conjugal rights 216

DEEDS, DESCRIPTIONS IN, Section
evidence of domicil 461
but not conclusive 463

DEFINITIONS,
difficulty of defining domicil 57
definitions of the Roman law 58–61
(*a*) definition of the Code 58–60, 374, 401
(*b*) definitions of the Digest 61, 374
definitions of domicil by
the older continental jurists 62
Donellus 62
John Voet 62
Hertius 62
Cujas 62
Pothier (Pandects) 62
Vattel 63
of the French jurists 63
Denizart 63
Pothier (Cout. d'Orléans) 63
Encyclopédie Moderne 63
Code Civil 63
Demolombe 63
Proudhon 63
Demante 63
Ortolan 63
Marcadé 63
other continental jurists 64
Savigny 64
Calvo 64
American definitions 65
Story 65
President Rush, in Guier *v.* O'Daniel 65
Parker, J., in Putnam *v.* Johnson 65
Louisiana Civil Code 65
English judges 66
Kindersley, V. C., in Lord *v.* Colvin 66
Lord Wensleydale, in Whicker *v.* Hume 66
English text-writers 67
Phillimore 67
Foote 67
Westlake 67
Dicey 67
miscellaneous definitions of domicil . . . . . 68, note 1
Wolff (Jus Gentium) 68
Forcellini (Lexicon) 68
Glück 68
Boullenois 68
Desquiron 68
Vallette . . . . . 68, note 1

DEFINITIONS — *continued.* Section
Emmery 68
Italian Code 68
Sardinian Code 68
Court of Cassation in Melizet's case 68
El Diccionario de Legislacion 68
Paige, J., in Crawford *v.* Wilson 68
Woodward, J., in Chase *v.* Miller 68
Wing, J., in Rue High Appellant 68
Bishop (Marr. & Div.) 68
usually not broad enough to include all phases of domicil . . 68
is domicil place or legal relation? 69
domicil defined by "home" 70–72
domicil defined by "residence" 73–75
of domicil suggested 72
of residence 74
of habitancy or inhabitancy 76
of domicil, national, *quasi*-national, and municipal 77
of domicil in the Roman law mainly *formulæ* of evidence . . 374

DESCRIPTIONS,
in judicial proceedings 464
in deeds and wills 461–463

DIVORCE,
jurisdiction in, depends upon domicil 39
can wife entitled to, establish a domicil for herself . . 39, 223 *et seq.*

DIVORCED WOMAN,
domicil of.
(See WIFE.)

DOMICIL,
acquired.
(See DOMICIL OF CHOICE.)
acquisition of.
(See CHANGE OF DOMICIL.)
application of, to various purposes in public and private international and municipal law . . . . . 25 *et seq.*
bibliography of 22–24
change of.
(See CHANGE OF DOMICIL.)
classification of 102, 103
criteria of . . . . . 362 *et seq.*
(See also EVIDENCE.
definitions of . . . . . 57 *et seq.*
(See also DEFINITIONS.)
in American jurisprudence 20
in British jurisprudence 18, 19
and allegiance . . . . . 144 *et seq.*, 185
and home; similarity 70
differences 71
home the fundamental idea of domicil 72

DOMICIL — *continued.* Section
and inhabitancy 76
and residence . . . . . 73 *et seq.*
"residence" in American legislation usually, although not always, means domicil 75
national, *quasi*-national, and municipal, distinguished 77
(See also NATIONAL DOMICIL, QUASI-NATIONAL DOMICIL, and MUNICIPAL DOMICIL.)
general rules of . . . . . 78 *et seq.*
(See also GENERAL RULES.)
evidence of.
(See EVIDENCE, BURDEN OF PROOF, PRESUMPTIONS, etc.)
reverter of . . . . . 190 *et seq.*
(See also REVERTER OF DOMICIL.)
of particular persons.
(See WIFE, INFANT, NON COMPOTES, PAUPERS, PRISONERS, EXILES, REFUGEES, INVALIDS, SOLDIERS, SAILORS, PUBLIC CIVIL OFFICERS, AMBASSADORS, CONSULS, and STUDENTS.)
in particular places.
(See FRANCE and EASTERN COUNTRIES.)
once shown, presumed to continue 362
(See also PRESUMPTIONS.)
once acquired continues until another is acquired . . 82, 113, 201
when domicil vests and is divested 134, 179

DOMICIL OF CHOICE,
described by Lord Westbury 195
gained *animo et facto* . . . . . 125 *et seq.*, 193–195
and, according to the doctrine of Udny v. Udny, may be lost by mere abandonment and without acquiring another domicil of choice . . . . . 192 *et seq.*
according to the American authorities continues until another domicil is gained 82, 113, 201
(See also CHANGE OF DOMICIL.)
slighter proof required to show the loss of domicil of choice than of domicil of origin 362
stronger proof required to show the substitution of one domicil of choice for another than to show reverter of domicil of origin 362
not the subject of reverter 208

DOMICIL OF ORIGIN . . . . . 104 *et seq.*
every person receives at birth a 104, 195
not the same as *origo* in the Roman law 6, 104
various phrases used as equivalent to . . . . . 104, note 3
forum originis an incorrect expression . . . . . 104, note 3
how constituted 105, 195
of legitimate child 105, 195
of illegitimate child 105, 195
of foundling 105

DOMICIL OF ORIGIN— *continued.* Section
of posthumous child 105
place of birth *prima facie* domicil of origin 105
but not conclusively 105
in the Roman law 106
opinions of Civilians concerning 107, 108
id. immutability 107
id constitution and change 108
in British and American jurisprudence . . . 109 *et seq.*, 190 *et seq.*
"clings closely" . . . . . 110 *et seq.*, 362
doctrine of Udny *v.* Udny . . . . . 111 *et seq.*, 192 *et seq.*
not likely to be held in this country 113
cannot be extinguished by act of the party 111, 195
may be extinguished by act of the law 111, 195
adheres until another domicil is acquired 114, 195, 380
presumption against change of 115–118, 380
this presumption modified by circumstances 116, 117
applies also in favor of resumed domicil of origin 118
burden of proof on him alleging a change of domicil of origin . 380
which is not discharged by showing mere residence elsewhere 380
contra 378
stronger proof required to show loss of, than loss of domicil of choice 362
"reverts easily" . . . . . 119 *et seq.*, 190 *et seq.*, 362
(See also REVERTER OF DOMICIL.)
slighter circumstances required to show re-acquisition of domicil of origin than acquisition of domicil of choice 119
the principle, however, a relative one 120
a matter wholly irrespective of any *animus* on the part of its subject 193
cannot be obliterated 195
is put in abeyance on acquisition of domicil of choice 195
a highly technical fiction 199
a person may have domicil of origin in a country without ever having been there 199

DOMICILIUM,
in the Roman law 5
texts concerning, collected . . . . . 5, note
and *origo* . . . . . 2 *et seq.*
(See also ORIGO AND DOMICILIUM.)

DOMICILIUM ORIGINIS.
(See DOMICIL OF ORIGIN.)

DOUBLE RESIDENCE 421–425
residence in several States or countries 422
municipal districts 423
may a person having several residences elect his domicil? . . 424
dwelling-house upon the dividing line of two districts 425

DWELLING-HOUSE, Section
ownership of, as evidence of domicil 417
sale of, as evidence of domicil 418
purchase of, as evidence of domicil 419
on dividing line of two districts 425

E.

EASTERN COUNTRIES,
domicil in 358–361
different rules for the determination of domicil applicable to Eastern and to Western countries 358
presumption against a change of domicil to the former stronger than to the latter 358–360
Lord Stowell, in The Indian Chief 358
Dr. Lushington, in Maltass *v.* Maltass 359
Chitty, J., in *Re* Tootal's Trusts 360
can an American or European acquire a domicil in an Eastern country? 360, 361

EAST INDIAN CASES . . . . . 155, 157, 360, note

EMANCIPATED MINOR.
(See INFANT.)

EVIDENCE RELATIVE TO DOMICIL,
general principles of, recapitulated 362
each case must be determined upon its own circumstances 366 *et seq.*
all the facts of a man's life are evidence of his domicil . 369 *et seq.*
"acts and declarations" 369
"conduct" 369
"train of conduct" 366
"mode of life" 369
"habits" 369
disposition 369
character 369
pursuits 369
domestic relations 369
family, fortune, and health 369
"the whole history of the man from his youth up" 369
no fact is of itself conclusive . . . . . 369 *et seq.*
although certain facts are usually entitled to more weight than others 373
and scarcely any is too trivial . . . . . 369 *et seq.*
how facts are to be construed 372
probabiles conjecturæ 371
definitions of domicil in the Roman law mainly *formulæ* of evidence 374
presence at a place *prima facie* evidence of domicil there . . . 375
but is not conclusive 376

EVIDENCE RELATIVE TO DOMICIL — *continued.* Section

residence as evidence of domicil . . . . . 377 *et seq*
(See also RESIDENCE.)
length of residence or time . . . . . 382 *et seq.*
(See also TIME.)
residence of wife and family . . . . . 401 *et seq.*
(See also WIFE.)
residence of children, grandchildren, and other relatives . . . 406
nationality and religion of wife, form of marriage ceremony, etc. 407
place of marriage and residence of wife as evidence of *quasi*-national domicil 408
betrothal 409
residence and engaging in business . . . . . 410 *et seq.*
mode of living . . . . . 414 *et seq.*
residence in hotels and temporary lodgings 415
residence in leased houses or lodgings 416
ownership, purchase and sale of dwelling-house or other real estate 417–419
location of personal property 420
double residence 421–425
place of death 426
place of burial 427
purchase of burial-place 428–430
sale of burial-place 431
naturalization 432–434
voting, etc. 435–441
(See also VOTING.)
payment, etc., of personal taxes 442, 443
(See also TAXES.)
holding office 444
(See also OFFICE.)
treatment by public officers 445
jury service 446
militia service 447
taking part in town meetings 448
declarations, oral and written, descriptions in legal documents, etc. . . . . 449 *et seq.*
(See DECLARATIONS.)
party whose domicil is in question may himself testify with regard to his intent 467

F.

FACT AND INTENTION.
(See ANIMUS ET FACTUM.)

FACTUM,
requisite for the acquisition of a domicil of choice is complete transfer of bodily presence from the old place of abode to the new . . . . . 127 *et seq.*

FACTUM — continued. Section
a domicil of choice cannot be acquired *in itinere* 130–133
requisite for reverter of domicil of origin is quitting the place of acquired domicil 204
transit to domicil of origin need not be direct 206
simple and easy to prove 364
transfer of bodily presence from one place to another will not alone constitute domicil, intention must concur 125, 126, 135, 136, 182

FAMILY, RESIDENCE OF
as evidence of domicil . . . . . 401 *et seq.*
(See also WIFE.)

FATHER,
relation of, to domicil of infant child . . . . . 235 *et seq.*
(See also INFANT.)
to domicil of insane major child 267, 268
(See also NON COMPOS.)

FORM,
of will as evidence of domicil 466

FORMAL DECLARATIONS OF DOMICIL.
(See DECLARATIONS.)

FOREIGN ATTACHMENTS,
relation of domicil to 49

FORUM ORIGINIS.
(See DOMICIL OF ORIGIN.)

FOUNDLING,
domicil of origin of, *prima facie*, where he is found . . 105, 228, 362
but not conclusively 105, 228, 362

FRANCE,
domicil of foreigners in . . . . . 341 *et seq.*
Article 13 of the Code Civil 341
the difficulty attending the subject largely one of method . . 342
various opinions of French text-writers 343–347
(1) that a foreigner cannot establish a domicil in France even with authorization 343
(2) that a foreigner may establish a domicil there only with authorization 344, 345
(3) that a foreigner may establish a domicil there without authorization 346, 347
decisions of the French courts 348
English cases 349–354
Collier *v.* Rivaz 349
Anderson *v.* Laneuville 350
Bremer *v.* Freeman 351
Hodgson *v.* De Beauchesne 352
Hamilton *v.* Dallas 353
results of the English cases 354

FRANCE — *continued.* Section
American cases 355, 356
Dupuy *v.* Wurtz 355
Tucker *v.* Field . . . . . 355, note
Harral *v.* Harral 356
are the consequences of authorization personal, or do they extend to wife and family? 357
FREEDOM OF CHANGE.
(See RULES.)

G.

GRANDPARENT,
when grandchild may acquire the domicil of 245
GUARDIAN,
relation of, to domicil of infant ward . . . . . 249 *et seq.*
(See also INFANT.)
to domicil of insane ward 265, 266
(See also NON COMPOTES.)
GUARDIANSHIP,
relation of domicil to 34

H.

HABITANCY.
(See INHABITANCY.)
"*HABITATIO ASSIDUA*,"
of the Civilians, equivalent to "residence" 377
as evidence of domicil 377
HOME AND DOMICIL,
similarity 70
differences 71
home the fundamental idea of domicil 72
HOMESTEAD AND OTHER EXEMPTIONS,
relation of domicil to 56
HÔTEL DES INVALIDES,
forms the domicil of its inmates 271
HOTELS,
residence in, as evidence of domicil 415
HOUSE, LEASED,
residence in, as evidence of domicil 416
(See also DWELLING-HOUSE.)
HUSBAND AND WIFE.
(See WIFE and MARRIAGE.)
HUSBAND, DOMICIL OF,
not controlled by wife 404

I.

IDIOTS AND LUNATICS. Section
(See NON COMPOTES.)

INABILITY TO RETURN,
to former place of abode after a voluntary absence *cum animo revertendi* prevents a change of domicil 139

INFANT,
domicil of origin of legitimate 228
illegitimate 228
posthumous 228
foundling 228
domicil of legitimated 228
domicil of, cannot be changed by his own act 229
under the Scotch law a child who has reached the age of puberty may change his domicil . . . . . 229, note 3
Roman law 230
the rule of disability sometimes stated in this country as applicable only to unemancipated minors 231
is there any exception in favor of the power of a married minor? 232
other exceptions suggested 233
emancipated minor an exception under the French Code Civil . 234
domicil of a minor follows that of his father during the life of the latter 235
even though they dwell apart 236
possible exception 237
upon the death of the father domicil of infant follows that of his mother . . . . . 238 *et seq.*
British authorities: Potinger *v.* Wightman 239
American authorities 240
does domicil of infant necessarily follow that of his widowed mother, or may she change hers without affecting his? . . 241
is the qualification that the mother must act without fraud a valid one? 242, 243
the power of the mother does not extend beyond widowhood . 244
upon the remarriage of their mother infant children retain the domicil which they have at that time 244
step-father cannot change the domicil of his step-children . . 244
domicil of illegitimate children . . . . . 244 *a*
upon the death of both parents an infant may acquire the domicil of a grandparent 245
but in such case he must reside with the grandparent . . 245
domicil of apprentice 246
adopted child 247, 248
power of guardian to change the domicil of minor ward . 249 *et seq.*
a vexed question 249
continental authorities in the affirmative 250
in the negative 251

INFANT — *continued.* Section
English text-writers 252
American text-writers 253
no direct decision in England 254
Potinger *v.* Wightman not in point, although by many erroneously supposed to be 254
American decisions
natural guardian may change the domicil of his infant ward 255
domicil of guardian not necessarily that of his infant ward 256
guardian may change the municipal domicil of his infant ward 257
power to change national or *quasi*-national domicil . . . . . 258 *et seq.*
cases in the affirmative 258
cases in the negative 259
general results of the American cases 260
general reasons against the power of guardian to change the national or *quasi*-national domicil of his infant ward 261–263

INHABITANCY AND DOMICIL 76

INSANE PERSONS, DOMICIL OF.
(See NON COMPOTES.)

INTENTION,
(See ANIMUS.)
to remain.
(See ANIMUS MANENDI.)
to change domicil not sufficient without actual removal 125, 126, 182
no matter how strong the intention may be 125, 126
or how solemnly expressed 125, 126
intention must concur with act . . . . 125 *et seq.*, 135, 136, 182
and must clearly appear 136
person whose domicil is in question may testify to his intention 467
the requisite, complex and difficult to prove 365
how provable . . . . . 365 *et seq.*

INTERNATIONAL LAW, PRIVATE,
uses of domicil in . . . . . 28 *et seq.*

INTERNATIONAL LAW, PUBLIC,
uses of domicil in 26, 27
national character 26
naturalization 27

INTESTACY.
(See SUCCESSION.)

INVALIDS,
domicil of . . . . . 141, 287 *et seq.*

ITINERE, Section
domicil cannot be changed *in* . . . . . 130 *et seq.*
contrary view maintained by some in event of death of the party during the journey 128, 129, 193, 194, 200
exception in favor of reverter of domicil of origin . 127, 190 *et seq.*
a fortiori, no change takes place when the territorial limits of the old domicil have not been passed 132

J.

JUDICIAL CITIZENSHIP,
dependent upon domicil 48
JUDICIAL PROCEEDINGS,
descriptions in, as evidence of domicil 464
JUDGMENTS, FOREIGN AND INTERSTATE,
relation of domicil to 47
JURISDICTION,
in general 47
of Federal courts in controversies between citizens of different States 48
of Federal courts in bankruptcy 48
in foreign attachments 49
in divorce 39
in the Roman law depended mainly upon *domicilium* 9
JURY SERVICE,
liability to, depends upon domicil 52
as evidence of domicil 446
JUS CIVITATIS.
(See CITIZENSHIP.)

L.

"*LARES*,"
equivalent to wife 58-60, 401
LAWS, LOCAL.
(See LOCAL LAWS AND CUSTOMS.)
LAWSUIT,
residence for the purpose of conducting, sufficient, according to Lord Stowell 386
contra, according to the generally received view 387
LEACH, SIR JOHN,
dictum of, in Munroe *v.* Douglas . . . . . 128 *et seq.*
followed by Wood, V. C., in Forbes *v.* Forbes 129
and by Wharton and Westlake 129
criticised . . . . . 128 note 3, 129 note 2, 193, 194

LEASED HOUSES, Section
residence in, as evidence of domicil 416
LEGACY TAXES.
(See TAXES.)
LEGITIMACY AND LEGITIMATION,
relation of domicil to 30, 31
LENGTH OF RESIDENCE,
(See TIME.)
not necessary to constitute domicil 134
if intention be present, domicil vests instantly . . . 134, 179
not sufficient to constitute domicil if intention be absent . 135, 136
as evidence of intention . . . . . 382 *et seq.*
LIMITATION OF ACTIONS,
relation of domicil to 50
LOCAL LAWS AND CUSTOMS,
great number of, formerly existing on the continent 14
gave rise to the application of the principle of domicil to the solution of questions of conflict 15
LOCALITY, RESIDENCE IN A DEFINITE,
not necessary for acquisition of domicil 133
LODGINGS,
temporary residence in, as evidence of domicil 415
leased houses or, residence in, as evidence of domicil 416
LUNATICS, DOMICIL OF.
(See NON COMPOTES.)

M.

MAJORITY AND MINORITY,
relation of domicil to 35, 195
MARRIAGE,
validity of, by what law determined 36, 195
formal requirements 36, 195
capacity for 36, 195
legal effects of 37, 38
mutual property rights of husband and wife 37
capacity of married women to make valid contracts 39
construction of marriage contracts 37*a*
form of marriage ceremony as evidence of domicil 407
place of, relation of, to *quasi*-national domicil 408
MARRIED MINOR.
(See INFANT.)
MARRIED WOMAN.
(See WIFE.)
MATRIMONIAL DOMICIL 37, 356

MILITIA SERVICE, Section
liability to, in many States, depends upon domicil 52
as evidence of domicil 447

MINOR.
(See INFANT.)

MINORITY.
(See MAJORITY.)

MODE OF LIVING,
as evidence of domicil 414

MOTHER,
relation of, to domicil of her infant child . . . . . 238 *et seq.*
(See also INFANT.)

MOTIVE FOR CHANGE OF DOMICIL,
immaterial if the proper intention be present 142
change of domicil not prevented because residence is chosen in
order to escape taxation 142
or other burdens 142
or to give jurisdiction to the Federal or other courts . . . 142
compulsion and, distinction between 140, 141
preference for a particular climate on account of health does
not prevent a change of domicil 141

MOVABLES,
assignments of . . . . . 40 *et seq.*
assignments of particular 40
general assignments of . . . . . 37, 41 *et seq.*
(1) by marriage 37
(2) by bankruptcy 41
(3) by death 42–45
(*A*) intestate succession 42
administration 45
(*B*) testamentary administration 43–45
(*a*) validity of wills 43
(a) capacity of testator 43
(b) formal requirements 43
(c) validity of particular provisions 43
(*b*) construction of wills 44
(*c*) probate 45

MUNICIPAL BURDENS,
subjection to, in the Roman law dependent upon *origo* and
domicilium 8

MUNICIPAL DOMICIL,
generally speaking, every person has a 86, 87, 181
every person receives a municipal domicil of origin 181
once acquired continues until another is acquired 181
not the subject of reverter 207

MUNICIPAL DOMICIL — *continued.* Section
change of . . . . . 180 *et seq.*
more easily changed than national or *quasi*-national domicil 180
presumption against change of 181
burden of proof on him who asserts it 181
factum et animus necessary for a change of 182
mere absence does not destroy 182
nor temporary presence at a place constitute 182
mere intention insufficient to change 182
act must accompany intention 182
the necessary act or *factum* is complete transfer of bodily presence 182
cannot be changed *in itinere* 182
the requisite *animus* . . . . . 183 *et seq.*
includes (1) capacity to choose 183
(2) freedom of choice 183
(3) actual choice 183
animus non revertendi 184
not always necessary for a change of municipal domicil . 184
animus manendi 185
necessary for a change of municipal domicil 185
not intention "to remain always" 185
intention to remain "for an indefinite time" 185
negative view of; "residence in a place without any present intention of removing therefrom" 186
intention to make the new place of abode "home" . . . 187
how far contingent *animus manendi* will suffice, not clear . 188
double residence 189
less proof required to show change of municipal domicil than change of national or *quasi*-national domicil 362
(See also DOMICIL.)

MUNICIPAL LAW,
uses of domicil in . . . . . 28 *et seq.*

MUNICIPAL ORGANIZATION OF THE ROMAN WORLD 1

MUNROE *v.* DOUGLAS,
dictum of Sir John Leach in (death *in itinere*) . . . . . 128 *et seq.*
followed by Wood, V. C., in Forbes *v.* Forbes 129
and by Wharton and Westlake 129
criticised . . . . . 128 note 3, 129 note 2, 193, 194

N.

NAME, SPELLING OF,
may be evidence of domicil 466

NATIONAL CHARACTER,
how far dependent upon domicil 26, 387
cases of, to be used with great caution as authorities upon the general subject of domicil 26, 387

NATIONAL DOMICIL, Section
distinguished from *quasi*-national and municipal domicil . . . 77
more difficult to change than *quasi*-national or municipal domicil 123
hence stronger proof required to show a change of the former than of either of the latter 362
(See also DOMICIL.)

NATIONALITY, POLITICAL,
as the basis of personal law 12, 16
change of, not necessary for change of domicil . 144 *et seq.*, 195, 432

NATIVE DOMICIL.
(See DOMICIL OF ORIGIN.)

NATIVITAS.
(See ORIGO.)

NATURAL DOMICIL.
(See DOMICIL OF ORIGIN.)

NATURALIZATION,
domicil usually necessary for 27, 432
not necessary for the acquisition of domicil . . . 144 *et seq.*, 432
strong evidence of domicil 432–434
opinions of the continental jurists 433
British and American authorities 434

NON COMPOTES . . . . . 264 *et seq.*
persons of unsound mind usually deemed incapable of changing their domicil 264
but not every degree of mental unsoundness will render them thus incapable 264
relation of guardian to the domicil of his insane ward . . . 265
(*a*) his domicil not necessarily that of his ward 265
(*b*) he appears to have the power to change his ward's municipal domicil 265
(*c*) his power to change his ward's national or *quasi*-national domicil, to say the least, is doubtful 265
French law 266
relation of the father to the domicil of his insane major child 267, 268
(*a*) where the latter becomes insane after attaining his majority 267, 268
(*b*) where he continues insane from infancy 267, 268
domicil of insane persons not changed by removal to asylum . 269

O.

OFFICE,
eligibility to, depends largely on domicil 54
holding local, evidence of domicil 444
but not conclusive 444
absence of right to hold, does not necessarily indicate absence of domicil 444

OFFICERS, PUBLIC, Section
treatment by, as evidence of domicil 445
domicil of.
(See PUBLIC CIVIL OFFICERS, SOLDIERS, SAILORS, AMBASSADORS, and CONSULS.)

ONUS.
(See BURDEN OF PROOF.)

ORIGIN, DOMICIL OF.
(See DOMICIL OF ORIGIN.)

ORIGINIS, FORUM.
(See DOMICIL OF ORIGIN.)

ORIGO, OR MUNICIPAL CITIZENSHIP IN THE ROMAN LAW . . . . . 3 *et seq.*
arose in four ways 3
(1) by birth (*origo* proper, or *nativitas*) 3
legitimate child usually followed the citizenship of his father 3
exception in certain cities 3
illegitimate child followed the citizenship of his mother . 3
(2) by adoption 3
emancipation destroyed citizenship acquired by adoption 3
(3) by manumission 3
(4) by allection 3
could be extinguished only with the consent of the municipal authorities 4
of the wife suspended during marriage 4
so too of the senator and soldier during the time of his service . 4
a person might at the same time possess citizenship in several towns 4
or might be without any 4
not domicil of origin 6, 104

ORIGO AND *DOMICILIUM* IN THE ROMAN LAW . . 2 *et seq.*
consequences of . . . . . 7 *et seq.*
subjection to (*a*) municipal burdens 8
(*b*) local magistrates (*forum*) 9
(*c*) personal law 10

OWNERSHIP OF DWELLING-HOUSE OR OTHER REAL ESTATE,
as evidence of domicil 417

P.

PARTICULAR PERSONS, DOMICIL OF.
(See WIFE, INFANT, NON COMPOTES, PAUPERS, PRISONERS, EXILES, REFUGEES, INVALIDS, SOLDIERS, SAILORS, PUBLIC CIVIL OFFICERS, AMBASSADORS, CONSULS, and STUDENTS.

PATERNAL DOMICIL. Section
(See DOMICIL OF ORIGIN.)

PATERNAL POWER 33

PAUPERS,
domicil of, not changed by removal to poor-house 270

PAUPER SETTLEMENT.
(See SETTLEMENT.)

PERSONAL LAW,
dependent to some extent upon *origo* and *domicilium* in the Roman law 10
but mainly upon Roman citizenship 12
in the Middle Ages, and to a small extent in modern times, upon race descent . . . . . 12 *et seq.*
in modern times, mainly upon domicil 12
although to some extent upon political nationality . . . 12

PERSONAL PROPERTY,
location of the bulk of, as evidence of domicil 420
(See also MOVABLES.)

PERSONS, PARTICULAR, DOMICIL OF.
(See PARTICULAR PERSONS.)

PLACE OF BIRTH.
(See BIRTH.)

PLACE OF BURIAL.
(See BURIAL.)

PLACE OF BUSINESS.
(See BUSINESS.)

PLACE OF DEATH.
(See DEATH.)

PLACE OF MARRIAGE.
(See MARRIAGE)

PLACE OF RESIDENCE.
(See RESIDENCE.)

POLITICAL NATIONALITY.
(See NATIONALITY.)

POSTHUMOUS CHILDREN, DOMICIL OF 105, 228

PRESENCE AT A PLACE,
evidence of domicil there 375
but not conclusive 376

PRESUMPTIONS,
against a change of domicil . . . . 115, 122 *et seq.*, 151, 181, 362
not overcome by merely showing absence 151
abandonment must clearly appear 151
(See CHANGE OF DOMICIL.)

PRESUMPTIONS — *continued.* Section
particularly strong against change of domicil of origin 115 *et seq.*, 122, 380
but this presumption is modified by circumstances . 116, 117
(See DOMICIL OF ORIGIN.)
that a man dwelling apart from his wife and family does not intend to abandon them 401
that a man is domiciled where his wife and family reside 401 *et seq.*
but this is not conclusive 404, 405
of domicil from long residence 389
(See also RESIDENCE and TIME.)
against reverter of domicil of origin 203
that the residence of certain persons is temporary.
(See AMBASSADOR, CONSUL, EXILE, PRISONER, PUBLIC CIVIL OFFICER, REFUGEE, SOLDIER, and STUDENT.)
(See also EVIDENCE and BURDEN OF PROOF.)

PRISONER,
does not necessarily acquire a domicil at the place of his imprisonment 272
but may if he so desire 273
domicil of prisoner for life 274
transported convict 275
relegatus in the Roman law 276

PRIZE CASES, BRITISH,
the only authority for the doctrine of Udny *v.* Udny 198
not safe as authorities upon the general subject of domicil 26, 198, 387

PROBABILES CONJECTURÆ,
to be resorted to for the determination of domicil 371

PROBATE DUTIES 46

PROBATE OF WILLS,
relation of domicil to jurisdiction for. 45

PROOF, BURDEN OF.
(See BURDEN OF PROOF.)

PROOF OF CHANGE OF DOMICIL RELATIVE,
each case must be determined upon its own circumstances 366 *et seq.*

PROOF, RELATIVE AMOUNT OF,
required to show change of national, *quasi*-national, and municipal domicil 362
acquisition of domicil of choice and reverter of domicil of origin 362

PUBERTY,
under the Scotch law, child who has reached the age of, may change his domicil at pleasure . . . . . 229, note 3

PUBLIC CIVIL OFFICERS,
life functionaries 308, 309

PUBLIC CIVIL OFFICERS — *continued.* Section
holders of temporary or revocable offices or employments 310 *et seq.*
do not necessarily acquire domicil at the place where their duties are to be performed 310–313
Government employees at Washington 313
holder of a temporary or revocable office may acquire domicil where his duties are to be performed 314
public officer remaining after the expiration of his office . . . 315
provisions of American State constitutions with respect to voting 316
PURCHASE OF BURIAL-PLACE,
as evidence of domicil 428–430
PURCHASE OF DWELLING-HOUSE,
or other real estate, as evidence of domicil 419

Q.

QUASI-NATIONAL DOMICIL,
distinguished from national and municipal domicil 77
the subject of reverter 207
change of, less proof required to show, than to show change of national domicil 362
stronger proof required to show, than to show change of municipal domicil 362

(See also DOMICIL.)

R.

RACE DESCENT AS THE BASIS OF PERSONAL LAW 12 *et seq.*
REAL ESTATE,
ownership of, as evidence of domicil 417
sale of, as evidence of domicil 418
purchase of, as evidence of domicil 419
REFUGEE,
domicil of . . . . . 279 *et seq.*
political . . . . . 280 *et seq.*
fugitive from the horrors and dangers of war 284
RESIDENCE,
and domicil . . . . . 73 *et seq.*
attempts to define 74, 377
used in different senses 73
in American legislation generally, although not always, means domicil 75
mere change of, not sufficient to constitute a change of domicil 125 *et seq.*, 135, 136, 182
no length of, sufficient to constitute domicil 135, 136
intention must concur . . . . 125 *et seq.*, 135, 136, 182, 380

RESIDENCE — *continued.* Section
no length of, necessary to constitute domicil 134
domicil vests instantly if the proper intention be present 134, 179
in a definite locality not necessary for a change of domicil . . 133
as evidence of domicil . . . . . 377 *et seq.*
prima facie evidence of domicil 378
but not conclusive 377
by itself equivocal as evidence of domicil 377, 379
decisive as to the necessary *factum* 379
but equivocal as to the necessary *animus* 379
length of.
(See TIME.)
and engaging in business as evidence of domicil 410–412
place of, preferred to place of business as domicil 413
in hotels or temporary lodgings as evidence of domicil . . . 415
in leased houses or lodgings as evidence of domicil 416
in several places.
(See DOUBLE RESIDENCE.)
national character gained by, ceases by abandonment . . 193, 194
of wife and family.
(See WIFE.)
of children.
(See CHILDREN.)

RETURN, INABILITY TO,
after voluntary absence from former place of abode *cum animo revertendi*, prevents a change of domicil 139

REVERTER OF DOMICIL,
"domicil of origin reverts easily" . . . . 119 *et seq.*, 190 *et seq.*
slighter circumstances required to show re-acquisition of domicil of origin than acquisition of domicil of choice 119, 362
the principle, however, a relative one 120
Story's statement of the doctrine of reverter 191
substantially that adopted by all American jurists 201
being *in itinere* to domicil of origin necessary to regain it . . . 191
British doctrine otherwise . . . . . 192 *et seq.*
Udny *v.* Udny, doctrine of, stated . . . . . 192 *et seq.*
doctrine of, criticised . . . . . 112, 196 *et seq.*
remarks of Lord Hatherley in 193
remarks of Lord Chelmsford in 194
remarks of Lord Westbury in 195
upon abandonment *simpliciter* of acquired domicil, domicil of origin *simpliciter* reverts (Udny *v.* Udny) . . . . . 192 *et seq.*
domicil of origin cannot be obliterated 195
is put in abeyance on acquisition of domicil of choice (per Lord Westbury) 195
Story's statement of the doctrine of reverter criticised in Udny *v.* Udny by Lord Hatherley 193
by Lord Chelmsford 194
by Lord Westbury 195

REVERTER OF DOMICIL — *continued.* Section
doctrine of Udny *v.* Udny not drawn from the Civilians . . . 196
rests upon the British Prize Cases as far as it rests upon any authority 198
tinctured by the doctrine of perpetual allegiance . . . 112, 198
objections on principle to 199
Westlake's apparent dissent from 200
he assumes domicil of origin (for the purpose of reverter) to be the last domicil which the person had prior to becoming an independent person 200
American doctrine of reverter, — commencement of transit to place of origin with intention to remain there necessary . . 201
some American *dicta* apparently support the doctrine of Udny *v.* Udny . . . . . 201, note 2
doctrine of Udny *v.* Udny not held on the Continent 202
reverter of domicil not held by continental authorities . . 202, note
reverter will not be presumed 203
burden of proof on him alleging it 203
but slighter proof will be required to show reverter than to show acquisition of domicil of choice 362
mere intention to return to domicil of origin no reverter . . . 203
nor is return without abandonment of acquired domicil . . . 203
requisite *factum* for reverter is quitting the place of acquired domicil 204
requisite *animus* is at least abandonment of place of acquired domicil 205
which must clearly appear 205
contingent *animus non revertendi* not sufficient 205
abandonment must be complete and final 205
a distant possibility, however, of return will not prevent reverter 205
transit to place of domicil of origin need not be direct . . . 206
quasi-national domicil the subject of reverter 207
otherwise as to municipal domicil 207
acquired domicil not the subject of reverter 208

ROMAN LAW, DEFINITIONS OF DOMICIL IN, mainly *formulæ* of evidence 374
(See also DEFINITIONS.)

RULES, GENERAL . . . . . 78 *et seq.*
(1) every person must have a domicil somewhere 79 *et seq.*, 193, 195
the Roman law and the Modern Civilians 79, 80
British and American authorities 81–83
gypsies and vagabonds 84
French jurists 85
municipal domicil 86, 87
(2) no person can at the same time have more than one domicil . . . . . 88 *et seq.*, 193
Roman law 88
French jurists 89

RULES, GENERAL — *continued.* Section
the necessity of unity of domicil 90
British and American authorities . . . . . 91 *et seq.*
remarks of Lord Alvanley in Somerville *v.* Somerville, and Lord Loughborough in Ommanney *v.* Bingham . . . 93
"domicil" and "principal domicil" 94
different domicils for different purposes 95, 96
municipal domicil 97
(3) every person who is *sui juris* and capable of controlling his personal movements may change his domicil at pleasure . . . . . 98 *et seq.*, 193
Roman law 98
modern jurists 99
British and American authorities 100
municipal domicil 101

S.

SAILORS,
in the war marine, domicil of . . . . . 297 *et seq.*
(See also SOLDIERS.)
in the merchant marine, domicil of 304–306

SALE OF BURIAL-PLACE,
as evidence of domicil 431

SALE OF DWELLING-HOUSE,
as evidence of domicil 418

SCOTT, SIR WILLIAM,
strong leaning of, in favor of captors 26, 387

SEPARATION, DEED OF.
(See DEED OF SEPARATION.)

SETTLEMENT UNDER THE POOR-LAWS,
relation of domicil to 55

"SETTLING,"
a word nearly describing the act of acquiring a domicil 162, 167, 193

SILENCE,
sometimes evidence of domicil 465

SLEEPING-PLACE,
important in determining domicil 413

SOLDIERS,
domicil of . . . . . 297 *et seq.*
Roman law 297
French jurists 298
does a soldier necessarily become domiciled within the territory of the sovereign whom he serves? 299, 300
can a soldier acquire a foreign domicil? 301, 302
Hodgson *v.* De Beauchesne 301
East India cases 302

SOLDIERS — *continued.* Section
quasi-national and municipal domicil not affected by military service 303

SOLDIERS' HOME,
may constitute the domicil of its inmates 271

SPELLING OF NAME.
(See NAME.)

STATUS,
political and civil, distinguished by Lord Westbury. 195
civil, how determined . . . . . 29 *et seq.*
largely dependent upon domicil . . . . . 29 *et seq.*, 195
various phases of . . . . . 30 *et seq.*
(See LEGITIMACY, LEGITIMATION, ADOPTION, GUARDIANSHIP, MAJORITY AND MINORITY, PATERNAL POWER, MARRIAGE.)

STATUTES,
real and personal 15

STEP-FATHER,
cannot change the domicil of his infant step-child 244

STOWELL, LORD.
(See SCOTT, SIR WILLIAM.)

STUDENT,
domicil of . . . . . 325 *et seq.*
does not necessarily gain a domicil at the place of his studies . 325
but may do so if the proper *animus* be present 325
the presumption is, however, against his gaining a domicil there 325
Roman law 326, 327
decennial residence 326, 327
domicil of student as viewed in this country 328–339
Massachusetts cases 329–333
Opinion of the Judges 329–331
Granby *v.* Amherst 332
Putnam *v.* Johnson 333
Fry's Election Case (Pa.) 334, 335
Sanders *v.* Getchell (Me.) 336, 337
the principles of the American cases applicable alike to all grades of domicil 338
residence of students for the purpose of voting under the American State Constitutions 339
presumption in favor of the acquisition of a domicil by a student who remains after the completion of his studies . . . 340

SUCCESSION, PERSONAL, RELATION OF DOMICIL TO 42–45
A. intestate succession 42, 195
administration 45
B. testamentary succession 43–45, 195
(*a*) validity of wills 43

SUCCESSION, PERSONAL, ETC. — *continued.* Section
(1) capacity of testator 43
(2) formal requirements 43
(3) validity of particular provisions 43
(*b*) construction of wills 44
(*c*) probate 45
succession and legacy duties 46

SUFFRAGE.
(See VOTING.)

T.

TAXES,
personal, assessed only at place of domicil 51
on immovable property at place where it is located 51
on tangible movable property either at place of location or of domicil 51
voluntary payment of personal taxes strong evidence of domicil 442
contra payment under protest 442
omission or refusal to pay 443
legacy and inheritance taxes 46

TIME OR LENGTH OF RESIDENCE,
as evidence of domicil . . . . . 382 *et seq.*
strong evidence of domicil . . . . . 370, 382 *et seq.*
but not conclusive . . . . . 382 *et seq.*
in the Roman law 383–385
residence for ten years offered in the Roman law a rule of presumption 383–385
but which was not conclusive 383–385
the grand ingredient in constituting domicil (Lord Stowell, in The Harmony) 386
criticism of Lord Stowell's remarks 387, 388
time or length of residence as evidence of domicil, Dr. Lushington on, in Hodgson *v.* De Beauchesne 389
Kindersley, V. C., in Cockrell *v.* Cockrell 390
Poland, J., in Hulett *v.* Hulett 391
Story, J., in the Ann Green 392
cases illustrative of the effect of length of residence upon domicil 393–399
result of the decisions 400
no length of residence necessary to constitute domicil . . 134, 179
domicil vests instantly upon the concurrence of act and intention 134, 179

TOWN MEETINGS,
attending, and taking part in the discussion of public affairs, evidence of domicil 448

TRANSFER OF BODILY PRESENCE, Section
from the old place of abode to the new, necessary for the establishment of domicil . . . . . 127 *et seq.*
(See also FACTUM.)

U.

USES OF DOMICIL . . . . . 25 *et seq.*

V.

VOTING,
right of suffrage in the United States depends on domicil 53, 435
important evidence of domicil 435
but not conclusive 435
offering to vote evidence of domicil 436
refusing to vote 437
failure to vote 438
absence of the right to vote 439
English cases 440
French authorities 441

W.

WARD,
relation of guardian to the domicil of his
(See INFANT and NON COMPOTES.)

WIDOW,
domicil of
(See WIFE.)

WIFE,
domicil of, merges in that of husband 209
and continues to follow it through all of its changes so long as the marriage relation subsists 209
grounds of identity of domicil of husband and 209
Roman law 210
invalid marriage, effect of, on domicil 210, 212
betrothal does not change domicil 210, 211
receives domicil of husband instantly upon marriage 213
although she has not yet arrived at the place of his domicil 213
domicil of, follows that of husband 214
although she does not accompany him to his new place of abode 214
cannot acquire a domicil for herself . . . . . 215 *et seq.*
even with the consent of her husband 215
or even though a formal deed of separation has been executed 216
divorced *a vinculo*, may acquire for herself 217

WIFE — *continued.* Section
retains domicil of her husband until she acquires one for herself 222
divorced *a mensa et thoro* may establish a domicil for herself 217 *et seq.*
British authorities 219, 220
American authorities 221
domicil of a *femme séparée de corps* under the French Code Civil 218
widow retains the domicil of her deceased husband until she establishes one for herself 222
can a wife entitled to a divorce establish a domicil for herself? 39, 223 *et seq.*
American authorities 224, 224*a*
English cases 225
the doctrine if at all admissible does not extend beyond cases of divorce 226, 227
and family, residence of, presumed to be the domicil of husband and father . . . . . 401 *et seq.*
but this presumption is not conclusive 404, 405
cannot control the domicil of her husband 404
nationality and religion of, as evidence of the domicil of her husband 407
performance of the marriage ceremony in accordance with the religion of, as evidence of the domicil of her husband . . 407
relation of residence of wife at time of marriage to *quasi*-national domicil 408
residence of, particularly important in determining domicil of sailor 306

WILL,
description in, evidence of domicil 462
but not conclusive 463
form of, sometimes evidence of domicil 466
validity, construction, etc., of
(See SUCCESSION.)

WRITTEN DECLARATIONS,
more reliable than oral ones 455
(See DECLARATIONS.)

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